

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondent

- and -

DAVID SULLIVAN and THOMAS CHAN

Appellants

- and -

**THE ATTORNEY GENERAL OF CANADA, WOMEN'S LEGAL EDUCATION AND
ACTION FUND INC., THE CANADIAN CIVIL LIBERTIES ASSOCIATION
and THE CRIMINAL LAWYERS' ASSOCIATION**

Interveners

**FACTUM OF THE INTERVENER
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.**

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PART I – OVERVIEW

1. At issue in these appeals is the constitutionality of Parliament’s decision to amend the common law to hold individuals criminally responsible when they commit violent acts while in a state of self-induced extreme intoxication. In reaching this decision, Parliament heard evidence and considered issues not raised in *R v Daviault*,¹ concerning: the gendered nature of violence, particularly sexual and domestic violence; the links between intoxication and such violence; and the policy reasons why those who harm others in a state of self-induced extreme intoxication should be held accountable. Parliament’s response in s 33.1 of the *Criminal Code* was a measured attempt to balance the s 7 and s 11 *Charter* rights of the accused, and the s 15, s 28, and s 7 rights of women and children, who are most often the victims of intoxicated male violence.

2. The Women’s Legal Education and Action Fund Inc. (LEAF) intervenes to argue that, in assessing the constitutionality of s 33.1, this Honourable Court must consider *all* of the rights Parliament was seeking to balance when enacting this provision, particularly the equality and security rights of women and children. This is essential for both the s 7 analysis² and any s 1 justification. Thus, this Court requires a clear understanding of Parliament’s objectives. The failure to consider the full range of rights implicated by s 33.1 has been a significant omission in past decisions considering its constitutionality,³ and a key reason why LEAF submits that the rules of *stare decisis* and judicial comity should apply to all questions of constitutional law. Decisions that fail to assess all of the *Charter* rights implicated by an impugned provision must be open to reconsideration by other judges of the same level of court.

¹ [1994] 3 SCR 63.

² LEAF is focusing its submissions on s 7 and s 1. It adopts the s 11(d) submissions of AG Ontario and AG Canada.

³ See Appendix “A”, summarizing the decisions that have considered the constitutionality of s 33.1.

PART II – STATEMENT OF FACTS

3. LEAF accepts the facts as stated by the parties.

PART III – ISSUES AND LAW

A. The objectives of section 33.1 are essential to the assessment of its constitutionality

4. The constitutionality of s 33.1 cannot be assessed without properly identifying the legislative objectives underlying its enactment. The nature of the social problem the provision is designed to address must be considered,⁴ including the appropriate balance to be struck between the rights of those who choose to become extremely intoxicated and then commit violent acts – and the rights of those who bear the consequences of those decisions as the victims of violence. The objectives are integral to the analysis under both s 7 and s 1 of the *Charter*.

5. Section 33.1 of the *Criminal Code* was enacted in 1995 in the wake of the Supreme Court of Canada's decision in *Daviault*. The records of the debates on Bill C-72, which ultimately enacted s 33.1, underscore that its objectives include both (1) ensuring the accountability of those who, in a state of self-induced intoxication, cause harm to others, and (2) protecting the security interests and equality rights of women and children, who are disproportionately subject to intoxicated violence, particularly sexual and domestic violence. These objectives were solidly grounded in the evidence considered by Parliament and are reflected in its preamble. There was considerable evidence about (a) the disproportionate impact of violence on women and children; (b) the role intoxication plays in such violence; and (c) the policy reasons why aggressors must be held accountable for intoxicated violence. Section 33.1 is a carefully tailored response to the role of self-induced extreme intoxication in violence against women and children.

⁴ *Thompson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, at paras 87–90; *Sauvé v Canada*, [2002] 3 SCR 519, at para 20; *Canada (Attorney General) v Bedford*, 2013 SCC 72, at paras 131–132, 138.

1. The disproportionate impact of violence on women and children

6. During the hearings conducted by the Standing Committee on Justice and Legal Affairs (the “Committee”) and the Parliamentary debates on Bill C-72, there was extensive discussion of the disproportionate impact of violence on women and children and their equality rights. The Committee heard that women and children (predominately girls) are the primary targets for coerced sex.⁵ Members of Parliament referred to Statistics Canada’s 1993 *Violence Against Women* survey, which indicated that half of all Canadian women had suffered some form of physical or sexual violence since the age of 16. The survey also found that 29% of women who had ever been married or in a common-law relationship had been assaulted by their husband, and 45% of women who had lived with an abusive male partner feared for their lives at some point.⁶

7. In light of this, both the Committee witnesses and the Members of Parliament who spoke to Bill C-72 emphasized that sexual violence is “an assault on human dignity and [that it] constitutes a denial of any concept of equality for women.”⁷ The Minister of Justice underscored the importance of s 33.1 in addressing the way violence undermines women’s equality rights:

[I]n my view the time has come for us to speak directly of such matters and to recognize that women are not equal in this society, for a number of reasons. One of the symptoms of that inequality is the extent to which they are victims of violence by men, and alcohol is very much tied up in that, statistically ... and factually and demonstrably. Let’s say so expressly. Let’s also acknowledge that inequality is depriving them of the very charter rights contemplated in the sections that are mentioned [in the preamble to Bill C-72].⁸

⁵ *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs [Minutes]*, No 97 (5 April 1995) at 9 (Prof Christine Boyle).

⁶ The survey results were published in Karen Rogers, “Wife assault: the findings of a national survey,” *Juristat*, vol 14, No 9 (March 1994) at 2, 4, 8. The results are referenced in *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11040 (Hon Allan Rock); *House of Commons Debates*, 35-1, no 224, vol 12 (22 June 1995) at 14474 (Hon Pierrette Venne).

⁷ *Minutes* No 97 *supra* note 10 at 7 (Prof Christine Boyle), paraphrasing the SCC’s comments in *R v Osolin*, [1993] 4 SCR 595 at 669; see also *Minutes* No 158 (6 June 1995) at 13 (Prof Elizabeth Sheehy) and *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11039 (Hon Allan Rock).

⁸ *Minutes*, No 98 (6 April 1995) at 22 (Hon Allan Rock).

8. Parliament also heard that the *Daviault* defence perpetuated this inequality, and was overwhelmingly invoked in cases involving violence against women. The Committee hearings began just over six months after *Daviault* was released, and witnesses testified that in that short time, there had already been at least nine cases (both before and after *Daviault*) where the defence had been successfully invoked, eight of which involved violence against women.⁹ Witnesses indicated the defence had been unsuccessfully attempted in at least six other reported sexual assault cases post-*Daviault*. The records of the Committee hearings make it clear that Parliament felt “the restriction of the defence of extreme intoxication defence [was] required to protect the rights of women and children as actual or potential victims of violence.”¹⁰

2. Alcohol is linked to violence

9. Several witnesses before the Committee emphasized the strong correlation between alcohol use and violent offences – particularly domestic and sexual violence.¹¹ Testimony highlighted the link between alcohol and violence against women in particular, and the fact that alcohol use was connected to more severe violence.¹² The Minister of Justice referenced findings from Statistics Canada’s *Violence Against Women* survey that abusers had been drinking in “more than 40 per cent of violent incidents” involving female victims, and that the “rate of assault for women living with men who drank heavily was six times higher than for those whose partners did not drink at all.”¹³

⁹ Elizabeth Sheehy, National Association of Women and the Law, “A Brief on Bill C-72: An Act to Amend the Criminal Code” (6 June 1995) submission to the Justice and Legal Affairs Standing Committee, at 8–9 [NAWL Brief]; *House of Commons Debates*, 35–1, no 224, vol 12 (22 June 1995) at 14471–14472 (Hon Pierrette Venne), and at 14482 (Hon Philip Mayfield).

¹⁰ *Minutes* No 163 (15 June 1995), at 3 (Hon Russell MacLellan).

¹¹ *Minutes* No 97 (5 April 1995) at 5 (Prof Patrick Healy), at 22 (Prof Christine Boyle); NAWL Brief, at 9–10; *Minutes* No 161 (13 June 1995) at 11, 14, 17. As AG Ontario notes at para 69-71 of its factum, although the Committee was focused most on alcohol, in part to refute the flawed scientific basis of the *Daviault* defence, their concerns (and objectives) were equally applicable to drug use.

¹² *Minutes*, No 158 (6 June 1995) at 15 (Susan Bazilli) and at 10, 12 (Prof Sheehy was specifically concerned that men were using alcohol as an excuse for their violence); NAWL Brief (6 June 1995), at 9.

¹³ *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11039 (Hon Allan Rock); *Minutes*, No 98 (6 April 1995) at 16 (Hon Allan Rock).

Other Parliamentarians also highlighted the link between alcohol and violence against women,¹⁴ citing statistics indicating that 55% of men who killed their partners had been drinking.¹⁵

3. The need to hold offenders accountable to further equality rights

10. Both the Committee hearings and Parliamentary debates highlighted the pressing social reasons for holding intoxicated offenders accountable for violence against women. Given the disproportionate impact of intoxicated violence on women, several witnesses indicated that failing to hold such offenders accountable perpetuated the inequality related to Canada's sexual assault laws, legitimized male violence against women, and deterred women from reporting these crimes.

11. Professor Christine Boyle testified at the Committee hearings that self-induced intoxicated violence against women sent the message that “[women are] so unimportant that it’s not worth the care it takes to avoid that behaviour.”¹⁶ Professor Elizabeth Sheehy elaborated on this concern during her testimony, explaining:

[E]xtreme intoxication as a defence works to reinforce and excuse male violence against women by attributing the blame to alcohol, minimizing the significance of the violence, focusing on expert accounts of men’s alleged mental states, and claiming that, pursuant to Charter values, someone in this state who admittedly has performed an act of physically assaulting, sexually assaulting, or even killing a woman is morally innocent.¹⁷

12. The submissions and testimony before the Committee indicated that some men viewed the extreme intoxication defence as an invitation to become deliberately intoxicated to avoid

¹⁴ *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11041 (Hon Pierrette Venne); and at 11043 (Hon Christiane Gagnon) (noting that alcohol is both “common” and a “prime factor” in spousal assaults).

¹⁵ *Minutes*, No 98 (6 April 1995) at 28 (Hon Sue Barnes); *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11041 (Hon Pierrette Venne) and at 11043 (Hon Christiane Gagnon).

¹⁶ *Minutes*, No 97 (5 April 1995) at 10 (Prof Christine Boyle);

¹⁷ *Minutes*, No 158 (6 June 1995) at 12 (Prof Elizabeth Sheehy); see also NAWL Brief (6 June 1995), at 10; *Minutes*, No 98, at 6 (per Hon Allan Rock).

criminal liability.¹⁸ Many Parliamentarians expressed concern about how the availability of the defence could telegraph to women that intoxicated male violence was acceptable or excusable.¹⁹ They emphasized that one of the important effects of s 33.1 would be to send the message that violence against women is not tolerated, which would, in turn, encourage women to report these crimes.²⁰ This was particularly important because, as one of the Committee members noted, only 10% of sexual assaults were being reported.²¹ The Committee was also alive to the potential ripple effects of excusing intoxicated violence against women. In addition to deterring women from reporting, the Committee heard testimony warning that the defence could affect decisions about the “founding” and prosecution of such offences.²²

13. The preamble to *An Act to Amend the Criminal Code (self-induced intoxication)*,²³ which introduced s 33.1 is entirely consistent with both the Parliamentary debates and the evidence heard by the Committee. Section 13 of the *Interpretation Act* confirms that the preamble “shall be read as part of the enactment intended to assist in explaining its purpose and object.”²⁴ As such, when assessing Parliament’s objectives, the preamble merits considerable weight.²⁵ It addresses the link between violence and intoxication and the reality that such violence disproportionately affects the equality rights of women and children. It also refers to the need to

¹⁸ *Minutes*, No 158 (6 June 1995) at 10, 12 (Prof Elizabeth Sheehy) and 15 (Susan Bazilli). See also Elizabeth Sheehy, “The Intoxication Defense in Canada: Why Women Should Care” (1996) 23 *Contemp Drug Probs* 595, at 610–611 [Sheehy Article].

¹⁹ See e.g. *House of Commons Debates*, 35–1, vol 8, (27 March 1995) at 11037–11039 (Hon Allan Rock); 11043–11044 (Hon Christiane Gagnon); 11048 (Hon Myron Thompson).

²⁰ *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11044 (Hon Christiane Gagnon), and at 11039 (Hon Allan Rock).

²¹ *Minutes*, No 98 (6 April 1995) at 16 (Hon Sue Barnes).

²² NAWL Brief, at 10–11; *Minutes*, No 158 (6 June 1995) at 7 (Prof Elizabeth Sheehy).

²³ SC 1995, c 32.

²⁴ RSC, 1985, c I–21.

²⁵ Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed.) (Markham: LexisNexis, 2014) at ss 14.28–14.29, 14.31.

hold such offenders accountable.²⁶ The preamble further references s 11 of the *Charter*, underscoring that Parliament was also concerned about the rights of the accused, and struck a balance between these competing rights. Its choice about the appropriate balance between these rights warrants deference.²⁷

B. Section 33.1 strikes an appropriate balance between competing s 7 Charter interests

14. LEAF adopts the submissions of both AG Ontario and AG Canada that s 33.1 does not violate s 7 of the *Charter* because any deprivation of accused's s 7 liberty interest accords with the principles of fundamental justice.²⁸ While LEAF agrees with much of the Attorneys General's s 7 analysis, LEAF does not agree with AG Ontario's contention that, post-*Bedford*, there is no room to consider or balance other interests under s 7.²⁹ LEAF maintains that any assessment of whether the impugned law violates s 7 must consider and seek to balance *all* of the *Charter* rights engaged by s 33.1, including the security interests of victims of self-induced intoxicated violence (predominately women and children), as well as the ss 15 and 28 equality rights that were at the forefront for Parliament when it passed Bill C-72.

15. The Supreme Court of Canada has repeatedly recognized that the principles of fundamental justice in s 7 are concerned not just with the rights of the accused but also with the protection of society and broader societal interests.³⁰ While recent Supreme Court of Canada decisions, such as *Bedford* and *Carter*, have found that competing moral claims and broader societal benefits are to be considered under s 1 and not s 7,³¹ the impugned laws in those cases, unlike s 33.1, were not

²⁶ *Supra* note 26, Preamble set out in full at Schedule B.

²⁷ *R v Mills*, [1999] 3 SCR 668, at paras 48, 58–60.

²⁸ See factum of AG Ontario at paras 35–54; factum of AG Canada at paras 6–34.

²⁹ See factum of AG Ontario at para 37.

³⁰ See e.g., *Cunningham v Canada*, [1993] 2 SCR 143 at 151–152.

³¹ *Bedford*, at paras 123, 125; *Carter v Canada*, 2015 SCC 5 at para 79–80. At least one professor has opined that societal interests will nevertheless invariably play a role in s 7 since the analysis so often requires consideration of the purposes or objectives of the laws found to interfere with s 7 interests. See,

concerned with balancing “similarly deserving” *Charter* rights.³² Since those decisions were released, the Supreme Court of Canada has re-affirmed the need to balance the *Charter* interests of accused and complainants in the context of sexual assault cases.³³ This approach is equally applicable in the context of s 33.1. This is consistent with the Supreme Court’s earliest *Charter* jurisprudence, holding that *Charter* provisions are not to be read in isolation, but rather interpreted in light of one another, and applied to everyone, not just the accused.³⁴

16. Equality rights enshrined in ss 15(1) and 28 of the *Charter* play a crucial role in interpreting the scope and content of other *Charter* rights. As Justice McIntyre observed in *Andrews v Law Society of British Columbia*, “The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*”.³⁵ The equality rights in ss 15 and 28 are an “interpretive lens” that have particular significance when determining “the scope of protection offered by s. 7”, and help ensure the Constitution is responsive “to the realities and needs of all members of society”.³⁶ The substantive equality guarantee informs the scope and content of the s 7 interests and the principles of fundamental justice engaged by s 33.1.

for example, Mark Carter, “*Carter v Canada: ‘Societal Interests’ Under Sections 7 and 1*” (2015) 78 Sask Law Rev 209 at 210–212.

³² Both *Bedford* and *Carter* were concerned with laws that were impugned as arbitrary, overbroad, and grossly disproportionate – different principles of fundamental justice than those raised in these appeals, including the prohibition on imposing liability in the absence of a morally voluntary act; the prohibition on absolute liability combined with the possibility of imprisonment, etc. The language of “similarly deserving rights” was used by McLachlin J (as she then was) in *Mills*, *supra* at para 61.

³³ See, e.g., *R v Goldfinch*, 2019 SCC 38 at para 39; *R v RV*, 2019 SCC 40 at para 35 and 40.

³⁴ *R v Rahey*, [1987] 1 SCR 588 at para 123; *Dubois v The Queen*, [1985] 2 SCR 350 at para 43; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at para 28.

³⁵ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 142 at 185.

³⁶ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [GJ] at paras 112 and 115, *per* L’Heureux-Dubé J concurring. See also *R v Darrach*, 2000 SCC 46 at para 70; *R v Mills*, [1999] 3 SCR 668 at paras 61, 90; *R v Osolin*, [1993] 4 SCR 595 at p 669; *R v Seaboyer*, *R v Gayme*, [1991] 2 SCR 577 at pp 698–99 *per* L’Heureux-Dubé J, dissenting but not on this point; *R v RV*, 2019 SCC 41 at para 40.

17. An equality analysis was entirely absent from *Daviault*.³⁷ None of the decisions that have found that s 33.1 violates s 7 have considered s 7 through the ss 15 and 28 interpretive lens, despite the fact that these rights lay at the core of Parliament’s objectives in passing Bill C-72. None have considered the competing s 7 interests engaged by s 33.1, in any meaningful way.³⁸

18. In enacting s 33.1, Parliament amended the common law and chose a regime different from that proposed by the majority in *Daviault*, in part because it considered a broader range of interests (and *Charter* rights) than those contemplated by the Court. As the Supreme Court stated in *Mills*, “Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. This is especially important to recognize in the context of sexual violence.”³⁹

19. Section 33.1 is not a simple reversal of the majority judgment in *Daviault*. While s 33.1(1) limits the defence of self-induced extreme intoxication, it does so only for general intent offences that involve interference with the bodily integrity of others (s 33.1(3)). The defence is available for all specific intent offences,⁴⁰ and for many general intent offences, such as property offences. Section 33.1(2) defines a standard of fault, drawn from the criminal negligence jurisprudence, for those who depart “markedly” from the standard of “reasonable care generally recognized in Canadian society”. It specifies that those who become so intoxicated as to be unaware of or incapable of controlling their behaviour and interfere with the bodily integrity of

³⁷ Sheehy Article *supra* note 20 at 602; Isabel Grant, “Second Chances: Bill C-72 and the *Charter*” (1996) 33 (2) Osgoode Hall L J 379 at 394–395 [Grant Article].

³⁸ See Appendix “A”, summarizing the decisions. In *R v Dunn*, [1999] OJ No 5452 (SCJ), Justice Wallace allows that there may be a need to balance the accused’s individual rights and societal interests in the s 7 analysis, but emphasizes that it is somewhat difficult to identify the “societal interests that the legislation specifically purports to protect”, perhaps due to her view that the Bill’s preamble both “misstates and overstates the safeguarded interests of society” (paras 23-24, 30). Justice Patterson adopts the *Dunn* analysis in *R v Fleming*, [2010] OJ No 5988 (SCJ) at paras 13-17.

³⁹ *Mills*, at para 58.

⁴⁰ This includes those known as “special stigma offences”. See Grant Article *supra* note 38, at 386.

another person have markedly departed from the standard of reasonable care. In other words, self-induced extreme intoxication, when paired with the violation of another person's bodily integrity, constitutes the requisite criminal fault for these offences. This marked departure standard has consistently been found to be constitutionally permissible under s 7 for a range of serious offences, other than for crimes of special stigma to which s 33.1 does not apply.⁴¹

20. When deciding to adopt this mode of liability, Parliament carefully considered the evidence about the disproportionate impact of violence on women and children, the correlation between alcohol and violence, and the need to hold offenders accountable in order to further women's equality rights. Against this backdrop, it decided there was a need to protect both the security interests and equality rights of those most likely to be victims of intoxicated violence.

21. The equality guarantee, which informed Parliament's legislative decisions, must be factored into this Court's analysis of the scope and content of the s 7 interests engaged by s 33.1. Any interference with the s 7 liberty interests of the accused cannot be understood in isolation either from the s 7 security interests of those who are victims of self-induced intoxicated violence, or from how that violence undermines equality rights. Simply put, the Court must consider the impact of intoxicated violence on the rights of women and children when assessing the appropriateness of s 33.1's marked departure standard.⁴² Considered within this necessary context, any interference with an accused's liberty interest is in accordance with the principles of fundamental justice. As Professor Isabel Grant explained:

⁴¹ See, e.g., *R v Hundal*, [1993] 1 SCR 867 (dangerous driving); *R v Creighton*, [1993] 3 SCR 3 (manslaughter); *R v Naglik*, [1993] 3 SCR 122 (failing to provide the necessities of life); and *R v Finlay*, [1993] 3 SCR 103 (careless use of a firearm). See generally the discussion in Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011), 61 U of T L J 545 at pp 554-562.

⁴² *Mills*, at paras 90-94.

Surely the principles of fundamental justice require that individuals should be held responsible for harm they cause to more vulnerable individuals when they have put themselves in a state where they are unable or unwilling to show respect for the physical integrity of others.⁴³

C. If section 33.1 infringes section 7, it is justified under section 1

22. Even if s 33.1 does violate s 7 of the *Charter*, any infringement is justified under s 1.⁴⁴

The pernicious problem of violence against women and children, and the role of intoxicated violence in perpetuating their marginalization, is precisely the type of situation in which a limit on the rights of those who voluntarily consume extreme amounts of intoxicants and harm others is justified. Promoting the security and equality rights of marginalized groups are central values of a free and democratic society, and thus integral to the s 1 analysis. Parliament is entitled to significant deference when it legislates to protect marginalized groups.⁴⁵ This should weigh heavily in the analysis of s 33.1.⁴⁶

1. The objectives of s 33.1 are pressing and substantial

23. There could be no clearer example of pressing and substantial objectives. The objectives of s 33.1 include both (1) ensuring the accountability of those who, in a state of self-induced intoxication, cause harm to others, and (2) protecting the security interests and equality rights of women and children, who are disproportionately subject to intoxicated violence. Where the legislative objective is the protection of another constitutional right – here, the ss 7, 15, and 28 rights of women and children – it has been found to be of “exceptional importance.”⁴⁷

⁴³ Grant Article, *supra* note 38 at 395.

⁴⁴ Although the Supreme Court has often suggested that it would be very difficult to justify infringements of s 7 under s 1, Chief Justice Lamer, in dissent, upheld a s 7 violation under s 1 in the context of the unavailability of the defence of intoxication for impaired driving cases (the majority found no violation of s 7): *R v Penno*, [1990] 1 SCR 865 at para 29-36. Some academics believe s 7 breaches will be easier to justify post-*Bedford*, given the importance of societal interests under s 1: see, e.g., Hamish Stewart, “*Bedford* and the structure of section 7”, (2015) 60(3) McGill L J 575 at pp 588–593.

⁴⁵ *R v Keegstra*, [1990] 3 SCR 697, at 756. See also *R v Butler*, [1992] 1 SCR 452 at 509.

⁴⁶ As was true in cases such as *R v Mills*, [1999] 3 SCR 668, at paras 55, 60; *Darrach* at paras 11, 22.

⁴⁷ *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at 890.

24. These objectives remain as important today as they were when s 33.1 was enacted. Violence - particularly sexual and domestic violence – remains a gendered problem, and alcohol continues to be linked to violence against women. In 2008 (14 years after *Daviault*) women were still 10 times more likely than men to be the victims of a police-reported sexual assault.⁴⁸ Earlier this year (now 25 years after *Daviault*) the Supreme Court of Canada recognized both that “eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society” and that sexual violence against women, particularly Indigenous women, remains “tragically common” and results in “devastating” consequences.⁴⁹ The Court recently highlighted the shattering consequences of such offences, noting that they result in high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm; and suicidal behaviour.⁵⁰

25. Alcohol (and drugs) remain closely linked to violence against women. Between 2007 and 2017, 63% of women and girls who were killed died at the hands of an intoxicated aggressor.⁵¹ The World Health Organization has also recently raised concerns about the link between alcohol and sexual violence.⁵²

26. The harm caused to women as a result of intoxicated violence is extensive, infringing on rights to security and equality. Holding individuals accountable for violent crimes committed in a

⁴⁸ Roxan Vaillancourt, “Gender Differences in Police-Reported Violent Crime in Canada, 2008” Canadian Centre for Justice Statistics, Statistics Canada, 2008, PDF online <<https://www150.statcan.gc.ca/n1/en/pub/85f0033m/85f0033m2010024-eng.pdf?st=mSuuLcsQ>> at 10.

⁴⁹ *R v Barton*, 2019 SCC 33, at para 1.

⁵⁰ *R v Goldfinch*, 2019 SCC 38, at para 37.

⁵¹ Shana Conroy, “Police Reported Violence Against Girls and Young Women in Canada, 2017” (Canadian Centre for Justice Statistics, Statistics Canada: 2017), at 16.

⁵² World Health Organization, *Violence Against Women* (29 November 2017) online: <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>, at 3; World Health Organization, *Global Status Report on Alcohol and Health 2018* (2018), at 7.

state of self-induced intoxication is a pressing and substantial objective, given that a failure to do so excuses such violence and discourages reporting.

2. Section 33.1 is a proportionate response

27. Proportionality under s 1 does not require perfection, only reasonable limits.⁵³ Section 33.1 is a narrowly crafted response to the concerns raised by *Daviault*.

a) Rational Connection

28. Parliament had a reasonable basis to conclude its objectives would be furthered by s 33.1.⁵⁴ The elimination of the extreme intoxication defence clearly ensures the accountability of those who become voluntarily intoxicated and harm others. This, in turn, furthers the security interests and equality rights of women and children. The Committee heard that the extreme intoxication defence sent the message that men were not responsible for the violence they committed while intoxicated and that this both discouraged women from reporting acts of violence and provided men with a ready-made excuse for such conduct.⁵⁵ A law that puts individuals on notice that they will be held accountable for such crimes conveys to victims that their experiences matter and that society will not excuse such acts. It thus encourages reporting.

b) Minimal Impairment

29. Section 33.1 is appropriately tailored in the context of its pressing objectives and the infringed right. Where, as here, the objectives seek to promote the s 15 rights of a vulnerable group, deference is warranted in the minimal impairment assessment.⁵⁶

30. Parliament considered a variety of alternatives,⁵⁷ and adopted the regime best suited to its objectives. Section 33.1 limits the extreme intoxication defence only for general intent crimes

⁵³ *Carter*, at para 97; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, at para 78.

⁵⁴ *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, at para 82; *R v Downey*, [1992] 2 SCR 10, at 37.

⁵⁵ See discussion *supra* at para 10–12.

⁵⁶ *RJR-MacDonald Inc*, at para 96; *R v Swain*, [1991] 1 SCR 933, at 983.

involving violence – and only where intoxication is self-induced. Critically, the Committee rejected a proposal to expand s 33.1 to all general intent offences in part because the evidence established a link between alcohol and crimes of violence, but not property offences, and also because of the equality concerns animating s 33.1. Specifically, the evidence showed women and children were disproportionately victims of violence – not property offences.⁵⁸

c) Proportionality between deleterious effects and salutary benefits

31. Broader societal concerns and overarching public goals that justify limiting *Charter* rights are central to the final stage of the proportionality analysis.⁵⁹ A person who deliberately ingests an intoxicating substance and then, while intoxicated, harms others, has interfered with the security and equality rights of the person harmed. Such violent acts, particularly where they involve sexual and domestic violence, are disproportionately committed against women and children. In light of the long-standing disadvantage and victimization suffered by women and children, it was entirely appropriate for Parliament to adopt the new mode of liability under s 33.1(2). As the public outcry in the wake of *Daviault* demonstrated,⁶⁰ excusing such violence undermines public trust in the justice system. These individuals are not morally blameless; they chose to consume intoxicating substances in amounts that contributed to them perpetrating violence against others. Victims – and women – should not bear the risk of this choice.

D. A Superior Court Judge’s finding of constitutional invalidity should be open to reconsideration where it fails to consider all *Charter* rights engaged by the law

32. Both appellants, supported by the other interveners, take the position that the trial judges were bound by the decision in *R v Dunn*. This argument raises concerns when considered in the context of the jurisprudential history of s 33.1 in Ontario. LEAF supports the position of the

⁵⁷ See discussion in AG Ontario factum at paras 74–75 and AG Canada factum at paras 52–55.

⁵⁸ *Minutes*, No 163 (15 June 1995) at 2–3.

⁵⁹ *Bedford*, at para 121.

⁶⁰ See Grant Article at 381.

Attorneys General that principles of *stare decisis* and judicial comity should apply to all questions of constitutional law.⁶¹ Judges may depart from earlier rulings where they are “plainly wrong”,⁶² including when they have failed to consider all rights engaged by the law.

33. The constitutionality of s 33.1 has now been assessed five times in Ontario. The first decision⁶³ found s 33.1 valid. Since then, Ontario judges have found it unconstitutional, without considering whether that ruling was “plainly wrong”. None of the Ontario decisions have considered – in any meaningful way – the competing *Charter* rights engaged by s 33.1 (the s 7 security interests and the ss 15 and 28 equality rights). The failure to do so underscores why those earlier Superior Court decisions had to be open to reconsideration by other judges from the same level of court. To find otherwise would privilege certain *Charter* rights over others. The need for such reconsideration is essential where, as here, there are limited appeal routes available to get the issue before appellate courts.

PART IV – ORDER REQUESTED

34. LEAF takes no position on the ultimate disposition of this appeal, and respectfully requests that it be decided in accordance with these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2019.



Megan Stephens



Lara Kinkartz

⁶¹ See factum of AG Ontario at paras 22–34; factum of AG Canada at paras 63–70. See also *R v Nur*, 2015 SCC 15 at para 71, which is consistent with that reasoning.

⁶² *R v Scarlett*, 2013 ONSC 562 (CanLII) at paras 42–43.

⁶³ *R v Decaire*, [1998] OJ 6339 (Gen Div).

**SCHEDULE “A”
AUTHORITIES TO BE CITED**

Jurisprudence

1. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 142
2. *Canada (Attorney General) v Bedford*, 2013 SCC 72
3. *Carter v Canada*, 2015 SCC 5
4. *Cunningham v Canada*, [1993] 2 SCR 143
5. *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835
6. *Dubois v The Queen*, [1985] 2 SCR 350
7. *Law Society of Upper Canada v Skapinker*, [1994] 1 SCR 357
8. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46
9. *R v Barton*, 2019 SCC 33
10. *R v Brenton*, 1999 CanLII 13930 (NWT SC)
11. *R v Butler*, [1992] 1 SCR 452
12. *R v Cedeno*, 2005 OJ No 1174 (Ct J)
13. *R v Chan*, 2018 OJ No 4731 (SC)
14. *R v Creighton*, [1993] 3 SCR 3
15. *R v Darrach*, 2000 SCC 46
16. *R v Daviault*, [1994] 3 SCR 63
17. *R v Decaire*, [1998] OJ No 6339 (Gen Div), appeal dismissed 1999 OJ No 4794 (CA)
18. *R v Dow*, 2010 QJ No 8999 (SC), appeal allowed 2014 JQ No 7451 (CA)
19. *R v Downey*, [1992] 2 SCR 10
20. *R v Dunn*, [1999] OJ No 5452 (SCJ), appeal dismissed 2002 OJ No 864 (CA)
21. *R v Eddison*, 2019 BCJ No 1227 (Prov Ct)
22. *R v Finlay*, [1993] 3 SCR 103
23. *R v Fleming*, [2010] OJ No 5988 (SCJ)
24. *R v Goldfinch*, 2019 SCC 38
25. *R v Hundal*, [1993] 1 SCR 867
26. *R v Jensen*, 2000 OJ No 4870 (SC), appeal dismissed 2005 CanLII 7649 (CA)
27. *R v Keegstra*, [1990] 3 S.C.R. 697
28. *R v McCaw*, 2018 OJ No 4134 (SC)

29. *R v Mills*, [1999] 3 SCR 668
30. *R v Naglik*, [1993] 3 SCR 122
31. *R v Osolin*, [1993] 4 SCR 595
32. *R v Penno*, [1990] 2 SCR 865
33. *R v Rahey*, [1987] 1 SCR 588
34. *R v RV*, 2019 SCC 40
35. *R v Scarlett*, 2013 ONSC 562
36. *R v Seaboyer, R v Gayme*, [1991] 2 SCR 577
37. *R v SN*, 2012 NuJ No 3 (Ct J)
38. *R v Swain*, [1991] 1 SCR 933
39. *R v Vickberg*, 1998 BCJ No 1034 (SC)
40. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199
41. *Thompson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877
42. *Sauvé v Canada*, [2002] 3 SCR 519
43. *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11

Secondary Sources:

1. Mark Carter, “*Carter v Canada: ‘Societal Interests’ Under Sections 7 and 1*” (2015) 78 Sask Law Rev 209
2. Shana Conroy, “Police Reported Violence Against Girls and Young Women in Canada, 2017” (Canadian Centre for Justice Statistics, Statistics Canada: 2017)
3. Isabel Grant, “Second Chances: Bill C-72 and the *Charter*” (1996) 33 (2) Osgoode Hall L J 379
4. Kent Roach, “Mind the Gap: Canada’s Different Criminal and Constitutional Standards of Fault” (2011), 61 U of T LJ 545
5. Karen Rogers, “Wife assault: the findings of a national survey,” *Juristat*, vol 14, No 9 (March 1994)
6. Elizabeth Sheehy, “The Intoxication Defense in Canada: Why Women Should Care” (1996) 23 Contemp Drug Probs 595
7. Hamish Stewart, “*Bedford* and the Structure of Section 7” (2015) 60(3) McGill L J 575
8. Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed) (Markham: LexisNexis, 2014)
9. Roxan Vaillancourt, “Gender Differences in Police-Reported Violent Crime in Canada, 2008” Canadian Centre for Justice Statistics, Statistics Canada, 2008

10. World Health Organization, *Violence Against Women* (29 November 2017), online: <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>
11. World Health Organization, *Global Status Report on Alcohol and Health 2018* (2018)

Parliamentary Record:

1. *House of Commons Debates*, 35–1, vol 8 (27 March 1995)
2. *House of Commons Debates*, 35–1, no 224, vol 12 (22 June 1995)
3. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No 97 (5 April 1995)
4. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No 98 (6 April 1995)
5. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No 158 (6 June 1995)
6. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No 161 (13 June 1995)
7. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No 163 (15 June 1995)
8. Brief presented to the Justice and Legal Affairs Standing Committee (6 June 1995) by Elizabeth Sheehy on behalf of the National Association of Women and the Law, “A Brief on Bill C-72: An Act to Amend the Criminal Code”
9. Document tabled at Justice and Legal Affairs Standing Committee (13 June 1995), Karen Rogers, “Wife assault: the findings of a national survey,” *Juristat*, vol 14, No 9 (March 1994)

**SCHEDULE “B”
RELEVANT LEGISLATIVE PROVISIONS**

[*Criminal Code* provisions omitted *per Criminal Appeal Rules*, SI/93-169, R. 16(4)(f).]

Interpretation Act, RSC 1985, c I-21

Preamble

13. The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

An Act to Amend the Criminal Code (self-induced intoxication), SC 1995, c 32

See the pages that follow.

First Session, Thirty-fifth Parliament,
42-43-44 Elizabeth II, 1994-95

Première session, trente-cinquième législature,
42-43-44 Elizabeth II, 1994-95

STATUTES OF CANADA 1995

LOIS DU CANADA (1995)

CHAPTER 32

CHAPITRE 32

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

Loi modifiant le Code criminel (intoxication volontaire)

BILL C-72

ASSENTED TO 13th JULY, 1995

PROJET DE LOI C-72

SANCTIONNÉ LE 13 JUILLET 1995

CHAPTER 32

AN ACT TO AMEND THE CRIMINAL CODE (SELF-INDUCED INTOXICATION)

SUMMARY

This enactment amends the *Criminal Code* by legislating a basis of criminal fault in relation to extreme self-induced intoxication and violence.

CHAPITRE 32

LOI MODIFIANT LE CODE CRIMINEL (INTOXICATION VOLONTAIRE)

SOMMAIRE

Le texte modifie le *Code criminel* pour fonder dans la loi la responsabilité criminelle par rapport à l'intoxication volontaire extrême et à la violence.

42-43-44 ELIZABETH II

42-43-44 ELIZABETH II

CHAPTER 32

CHAPITRE 32

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

Loi modifiant le Code criminel (intoxication
volontaire)

[Assented to 13th July, 1995]

[Sanctionnée le 13 juillet 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 disadvantageous 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;

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:

R.S., c. C-46; R.S., cc. 2, 11, 27, 31, 47, 51, 52 (1st Suppl.), cc. 1, 24, 27, 35 (2nd Suppl.), cc. 10, 19, 30, 34 (3rd Suppl.), cc. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4th Suppl.); 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

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 :

L.R., ch. C-46; L.R., ch. 2, 11, 27, 31, 47, 51, 52 (1^{er} suppl.), ch. 1, 24, 27, 35 (2^e suppl.), ch. 10, 19, 30, 34 (3^e suppl.), ch. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4^e 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:

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

Self-induced Intoxication

Intoxication volontaire

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).

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).

Non-application du moyen de défense

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.

(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.

Responsabilité criminelle en raison de l'intoxication

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.

(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.

Infractions visées

Coming into force

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

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

Entrée en vigueur

APPENDIX “A” - 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
<u><i>R v Vickberg, 1998 BCJ No 1034 (SC)</i></u>	<ul style="list-style-type: none"> - Constitutional⁶⁴ - Infringes s 7 and s 11(d) of the <i>Charter</i>, but is justified under s 1 - Acquitted of assault with a weapon 	No	No	- No
<u><i>R v Decaire, 1999 OJ No 6339 (Gen Div)</i></u>	<ul style="list-style-type: none"> - Constitutional - Infringes s 7 and s 11(d) of the <i>Charter</i>, but is justified under s 1 - Convicted of aggravated assault 	No	No	<ul style="list-style-type: none"> - <u><i>R v Decaire, 1999 OJ No 4794 (CA)</i></u> - Appeal to ONCA dismissed. - s 33.1 not considered.
<u><i>R v Brenton, 1999 CanLII 13930 (NWT SC)</i></u>	<ul style="list-style-type: none"> - Unconstitutional (on appeal from the Territorial Court) - Infringes s 7 and s 11(d) of the <i>Charter</i> and is not justified under s 1 - 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
<u><i>R v Dunn, 1999 OJ No 5452 (SC)</i></u>	<ul style="list-style-type: none"> - Unconstitutional - Infringes s 7 and s 11(d) of the <i>Charter</i> and is not justified under s 1 - 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	<ul style="list-style-type: none"> - <u><i>R v Dunn, 2002 OJ No 864 (CA)</i></u> - Appeal to ONCA in relation to sentence dismissed. - s 33.1 not considered.
<u><i>R v Jensen, 2000 OJ No 4870 (SC)</i></u>	<ul style="list-style-type: none"> - Unconstitutional - No reasons given - Convicted of second degree murder 	No	No	<ul style="list-style-type: none"> - <u><i>R v Jensen, 2005 CanLII 7649 (ONCA)</i></u> - Appeal to ONCA dismissed. Did not consider s 33.1.
<u><i>R v Cedeno, 2005 OJ No 1174 (Ct J)</i></u>	<ul style="list-style-type: none"> - Unconstitutional - Followed <i>Jensen</i> - 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
<u>R v Dow, 2010 QJ No 8999 (SC)</u>	<ul style="list-style-type: none"> - Constitutional - Infringes s 7 and s 11(d) of the <i>Charter</i>, but is justified under s 1 - Convicted at trial of second degree murder, attempted murder and careless use of a firearm x 2 	No	No	<ul style="list-style-type: none"> - <u>Dow c R, 2014 QJ No 7451 (CA)</u> - Appeal to QCCA allowed in relation to jury instructions; no consideration of s 33.1. - New trial ordered.
<u>R v Fleming, 2010 OJ No 5988 (SC)</u>	<ul style="list-style-type: none"> - Unconstitutional - Infringes s 7 and s 11(d) of the <i>Charter</i> and is not justified under s 1 - Finding from trial proper not published 	Very limited, tracking the reasoning in <i>Dunn</i> .	No	No
<u>R v SN, 2012 NuJ No 3 (Ct J)</u>	<ul style="list-style-type: none"> - Constitutional - Infringes s 7 and s 11(d) of the <i>Charter</i> and is not justified under s 1 - Finding from trial proper not published 	No	No	No
<u>R v Chan, 2018 OJ No 4731 (SC)</u>	<ul style="list-style-type: none"> - Constitutional - Saved under s 1 - 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
<u><i>R v McCaw</i>, 2018 OJ No 4134 (SC)</u>	<ul style="list-style-type: none"> - Unconstitutional - Infringes s 7 and s 11(d) of the <i>Charter</i> and is not justified under s 1 - Convicted of sexual assault 	<p>Very limited discussion, on the basis that both <i>Daviault</i> 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).</p>	<p>No</p>	<p>No</p>
<u><i>R v Eddison</i>, 2019 BCJ No 1227 (Prov Ct)</u>	<ul style="list-style-type: none"> - Unconstitutional - Followed <i>Chan</i> - Convicted of assault - Engages in no analysis of its own 	<p>No</p>	<p>No</p>	<p>No</p>

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Respondent

DAVID SULLIVAN AND THOMAS CHAN
Appellants

- and -

**THE ATTORNEY GENERAL OF CANADA, WOMEN'S
LEGAL EDUCATION AND ACTION FUND INC., THE
CANADIAN CIVIL LIBERTIES ASSOCIATION
and THE CRIMINAL LAWYERS' ASSOCIATION**
Interveners

**FACTUM OF THE INTERVENER,
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