

# Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the *Criminal Code*

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## ABSTRACT

Section 33.1 of the *Criminal Code* is a legislated form of guilt-by-proxy. It allows the court to substitute the *mens rea* of voluntary intoxication for the *mens rea* of general intent offences that involve an element of personal violence. It represents a revival of the controversial *Leary* rule, albeit with limited application to crimes of violence. Parliament enacted section 33.1 notwithstanding the unequivocal view of the majority of the Supreme Court of Canada in *R v Daviault* that the *Leary* rule violated sections 7 and 11(d) of the *Charter* and could not be justified under section 1. It would appear, from reasons that echo the decision of the majority in that case, that section 33.1 similarly offends the *Charter*. However, despite the passage of more than twenty years since its enactment, and sharply divided trial court rulings on the *Charter* question, the Supreme Court has yet to decide the issue. It is recommended on the basis of the analysis set out in this paper that the

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provision be struck. Alternatively, it is proposed that the courts interpret the provision in a manner that effectively incorporates the constitutionally required minimal fault standard. Either way, the question of the constitutionality of section 33.1 must be resolved, failing which accused persons in Canada face the disconcerting prospect of differential treatment at law depending largely on the jurisdiction in which their case proceeds.

**KEYWORDS :** *Intoxication defence, voluntary intoxication, Charter of Rights and Freedoms, principles of fundamental justice, right to make full answer and defence, substance abuse, addiction, extreme intoxication akin to automatism, extreme intoxication akin to insanity, substance-induced psychosis, mental disorder, violence against women, and children.*

## I. INTRODUCTION

Historically, the law has viewed self-induced intoxication as the product of rational choice for which the accused is morally culpable. In his classic text, *A Treatise of the Pleas of the Crown*, Hawkins wrote that no leniency should be afforded to accused persons who commit offences while in a state of voluntary intoxication, saying that such a person “shall be punished for [the offence] as much as if he had been sober.”<sup>1</sup> Section 33.1 of the *Criminal Code*<sup>2</sup> is consistent with that norm. It is a legislated form of guilt-by-proxy, the purpose of which is to facilitate the prosecution of accused persons for violent acts committed in states of extreme intoxication. It operates so as to allow the court to rely on the *mens rea* of self-induced intoxication to establish the *mens rea* of the offence - and thereby ensure a conviction - in those cases where the Crown could not otherwise prove that the acts of the accused were either voluntary or intentional.

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<sup>1</sup> William Hawkins, *A Treatise of the Pleas of the Crown* 8<sup>th</sup> ed by John Curwood (London, UK: C Roworth Bell Yard, 1824) Vol 1 at B2. See also, *inter alia*, David McCord, “The English and American History of Voluntary Intoxication to Negate *Mens Rea*” (1990) 11:3 J Legal Hist 372; Jerome Hall, “Intoxication and Criminal Responsibility” (1944) 57:1 Harvard LR 1045; and RU Singh, “History of the Defence of Drunkenness in English Criminal Law” (1933) 49 Law Q Rev 528.

<sup>2</sup> *Criminal Code*, RSC 1985, c C-46, s 33.1.

In the seminal 1994 case of *R v Daviault*,<sup>3</sup> the majority of the Supreme Court of Canada was unequivocal in its view that the conviction of an accused person without proof of the minimal mental element of the offence offends the *Charter*<sup>4</sup> in a manner “so drastic and so contrary to the principles of fundamental justice” that it cannot be justified under section 1.<sup>5</sup> Parliament enacted section 33.1 notwithstanding the majority’s clear denunciation of the guilt-by-proxy regime under consideration in that case. In the circumstances, a *Charter* challenge to section 33.1 might have seemed inevitable.<sup>6</sup> However, despite the passage of more than 20 years, and sharply divided trial court rulings on the question, the Supreme Court of Canada has yet to determine the constitutionality of the provision. It had the opportunity to do so in the relatively recent 2011 case of *R v Bouchard-Lebrun*<sup>7</sup> but declined, ostensibly on the grounds that counsel had not raised the argument.<sup>8</sup>

It may be said that the Court’s reliance on section 33.1 in the *Bouchard-Lebrun* case reflects some underlying comfort with the provision.<sup>9</sup> Even if that is the case, it is incumbent on the Court to explain how the use of guilt-by-proxy in section 33.1 can be reconciled with the *Charter*, if not for the benefit of coherence in the law itself then for the sake of those accused

<sup>3</sup> *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4<sup>th</sup>) 469 [*Daviault*].

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>5</sup> *Ibid* at 92.

<sup>6</sup> See Isabel Grant, “Second Chances: Bill C-72 and the *Charter*” (1995) 33:2 *Osgoode Hall LJ* 379 [Grant]; Martin Shain, “The *Charter* and Intoxication: Some Observations on Possible *Charter* Challenges to an Act to Amend the Criminal Code (*Self-Induced Intoxication*) 1995, C-72” (1996) 23:4 *Contemporary Drug Problems* 731; and Heather MacMillan-Brown, “No Longer ‘Leary’ About Intoxication: In the Aftermath of *R v Daviault*” (1995) 59:2 *Sask L Rev* 311.

<sup>7</sup> *R v Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 SCR 575 [*Bouchard-Lebrun*].

<sup>8</sup> See Don Stuart, “Annotation on *Bouchard-Lebrun*” (2011) 89 *CR* (6th) 1; and HA Kaiser, “*Bouchard-Lebrun*: Unduly Limiting Toxic Psychosis and Reigniting the Dangerous Intoxication Debate” (2012) 89 *CR* (6th) 68, in which the authors criticize the decision of the Court not to initiate the *Charter* inquiry on its own motion. Kaiser described that decision as giving rise to a troubling new form of “osmotic constitutionalization.”

<sup>9</sup> Cf Dennis J Baker & Rainer Knopff, “*Daviault* Dialogue: The Strange Journey of Canada’s Intoxication Defence” (2014-2015) 19:1 *Rev Const Stud* 35 [Baker & Knopff].

persons whose prosecution turns on the question. Until the constitutionality of section 33.1 is settled, accused persons in Canada face the unsettling prospect of differential treatment at law based largely on the jurisdiction in which they are prosecuted. At the moment, it appears that they will be subject to conviction under section 33.1 in British Columbia, Quebec and Nunavut, where lower courts have upheld the provision.<sup>10</sup> They will not in Ontario or the Northwest Territories, where courts have declared it invalid.<sup>11</sup>

This paper offers an overview of the legal and political controversies that emanated from the *Daviault* decision and inspired the subsequent enactment of section 33.1 of the *Criminal Code*. It describes the essential elements of section 33.1, so as to make some sense of the practical scope of the provision and the narrow factual circumstances to which it might properly be applied. It also reports the outcomes of lower court cases, few though they are in number, in which the constitutionality of the provision was assessed. It proceeds from there to consider the *Charter* question anew. It is argued in the result, for reasons which largely echo the decision of the majority in the *Daviault* case, that section 33.1 offends sections 7 and 11(d) of the *Charter* and cannot be justified under section 1. The paper concludes with the recommendation that the Court interpret the provision in a manner that effectively incorporates the constitutionally required minimal fault standard or, better yet, strike down the provision in its entirety and

<sup>10</sup> *R v Vickberg* (1998), 16 CR (5<sup>th</sup>) 164, 54 CRR (2d) 83 (BCSC) [*Vickberg*]; *R v Dow*, 2010 QCCS 4276, 261 CCC (3d) 399 [*Dow*], appeal allowed on other grounds (2014) QCCA 1416; and *R v SN*, 2012 NUCJ 02, 99 WCB (2d) 841 [*SN*]. Other courts have similarly proceeded on the assumption that section 33.1 is constitutional without considering the *Charter* issue: *R v Peters*, 2014 BCSC 983, 114 WCB (2d) 420 [*Peters*]; *R c Côté*, 2013 QCCQ 4485, 2013 CarswellQue 4720; *R v Wells* (2013), 2013 CanLII 2932 (NL PC), 334 Nfld & PEIR 263 (Prov Ct); *R v Weitzel*, 2004 BCSC 1767, 64 WCB (2d) 161; *R v BJT*, 2000 SKQB 572, [2001] 4 WWR 741; *R v Martin*, [1999] OJ No 5066 (CA), 1999 CanLII 1708; *R v Frechette* (1999), 132 CCC (3d) 1, 118 BCAC 235 (BCCA); and *R v Bonnell*, 2015 NBCA 6, 321 CCC (3d) 247.

<sup>11</sup> *R v Dunn*, [1999] 28 CR (5<sup>th</sup>) 295, [1999] OJ No 5452 (Ont Sup Ct Just) [*Dunn*]; *R v Brenton* (1999), 28 CR (5<sup>th</sup>) 308, 180 DLR (4<sup>th</sup>) 314 (NWTSC) [*Brenton*], rev'd on other grounds 2001 NWTCA 1, 199 DLR (4<sup>th</sup>) 119; *R v Jensen*, [2000] OJ No 4870, 2000 CarswellOnt 6489 (Sup Ct Just) [*Jensen*]; *R v Cedeno*, 2005 ONCJ 91, 195 CCC (3d) 468 [*Cedeno*]; and *R v Fleming*, 2010 ONSC 8022, 94 WCB (2d) 252 [*Fleming*]. Cf *R v Decaire*, [1998] OJ No 6339 (Ct Just) [*Decaire*].

return to Parliament the task of formulating an offence that better matches the *mens rea* and *actus reus* of dangerous intoxication.

## II. HISTORY OF SECTION 33.1

### A. *R v Daviault*: Judicial Recognition of Extreme Intoxication Defence

The *Daviault*<sup>12</sup> case involved a factual matrix that is simultaneously pedestrian and peculiar. At issue were not uncommon allegations of sexual assault against a woman who was vulnerable by reason of age and disability. The accused was someone she knew. What makes the case unusual is the purported mental state of the accused at the time of the alleged offence. He was a chronic alcoholic. Although the accused did not take the stand at trial, it was suggested that he drank almost the entirety of a 40-ounce bottle of brandy in the hours preceding the alleged assault, in addition to a further seven or eight bottles of beer earlier in the day. A pharmacologist testified that consumption of these quantities and concentrations of alcohol would have produced in the accused a blood-alcohol ratio of between 400 and 600 milligrams per 100 milliliters of blood. Moreover, and more significantly, it was the opinion of the expert that extreme intoxication of this nature could trigger an episode of “l’amnésie-automatisme,” wherein the individual “loses contact with reality and the brain is temporarily dissociated from normal functioning” and “has no awareness of his actions ... and will likely have no memory of them the next day.”<sup>13</sup>

Arising from these facts was the question of whether an accused could assert a defence to the general intent offence of sexual assault on the basis of extreme intoxication akin to automatism. Until this case, it was well established in Canadian law that a partial defence was available in response to a charge of a specific intent offence if there was reasonable doubt as to whether the accused formed the specific intent required for conviction by reason of intoxication.<sup>14</sup> In such a case, the accused would be acquitted of

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<sup>12</sup> *Daviault*, *supra* note 3.

<sup>13</sup> *Ibid* at 105.

<sup>14</sup> The origins of the intoxication defence date to the 1920 decision of the *House of Lords* in *Director of Public Prosecutions v Beard*, [1920] AC 479, 12 ALR 846, which ruling the Supreme Court of Canada endorsed in the subsequent 1930 decision of *MacAskill v*

the specific intent offence and convicted instead of any lesser-included general intent offence.<sup>15</sup> It was less clear, however, whether a *full* defence should be similarly available in response to a charge of a general intent offence in circumstances where the accused lacked even the modest degree of general intent required for conviction.

On this point, the majority of the Supreme Court of Canada previously ruled in the 1978 case of *Leary v The Queen*<sup>16</sup> that intoxication is not a defence to a general intent offence. In most cases, it held, the *mens rea* of the offence could be inferred from the *actus reus* itself. Where the necessary inference could not be made, it was open to the court to substitute evidence that intoxication was voluntary. The use of substituted *mens rea* in this way came to be known as the *Leary* rule. Its purpose was to ensure the successful prosecution of accused persons for dangerous acts committed while impaired.<sup>17</sup> Laudable though that aim might be, the *Leary* rule nonetheless became the target of judicial criticism, particularly after the *Charter* was enacted in 1982. In the *Bernard*<sup>18</sup> case, for example, Wilson J. questioned its constitutionality. She suggested that an exception to the *Leary* rule might be required in cases of extreme intoxication, though she left the issue to be

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*The King*, [1931] SCR 330, 55 CCC 81. See also *R v George*, [1960] SCR 871, 128 CCC 289 and *R v Robinson*, [1996] 1 SCR 683, 133 DLR (4th) 42. The equivalent American law is discussed in Douglas B Marlowe, Jennifer B Lambert & Robert G Thompson, "Voluntary Intoxication & Criminal Responsibility" (1999) 17:2 Behav Sci & L 195.

<sup>15</sup> There is insufficient opportunity in this paper to discuss the merits of the distinction in law between "specific intent offences" and "general intent offences" for the purposes of the intoxication defence. Suffice it to say that the distinction has a long history in English and Canadian law: *Daviault*, *supra* note 3, at 115-126. It is a distinction that is nonetheless both curious and controversial. Ferguson pointedly describes it as "unprincipled, illogical and arbitrary": Gerry Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (2012) 57 SCLR (2d) 111 at 123 [Ferguson]. Despite this criticism, in the relatively recent case of *R v Tatton*, 2015 SCC 33, [2015] SCR 574, the Supreme Court of Canada defended the distinction and affirmed its continued use.

<sup>16</sup> *R v Leary*, [1978] 1 SCR 29, 74 DLR (3d) 103.

<sup>17</sup> See *Daviault*, *supra* note 3 at 114, where Sopinka J. described what he characterized as the "sound policy considerations" underlying the *Leary* rule. He wrote that "[s]ociety is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community".

<sup>18</sup> *R v Bernard*, [1988] 2 SCR 833, 45 CCC (3d) 1. See also *R v Penno*, [1990] 2 SCR 865, 59 CCC (3d) 344 [Penno].

decided in a future case.<sup>19</sup> Dickson C.J. was not so hesitant. In a separate decision penned in *Bernard*, he characterized the *Leary* rule as a deviation from foundational principles of Canadian criminal law and a plain violation of sections 7 and 11(d) of the *Charter*.<sup>20</sup>

It fell to the Supreme Court of Canada in *Daviault* to resolve the *Charter* question. On that issue, the Court divided. It was the reasoning of Cory J. that was supported by the majority. He described the *Leary* rule as “a true substitution” of self-induced intoxication for the *mens rea* of the offence notwithstanding the absence of “such a connection between the consumption of alcohol and the crime of assault that it can be said that drinking leads inevitably to the assault.”<sup>21</sup> The *mens rea* requirement is fundamental and integral to Canadian criminal law, he held, and one that could not be satisfied by the substitution of the intention to become intoxicated because the latter “simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime.”<sup>22</sup> In the result, the majority concluded that the substitution of the *mens rea* of voluntary intoxication had the effect of eliminating the minimal *mens rea* element of the offence contrary to the principles of fundamental justice guaranteed in section 7 of the *Charter*. It likewise violated section 11(d) since it allowed for the conviction of the accused even in the face of reasonable doubt as to an essential element of the offence. In Cory J.’s words:

<sup>19</sup> *Bernard*, *supra* note 18 at 889-890.

<sup>20</sup> *Ibid* at 850-851; Elizabeth Sheehy, “The Intoxication Defense in Canada: Why Women Should Care” (1996) 23:4 *Contemporary Drug Problems* 595 at 600. Sheehy reports that the divergence of judicial opinion in the *Bernard* case gave rise to some confusion on the question of whether an exception to the *Leary* rule ought to be recognized in cases of extreme intoxication akin to automatism or insanity. By way of illustration, she identified four cases decided after *Bernard* and prior to *Daviault* in which acquittals were granted in cases of extreme intoxication, and another five in which acquittals were denied in comparable circumstances.

<sup>21</sup> *Daviault*, *supra* note 3 at 87-88.

<sup>22</sup> *Ibid* at para 42. On this point, Cory J. applied the test articulated in *R v Vaillancourt*, [1987] 2 SCR 636, 39 CCC (3d) 118 and restated in *R v Whyte*, [1988] 2 SCR 3 at 18-19, 42 CCC (3d) 97, namely, that “[o]nly if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid”.

In my view, the mental element of voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy. It simply cannot be automatically inferred that there would be an objective foresight that the consequences of voluntary intoxication would lead to the commission of the offence. It follows that it cannot be said that a reasonable person, let alone an accused who might be a young person inexperienced with alcohol, would expect that such intoxication would lead to either a state akin to automatism, or to the commission of a sexual assault. Nor is it likely that someone can really intend to get so intoxicated that they would reach a state of insanity or automatism.<sup>23</sup>

It was the view of the dissent, led by Sopinka J., that the principles of fundamental justice do not require strict symmetry between *actus reus* and *mens rea*. They require only that the two are sufficiently proportionate. Sopinka J. wrote that “[t]he principles of fundamental justice can exceptionally be satisfied provided the definition of the offence requires that a blameworthy mental element be proved and that the level of blameworthiness not be disproportionate to the seriousness of the offence.”<sup>24</sup> This is achieved in the *Leary* rule, he held, at least in relation to the offence of sexual assault:

There are a few crimes in respect of which a special level of *mens rea* is constitutionally required by reason of the stigma attaching to a conviction and by reason of the severity of the penalty imposed by law. Accordingly, murder and attempted murder require a *mens rea* based on a subjective standard. No exception from the principle of fundamental justice should be made with respect to these offences and, as specific intent offences, drunkenness is a defence.

By contrast, sexual assault does not fall into the category of offences for which either the stigma or the available penalties demand as a constitutional requirement subjective intent to commit the *actus reus*. Sexual assault is a heinous crime of violence. Those found guilty of committing the offence are rightfully submitted to a significant degree of moral opprobrium. That opprobrium is not misplaced in the case of the intoxicated offender. Such individuals deserve to be stigmatized. Their moral blameworthiness is similar to that of anyone else who commits the offence of sexual assault and the effects of their conduct upon both their victims and society as a whole are the same as in any other case of sexual assault. Furthermore, the sentence for sexual assault is not fixed. To the extent that it bears upon his or her level of moral blameworthiness, an offender's degree of intoxication at the time of the offence may be considered during

<sup>23</sup> *Daviault*, *supra* note at 91. Voluntariness is sometimes treated as an element of the *actus reus* of the offence: *R v Parks*, [1992] 2 SCR 871 at 1, 75 CCC (3d) 287 and *R v Théroux*, [1993] 2 SCR 5 at 12, 19 CR (4<sup>th</sup>) 194. Cory J. expressly stated at para 66 that his reasoning applies regardless of whether voluntariness is characterized as part of the *mens rea* or *actus reus* of an offence.

<sup>24</sup> *Ibid* at 118.

sentencing. Taking all of these factors into account, I cannot see how the stigma and punishment associated with the offence of sexual assault are disproportionate to the moral blameworthiness of a person like the appellant who commits the offence after voluntarily becoming so intoxicated as to be incapable of knowing what he was doing. The fact that the *Leary* rule permits an individual to be convicted despite the absence of symmetry between the *actus reus* and the mental element of blameworthiness does not violate a principle of fundamental justice.<sup>25</sup>

Sopinka J. applied the same logic to section 11(d) of the *Charter*. He held that the voluntariness requirement is not absolute, and that prosecutions can proceed in the absence of proof of voluntariness on an exceptional basis where the accused is found to have brought about that condition through voluntary intoxication.

Cory J. firmly rejected the view that voluntary intoxication alone is sufficiently blameworthy to satisfy the requirements of the *Charter*. He aptly noted that “[v]oluntary intoxication is not yet a crime” and that “[a] person intending to drink cannot be said to be intending to commit a sexual assault.”<sup>26</sup> In the view of the majority, there must be a link between the *mens rea* requirements of the offence and the prohibited acts, “that is to say that the mental element is one of intention with respect to the *actus reus* of the crime charged...and reflect the particular nature of the crime.”<sup>27</sup> Moreover, “to deny that even a very minimal mental element is required for [the general intent offence of] sexual assault offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1.”<sup>28</sup>

On the contrary, the majority held, accused persons who lack *mens rea* owing to extreme intoxication *akin to automatism or insanity* are entitled under the *Charter* to an acquittal. Cory J. set out the parameters of that defence – which included a rare reverse onus – as follows:

Just as in a situation where it is sought to establish a state of insanity, the accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication. This will undoubtedly require the testimony of an expert. Obviously, it will be a rare situation where an accused is able to establish such an extreme degree of intoxication. Yet, permitting such a procedure would mean that a defence would remain open that, due to the extreme degree of

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<sup>25</sup> *Ibid* at 119-120.

<sup>26</sup> *Ibid* at 92.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

intoxication, the minimal mental element required by a general intent offence had not been established. To permit this rare and limited defence in general intent offences is required so that the common law principles of intoxication can comply with the *Charter*.<sup>29</sup>

In the result, the majority allowed the appeal and directed a new trial, presumably so the accused might have the opportunity to advance this new “*Daviault* defence” in accordance with the requirements set out above. That trial never took place, however, as the complainant died (of unrelated causes).<sup>30</sup> The Crown apparently attempted to adduce the complainant’s prior testimony as an exception to the rule against hearsay, but was not successful. The charge against the accused was dismissed.<sup>31</sup>

### B. Bill C-72: Parliament Limits Scope of *Daviault* Defence

It is not known whether Cory J., or any of the other justices who supported his ruling, had any sense of the public furor their decision would spark. That furor was both swift and damning. Grant describes it in the following terms:

The suggestion that someone could be too drunk to be convicted of sexual assault shocked the public’s sense of justice and common sense. The facts of the case, that the victim was elderly and disabled, and that she was literally dragged from her wheelchair and sexually assaulted, brought the issue into stark focus for the public. Women’s groups were outraged and most media reports of the decision were negative. Even a United States State Department Country Report on Human Rights implicated *Daviault* as hindering the enforcement of laws prohibiting violence against women.<sup>32</sup>

Subsequent lower court rulings, in which accused persons were acquitted of violent crimes in circumstances similar those of in *Daviault*,

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<sup>29</sup> *Ibid* at 103.

<sup>30</sup> Robin Room, “Drinking, Violence, Gender and Causal Attribution: A Canadian Case Study in Science, Law and Policy” (1996) 23:4 *Contemporary Drug Problems* 649 at 650 [Robin].

<sup>31</sup> *Ibid*.

<sup>32</sup> Grant, *supra* note 6 at 383. See also Sheehy, *supra* note 20; Robin Room, *supra* note 30; Susan J Bondy, “Self-Induced Intoxication as a Defence in the Criminal Code of Canada: Issues and Discussion Around *Daviault v. R.*” (1996) 23 *Contemporary Drug Problems* 571 at 573-74; and Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto, ON: Thomson Carswell, 2014).

amplified the public outrage.<sup>33</sup> As Grant notes, “[i]t soon became apparent that the government had no choice but to act quickly...”<sup>34</sup>

Less than five months after the Supreme Court of Canada rendered its decision in the *Daviault* case, the governing Liberal Party tabled Bill C-72, entitled *An Act to amend the Criminal Code (self-induced intoxication)*.<sup>35</sup> The Minister of Justice expressly addressed the *Daviault* decision in his comments to Parliament on the motion for second reading of the bill, and made plain his shared concern for the protection of women and children:

The *Daviault* judgment raised obvious concerns for members of Parliament and indeed for all Canadians. The whole question of accountability under the criminal law was brought into sharp focus.

Specific concerns related to crimes of violence against women and children. Indeed the *Daviault* case itself involved an allegation of sexual assault against a woman. In the weeks that followed the release of the *Daviault* case, there were other cases in various parts of Canada applying its principle, each case involving allegations of violence against women.

Concern grew that a person might be charged with murder and defend on the basis of intoxication. If the extent of intoxication was established to be sufficiently extreme, that person might walk out of the courtroom entirely free because they were incapable of performing a specific intent involving murder and because the intoxication was such that they were exculpated from the general intent crime of manslaughter. The result would be that they would face no sanction at all.

Concerns were also expressed that people might manipulate the legal principles so as to intoxicate themselves to some extent for the purpose of committing a crime. They would then intoxicate themselves further afterward before apprehension and rely upon the degree of intoxication overall to escape liability for the crime.<sup>36</sup>

The drafters of Bill C-72 took the unusual step of articulating and particularizing these concerns in a lengthy preamble. That preamble warrants reproduction in full for the purposes of this analysis:

<sup>33</sup> See Sheehy, *supra* note 20 and Room, *supra* note 30.

<sup>34</sup> Grant, *supra* note 6 at 383.

<sup>35</sup> *An Act to amend the Criminal Code (self-induced intoxication)*, RSC 1995, c 32. In the years preceding the *Daviault* ruling, the federal government was engaged in a broader policy process, the object of which was to reform and modernize the *Criminal Code*. Among the proposed amendments under consideration at that time were specific provisions dealing within self-induced intoxication. The government accelerated that process - or at least those parts dealing with self-induced intoxication - as a result of *Daviault*. See Susan J Bondy, “A Summary of Public Consultation on Reform of the Criminal Code of Canada as Related to a Defense of Self-Induced Intoxication Resulting in Automatism” (1996) 23:4 *Contemporary Drug Problems* 583.

<sup>36</sup> *House of Commons Debates*, 35<sup>th</sup> Parl, 1<sup>st</sup> Sess, No 177 (27 March 1995) at 11037 (Hon Allan Rock) [*House of Commons Debates*].

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;

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;<sup>37</sup>

The actual amendments to the *Criminal Code* included in Bill C-72 were otherwise relatively short. They were limited to the addition of a new section 33.1, the terms of which are as follows:

- (1) It is not a defence to a 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) 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

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<sup>37</sup> An Act to amend the *Criminal Code* (self-induced intoxication), *supra* note 35.

involuntarily interferes or threatens to interfere with the bodily integrity of another person.

- (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.<sup>38</sup>

Parliamentarians engaged in a robust debate on the merits of the new provision, and the question of whether it would survive a *Charter* challenge. The Minister of Justice assured Parliament that it would.<sup>39</sup> Ultimately, Parliament voted to pass Bill C-72 without revision and without invoking the notwithstanding clause in the *Charter*. Section 33.1 was brought into force by regulation on September 15, 1995.<sup>40</sup>

### III. JUDICIAL INTERPRETATION OF SECTION 33.1

As noted at the outset of this paper, section 33.1 represents a form of guilt-by-proxy because it allows the court to rely on the *mens rea* of self-induced intoxication to establish the *mens rea* of a general intent offence. In effect, it revives the *Leary* rule, albeit with its application limited to general intent crimes of violence. Though the Supreme Court of Canada did not comment on the constitutionality of the provision in *Bouchard-Lebrun*, it did offer useful direction as to the circumstances in which it will apply. In particular, Le Bel J. held that the application of section 33.1 is subject to the following conditions:

- (1) The accused was intoxicated at the material time;
- (2) The intoxication was self-induced; and
- (3) The accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person.<sup>41</sup>

What follows is a discussion of each of these conditions, for the purpose of defining the practical scope of the provision.

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra* note 36.

<sup>40</sup> *An Act to Amend the Criminal Code*, *supra* note 35, proclaimed in force September 15, 1995, SI/95-101, (1995) C Gaz II, 2677.

<sup>41</sup> *Bouchard-Lebrun*, *supra* note 7 at para 89.

### A. Condition One: “the accused was intoxicated at the material time”

It is perhaps obvious that section 33.1 applies only in those cases where the accused was intoxicated at the time of the offence. What is important to note is that the Crown need not prove the existence of any particular mental condition arising from that intoxication. In *Bouchard-Lebrun*, the Supreme Court of Canada made clear that the provision applies to “any mental condition that is the direct extension of a state of intoxication,” even if the onset of that mental condition was not a “normal effect” of intoxication.<sup>42</sup> That said, the Crown need only have resort to section 33.1 if the nature and degree of intoxication is such that the individual was rendered “unaware of, or incapable of consciously controlling, their behaviour”<sup>43</sup> and “lacked the general intent or the voluntariness required”<sup>44</sup> for conviction as a result. This language clearly captures the mental state described in the *Daviault* case as “extreme intoxication akin to automatism or insanity.” That is a discrete and particular mental state. It is one that is qualitatively different than the experience of aggression or disinhibition typically associated with alcohol and certain other drug use,<sup>45</sup> for which no defence is available in Canadian law.

Pharmacological research suggests that only a limited class of substances can produce a mental state *akin to automatism*. These are known as dissociative anesthetics, and include ketamine (“Special-K”) and phencyclidine (“angel dust”).<sup>46</sup> Alcohol is not a dissociative anesthetic.<sup>47</sup> As early as October 1995, Kalant and others reported to the House of Commons Standing Committee on Justice and Legal Affairs that there was no scientific evidence to support the contention that intoxication by alcohol alone, no matter how extreme, could produce a mental state akin to

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<sup>42</sup> *Ibid* at para 91. In *Bouchard-Lebrun*, the Supreme Court of Canada specifically rejected the argument that toxic psychosis was excluded from the ambit of section 33.1 on the purported view that psychosis was not a normal effect of ecstasy use.

<sup>43</sup> *Criminal Code*, *supra* note 2, s 33.1(2).

<sup>44</sup> *Ibid* s 33.1(1).

<sup>45</sup> See Anne M Day et al, “Executive Functioning in Alcohol Use Studies: A Brief Review of Findings and Challenges in Assessment” (2015) 8:1 *Curr Drug Abuse Rev* 26.

<sup>46</sup> Harold Kalant, “Intoxicated Automatism: Legal Concept vs. Scientific Evidence” (1996) 23:4 *Contemporary Drug Problems* 631 at 643.

<sup>47</sup> *Ibid* at 638, wherein Kalant reported that, at most, alcohol may trigger automatism in those with underlying, independent physical and psychiatric disorders.

automatism.<sup>48</sup> As set out above, Parliament likewise noted in the preamble of Bill C-72 that it was “aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily.”<sup>49</sup> It is not known why the Crown did not call evidence to this effect in the *Daviault* case. It subsequently did so with success in the 2010 case of *R v Dow*.<sup>50</sup> In that case, the Quebec Superior Court found as a matter of fact that the accused’s allegations of alcohol-induced automatism were not scientifically supported. The court concluded on the strength of that evidence that “the defence of extreme intoxication akin to automatism induced by an over-consumption of alcohol does not exist anymore in Canadian criminal law.”<sup>51</sup>

It would appear, in reliance on *Bouchard-Lebrun*,<sup>52</sup> that section 33.1 also captures experiences of substance-induced psychosis. Among those substances listed in the *Diagnostic and Statistical Manual of Mental Disorders* as potential triggers of psychosis are alcohol, cannabis, hallucinogens (including phencyclidine), inhalants, and stimulants (including cocaine), as well as sedatives, hypnotics, and anxiolytics.<sup>53</sup> That said, whether or not an episode of psychosis manifests in association with the use of one or more of these substances seems to depend not only on the pharmacological effect of the substances themselves but also the neurobiological constitution of the user and that user’s exposure to environmental stressors.<sup>54</sup> In the *Bouchard-*

<sup>48</sup> Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 35th Parl, 1st Sess, No 161 (13 June 1995). It does not appear on the basis of a survey of subsequent research that the findings articulated by Kalant have been subsequently challenged or otherwise displaced. See also *Dow*, *supra* note 10, wherein the court summarizes the contents of comparable expert evidence adduced by the Crown in that case.

<sup>49</sup> *An Act to amend the Criminal Code (self-induced intoxication)*, *supra* note 35.

<sup>50</sup> *R v Dow*, *supra* note 10 at paras 101-102.

<sup>51</sup> *Ibid* at para 102. This outcome is consistent with more recent findings reported in Mark R Pressman & David S Caudill, “Alcohol-Induced Blackout as a Criminal Defense or Mitigating Facts: An Evidence-Based Review and Admissibility as Scientific Evidence” (2013) 58:4 J Forensic Sciences 932.

<sup>52</sup> *Bouchard-Lebrun*, *supra* note 7.

<sup>53</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition (Washington, DC: American Psychiatric Association, 2013) at 110-11 “Substance/Medication-Induced Psychotic Disorder.”

<sup>54</sup> See, *inter alia*, Gregory B Leong, Sarah E Leisenring & Margaret D Dean, “Commentary: Intoxication and Settled Insanity - Unsettled Matters” (2007) 35:2 J of the American

*Lebrun* case, the accused committed grievous assaults while in a state of ecstasy-induced psychosis, or what the court referred to as “toxic psychosis.” The assaults were intentional, and apparently justified in the mind of the accused on religious grounds.<sup>55</sup> It was found that, by reason of the psychosis, the accused was incapable of distinguishing right from wrong. In other words, he was in a state of extreme intoxication *akin to insanity*. Of particular significance is the fact that the Supreme Court of Canada applied section 33.1 notwithstanding evidence that the assaults were deliberate. This suggests that a psychotic intent to commit acts of violence does not constitute “general intent” for the purposes of section 33.1.<sup>56</sup>

It is theoretically possible that section 33.1 could also apply in those cases where the nature and degree of intoxication, although not extreme, was sufficiently severe to cause the individual to make a mistake of fact as to an essential element of the offence and lack the general intent required for conviction as a result. By way of example, an accused may be convicted of the general intent offence of assaulting a police officer pursuant to section 33.1 even if he was mistaken as to the identity of the victim owing to the effects of intoxication. Resort to section 33.1 in such a case is only necessary, however, if the *Daviault* defence is found to extend to cases of mistake of fact.<sup>57</sup> This is an aspect of the *Daviault* ruling that has been largely

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Academy of Psychiatry and the L 183; and Robert F Leeman, Jon E Grant & Marc N Potenza, “Behavioral and Neurological Foundations for the Moral and Legal Implications of Intoxication, Addictive Behaviors and Disinhibition” (2009) 27:2 Behav Sci Law 237.

<sup>55</sup> *Bouchard-Lebrun*, *supra* note 7 at para 13.

<sup>56</sup> *Cf R v Paul*, 2011 BCCA 46, 299 BCAC 85 wherein the accused was convicted of three counts of second-degree murder and two counts of attempted murder for shootings committed while in a state of drug-induced psychosis. See also *R v Courville* (1982), 2 CCC (3d) 118 (Ont CA), *aff'd* [1985] 1 SCR 847. Although the argument has yet to be advanced in Canadian law, it is open to the accused to argue that the actions of an accused in those circumstances, although intentional, lacked *moral* voluntariness due to psychosis: *R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687.

<sup>57</sup> Prior to the *Daviault* ruling, intoxication could not be advanced by way of defence to a general intent offence on the grounds that the intoxication caused a mistake of fact to an essential element of the offence: *R v Moreau*, 26 CCC (3d) 359, [1986] 51 CR (3d) 359 (Ont CA). When the Court recognized in that case a full defence in circumstances where the accused lacked general intent by reason of extreme intoxication *akin to automatism or insanity*, by implication it opened the door to a comparable defence in circumstances where the accused lacked general intent by reason of mistake of fact: Ferguson, *supra* note 15.

overlooked. To date, there are no reported cases in which section 33.1 has been considered in this context.<sup>58</sup>

### B. Condition Two: “the intoxication was self-induced.”

The application of section 33.1 is subject to proof that intoxication was self-induced. Parliament did not define “self-induced” either within section 33.1 or elsewhere in the *Criminal Code*, leaving it instead to the courts to give meaning to the term. The Nova Scotia Court of Appeal had that opportunity in the 2007 decision of *R v Chaulk*.<sup>59</sup> At issue was the question of whether the Crown is required under section 33.1 to prove a subjective awareness of the risk of intoxication, or whether awareness of that risk could be assessed on an objective standard. Bateman J.A canvassed lower court decisions on the question,<sup>60</sup> as well as earlier case law on the definition of voluntary intoxication applicable to the impaired driving offences in the *Criminal Code*.<sup>61</sup> She formulated a three-part test that effectively synthesized these decisions. Intoxication is self-induced for the purposes of section 33.1 of the *Criminal Code*, she held, if:

- (i) The accused voluntarily consumed a substance which;
- (ii) S/he knew or ought to have known was an intoxicant and;
- (iii) The risk of becoming intoxicated was or should have been within his/her contemplation.<sup>62</sup>

<sup>58</sup> *Ibid.* Ferguson, *supra* note 15, notes that in *Bernard*, Dickson C.J. identified a similar “mistake of fact gap” in the application of the *Leary* rule, and that this gap has been “largely ignored” since then. He characterizes it as a violation of sections 7 and 11(d), which cannot be justified under section 1. See also section 273.2(a)(i) of the *Criminal Code*, *supra* note 2, which specifically prohibits the defence of mistake of fact as to consent to sexual contact where that mistake arose from the accused’s self-induced intoxication .

<sup>59</sup> *R v Chaulk*, 2007 NSCA 84, 223 CCC (3d) 174 [*Chaulk*].

<sup>60</sup> *Ibid.*, citing *Vickberg*, *supra* note 10 and *Brenton*, *supra* note 11.

<sup>61</sup> *Chaulk*, *supra* note 59: citing *R v King*, [1962] SCR 746, 35 DLR (2d) 386; *R v Mavin* (1997), 154 Nfld & PEIR 242 (CA), 119 CCC (3d) 38; *R v Rushton*, [1964] 1 CCC 382, 1963 CarswellNS17, (NSSCAD); *R v McDowell* (1980), 52 CCC (2d) 298, [1980] OJ No 488, (Ont CA); *R v Mack* (1975), 22 CCC (2d) 257, 1975 CarswellAlta 24, (Alta SCAD); and *R v Honish* (1991), 68 CCC (3d) 329, 85 Alta LR (2d) 129, (Alta CA), aff’d [1993] 1 SCR 458.

<sup>62</sup> *Chaulk*, *supra* note 59 at para 47.

In other words, as Roach explains, “consumption of drugs or alcohol will be excluded as self-induced intoxication under section 33.1 only if the accused did not know and could not reasonably be expected to know the risk of becoming intoxicated.”<sup>63</sup>

There is no apparent accommodation in the *Chaulk* test for circumstances of addiction, although it is worth noting that addiction was not part of the factual circumstances before that court in that case. Regardless, it would appear that consumption will be treated as voluntary without consideration of whether the individual was dependent on the drug and ingested it in response to a craving.<sup>64</sup> Practically speaking, evidence of addiction may in fact further the Crown’s case under section 33.1 to the extent it portrays the accused as an experienced user. It may be more readily inferred on the strength of such evidence that consumption was deliberate and done with subjective knowledge of the risks of intoxication, if not an actual intention to become intoxicated. An accused person in circumstances of co-occurring substance use and mental disorder (including addiction) must instead seek recourse through the defence of not-criminally-responsible-by-reason-of-mental-disorder pursuant to section 16 of the *Criminal Code*.<sup>65</sup>

Of particular significance for the purposes of this analysis is the fact that, pursuant to *Chaulk*, the Crown need not adduce evidence of an intention on the part of the accused to commit the offence itself. It likewise does not need to prove actual or objective foresight of the risk that the accused might “voluntarily or involuntarily [interfere] or [threaten] to interfere with the bodily integrity of another person.”<sup>66</sup> The Crown need not even show actual or objective foresight of the risk that intoxication could render an accused person “unaware of, or incapable of consciously

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<sup>63</sup> Kent Roach, *Criminal Law*, 5<sup>th</sup> ed (Toronto: Irwin, 2012) at 273. See also *Vickberg*, *supra* note 10, wherein section 33.1 was held not to apply because the accused had not intended to become intoxicated when he consumed Clonidine tablets prescribed for him to alleviate the symptoms of heroin withdrawal. He reasonably thought that the medication would improve his condition. The resulting intoxication was found by the court to be involuntary.

<sup>64</sup> See *R v Huppie*, 2008 ABQB 539, [2009] AWLD 1702.

<sup>65</sup> Whether the particular mental state constitutes a “mental disorder” for the purposes of that defence will turn on the application of the more holistic approach test: *Bouchard-Lebrun*, *supra* note 7 and Michelle Lawrence, “Drug-Induced Psychosis: Overlooked *Obiter Dicta* in *Bouchard-Lebrun*” (2016) 32 CR (7th) 151.

<sup>66</sup> *Criminal Code*, *supra* note 2, s 33.1(3).

controlling, their behaviour.”<sup>67</sup> The *Chaulk* test requires simply that the accused knew, or ought to have known, that there was a risk of intoxication arising from consumption. This is a strikingly low standard.

**C. Condition Three: “the accused departed from the standard of reasonable care... by interfering or threatening to interfere with the bodily integrity of another person.”**

Section 33.1 expressly imports a penal negligence standard of criminal fault.<sup>68</sup> Subsection 33.1(2) operates together with subsection 33.1(3) to deem acts of personal violence committed in a state of “self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour” to be marked departure from “the standard of reasonable care recognized in Canadian society.” For section 33.1 to apply, therefore, the Crown must prove only that the *actus reus* of offence included “an element of assault or any other interference or threat of interference by a person with the bodily integrity of another person.”<sup>69</sup> It obviously cannot do so in relation to property offences, such as the offence of break and enter contrary to section 348(1)(a) of the *Criminal Code*.<sup>70</sup> The *Daviault* defence remains available to accused persons charged with these offences.<sup>71</sup>

Otherwise, the Crown can rely on the penal negligence standard prescribed in subsection 33.1(2) to satisfy the *mens rea* requirements of general intent offences, notwithstanding that these offences require proof of subjective fault and voluntariness on the part of the accused. As noted in *Daviault*, however, certain crimes require a constitutionally compliant “special level of *mens rea*” due to the stigma associated with the offence and the severity of the sentence on conviction.<sup>72</sup> An exception to section 33.1

<sup>67</sup> *Ibid*, s 33.1(2). See also *Chaulk*, *supra* note 59, J Benedet’s Annotation.

<sup>68</sup> *R v Hundal*, [1993] 1 SCR 867, 79 CCC (3d) 97 and *R v ADH*, 2013 SCC 28, [2013] 2 SCR 269.

<sup>69</sup> *Criminal Code*, *supra* note 2, s 33.1(3).

<sup>70</sup> This was one of the offences cited by the Supreme Court of Canada in *Bouchard-Lebrun* as outside the scope of section 33.1, by reason of the fact that it does not include an element of personal violence. The Court noted that the accused was acquitted of that charge, as well as a related charge against him under section 463, in reliance on the *Daviault* defence: *Bouchard-Lebrun*, *supra* note 7 at para 35.

<sup>71</sup> *Ibid*. See also *R v Daley*, 2007 SCC 53 at para 43, 52 CR (6<sup>th</sup>) 221.

<sup>72</sup> *Daviault*, *supra* note 3 at 119.

would have to be recognized for any offence that has a constitutionally protected minimum *mens rea* requirement of this nature. Although the argument has yet to be made in any reported cases, it might be said that section 33.1 cannot apply to the prosecution of charges of unlawful act manslaughter, as that offence has been held to specifically include proof of the *mens rea* of the unlawful act.<sup>73</sup> Arguably, in cases involving unlawful acts of assault, the *mens rea* requirement for those assaults would have to be subjective and could not be satisfied by the *mens rea* of self-induced intoxication alone.

#### IV. LOWER COURT RULINGS ON CHARTER QUESTION

The British Columbia Supreme Court was among the first to consider the constitutionality of section 33.1 of the *Criminal Code*. It did so in the 1998 case of *R v Vickberg*.<sup>74</sup> The accused in that case was charged with attempted murder and assault with a weapon. He admitted these acts and advanced the *Daviault* defence. The accused claimed to have been in a state of non-insane automatism, purportedly induced by the over-consumption of prescription drugs, namely Clonidine and Imovane, which he took for therapeutic purposes. Owen-Flood J. accepted this evidence, but determined that section 33.1 was not applicable by reason of the fact that intoxication was not “self-induced.” Owen-Flood J. nonetheless went on to consider the constitutionality of section 33.1. He concluded, albeit *obiter*, that the provision violated both sections 7 and 11(d) of the *Charter*, but was saved by section 1. He described the nature of the *Charter* breach in the following terms:

The section effectively eliminates the minimal required *mens rea* for the general intent offences to which it applies. It substitutes proof of voluntary intoxication for proof of the intent to commit an offence of general intent, most commonly, assault. It is also obvious that the section, on its face, imposes criminal liability in the potential absence of any voluntariness in the actions of the accused. The legal explanations provided by Crown counsel in attempting to establish the constitutionality of this provision have not persuaded me that any other

<sup>73</sup> *R v Creighton*, [1993] 3 SCR 3, 83 CCC (3d) 346 [Creighton]. See also *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4<sup>th</sup>) 595 [DeSousa], wherein the Court excluded absolute liability offences, which are arguably analogous, from the category of conduct captured by the offence of unlawfully causing bodily harm contrary to section 269 of the *Criminal Code*.

<sup>74</sup> *Vickberg*, *supra* note 10.

conclusion can reasonably be drawn. I hold that s. 33.1 of the *Criminal Code* violates ss. 7 and 11(d) of the *Charter*.<sup>75</sup>

Ferteryga J. of the Ontario Court of Justice (General Division) reached the same conclusion later that year in the case of *R v Decaire*.<sup>76</sup> He expressly concurred with the reasoning of Owen-Flood J. in the *Vickberg* case with respect to the rational connection aspect of the *Oakes* test, and the view that “intoxication is a contributing factor to incidents of violence against women, children and others.”<sup>77</sup>

However, the Ontario Superior Court of Justice reached the opposite result in the subsequent case of *R v Dunn*.<sup>78</sup> It was handed down one year after the *Vickberg* and *Decaire* decisions. Wallace J. preferred a narrow view of the objectives of Bill C-72. He characterized the assertions in the preamble as both “mis-statements” and “overstatements”:

First, respecting its 'mis-statement'. Based on its stated premise that violence negatively affects the equality rights of women and children, their security of person and their access to Principles of fundamental justice, the preamble represents that s. 33.1 will rectify the imbalance. The preamble invites a balancing of victims' interests against an accused's rights as it purports to ensure victims' protection guaranteed by s. 7 of the *Charter*. In fact, what s. 7 guarantees to all Canadians is that their lives will be safeguarded before the courts by principles of fundamental justice. Section 7 promises procedural and substantive justice. It is misleading, I respectfully suggest, for Parliament to draft a preamble to legislation that appears to equate victims' rights [with] society's interests, victims' are, undoubtedly, a component of society's interests but society's interests must also include a system of law, governed by the principles of fundamental justice. Second, the preamble overstates society's interest to be addressed by s. 33.1. To say that it protects victims generally, and women and children particularly, against the combined effect of alcohol and violence, is a significant overstatement. The section cannot accurately be said to address victims' s. 7 rights; nor does it address any special needs of women or of children; rather, it sets out to protect victims against intoxicated automatons who act violently.<sup>79</sup>

Wallace J. determined that “the most society gains from s. 33.1 is the removal of one defence [from] violent, intoxicated automatons.”<sup>80</sup> He

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<sup>75</sup> *Ibid* at para 84.

<sup>76</sup> *Decaire*, *supra* note 11.

<sup>77</sup> *Ibid* at para 13.

<sup>78</sup> *Dunn*, *supra* note 11.

<sup>79</sup> *Ibid* at 9-10.

<sup>80</sup> *Ibid* at para 10.

considered this to be an “extremely narrow degree of protection,” and a result which did not outweigh the broader social interest in “preserving *mens rea*...as an essential element of Canadian criminal law.”<sup>81</sup> Wallace J. concluded that, although there is likely a rational connection between section 33.1 and the stated objectives of Parliament, given the reported link between intoxication and violence, and the disproportionate representation of women and children among victims of intoxicated offenders, section 33.1 failed the remaining branches of the proportionality test. In this regard he held as follows:

How serious is the infringement? In my view, there are few infringements that could be more serious. When an accused can be convicted without proof that he intended his actions or without proof that his actions were voluntary, then absolute liability has become a component of Canadian criminal justice, the presumption of innocence is eroded and principles of fundamental justice are seriously compromised. In my view, there is no acceptable proportionality between the good that s. 33.1 may achieve and the serious infringement of individual rights that it creates.<sup>82</sup>

Likewise, in the 1999 case of *R v Brenton*, the Northwest Territories Supreme Court similarly concluded that section 33.1 violated the *Charter*. Echoing the words of Cory J. in *Daviault*, Vertes J. held that “to deny a defence of [extreme-intoxication-akin-to-automatism] offends the *Charter of Rights and Freedoms* in a manner that is so drastic and contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*.”<sup>83</sup> Then J., also of the Ontario Superior Court of Justice, reached the same conclusion in the 2000 case of *R v Jensen*.<sup>84</sup>

Apart from these cases, and a 2005 decision of the Ontario Court of Justice in *R v Cedeno*, the question of the constitutionality of section 33.1

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<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid* at para 13-14.

<sup>83</sup> *Brenton*, *supra* note 11 at 127. In its decision on the appeal from this judgment the Northwest Territories Court of Appeal declined to consider the constitutionality of section 33.1 on the view that there was “an insufficient factual foundation at trial upon which to mount a constitutional challenge” and that “this was not a proper case in which to engage this important constitutional issue”: *R v Brenton*, 2001 NWTCA 1 at para 1, 199 DLR (4<sup>th</sup>) 119. It found that the accused in this case had failed to establish as a matter of fact that he was in a state of extreme intoxication akin to automatism at the time of the offences. It restored the convictions for the general intent offences at issue in this case.

<sup>84</sup> *Jensen*, *supra* note 11.

lay dormant for almost a decade.<sup>85</sup> In fact, in the *Cedeno* case, D.W. Duncan J.J. characterized the law – in Ontario at least – as settled. In reliance on the *Jensen* decision and notwithstanding academic commentary to the contrary,<sup>86</sup> he held as follows:

Courts have given the section mixed reviews... However, the law in Ontario at this point appears to be that the section offends section 7 and 11(d) of the Charter and is not saved by section 1. It is therefore unconstitutional and of no force and effect...<sup>87</sup>

The debate surrounding section 33.1 was subsequently revived with the 2010 decision of the Quebec Superior Court in *R v Dow*.<sup>88</sup> As noted above, in that case, the Quebec Superior Court rejected the accused's claim of alcohol-induced automatism on a factual basis:

The Court reckons that the judicial definition of extreme intoxication akin to automatism given by the Supreme Court in *Daviault* is inconsistent with the scientific evidence tendered in the case at bar, for situations involving over-consumption of alcohol alone. The scientific basis in *Daviault*, which was taken for granted then and after, led to a wrong conclusion. The latter must be set aside. This Court's decision ... determines that the defence of extreme intoxication akin to automatism induced by an over-consumption of alcohol does not exist anymore in Canadian criminal law. Therefore, it cannot be put to the jury.<sup>89</sup>

The Court nonetheless went on to consider the accused's challenge to the constitutionality of section 33.1. On that question, the Court adopted a broad view of the objectives of Bill C-72, finding that they concern the protection of women, the effects of violence and related alcohol consumption, and the accountability of intoxicated offenders for criminal conduct. It further held that these objectives were sufficiently pressing and substantial to satisfy the first branch of the *Oakes* test. In relation to proportionality, the Court found that the means embedded in section 33.1 are rationally connected to the objectives of the legislation, that section 33.1 represents a minimal impairment of *Charter* rights, and that any deleterious effect is proportionate to the salutary benefit of the legislation. With respect to the latter in particular, François Huot J.S.C. concluded:

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<sup>85</sup> *Cedeno*, *supra* note 11.

<sup>86</sup> *Ibid* at 16-17, citing K Smith, "Section 33.1: Denial of the *Daviault* Defence should be held Constitutional" (2000) 28 CR (5<sup>th</sup>) 350.

<sup>87</sup> *Ibid*. Cf *R v Goard*, 2014 ONSC 2215, 310 CCC (3d) 491.

<sup>88</sup> *Dow*, *supra* note 10.

<sup>89</sup> *Ibid* at paras 101-2.

[O]nly very few offenders could eventually be prejudiced by section 33.1, that is to say, those individuals:

- 1) charged with a general intent offence,
- 2) of violent nature,
- 3) committed after having voluntarily ingested,
- 4) one of the few drugs likely to bring about a state of automatism, and
- 5) being actually in a state of extreme intoxication.

What are the benefits, or salutary effects associated with the limitation? The most important is definitely the enhancement of the security and bodily integrity of Canadian citizens, and more particularly those of women and children. Studies tendered in evidence show that there is a close connection between violence and intoxication. Women and children represent particularly vulnerable targets for intoxicated offenders and deserve better protection in our free and democratic society.

Second, people who commit general intent crimes of violence while being in a state of extreme intoxication will not be allowed to rely on their intoxication to escape liability. They will be as criminally accountable for their behaviour as would be anybody performing the same acts while being sober. The Court agrees with the Intervener that it is reasonable for the legislator to impute blame on a perpetrator in such circumstances.

The legislation's deleterious effects are not insignificant. However, balancing the salutary and harmful repercussions of section 33.1, the Court concludes that the impact of the limitation is proportionate.<sup>90</sup>

In the result, the trial judge found that section 33.1 was saved by section 1. The Nunavut Court of Justice reached the same outcome in the more recent case of *R v S.N.*<sup>91</sup>

In *R v Fleming*, which was handed down one month after the *Dow* decision, the Ontario Superior Court took the opposite view yet again.<sup>92</sup> In that case, T.L.J. Patterson J. adopted the position previously expressed by the Ontario courts to the effect that section 33.1 violated both sections 7 and 11(d) of the *Charter*, and endorsed the reasoning articulated in *R v Dunn* concerning section 1. The Court specifically rejected the decision of the Quebec Superior Court in *R v Dow* with respect to section 1, and held that section 33.1 could not be justified under that provision.<sup>93</sup>

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<sup>90</sup> *Ibid* at paras 150-153.

<sup>91</sup> *SN*, *supra* note 10.

<sup>92</sup> *Fleming*, *supra* note 11.

<sup>93</sup> *Ibid* at paras 25-34.

## V. REVISITING THE CONSTITUTIONAL QUESTION

A. Sections 7 and 11(d) of the *Charter*

Section 33.1 violates section 7 of the *Charter* to the extent that it facilitates the conviction of an accused person for a general intent offence in the absence of proof that the criminal act was either voluntary or intentional. It likewise violates section 11(d) rights to make full answer and defence by permitting the conviction of an accused person in the face of reasonable doubt as to an essential element of the offence. These are not controversial arguments. Indeed, it is the shared view of the lower courts that section 33.1 violates both sections 7 and 11(d) of the *Charter*.<sup>94</sup> It is important to note, however, that they are nonetheless subject to a finding that the *mens rea* of self-induced intoxication is not sufficiently culpable, or sufficiently connected to acts of violence, to be accepted as a legitimate substitute for the *mens rea* of the offence.

On this point, the majority in *Daviault* considered research on the critical question of the correlation between substance use and violence, including findings that the relationship was not causal in nature but was instead informed by a complex array of factors that included environmental and physiological inputs. It determined on the strength of that evidence that an intention to become intoxicated does not “lead inexorably” to the conclusion that the accused intended the offence.<sup>95</sup> It would be open to the Crown on a future *Charter* challenge to advance new evidence on this issue. Indeed, research on the correlation between substance use and violence has advanced considerably since 1994. It is apparent from a scan of the literature published since that time that scientists and scholars have gone on to apply varying methodologies to the study of whether, or the extent to which, particular types of substances or patterns of substance use contribute to violence generally and to the commission of specific categories of offences in particular.<sup>96</sup> There is insufficient opportunity in this paper to engage in

<sup>94</sup> See also, *inter alia*, Ferguson, *supra* note 15; David Paciocco, “The Legacy of *Daviault*: Part I The Constitutionality of Bill C-72” (1995) 2:4 *Sexual Offences L Reporter* 105; and Heather MacMillan-Brown, “No Longer ‘Leary’ About Intoxication: In the Aftermath of *R v Daviault*” (1995) 59(2) *Sask L Rev* 311.

<sup>95</sup> *Daviault*, *supra* note 3 at 90.

<sup>96</sup> See, *inter alia*, Christine Wekerle & Anne-Marie Wall, eds, *The Violence and Addiction Equation: Theoretical and Clinical Issues in Substance Abuse and Relationship Violence* (New

a full review of this research. Suffice it to say that their findings do not appear to displace, at least not at this point in time, the essential conclusions reached by Cory J. in *Daviault*. If anything, they are confirmed.<sup>97</sup>

### B. Section 1 of the *Charter*

Where the controversy lies is instead in the question of whether the violation of sections 7 and 11(d) can be justified under section 1 of the *Charter*. The applicable test is set out in *R v Oakes*.<sup>98</sup> It has two parts. The first requires the government to prove that the goal of the legislation is “pressing and substantial.” In other words, it must be important. It is doubtful that the government would fail that part of the test in relation to section 33.1, especially given the particularity of intention expressed in the preamble to Bill C-72.<sup>99</sup> At the heart of the constitutional question is instead the second part of the test that requires proportionality in the means by which Parliament seeks to achieve its goals. In this part of the *Oakes* test, the court must be satisfied that there is a rational connection between

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York, NY: Brunner-Routledge, 2002); Stephen T Chermack et al, “Violence Among Men and Women in Substance Use Disorder Treatment: A Multi-Level Event-Based Analysis” (2010) 112:3 *Drug and Alcohol Dependence* 194; Cory A Crane et al, “Substance Use Disorders and Intimate Partner Violence Perpetration Among Male and Female Offenders” (2014) 4:3 *Psychology of Violence* 322; Neal Doran et al, “Adolescent Substance Use and Aggression” (2012) 39:6 *Criminal Justice & Behaviour* 748; Fleur L Kraanen et al, “Prediction of Intimate Partner Violence by Type of Substance Use Disorder” (2014) 46:4 *J Substance Abuse Treatment* 532; Alison B Hamilton & Nicholas E Goeders, “Violence Perpetrated by Women who Use Methamphetamine” (2010) 15:5 *J Substance Use* 313; Phillip H Smith et al, “Intimate Partner Violence and Specific Substance Use Disorders: Findings from the National Epidemiologic Survey on Alcohol and Related Conditions” (2012) 26:2 *Psychology of Addictive Behaviors* 236; and Monica F Tomlinson, Matthew Brown & Peter N S Hoaken, “Recreational Drug Use and Human Aggressive Behavior: A Comprehensive Review since 2003” 27 *Aggression & Violent Behavior* 9.

<sup>97</sup> See, *inter alia*, Sharon M Boles & Karen Miotto, “Substance Abuse and Violence: A Review of the Literature” (2003) 8:2 *Aggression and Violent Behaviour* 155; Peter N S Hoaken & Sherry H Stewart, “Drugs of Abuse and the Elicitation of Human Aggressive Behaviour” (2003) 28:9 *Addictive Behaviours* 1533; S Macdonald et al, “Predicting Violence Among Cocaine, Cannabis, and Alcohol Treatment Clients” (2008) 33:1 *Addictive Behaviours* 201. Note also that, in some studies, no such correlation was found. See e.g. Ian Martin et al, “Violence Among Street-Involved Youth: The Role of Methamphetamine” (2009) 15:1 *Eur Addict Res* 32.

<sup>98</sup> *R v Oakes*, [1986] 1 SCR 103, 24 CCC (3d) 321.

<sup>99</sup> See Grant, *supra* note 6 at 400-408.

section 33.1 and the goal of the legislation, that section 33.1 minimally impairs *Charter* rights, and that the salutary effects of the legislation outweigh the deleterious effects. These are examined below.

### *1. Rational connection*

The first part of the proportionality analysis requires consideration of whether the provision under examination is rationally connected to the goal of the legislation. The aspirations of Parliament are plainly set out in the preamble to Bill C-72. They might well be characterized in broad terms as protection of the public.<sup>100</sup> Although the preamble speaks specifically of the need to protect women and children, and to safeguard their rights in particular, section 33.1 does not discriminate in its application. The question is whether there is a rational connection between the goal of protection of the public and the content of the provision itself. Clearly there is. At its most basic, section 33.1 forecloses the *Daviault* defence in circumstances that would otherwise produce acquittals. In this way it facilitates the attribution of criminal responsibility and the imposition of criminal sanction on individuals who commit violent acts while intoxicated.

### *2. Minimal Impairment*

It will be considerably more difficult for the government to prove that section 33.1 minimally impairs the rights of accused persons guaranteed under sections 7 and 11(d) of the *Charter*. As noted above, it is on this question that the lower courts diverge markedly, with some characterizing the intrusion as modest and others as severe. Arguably, both points of view are correct. On the one hand, section 33.1 is narrow in scope. It is limited in its application to offenders who (a) commit general intent offences, (b) that involve an element of violence, (c) while intoxicated, (d) where intoxication was self-induced within the meaning of the *Chaulk* test, and (e) who lacked general intent or voluntariness as a result of that intoxication. Moreover, given what is known about the pharmacological effects of drugs and alcohol, it would appear that section 33.1 will be applied only in those cases where the accused (a) ingested a dissociative anesthetic and experienced dissociation as a result, or (b) consumed a psychogenic

<sup>100</sup> See, *inter alia*, *Vickberg*, *supra* note 10 and *Decaire*, *supra* note 11. See also the formulation of legislative purpose in *Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 SCR 180 [*Safarzadeh-Markhali*].

substance and experienced psychosis as a result. In Cory J.'s words, "[i]t is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful."<sup>101</sup> However, in those cases where section 33.1 is successfully applied, few though they may be, its impact is significant. Section 33.1 allows the conviction of the accused for conduct that was either involuntary or not intentional, and which the accused perhaps did not or could not have reasonably foreseen. It ensures a conviction where an acquittal would otherwise result. It is in this regard that the *Charter* breach might fairly be described as "drastic."<sup>102</sup>

It is easy to point to reasonable alternative approaches that Parliament could have taken in pursuit of its goal of protection of the public. Perhaps the most obvious is the development of a specific offence for acts of criminal intoxication. After all, as Cory J. noted in *Daviault*, "it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk."<sup>103</sup> The Law Reform Commission of Canada recommended just that as early as 1982.<sup>104</sup> Of particular interest is Ferguson's recent proposal for the development of an alternate included offence to capture acts committed without the requisite intention due to

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<sup>101</sup> *Daviault*, *supra* note 3 at 100. A scan of reported cases included in the QuickLaw and CanLii databases revealed only two cases in the 2014-16 period in which section 33.1 was applied; namely, *R v Madood*, 2015 ABQB 611, 25 CR (7<sup>th</sup>) 130 and *Peters*, *supra* note 10.

<sup>102</sup> *Daviault*, *supra* note 3 at 92-93.

<sup>103</sup> *Ibid* at 100. See also *Penno*, *supra* note 18 at 902-903.

<sup>104</sup> Law Reform Commission of Canada, "Criminal Law, The General Part: Liability and Defences" (1982) Ministry of Supply and Services Canada Working Paper 29, online: <<http://www.lareau-law.ca/LRCWP29ONE.pdf>>. Just prior to the enactment of Bill C-72, three bills were introduced (two in Parliament and one in the Senate), all of which proposed that the *Criminal Code* be amended to include this offence: Bill S-6, *An Act to amend the Criminal Code (dangerous intoxication)*, 1<sup>st</sup> Sess, 35<sup>th</sup> Parl, Canada, 1994-96; Bill C-303, *An Act to amend the Criminal Code (dangerous intoxication)*, 1<sup>st</sup> Sess, 35<sup>th</sup> Parl, Canada, 1994-95; and Bill C-305, *An Act to amend the Criminal Code (voluntary intoxication)*, 1<sup>st</sup> Sess, 35<sup>th</sup> Parl, Canada, 1994-95. For a discussion of comparable offences in Europe, see also See Articles 18.51-18.59 of Secretary of State for the Home Department & Secretary of State for Social Services, *Report of the Committee on Mentally Abnormal Offenders* (London, UK: Her Majesty's Stationery Office, 1975) and Benedikt Fischer & Jurgen Rehm, "Alcohol Consumption and the Liability of Offenders in the German Criminal System" (1996) 23:4 *Contemporary Drug Problems* 707.

intoxication.<sup>105</sup> There are other proposals, the relative merits of which vary on policy and political perspectives.<sup>106</sup> The point is simply that these alternatives exist. Although they may not have the popular appeal of Bill C-72, they link the requirements of *mens rea* to the prohibited consequences captured by the *actus reus* elements of the offence, as contemplated by the majority in *Daviault*. In that way, they further the goal of protection of the public without unduly interfering with *Charter* rights.

### 3. Proportionality

The final question within the second part of the *Oakes* test is whether the salutary effects of the provision outweigh the deleterious effects. In other words, does the ease of conviction generated by section 33.1 outweigh the derogation of the rights of accused persons to be free from criminal sanction for those acts committed involuntarily or without the requisite general intent. As noted above, the scope of section 33.1 is relatively narrow, and the number of accused persons affected by it is relatively few. The appropriate measure is not the *frequency* of the provision's application, however, but the *impact* of its application on an accused person's *Charter* rights.<sup>107</sup> In the case of section 33.1 the breach cannot be described as anything less than significant, severe, and grossly disproportionate. It exposes accused persons to the prospect of convictions for acts which they did not consciously control or which they did not intend. In doing so, it departs from foundational concepts of criminal fault embedded in Canadian criminal law. In the absence of evidence that establishes an incontrovertible link between substance use and violence, it is difficult to see how the provision might be characterized as reasonable, let alone demonstrably justified within the meaning of section 1.<sup>108</sup>

<sup>105</sup> Ferguson, *supra* note 15.

<sup>106</sup> See, *inter alia*, Paul B Schabas "Intoxication and Culpability: Towards an Offence of Criminal Intoxication" (1984) 42:2 UT Fac L Rev 147; Tim Quigley, "Reform of the Intoxication Defence" (1987) 33 McGill LJ 1; and Andrea Onn, "Self-Induced Intoxication: Balancing Principles of Justice and Responsibility" (1996) 23:4 Contemporary Drug Problems 687. See also *House of Commons Debates*, *supra* note 36, at 11037-38.

<sup>107</sup> *Canada v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101; and *R v Michaud*, 2015 ONCA 585, 339 OAC 41 [Michaud].

<sup>108</sup> See, *inter alia*, *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331; and *Safarzadeh-Markhali*, *supra* note 100, wherein McLachlin C.J. noted at para 57 that "[l]aws that deprive individuals of liberty contrary to a principle of fundamental justice are not easily

### C. Remedy

It is recommended that the Court strike down section 33.1. Parliament is best suited to the task of developing the appropriate policy and legal response to the phenomenon of substance-induced violence, albeit within the confines of the *Charter*. It is nonetheless conceivable that the Court might prefer a judicial fix. After all, Parliament is justified in criminalizing drug and alcohol-fuelled violence, if not for the promotion and protection of victims then for the maintenance of social order more generally.

To that end, and subject to any minimal constitutional fault standard applicable to the offence at issue,<sup>109</sup> the Court could make the application of section 33.1 conditional on proof that the accused consumed intoxicants with actual or objective foresight of the risk that consumption could produce the mental states that section 33.1 captures. In other words, if the accused was actually aware, or ought to have been aware, that consuming the intoxicants could render him or her “unaware of, or incapable of consciously controlling, their behaviour,”<sup>110</sup> there may be sufficient fault to support a conviction. That fault standard entails reckless or negligent assumption of the risks inherent in becoming unaware of, or unable to control, one’s behaviour. Arguably, though less than that prescribed by the majority in *Daviault*, it is nonetheless justified on the view that states of extreme intoxication are inherently dangerous and are conditions that the reasonable person should take steps to avoid. It should go without saying that others are at risk so long as individuals are not in control of their actions, or lack awareness of what they are doing. Additionally, or alternatively, the Court could require proof that the accused had actual or objective foresight of the risk that “he or she might interfere or threaten to interfere with the bodily integrity of another person while in that state of intoxication.”<sup>111</sup> Either way, the appropriate fault standard could be effectively incorporated through the adoption of a modified *Chaulk* test, wherein self-induced intoxication is defined to include the requisite degree

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upheld.” *Cf R v Michaud*, *supra* note 107.

<sup>109</sup> See, *inter alia*, *Creighton*, *supra* note 73 and *DeSousa*, *supra* note 73.

<sup>110</sup> *Criminal Code*, *supra* note 2, s 33.1(2).

<sup>111</sup> *Ibid*, s 33.1(3). In determining the applicable fault standard, the Court may be informed in its analysis by the reasoning of the majority in *Creighton*, *supra* note 73, wherein McLachlin J. (as she then was) made clear that an accused may be held responsible in law for unforeseen actions, and that there is no requirement of absolute symmetry between the moral fault of the accused and the prohibited consequences of a criminal act.

of fault, whether it be intentional consumption of known intoxicants coupled with an actual or objective awareness of the risk of onset of the mental states captured by section 33.1 and/or of the risk of the very acts of violence to which the provision is intended to apply.

Practically speaking, it should fall to the Crown in any given case to prove what actually was, or more importantly what ought to have been, in the contemplation of the accused in any given case. What the reasonable person might expect in relation to modest cannabis use, for example, could differ considerably from what should be expected from the excessive use of crystal methamphetamine. Though the proposed modification to the *Chaulk* test might appear at first blush to place a heavy burden on the Crown, that burden is mitigated by the fact that the Crown will have the ability to adduce evidence from medical experts called by the defence and likely also from the accused himself or herself. It must be remembered that the potential application of section 33.1 is triggered by the successful advancement of the *Daviault* defence. To make out that defence, the accused is subject to a reverse onus. The accused must adduce sufficient evidence to prove on a balance of probabilities that he or she was in a state of extreme intoxication akin to automatism at the time of the offence. As noted in *Daviault*, that will necessarily require the evidence of expert witnesses.<sup>112</sup> It likely also will require the accused to take the stand to attest to the nature and quantity of substances consumed and the experience of intoxication that resulted. The Crown may then cross-examine these witnesses on matters relevant to the application of section 33.1, including what the accused knew about the risks associated with use, and what the reasonable person ought to have known about the substances in question.

## VI. CONCLUDING COMMENTS

It is truly disquieting to think that an accused person could escape criminal liability for acts of violence because of a mental state that they induced willingly or by their own recklessness. The question is not whether Parliament or the courts are justified in holding these individuals to account under the criminal law, but how they might properly do so. Section 33.1 has obvious political appeal. It pegs liability on an accused, for crimes otherwise committed without general intent or voluntariness, on the

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<sup>112</sup> *Daviault*, *supra* note 3 at 103.

convenient view that acts of self-induced intoxication are themselves culpable. But this approach is crude and simplistic. It relies on anachronistic assumptions about alcohol and drug use. It overlooks the clinical realities of those who struggle with addiction, and those whose use of substances and experiences of intoxication might be motivated by, or the product of, neurobiological vulnerabilities. More importantly, it disregards foundational requirements of criminal fault, and unjustifiably offends principles of fundamental justice and the rights of accused persons to make full answer and defence.

For these reasons, section 33.1 violates the *Charter* and should be struck. That said, it would not be surprising if the Court preferred to either read in a fix, or otherwise interpret the provision in a manner that would bring it into compliance with the *Charter*. That could be achieved through the modification of the *Chaulk* test as noted above. The effect of that modification would be to individualize the application of section 33.1. Arguably, any law that seeks to assign criminal responsibility on the basis of substance use should be appropriately flexible in its application to accommodate the varying degrees of awareness and risk associated with diverse patterns of use. Patterns of consumption have evolved to include an array of more potent, mind-altering drugs. Some might be taken singularly, others in cocktails of varying content. Given these realities, the threshold for penal negligence must necessarily be case specific.

Either way, it is incumbent on the appellate courts to decide the question of the constitutionality of section 33.1 at the earliest opportunity, lest we default to the wholly unsatisfying form of osmotic constitutionalization that Kaiser has so aptly described in his critique of the *Bouchard-Lebrun* case.<sup>113</sup> It is indeed regrettable that the Court could not resolve the *Charter* issue in that case. Baker and Knopf assume too much, however, when they characterize that decision as a “strategically camouflaged second look” at the constitutionality of the provision.<sup>114</sup> Given the shortcomings of the trial record in *Bouchard-Lebrun*, and the complete lack of any evidentiary foundation on which the *Charter* argument could be properly assessed, it is understandable that the Court would defer the question to a future case.<sup>115</sup> It might even be said that the Court acted

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<sup>113</sup> Kaiser, *supra* note 8.

<sup>114</sup> Baker & Knopf, *supra* note 9 at 48.

<sup>115</sup> See *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4<sup>th</sup>) 385, wherein Cory J. cautioned

responsibly in doing so. Regardless, a decisive ruling is now long overdue. Narrow though the practical application of section 33.1 might be, the rights at stake are significant. Moreover, until the constitutionality of the provision is finally determined, accused persons will continue to be subject to differential treatment at law depending largely on the jurisdiction in which their case proceeds, and will risk divergent outcomes in the Canadian criminal justice system as a result.

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against the determination of *Charter* challenges in the absence of a proper evidentiary foundation.