



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Brown, 2022  
SCC 18

**APPEAL HEARD:** November 9,  
2021

**JUDGMENT RENDERED:** May  
13, 2022

**DOCKET:** 39781

**BETWEEN:**

**Matthew Winston Brown**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General  
of Manitoba, Attorney General of British Columbia, Attorney General of  
Saskatchewan, Canadian Civil Liberties Association, Empowerment Council,  
Criminal Lawyers' Association and Women's Legal Education and Action  
Fund Inc.**  
Interveners

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,  
Kasirer and Jamal JJ.

**REASONS FOR** Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Côté,  
**JUDGMENT:** Brown, Rowe, Martin and Jamal JJ. concurring)  
(paras. 1 to 168)

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**Matthew Winston Brown**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Attorney General of Manitoba,  
Attorney General of British Columbia,  
Attorney General of Saskatchewan,  
Canadian Civil Liberties Association,  
Empowerment Council,  
Criminal Lawyers' Association and  
Women's Legal Education and Action Fund Inc.**

*Interveners*

**Indexed as: R. v. Brown**

**2022 SCC 18**

File No.: 39781.

2021: November 9; 2022: May 13.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer  
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

*Constitutional law — Charter of Rights — Fundamental justice — Presumption of innocence — Reasonable limits — Section 33.1 of Criminal Code preventing accused from raising common law defence of self-induced intoxication akin to automatism — Whether s. 33.1 violates principles of fundamental justice or presumption of innocence — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) — Criminal Code, R.S.C. 1985, c. C-46, s. 33.1.*

At a house party, B consumed alcohol and magic mushrooms. Magic mushrooms contain psilocybin, an illegal drug that can bring about hallucinations. B lost his grip on reality and left the house. B was not simply drunk or high: while capable of physical movement, he was in a psychotic state and had no willed control over his actions. He broke into the nearby house of a stranger and attacked the occupant, causing permanent injuries. He then broke into another residence and the occupants called the police. B was charged with break and enter and aggravated assault, and with break and enter and mischief to property over \$5,000.

At trial, B argued that he was not guilty of the offences by reason of automatism caused by the consumption of psilocybin. Expert evidence adduced at trial confirmed that B had no voluntary control over his conduct at the time. The Crown invoked s. 33.1 of the *Criminal Code* as a means of precluding B from relying on self-induced intoxication akin to automatism as a defence to the charge of aggravated assault. Parliament added s. 33.1 to the *Criminal Code* in response to *R. v. Daviault*, [1994] 3 S.C.R. 63. The Court in *Daviault* confirmed the common law rule that

intoxication is not a defence to crimes of general intent, but a majority recognized that the *Charter* mandated an exception where intoxication is so extreme that an accused falls into a condition akin to automatism and is incapable of voluntarily committing a guilty act or of having a guilty mind. Section 33.1 was enacted to address the constitutional failings identified by the majority in *Daviault* in a manner that would properly reflect the blameworthiness of the extremely self-intoxicated accused identified by the dissent. Section 33.1 blocks the defence of automatism for general intent crimes designated in s. 33.1(3), including aggravated assault and sexual assault.

B challenged the constitutionality of s. 33.1. The *voir dire* judge concluded that s. 33.1 violates the principles of fundamental justice and the presumption of innocence guaranteed by ss. 7 and 11(d) of the *Charter* and that the violations are not justified pursuant to s. 1 of the *Charter*. He declared s. 33.1 to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*. As a result, B was entitled to raise the defence of extreme intoxication akin to automatism at trial. The trial judge found that the defence was an answer to both charges and entered acquittals. The Court of Appeal reversed the declaration that s. 33.1 was of no force or effect, set aside the acquittal on the count of break and enter and aggravated assault, and entered a conviction for that offence. The acquittal on the mischief charge was unaffected by s. 33.1 and not appealed.

*Held:* The appeal should be allowed. Section 33.1 of the *Criminal Code* should be declared unconstitutional and of no force or effect pursuant to s. 52(1) of the

*Constitution Act, 1982*. The acquittal on the count of unlawful break and enter of a dwelling house and committing aggravated assault therein should be restored.

This is not a drunkenness case. B consumed a drug which, taken in combination with alcohol, provoked psychotic, delusional and involuntary conduct. Criminal liability for violent conduct produced by alcohol alone, short of the psychotic state akin to automatism experienced by B, is not in issue. The outcome of the declaration of unconstitutionality with respect to s. 33.1 has no impact on the rule that intoxication short of automatism is not a defence to violent crimes of general intent, such as assault or sexual assault. While s. 33.1 is unconstitutional, there may well have been other paths for Parliament to achieve its legitimate aims connected to combatting extreme intoxicated violence. The sense that an accused who acts violently in a state of extreme self-induced intoxication is morally blameworthy is by no means beyond the proper reach of the criminal law. Protecting the victims of violent crime — particularly in light of the equality and dignity interests of women and children who are vulnerable to intoxicated sexual and domestic violence — is a pressing and substantial social purpose. And it was not impermissible for Parliament to enact legislation seeking to hold an extremely intoxicated person accountable for a violent crime when they chose to create the risk of harm by ingesting intoxicants.

Section 33.1(1) of the *Criminal Code* eliminates the defence of self-induced intoxication akin to automatism applied to the violent offences identified in s. 33.1(3) where the accused departs markedly from the standard of care described

in s. 33.1(2). Section 33.1 does not create a new predicate act offence of self-induced extreme intoxication or a new criminal negligence offence. The accused faces the full stigma of conviction and the full brunt of punishment for the general intent offence pointed to in s. 33.1(3). Section 33.1 applies when three conditions are met: the accused was intoxicated at the material time, the intoxication was self-induced, and the accused departed markedly from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person. When these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence named in s. 33.1(3). The requirements of s. 33.1 are not, together or separately, a measure of fault; they are conditions of liability, as the use of the word “while” in s. 33.1(2) confirms. The marked departure described in s. 33.1(2) depends on proof of two facts: that the person was in a state of self-induced intoxication that rendered them unaware of, or incapable of controlling, their behaviour, and that the violent act occurred while they were in that state. These facts are conditions of liability and not measures of fault because neither of them import a criminal negligence standard. Thus s. 33.1 deems criminal fault for the violent offence to be present based on the accused’s choice to become intoxicated. What Parliament sought was to impose liability for the charged offence, and not the act of self-induced intoxication itself.

The rights of victims of intoxicated violence, in particular the rights of women and children, should be considered at the justification stage under s. 1 of the *Charter* rather than informing the analysis of a possible breach of the accused’s rights

under s. 7. Balancing competing *Charter* rights under the breach analysis should occur where the rights of the accused and another party conflict and are directly implicated by state action. The equality, dignity and security interests of vulnerable groups informed the overarching public policy goals of Parliament but they are best considered under s. 1.

Section 33.1 breaches s. 7 of the *Charter* by allowing a conviction without proof of *mens rea* or proof of voluntariness. It is a principle of fundamental justice that proof of penal negligence, in the form of a marked departure from the standard of a reasonable person, is minimally required for a criminal conviction, unless the specific nature of the crime demands subjective fault. Section 33.1 requires an intention to become intoxicated but intention to become intoxicated to any degree suffices — it matters little that a person did not foresee their loss of awareness or control, and nothing is said about the licit or illicit nature of the intoxicant or its known properties. For this reason, while s. 33.1 applies to those who recklessly invite their loss of control, it also captures unexpected involuntariness, for example an unexpected reaction to a prescribed pain medication. It also imposes criminal liability where a person's intoxication carries no objective foreseeability of harm. Furthermore, instead of asking whether a reasonable person would have foreseen the risk and taken steps to avoid it and whether the failure to do so amounted to a marked departure from the standard of care expected in the circumstances, s. 33.1 deems a marked departure to be present whenever a violent act occurs while the person is in a state of extreme voluntary intoxication akin to automatism. Since s. 33.1 allows the court to convict an accused

without proof of the constitutionally required *mens rea*, it violates s. 7 of the *Charter*. Section 33.1 also directs that an accused person is criminally responsible for their involuntary conduct. Because involuntariness negates the *actus reus* of the offence, involuntary conduct is not criminal, and the law recognizes that voluntariness for the conviction of a crime is a principle of fundamental justice.

Section 33.1 also breaches the right to be presumed innocent until proven guilty guaranteed by s. 11(d) of the *Charter*. To convict the accused, the Crown must prove all the essential elements of an offence beyond a reasonable doubt. A direction from Parliament that proof of one fact is presumed to satisfy proof of one of the essential elements of an offence can only comply with s. 11(d) if, in all cases, proof of the substituted fact leads inexorably to the conclusion that the essential element it replaces exists. Otherwise, the substitution may result in the accused being convicted, based on proof of the substituted fact, despite the existence of a reasonable doubt as to the essential element of the offence that it replaces. Section 33.1 improperly substitutes proof of self-induced intoxication for proof of the essential elements of an offence. The fault and voluntariness of intoxication are substituted for the fault and voluntariness of the violent offence. This amounts to a constitutionally improper substitution. It cannot be said that in all cases under s. 33.1, the intention to become intoxicated can be substituted for the intention to commit a violent offence.

Parliament had before it a record that highlighted the strong correlation between alcohol and drug use and violent offences, in particular against women, and

brought to the fore of Parliament's attention the equality, dignity, and security rights of all victims of intoxicated violence. Parliament's protective public goals cannot be understated: these interests bear meaningful attention at both principal steps in the s. 1 analysis. But the Crown must show on a balance of probabilities that the limits of ss. 7 and 11(d) brought by s. 33.1 are reasonable and demonstrably justified under s. 1 of the *Charter*. Given the patent risk that s. 33.1 may result in the conviction of an accused person who had no reason to believe that their voluntary intoxication would lead to a violent consequence, s. 33.1 fails at the proportionality step and thus cannot be saved under s. 1.

With respect to pressing and substantial purpose, the purpose of a provision must be properly identified with a view to justifying the infringement of the *Charter*, otherwise the exercise is not helpful for the balancing mandated by s. 1. In enacting s. 33.1, Parliament blocked the defence of automatism for the extremely intoxicated offender for two legitimate purposes: to protect the victims of extremely intoxicated violence, with particular attention to women and children whose equal place in society is compromised by sexual assault and other violent crimes of general intent in such circumstances; and to call offenders to answer for their choice to voluntarily ingest intoxicants where that choice creates a risk of violent crime. The protective purpose is sufficiently pressing and substantial to warrant limiting *Charter* rights — the protection of the public from intoxicated offenders is of sufficient importance to warrant overriding a constitutionally protected right or freedom. As for the accountability objective, it rests on a philosophical idea that one should not be able to create the

conditions of one's own criminal defence to block liability for the crime committed. An individual is responsible for their involuntary state because that person's choice to ingest intoxicants and become extremely intoxicated ultimately creates a risk of violence. Stated in this manner, accountability in this context is pressing and substantial and fits appropriately within the *Oakes* analysis.

The deterrent and denouncing effects of s. 33.1 provide a rational connection to Parliament's protective objective. While it is true that s. 33.1 applies to an accused who could not have foreseen the risk of a loss of control or of bodily harm, it also extends to situations in which there was a foreseeable risk of a loss of control and harm. Thus, an individual who consumes an intoxicant with psychosis-inducing effects, including those who know they lost control of their conduct while in a drug-induced psychosis in the past, will be caught by s. 33.1. It is reasonable that Parliament would expect the provision to hold some modest deterrent effect for such individuals. This deterrent effect dissuades those contemplating this kind of intoxication and, as such, s. 33.1 is rationally connected to its protective purpose. In addition, s. 33.1 is rationally connected to the objective of holding individuals accountable, in as full a manner as possible, for the choice to become extremely intoxicated and the violence committed while in that state. It is obvious that a person foreclosed from advancing a defence that could result in an acquittal is held accountable.

Section 33.1 is, however, not minimally impairing of an accused's ss. 7 and 11(d) rights. There are less harmful means of achieving Parliament's objectives in

a real and substantial manner. Options have been advanced that would trench less on the rights of the accused, including a stand-alone offence of criminal intoxication. Alternatively, a path to liability for the underlying violent offence might be based on a criminal negligence standard that would allow the trier of fact to consider whether a loss of control and bodily harm were both reasonably foreseeable at the time of intoxication. This latter option could allow an accused to be convicted for the underlying violent act and not simply negligent or dangerous intoxication while achieving the minimum objective fault standard required by the Constitution.

Section 33.1 also fails on an assessment of the relative benefits and negative effects of the law under the *Oakes* test. At the final stage under s. 1, the question is whether there is proportionality between the overall effects of the *Charter*-infringing measure and the legislative objectives. This invites the broadest assessment of the benefits of s. 33.1 to society, weighed against the cost of the limitations to ss. 7 and 11(d) of the *Charter*. With respect to its salutary effects, s. 33.1 gives expression to the close and harmful association between extreme self-induced intoxication and violence and affirms society's commitment to the equality and security rights of victims vulnerable to intoxicated crime. It responds meaningfully to inequality by recognizing that women and children deserve the full protection of the law and by condemning intoxicated gendered and family violence. It includes in its reach the irresponsible use and mixing of intoxicants that could lead to automatism and violence which discourages such behaviour and raises awareness about the link between extreme intoxication and violence. It contributes to public confidence in the criminal justice

system, although this benefit must be balanced against recognizing society's interests in a system of law governed by the principles of fundamental justice. As well, it fosters personal responsibility in respect of voluntary intoxication, which Parliament saw as one of the root sources of violent crime.

However, s. 33.1's deleterious effects are serious and troubling. Its fundamental flaw is the risk of wrongful convictions it presents. It contravenes virtually all the criminal law principles that the law relies upon to protect the morally innocent. It enables conviction where the accused acted involuntarily, where the accused did not possess the minimum level of fault required, and where the Crown has not proven beyond a reasonable doubt the essential elements of the offence for which an accused is charged. Because s. 33.1 does not build in a criterion of objective foreseeability, it is impossible to say who, among those who voluntarily ingest intoxicants, has the degree of blameworthiness that would justify the stigma and punishment associated with the underlying offence with which they are charged. Where the intoxicant is licit, or where no reasonable person would anticipate the risk of automatism, whatever blameworthiness that comes from voluntary intoxication is relatively low and likely disproportionate to the punishment the individual would face if convicted for an offence committed in a state akin to automatism. It cannot be concluded that the morally innocent will not be punished. This is an extremely serious deleterious effect. Additionally, s. 33.1 disproportionately punishes for unintentional harm, contrary to the principle that punishment must be proportionate to the gravity of the offence.

The Crown has not discharged its burden of showing that the benefits suggested by the evidence are fairly realized by s. 33.1. There are socially and constitutionally acceptable alternatives to the *Daviault* exception that achieve the legitimate objectives of the law more fairly than in s. 33.1. In the absence of s. 33.1, the benefits tied to accountability and protection will continue to be met through the application of common law rules which prevent the defence of intoxication including to general intent crimes of violence. Parliament can further advance these goals with respect to self-induced extreme intoxication akin to automatism through other means. The weight to be accorded to the principles of fundamental justice and the presumption of innocence cannot be ignored. Section 33.1 trenches on fundamental principles at the core of Canada's criminal law system, creates a liability regime that disregards principles meant to protect the innocent, and communicates the message that securing a conviction is more important than respecting the basic principles of justice. Its impact on the principles of fundamental justice is disproportionate to its overarching public benefits. It should therefore be declared unconstitutional and of no force or effect.

### **Cases Cited**

**Applied:** *R. v. Oakes*, [1986] 1 S.C.R. 103; **considered:** *R. v. Sullivan*, 2020 ONCA 333, 151 O.R. (3d) 353; *R. v. Daviault*, [1994] 3 S.C.R. 63; **referred to:** *R. v. Stone*, [1999] 2 S.C.R. 290; *Rabey v. The Queen*, [1980] 2 S.C.R. 513; *R. v. Luedecke*, 2008 ONCA 716, 93 O.R. (3d) 89; *R. v. Sullivan*, 2022 SCC 19; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Creighton*, [1993] 3 S.C.R. 3; *Leary v.*

*The Queen*, [1978] 1 S.C.R. 29; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Parks*, [1992] 2 S.C.R. 871; *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687; *R. v. Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 S.C.R. 575; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. Penno*, [1990] 2 S.C.R. 865; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3; *R. v. Chaulk*, 2007 NSCA 84, 257 N.S.R. (2d) 99; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Vickberg* (1998), 16 C.R. (5th) 164; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Robinson*, [1996] 1 S.C.R. 683; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Dunn* (1999), 28 C.R. (5th) 295; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Brenton* (1999), 180 D.L.R. (4th) 314; *R. v. Chan*, 2018 ONSC 3849, 365 C.C.C. (3d) 376; *R. v. Stevens*, [1988] 1 S.C.R. 1153; *R. v. Hess*, [1990] 2 S.C.R.

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*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 11, 15, 28.

*Constitution Act, 1982*, s. 52.

*Criminal Code*, R.S.C. 1985, c. C-46, Part I, s. 33.1.

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APPEAL from a judgment of the Alberta Court of Appeal (Slatter, Khullar and Hughes JJ.A.), *2021 ABCA 273*, *30 Alta L.R. (7th)* 1, *404 C.C.C. (3d)* 311, [2021] *11 W.W.R.* 191, [2021] A.J. No. 1028 (QL), *2021 CarswellAlta* 1808 (WL Can.), setting aside a decision of Hollins J., *2020 ABQB* 166, *9 Alta. L.R. (7th)* 375, [2020] A.J. No. 294 (QL), *2020 CarswellAlta* 442 (WL Can.). Appeal allowed.

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The judgment of the Court was delivered by

KASIRER J. —

## I. Overview

[1] Following a party at which he had consumed alcohol and “magic mushrooms”, Matthew Winston Brown violently attacked Janet Hamnett, a person he did not know and who had done nothing to invite the assault. At the time, Mr. Brown was in what the trial judge described as a “substance intoxication delirium” that was so extreme as to be “akin to automatism” (2020 ABQB 166, 9 Alta. L.R. (7th) 375, at para. 87). While capable of physical movement, he was in a delusional state and had no willed control over his actions. Mr. Brown’s extreme intoxication akin to automatism was brought about by his voluntary ingestion of the magic mushrooms which contained a drug called psilocybin. Mr. Brown was acquitted at trial. The Alberta Court of Appeal set aside that verdict and convicted him of the general intent offence of aggravated assault.

[2] At common law, automatism is “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action” (*R. v. Stone*, [1999] 2 S.C.R. 290, at para. 156). It is sometimes said that the effect of automatism is to provoke physical involuntariness whereby there is no connection between mind and body (see *Rabey v. The Queen*, [1980] 2 S.C.R. 513, at p. 518). Examples often given include the involuntary physical movement of an individual who has suffered a heart attack or seizure. Conduct that is involuntary in this sense cannot be criminal (see *R. v. Luedecke*, 2008 ONCA 716, 93

O.R. (3d) 89, at paras. 53-56, relying in particular on *Rabey*, at p. 519, per Ritchie J., and at p. 545, per Dickson J., as he then was, dissenting but not on this point).

[3] Mr. Brown’s appeal before this Court turns on the circumstances in which persons accused of certain violent crimes can invoke self-induced extreme intoxication to show that they lacked the general intent or voluntariness ordinarily required to justify a conviction and punishment. Similar matters are at the heart of the Crown appeals in *R. v. Sullivan* and *R. v. Chan*, for which judgments are rendered simultaneously with this case (*R. v. Sullivan*, 2022 SCC 19) (the “*Sullivan* and *Chan* appeals”). The Court is asked in all three cases to decide upon the constitutionality of *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32 (“Bill C-72”), in light of, on the one hand, the principles of fundamental justice and the presumption of innocence guaranteed to the accused by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and, on the other, Parliament’s aims to protect victims of intoxicated violence, in particular women and children, and hold perpetrators to account.

[4] These are not drunkenness cases. The accused in each of these appeals consumed drugs which, they argued, taken alone or in combination with alcohol, provoked psychotic, delusional and involuntary conduct, which are reactions not generally associated with drunkenness. As I note below, there is good reason to believe Parliament understood that alcohol alone is unlikely to bring about the delusional state akin to automatism it sought to regulate in enacting s. 33.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. As Lauwers J.A. wrote in *R. v. Sullivan*, 2020 ONCA 333, 151 O.R. (3d)

353, “it is not clear that extreme alcohol intoxication causes non-mental disorder automatism as a matter of basic science” (para. 288). In any event, these reasons say nothing about criminal liability for violent conduct produced by alcohol alone short of the psychotic state akin to automatism experienced by Mr. Brown and spoken to by the trial judge. I specifically leave intact the common law rule that drunkenness, absent clear scientific evidence of automatism, is not a defence to general intent crimes, including crimes of violence such as sexual assault.

[5] It thus bears emphasizing that Mr. Brown was not simply drunk or high. To be plain: it is the law in Canada that intoxication short of automatism is not a defence to the kind of violent crime at issue here. The outcome of the constitutional questions in these appeals has no impact on the rule that intoxication short of automatism is not a defence to violent crimes of general intent in this country.

[6] Parliament added s. 33.1 largely in response to *R. v. Daviault*, [1994] 3 S.C.R. 63. In that case, the Court confirmed the common law rule that intoxication is not a defence to crimes of general intent. The majority in *Daviault* recognized, however, that the *Charter* mandated an exception to the common law rule: where intoxication is so extreme that an accused falls into a condition akin to automatism, a conviction for the offence charged would violate ss. 7 and 11(d) of the *Charter*. It would be unfair, reasoned the Court, to hold an individual responsible for crimes committed while in a state of automatism, as they are incapable of voluntarily committing a guilty act or of having a guilty mind.

[7] Crown counsel in this appeal and the *Sullivan* and *Chan* appeals recall that the *Daviault* exception was met with public incomprehension and disapproval. In dissent, Sopinka J. anticipated this grievance when he wrote that those who voluntarily render themselves intoxicated and then violently cause bodily harm to others are “far from blameless” (p. 128). In order to address the constitutional failings identified by the majority of the Court in a manner that would properly reflect the blameworthiness of the extremely self-intoxicated accused identified by the dissent, Parliament enacted s. 33.1. The new provision purported to remove the defence of automatism for the extremely self-intoxicated accused and put in place a constitutionally-compliant measure of criminal fault for the underlying violent offence. The Crown and the intervening attorneys general urge us to interpret s. 33.1 as validly imposing liability for violent crimes based on a standard of criminal negligence that would answer the violations of the *Charter* pointed to in *Daviault*.

[8] But the impugned provision of the *Criminal Code* does not establish a proper measure of criminal fault by reason of intoxication. Instead, s. 33.1 imposes liability for the violent offence if an accused interferes with the bodily integrity of another “while” in a state of self-induced intoxication rendering them incapable of consciously controlling their behaviour. Section 33.1 treats extreme voluntary intoxication, foreseeable or otherwise, as a condition of liability for the underlying violent offence and not as a measure of fault based on criminal negligence.

[9] Accordingly, the accused risks conviction for the relevant general intent offence — in Mr. Brown’s case, for aggravated assault — based on conduct that occurred while they are incapable of committing the guilty act (the *actus reus*) or of having the guilty mind (*mens rea*) required to justify conviction and punishment. They are not being held to account for their conduct undertaken as free agents, including the choice to ingest an intoxicant undertaken when neither the risk of automatism nor the risk of harm was necessarily foreseeable. Instead, the accused is called to answer for the general intent crime that they cannot voluntarily or wilfully commit, an offence for which the whole weight of the criminal law and ss. 7 and 11(d) say they may be morally innocent. To deprive a person of their liberty for that involuntary conduct committed in a state akin to automatism — conduct that cannot be criminal — violates the principles of fundamental justice in a system of criminal justice based on personal responsibility for one’s actions. On its face, not only does the text of s. 33.1 fail to provide a constitutionally compliant fault for the underlying offence set out in its third paragraph, it creates what amounts to a crime of absolute liability.

[10] I hasten to say that there may well have been other paths for Parliament to achieve its legitimate aims connected to combatting extreme intoxicated violence. The sense that an accused who acts violently in a state of extreme self-induced intoxication is morally blameworthy is by no means beyond the proper reach of the criminal law. Protecting the victims of violent crime — particularly in light of the equality and dignity interests of women and children who are vulnerable to intoxicated sexual and domestic violence — is a pressing and substantial social purpose. And as I shall

endeavour to show, it was not impermissible for Parliament to enact legislation seeking to hold an extremely intoxicated person accountable for a violent crime when they chose to create the risk of harm by ingesting intoxicants.

[11] The alternatives to the constitutionally fragile s. 33.1 strike different balances between individual rights and societal interests and, no doubt, each has advantages and shortcomings as a matter of social policy. Some of these options would be manifestly fairer to the accused while achieving some, if not all, of Parliament's objectives. I am mindful that it is not the role of the courts to set social policy, much less draft legislation for Parliament, as courts are not institutionally designed for these tasks. But it is relevant to the analysis that follows that, as noted by the majority in *Daviault* itself (p. 100) and by the majority of the Court of Appeal in *Sullivan* (para. 132), it would likely be open to Parliament to establish a stand-alone offence of criminal intoxication. Others, including the *voir dire* judge in this very case (2019 ABQB 770, at para. 80 (CanLII)), have suggested liability for the underlying offence would be possible if the legal standard of criminal negligence required proof that both of the risks of a loss of control and of the harm that follows were reasonably foreseeable. In either of these ways, Parliament would be enacting a law rooted in a "moral instinct" that says a person who chooses to become extremely intoxicated may fairly be held responsible for creating a situation where they threaten the physical integrity of others (I borrow the phrase "moral instinct" from Professors M. Plaxton and C. Mathen, "What's Right With Section 33.1" (2021), 25 *Can. Crim. L.R.* 255, at p. 257).

[12] Parliament did not enact a new offence of dangerous intoxication, nor did it adopt a new mode of liability for existing violent offences based on a proper standard of criminal negligence. With the utmost respect, I am bound to conclude the path Parliament chose in enacting s. 33.1 was not, from the point of view of ss. 7 and 11(d) of the *Charter*, constitutionally compliant. I am unable to agree with what the Minister of Justice asserted on the third reading of s. 33.1 in Parliament: “. . . the approach taken in Bill C-72 is fundamentally fair, both to the victims of violence and to those accused of crime” (*House of Commons Debates* (“Hansard”), vol. 133, No. 224, 1st Sess., 35th Parl., June 22, 1995, at p. 14470).

[13] The violations of the rights of the accused in respect of the principles of fundamental justice and the presumption of innocence occasioned by s. 33.1 are grave. Notwithstanding Parliament’s laudable purpose, s. 33.1 is not saved by s. 1 of the *Charter*. The legitimate goals of protecting the victims of these crimes and holding the extremely self-intoxicated accountable, compelling as they are, do not justify these infringements of the *Charter* that so fundamentally upset the tenets of the criminal law. With s. 33.1, Parliament has created a meaningful risk of conviction and punishment of an extremely intoxicated person who, while perhaps blameworthy in some respect, is innocent of the offence as charged according to the requirements of the Constitution.

[14] In the case of Mr. Brown, and on the strength of the findings of fact at trial, the conclusion may be plainly stated. Mr. Brown might well be reproached for choosing to drink alcohol and ingest magic mushrooms prior to the harm suffered by

Ms. Hamnett, but that blame cannot ground criminal liability for the aggravated assault that occurred while he was in a state of delirium akin to automatism. On a constitutional standard, he did not commit the guilty act of aggravated assault voluntarily and he was incapable of forming even the minimally-required degree of *mens rea* required for conviction of that offence. In my respectful view, to punish him in these circumstances, however exceptional they might be, would be intolerable in a free and democratic society. The law imposes the solemn and onerous duty on this Court to declare s. 33.1 unconstitutional (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (“*Motor Vehicle Reference*”), at p. 497). For the reasons that follow, I would set aside the judgment of the Court of Appeal, declare s. 33.1 to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and restore Mr. Brown’s acquittal rendered at trial.

## II. Background

[15] At a friend’s house party on a January night in Calgary, Mr. Brown had six or seven mixed drinks, a few beers and consumed several one-half gram or smaller portions of magic mushrooms. He was 26 years old and in his last year of university and was aware that psilocybin in magic mushrooms is an illegal drug that can bring about hallucinations. He had tried magic mushrooms once before and believed that they generally gave a “fuzzy but positive feeling” (trial reasons, at para. 38).

[16] As Mr. Brown would testify at his trial, at around 1:30 a.m. he felt “wonky” and began to “los[e] [his] grip on reality” (A.R., vol. V, at p. 13). Without any memory of having done so, Mr. Brown removed his clothing and left the house in

an agitated state at around 3:45 a.m., running naked and barefoot into the cold winter night. His friends searched for him for about 10 to 15 minutes and then called the police.

[17] In a nearby house, Janet Hamnett was awoken around 4:00 a.m. by a loud noise. When she went to investigate, Ms. Hamnett was attacked by someone she did not know who she later described as a huge presence screaming at the top of his lungs. The intruder was Mr. Brown. Ms. Hamnett fell to the ground and put her arms up as he beat her repeatedly with a broken broom handle. With her head, face and arms covered in blood, she managed to get to a bathroom and lock the door. Mr. Brown left the house and continued into the street. When all appeared quiet Ms. Hamnett sought refuge at a neighbour's house, at which time the police were called. The attack left her with cuts and contusions, as well as broken bones in her right hand which resulted in permanent injuries. She also suffered psychological harm from the incident.

[18] At about 5:00 a.m., Mr. Brown broke into the Varshney residence a kilometer away by throwing a heavy object through the front door window. Mr. and Mrs. Varshney, who did not know Mr. Brown, heard screaming and the sound of breaking glass. They were able to take shelter in their bedroom and call the police. The police found Mr. Brown lying naked on the floor of a bathroom. He was whispering and appeared confused by his surroundings; his feet were visibly bruised and bloodied. Mr. Brown complied with police instructions and was taken for medical care. He recalled coming to in hospital then waking later in a jail cell. Mr. Brown later said he had no memory of what transpired at either of the two homes.

[19] Mr. Brown had no previous criminal record and no history of mental illness. He was charged with one count of breaking and entering Ms. Hamnett's home and committing the indictable offence of aggravated assault and one count of breaking and entering the Varshney home and committing the indictable offence of mischief to property over \$5,000.

[20] At trial, Mr. Brown argued that he was not guilty of the offences charged by reason of automatism. He claimed to have been so impaired by the consumption of psilocybin that his actions were involuntary and that he did not have the necessary *mens rea* for conviction of aggravated assault or mischief to property. Expert evidence adduced at trial confirmed that the psilocybin was the "clear causative factor" for what was described as the accused's delirium (trial reasons, at para. 73). On the basis of this evidence, Mr. Brown was said to have no voluntary control over his conduct at the time.

[21] The Crown invoked s. 33.1 as a means of precluding Mr. Brown from relying on self-induced intoxication akin to automatism as a defence to the charge of aggravated assault. Mr. Brown answered that, insofar as it prevented him from raising automatism as a defence, s. 33.1 violated ss. 7 and 11(d) of the *Charter* and could not be saved by s. 1. He said that the defence should be available to him against both charges, including the offence relating to the aggravated assault to which s. 33.1 purportedly applied.

### III. Proceedings Below

A. *Alberta Court of Queen's Bench*

(1) The Constitutional Ruling, 2019 ABQB 770 (deWit J.)

[22] In a judgment rendered following a *voir dire*, deWit J. concluded that s. 33.1 violated the principles of fundamental justice and the presumption of innocence guaranteed by the *Charter* and was not otherwise justified pursuant to s. 1.

[23] The *voir dire* judge observed that s. 33.1 “does not deal with the consequence of criminal acts” but “simply eliminates any evidence and argument regarding the *mens rea* and voluntariness of the accused” (paras. 29-30). He concluded that s. 33.1 allows for a conviction in the absence of proof that the underlying violent offence was intended or committed voluntarily, contrary to s. 7 of the *Charter* (para. 31). Instead, the provision operates akin to a regime of absolute liability. He further held that s. 33.1 enables conviction even where there is a reasonable doubt about the essential elements of the charged offence, contrary to s. 11(d) (para. 37).

[24] He then held that these limits cannot be reasonably justified in a free and democratic society. The judge did recognize that the provision had pressing and substantial objectives relevant to s. 1 of the *Charter*. Section 33.1 was not, however, minimally impairing, as there were less harmful means of assuring Parliament's protection and accountability objectives (para. 80). For the *voir dire* judge, the deleterious effects of s. 33.1 outweighed its benefits. Section 33.1's primary flaw is that it offends “sacrosanct” principles of the legal system designed to avoid convicting

the morally innocent (para. 89). This negative effect outweighs the benefits of the law, especially when Parliament could have adopted a better-tailored rule bearing on the consumption of intoxicants and their effects.

[25] The *voir dire* judge declared s. 33.1 to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*. As a result, Mr. Brown was entitled to raise the defence of extreme intoxication akin to automatism that s. 33.1 purported to exclude.

(2) Reasons for Judgment on the Merits, 2020 ABQB 166, 9 Alta. L.R. (7th) 375 (Hollins J.)

[26] At trial, Mr. Brown led evidence in support of the defence of extreme intoxication akin to automatism. Hollins J. held that every material piece of evidence supported a finding of automatism.

[27] The trial judge found that Mr. Brown was in a state of delirium due to his consumption of psilocybin, “which meant that he was not acting voluntarily in the commission of these offences nor with knowledge of his acts” (para. 34). Expert testimony was adduced that Mr. Brown’s conduct was involuntary at the time of the offences and he had no conscious control over or awareness of his actions. A forensic psychologist, Dr. Thomas Dalby, stated that Mr. Brown’s delirium was caused by the psilocybin and that his reaction was “unanticipated” (A.R., vol. III, at p. 318). An expert in pharmacology, Dr. Mark Yarema, agreed that psilocybin can “induce a state

akin to legal automatism” (A.R., vol. III, at p. 241). In his view, Mr. Brown’s actions were those of someone “who has lost touch with reality, does not have a normal level of consciousness, and does not have voluntary control over their actions” (A.R., vol. III, at p. 242).

[28] Hollins J. accepted these conclusions as well as the evidence of other witnesses who testified, including the victims, who were all credible in her view. The defence was an answer to the property-based offence at common law and was available for the charge relating to the aggravated assault given that s. 33.1 had been declared of no force and effect by her colleague, deWit J. Accordingly, she entered acquittals on both counts of the indictment.

B. *Court of Appeal of Alberta, 2021 ABCA 273, 30 Alta. L.R. (7th) 1 (Slatter, Khullar and Hughes J.J.A.)*

[29] In separate opinions written by Slatter, Khullar and Hughes J.J.A., the Court of Appeal reversed deWit J.’s declaration that s. 33.1 was of no force or effect. The court set aside the acquittal on the first count and entered a conviction on the included offence of aggravated assault. The acquittal on the mischief charge, unaffected by s. 33.1, was not appealed.

[30] Slatter and Hughes J.J.A. both held that the *voir dire* judge had erred in concluding that s. 33.1 violated ss. 7 and 11(d) of the *Charter*.

[31] For Slatter J.A., the Supreme Court had “expressly invited Parliament to do exactly what it did, namely legislate to fill the gap created by *Daviault*, contemplating that the result would comply with s. 7” (para. 14). Slatter J.A. saw no breach of the principle of voluntariness because it was acceptable for Parliament to criminalize voluntary intoxication in situations where a self-created risk of harm is objectively foreseeable. He further held that there was no breach of the constitutional requirement of *mens rea* because s. 33.1 adopts the marked departure standard, which has been accepted as a sufficient measure of fault, in particular in *R. v. Creighton*, [1993] 3 S.C.R. 3. All that is constitutionally required is an “objectively foreseeable risk of personal injury” (para. 26 (emphasis in original)). Finally, Parliament had not improperly substituted proof of extreme intoxication for proof of the essential elements of the charged offence because s. 33.1 simply “redefined” the *mens rea* for general intent offences (para. 27). Slatter J.A. concluded that by “self-administering a dangerous drug”, a person is responsible for the objectively foreseeable risks associated with self-induced intoxication (para. 30). “It follows”, he wrote, “that there is nothing unconstitutional about Parliament establishing criminal fault based on the risks inherent in self-intoxication” (para. 34).

[32] In the alternative, wrote Slatter J.A., s. 33.1 would be saved under s. 1. Protecting citizens from violent crimes and holding violent citizens accountable, as specific purposes, can be acknowledged as pressing and substantial, in addition to “the general purpose of the criminal law of protecting core social values” (para. 61). The provision has clear benefits: it affirms fundamental societal values about protecting

women and children, it restores confidence in the justice system, it encourages the reporting of crime, and it denounces and deters the use of illegal substances. These outweigh any deleterious effects. “No one who is truly morally innocent is impacted”, he wrote (para. 81). He concluded that “it is demonstrably justifiable to hold persons like [Mr. Brown] accountable for their decisions to consume substances known to affect human behaviour” (para. 85). Slatter J.A. concluded that the appeal should be allowed, the declaration of unconstitutionality set aside, and a conviction should be entered for aggravated assault.

[33] In concurring reasons, Hughes J.A. wrote that s. 33.1 requires a measure of fault that reflects a marked departure from the standard of care of a reasonable person. No substitution breach arose under the provision because Parliament created an alternative level of objective fault. Accused persons can still raise a reasonable doubt about whether the intoxication was self-induced or unforeseen. There is no *Charter* breach. If she were wrong in this view, Hughes J.A. would agree with her colleagues that s. 33.1 is saved by s. 1.

[34] In her reasons concurring in the result, Khullar J.A. found breaches of ss. 7 and 11(d) but decided that the provision could be upheld under s. 1. In respect of the *prima facie* breach, she relied on the reasons of Paciocco J.A. in *Sullivan* that s. 33.1 allows conviction even though the conduct of the offence was not voluntary (para. 168, citing *Sullivan* at paras. 64-74) and, as such, it violated a principle of fundamental justice constitutionally mandated by the *Charter*. Relying further on *Sullivan*,

Khullar J.A. noted that s. 33.1 fails to satisfy the minimum *mens rea* required by the *Charter* (para. 168, citing *Sullivan*, at paras. 79-94). Section 33.1 infringed s. 11(d) of the *Charter* to the extent that it allows an accused to be found guilty despite a reasonable doubt whether they had the *mens rea* required by the offence.

[35] Khullar J.A. concluded however that the provision could be saved under s. 1. She stated that the justification analysis was a “hard and close case” but that Parliament’s choice was a defensible one in light of the options it reviewed (para. 166).

[36] For Khullar J.A., Parliament had pressing and substantial objectives relating to accountability and protection in enacting s. 33.1. She disagreed with the view, expressed by the majority in *Sullivan*, that the accountability purpose is constitutionally impermissible. She was of the view that the majority in *Sullivan* confused the purpose of the provision with its effects (para. 184). Turning to the proportionality leg of the s. 1 test, Khullar J.A. found that the means were rationally connected to these objectives. Section 33.1 serves as a deterrent and strengthens a social ethos that disapproves of excessive intoxication leading to violence.

[37] Khullar J.A. observed that the provision might have been drafted using the modified objective test described by the *voir dire* judge which would have been “less problematic” (para. 197). Parliament was, however, owed deference in its choice for the difficult moral issues. Thus, s. 33.1 passed the minimal impairment stage of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103).

[38] At the final balancing stage, Khullar J.A. acknowledged that there are “serious and troubling negative effects of s. 33.1” in that it allows conviction for violent crimes even where the conduct constituting the *actus reus* is not voluntary and the accused does not possess the *mens rea* required for the general intent offence (para. 201). However, the important benefits outweigh these deleterious effects, including the protection of women and children that “breathes some meaning into the equality rights of victims” (para. 202). It also deters the irresponsible use and mixing of intoxicants that could lead to automatism and violent behaviour (para. 204): “Parliament is entitled to craft a legislative response regardless of how often an accused would fall within s. 33.1” (para. 207).

[39] In conclusion, Khullar J.A. adopted Slatter J.A.’s disposition of the matter. The Court entered a conviction for aggravated assault.

#### IV. Issue

[40] The only issue is whether s. 33.1 violates ss. 7 and 11(d) of the *Charter* and, if so, whether it can be saved under s. 1.

[41] Section 33.1 provides:

**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).

(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.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

## V. Analysis

### A. *Intoxication and Criminal Liability*

[42] While Mr. Brown was convicted of aggravated assault, it is of central importance to recall that s. 33.1 blocks the defence of automatism for all general intent crimes designated in s. 33.1(3), including sexual assault and some other forms of gendered violence. Intoxicated sexual assault was in issue in *Leary v. The Queen*, [1978] 1 S.C.R. 29, *R. v. Bernard*, [1988] 2 S.C.R. 833, and *Daviault*. Domestic and sexual violence have had, as the preamble of Bill C-72 makes plain, a “particularly disadvantageous impact on the equal participation of women and children in society” and Parliament was especially concerned not to allow voluntary intoxication to “excuse” violence against women and children. It is not only important that this preoccupation be recognized as legitimate, but that it be understood as having shaped arguments challenging the provision (see I. Grant, “Second Chances: Bill C-72 and the Charter” (1995), 33 *Osgoode Hall L.J.* 379).

[43] The common law has developed an unsympathetic view towards offenders who argue that their intoxication rendered them incapable of forming the necessary guilty mind. In principle, intoxication does not allow the guilty to evade the stigma of proper conviction or the exacting of fair punishment in Canadian law. Intoxication short of automatism is never a defence to crimes of general intent, including manslaughter, assault, and sexual assault (see *Director of Public Prosecutions v. Beard*, [1920] A.C. 479 (H.L.); *Leary*, at pp. 57-60). In *Leary*, the majority determined that the recklessness involved in becoming drunk was sufficient to find the guilty mind for whatever general intent offence follows. At the time, the *Leary* rule applied to all degrees of intoxication, including extreme intoxication akin to automatism. Intoxication may only negate fault for crimes of specific intent, such as murder, by reason of the complexity of *mens rea* required for conviction. It bears repeating: The rule that intoxication is not a defence to general intent crimes remains untouched by this appeal, except in the case of intoxication akin to automatism.

[44] The constitutionality of the *Leary* rule was upheld in *Bernard*. In concurring reasons, Wilson J. upheld the rule on the basis that the *mens rea* for sexual assault could be inferred from the commission of the act, notwithstanding drunkenness, where the accused engaged in an “intentional and voluntary” act (p. 883). Wilson J. was quick however to distinguish the facts of *Bernard* from cases of extreme intoxication akin to automatism. Wilson J. took care to note that, in a case of true automatism, the *Leary* rule could violate the presumption of innocence by substituting the fault of becoming drunk for the fault of the charged offence (pp. 889-90).

[45] It bears recalling, then, that most degrees of intoxication do not provide a defence to crimes of general intent like the offence of aggravated assault from which Mr. Brown was convicted on appeal. Only the highest form of intoxication — that which results in a person losing voluntary control of their actions — is at issue here: extreme intoxication akin to automatism as a defence to violent crimes of general intent and, then again only intoxication that is self-induced.

[46] The defence of automatism denies the element of voluntariness and therefore negates the *actus reus* of the offence (*R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1321; *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 896). Involuntary conduct is understood to be genuinely exculpatory because, while the prohibited act was harmful, the accused lacks the capacity to answer for what they did (J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007), at p. 142). A physically involuntary act, however wrongful in outward appearance, is not a guilty act that can be imputed to an accused.

[47] Automatism is reflected in involuntary movements that may be associated with heart attacks, seizures or “external” shock, or conditions such as sleepwalking or delirium, where the body moves but there is no link between mind and body (*Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386 (H.L.), at p. 409; *Rabey*, at p. 523). Physical voluntariness is a principle of fundamental justice and a requirement of all true criminal offences, central to the criminal law’s desire to avoid convicting the morally innocent (*Daviault*, at p. 74; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at

paras. 46-47; *R. v. Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 S.C.R. 575, at para. 45). Absent a willed movement of the body, the Crown cannot prove the *actus reus* beyond a reasonable doubt (*R. v. Théroux*, [1993] 2 S.C.R. 5, at pp. 17-18). This is distinguished from moral involuntariness, which describes scenarios where the accused retains conscious control over their body but has no realistic choice but to commit a guilty act (*Ruzic*, at para. 44).

[48] In addition, an automaton cannot form the *mens rea*, or guilty mind, if their actions are involuntary. Where an accused has no conscious awareness of their movements, they necessarily cannot intend their involuntary acts. Imposing criminal liability in the absence of proof of fault also offends the principles of fundamental justice (*Motor Vehicle Reference*, at pp. 513-15).

[49] I recall that, in *Bernard*, Wilson J. wrote that in a case of true intoxication akin to automatism, it may be improper to substitute proof of intention to become intoxicated for proof of intention to commit the violent offence (pp. 889-90). The choice to become intoxicated through legal or illegal means, a choice that many Canadians make, cannot be said to be the same as an intention to perpetrate the illegal act. The substitution violates the presumption of innocence, because a person can be convicted despite a reasonable doubt about whether the essential elements of the offence have been established (*Oakes*, at p. 134; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 656).

[50] I note that the defence has been referred to as “rare” in the case law (*Daviault*, at pp. 92-93; *Sullivan*, at para. 118). The Attorney General of Manitoba disputes that and points to instances of violence involving street drugs with known psychosis-inducing properties. It is certainly plain that intoxicated violence is a serious social problem. Whatever proportion of this phenomenon relates to involuntary conduct, it is notable that extreme intoxication akin to automatism is an exigent defence requiring the accused to show that their consciousness was so impaired as to deprive them of all willed control over their actions. This is not the same as simply waking up with no memory of committing a crime. A failure to remember does not prove that an individual was acting involuntarily. Nor is it the same as suffering a psychotic episode where physical voluntariness remains intact. But even if one were to accept that the defence is a rarity, it hardly seems conclusive to either side of the debate. It is cold comfort to the victim of extreme intoxicated violence that their plight is a rare one. And it is equally chilling to think that denying the defence to a person who is morally and physically incapable of committing a crime is somehow palatable in that it is a rare occurrence.

[51] Disagreements concerning the blameworthiness of voluntary intoxication animated the majority and minority opinions in *Daviault*, which addressed squarely the impact of the *Leary* rule and the preoccupations of Wilson J. in *Bernard* on extreme intoxication akin to automatism.

(1) *Daviault*

[52] Mr. Daviault sexually assaulted an acquaintance after drinking 7 or 8 bottles of beer and 35 ounces of brandy, an amount that would likely cause death or a coma in an ordinary person. The issue was, as a matter of law, whether evidence of extreme self-induced intoxication akin to automatism could ground a defence to the general intent crime of sexual assault. Cory J. for the majority held that the *Leary* rule offended ss. 7 and 11(d) of the *Charter* in three ways, helpfully explained by Paciocco J.A. in *Sullivan* as the “voluntariness breach”, the “improper substitution breach” and the “mens rea breach” (*Sullivan*, at para. 47; *Daviault*, at pp. 89-92).

[53] The majority was concerned that an accused in a state of extreme intoxication akin to automatism could be convicted for conduct that, by reason of its involuntary character, cannot amount to the *actus reus* of the offence, for which proof beyond a reasonable doubt must be made. This violation of the criminal law’s voluntariness principle would breach the principles of fundamental justice in s. 7 of the *Charter* (pp. 91-92). Moreover, the choice to become intoxicated cannot be properly substituted for the *mens rea* of the offence charged. Proof of voluntary intoxication does not inevitably lead to the conclusion that the accused had the requisite mental element required for conviction. The improper substitution of proof of self-induced intoxication for proof of *mens rea* of the offence is a breach of the presumption of innocence (s. 11(d)) (p. 92). Finally, the majority in *Daviault* recalled that voluntary intoxication is not a crime and the consequences of self-induced intoxication may themselves not be voluntary or foreseeable. To convict a person based on self-induced intoxication means that an accused might not have the constitutionally required

minimum *mens rea* that fits the offence charged and the criminal sanction that attaches thereto. This would violate the principles of fundamental justice in s. 7 of the *Charter* and constitutes the *mens rea* breach (*ibid.*).

[54] The majority in *Daviault* thus modified the rule that intoxication is not a defence to crimes of general intent. Exceptionally, a defence of extreme intoxication akin to automatism, including self-induced extreme intoxication, could be raised by an accused, although intoxication short of automatism would still not be a defence, as it will not interfere with someone's ability to form the minimum mental element required for a general intent offence (pp. 99-101). Cory J. invited Parliament to legislate to meet what he considered to be the rare case of this degree of intoxication, noting that it was "always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk" (p. 100).

[55] In dissent, Sopinka J. said that self-induced extreme intoxication cannot be a defence for general intent crimes such as sexual assault. In his view, the principles of fundamental justice could be satisfied if there is a blameworthy mental element and the level of blameworthiness is not disproportionate to the seriousness of the offence (p. 118). Those who voluntarily consume alcohol or drugs and render themselves involuntary are not morally blameless. Sopinka J. wrote that the voluntariness principle must give way as a "perpetrator who by his or her own fault brings about the conditions should not escape punishment" (p. 121).

[56] Thus, following *Daviault*, at common law, an accused was entitled to an acquittal for a general intent offence if they could prove, on a balance of probabilities, that they committed the acts involuntarily, while in a state of extreme intoxication akin to automatism. In order to do so, the accused must adduce expert evidence.

[57] In its aftermath, the majority opinion in *Daviault* was criticized for its “alarming lack of consideration of the social context of sexual assault particularly for women and children” (I. Grant, “The Limits of *Daviault*” (1995), 33 C.R. (4th) 277, at p. 287; see also M. Shaffer, “*R. v. Daviault*: A Principled Approach To Drunkenness or A Lapse of Common Sense?” (1996), 3 *Rev. Const. Stud.* 311, at pp. 324-27). Professor Grant, for example, argued that alcohol is often implicated in gendered violence, and therefore strong equality protections are necessary (“Second Chances: Bill C-72 and the *Charter*”, at p. 389). She wrote that “[t]he suggestion that someone could be too drunk to be convicted of sexual assault shocked the public’s sense of justice and common sense” (p. 383).

(2) Bill C-72

[58] Within a relatively short period following the judgment of this Court in *Daviault*, Parliament added s. 33.1 to the general part (Part I — General) of the *Criminal Code*, which sought to abolish self-induced intoxication akin to automatism as a defence to general intent offences involving violence. The preamble of Bill C-72, to which I will return, emphasized Parliament’s concerns regarding intoxicated violence and its impact on the equality and security interests of women and children. It

also spoke to the moral view that someone who caused harm while voluntarily intoxicated was blameworthy and should be held accountable for that harm.

[59] Before the Standing Committee on Justice and Legal Affairs in advance of the Bill's enactment, the Minister of Justice stated that in *Daviault*, Sopinka J. "wrote a strong judgment for the dissent. . . . He was able to conclude that the moral blameworthiness in the act of inducing your own intoxication was sufficient as a link to criminal liability for the harm charged in the offence" (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 98, 1st Sess., 35th Parl., April 6, 1995, at p. 17). He stated that the draft amendment provided a sufficient level of fault in that self-induced intoxication to the point of automatism was a departure from the standard of care (*ibid.*). In its response to *Daviault*, Parliament thus sought to supply a link between the intention to become intoxicated and the intention to commit a crime of violence identified by the majority. It endeavoured to do so by legislating the marked departure standard described in s. 33.1(2), which was viewed as avoiding the constitutional infirmities identified by Cory J. and extending the moral and policy reasoning of Sopinka J.'s dissent.

[60] Even after *Daviault*, there is general agreement that a person acting in a state of automatism deserves an acquittal where their loss of control is truly morally blameless. But, to borrow a phrase from the United Kingdom Law Commission, there is a persistent sense shared by many that "it is not fair for there to be an acquittal where the accused may be blamed for whatever led to the loss of control" (*Criminal Liability:*

*Insanity and Automatism — A Discussion Paper* (2013), at para. 1.117). On this view, a person whose automatism is brought about by self-induced extreme intoxication should shoulder that blame and the law should not allow them to escape liability for their violent conduct. There is a perceived difference, say, between a person who consumes a spiked drink and, as a result, loses control of their actions and another person who, because they chose to drink or take drugs to excess, falls into a state akin to automatism. At the same time, issues related to agency and automatism are complicated by other factors, including the social problem of addiction that may have a bearing on the question of moral blameworthiness (see, generally, L. Silver, *Who is Responsible for Extreme Intoxication?*, October 7, 2021 (online); L. M. Kelly and N. Gill, *The punishing response to the defence of extreme intoxication*, October 13, 2020 (online)). While this bears noting, it is unnecessary to say more on this problem that does not arise on the facts of this appeal or of the *Sullivan* and *Chan* appeals before the Court.

[61] I take due note that the preamble to Bill C-72 provides that, in most cases, extreme intoxication akin to automatism is brought about not through the consumption of alcohol alone, but by the consumption of other intoxicants or a mix of alcohol and another substance. For this observation, Parliament relied upon reports and testimony by three experts in support of its conclusion that alcohol alone will not induce a state of automatism. One expert, Dr. Harold Kalant, stated that there was no scientific evidence that alcohol could cause automatism, absent an underlying health condition (*Sullivan* and *Chan* appeals, A.R., vol. VI, at pp. 93-95; see also the evidence of

Dr. Kendall and Dr. Bradford in Standing Committee on Justice and Legal Affairs, *Evidence*, No. 161, 1st Sess., 35th Parl., June 13, 1995, at pp. 22-25). While s. 33.1 refers to intoxication generally, without formally distinguishing between licit or illicit substances, the preamble to Bill C-72 states that “the Parliament of Canada . . . is aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily”.

[62] Although both *Daviault* and Parliament were focussed on “drunkenness”, the parliamentary record and facts of this appeal and the *Sullivan* and *Chan* appeals suggest that the defence of extreme intoxication akin to automatism will generally not be relevant in cases involving alcohol alone. The experts in this case explained, with reference to the legal definition of automatism, that psilocybin may induce delusions, psychotic episodes, confusion and disorientation (A.R., vol. III, at pp. 241 and 315). Dr. Kalant, in contrast, testified before Parliament that, normally, alcohol progressively decreases nerve cell activity in the brain until a person becomes both unconscious and incapable of physical movement (*Sullivan* and *Chan* appeals, A.R., vol. VI, at p. 93), an effect which would not satisfy the state of impaired conscious and unwilled movements necessary for a true state automatism. Claims of extreme intoxication must, of course, be assessed with reference to the facts and expert evidence adduced at the trial. It would be inappropriate here to foreclose a finding of extreme intoxication through any intoxicant taken alone, if medical and scientific evidence adduced compel such a conclusion.

[63] I now turn to the question of whether s. 33.1 infringes ss. 7 and 11(d) of the *Charter*, as alleged by Mr. Brown.

B. *Section 33.1 Infringes Sections 7 and 11(d)*

(1) Principal Arguments

[64] Mr. Brown says s. 33.1 violates ss. 7 and 11(d) of the *Charter*. In its reading of the provision, the Court of Appeal erred in departing from the principles set forth in *Daviault*. He says that s. 33.1 unfairly extends to situations in which there is no foreseeable risk of violence for the general intent offence to which it applies. It creates a regime for absolute liability by allowing conviction without proof beyond a reasonable doubt that the accused intentionally or voluntarily committed the offence. Section 33.1 therefore improperly substitutes intent to become intoxicated with intent to commit the violent offence. Mr. Brown adds that s. 33.1 also limits s. 7 because it mandates conviction without any contemporaneity between the *actus reus* and *mens rea* of a criminal offence.

[65] The Crown responds that, when properly interpreted, s. 33.1 complies with the *Charter*. Under the Crown's reading, s. 33.1 only punishes the intentional and voluntary consumption of drugs to an extreme level, thus meeting the voluntariness requirement. There is no *mens rea* breach because s. 33.1 contains a true objective standard and includes objective foresight of harm. There is no improper substitution

because s. 33.1 changes the *mens rea* needed to prove a general intent offence. Parliament was entitled to set standards of behaviour that all in society must follow.

[66] The intervening attorneys general say that s. 33.1 has cast a unique mode of liability that provides the necessary ingredients for a constitutionally valid offence. The mental element inherent in s. 33.1(2) reflects the minimum objective fault requirement along the same marked departure standard recognized in cases such as *R. v. Hundal*, [1993] 1 S.C.R. 867, *Creighton* and *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60. Accordingly, s. 33.1 is consistent with ss. 7 and 11(d) of the *Charter* because it follows “a blueprint this Court has already endorsed as constitutional” (Condensed Book, A.G. Ontario, at p. 2). Moreover, Parliament can constitutionally preclude intoxication as a defence if it is the gravamen of the offence (*R. v. Penno*, [1990] 2 S.C.R. 865, at p. 891, per Wilson J.). Here, acting on this Court’s invitation in *Daviault*, Parliament has sought to impose liability for the unintended consequences of a blameworthy predicate act following, in particular, *R. v. DeSousa*, [1992] 2 S.C.R. 944.

(2) Threshold Issue: Internal Balancing Under Section 7

[67] As a preliminary matter, the Court must first decide whether the rights of victims of intoxicated violence, in particular the rights of women and children under ss. 7 and 15 of the *Charter* and alluded to in the preamble to Bill C-72, should inform the analysis of a possible breach of the accused’s rights under s. 7, or whether it is appropriate to consider these interests specifically at the justification stage under s. 1.

[68] The intervener Women’s Legal Education and Action Fund Inc. (LEAF) invites this Court to balance the rights of the accused against the rights of women and children in the s. 7 analysis. It says that, in *Daviault*, there was no consideration of competing rights at that stage, unlike the clear engagement with equality, security and dignity interests in Bill C-72. These rights are not simply other social interests that should be “relegated” to the s. 1 justification. Where courts fail to undertake balancing under s. 7 — as the majority of the Court of Appeal did not do in *Sullivan*, for example — the effect is that, wittingly or unwittingly, they favour individual rights over those of vulnerable groups who disproportionately bear the risk of intoxicated violence. Others, including the Crown and the Canadian Civil Liberties Association, depart from this view and submit that the interests of women and children are properly considered under s. 1 following *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

[69] LEAF invokes *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mills*, [1999] 3 S.C.R. 668, in which this Court balanced competing *Charter* rights under the breach analysis. These cases involved situations where state action directly implicated multiple sets of *Charter* rights. In both, the procedural rights of the accused brought the *Charter* rights of another party into conflict and created the risk that both sets of rights would be undermined.

[70] In my view, the *Dagenais* and *Mills* mode of analysis does not apply and does not support the argument that balancing between the rights and interests of alleged perpetrators and victims of crime should take place under s. 7 in this circumstance. *Dagenais* and *Mills* apply when the *Charter* rights of two or more parties are in conflict and both are directly implicated by state action, which is not the case here. Section 33.1 affects the substantive rights of the accused subject to prosecution by the state. The equality and dignity interests of women and children are certainly engaged as potential victims of crime — but in this context, by virtue of the accused’s actions, not of some state action against them. This is qualitatively different from the balancing undertaken for example in *Mills*, where it was state action — through the application of an evidentiary rule for the production of records to the accused relating to the complainant — that directly affected both the accused and the complainant. Section 33.1 operates to constrain the ability of an accused to rely on the defence of automatism but nothing in the provision limits, by the state’s action, the rights of victims including the ss. 7, 15 and 28 *Charter* rights of women and children. These interests are appropriately understood as justification for the infringement by the state. As the preamble of Bill C-72 makes plain, the equality, dignity and security interests of vulnerable groups informed the overarching social policy goals of Parliament; they are best considered under s. 1.

[71] Considering these as societal concerns under s. 1 does not “relegate” the equality, security and dignity interests of women and children to second order importance. LEAF is correct to say that these rights are intensely important and must

be given full consideration in the *Charter* analysis. Indeed, it has been usefully argued that the opportunity to consider the competing interests of vulnerable groups in the present context should find its fullest expression when a court considers the proportionality of deleterious and salutary effects of legislation under s. 1. Commenting on the justification for the breach by the majority of the Court of Appeal in *Sullivan*, Professor S. Coughlan writes that s. 1, as opposed to s. 7, gives a proper opportunity to “shift from an individual focus to a comparative focus”, which is methodologically more suited to balancing under s. 1 than s. 7 in this context (“*Sullivan: Can a Section 7 Violation Ever be Saved Under Section 1?*” (2020), 63 C.R. (7th) 157, at p. 159). Counsel for LEAF at the *Sullivan* and *Chan* appeals rightly urged that, as an alternative to her preferred s. 7 balancing, s. 1 should be seized upon by this Court to reinforce the accountability and protective objectives of s. 33.1 from the perspective of the particular vulnerability of women and children to the intoxicated violence (transcript, at p. 100). I agree.

[72] Finally, and with due respect for other views, the basic values against arbitrariness, overbreadth and gross disproportionality are unrelated to the analysis of the *Charter* rights engaged in this appeal and the *Sullivan* and *Chan* appeals. The principles in *Bedford* speak to “failures of instrumental rationality” that reflect a legislative provision that is unconnected from or grossly disproportionate with its purpose (para. 107). By contrast, the principles of fundamental justice in this case relate to substantive and procedural standards for criminal liability that ensure the fair operation of the legal system and which are “found in the basic tenets of our legal

system” (*Motor Vehicle Reference*, at p. 503). I agree on this point with Paciocco J.A. in *Sullivan* (para. 61) that the challenge here pertains to s. 7 principles of the voluntariness and *mens rea* required to justify punishment and not those matters of arbitrariness and proportionality at issue in *Bedford*. A court’s s. 7 analysis should start by asking whether a statutory provision fails to meet the requirements of the specific principle raised by the claimant before turning to the more general matter as to whether the law is arbitrary or disproportionate in light of its purpose in the *Bedford* sense (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 129 and 135-45).

(3) Interpretation of Section 33.1

[73] Much of the argument in this appeal, as well as in the *Sullivan* and *Chan* appeals, turns on the proper interpretation of s. 33.1. Crown counsel and interveners in these appeals offer somewhat different readings of the text of s. 33.1 in support of its validity. In the *Sullivan* and *Chan* appeals, the Crown says that liability under s. 33.1 is imposed for the “predicate act of self-induced extreme intoxication when it leads to involuntary or unintended violence” (Appellant’s Condensed Book, at p. 1). That blameworthy predicate act is said to include, according to the Crown, a constitutionally-compliant fault element of negligence requiring a marked departure from the reasonably prudent person. In this appeal, it was argued that the “self-induced” character of intoxication, alluded to in s. 33.1, incorporates voluntariness and *mens rea* components: “The act of voluntarily intoxicating oneself to an extreme level”, said the Crown, “is a marked departure from the standard of reasonable care generally

recognized in Canadian society” (Respondent’s Condensed Book, at p. 1; see also transcript, at pp. 35-36). When pressed on these interpretations of s. 33.1 in oral argument in this appeal and the *Sullivan* and *Chan* appeals, counsel acknowledged that the basis for the position they espouse was not found expressly in the text of the section. But, they said, when read purposefully and as a whole, s. 33.1 both eliminates a defence and creates a new mode of liability.

[74] The Attorney General of Canada stated that s. 33.1 must be read in keeping with the presumption of constitutionality. The Attorney General argued that the fault targeted by s. 33.1(1) and (2) is the voluntary consumption of an intoxicant that a person knew or ought to have known creates a risk of automatism and, when violence ensues, that self-induced intoxication departs markedly from the standard of care reasonably expected in the circumstances. But in advancing that view, counsel acknowledged, at the hearing in the *Sullivan* and *Chan* appeals, that “you are not going to find that specifically in the section” (transcript, at p. 51). Moreover, counsel for the attorneys general of Canada, Manitoba and Saskatchewan invited the Court variously to interpret or read words into the text to overcome what was, they said, “inelegant drafting”, “hardly a model of successful drafting”, or a provision that was “oddly drafted” (*Sullivan* and *Chan* appeals, transcript, at pp. 56, 73 and 83).

[75] I see no ambiguity in s. 33.1 and disagree with the interpretation proposed by the Crown and the attorneys general which, with due respect for those who hold other views, falls afoul of the ordinary meaning of the provision. I would add that the

interpretation proposed by the Crown in these appeals trenches on the plain reading of the text given by this Court in *Bouchard-Lebrun*, albeit in another context. This plain reading, as Paciocco and Khullar JJ.A. held, suggests strongly that Parliament fell short in its stated goal of providing a constitutionally-compliant measure of criminal fault for violent crimes of general intent based on self-induced intoxication.

[76] What does the impugned provision in fact say? Section 33.1(1) eliminates the defence of self-induced intoxication akin to automatism applied to the violent offences identified in s. 33.1(3) where the accused departs markedly from the standard of care described in s. 33.1(2). It opens with the words “[i]t is not a defence”. These words have been consistently interpreted in the context of other provisions of the *Criminal Code* as invalidating or limiting a defence (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 7; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3). Nowhere does s. 33.1 create a new offence, with or without the same penalties, be it a predicate act offence of self-induced extreme intoxication or a new criminal negligence offence. The accused faces the full stigma of conviction and the full brunt of punishment for the general intent offence pointed to in s. 33.1(3). For Mr. Brown, that offence is the included offence of aggravated assault to count 1 of his indictment. For Mr. Sullivan, the offences are aggravated assault and assault with a weapon. For Mr. Chan, the offences are manslaughter and aggravated assault. In none of their cases were they charged with dangerous or negligent self-induced extreme intoxication causing bodily harm. Extreme voluntary intoxication may well be an instance of what many Canadians

see as morally reprehensible conduct, but s. 33.1 — or any other act of Parliament for that matter — does not designate it an unlawful act.

[77] I agree with LeBel J. in *Bouchard-Lebrun* when he said that s. 33.1 applies when three conditions are met: (1) that the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) that the accused departed markedly from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person (para. 89). LeBel J. did not comment on the constitutionality of the provision but observed how it operated, concluding — in a manner consonant with the ordinary meaning of the text itself — that when these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence named in s. 33.1(3). To that extent, the provision undoes the defence recognized in *Daviault*.

[78] The Crown is mistaken when it draws an analogy between impaired driving offences and s. 33.1. The gravamen of the offence faced by Mr. Brown does not include intoxication, unlike criminal offences for impaired driving. Counsel for Mr. Sullivan made the point plainly: “The gravamen of assault is not intoxication. Without intoxication, every element of an assault [must] be proven; without intoxication, driving is benign” (*Sullivan and Chan* appeals, R.F., at para. 44; see also *Sullivan*, at para. 65, per Paciocco J.A.).

[79] The requirements of s. 33.1 — that the accused be intoxicated at the material time and the intoxication be self-induced — are not, together or separately, a

measure of fault. They are, as *Bouchard-Lebrun* makes clear, conditions of liability as the use of the word “while” in s. 33.1(2) confirms.

[80] Section 33.1(1) blocks the defence of automatism to general intent offences where the automatism was the result of self-induced intoxication and the accused departed markedly from the standard of care described in s. 33.1(2). Under s. 33.1(2), an accused departs markedly from the standard of care 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.

[81] In 1995, the Minister of Justice said in the House that “[w]e are stating in Bill C-72 conclusively that intoxicating yourself to the point at which you lose conscious control and harm others is a departure from the standard of care” (Hansard, vol. 133, No. 177, 1st Sess., 35th Parl., March 27, 1995, at p. 11039). This description fits the text of the section that was enacted. The marked departure alluded to in s. 33.1(1) depends on proof of the two facts alluded to by the Minister and spoken to in s. 33.1(2). First, that the person must be in a state of *self-induced intoxication* that renders them unaware of, or incapable of controlling, their behaviour. Second, the *violent act* must occur while they are in that state. These facts are best understood as conditions of liability and not measures of fault because neither of them import a criminal negligence standard.

[82] I disagree with the view advanced by the Attorney General of Saskatchewan and others that the adjective “self-induced” must be read so that s. 33.1 carries with it a proper criminal negligence standard. The cases say that intoxication is “self-induced” where the accused voluntarily ingests a substance that they know or ought to know is an intoxicant, in circumstances where the risk of becoming intoxicated is or should be within their contemplation (see, e.g., *R. v. Chaulk*, 2007 NSCA 84, 257 N.S.R. (2d) 99 (“*Chaulk (2007)*”), at para. 47). The term “self-induced intoxication” says nothing about whether the accused foresaw, or ought to have foreseen, the risk of extreme intoxication.

[83] Moreover, no plausible reading of the text suggests that self-induced intoxication brings with it a reasonable foreseeability of bodily harm, as the *voir dire* judge rightly wrote in this case, at paras. 36-37. In addition, I agree with Paciocco J.A. in *Sullivan* that the problem is not overcome by designating the violent act as the marked departure. This is so because, as he wrote, “moral fault cannot come from a consequence alone” (para. 94). Drawing on this Court’s judgment in *Creighton*, at p. 58, he explained that the mental fault inherent in penal negligence “lies in [the] failure to direct the mind to a risk which the reasonable person would have appreciated” (para. 94). If the marked departure from the norm was simply the violent act, the law countenances a form of absolute liability. On its face, and notwithstanding the reference to “departed markedly” in subs. (1), s. 33.1 is not a fault-creating provision but one that sets conditions of liability for intoxicated violence. The fault is that which is already required in the underlying offence mentioned in s. 33.1(3).

[84] In oral argument in the *Sullivan* and *Chan* appeals, the Crown asserted that “nobody says that this is a pure deeming provision such that when this state of intoxication coincides with violence it results in liability” (transcript, at p. 5). This statement must be qualified. It is true that Mr. Brown, Mr. Sullivan and Mr. Chan do not suggest that s. 33.1 is a “pure” deeming provision, as they all recognize that s. 33.1 does not capture those who commit acts of automatistic violence after involuntarily consuming, say, a spiked drink. However, the Crown is incorrect in a more fundamental sense. As the appellant in this appeal and the respondents in the *Sullivan* and *Chan* appeals argue, s. 33.1 deems criminal fault for the violent offence to be present based on the accused’s choice to become intoxicated. Indeed, this was the conclusion reached by deWit J. (para. 30), and Khullar J.A. (para. 168) in this case, and by Paciocco and Lauwers J.J.A. in *Sullivan* (paras. 94 and 275). It is a conclusion, too, that finds repeated support in a segment of the scholarship on s. 33.1 (see, e.g., M. S. Lawrence, “Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the *Criminal Code*” (2017), 40:3 *Man. L.J.* 391, at pp. 403-10; S. Roy, “Intoxication”, in *JurisClasseur Québec — Collection Droit pénal — Droit pénal général* (loose-leaf), fasc. 13, at No. 18). Crown counsel in the *Sullivan* and *Chan* appeals was well aware that, if the Court did not adopt his interpretation of s. 33.1 to include a fault on the marked departure standard as contemplated in *Creighton* and similar cases, “then the provision imposes liability in the absence of [a] necessary . . . minimum fault requirement and we are into section 1” (transcript, at p. 10).

[85] Contrary to the Crown’s position, the “marked departure” standard of fault in s. 33.1(2) clearly attaches then to the violent offence, not the act of self-induced intoxication. Neither can the definition of “self-induced” supply the *mens rea* for criminal negligence, as it says nothing about risk, either by way of foreseeability of extreme intoxication or the possibility of violence.

[86] The whole of the text confirms this. Section 33.1(1) distinguishes self-induced intoxication from the prohibited offence, meaning the two cannot be the same. It provides that no defence is available where “the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence”. This is telling and clearly indicates that what Parliament sought was to impose liability for the charged offence, namely the assaultive behaviour, and not the act of self-induced intoxication itself. Furthermore, in *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, Moldaver J. interpreted the phrase “[i]t is not a defence” as precluding an independent pathway to conviction, as was similarly argued in that case (para. 82). Here, rather than an alternate route to liability, the word “defence” refers to a defence advanced by the accused that would entitle them to an acquittal.

[87] Counsel was unable to cite a single case in the 25-year history of s. 33.1 that adopted the interpretation proposed here by the Crown apart from the majority view of the Court of Appeal in this case. Counsel further acknowledged that the court in *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.) — cited by LeBel J. with approval in *Bouchard-Lebrun*, at para. 89 — expressly rejected the reading of s. 33.1

he advanced (*Sullivan* and *Chan* appeals, transcript, at pp. 30-31). In my view, *Vickberg* rightly points to the failing of the Crown's proposed interpretation and the reasoning offered in 1998 by Owen-Flood J. on this point remains compelling today: "The 'marked departure' language does not refer to the manner in which the accused got into the state of intoxication[, it refers to] the interference with another's bodily integrity while in that state" (para. 69).

[88] Neither can this Court "read in" that interpretation, as the Crown suggested, by relying on the marginal notes accompanying the legislation and the presumption of constitutionality. To do so would strain the meaning beyond what the text can plausibly bear. In the *Sullivan* and *Chan* appeals, Crown counsel pointed this Court to the marginal note in Bill C-72 recorded next to s. 33.1(2) in support of its interpretation (transcript, at p. 7). The marginal note may well state "Criminal fault by reason of intoxication" but, however relevant it is in interpreting parliamentary intent, it cannot displace the plain language of s. 33.1. Whatever the marginal note might suggest, the text states that fault is determined not "*by reason*" of intoxication but instead "*while*" in a state of intoxication. The Crown's reliance on the presumption of constitutionality is also undermined by the plain meaning of the section. The presumption cannot be relied upon in service of one interpretation where statutory language to the contrary is so clear (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 15).

(4) Breaches of Sections 7 and 11(d) of the *Charter*

[89] Section 33.1 thus applies whenever a person interferes with the bodily integrity of another while in a state of extreme intoxication akin to automatism, regardless of whether a loss of awareness or control or a risk of harm was foreseeable. This breaches ss. 7 and 11(d) of the *Charter*, even if one accepts Sopinka J.'s premise in *Daviault* that individuals who create the conditions for their loss of control may be in some way morally blameworthy.

(a) *Mens Rea as Required by Section 7*

[90] It is a principle of fundamental justice that proof of penal negligence, in the form of a marked departure from the standard of a reasonable person, is minimally required for a criminal conviction, unless the specific nature of the crime demands subjective fault (*Creighton*, at pp. 61-62; *Vaillancourt*, at pp. 653-54; *DeSousa*, at p. 962). If the offence takes the form of a predicate act offence, objective foreseeability of harm can be constitutionally sufficient (*DeSousa*, at p. 962).

[91] Section 33.1 requires, for its proper application, an intention to become intoxicated. As noted, the term “self-induced intoxication” has been interpreted to mean voluntarily ingesting a substance that one knows or ought to have known is an intoxicant, in circumstances where the risk of becoming intoxicated is or should be within contemplation (*Chaulk (2007)*, at para. 47). Yet, as LeBel J. observed in his interpretation of s. 33.1 in *Bouchard-Lebrun*, “no distinction based on the seriousness of the effects of self-induced intoxication is drawn in this provision” (para. 91). In other words, it matters little that a person did not foresee their loss of awareness or control.

Moreover, nothing is said about the licit or illicit nature of the intoxicant or its known properties. Intention to become intoxicated to any degree suffices.

[92] For this reason, while the provision applies to those who recklessly invite their loss of control, it also captures the sudden and unexpected onset of involuntariness produced by “self-induced intoxication”, for example the patient who experiences an overwhelming and unexpected reaction to a prescribed pain medication and injures another in a state of involuntariness. The patient may have intended to experience the ordinary pain relief effects of the medication, but in those circumstances it would be beyond the contemplation of a reasonable person to foresee a loss of control or awareness of their behaviour.

[93] Section 33.1 also imposes criminal liability where a person’s intoxication carries no objective foreseeability of harm. Just as it draws no distinction based on the seriousness of the effects of intoxication, neither does s. 33.1 draw any distinction based on the risk of harm, which may vary depending on the intoxicant in question. It is certainly true that some inherently risky forms of self-intoxication — such as mixing alcohol with dangerous street drugs — may carry reasonably foreseeable harm. The difficulty is that s. 33.1 applies even where the intoxicant in question is typically known for its relaxing or therapeutic properties: [TRANSLATION] “. . . the provision seems capable of applying to people who have done little or nothing for which they can be reproached” (H. Parent, “La constitutionnalité de l’article 33.1 du Code criminel: analyse et commentaires” (2022), 26 *Can. Crim. L. Rev.* 175, at p. 190). Forms of

self-intoxication that carry reasonably foreseeable harm are more blameworthy than those that do not because the individual has proceeded in spite of the known risks. Yet s. 33.1 captures both indifferently on the premise that all extreme self-intoxication is blameworthy.

[94] Additionally, even where an offence criminalizes an inherently dangerous activity, the trier of fact must not simply infer a marked departure from the standard of care (see, e.g., *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *Roy*). It must still be asked whether, first, a reasonable person would have foreseen the risk and taken steps to avoid it and, second, whether the failure to do so amounted to a marked departure from the standard of care expected of a reasonable person in the circumstances. As Professor Parent has observed, [TRANSLATION] “the danger of convicting a person who does not evince ‘sufficient blameworthiness to support a finding of penal liability’ is indeed real” (p. 191, quoting *Beatty*, at para. 33).

[95] Instead, s. 33.1 deems a person to have departed markedly from the standard of care expected in Canadian society whenever a violent act occurs while the person is in a state of extreme voluntary intoxication akin to automatism. This is so even where a loss of control or awareness of one’s behaviour and a risk of harm was unforeseeable and even where the accused’s conduct did not in fact depart markedly from the standard of a reasonable person. In doing so, s. 33.1 runs afoul of the principle of fundamental justice that penal liability requires proof of fault reflecting the offence and punishment faced by the accused (*Motor Vehicle Reference*, at pp. 513-15;

*Vaillancourt*, at pp. 653-54). Since s. 33.1 allows a court to convict an accused without proof of the constitutionally required *mens rea*, s. 33.1 violates s. 7 (*Daviault*, at p. 90). By allowing courts to convict individuals of a crime without proof of *mens rea*, s. 33.1 turns those offences, which carry the possibility of imprisonment, into what amounts to absolute liability offences, contrary to s. 7 of the *Charter* (*Motor Vehicle Reference*, at p. 515).

(b) *Voluntariness as Required by Section 7*

[96] Section 33.1 also directs that an accused person is criminally responsible for their involuntary conduct. Because involuntariness negates the *actus reus* of the offence, involuntary conduct is not criminal, and Canadian law recognizes that the requirement of voluntariness for the conviction of a crime is a principle of fundamental justice (*Luedecke*, at para. 53; *Daviault*, at pp. 91-92). Mr. Brown was convicted by the Court of Appeal of aggravated assault, for actions that he did not commit voluntarily. This breaches s. 7.

[97] There may be situations in which an accused should be answerable for their involuntary actions where they are to blame for the conditions that led to their involuntariness. In terms of physical involuntariness, Professors Plaxton and Mathen give the example of an accused experiencing an involuntary reflex and pulling the trigger of a gun deliberately and voluntarily pointed at a victim (p. 264). I disagree, however, with the view of Slatter J.A. that s. 33.1 operates in a similar manner when he wrote that “Parliament is entitled to establish criminal liability commencing at the

stage that intoxicating substances are voluntarily consumed, where the risk of harm to other persons is self-created and objectively foreseeable” (para. 25, citing *Penno*, at pp. 884-85 and 904). The gravamen of s. 33.1 is the violent conduct for which an accused person is charged — in the case of Mr. Brown, aggravated assault — and not the act of voluntarily consuming intoxicants.

[98] It may be that the voluntariness problem could be avoided if Parliament legislated an offence of dangerous intoxication or intoxication causing harm that incorporates voluntary intoxication as an essential element — in this hypothetical offence, the gravamen of the offence is the voluntary intoxication, not the involuntary conduct that follows. I recall that, in part, this was the invitation made by the majority of this Court in *Daviault* (p. 100); a suggested avenue of legislative action that had also been noted nearly twenty years before the enactment of Bill C-72 by Dickson J., as he then was, in *Leary* (“a crime of being drunk and dangerous”) (pp. 46-47). I recall too that Paciocco J.A. signaled this option in *Sullivan*, as one that would not infringe the *Charter* rights that s. 33.1 disregards: “It would criminalize”, he wrote, “the very act from which the Crown purports to derive the relevant moral fault, namely, the decision to become intoxicated in those cases where that intoxication proves, by the subsequent conduct of the accused, to have been dangerous” (para. 134). This, however, is not what Parliament enacted in that s. 33.1 exposes the accused to jeopardy for the underlying offence, not for extreme intoxication which is not, in itself, an unlawful act.

(c) *Substitution as Prohibited by Section 11(d)*

[99] Section 11(d) of the *Charter* guarantees the accused's right to be presumed innocent until proven guilty. To convict the accused, the Crown must prove all the essential elements, including the requisite *mens rea* for the offence, beyond a reasonable doubt. As my colleague Moldaver J. explained in *Morrison*, Parliament sometimes directs that proof of one fact is presumed to satisfy proof of one of the essential elements of the offence and this kind of substitution can comply with s. 11(d). Yet as he observed, the presumption of innocence will only be satisfied if proof of the substituted fact leads "inexorably" to the conclusion that the essential element it replaces exists (para. 52). This connection must hold true "in all cases" and not be based on a mere probability or common sense inference (para. 53). Otherwise, the substitution may result in the accused being convicted, based on proof of the substituted fact, despite the existence of a reasonable doubt as to the essential element of the offence that it replaces.

[100] Many critics of *Daviault* take the view that intoxication should aggravate, not excuse, the liability of someone who self-intoxicates and causes injury to another, even if their actions are involuntary (see discussion in P. Healy, "Criminal Reports Forum on Daviault: Extreme Intoxication Akin to Automatism Defence to Sexual Assault — Another Round on Intoxication" (1995), 33 C.R. (4th) 269, at p. 271). It is often argued that the fault attaching to a person who puts themselves in a situation where they lose control and cause harm to another by reason of voluntary intoxication sufficiently demonstrates fault for the violent act itself. I recall the words of the Minister in Parliament quoted above who, after referencing the dissent in *Daviault*,

noted that the blameworthiness in the act of voluntary intoxication can be sufficient to link it to criminal liability for the harm charged in the offence given the seriousness of that harm.

[101] The Crown argues that s. 33.1 is not an instance of improper substitution, but instead a choice by Parliament to redefine the fault and voluntariness required for conviction of the underlying offence. Where violence ensues, the expression “self-induced intoxication” in s. 33.1 includes a voluntariness component in that the accused is properly held responsible for the free choice to become extremely intoxicated. The term “self-induced” also provides the constitutionally required *mens rea*. It should be interpreted, says the Crown, to mean that the accused knew or ought to have known that the substance was an intoxicant and that the risk of becoming intoxicated was or should have been in their contemplation. Moreover, read together, s. 33.1(1) and (2) satisfy the requirements of criminal negligence of a marked departure from the standard of reasonable conduct through the voluntary act of becoming intoxicated.

[102] I disagree with the Crown. Mr. Brown is right to say that s. 33.1 improperly substitutes proof of self-induced intoxication for proof of the essential elements of an offence, contrary to s. 11(d) of the *Charter*.

[103] As noted, s. 33.1 unequivocally removes a defence that the accused lacked the general intent or voluntariness to commit the offence. Accordingly, the fault and voluntariness of intoxication are substituted by s. 33.1 for the fault and voluntariness

of the violent offence. The provision has been described as “a legislated form of guilt-by-proxy” whereby the moral blameworthiness that one might associate with extreme self-induced intoxication is substituted for the *mens rea* of the violent offences of general intent which make up the charge pursuant to s. 33.1(3) (Lawrence, at p. 391; see also F. E. Chapman, “*Sullivan*. Specific and General Intent be Damned: Volition Missing and *Mens Rea* Incomplete” (2020), 63 C.R. (7th) 164, at pp. 167-71). To avoid the improper substitution problem, the trier of fact must be sure that the fault attaching to the intoxication is such that the person can fairly be held accountable for their violent conduct.

[104] Section 33.1 fails the test in *Morrison* and amounts to a constitutionally improper substitution. While an accused who loses conscious control and assaults another person after a night of substance abuse is undoubtedly morally blameworthy, s. 33.1 faces obvious difficulties. It does not discern, for example, between the accused and morally blameless individuals who voluntarily consume legal intoxicants for personal or medical purposes. It therefore cannot be said that, “in all cases” under s. 33.1, the intention to become intoxicated can be substituted for the intention to commit a violent offence. Moreover, even in the case of the accused who voluntarily ingested an illegal drug like magic mushrooms, proof of self-induced intoxication does not lead inexorably to the conclusion that the accused intended to or voluntarily committed aggravated assault in all cases.

[105] In sum, the effect of s. 33.1 is to invite conviction even where a reasonable doubt remains about the voluntariness or the fault required to prove the violent offence, contrary to the presumption of innocence under s. 11(d).

(d) *Contemporaneity*

[106] As a final point, Mr. Brown asserts that s. 33.1 infringes s. 7 of the *Charter* because the violent offence occurs later in time than the intention to become intoxicated. Mr. Brown says this is contrary to rule of contemporaneity, which holds that the *actus reus* and *mens rea* must coincide. The Crown responds that symmetry is not required between the *mens rea* and the consequences of the prohibited act.

[107] Symmetry differs from contemporaneity. Symmetry refers to knowledge or foreseeability of the precise consequences of the *actus reus*. For example, in *Creighton*, McLachlin J., as she then was, held that the accused need not foresee death, the consequence, specifically — it was enough to foresee bodily harm that is neither trivial nor transitory (pp. 44-45). Contemporaneity holds that the guilty mind must concur with the prohibited act, although this principle is applied flexibly (*R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 156). Contemporaneity has not yet been recognized as a principle of fundamental justice, and I respectfully decline to do so here. The *mens rea*, voluntariness, and improper substitution breaches remain the most accurate and relevant way of describing the way in which s. 33.1 imposes absolute liability, contrary to the principles of fundamental justice.

[108] I thus agree with the conclusion of the *voir dire* judge and with Khullar J.A., who relied on the reasons of the majority of the Court of Appeal in *Sullivan*, that s. 33.1 violates ss. 7 and 11(d) of the *Charter*.

[109] I turn to a consideration of whether s. 33.1 can be saved under s. 1.

### C. *Justification Analysis*

[110] The Crown must show on a balance of probabilities that the limits on ss. 7 and 11(d) brought by s. 33.1 are reasonable and demonstrably justified under s. 1 of the *Charter* (*Oakes*, at pp. 135 and 137). The legislative goals of the provision must first be sufficiently pressing and substantial to justify curtailing a *Charter* right. There must also be proportionality between Parliament's objectives and its chosen means. Proportionality is understood to have three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure and the objective (*Oakes*, at pp. 138-39; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 58).

[111] Unlike in the appeal in *Daviault*, Parliament had before it a record related to the social problems associated with extreme intoxication and violence when enacting s. 33.1. The evidence highlighted the strong correlation between alcohol and drug use and violent offences, in particular against women, and brought to the fore of Parliament's attention the equality, dignity, and security rights of all victims of intoxicated violence with particular attention given to vulnerable groups, including

women and children. In the circumstances of the three appeals before the Court, it is undeniable that Mr. Brown, Mr. Sullivan and Mr. Chan inflicted great harm upon their victims and have caused lasting physical and psychological injuries. Bill C-72's protective public goals cannot be understated: these interests bear meaningful attention at both principal steps in the s. 1 analysis.

[112] While s. 33.1 reflects broad Parliamentary pursuits relating to the common good, it also engages the traditional confrontation between the individual accused and the state in the context of a criminal prosecution. As we have seen, s. 33.1 challenges principles at the very core of our justice system, including the presumption of innocence, that exist to protect the morally innocent and prevent wrongful convictions. I observe that Parliament also had these considerations in mind in enacting s. 33.1. The sixth paragraph of the preamble has largely been ignored, where Parliament states its desire “to promote and help to ensure the full protection of the rights guaranteed under sections 7, 11, 15 and 28 of the *Canadian Charter of Rights and Freedoms* for all Canadians”. To be sure, this contains a further reference to the rights of victims, including women and children. But the reference to s. 7 also extends, of course, to persons accused and, more tellingly still, the reference to s. 11, including the presumption of innocence in s. 11(d), can only refer to “[a]ny person charged with an offence”. In announcing its policy goals of protecting victims of intoxicated violence, on the one hand, and the rights of the accused, on the other, Parliament appears to have foreseen in the preamble the delicate balancing task that this Court must undertake under s. 1 of the *Charter*.

[113] Invoking the goals served by s. 33.1, the Crown submits that the Alberta Court of Appeal was right to decide the provision imposes reasonable limits and is justified under s. 1. As for Mr. Brown, he argues that the provision fails at each step of the proportionality analysis. Its only valid purpose is not rationally connected to the provision, it is not minimally impairing, and the meaningful risk of wrongful convictions outweigh the salutary effects.

[114] In my respectful view, Mr. Brown significantly understates the important goals pursued by Parliament in enacting s. 33.1. That said, given the patent risk that s. 33.1 may result in the conviction of an accused person who had no reason to believe that their voluntary intoxication would lead to a violent consequence, I agree with him, and with the respondents in the *Sullivan* and *Chan* appeals, that s. 33.1 fails at the proportionality step and thus cannot be saved under s. 1. After a weighing of the salutary and deleterious effects of s. 33.1, including the risk of what I see as a wrongful conviction, I conclude that Parliament's aims come at too high a cost.

(1) Pressing and Substantial Purpose

[115] The parliamentary record, the preamble and, of course, s. 33.1 itself, all point to the two broad reasons why s. 33.1 was enacted in the period following *Daviault*: the protection of the victims of extremely intoxicated violence and a sense that the law should hold offenders accountable for the bodily harm they cause to others when, by choice, they become extremely intoxicated. With some variations, these were the purposes recognized by the *voir dire* judge and all the judges on appeal in this case.

[116] While these broad aspirations are easy enough to identify, the accused in this appeal and in the *Sullivan* and *Chan* appeals argue that the purposes of a provision must be described with greater precision when one examines whether a law that breaches the *Charter* is justified under s. 1. It is rightly said that, for the law’s purpose to be “pressing and substantial”, it must be characterized in light of the requirements of the *Oakes* test to be of value (*Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 76). The purpose must be properly identified with a view to justifying the infringement of the *Charter*, otherwise the exercise is not helpful for the balancing mandated by s. 1. If the purpose is characterized too broadly and without a view to the infringement, the rational connection inquiry in *Oakes* and the balancing exercise at the core of the s. 1 analysis risk losing their *raison d’être*. One can fairly say that virtually all of substantive criminal law seeks, at some level, to “protect victims of crime” and “hold perpetrators accountable for their blameworthy conduct”. So characterized, s. 33.1 would inevitably be understood as rationally connected to its purpose and the measure of proportionality would be thwarted such that the s. 1 analysis would lose its explanatory value.

[117] It is not therefore enough to say, as the Attorney General of Canada does here, that “protection for victims of intoxicated crime” and “holding perpetrators of intoxicated violence accountable” defines Parliament’s purpose in enacting s. 33.1 in such a sufficiently precise a manner so as to ground the s. 1 analysis (I.F., at paras. 3 and 6). In particular, this was one of the reasons that Paciocco J.A. rejected

accountability as a pressing and substantial purpose in *Sullivan*. Not only is “accountability for morally blameworthy” conduct unhelpfully broad, “accountability for morally blameworthy behaviour in a constitutionally compliant manner” is also unworkable in that the latter identification of the accountability purpose risks circular reasoning by confusing the ends of the legislation with its means. Nor is it enough to say that Parliament simply sought to legislate a standard of fault, as that would describe the purpose too narrowly and merely reiterate the means chosen to achieve the legislative ends (*K.R.J.*, at para. 63).

[118] What, then, are the objectives of s. 33.1 and are they properly identified for conducting the justification exercise under s. 1?

[119] It is plain that s. 33.1, above all things, blocks the defence of automatism for the extremely intoxicated offender that was recognized in *Daviault* as an exception to the intoxication rules. Parliament did so with two specific purposes in mind. First, it sought to protect the victims of extremely intoxicated violence, with particular attention to women and children whose equal place in society is compromised by sexual assault and other violent crimes of general intent in such circumstances. Second, it sought to call offenders to answer for their choice to voluntarily ingest intoxicants, where that choice creates a risk of violent crime. Those offenders should be accountable for the harm they cause as a result of their choice to self-intoxicate and thereby create the risk of extreme intoxication. In other words, in addition to its goal of protecting victims of such crimes, Parliament wanted to explain, as a moral proposition, why the defence of

automatism should not be available for those who chose to intoxicate themselves to an extreme degree and risk violent consequences. Unlike a person who becomes an automaton by reason of an external force beyond their control, a person who voluntarily becomes intoxicated in the extreme has taken a risk that they will harm others in that state. Parliament sought to have an accused answer for that choice. These are the two objectives that Parliament felt were sufficient to justify the enactment of legislation that, as we have seen, infringes *prima facie* upon ss. 7 and 11(d) of the *Charter*.

[120] I share the view that the protective purpose is sufficiently pressing and substantial to warrant limiting *Charter* rights. As stated by Lamer C.J. in *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 43: “There 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.”

[121] Paciocco J.A. explained in *Sullivan* why he viewed the accountability objective as impermissible and, as a result, cannot be considered as a “pressing and substantial objective” under the *Oakes* analysis. He wrote in part: “It cannot be that a preference for other values over constitutionally entrenched values is a pressing and substantial reason for denying constitutional rights” (para. 113).

[122] Respectfully, I disagree. First, as I note below, Parliament did not “reject” the constitutional values spoken to in *Daviault* when it enacted s. 33.1. As the Minister stated in the House and as evidenced by the preamble to Bill C-72, the law sought to respect both the rights of the accused and the interests of victims. More importantly, I

believe that, properly construed, Parliament's specific accountability objective in the particular circumstances of this case is neither too broad nor does it lead to circular reasoning that would defeat the usefulness of *Oakes*.

[123] The objectives that moved Parliament to enact s. 33.1 in the wake of *Daviault* are not completely encapsulated by the single goal of protecting the victims of extremely intoxicated violent crime. For Parliament, s. 33.1 also sought to express a moral view, stated in the preamble, that a person should be precluded from escaping liability for certain violent crimes by reason of their self-induced extreme intoxication. In the House, the Minister made plain when speaking to his approach based on the principle of accountability, that “[p]eople cannot be permitted to hide behind drunkenness or other forms of intoxication to escape responsibility for their criminal conduct” (Hansard, March 27, 1995, at p. 11038). Parliament's purpose in enacting s. 33.1 reflects this idea of personal responsibility and its relevance to the availability of the defence of automatism for intoxicated violence.

[124] The objective that Parliament sought to act upon is distinct from the protective purpose of the law. In fact, it rests on a philosophical idea that one should not be able to create the conditions of one's own criminal defence to block liability for the crime committed (see S. Dimock, “Actio Libera in Causa” (2013), 7 *Crim. Law and Philos.* 549, at p. 511 (who gives the example of the voluntarily intoxicated offender); see also, Plaxton and Mathen, at p. 257). As Professor Parent has written, in addition to protecting the public, [TRANSLATION] “the purpose of section 33.1 is to *render*

*accountable* those intoxicated individuals who interfere with the bodily integrity of another person” based on what he describes as the “*active participation* of the individual in creating the incapacity relied upon and the risk that materialized” (pp. 176 and 184 (emphasis in original)). This is the essence of the accountability objective: an individual is responsible for their involuntary state because that person’s choice to ingest intoxicants and become extremely intoxicated ultimately creates a risk of violence. The physically involuntary conduct did not arise by accident or through some external force, but by choice and, as such, Parliament saw this as conduct for which the offender must answer. The connection observed in the Parliamentary record between violence and intoxication would be attenuated, on this moral view, if people took responsibility for the choice they made to consume intoxicants and the risks that are created by that choice. Because of the danger they create through the voluntary character of their extreme intoxication, people who cause harm to others in that state are, to recall Sopinka J.’s phrase in dissent in *Daviault*, “far from blameless”. In answer to the public response to *Daviault*, s. 33.1 has the distinct public purpose of holding the voluntarily extremely intoxicated responsible for the danger they brought about.

[125] Perhaps the plainest demonstration that Parliament’s objective cannot be limited to the protective goal is found in the explanation, by the Minister, as to why the stand-alone offence was rejected as not meeting his goals. He accepted the view that the option of a new stand-alone offence of criminal intoxication would be inadequate. While it offers protection against extremely intoxicated violence, it fails to meet Parliament’s accountability objective in that the offender would not be held to answer

for creating the risk of more serious underlying violent crime, with its more meaningful stigma and punishment. Even if found guilty of the new offence, the offender would not answer, by reason of their self-induced extreme intoxication, for the full extent of the harm in law, and would benefit from what the Minister described as a “drunkenness discount” (Standing Committee on Justice and Legal Affairs, April 6, 1995, at p. 6). He observed that “[t]he government believes that a person who becomes voluntarily intoxicated to the point of losing conscious control or awareness . . . should be held criminally accountable for that offence [i.e., the underlying assault] and for nothing less”, said the Minister in the House (Hansard, March 27, 1995, at pp. 11037-38).

[126] This distinct and particularized accountability goal can serve as an objective for the purpose of the *Oakes* test in the unusual circumstances of this case. Here, the objective concerns the choice to create a risk, and this choice is not the conduct Parliament aims to criminalize. In other words, the objective is separate from the gravamen of the offence (i.e., the assault), which ensures that the ends and the means remain distinct. Stated in this manner, accountability in this context is pressing and substantial and fits appropriately within the *Oakes* analysis. This is not just a preference for other values over rights that have been constitutionally entrenched; right or wrong, it is a policy choice, by Parliament, that accountability for creating a risk of violence and bodily harm by way of extreme voluntary intoxication take precedence in a free and democratic society (see Coughlan, at p. 2). It is not circular to frame the accountability objective in this way; the finding that a right has been violated, as I have found here with respect to ss. 7 and 11(d), is a preliminary conclusion. An

“infringement” in this context is a limit that is not justified (*K.R.J.*, at paras. 91-92 and 115-16). The infringement question is only answered once the *prima facie* breaches have been considered in light of the broader public interest considerations mandated by *Oakes*.

[127] To be clear, this conclusion rests on the specific concerns Parliament had when enacting s. 33.1. This case engages unusual issues and should not be seen as allowing governments to justify attempts to expand criminal liability as a routine matter. The accountability objective must, as here, be defined with precision, distinct from the means and, importantly, be sufficiently compelling from a societal perspective to warrant the overriding of rights.

(2) Proportionality

(a) *Rational Connection*

[128] At this stage, the Crown must show, first, that s. 33.1 is rationally connected to holding individuals accountable, in as full a manner as possible, for the choice to become extremely intoxicated and the violence committed while in that state and, second, that it is rationally connected to protecting vulnerable groups from extremely intoxicated violence. There must be “a causal connection between the infringement and the benefit sought on the basis of reason or logic” (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153).

[129] Mr. Brown focussed his criticism on the connection between s. 33.1 and the protection of vulnerable groups, as did Mr. Chan and Mr. Sullivan. In Mr. Brown's submission, the protective purpose relies on an unrealizable deterrent effect of s. 33.1 for its value. Since a person cannot necessarily foresee the possibility that they will find themselves in a state of automatism or that they will commit an act of violence while in that state, s. 33.1 can have no meaningful deterrent effect. In short, deterrence has no effect on the automaton.

[130] I agree with the Court of Appeal in this case that the deterrent and denunciating effects of s. 33.1 provide a rational connection to Parliament's protective objective.

[131] I recognize Paciocco J.A.'s criticism that s. 33.1 fails to offer meaningful deterrence in support of Parliament's protective purpose. In *Sullivan*, he wrote that "[e]ffective deterrence requires foresight . . . of the penal consequence" (para. 121). "I am not persuaded", he continued, "that a reasonable person would anticipate the risk that, by becoming voluntarily intoxicated, they could lapse into a state of automatism and unwilfully commit a violent act" (*ibid.*).

[132] It is no doubt true that the deterrent effect of the provision would be more immediately felt if one could be sure that the accused understood the risk of violence associated with extreme self-induced intoxication and that this element is lacking in s. 33.1. However, in keeping with its moral view of fault expressed in the preamble, Parliament's focus was on the choice to become extremely intoxicated. Section 33.1's

deterrent value should also be considered in relation to individuals at the time they make that choice. While it is true that s. 33.1 applies to an accused who could not have foreseen the risk of a loss of control or of bodily harm, it also extends to situations in which there was a foreseeable risk of a loss of control and harm. Thus, an individual who consumes an intoxicant with psychosis-inducing effects, including those who know they lost control of their conduct while in a drug-induced psychosis in the past, will be caught by s. 33.1. It is reasonable that Parliament would expect the provision to hold some modest deterrent effect for such individuals. This deterrent effect acts [TRANSLATION] “upstream”, as Professor Parent writes (p. 187), to dissuade those contemplating this kind of intoxication. As such, s. 33.1 is rationally connected to its protective purpose.

[133] Courts should exercise caution before concluding that a measure in like circumstances is ineffective simply because they could imagine a way in which it would be more effective. To my mind, the Crown has met the rational connection test for Parliament’s protective purpose.

[134] In addition, s. 33.1 is rationally connected to the objective of holding individuals accountable, in as full a manner as possible, for the choice to become extremely intoxicated and the violence committed while in that state. It is obvious that where a person is foreclosed from advancing a defence that could result in an acquittal, that person is held accountable for something they otherwise would not be.

(b) *Minimal Impairment*

[135] The state must show that the impugned provision impairs rights as little as reasonably possible in furtherance of the legislative objective (*RJR-MacDonald*, at para. 160; *Oakes*, at p. 139). The law should only fail minimal impairment when there are less harmful means of achieving the objectives “in a real and substantial manner” (*K.R.J.*, at para. 70; *Hutterian Brethren*, at para. 55). It is understood that the courts show some deference to legislatures at this stage of the analysis. The question is whether s. 33.1 falls within a range of reasonable alternatives open to Parliament to achieve its objectives; if it is within this range, it should not fail the minimal impairment test merely because, in the Court’s view, an alternative would have been better suited to the objective (see *RJR-MacDonald*, at para. 160). This is particularly so where the impugned measure seeks to strike a balance between competing and legitimate social values (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 439, per McLachlin C.J., concurring). This is the circumstance here: the debate surrounding the enactment of s. 33.1 and its application to Mr. Sullivan, Mr. Chan and Mr. Brown has brought to the fore the challenge Parliament faced in striking a balance between the rights of the accused and the stake society has in the equality and dignity interests of the victims of intoxicated violence.

[136] I have no hesitation imagining less impairing options. Many scholars have advanced options that would trench less on the rights of the accused (see, e.g., D. Stuart, “Parliament Should Declare a New Responsibility for Drunkenness Based on Criminal Negligence” (1995), 33 C.R. (4th) 289; T. Quigley, “A Time for Parliament to Enact an Offence of Dangerous Incapacitation” (1995), 33 C.R. (4th) 283; M. Tremblay,

“*Charte canadienne et intoxication volontaire: l’article 33.1 du Code criminel et ses solutions de rechange*” (2020), 79 *R. du B.* 67, at p. 98; G. Ferguson, “The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation” (2012), 57 *S.C.L.R.* (2d) 111). Paciocco J.A. concluded that a stand-alone offence of criminal intoxication would achieve similar objectives as s. 33.1 and would arguably improve on the protective purpose by making deterrence more focused on the intoxication itself (paras. 132-34). It is certainly true, as the Minister said in Parliament, that the lesser stigma and lesser penalties associated with a new offence would punish intoxicated perpetrators less severely for their wrongs than would a conviction for the underlying offence. But it is an alternative to the consequence of allowing the extremely intoxicated offender to escape punishment altogether.

[137] Apart from the stand-alone offence, others have proposed alternative paths to liability for the underlying violent offence based on a criminal negligence standard more carefully crafted than that advanced by s. 33.1. One example is that proposed by the *voir dire* judge. He accepted Parliament’s goal of holding people accountable for a violent act when they have departed from a minimum standard of care by voluntarily consuming intoxicants (para. 79). However, he observed that this standard could be achieved in a less impairing way if s. 33.1 incorporated a true objective fault standard that clearly attaches to the act of self-induced intoxication, which would allow the trier of fact to consider whether a loss of control and bodily harm were both reasonably foreseeable at the time of intoxication (para. 80). He concluded that this would “truly be a link between the *mens rea* of becoming intoxicated and the *mens rea* for the

underlying offence” (*ibid.*). This would align with the principle in *DeSousa* and *Creighton* that specific consequences need not always be foreseen provided there is an objectively foreseeable risk of bodily harm.

[138] In terms of the minimal impairment analysis, the stand-alone offence fails to meet Parliament’s full objective and thus was not a viable alternative. It would have labelled Mr. Brown’s offence as one of negligent or dangerous intoxication, rather than stigmatize him for the aggravated assault. The stand-alone offence might also have led to lesser sentences, and, as noted above, the option was criticized as proposing a “drunkenness discount”. Indeed, Parliament rejected the stand-alone offence because it would fail to recognize the true harm committed by an offender and would send the message that an offender should not be held accountable for the harm that is inherent in the underlying offence (see, e.g., Department of Justice, *Self-Induced Intoxication as Criminal Fault: Information Note* (1995), at p. 5). This would be a particular failure in respect of Parliament’s goal to hold perpetrators to account in as full a manner as possible for the choice to become extremely intoxicated and the violence committed while in that state (see P. Healy, “Intoxication in the Codification of Canadian Criminal Law” (1994), 73 *Can. Bar Rev.* 515, at pp. 541-42; E. Sheehy, “The intoxication defense in Canada: why women should care” (1996), 23 *Contemp. Drug Probs.* 595, at p. 618). In the circumstances, it is difficult to conclude that the stand-alone offence would have achieved the objectives in a “real and substantial manner”.

[139] The alternative proposed by the *voir dire* judge could however allow an accused to be convicted for the underlying violent act and not simply negligent or dangerous intoxication. Incorporating a true marked departure standard into s. 33.1 would allow it to achieve the minimum objective fault standard required by the Constitution (in the case of offences that are not constitutionally required to contain subjective fault, per *R. v. Martineau*, [1990] 2 S.C.R. 633). Indeed, Khullar J.A. recognized that this alternative would be “less problematic”.

[140] I am aware that Parliament is entitled to deference in this analysis. Indeed, in crafting a new legislative response to the problem of intoxicated violence, it is up to Parliament to decide how to balance its objectives while also respecting *Charter* rights as much as possible (see, e.g., P. W. Hogg and A. A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997), 35 *Osgoode Hall L.J.* 75; D. Baker and R. Knopff, “*Daviault* Dialogue: The Strange Journey of Canada’s Intoxication Defence” (2014), 19 *Rev. Const. Stud.* 35, at p. 41). Parliament may also wish to study and regulate according to the nature and properties of the intoxicant. The common effects of the intoxicant, its legality, and the circumstances in which it was obtained and consumed may be relevant to a marked departure standard.

[141] In light of these alternatives, in particular that proposed by the *voir dire* judge, which would have achieved Parliament’s accountability objective in a real and substantial manner, I conclude that s. 33.1 is not minimally impairing. Parliament’s objectives of protection and accountability would have been partially met by the

stand-alone offence and even more completely met had Parliament properly followed through on its announced design for a law based on a constitutionally-compliant standard of criminal negligence. But I acknowledge that this is a close call and that experts who have studied the alternatives are not of a single view. Professor Parent has, for example, proposed no less than four variations on the criminal negligence theme, all designed to ensure that the objective fault required by a remodeled s. 33.1 would ensure that punishment for the general intent offence would only be imposed on those deserving the stigma of a criminal conviction (p. 191).

[142] While I conclude that s. 33.1 is not minimally impairing of an accused's ss. 7 and 11(d) rights, I recognize that Parliament is entitled to a degree of deference in measuring the reasonable character of policy alternatives. But even if those who defend the law as minimally impairing were right, I am unequivocally of the view that s. 33.1 must fail on the last branch of the proportionality test which reveals the most profound failings of the provision. Mindful that the proportionality analysis is holistic and depends on a close connection between the final two stages of *Oakes* (*Hutterian Brethren*, at para. 191, per LeBel J.), I turn now to an explanation of why s. 33.1 must also fail on an assessment of the relative benefits and negative effects of the law under the *Oakes* test.

(c) *Proportionality Between Effects and Objectives*

[143] At the final stage under s. 1, the question is whether there is proportionality between the overall effects of the *Charter*-infringing measure and the legislative

objectives (*Oakes*, at p. 139; *Hutterian Brethren*, at paras. 72-73). This invites the broadest assessment of the benefits of s. 33.1 to society, weighed against the cost of the limitations to ss. 7 and 11(d) of the *Charter* (see *K.R.J.*, at para. 77; *Bedford*, at para. 123; *Carter*, at para. 122). Balancing requires a court to “transcend the law’s purpose and engage in a robust examination of the law’s impact on Canada’s free and democratic society ‘in direct and explicit terms’” (*K.R.J.*, at para. 79).

[144] Mr. Brown says that the Court of Appeal erred in minimizing the deleterious effects of s. 33.1 in that the provision would allow for wrongful convictions based on involuntary acts and the absence of even reasonable foreseeability of the consequences of those acts. In response, the Crown asks this Court to accept the proportionality analysis of the Court of Appeal, in particular the analysis of Khullar J.A. It says that her emphasis on the gendered nature of intoxicated violence and Parliament’s efforts to address that problem in s. 33.1 should be adopted, notwithstanding the abridgment of the ss. 7 and 11(d) *Charter* rights of the accused which the Crown argues Mr. Brown has overstated.

[145] In my view, Mr. Brown is right on this point. In the result, the meaningful benefits of s. 33.1 do not outweigh the costs, in particular to what the *voir dire* judge describes as the “sacrosanct principles” integral to our criminal justice system, including the presumption of innocence (para. 89).

(i) Salutary Effects

[146] By including general intent crimes of sexual and domestic violence within s. 33.1(3), the amendments to the *Criminal Code* do help to ensure the rights of women and children to equal protection and benefit of the law as guaranteed by the *Charter*, as promised in the preamble. The provision gives expression to the close and harmful association between extreme self-induced intoxication and violence. By removing the defence in s. 33.1(1), it ensures that the morally blameworthy conduct of self-induced extreme intoxication is not an excuse at law for that violence, which is a plain social good. Section 33.1 voices society's strong intolerance for such behaviour, and affirms society's commitment to the equality and security rights of victims vulnerable to intoxicated crime.

[147] The "recognition of the dignity and self-worth of women and children" was well described by Khullar J.A., who wrote that this "breathes some meaning" into equality rights in the *Charter*, and properly took notice of this as a beneficial effect of s. 33.1 in the justification analysis (para. 202). Others have rightly observed that violence against vulnerable groups is "one way in which women are denied full participation in society, furthering women's inequality" (Grant, "Second Chances: Bill C-72 and the *Charter*", at p. 388). Section 33.1 responds meaningfully to that inequality by recognizing that women and children deserve the full protection of the law and by condemning intoxicated gendered and family violence. I would add that by considering equality as a broad social interest under s. 1 rather than under s. 7 as she did, Khullar J.A. did not devalue its importance as a justification for the *Charter* violation. Not only is s. 7 unsuited, in this case, to the balancing of competing rights,

s. 1 is the proper locus for considering how much society, including the victims of crime, benefit from the impugned law (see *Bedford*, at para. 125; Coughlan, at p. 157). I agree too with Khullar J.A. that a benefit of s. 33.1 is that the accountability promised in the preamble advances dignity and equality interests that unpunished intoxicated violence threatens (paras. 202-4).

[148] Section 33.1 also provides societal benefit through its communicative and deterrent effects. Khullar J.A. recognized not only that s. 33.1 contributes to a social ethos of disapproval of extreme self-induced intoxication, she wrote that it “serves the important role of signalling to people that they must be aware and cautious that their alcohol and drug use may lead to consequences they do not intend and cannot control” (para. 206). Similarly, the interveners the Attorney General of Saskatchewan and LEAF argue that s. 33.1 denounces wrongful behaviour and, as a result, recognizes the dignity and equality interests of victims. Because s. 33.1 includes in its reach the irresponsible use and mixing of intoxicants that could lead to automatism and violence, the law discourages such behaviour and also raises awareness about the link between extreme intoxication and violence. This benefit is not negated by the fact that some deterrence is already provided by the common law rule on intoxication or that the deterrent effect is mitigated by the fact that it needs to take hold before the offender loses control. And while I recognize that deterrence might also come if a stand-alone offence of dangerous intoxication was enacted, I nevertheless agree that these meaningful benefits are properly ascribed to s. 33.1.

[149] In addition, as the Attorney General of Manitoba submits, s. 33.1 contributes to public confidence in the criminal justice system. In *Creighton*, McLachlin J. observed that it would “offend common notions of justice to acquit a person who has killed another of manslaughter and find him guilty instead of aggravated assault on the ground that death, as opposed to harm, was not foreseeable” (p. 54). Similarly, it was reasonable for Parliament to conclude, as suggested in the record, that it offended the public’s common notions of justice that, to take the example of *Daviault*, a highly intoxicated accused who intentionally ingested half-a-dozen beers and a bottle of brandy might completely escape liability for sexually assaulting an elderly, disabled woman. That said, given that s. 33.1 infringes the *Charter* as it does, it is best not to overstate the confidence to the public that its protective and accountability purposes might foster. It is too easy to lose sight of the fact that, as Wallace J. wrote in *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. C.J. (Gen. Div.)), “society’s interests must also include a system of law, governed by the principles of fundamental justice” (para. 32). Principles of fundamental justice are recognized as such because they form basic tenets of the legal system in which there is some “general acceptance among reasonable people” that the principle is vital or fundamental to societal notions of justice (*Malmo-Levine*, at para. 112 (emphasis deleted); *Motor Vehicle Reference*, at p. 503; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 590-91 and 607). In denying the presumption of innocence, s. 33.1 unwittingly serves to compromise the full promise of the confidence that Parliament designed it to promote.

[150] There is a manifest benefit to be connected with the accountability purpose of Parliament described above which, in my respectful view, the majority of the Court of Appeal in *Sullivan* should have considered as part of the full measure of the beneficial effects of s. 33.1 (see, on this point, Coughlan, at p. 158). Section 33.1 targets the offender's choice to create a risk of harm by becoming extremely intoxicated. One of the benefits of s. 33.1 is that it fosters personal responsibility in respect of voluntary intoxication that Parliament saw as one of the root sources of violent crime. To ignore that policy is to diminish one of the benefits of the impugned law which — however imperfectly — sought to impose that ethic of personal responsibility as a key to breaking the connection between intoxication and violence. I note that Lauwers J.A. did take this dimension of s. 33.1 into consideration in his justification analysis and the majority considered the matter in the alternative and that neither felt this factor, on its own, tipped the scales in the ultimate balancing under *Oakes*.

[151] At the end of the day, Parliament's own accountability objective was undone by the very means it chose to pursue it. In holding the extreme self-intoxicated offender to account, s. 33.1 does not require objective foreseeability of the risk of falling into a state of automatism, much less the risk of consequential harm. Parliament's goal may have been to impose personal responsibility for the creation of the risk of harm, but in the absence of a requirement of reasonable foreseeability, that goal is frustrated. The Minister said in the House — his point was echoed by the Crown in this appeal and the *Sullivan* and *Chan* appeals — that s. 33.1 "provides for the link

between the fault in self-induced intoxication and the harm or fault in the criminal conduct which forms the basis of the charge” (Hansard, March 27, 1995, at p. 11038). With great respect, that link is not found in s. 33.1, suggesting strongly that Parliament failed to satisfy its own announced purpose.

(ii) Deleterious Effects

[152] The fundamental flaw of s. 33.1 is the risk of wrongful convictions it presents. By denying even a small fraction of accused persons the ability to raise a reasonable doubt as to the voluntariness or *mens rea* elements of the offence charged, s. 33.1 permits an individual to be convicted, and subject to the stigma, liberty restrictions and other consequences of a criminal conviction, for involuntary conduct. Section 33.1 runs counter to the fundamental organizing principles that are necessary to allow individuals to face the power of the state in the criminal justice system fairly, in particular the all-important presumption of innocence. It enables conviction for conduct that an accused person was not aware of and could not control and therefore cannot be a “guilty act” as defined by the underlying offences. This result follows even where individuals ingest alcohol or drugs in common-place situations where there is no subjective or objective foresight of automatism or violence.

[153] I agree with the courts below that the deleterious effects of s. 33.1 are serious and troubling. As Vertes J. put it in *R. v. Brenton* (1999), 180 D.L.R. (4th) 314 (N.W.T.S.C.), in denying the defence of automatism, s. 33.1 “casts aside the fundamental principle of voluntariness as well as the presumption of innocence, values

that are enshrined in the Charter and at the very core of our criminal law system as developed over many centuries” (para. 122). In *Dunn*, Wallace J. concluded that there are few infringements that could be more serious because “[w]hen an accused can be convicted without proof that he intended his actions or without proof that his actions were voluntary, then absolute liability has become a component of Canadian criminal justice, the presumption of innocence is eroded and principles of fundamental justice are seriously compromised” (para. 54). In *Sullivan*, Paciocco J.A. wrote compellingly that “the deleterious effects of s. 33.1 include the contravention of virtually all the criminal law principles that the law relies upon to protect the morally innocent, including the venerable presumption of innocence” (para. 153), and Lauwers J.A. said that fundamental rights of the accused under ss. 7 and 11(d) are “severely limited” (para. 287). In this case, Khullar J.A. acknowledged that the negative effects on the rights of the accused are “serious and troubling” (para. 201). This is particularly true when one recalls that Parliament failed to respect its own promise, made in the preamble to Bill C-72, to provide “full protection” to the ss. 7 and 11 rights of the accused.

[154] It is not unfair to say that the narrow compass of s. 33.1 limits these negative effects. Section 33.1 only applies, as we have seen, to the violent offences of general intent named in s. 33.1(3). It is also not unfair to say that the burden of showing automatism presents a high hurdle for the accused and that the law only applies to certain intoxicants that have the properties that can bring about a state akin to automatism. While these considerations may limit the number of offenders who face

these negative consequences, it is best to recognize that the narrow compass argument is two-edged. If it is indeed true that s. 33.1 does not apply to alcohol alone, for example — a point I need not decide here — then some of the benefits ascribed to the law by the Crown were already assured by the aspects of the *Leary* rule that denied the defence of most forms of intoxication for crimes of general intent that *Daviault* left intact.

[155] But even if its compass is narrow and its application rare, s. 33.1 limits not just one but three fundamental rights of the accused. It enables conviction where the accused acted involuntarily, where the accused did not possess the minimum level of fault required, and where the Crown has not proven beyond a reasonable doubt the essential elements of the offence for which an accused is charged. These limitations operate to put in place a regime of absolute liability that undermines many of the core beliefs used to structure our system of criminal law. It is difficult to imagine more serious limitations than the denial of voluntariness, *mens rea*, and the presumption of innocence all in one. An accused may be morally blameworthy in some measure for voluntarily consuming intoxicants but that blame is not the measure of guilt at law for the underlying offences set out in s. 33.1(3). With great respect, I cannot agree with Slatter J.A., who said in the balancing of salutary and deleterious effects, that “[n]o one who is truly morally innocent is impacted [by s. 33.1]” (para. 81).

[156] I acknowledge that some, pointing in particular to Sopinka J.’s dissent in *Daviault*, have argued that s. 33.1 does not create a true offence of absolute liability since extreme voluntary intoxication can bring with it a degree of fault. Contrary to the

person who falls into a state of involuntariness by reason of an uncontrollable epileptic fit, for example, the voluntarily extremely intoxicated offender is [TRANSLATION] “directly responsible for their lack of voluntariness” (Parent, at p. 197). But as I have endeavoured to show, it is not enough that s. 33.1 captures only the blameworthiness associated with extreme self-intoxication when s. 33.1 fails to consider whether the offender knew or ought to have known that there was a risk they would lose control of their actions and thereby risk causing harm to others. Because s. 33.1 does not build in a criterion of objective foreseeability, it is impossible to say who, among those who voluntarily ingest intoxicants, has the degree of blameworthiness that would justify the stigma and punishment associated with the underlying offence with which they are charged.

[157] Where the intoxicant is licit, or where no reasonable person would anticipate the risk of automatism, whatever blameworthiness that comes from voluntary intoxication is relatively low and likely disproportionate to the punishment the individual would face if convicted for an offence committed in a state akin to automatism (see *Creighton*, at pp. 48-49, citing *Martineau*, at p. 647). While Mr. Brown ingested an illicit drug, the trial judge found, based on expert evidence, that his reaction to the drug was not reasonably foreseeable. Even if the ingestion of magic mushrooms is not morally innocent in the broadest sense, to convict Mr. Brown for aggravated assault in light of the voluntariness and minimal *mens rea* requirements fixed by the *Charter* would, in my view, account to a wrongful conviction for the offence as charged.

[158] One is hard pressed to disagree with the trial judge in *R. v. Chan*, 2018 ONSC 3849, 365 C.C.C. (3d) 376, who observed that “Parliament is entitled to express the view that extreme self-intoxication is morally blameworthy behaviour” (para. 152). But I respectfully disagree with him where he wrote “the morally innocent will not be punished” (para. 156). Mr. Brown may not have been blameless in deciding to consume the magic mushrooms, but he is not guilty of the crime with which he was charged according to the requirements of the *Charter*.

[159] The *voir dire* judge in Mr. Brown’s case was right to speak of the principles breached by s. 33.1 as “sacrosanct”. In the *Motor Vehicle Reference*, Lamer J., as he then was, wrote that the principle that the innocent must not be punished “has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law” (p. 513).

[160] The idea that a conviction in the absence of the required proof of blameworthiness threatens a system of criminal justice founded on the dignity and worth of the human person has been a recurring theme in our jurisprudence (see, e.g., *Oakes*, at p. 136; *R. v. Stevens*, [1988] 1 S.C.R. 1153, at p. 1175; *R. v. Hess*, [1990] 2 S.C.R. 906, at p. 918). Where a person is punished who did not know or could not know they are committing an offence, wrote Wilson J. in *Hess*, that state action inflicts a grave injury on that person’s dignity and self-worth. Two comments, however, help explain the full message of this idea. First, the measure of moral innocence extends not

just to the requirement of proof of subjective fault but, as Wilson J. suggests, it leaves room for offences where blameworthiness is measured on a modified objective basis, anticipating developments in the law coming later in cases such as *Creighton*. Section 33.1 does not do even this and, in my view, the possibility of a fairly crafted rule on criminal liability for harm caused by self-induced intoxication remains open to Parliament. Second, and importantly, the recognition of the “dignity and self-worth” of the accused does not come at the expense of the dignity and self-worth of the victims of crime, a value alluded to in the preamble of Bill C-72. Nor is the victim’s dignity interest consigned to a second-order status if, in the balancing mandated by s. 1, s. 33.1 is struck down because of its overarching deleterious effects of state action.

[161] The *voir dire* judge rightly recognized that these principles exist to ensure that the morally innocent are not convicted (para. 89). Section 33.1 creates the risk that a person will be convicted of the underlying offence on the basis of proof of the blameworthiness associated with extreme intoxication, without regard to the objective foreseeability of harm. It holds a person to answer for their involuntary conduct. It does so without due regard to the presumption of innocence which protects against arbitrary exercise of power by the state. Potentially, s. 33.1 could apply to anyone who voluntarily consumes an intoxicant, even if they do so with restraint or for medical reasons where the reasonable person would not have foreseen even trivial or transitory physical harm. This is an extremely serious deleterious effect.

[162] An additional deleterious effect is that s. 33.1 disproportionately punishes for unintentional harm, contrary to the principle that punishment be proportionate to the gravity of the offence. Section 33.1 requires the offender to face full responsibility of the underlying crime even though the *actus reus* and *mens rea* of the violent offence are not met. They are exposed, at sentence, to the full brunt of punishment for that offence, subject to the sentencing judge's exercise of discretion, according to law. This must be the focus of the deleterious effects analysis since, under s. 33.1(3), it is the violent offence for which the accused is convicted and punished. It bears repeating: the gravamen of Mr. Brown's charged offence is not extreme intoxication, it is the violent assault that he is said to have committed while he did not have the capacity for voluntary action.

[163] In saying this, I have not lost sight of the often-cited public outcry that followed *Daviault* which the Minister of Justice of the day said was one of the driving forces behind the enactment of s. 33.1. But public outcries do not in themselves justify unconstitutional laws. And to my mind, that response was focused on the ultimate effect of allowing the defence of automatism to act as a source of *impunity* for the violent intoxicated offender by allowing them, in the words of the Minister of Justice in Parliament in 1995, "to escape the consequences [of the] law" (Hansard, March 27, 1995, at p. 11038). But if s. 33.1 were properly tailored to the blameworthiness of the accused — if it, for example, punished dangerous intoxication or criminally negligent intoxication leading to objectively foreseeable loss of control and non-trivial, non-transitory bodily harm — the accused would not escape the

consequences of the law and the accountability and protective goals of Parliament would have been met. This Court's task is not to solve the problem for Parliament of the right balance between competing interests. But it is fair to surmise that there are socially and constitutionally acceptable alternatives to the complete immunity that achieve the legitimate objectives of the law more fairly than in s. 33.1.

(iii) Weighing the Salutary and Deleterious Effects

[164] As this Court held in *Bedford*, at the final stage of the s. 1 analysis, the negative impact of the law is weighed against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are weighed both qualitatively and quantitatively. As with the previous stages of the justification analysis, the state continues to bear the burden of showing that the breaches are justified having regard to Parliament's goals. The Crown is well placed to call the social science and expert evidence required to justify the law's impact in societal terms (*Bedford*, at para. 126). At the end of the day, the courts determine whether the *Charter* infringements resulting from state action are too high a price to pay for the benefit of the law.

[165] In my respectful view, the Crown has not discharged its burden of showing that the benefits suggested by the evidence are fairly realized by s. 33.1. The Crown warns of widespread sexual and intimate partner violence, with the implication that such gendered violence will go undeterred in the absence of s. 33.1. I accept that such violence exists in the severe magnitude described by the Crown. But even the current

common law precludes an accused from relying on voluntary intoxication as a complete answer to crime in a broad sweep of instances of intoxicated violence. It is not the case that in the absence of what amounts to a rule of absolute liability in s. 33.1 such violence will go unpunished or undeterred. Rather, in relation to the evidence presented by the Crown, in the absence of s. 33.1, the benefits tied to accountability and protection will continue to be met, to a not unmeaningful extent, through the application of common law rules which prevent the defence of intoxication including to general intent crimes of violence. This would be truer still if a more fairly crafted rule than s. 33.1 was enacted by Parliament.

[166] The limits imposed on the most fundamental *Charter* rights in our system of criminal justice outweigh societal benefits that are already in part realized, and which Parliament can advance through other means. The weight to be accorded to the principles of fundamental justice and the presumption of innocence cannot be ignored here. In *Oakes*, Dickson C.J. explained that different rights and freedoms carry different weight: “Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society” (pp. 139-40). Some rights, such as the protections in ss. 7 and 11(d), will not be easily outweighed by collective interests under s. 1. That is the case here, as s. 33.1 trenches on fundamental principles at the very core of our criminal law system, including the presumption of innocence upon which the fairness of the system itself depends. Section 33.1 creates a

liability regime that disregards principles meant to protect the innocent, and communicates the message that securing a conviction is more important than respecting basic principles of justice. Balancing the salutary and deleterious effects of the law, I respectfully conclude that the impact on the principles of fundamental justice is disproportionate to its overarching public benefits. For these reasons, the limits s. 33.1 places on ss. 7 and 11(d) of the *Charter* cannot be justified in a free and democratic society.

## VI. Conclusion

[167] I would answer the constitutional questions as follows: s. 33.1 of the *Criminal Code* infringes ss. 7 and 11(d) of the *Charter* and the infringements are not justified under s. 1 of the *Charter*. I would allow Mr. Brown's appeal. Section 33.1 should be declared unconstitutional and of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. The trial judge concluded in this case, based on the evidence brought before her by the defence, that Mr. Brown was in a state of extreme intoxication akin to automatism. That finding was not challenged on appeal. His acquittal on the count of break and enter and committing aggravated assault was wrongly set aside because the Court of Appeal erred in deciding that s. 33.1 is constitutional. As a result, I would restore Mr. Brown's acquittal.

[168] The judgment of the Court of Appeal should be set aside. The acquittal entered by Hollins J. on the count of unlawful break and enter of a dwelling house and committing aggravated assault therein should be restored; the acquittal for unlawful

break and enter of a dwelling house and committing mischief to property over \$5,000 should be left undisturbed.

*Appeal allowed.*

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