**CCLISAR CONSULTATION ON S.33.1 OF THE CRIMINAL CODE**
**NOVEMBER 27, 2020, 1PM – 4PM (EASTERN)**

**DISCUSSION QUESTIONS AND BACKGROUND DOCUMENT**

The participants to this consultation are familiar with the history of s.33.1 which came into force in 1995 and was a legislated response to (and rejection of) the Supreme Court of Canada's 1994 decision in *R v. Daviault*.

From 1995 to date, the constitutionality of s.33.1 has been challenged in twelve cases (excluding *R v. Chan*). In five of these cases, the constitutionality was upheld; in seven cases s.33.1 was found to be unconstitutional, although some of the cases simply relied on previous rulings and did not engage the arguments in detail. *R v. Sullivan; R v. Chan* is the first time the issue has been considered by an appellate court in the twenty five years since the enactment of s.33.1.

CCLISAR is grateful for your participation in this consultation, the purpose of which is to guide CCLISAR's analysis of the issue from a feminist perspective and assist in determining the content and focus of any background or analysis papers that CCLISAR may prepare and publish on its website.

This background document will summarize the facts and trial decisions in *R v. Chan* and *R v. Sullivan* as well as the ONCA's June 2020 decision striking down s.33.1 of the *Criminal Code* on the basis that it violates ss.7 and 11(d) of the *Charter* and cannot be justified under s.1. The memo will also reference the Crown's arguments drawn from the factums filed by the Attorneys General of Ontario and Canada submitted in the appeal.

If participants have time, however, a review of the ONCA decision and the Crown factums rather than the summary below would be preferred (skipping the sections that deal with comity or issues unrelated to the *Charter* argument).

Attached as appendices to this background document are the text of s.33.1 (Appendix A); a helpful comparison chart that was appended to the *R v. Chan* trial decision and which explains the development of the intoxication defence over time (Appendix B); and a chart of past cases which have considered the constitutionality of s.33.1 which was attached to LEAF's intervener factum at the ONCA (Appendix C).

While there are many interesting and complicated technical legal arguments arising in this constitutional challenge, boiled down to its essentials, the key issue is whether, following the SCC's decision in *Daviault,* Parliament can constitutionally legislate criminal liability (fault and moral blameworthiness) of an accused who assaults or kills another person when, at the time the offence was committed, the accused was in a state of self-induced extreme intoxication and did

not knowingly or voluntarily commit the act in question. While the parties and the Court disagree on the application of the constitutional analysis, it is generally fair to say that common ground is that s.33.1 criminalizes self-induced intoxication to the point of automatism when a violent act is committed in that state. The act of becoming voluntarily intoxicated becomes an essential element of the offence, along with the consequence of that act, being the violence perpetrated on the victim.

Below are a series of questions for discussion at the workshop. The questions as framed below assume a fairly deep level of knowledge of the decision, but have been set out upfront in this memo so that you have a sense of what to look for when you review the summary of the case below and/or the ONCA decision and Crown factums.

If prior to Friday November 27th you think other issues or questions would be helpful to discuss, please get in touch with me.

**Discussion Questions**

1. Although s.33.1 has been held to be constitutional on five occasions (six including the lower court decision in *R v. Chan*), all prior rulings upholding the provision have found that s.33.1 breached the accused's rights, but is justified under s.1. The Crowns in *Sullivan and Chan* attempted to argue that there is no *prima facie* breach of s.7 and s.11(d). They acknowledge that it is a principle of fundamental justice that no person should be found criminally at fault in the absence of some voluntary wrongful conduct to which a culpable mental state is attached. They argued, however, that s.33.1(2) creates a "new alternate mode of liability" in which the culpable mental state and wrongful conduct are established when the Crown proves the voluntariness of the act of intoxication with knowledge or constructive knowledge of the risks of consuming the intoxicating substance.

    a. What are participants views on the Crown's interpretation of s.33.1(2) as creating a new mode of or route to liability? And does it avoid the substitution breach (the ONCA said "no").

    b. What are participants' views on the feminist arguments (or strongest arguments) that can be advanced that s.33.1 does not violate an accused's *Charter* rights?

    c. What are the risks of any such arguments in terms of implications for other contexts and/or the most vulnerable accused?

2. The ONCA held that there was no place for internal balancing in defining the principles of fundamental justice in this case. The Court distinguished *Chan* from *Mills* on the basis that the amendment to the Code in *Mills* was a legislative accommodation of the complainant's equality/privacy rights with the accused's rights of full answer and defence, and as such internal balancing was appropriate. But in s.33.1, the statute is not aimed at achieving a compromise between protected interests, but rather the dual goals of accountability for those who engage in societally unacceptable violent conduct

and protection for the victims of that violence (with a stated concern in the preamble for violence against women and children). The Court also held that regardless of any theoretical discussion of the possibility of internal balancing of competing rights under s.7, the principles of fundamental justice at issue as they relate to s.33.1 "have already been authoritatively determined" (a ruling that is a bit hard to argue with). **Question:** Is there any role for internal balancing of the ss.7, 15 and 28 rights of women/children impacted by intoxicated violence in the analysis of the principles of fundamental justice in this case? And if so, what practical or analytical impact does this internal balancing have?

3. It seems difficult to argue that the SCC in *Daviault* hasn't already decided, at a minimum, that s.33.1 breaches an accused's ss.7 and 11(d) Charter rights. There thus appears to be limited room to argue that an accused's ss.7 and 11(d) rights are not breached. At the ONCA, the Ontario Crown attempted to distinguish *Daviault* from s.33.1 by arguing that *Daviault's* application is narrow in scope and that *Daviault* only found the common law prohibition of the defence of self-induced extreme intoxication in *Leary* to be unconstitutional, but did not prohibit Parliament from stepping-in and legislating. **Questions:** What are participants' views on the strength of this argument? With reference to the question in #2 above, is there any scope for distinguishing *Daviault* on the basis that it was decided years before *Mills* and the recent *Barton/Goldfinch* trilogy? What other arguments or analyses are available to distinguish or develop *Daviault* in the intervening 25 years? Or is the only principled submission that the SCC must re-consider *Daviault*'s breach analysis? Virtually no section 1 analysis was undertaken in *Daviault* (which will be discussed below). Accordingly, it is much easier to argue that *Daviault* is not binding on the Court in 2021 insofar as the Court must undertake at first instance a nuanced and contextual s.1 analysis having regard to competing societal interests. This discussion question, however, addresses challenging *Daviault*'s finding of *prima facie* breach.

4. A variety of specific questions relating to the s.1 analysis undertaken by the ONCA are set out below, but in general, what are participants views on the best arguments to support the justification for s.33.1 under s.1? In particular, especially having regard to the Court's concerns about the accountability and protective purposes discussed below, what are the strongest arguments to support a s.1 analysis having regard to the security and equality rights of women and children (and other victims) targeted by intoxicated offenders? As with the discussion of the *prima facie* breach, for participants who think that the legislation cannot or should not be upheld under s.1, what are the implications of arguments in favour of doing so, particularly for other contexts?

5. Under section 1, the ONCA defined the legislative purpose narrowly and then ruled that such purpose itself was unconstitutional (and thus of no assistance in the s.1 analysis). Specifically, the ONCA ruled that the legislation is not targeted at alcohol-induced violence in general, but only at the rare circumstance of violence committed by offenders while in a state of automatism caused by self-induced intoxication. The Court accepted that there are two objectives of the legislation: (1) to hold individuals who are in a state of automatism due to self-induced intoxication accountable for their

violent acts (the "accountability purpose"); and (2) to protect victims, including women and children, from violence-based offences committed by those who are in a state of automatism due to self-induced intoxication (the "protective purpose"). The Court held that the accountability purpose is an "improper" purpose and cannot serve as a pressing and substantial societal objective: "…given that the principles of fundamental justice at stake exist to define the constitutional preconditions to criminal accountability, the desire to impose accountability is itself an unconstitutional purpose" (para. 139). The Court also ruled that all criminal law exists to hold offenders accountable, and as such the accountability purpose is too broad and would otherwise serve to inoculate all criminal legislation. **Question:** What are participants thoughts on this analysis of the legislative purpose? What are the best arguments to reject the ONCA's analysis in this regard?

6. In terms of the protective purpose, the ONCA held that this was a substantial and pressing concern, but like the trial judge, held that this purpose was not rationally connected to s.33.1 since the provision does not act as a deterrent to intoxicated offenders. **Question:** What are participants' views on the Court's analysis of the "protective purpose"? And isn't the purpose of all criminal legislation to prohibit unacceptable conduct to protect society? Having regard to the studies that establish that criminal law generally has a very limited deterrent effect, what implications does the Court's analysis of the protective purpose have more generally?

7. On minimal impairment, the ONCA ruled that there were other alternatives available to Parliament short of the prohibition under s.33.1. These alternatives included the *Daviault* defence itself, which confines the defence to a rare and narrow band of cases; and the option of a stand-alone offence of criminal intoxication, making it a crime to commit a prohibited act while drunk. It is arguably quite surprising how much time the Court devotes to the option of a stand-alone offence of criminal intoxication, particularly since the Court simultaneously acknowledges (at para.136) that such option might itself be constitutionally suspect. **Question:** What are participants' views on the Court introducing the idea of the stand-alone offence of criminal intoxication (which idea was rejected by Parliament in 1994/1995) as a basis for finding that s.33.1 is not minimally impairing or proportionate?

8. The defence of extreme intoxication to the point of automatism should be available only in the rarest of cases. On the other hand, we know from past experience that if s.33.1 is struck down, the defence will be raised routinely and likely will be successful much more often than in the rarest and most exceptional circumstances. Feminist scholars have pointed to the ubiquity of the honest but mistaken belief in consent defence, which was also anticipated to be the exception and not the rule. An equality argument made at the ONCA was that s.33.1 was necessary to prohibit the defence of extreme intoxication because of its prevalence following *Daviault*. A similar argument, focused on effects, is that permitting the defence of extreme intoxication will further normalize violence against women and will deter victims from reporting. A difficulty with these arguments, however, is that the problem is not the law, but the lower courts misapplying the law and/or the facts in the cases before them. It's hard to argue that an

unconstitutional law should be upheld under s.1 because courts just can't get the *Daviault* standard right. What role, if any, does this argument (or problem) have in legal arguments that might be presented to the SCC?

9. Relying on the dated Hansard evidence and submissions, rather than updated evidence, the Crown argued that the factual foundation for the *Daviault* decision was scientifically flawed, since alcohol consumption on its own cannot cause a state akin to automatism. What scope for advocacy, if any, is there on this point prior to the SCC hearing the appeal (assuming leave is granted)?

10. Similarly, it is notable that in both Sullivan and Chan the temporary psychosis caused both accused to be in a state of intense fear and threat, and their violent acts appeared to be in self-defence. Violence against women, and sexual violence in particular, arguably never takes this form. In fact, it is difficult to imagine how a state of psychosis caused by an intoxicant could cause someone to engage in sexual assault as a defensive act. **Questions:** What scope for advocacy, if any, is there on this point given the apparent relative paucity of the scientific data? Assuming it is scientifically accurate that no person can engage in sexual assault as an automaton (as alleged in *Daviault*), how would this information impact an analysis of s.33.1? Would it mean that there is no role for Parliament to play since the extreme intoxication defence, even if available in theory, could never be made out in fact and as such a law prohibiting the defence is moot? Or is it legitimate for Parliament to clarify that the defence can never apply, including to the category of cases involving only alcohol and sexual assault?

11. A central feature of the ONCA's decision in *Sullivan and Chan* is that on a criminal standard of penal negligence, there is no (or at least insufficient) foreseeable risk between consuming an intoxicant such as alcohol (or mushrooms or Wellbutrin or legalized cannabis, or prescription drugs with psychotic side effects) and violence, let alone extreme violence. The Court pointed out that it simply cannot be a "marked departure from the standards of the norm to become intoxicated", particularly in a world where consumption of alcohol and cannabis are legal (and, one might add, sold and arguably promoted by the government). In the *Chan* decision it was also emphasized that Chan had consumed mushrooms before with no ill effect. **Question:** What are participants' views on developing an argument that if the legislation is unconstitutional, the finding of unconstitutionality should be limited and s.33.1 should be read down to apply only to cases where the accused has a prior history of psychosis and/or violence associated with intoxicants (which would arguably make the defence unavailable to Sullivan). In other words, Parliament may properly prohibit reliance on extreme self-induced intoxication where the accused has engaged in violence in a state of intoxication in the past. In such cases, there is a clearer connection between the choice to become intoxicated and the violent act. Such an approach would almost certainly make the defence definitionally unavailable to the vast majority of cases involving intimate partner violence. Alternatively, if this idea has some currency but it is too difficult to develop as a form of reading down argument, what arguments could be made to encourage the Court to include in its delineation of the rare circumstances

in which the defence might be available, an additional requirement and onus on the accused to established that he has no past history of intoxicated violence?

12. In addition to the proposed argument above that would further narrow the scope of accused who might access the defence of extreme intoxication to the point of being an automaton, what other arguments can be made to stop the inevitable floodgates in sexual assault cases, should the SCC uphold the ONCA decision?

13. Given the onus on the accused to establish the defence of extreme intoxication, and the requirement for expert evidence, this defence (if upheld by the SCC) is realistically only going to be available to more privileged accused. Does this social reality have any bearing on the legal analysis?

14. Two other areas that would be useful to discuss on a preliminary basis and that are separate from the legal analysis of the constitutionality of s.33.1, are:

    a. What is the most effective (feminist) approach to public communication about the case and the issue?

    b. If the legislation is struck down, what are the next steps in terms of advocacy and legislative reform? What alternative proposals could/should be made to Parliament? Should a new defence akin to a s.16 NCR be established instead such that any person to whom the defence applies is subject to appropriate monitoring by the state? Such monitoring would seem unnecessary in cases such as Mr. Chan's, but could be structured to protect women and children in cases of substance abuse and intimate partner violence.

**Summary of the Facts and Judicial History *R v. Sullivan; R v. Chan***

***Facts and trial decision in R v. Chan***

*R v. Chan* involved a high school student who consumed magic mushrooms in his mother's basement. Chan had consumed mushrooms before with no ill effect, but this time he consumed four times the quantity of previous occasions. Chan became agitated a few hours after consuming the mushrooms, calling his sister and mother "Satan" and the "Devil", speaking in gibberish and eventually breaking into his father's house nearby, fatally stabbing his father and grievously wounding his step-mother. At trial the defence called an expert toxicologist who testified that the active ingredient in mushrooms, psilocybin, is "pretty safe" but in large quantities can cause substance-induced psychosis. No expert evidence was filed by either party on the *Charter* application. The trial judge held that:

> No expert psychiatric evidence was filed on this application. I am, however, prepared to accept, for the purposes of this application, that Mr. Chan has an arguable case that his actions were not voluntary at the time he attacked his father and Ms. Witteveen.

> Based on the whole of the evidence, I conclude that, at the time of the offences, Mr. Chan was experiencing a psychotic episode that rendered him incapable of knowing that his actions were wrong.[1]

Because the psychotic episode was caused by the mushrooms and not an ongoing psychotic illness or by Mr. Chan's mild traumatic brain injury, the NCR exemption under s.16 of the Code was not available to him. The Court further found that s.33.1 barred Mr. Chan from relying on a psychosis that was caused by his voluntary consumption of mushrooms. In response to the constitutional challenge, the trial judge found that s.33.1 violated ss.7 and 11(d) of the *Charter* but was upheld under s.1.

The Crown did not call any evidence at trial on s.1 but relied on the statutory purpose and legislative debates. As summarized by the trial judge:

> The court is somewhat disadvantaged because the Crown elected to file virtually no evidence on the application. They submitted some Parliamentary Hansards reflecting debate when the legislation was tabled in Parliament. They also submitted a few selected transcripts of submissions made to the Standing Committee on Justice and Legal Affairs when the provision was being considered. Most of this material reflects submissions and not evidence. There is arguably some minimal evidence provided in submissions by two physicians made to the Standing Committee linking intoxication and sexual violence. But that is the extent of it.[2]

The trial judge accepted references to evidence submitted in the Standing Committee hearings that there exists a strong linkage between intoxication and violence.

The trial judge's s.1 analysis is arguably of greatest importance to the discussion at the CCLISAR workshop.

In terms of the objective of ss.33.1, the trial judge held that the legislative objects are "the protection of women and children from intoxicated violence and ensuring accountability of those who commit offences of violence while intoxicated" and that these objectives "are pressing and substantial concerns."[3]

On rational connection, the trial judge held that there was clearly a rational connection between the legislation and the goal of ensuring accountability by intoxicated offenders for crimes of violence committed while intoxicated, but that it was "less clear" how the section "does much to protect women and children from violence," noting that s.33.1 would not deter individuals from drinking "in the off chance they render themselves automatons and hurt someone." Accordingly, he found only a rational connection to the objective of accountability.

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[1] *R v. Chan* 2018 ONSC 7158 at paras. 11 and 90 (Chan trial judgment).
[2] Chan trial judgment, para. 124.
[3] Chan trial judgment at para. 121.

On minimal impairment, the trial judge held that while the impairment of Charter rights "is certainly not minimal", the test was nevertheless met because of various mitigating factors and considerations:

1. The legislation applies only to general intent offences;

2. The legislation applies only to offences that interfere with or threaten to interfere with the bodily integrity of another person (and not property offences); and

3. The limitation on the right only applies to self-induced intoxication. "There is a moral blameworthiness attached to getting oneself so intoxicated as to lose control of one's faculties. Individuals caught within the net of this provision are not entirely morally blameless." (para. 134).

4. Parliament considered other alternative provisions, such as a new offence of criminal intoxication or a special verdict of not criminally responsible because of intoxication, and rejected them for good reason, and Parliament in law is not required to choose the absolutely least intrusive alternative to meet its objectives; and

5. The Court noted that in the "big picture" the rarity of the automaton defence means that the rights of accused in general are minimally impaired, but agrees that the impairment on the individual accused is "substantial".

Under the balancing step, the trial importantly held that no right is sacrosanct. Referring to the limits on the right of self-incrimination upheld in *BC Motor Vehicles Act*, and the approach to s.7 and s.1 in *Bedford*, the trial judge held that other societal interests and broader social concerns may be addressed under the s.1 analysis, including the equality and security of person rights and interests of women and children.

He concluded that:

> Parliament is entitled to express the view that extreme self-intoxication is morally blameworthy behaviour. It is entitled to express the view that those who voluntarily become extremely intoxicated and hurt others while in that condition are to be held accountable…Parliament was entitled to weigh in with its view of the morally appropriate balance between intoxicated offenders and the rest of society and to hold intoxicated offenders to account. Parliament's balancing is, in my view, entitled to deference.

Finally, the trial judge held that the proportionality test is met since "the morally innocent will not be punished" (those who self-intoxicate and cause injury to others are not blameless) and the lack of voluntariness may be taken into account at sentencing.

***Facts of R v. Sullivan***

*R v. Sullivan* involved an accused who consumed 30 to 80 Wellbutrin tablets in a suicide attempt (psychosis is a known side effect of Wellbutrin), following which he attacked his mother with two

kitchen knives. It was accepted at trial that Mr. Sullivan was acting involuntarily when he stabbed his mother. The constitutionality of s.33.1 was not challenged. The defence rather was that s.33.1 did not apply since Mr. Sullivan had not voluntarily consumed the intoxicant. In the alternative, he also invoked the mental disorder defence. He was not successful on either count. With respect to voluntariness, the trial judge held that "Voluntary intoxication means that Mr. Sullivan consumed Wellbutrin when he knew or had reasonable grounds to believe that it might cause him to be impaired."[4]

A review of the Crown's appeal factum suggests that the facts of Sullivan as summarized in the ONCA decision are somewhat less complicated and somewhat more sympathetic than those adduced at trial. Sullivan was a drug addict (including a prior addiction to crack cocaine) who was hospitalized for experiencing hallucinations associated with Wellbutrin four months prior to the attack on his mother. The Crown's arguments in the appeal that Sullivan knew or should have known that the consumption of Wellbutrin could cause him to become psychotic were thus not as harsh or unreasonable as they appear in the judgment. At the hospital following his first admission for psychosis related to Wellbutrin, Sullivan admitted to smoking crack, taking meth and injecting Wellburtrin. The defence forensic psychiatrist acknowledged in cross-examination that Wellbutrin is known as a drug of abuse on the streets and has been called the "poor man's cocaine". The psychiatric evidence at trial was that Sullivan likely had a "narcissistic personality disorder with histrionic and anti-social traits" as well as a "poly substance use disorder." In respect of the suicide attempt, the evidence at trial was that Sullivan took an overdose of Wellbutrin while "feeling like an automaton" but then realized his mistake and took efforts to reverse the overdose by drinking water and attempting to induce vomiting. He believed the "storm had passed" and joined his mother for dinner. He next awoke in hospital after the attack.

***The ONCA Ruling***

The Court of Appeal ruled that s.33.1 violates ss.11(d) and 7 of the *Charter* in the three respects identified by the SCC in *Daviault* (summarized in the ONCA judgment at para 47 as follows):

1. **The Voluntariness Breach** – It would be contrary to the principles of fundamental justice (*Charter*, s. 7) and the presumption of innocence (*Charter*, s. 11(d)) to permit accused persons to be convicted for their involuntary acts, as those acts are not willed and therefore not truly the acts of the accused: *Daviault*, at pp. 74, 91;

2. **The Improper Substitution Breach** – It would be contrary to the presumption of innocence (*Charter*, s. 11(d)) to convict accused persons in the absence of proof of a requisite element of the charged offence, unless a substituted element is proved that inexorably or inevitably includes that requisite element. A prior decision to become intoxicated cannot serve as a substituted element because it will not include the requisite mental state for the offences charged: *Daviault*, at pp. 89-91; and

[4] *R v. Sullivan; R v. Chan* 2020 ONCA 333 at para.174 ("ONCA Judgment").

3. **The Mens Rea Breach** – It would be contrary to the principles of fundamental justice (*Charter*, s. 7) to convict accused persons where the accused does not have the minimum *mens rea* that reflects the nature of the crime: *Daviault*, at pp. 90-92.

Justice Paciocco's decision goes into detail on why the s.33.1 breaches ss.7 and 11(d). Justice Lauwers' concurring decision succinctly summarizes the issue as follows (at para. 198):

> Section 33.1 tries to sidestep *Daviault* by substituting the mental element associated with penal negligence for the mental element ordinarily required for the predicate violent acts. But, in *Daviault*, the Supreme Court found that this type of substitution – replacing the mental element for sexual assault with the mental element required for intoxication, for example – was a fatal flaw in the *Leary* rule. Did the design of s. 33.1 overcome the court's concern? I agree with my colleague that it did not.

The Crown did not concede the *prima facie* breach. The Crown argued that although s.33.1 engages the liberty interests of the accused, it complies with the principles of fundamental justice and the presumption of innocence. In this regard, the Crown's argument was summarized as follows:

a. Section 7 analysis does not involve a balancing of the law's salutary and deleterious effects, which is appropriately performed under s. 1;

b. Section 33.1 does not offend the principle from *Daviault*. The majority in *Daviault* prohibited courts from substituting self-induced intoxication for statutorily required elements. By creating a different statutory way to commit offences, Parliament did not run afoul of *Daviault*;

c. Section 33.1 does not offend the requirement for criminal liability of (*i*) a voluntary act and (*ii*) a blameworthy mental state. Both are required: (*i*) voluntary consumption of an intoxicant with (*ii*) actual or constructive knowledge of its potential effects; and

d. Section 33.1 does not permit criminal liability in the absence of a constitutionally required mental element. Liability under s. 33.1 requires intentional consumption leading to extreme intoxication akin to automatism, and actual or constructive knowledge of the risk of intoxication. It was open to Parliament to deem this intentional risk-taking to be criminal and to impose liability in accordance with the conduct's actual consequences.

The Crown attempted to narrow the SCC's ruling in *Daviault* by arguing that:

> "The majority did not hold that it would offend the *Charter* for Parliament to codify what *Leary* sought to achieve. At the very least, the majority left the question open in commenting that "[v]oluntary intoxication is not yet a crime" (emphasis added), and "it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk". That is what s. 33.1 does. Liability under s. 33.1 does not involve courts replacing statutory

> essential elements. In s. 33.1, Parliament created a new mode of committing violent, general-intent offences involving different essential elements. *Daviault* does not prohibit this."

The Crown argued that in relieving the Crown from proving voluntariness and intent with respect to the offence charged, s.33.1 "creates a different mode of committing an offence." Comparing s.33.1 to s.21 of the Code (that provides different modes of participation in an offence as a principal or party), the Crown argued that:

> s. 33.1 provides an additional route to liability. It applies only to general intent offences that include "as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person". When s. 33.1 applies, the Crown must prove every element of the violent, general intent offence charged other than intent and voluntariness with respect to the prohibited act. In addition, the Crown must prove the accused,
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> - Was in a state of self-induced intoxication at the material time;
>
> - Departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person; and
>
> - Lacked the general intent and / or voluntariness of the offence charged "by reason of" the predicate act of self-induced intoxication – *i.e.* involuntariness or a lack of general intent for some other reason remains a defence.

On this reading of s.33.1, the "essential element" of self-induced intoxication requires proof of the accused's voluntary consumption of a substance and a corresponding mental element (actual or constructive knowledge of the risk of impairment), and argued that the accused need not "know to a nicety what the effect of the intoxicating substances will be" (citing R v. King 1962 SCC).

The Crown argued that s.33.1 does not impermissibly substitute because:

> s.33.1 does not substitute one fact for proof of an element required by Parliament or the Constitution, but rather creates a form of liability involving different statutory elements. When s. 33.1 applies, proof of voluntariness and intent with respect to the violent consequences of self-induced extreme intoxication is not a statutory essential element.

The Crown further argued that a mental element with respect to the violent act (violent consequences of self-induced extreme intoxication) is not constitutionally required:

> When s. 33.1 applies, liability is imposed for the unintended and / or involuntary consequences of what Parliament has determined to be a blameworthy predicate act. As the marginal note for s. 33.1(2) indicates, the provision imposes "[c]riminal fault by reason of intoxication". The preamble to s. 33.1's enacting legislation notes that Parliament (*i*) recognizes "a close association between violence and intoxication", (*ii*) holds "moral view

> that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it", and (*iii*) concluded it was "necessary to legislate a basis of criminal fault in relation to self- induced intoxication".
>
> Where an accused commits the predicate act of self-induced intoxication and, in a resulting state akin to automatism, commits a violent, general intent offence, s. 33.1 criminalizes the result. For offences like s. 33.1, structured to impose liability for the unintended consequences of a predicate act, the Constitution does not require proof of a discrete mental element attached to the act's consequences. The Supreme Court unanimously reached this conclusion in *R. v. DeSousa*, a case involving the constitutionality of the offence of unlawfully causing bodily harm. The Court held that although objective foreseeability of the risk of bodily harm is an element of that offence, this element was not constitutionally required.

The ONCA rejected all of the above arguments. On a statutory interpretation analysis, the Court did not accept the Crown's argument that the regime creates a new element of the offence of voluntariness to consume the intoxicant. Properly read the prosecuted act is the commission of the assaultive behaviour, not the self-induced intoxication (noting that the act of intoxication is benign without the assaultive conduct). The Court further held that even if s.33.1 could be read as the Crown argued, this did not avoid the problem of voluntariness or improper substitution. On the *mens rea* breach, the Court ruled that s.33.1 does not meet the test for a constitutionally compliant level of fault even on a criminal negligence standard. The violence in *Chan* and *Sullivan* were not reasonably foreseeable risks arising from the voluntary intoxication, and certainly not so foreseeable as to amount to a marked departure from standards of ordinary prudence to engage in the risky behaviour. The Court held that the violent act committed while an automaton cannot satisfy the marked departure, since moral fault cannot come from a consequence alone, but rather the direction or failure to direct the mind to the behaviour or the risk of the behaviour.

The Crown argued and the trial judge held that the purpose of the legislation is to hold offenders accountable for intoxicated violence and to protect victims from this violence. The ONCA rejected this definition of the legislative purpose as being overbroad. Instead the Court narrowed the legislated purpose to specifically targeting intoxicated violence committed while in a state of automatism, citing the two-fold purpose as follows: (1) to hold individuals who are in a state of automatism due to self-induced intoxication accountable for their violent acts (the "accountability purpose"); and (2) to protect victims, including women and children, from violence-based offences committed by those who are in a state of automatism due to self-induced intoxication (the "protective purpose").

The Court held that the accountability purpose is an "improper" and itself unconstitutional purpose and cannot serve as a pressing and substantial societal objective: "…given that the principles of fundamental justice at stake exist to define the constitutional preconditions to criminal accountability, the desire to impose accountability is itself an unconstitutional purpose" (para. 139).

> I am persuaded that the accountability purpose cannot be relied upon in the s. 1 evaluation, given that infringing constitutional limits on accountability in order to impose accountability is itself an unconstitutional purpose. (para. 146)

In terms of the protective purpose, the ONCA held that this was a substantial and pressing concern, but like the trial judge, held that this purpose was not rationally connected to s.33.1 since the provision does not act as a deterrent to intoxicated offenders.

Since the "accountability" purpose was held to be unconstitutional, if thus did not meet any of the other elements of the *Oakes* test. The "protective purpose" failed rational connection, since intoxicated offenders would not be deterred from reaching a state of automatism simply because of the removal of the defence in the *Code*.

Section 33.1 was held to fail minimal impairment for a variety of reasons, including that there were less impairing options open to Parliament, including leaving the *Daviault* defence in place (which would only be available in rare circumstances) and enacting a "stand-alone offence of criminal intoxication" (apparently no matter how constitutionally suspect).

On the overall proportionality analysis, the Court not surprisingly restated its concerns as they related to the breach analysis, that the legislation was not proportionate. Rather than summarize, this memo will conclude by excerpting the Court's analysis:

> [152] Moreover, as Cory J. recognized in *Daviault*, at p. 87, even leaving aside the other objections I have identified, it is not appropriate to transplant the mental element from the act of consuming intoxicants for the mental element required by the offence charged, particularly where the act of self-inducing intoxication is over before the *actus reus* of the offence charged occurs. This is what s. 33.1 seeks to do. This transplantation of fault is contrary to the criminal law principle of contemporaneity, which requires the *actus reus* and *mens rea* to coincide at some point: see *R. v. Williams*, 2003 SCC 41, [2003] 2 S.C.R. 134, at para. 35.
>
> [153] Put simply, 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.
>
> [154] Only the most compelling salutary effects could possibly be proportional to these deleterious effects. Yet, s. 33.1 achieves little. If not entirely illusory, its contribution to deterrence is negligible. I have already explained that the protective purpose relied upon carries little weight.
>
> [155] The Crown and supporting interveners argue that s. 33.1 has collateral salutary effects, such as: "(i) encouraging victims to report intoxicated violence, (ii) recognizing and promoting the equality, security, and dignity of crime victims, particularly women and children who are disproportionately affected by intoxicated violence, and (iii) avoiding normalizing and/or incentivizing intoxicated violence."
>
> [156] I see no reasoned basis for concluding that victims who would have reported intoxicated violence would be unlikely to do so because of the remote possibility that a

non-mental disorder automatism defence could be successfully raised, or that s. 33.1 plays a material role in preventing the normalization and incentivization of intoxicated violence. Section 33.1 addresses a miniscule percentage of intoxicated violence cases.

[157] As for recognizing and promoting the equality, security, and dignity of crime victims, it is obvious that those few victims who may see their offenders acquitted without s. 33.1 will be poorly served. They are victims, whether their attacker willed or intended the attack. However, to convict an attacker of offences for which they do not bear the moral fault required by the *Charter* to avoid this outcome, is to replace one injustice for another, and at an intolerable cost to the core principles that animate criminal liability.

**APPENDIX "A"**

CCLISAR CONSULTATION ON S.33.1 OF THE CRIMINAL CODE
NOVEMBER 27, 2020, 1PM – 4PM (EASTERN)

DISCUSSION QUESTIONS AND BACKGROUND DOCUMENT

The participants to this consultation are familiar with the history of s.33.1 which came into force in 1995 and was a legislated response to (and rejection of) the Supreme Court of Canada's 1994 decision in *R v. Daviault*.

From 1995 to date, the constitutionality of s.33.1 has been challenged in twelve cases (excluding *R v. Chan*). In five of these cases, the constitutionality was upheld; in seven cases s.33.1 was found to be unconstitutional, although some of the cases simply relied on previous rulings and did not engage the arguments in detail. *R v. Sullivan; R v. Chan* is the first time the issue has been considered by an appellate court in the twenty five years since the enactment of s.33.1.

CCLISAR is grateful for your participation in this consultation, the purpose of which is to guide CCLISAR's analysis of the issue from a feminist perspective and assist in determining the content and focus of any background or analysis papers that CCLISAR may prepare and publish on its website.

This background document will summarize the facts and trial decisions in *R v. Chan* and *R v. Sullivan* as well as the ONCA's June 2020 decision striking down s.33.1 of the *Criminal Code* on the basis that it violates ss.7 and 11(d) of the *Charter* and cannot be justified under s.1. The memo will also reference the Crown's arguments drawn from the factums filed by the Attorneys General of Ontario and Canada submitted in the appeal.

If participants have time, however, a review of the ONCA decision and the Crown factums rather than the summary below would be preferred (skipping the sections that deal with comity or issues unrelated to the *Charter* argument).

Attached as appendices to this background document are the text of s.33.1 (Appendix A); a helpful comparison chart that was appended to the *R v. Chan* trial decision and which explains the development of the intoxication defence over time (Appendix B); and a chart of past cases which have considered the constitutionality of s.33.1 which was attached to LEAF's intervener factum at the ONCA (Appendix C).

While there are many interesting and complicated technical legal arguments arising in this constitutional challenge, boiled down to its essentials, the key issue is whether, following the SCC's decision in *Daviault*, Parliament can constitutionally legislate criminal liability (fault and moral blameworthiness) of an accused who assaults or kills another person when, at the time the offence was committed, the accused was in a state of self-induced extreme intoxication and did not knowingly or voluntarily commit the act in question. While the parties and the Court disagree on the application of the constitutional analysis, it is generally fair to say that common ground is

that s.33.1 criminalizes self-induced intoxication to the point of automatism when a violent act is committed in that state. The act of becoming voluntarily intoxicated becomes an essential element of the offence, along with the consequence of that act, being the violence perpetrated on the victim.

Below are a series of questions for discussion at the workshop. The questions as framed below assume a fairly deep level of knowledge of the decision, but have been set out upfront in this memo so that you have a sense of what to look for when you review the summary of the case below and/or the ONCA decision and Crown factums.

If prior to Friday November 27th you think other issues or questions would be helpful to discuss, please get in touch with me.

**Discussion Questions**

1. Although s.33.1 has been held to be constitutional on five occasions (six including the lower court decision in *R v. Chan*), all prior rulings upholding the provision have found that s.33.1 breached the accused's rights, but is justified under s.1. The Crowns in *Sullivan and Chan* attempted to argue that there is no *prima facie* breach of s.7 and s.11(d). They acknowledge that it is a principle of fundamental justice that no person should be found criminally at fault in the absence of some voluntary wrongful conduct to which a culpable mental state is attached. They argued, however, that s.33.1(2) creates a "new alternate mode of liability" in which the culpable mental state and wrongful conduct are established when the Crown proves the voluntariness of the act of intoxication with knowledge or constructive knowledge of the risks of consuming the intoxicating substance.

    a. What are participants views on the Crown's interpretation of s.33.1(2) as creating a new mode of or route to liability? And does it avoid the substitution breach (the ONCA said "no").

    b. What are participants' views on the feminist arguments (or strongest arguments) that can be advanced that s.33.1 does not violate an accused's *Charter* rights?

    c. What are the risks of any such arguments in terms of implications for other contexts and/or the most vulnerable accused?

2. The ONCA held that there was no place for internal balancing in defining the principles of fundamental justice in this case. The Court distinguished *Chan* from *Mills* on the basis that the amendment to the Code in *Mills* was a legislative accommodation of the complainant's equality/privacy rights with the accused's rights of full answer and defence, and as such internal balancing was appropriate. But in s.33.1, the statute is not aimed at achieving a compromise between protected interests, but rather the dual goals of accountability for those who engage in societally unacceptable violent conduct and protection for the victims of that violence (with a stated concern in the preamble for violence against women and children). The Court also held that regardless of any

theoretical discussion of the possibility of internal balancing of competing rights under s.7, the principles of fundamental justice at issue as they relate to s.33.1 "have already been authoritatively determined" (a ruling that is a bit hard to argue with). **Question:** Is there any role for internal balancing of the ss.7, 15 and 28 rights of women/children impacted by intoxicated violence in the analysis of the principles of fundamental justice in this case? And if so, what practical or analytical impact does this internal balancing have?

3. It seems difficult to argue that the SCC in *Daviault* hasn't already decided, at a minimum, that s.33.1 breaches an accused's ss.7 and 11(d) Charter rights. There thus appears to be limited room to argue that an accused's ss.7 and 11(d) rights are not breached. At the ONCA, the Ontario Crown attempted to distinguish *Daviault* from s.33.1 by arguing that *Daviault's* application is narrow in scope and that *Daviault* only found the common law prohibition of the defence of self-induced extreme intoxication in *Leary* to be unconstitutional, but did not prohibit Parliament from stepping-in and legislating. **Questions:** What are participants' views on the strength of this argument? With reference to the question in #2 above, is there any scope for distinguishing *Daviault* on the basis that it was decided years before *Mills* and the recent *Barton/Goldfinch* trilogy? What other arguments or analyses are available to distinguish or develop *Daviault* in the intervening 25 years? Or is the only principled submission that the SCC must re-consider *Daviault*'s breach analysis? Virtually no section 1 analysis was undertaken in *Daviault* (which will be discussed below). Accordingly, it is much easier to argue that *Daviault* is not binding on the Court in 2021 insofar as the Court must undertake at first instance a nuanced and contextual s.1 analysis having regard to competing societal interests. This discussion question, however, addresses challenging *Daviault*'s finding of *prima facie* breach.

4. A variety of specific questions relating to the s.1 analysis undertaken by the ONCA are set out below, but in general, what are participants views on the best arguments to support the justification for s.33.1 under s.1? In particular, especially having regard to the Court's concerns about the accountability and protective purposes discussed below, what are the strongest arguments to support a s.1 analysis having regard to the security and equality rights of women and children (and other victims) targeted by intoxicated offenders? As with the discussion of the *prima facie* breach, for participants who think that the legislation cannot or should not be upheld under s.1, what are the implications of arguments in favour of doing so, particularly for other contexts?

5. Under section 1, the ONCA defined the legislative purpose narrowly and then ruled that such purpose itself was unconstitutional (and thus of no assistance in the s.1 analysis). Specifically, the ONCA ruled that the legislation is not targeted at alcohol-induced violence in general, but only at the rare circumstance of violence committed by offenders while in a state of automatism caused by self-induced intoxication. The Court accepted that there are two objectives of the legislation: (1) to hold individuals who are in a state of automatism due to self-induced intoxication accountable for their violent acts (the "accountability purpose"); and (2) to protect victims, including women and children, from violence-based offences committed by those who are in a state of

automatism due to self-induced intoxication (the "protective purpose"). The Court held that the accountability purpose is an "improper" purpose and cannot serve as a pressing and substantial societal objective: "…given that the principles of fundamental justice at stake exist to define the constitutional preconditions to criminal accountability, the desire to impose accountability is itself an unconstitutional purpose" (para. 139). The Court also ruled that all criminal law exists to hold offenders accountable, and as such the accountability purpose is too broad and would otherwise serve to inoculate all criminal legislation. **Question:** What are participants thoughts on this analysis of the legislative purpose? What are the best arguments to reject the ONCA's analysis in this regard?

6. In terms of the protective purpose, the ONCA held that this was a substantial and pressing concern, but like the trial judge, held that this purpose was not rationally connected to s.33.1 since the provision does not act as a deterrent to intoxicated offenders. **Question:** What are participants' views on the Court's analysis of the "protective purpose"? And isn't the purpose of all criminal legislation to prohibit unacceptable conduct to protect society? Having regard to the studies that establish that criminal law generally has a very limited deterrent effect, what implications does the Court's analysis of the protective purpose have more generally?

7. On minimal impairment, the ONCA ruled that there were other alternatives available to Parliament short of the prohibition under s.33.1. These alternatives included the *Daviault* defence itself, which confines the defence to a rare and narrow band of cases; and the option of a stand-alone offence of criminal intoxication, making it a crime to commit a prohibited act while drunk. It is arguably quite surprising how much time the Court devotes to the option of a stand-alone offence of criminal intoxication, particularly since the Court simultaneously acknowledges (at para.136) that such option might itself be constitutionally suspect. **Question:** What are participants' views on the Court introducing the idea of the stand-alone offence of criminal intoxication (which idea was rejected by Parliament in 1994/1995) as a basis for finding that s.33.1 is not minimally impairing or proportionate?

8. The defence of extreme intoxication to the point of automatism should be available only in the rarest of cases. On the other hand, we know from past experience that if s.33.1 is struck down, the defence will be raised routinely and likely will be successful much more often than in the rarest and most exceptional circumstances. Feminist scholars have pointed to the ubiquity of the honest but mistaken belief in consent defence, which was also anticipated to be the exception and not the rule. An equality argument made at the ONCA was that s.33.1 was necessary to prohibit the defence of extreme intoxication because of its prevalence following *Daviault*. A similar argument, focused on effects, is that permitting the defence of extreme intoxication will further normalize violence against women and will deter victims from reporting. A difficulty with these arguments, however, is that the problem is not the law, but the lower courts misapplying the law and/or the facts in the cases before them. It's hard to argue that an unconstitutional law should be upheld under s.1 because courts just can't get the

*Daviault* standard right. What role, if any, does this argument (or problem) have in legal arguments that might be presented to the SCC?

9. Relying on the dated Hansard evidence and submissions, rather than updated evidence, the Crown argued that the factual foundation for the *Daviault* decision was scientifically flawed, since alcohol consumption on its own cannot cause a state akin to automatism. What scope for advocacy, if any, is there on this point prior to the SCC hearing the appeal (assuming leave is granted)?

10. Similarly, it is notable that in both Sullivan and Chan the temporary psychosis caused both accused to be in a state of intense fear and threat, and their violent acts appeared to be in self-defence. Violence against women, and sexual violence in particular, arguably never takes this form. In fact, it is difficult to imagine how a state of psychosis caused by an intoxicant could cause someone to engage in sexual assault as a defensive act. **Questions:** What scope for advocacy, if any, is there on this point given the apparent relative paucity of the scientific data? Assuming it is scientifically accurate that no person can engage in sexual assault as an automaton (as alleged in *Daviault*), how would this information impact an analysis of s.33.1? Would it mean that there is no role for Parliament to play since the extreme intoxication defence, even if available in theory, could never be made out in fact and as such a law prohibiting the defence is moot? Or is it legitimate for Parliament to clarify that the defence can never apply, including to the category of cases involving only alcohol and sexual assault?

11. A central feature of the ONCA's decision in *Sullivan and Chan* is that on a criminal standard of penal negligence, there is no (or at least insufficient) foreseeable risk between consuming an intoxicant such as alcohol (or mushrooms or Wellbutrin or legalized cannabis, or prescription drugs with psychotic side effects) and violence, let alone extreme violence. The Court pointed out that it simply cannot be a "marked departure from the standards of the norm to become intoxicated", particularly in a world where consumption of alcohol and cannabis are legal (and, one might add, sold and arguably promoted by the government). In the *Chan* decision it was also emphasized that Chan had consumed mushrooms before with no ill effect. **Question:** What are participants' views on developing an argument that if the legislation is unconstitutional, the finding of unconstitutionality should be limited and s.33.1 should be read down to apply only to cases where the accused has a prior history of psychosis and/or violence associated with intoxicants (which would arguably make the defence unavailable to Sullivan). In other words, Parliament may properly prohibit reliance on extreme self-induced intoxication where the accused has engaged in violence in a state of intoxication in the past. In such cases, there is a clearer connection between the choice to become intoxicated and the violent act. Such an approach would almost certainly make the defence definitionally unavailable to the vast majority of cases involving intimate partner violence. Alternatively, if this idea has some currency but it is too difficult to develop as a form of reading down argument, what arguments could be made to encourage the Court to include in its delineation of the rare circumstances in which the defence might be available, an additional requirement and onus on the accused to established that he has no past history of intoxicated violence?

12. In addition to the proposed argument above that would further narrow the scope of accused who might access the defence of extreme intoxication to the point of being an automaton, what other arguments can be made to stop the inevitable floodgates in sexual assault cases, should the SCC uphold the ONCA decision?

13. Given the onus on the accused to establish the defence of extreme intoxication, and the requirement for expert evidence, this defence (if upheld by the SCC) is realistically only going to be available to more privileged accused. Does this social reality have any bearing on the legal analysis?

14. Two other areas that would be useful to discuss on a preliminary basis and that are separate from the legal analysis of the constitutionality of s.33.1, are:

    a. What is the most effective (feminist) approach to public communication about the case and the issue?

    b. If the legislation is struck down, what are the next steps in terms of advocacy and legislative reform? What alternative proposals could/should be made to Parliament? Should a new defence akin to a s.16 NCR be established instead such that any person to whom the defence applies is subject to appropriate monitoring by the state? Such monitoring would seem unnecessary in cases such as Mr. Chan's, but could be structured to protect women and children in cases of substance abuse and intimate partner violence.

**Summary of the Facts and Judicial History *R v. Sullivan; R v. Chan***

***Facts and trial decision in R v. Chan***

*R v. Chan* involved a high school student who consumed magic mushrooms in his mother's basement. Chan had consumed mushrooms before with no ill effect, but this time he consumed four times the quantity of previous occasions. Chan became agitated a few hours after consuming the mushrooms, calling his sister and mother "Satan" and the "Devil", speaking in gibberish and eventually breaking into his father's house nearby, fatally stabbing his father and grievously wounding his step-mother. At trial the defence called an expert toxicologist who testified that the active ingredient in mushrooms, psilocybin, is "pretty safe" but in large quantities can cause substance-induced psychosis. No expert evidence was filed by either party on the *Charter* application. The trial judge held that:

> No expert psychiatric evidence was filed on this application. I am, however, prepared to accept, for the purposes of this application, that Mr. Chan has an arguable case that his actions were not voluntary at the time he attacked his father and Ms. Witteveen.

> Based on the whole of the evidence, I conclude that, at the time of the offences, Mr. Chan was experiencing a psychotic episode that rendered him incapable of knowing that his actions were wrong.[1]

Because the psychotic episode was caused by the mushrooms and not an ongoing psychotic illness or by Mr. Chan's mild traumatic brain injury, the NCR exemption under s.16 of the Code was not available to him. The Court further found that s.33.1 barred Mr. Chan from relying on a psychosis that was caused by his voluntary consumption of mushrooms. In response to the constitutional challenge, the trial judge found that s.33.1 violated ss.7 and 11(d) of the *Charter* but was upheld under s.1.

The Crown did not call any evidence at trial on s.1 but relied on the statutory purpose and legislative debates. As summarized by the trial judge:

> The court is somewhat disadvantaged because the Crown elected to file virtually no evidence on the application. They submitted some Parliamentary Hansards reflecting debate when the legislation was tabled in Parliament. They also submitted a few selected transcripts of submissions made to the Standing Committee on Justice and Legal Affairs when the provision was being considered. Most of this material reflects submissions and not evidence. There is arguably some minimal evidence provided in submissions by two physicians made to the Standing Committee linking intoxication and sexual violence. But that is the extent of it.[2]

The trial judge accepted references to evidence submitted in the Standing Committee hearings that there exists a strong linkage between intoxication and violence.

The trial judge's s.1 analysis is arguably of greatest importance to the discussion at the CCLISAR workshop.

In terms of the objective of ss.33.1, the trial judge held that the legislative objects are "the protection of women and children from intoxicated violence and ensuring accountability of those who commit offences of violence while intoxicated" and that these objectives "are pressing and substantial concerns."[3]

On rational connection, the trial judge held that there was clearly a rational connection between the legislation and the goal of ensuring accountability by intoxicated offenders for crimes of violence committed while intoxicated, but that it was "less clear" how the section "does much to protect women and children from violence," noting that s.33.1 would not deter individuals from drinking "in the off chance they render themselves automatons and hurt someone." Accordingly, he found only a rational connection to the objective of accountability.

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[1] *R v. Chan* 2018 ONSC 7158 at paras. 11 and 90 (Chan trial judgment).
[2] Chan trial judgment, para. 124.
[3] Chan trial judgment at para. 121.

On minimal impairment, the trial judge held that while the impairment of Charter rights "is certainly not minimal", the test was nevertheless met because of various mitigating factors and considerations:

1. The legislation applies only to general intent offences;

2. The legislation applies only to offences that interfere with or threaten to interfere with the bodily integrity of another person (and not property offences); and

3. The limitation on the right only applies to self-induced intoxication. "There is a moral blameworthiness attached to getting oneself so intoxicated as to lose control of one's faculties. Individuals caught within the net of this provision are not entirely morally blameless." (para. 134).

4. Parliament considered other alternative provisions, such as a new offence of criminal intoxication or a special verdict of not criminally responsible because of intoxication, and rejected them for good reason, and Parliament in law is not required to choose the absolutely least intrusive alternative to meet its objectives; and

5. The Court noted that in the "big picture" the rarity of the automaton defence means that the rights of accused in general are minimally impaired, but agrees that the impairment on the individual accused is "substantial".

Under the balancing step, the trial importantly held that no right is sacrosanct. Referring to the limits on the right of self-incrimination upheld in *BC Motor Vehicles Act*, and the approach to s.7 and s.1 in *Bedford*, the trial judge held that other societal interests and broader social concerns may be addressed under the s.1 analysis, including the equality and security of person rights and interests of women and children.

He concluded that:

> Parliament is entitled to express the view that extreme self-intoxication is morally blameworthy behaviour. It is entitled to express the view that those who voluntarily become extremely intoxicated and hurt others while in that condition are to be held accountable…Parliament was entitled to weigh in with its view of the morally appropriate balance between intoxicated offenders and the rest of society and to hold intoxicated offenders to account. Parliament's balancing is, in my view, entitled to deference.

Finally, the trial judge held that the proportionality test is met since "the morally innocent will not be punished" (those who self-intoxicate and cause injury to others are not blameless) and the lack of voluntariness may be taken into account at sentencing.

***Facts of R v. Sullivan***

*R v. Sullivan* involved an accused who consumed 30 to 80 Wellbutrin tablets in a suicide attempt (psychosis is a known side effect of Wellbutrin), following which he attacked his mother with two

kitchen knives. It was accepted at trial that Mr. Sullivan was acting involuntarily when he stabbed his mother. The constitutionality of s.33.1 was not challenged. The defence rather was that s.33.1 did not apply since Mr. Sullivan had not voluntarily consumed the intoxicant. In the alternative, he also invoked the mental disorder defence. He was not successful on either count. With respect to voluntariness, the trial judge held that "Voluntary intoxication means that Mr. Sullivan consumed Wellbutrin when he knew or had reasonable grounds to believe that it might cause him to be impaired."[4]

A review of the Crown's appeal factum suggests that the facts of Sullivan as summarized in the ONCA decision are somewhat less complicated and somewhat more sympathetic than those adduced at trial. Sullivan was a drug addict (including a prior addiction to crack cocaine) who was hospitalized for experiencing hallucinations associated with Wellbutrin four months prior to the attack on his mother. The Crown's arguments in the appeal that Sullivan knew or should have known that the consumption of Wellbutrin could cause him to become psychotic were thus not as harsh or unreasonable as they appear in the judgment. At the hospital following his first admission for psychosis related to Wellbutrin, Sullivan admitted to smoking crack, taking meth and injecting Wellburtrin. The defence forensic psychiatrist acknowledged in cross-examination that Wellbutrin is known as a drug of abuse on the streets and has been called the "poor man's cocaine". The psychiatric evidence at trial was that Sullivan likely had a "narcissistic personality disorder with histrionic and anti-social traits" as well as a "poly substance use disorder." In respect of the suicide attempt, the evidence at trial was that Sullivan took an overdose of Wellbutrin while "feeling like an automaton" but then realized his mistake and took efforts to reverse the overdose by drinking water and attempting to induce vomiting. He believed the "storm had passed" and joined his mother for dinner. He next awoke in hospital after the attack.

***The ONCA Ruling***

The Court of Appeal ruled that s.33.1 violates ss.11(d) and 7 of the *Charter* in the three respects identified by the SCC in *Daviault* (summarized in the ONCA judgment at para 47 as follows):

1. **The Voluntariness Breach** – It would be contrary to the principles of fundamental justice (*Charter*, s. 7) and the presumption of innocence (*Charter*, s. 11(d)) to permit accused persons to be convicted for their involuntary acts, as those acts are not willed and therefore not truly the acts of the accused: *Daviault*, at pp. 74, 91;

2. **The Improper Substitution Breach** – It would be contrary to the presumption of innocence (*Charter*, s. 11(d)) to convict accused persons in the absence of proof of a requisite element of the charged offence, unless a substituted element is proved that inexorably or inevitably includes that requisite element. A prior decision to become intoxicated cannot serve as a substituted element because it will not include the requisite mental state for the offences charged: *Daviault*, at pp. 89-91; and

[4] *R v. Sullivan; R v. Chan* 2020 ONCA 333 at para.174 ("ONCA Judgment").

3. **The Mens Rea Breach** – It would be contrary to the principles of fundamental justice (*Charter*, s. 7) to convict accused persons where the accused does not have the minimum *mens rea* that reflects the nature of the crime: *Daviault*, at pp. 90-92.

Justice Paciocco's decision goes into detail on why the s.33.1 breaches ss.7 and 11(d). Justice Lauwers' concurring decision succinctly summarizes the issue as follows (at para. 198):

> Section 33.1 tries to sidestep *Daviault* by substituting the mental element associated with penal negligence for the mental element ordinarily required for the predicate violent acts. But, in *Daviault*, the Supreme Court found that this type of substitution – replacing the mental element for sexual assault with the mental element required for intoxication, for example – was a fatal flaw in the *Leary* rule. Did the design of s. 33.1 overcome the court's concern? I agree with my colleague that it did not.

The Crown did not concede the *prima facie* breach. The Crown argued that although s.33.1 engages the liberty interests of the accused, it complies with the principles of fundamental justice and the presumption of innocence. In this regard, the Crown's argument was summarized as follows:

a. Section 7 analysis does not involve a balancing of the law's salutary and deleterious effects, which is appropriately performed under s. 1;

b. Section 33.1 does not offend the principle from *Daviault*. The majority in *Daviault* prohibited courts from substituting self-induced intoxication for statutorily required elements. By creating a different statutory way to commit offences, Parliament did not run afoul of *Daviault*;

c. Section 33.1 does not offend the requirement for criminal liability of (*i*) a voluntary act and (*ii*) a blameworthy mental state. Both are required: (*i*) voluntary consumption of an intoxicant with (*ii*) actual or constructive knowledge of its potential effects; and

d. Section 33.1 does not permit criminal liability in the absence of a constitutionally required mental element. Liability under s. 33.1 requires intentional consumption leading to extreme intoxication akin to automatism, and actual or constructive knowledge of the risk of intoxication. It was open to Parliament to deem this intentional risk-taking to be criminal and to impose liability in accordance with the conduct's actual consequences.

The Crown attempted to narrow the SCC's ruling in *Daviault* by arguing that:

> "The majority did not hold that it would offend the *Charter* for Parliament to codify what *Leary* sought to achieve. At the very least, the majority left the question open in commenting that "[v]oluntary intoxication is not yet a crime" (emphasis added), and "it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk". That is what s. 33.1 does. Liability under s. 33.1 does not involve courts replacing statutory

> essential elements. In s. 33.1, Parliament created a new mode of committing violent, general-intent offences involving different essential elements. *Daviault* does not prohibit this."

The Crown argued that in relieving the Crown from proving voluntariness and intent with respect to the offence charged, s.33.1 "creates a different mode of committing an offence." Comparing s.33.1 to s.21 of the Code (that provides different modes of participation in an offence as a principal or party), the Crown argued that:

> s. 33.1 provides an additional route to liability. It applies only to general intent offences that include "as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person". When s. 33.1 applies, the Crown must prove every element of the violent, general intent offence charged other than intent and voluntariness with respect to the prohibited act. In addition, the Crown must prove the accused,
>
> - Was in a state of self-induced intoxication at the material time;
>
> - Departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person; and
>
> - Lacked the general intent and / or voluntariness of the offence charged "by reason of" the predicate act of self-induced intoxication – *i.e.* involuntariness or a lack of general intent for some other reason remains a defence.

On this reading of s.33.1, the "essential element" of self-induced intoxication requires proof of the accused's voluntary consumption of a substance and a corresponding mental element (actual or constructive knowledge of the risk of impairment), and argued that the accused need not "know to a nicety what the effect of the intoxicating substances will be" (citing R v. King 1962 SCC).

The Crown argued that s.33.1 does not impermissibly substitute because:

> s.33.1 does not substitute one fact for proof of an element required by Parliament or the Constitution, but rather creates a form of liability involving different statutory elements. When s. 33.1 applies, proof of voluntariness and intent with respect to the violent consequences of self-induced extreme intoxication is not a statutory essential element.

The Crown further argued that a mental element with respect to the violent act (violent consequences of self-induced extreme intoxication) is not constitutionally required:

> When s. 33.1 applies, liability is imposed for the unintended and / or involuntary consequences of what Parliament has determined to be a blameworthy predicate act. As the marginal note for s. 33.1(2) indicates, the provision imposes "[c]riminal fault by reason of intoxication". The preamble to s. 33.1's enacting legislation notes that Parliament (*i*) recognizes "a close association between violence and intoxication", (*ii*) holds "moral view

> that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it", and (*iii*) concluded it was "necessary to legislate a basis of criminal fault in relation to self- induced intoxication".
>
> Where an accused commits the predicate act of self-induced intoxication and, in a resulting state akin to automatism, commits a violent, general intent offence, s. 33.1 criminalizes the result. For offences like s. 33.1, structured to impose liability for the unintended consequences of a predicate act, the Constitution does not require proof of a discrete mental element attached to the act's consequences. The Supreme Court unanimously reached this conclusion in *R. v. DeSousa*, a case involving the constitutionality of the offence of unlawfully causing bodily harm. The Court held that although objective foreseeability of the risk of bodily harm is an element of that offence, this element was not constitutionally required.

The ONCA rejected all of the above arguments. On a statutory interpretation analysis, the Court did not accept the Crown's argument that the regime creates a new element of the offence of voluntariness to consume the intoxicant. Properly read the prosecuted act is the commission of the assaultive behaviour, not the self-induced intoxication (noting that the act of intoxication is benign without the assaultive conduct). The Court further held that even if s.33.1 could be read as the Crown argued, this did not avoid the problem of voluntariness or improper substitution. On the *mens rea* breach, the Court ruled that s.33.1 does not meet the test for a constitutionally compliant level of fault even on a criminal negligence standard. The violence in *Chan* and *Sullivan* were not reasonably foreseeable risks arising from the voluntary intoxication, and certainly not so foreseeable as to amount to a marked departure from standards of ordinary prudence to engage in the risky behaviour. The Court held that the violent act committed while an automaton cannot satisfy the marked departure, since moral fault cannot come from a consequence alone, but rather the direction or failure to direct the mind to the behaviour or the risk of the behaviour.

The Crown argued and the trial judge held that the purpose of the legislation is to hold offenders accountable for intoxicated violence and to protect victims from this violence. The ONCA rejected this definition of the legislative purpose as being overbroad. Instead the Court narrowed the legislated purpose to specifically targeting intoxicated violence committed while in a state of automatism, citing the two-fold purpose as follows: (1) to hold individuals who are in a state of automatism due to self-induced intoxication accountable for their violent acts (the "accountability purpose"); and (2) to protect victims, including women and children, from violence-based offences committed by those who are in a state of automatism due to self-induced intoxication (the "protective purpose").

The Court held that the accountability purpose is an "improper" and itself unconstitutional purpose and cannot serve as a pressing and substantial societal objective: "…given that the principles of fundamental justice at stake exist to define the constitutional preconditions to criminal accountability, the desire to impose accountability is itself an unconstitutional purpose" (para. 139).

> I am persuaded that the accountability purpose cannot be relied upon in the s. 1 evaluation, given that infringing constitutional limits on accountability in order to impose accountability is itself an unconstitutional purpose. (para. 146)

In terms of the protective purpose, the ONCA held that this was a substantial and pressing concern, but like the trial judge, held that this purpose was not rationally connected to s.33.1 since the provision does not act as a deterrent to intoxicated offenders.

Since the "accountability" purpose was held to be unconstitutional, if thus did not meet any of the other elements of the *Oakes* test. The "protective purpose" failed rational connection, since intoxicated offenders would not be deterred from reaching a state of automatism simply because of the removal of the defence in the *Code*.

Section 33.1 was held to fail minimal impairment for a variety of reasons, including that there were less impairing options open to Parliament, including leaving the *Daviault* defence in place (which would only be available in rare circumstances) and enacting a "stand-alone offence of criminal intoxication" (apparently no matter how constitutionally suspect).

On the overall proportionality analysis, the Court not surprisingly restated its concerns as they related to the breach analysis, that the legislation was not proportionate. Rather than summarize, this memo will conclude by excerpting the Court's analysis:

> [152] Moreover, as Cory J. recognized in *Daviault*, at p. 87, even leaving aside the other objections I have identified, it is not appropriate to transplant the mental element from the act of consuming intoxicants for the mental element required by the offence charged, particularly where the act of self-inducing intoxication is over before the *actus reus* of the offence charged occurs. This is what s. 33.1 seeks to do. This transplantation of fault is contrary to the criminal law principle of contemporaneity, which requires the *actus reus* and *mens rea* to coincide at some point: see *R. v. Williams*, 2003 SCC 41, [2003] 2 S.C.R. 134, at para. 35.
>
> [153] Put simply, 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.
>
> [154] Only the most compelling salutary effects could possibly be proportional to these deleterious effects. Yet, s. 33.1 achieves little. If not entirely illusory, its contribution to deterrence is negligible. I have already explained that the protective purpose relied upon carries little weight.
>
> [155] The Crown and supporting interveners argue that s. 33.1 has collateral salutary effects, such as: "(i) encouraging victims to report intoxicated violence, (ii) recognizing and promoting the equality, security, and dignity of crime victims, particularly women and children who are disproportionately affected by intoxicated violence, and (iii) avoiding normalizing and/or incentivizing intoxicated violence."
>
> [156] I see no reasoned basis for concluding that victims who would have reported intoxicated violence would be unlikely to do so because of the remote possibility that a

non-mental disorder automatism defence could be successfully raised, or that s. 33.1 plays a material role in preventing the normalization and incentivization of intoxicated violence. Section 33.1 addresses a miniscule percentage of intoxicated violence cases.

[157] As for recognizing and promoting the equality, security, and dignity of crime victims, it is obvious that those few victims who may see their offenders acquitted without s. 33.1 will be poorly served. They are victims, whether their attacker willed or intended the attack. However, to convict an attacker of offences for which they do not bear the moral fault required by the *Charter* to avoid this outcome, is to replace one injustice for another, and at an intolerable cost to the core principles that animate criminal liability.

# CHAPTER 32

An Act to amend the Criminal Code (self-induced intoxication)

[*Assented to 13th July, 1995*]

Preamble

WHEREAS the Parliament of Canada is gravely concerned about the incidence of violence in Canadian society;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children;

WHEREAS the Parliament of Canada recognizes that the potential effects of alcohol and certain drugs on human behaviour are well known to Canadians and is aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily;

WHEREAS the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it;

WHEREAS the Parliament of Canada desires 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, including those who are or may be victims of violence;

42-43-44 ELIZABETH II

# CHAPITRE 32

Loi modifiant le Code criminel (intoxication volontaire)

[*Sanctionnée le 13 juillet 1995*]

Préambule

Attendu :

que la violence au sein de la société canadienne préoccupe sérieusement le Parlement du Canada;

que le Parlement du Canada est conscient que la violence entrave la participation des femmes et des enfants dans la société et nuit gravement au droit à la sécurité de la personne et à l'égalité devant la loi que leur garantissent les articles 7, 15 et 28 de la *Charte canadienne des droits et libertés*;

que le Parlement du Canada est conscient des liens étroits qui existent entre la violence et l'intoxication et est préoccupé du fait que l'intoxication volontaire puisse être utilisée socialement et légalement pour justifier la violence, plus particulièrement contre les femmes et les enfants;

que le Parlement du Canada est conscient, d'une part, que les Canadiens connaissent les effets potentiels de l'alcool et de certaines drogues sur le comportement et, d'autre part, de l'existence de preuves scientifiques selon lesquelles la consommation de la plupart des substances intoxicantes, dont l'alcool, n'a pas en soi pour effet de faire en sorte qu'une personne agisse de façon involontaire;

que le Parlement du Canada considère, comme les Canadiens, que celui qui porte atteinte à l'intégrité physique d'autrui alors qu'il est dans un état d'intoxication volontaire est blâmable et qu'une telle conduite devrait engager sa responsabilité criminelle;

que le Parlement du Canada entend promouvoir et assurer la protection des droits que les articles 7, 11, 15 et 28 de la *Charte canadienne des droits et libertés* garantissent à tous, notamment aux victimes et aux victimes potentielles des actes de violence;

WHEREAS the Parliament of Canada considers it necessary to legislate a basis of criminal fault in relation to self-induced intoxication and general intent offences involving violence;

WHEREAS the Parliament of Canada recognizes the continuing existence of a common law principle that intoxication to an extent that is less than that which would cause a person to lack the ability to form the basic intent or to have the voluntariness required to commit a criminal offence of general intent is never a defence at law;

AND WHEREAS the Parliament of Canada considers it necessary and desirable to legislate a standard of care, in order to make it clear that a person who, while in a state of incapacity by reason of self-induced intoxication, commits an offence involving violence against another person, departs markedly from the standard of reasonable care that Canadians owe to each other and is thereby criminally at fault;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

que le Parlement du Canada estime nécessaire de fonder, dans la législation, la responsabilité criminelle par rapport à l'intoxication volontaire et aux infractions d'intention générale mettant en cause la violence;

que le Parlement du Canada reconnaît le principe de common law selon lequel l'intoxication à un degré moindre que celui qui empêche une personne d'avoir l'intention de base ou la volonté requise pour la perpétration d'une infraction criminelle d'intention générale ne constitue pas un moyen de défense reconnu en droit;

que le Parlement du Canada estime nécessaire et souhaitable que la loi prévoie une norme de diligence qui permette d'établir clairement que toute personne qui, alors qu'elle est dans un état d'intoxication volontaire, commet une infraction mettant en cause la violence contre autrui s'écarte d'une façon marquée de la norme de diligence raisonnable acceptée dans la société canadienne et, de ce fait, est criminellement responsable,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

R.S., c. C-46; R.S., cc. 2, 11, 27, 31, 47, 51, 52 (1st Supp.), cc. 1, 24, 27, 35 (2nd Supp.), cc. 10, 19, 30, 34 (3rd Supp.), cc. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4th Supp.); 1989, c. 2; 1990, cc. 15, 16, 17, 44; 1991, cc. 1, 4, 28, 40, 43; 1992, cc. 1, 11, 20, 21, 22, 27, 38, 41, 47, 51; 1993, cc. 7, 25, 28, 34, 37, 40, 45, 46; 1994, cc. 12, 13, 38, 44

L.R., ch. C-46; L.R., ch. 2, 11, 27, 31, 47, 51, 52 (1er suppl.), ch. 1, 24, 27, 35 (2e suppl.), ch. 10, 19, 30, 34 (3e suppl.), ch. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4e suppl.); 1989, ch. 2; 1990, ch. 15, 16, 17, 44; 1991, ch. 1, 4, 28, 40, 43; 1992, ch. 1, 11, 20, 21, 22, 27, 38, 41, 47, 51; 1993, ch. 7, 25, 28, 34, 37, 40, 45, 46; 1994, ch. 12, 13, 38, 44

**1. The *Criminal Code* is amended by adding the following after section 33:**

*Self-induced Intoxication*

When defence not available

**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).

Criminal fault by reason of intoxication

(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.

Application

(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.

Coming into force

**2. This Act shall come into force on a day to be fixed by order of the Governor in Council.**

**1. Le *Code criminel* est modifié par adjonction, après l'article 33, de ce qui suit :**

*Intoxication volontaire*

Non-application du moyen de défense

**33.1** (1) Ne constitue pas un moyen de défense à une infraction visée au paragraphe (3) le fait que l'accusé, en raison de son intoxication volontaire, n'avait pas l'intention générale ou la volonté requise pour la perpétration de l'infraction, dans les cas où il s'écarte de façon marquée de la norme de diligence énoncée au paragraphe (2).

Responsabilité criminelle en raison de l'intoxication

(2) Pour l'application du présent article, une personne s'écarte de façon marquée de la norme de diligence raisonnable généralement acceptée dans la société canadienne et, de ce fait, est criminellement responsable si, alors qu'elle est dans un état d'intoxication volontaire qui la rend incapable de se maîtriser consciemment ou d'avoir conscience de sa conduite, elle porte atteinte ou menace de porter atteinte volontairement ou involontairement à l'intégrité physique d'autrui.

Infractions visées

(3) Le présent article s'applique aux infractions créées par la présente loi ou toute autre loi fédérale dont l'un des éléments constitutifs est l'atteinte ou la menace d'atteinte à l'intégrité physique d'une personne, ou toute forme de voies de fait.

Entrée en vigueur

**2. La présente loi entre en vigueur à la date fixée par décret.**

# APPENDIX "B"

| | **The Leary Rule** | **Post-Daviault** | **Post-Robinson** | **Post-s.33.1** |
|---|---|---|---|---|
| **General Intent Offences** | Extreme Intoxication is no defence to general intent offences | Extreme intoxication may be a defence to a general intent offence, but only if the accused can demonstrate, on a balance of probabilities, that s/he was in an automatistic state | Extreme intoxication may be a defence to a general intent offence, but only if the accused can demonstrate, on a balance of probabilities, that s/he was in an automatistic state | Extreme intoxication is no defence to a general intent offence where the accused interfered with, or threatened to interfere with another person's bodily integrity |
| **Specific Intent Offences** | Extreme intoxication may be a defence to specific intent offences, but only if the accused can demonstrate s/he did not have the capacity to form the requisite intent | Extreme intoxication may be a defence to specific intent offences, but only if the accused can demonstrate s/he did not have the capacity to form the requisite intent | Intoxication may be a defence to specific intent offences, if, in the context of all of the evidence, a reasonable doubt is raised about whether the accused had the requisite intent to commit the offence in issue | Intoxication may be a defence to specific intent offences, if, in the context of all of the evidence, a reasonable doubt is raised about the whether the accused had the requisite intent to commit the offence in issue |

**APPENDIX "C"**

**CHRONOLOGY OF TRIAL DECISIONS ASSESSING THE CONSTITUTIONALITY OF S 33.1**

| Case | Finding on Constitutionality of s. 33.1 and Finding at Trial Proper | Analysis of competing s 7 interests | Discussion of s 15 equality rights | Appeal |
|---|---|---|---|---|
| ***R v Vickberg*, 1998 BCJ No 1034 (SC)** | - Constitutional[64]<br>- Infringes s 7 and s 11(d) of the *Charter*, but is justified under s 1<br>- Acquitted of assault with a weapon | No | No | - No |
| ***R v Decaire*, 1999 OJ No 6339 (Gen Div)** | - Constitutional<br>- Infringes s 7 and s 11(d) of the *Charter*, but is justified under s 1<br>- Convicted of aggravated assault | No | No | - *R v Decaire*, 1999 OJ No 4794 (CA)<br>- Appeal to ONCA dismissed.<br>- s 33.1 not considered. |
| ***R v Brenton*, 1999 CanLII 13930 (NWT SC)** | - Unconstitutional (on appeal from the Territorial Court)<br>- Infringes s 7 and s 11(d) of the *Charter* and is not justified under s 1<br>- Convicted at trial of sexual assault, assault and assaulting a peace officer x2. Convictions set aside on appeal. | No | No | - No further appeal. |

[64] Justice Owen-Flood noted that his comments on the constitutionality of s. 33.1 were *obiter* because the accused was found to be involuntarily intoxicated, therefore s. 33.1 did not apply.

| Case | Finding on Constitutionality of s. 33.1 and Finding at Trial Proper | Analysis of competing s 7 interests | Discussion of s 15 equality rights | Appeal |
|---|---|---|---|---|
| ***R v Dunn*, 1999 OJ No 5452 (SC)** | - Unconstitutional<br>- Infringes s 7 and s 11(d) of the *Charter* and is not justified under s 1<br>- Convicted of aggravated assault | Very limited discussion, due in part to the judge's difficulty identifying "the societal interests" the legislation seeks to protect (para 25-26) and the finding that the "preamble mis-states and overstates the safeguarded interests of society" (para 31). | No | - *R v Dunn*, 2002 OJ No 864 (CA)<br>- Appeal to ONCA in relation to sentence dismissed.<br>- s 33.1 not considered. |
| ***R v Jensen*, 2000 OJ No 4870 (SC)** | - Unconstitutional<br>- No reasons given<br>- Convicted of second degree murder | No | No | - *R v Jensen*, 2005 CanLII 7649 (ONCA)<br>- Appeal to ONCA dismissed. Did not consider s 33.1. |
| ***R v Cedeno*, 2005 OJ No 1174 (Ct J)** | - Unconstitutional<br>- Followed *Jensen*<br>- Convicted of sexual assault | No | No | No |

| Case | Finding on Constitutionality of s. 33.1 and Finding at Trial Proper | Analysis of competing s 7 interests | Discussion of s 15 equality rights | Appeal |
|---|---|---|---|---|
| ***R v Dow*, 2010 QJ No 8999 (SC)** | - Constitutional<br>- Infringes s 7 and s 11(d) of the *Charter*, but is justified under s 1<br>- Convicted at trial of second degree murder, attempted murder and careless use of a firearm x 2 | No | No | - *Dow c R*, 2014 QJ No 7451 (CA)<br>- Appeal to QCCA allowed in relation to jury instructions; no consideration of s 33.1.<br>- New trial ordered. |
| ***R v Fleming*, 2010 OJ No 5988 (SC)** | - Unconstitutional<br>- Infringes s 7 and s 11(d) of the *Charter* and is not justified under s 1<br>- Finding from trial proper not published | Very limited, tracking the reasoning in *Dunn*. | No | No |
| ***R v SN*, 2012 NuJ No 3 (Ct J)** | - Constitutional<br>- Infringes s 7 and s 11(d) of the *Charter* and is not justified under s 1<br>- Finding from trial proper not published | No | No | No |
| ***R v Chan*, 2018 OJ No 4731 (SC)** | - Constitutional<br>- Saved under s 1<br>- Convicted of manslaughter and aggravated assault | No | No | Pending |

| Case | Finding on Constitutionality of s. 33.1 and Finding at Trial Proper | Analysis of competing s 7 interests | Discussion of s 15 equality rights | Appeal |
|---|---|---|---|---|
| ***R v McCaw*, 2018 OJ No 4134 (SC)** | - Unconstitutional<br>- Infringes s 7 and s 11(d) of the *Charter* and is not justified under s 1<br>- Convicted of sexual assault | Very limited discussion, on the basis that both *Daviault* and the findings of previous courts on ss. 7 and 11(d) rendered detailed analysis unnecessary (paras 96, 109) and that the purpose of s. 33.1 set out in the preamble is "overstated" (paras 128-29). | No | No |
| ***R v Eddison*, 2019 BCJ No 1227 (Prov Ct)** | - Unconstitutional<br>- Followed *Chan*<br>- Convicted of assault<br>- Engages in no analysis of its own | No | No | No |