

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

B E T W E E N:

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(Respondent)

–and–

HER MAJESTY THE QUEEN

Respondent
(Appellant)

–and–

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Interveners

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Table of Contents

| | |
|--|----|
| PART I – OVERVIEW AND STATEMENT OF FACTS..... | 1 |
| PART II – POSITION WITH RESPECT TO APPELLANT’S QUESTIONS..... | 2 |
| PART III – STATEMENT OF ARGUMENT..... | 3 |
| A. Where protected <i>Charter</i> rights are potentially in conflict, courts must seek to strike a balance that respects the importance of all rights engaged..... | 3 |
| B. Accountability is a pressing and substantial objective, targeted at redressing the inequality experienced by women and children..... | 7 |
| PART IV – SUMMISSIONS ON COSTS | 10 |
| PART V – ORDER..... | 10 |
| PART VII – TABLE OF AUTHORITIES | 11 |
| Jurisprudence | 11 |
| Parliamentary Record..... | 12 |
| Secondary Sources | 13 |
| Statutes, Legislation, Rules, Etc. | 14 |
| PART VII – STATUTES, REGULATIONS, ETC. | 15 |

PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal concerns the constitutionality of s. 33.1 of the *Criminal Code*, Parliament’s amendment of the common law¹ to hold individuals criminally responsible for violent acts committed while in a state of self-induced extreme intoxication. In three sets of reasons, concurring in the result but differing in their analysis, the Court of Appeal of Alberta found s. 33.1 constitutional.² The reasons are largely silent about the fact that Parliament, in enacting s. 33.1, sought to balance the accused’s ss. 7 and 11(d) rights with the equality, dignity, and security rights of women and children guaranteed under ss. 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*.³ Parliament struck that balance between rights after considering evidence about the gendered nature of violence, particularly sexual and domestic violence; the links between intoxication and such violence; and the policy reasons why those who consume intoxicants to the point where they lose control and harm others should be held accountable. With the exception of a brief passage in Justice Khullar’s opinion,⁴ the Court does not address the issue of how rights balancing should factor into its constitutional scrutiny of the impugned provision.

2. LEAF intervenes to argue that courts assessing the constitutionality of legislation enacted to strike a balance between different *Charter* rights must adopt an analytical approach that considers *all* of those rights. In the case of s. 33.1, courts must consider both the rights of the accused *and* the rights of women and children in their s. 7 analysis, as this Court has done in cases such as *R. v. Mills*.⁵ All of these rights must also be given due weight in any s. 1 justification.

¹ Bill C-72, which enacted [s. 33.1](#) of the *Criminal Code*, was Parliament’s response to this Court’s decision in *R. v. Daviault*, [\[1994\] 3 S.C.R. 63](#).

² *R. v. Brown*, [2021 ABCA 273](#). Slatter and Hughes J.J.A. issued separate reasons finding [s. 33.1](#) did not breach either ss. [7](#) or [11\(d\)](#) of the *Charter*, and alternate reasons for why any infringement would be saved by s. 1: paras. 1-88 (*per* Slatter J.A.), paras. 189-165 (*per* Hughes J.A.). Justice Khullar adopted the majority reasons in *R. v. Sullivan*, [2020 ONCA 333](#) finding that s. 33.1 violates ss. [7](#) and [11\(d\)](#), but found the breach to be justified under s. 1: see paras. 177-210.

³ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11 (“the *Charter*”).

⁴ *Brown*, *supra* note 2 at paras. 170-176.

⁵ *R. v. Mills*, [\[1999\] 3 S.C.R. 668](#).

3. None of the judges at the Alberta Court of Appeal meaningfully engaged in an internal balancing of rights when deciding whether any deprivation of an accused's persons s. 7 liberty interest caused by s. 33.1 accords with the principles of fundamental justice. While neither Justice Slatter nor Justice Hughes opined on the appropriateness of such a balancing, Justice Khullar found it would be inconsistent with the "focus of analysis" required under s. 7: "whether the impugned law infringes an individual's rights."⁶ Failing to consider all the rights that Parliament sought to balance runs counter to decisions of this Court advising against adopting a hierarchical approach to rights.

4. All three judges in the Alberta Court of Appeal accepted accountability as a valid legislative objective, that was pressing and substantial.⁷ Their analysis, however, failed to consider the extensive evidence before Parliament about the need for accountability as a means to redress the inequality experienced by women and children in the context of intoxicated gender-based violence. The nature of the social problem s. 33.1 was designed to address, including the protection of other important *Charter* rights, warrants careful consideration when identifying its objectives.⁸ The failure to do so can skew the proportionately assessment under s. 1. This in turn risks undermining the rights of vulnerable groups, such as women and children in the case of s. 33.1, to the full protection of the law.⁹

PART II – POSITION WITH RESPECT TO APPELLANT'S QUESTIONS

5. The questions in this appeal are whether s. 33.1 of the *Criminal Code* infringes ss. 7 and 11(d) of the *Charter*, and if so, whether that violation can be justified under s. 1. LEAF submits that, in resolving these questions, this Court must give full consideration to *all* of the rights Parliament contemplated when enacting this provision, at all stages of the constitutional analysis.

⁶ *Brown*, *supra* note 2 at para. 171 [emphasis added].

⁷ Compare *Brown*, *supra* note 2 at paras. 60-64 (Slatter J.A.) and paras. 182-184 (Khullar J.A.), with *Sullivan*, *supra* note 2 at paras. 112-114.

⁸ See, for example, *Thompson Newspapers Co v. Canada (Attorney General)*, [1998] 1 SCR 877; *Sauvé v. Canada*, 2002 SCC 68 at para. 20; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 131-132, 138.

⁹ *R. v. Barton*, 2019 SCC 33 at para. 210.

PART III – STATEMENT OF ARGUMENT

6. When legislation designed to balance rights is subject to constitutional scrutiny, all of those rights must be given due weight in the court’s assessment. The court below gave only passing consideration to the rights of women and children in its decision, or to how Parliament understood accountability as a means to redress the inequality experienced by women and children who are disproportionately the victims of intoxicated violence.

A. Where protected *Charter* rights are potentially in conflict, courts must seek to strike a balance that respects the importance of all rights engaged

7. Justice Khullar - the only judge to consider this issue - held that it was not appropriate to internally balance rights when deciding whether the deprivation of an accused person’s s. 7 liberty interest accords with the principles of fundamental justice. This runs counter to the longstanding jurisprudence of this Court cautioning against privileging some *Charter* rights over others. When rights appear to conflict, courts must strive to find a balance that respects both sets of rights. As Chief Justice Lamer explained in *Dagenais v. Canadian Broadcasting Corporation*:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter*, and when developing the common law. When the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.¹⁰

8. In *Dagenais*, this Court modified the pre-*Charter* common law rule governing publication bans to strike a better balance consistent with *Charter* principles and the “equal status given by the *Charter* to ss. 2(b) and 11(d).”¹¹ This Court adopted a similar approach in *R. v. Mills* when assessing the constitutionality of legislation enacted by Parliament to further different rights that may be in conflict. In *Mills*, this Court balanced the privacy, security, and equality rights of complainants in sexual assault proceedings with those of accused persons when finding that the right to full answer and defence was a principle of fundamental justice, but that it was not unlimited.¹² The Court explained why this internal balancing was necessary:

¹⁰ *Dagenais v. CBC*, [1994] 3 S.C.R. 835, at p. 877.

¹¹ *Ibid.* See also *R. v. Mentuck*, 2001 SCC 76.

¹² *Mills*, *supra* note 5, at paras. 71-76, 94. See also *R. v. Darrach*, [2000] 2 S.C.R. 443, at paras. 29-31; 42-43; 69-70.

No single [*Charter*] principle is absolute and capable of trumping the others; all must be defined in light of competing claims. . . This illustrates the importance of interpreting rights in a contextual manner - not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.¹³

This approach to interpreting the scope of s. 7 protection when other rights are engaged is also consistent with the fact that s. 7, unlike most other *Charter* rights, is internally limited.¹⁴

9. Justice Khullar accepted that the principle from *Mills* that fundamental justice encompasses more than just an accused's rights was still "sound", but found that it "must now be read in conjunction with more recent case law"¹⁵ such as *Canada (Attorney General) v. Bedford*¹⁶ and *Carter v. Canada (Attorney General)*.¹⁷ She noted that *Bedford* and *Carter* establish a "division of labour" between s. 7 and s. 1 – with societal interests warranting consideration under s. 1 and the focus of s. 7 being whether the impugned law infringes an individual's rights.¹⁸ While those cases found that societal interests were more the fare of s. 1 than s. 7, they did so in a different context. *Bedford* and *Carter* involved laws that deprived individuals of their s. 7 rights through "failures of instrumental rationality" in that the state chose to attain its objectives using means that were arbitrary, overbroad or grossly disproportionate to its legislative goal.¹⁹ Where, as here, there is debate as to the boundaries of the *Charter* rights or principles of fundamental justice in question, the balancing of individual rights remains relevant to "elucidating the principles of fundamental justice".²⁰ Post-*Bedford*, this Court has re-affirmed that freestanding principles of fundamental justice, such as the right to full answer and defence, are not without limit and can be modified to balance the *Charter* rights of accused persons and complainants.²¹

¹³ *Mills*, *supra* at note 5 at para. 61 [reference to *Dagenais* omitted].

¹⁴ Not every deprivation of life, liberty or security of the person will infringe s. 7, only those deprivations that are not in accordance with the principles of fundamental justice will breach s. 7.

¹⁵ *Brown*, *supra* note 2 at para. 170.

¹⁶ *Bedford*, *supra* note 8 at paras. 124-127.

¹⁷ *Carter v. Canada (Attorney General)*, [2015 SCC 5](#) at paras. 79-82.

¹⁸ *Brown*, *supra* note 2 at paras. 171-172.

¹⁹ *Bedford*, *supra* note 8 at paras. 105-107.

²⁰ *R. v. Malmo-Levine*, [2003 SCC 74](#) at para. 98.

²¹ See, for example, *R. v. Goldfinch*, [2019 SCC 38](#) at para. 39, *R. v. R.V.*, [2019 SCC 41](#) at paras. 35, 40; *R. v. Quesnelle*, [2014 SCC 46](#) at paras. 62-65.

10. The evidence and issues Parliament examined in Committee hearings leading to the enactment of s. 33.1 make it clear that a balancing of rights is at the heart of this provision. Committee hearings and Parliamentary debate on Bill C-72, which amended the *Criminal Code* by adding s. 33.1, focused on the disproportionate impact of violence, particularly sexual and domestic violence, on women and girls – and their equality rights.²² Committee witnesses emphasized the strong correlation between alcohol use and violent offences against women, highlighting how alcohol use was often connected to more severe violence.²³ The Minister of Justice raised concerns about the connection between domestic assault and intoxicated assailants when speaking about the proposed bill.²⁴ Enacting s. 33.1 was seen as sending an important message – that intoxicated violence against women would not be tolerated, thus encouraging reporting.²⁵ The preamble to Bill C-72 tracks these concerns and largely mirrors the language in the preamble to Bill C-46, which brought into effect the regime governing access to records in sexual assault cases that was the subject of constitutional scrutiny in *Mills*.²⁶

11. In the circumstances, an approach like that taken in *Mills*, which seeks to delineate the boundaries of equally deserving rights (both those of the accused and those of women and children) under s. 7, is required.²⁷ This approach is consistent with earlier decisions of this Court recognizing that “many, if not most, of the individual rights protected in the *Charter* also have a broader, societal

²² See, for example, *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), referencing Statistics Canada’s 1993 *Violence Against Women Survey*, as published in Karen Rodgers, “Wife assault: findings of a national survey,” *Juristat*, vol 14, no 9 (March 1994).

²³ See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* [“Minutes”], No 97 (5 April 1995) at 5 (Prof Patrick Healy), at 22 (Prof Christine Boyle), *Minutes* No 161 (13 June 1995) at 11, 14, 17; *Minutes*, No 158 (6 June 1995) at 15 (Susan Bazilli), and at 10, 12 (Prof Elizabeth Sheehy).

²⁴ *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).

²⁵ See, for example, *House of Commons Debates*, 35-1, vol 8 (27 March 1995) at 11044 (Hon Christiane Gagnon), and at 11039 (Hon Allan Rock); *Minutes*, No 158 (6 June 1995) at 7 (Prof Elizabeth Sheehy).

²⁶ *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, [Preamble](#); *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30, [Preamble](#).

²⁷ See, for example, [Mills](#), *supra* note 5 at para. 66.

dimension”,²⁸ and that “the principles of fundamental justice, including the ‘fairness of the trial’, necessarily reflect a balancing of societal and individual interests”.²⁹ The Court of Appeal of Alberta should have engaged in an internal balancing under s. 7 in assessing the constitutionality of s. 33.1.

12. Justice Khullar also erred by adopting the s. 7 analysis of the majority in *Sullivan*, which found that this Court had already “authoritatively determined” the scope of the principles of fundamental justice in *Daviault*.³⁰ In *Daviault*, this Court was asked to determine only whether the common law rule infringed the rights of the accused. When Parliament amended the common law and chose a regime different from that proposed by the majority in *Daviault*, it did so in large part because it considered a broader range of *Charter* rights than those contemplated by this Court – specifically the equality, security, and dignity of women and children. Because this Court’s decision in *Daviault* gave no consideration to those rights, it cannot be the final word on the scope of the principles of fundamental justice in this context. An accused person’s ss. 7 and 11(d) fair trial rights need to be understood and interpreted in a manner that respects other *Charter* rights.³¹

13. In particular, the delineation of the principles of fundamental justice considered in *Daviault* must be reconsidered with the security, dignity, and equality rights of women and children in mind. As Professor Hogg has noted, this Court has relied on equality values both to expand – and to narrow – the scope of fundamental justice. The requirements of fundamental justice may be narrowed where the equality rights of others are in conflict with the interests of those claiming the s. 7 rights.³² The Court of Appeal’s failure to re-assess the boundaries of the principles of fundamental justice privileges an individualistic approach to s. 7 rights. This could undermine

²⁸ *R. v. O’Connor*, [1995] 4 S.C.R. 411 at para. 64 (*per* L’Heureux-Dubé J., writing for the majority on this issue).

²⁹ *Ibid.* at para. 65 [citations omitted].

³⁰ *Brown*, *supra* note 2 at para. 168, adopting the reasons of the majority in *R. v. Sullivan*, *supra* note 2 at para. 58.

³¹ *Dagenais*, *supra* note 10; *Mills*, *supra* note 5; *Darrach*, *supra* note 12; *R. v. N.S.*, 2012 SCC 72.

³² Peter W. Hogg, “[Equality as a Charter Value in Constitutional Interpretation](#)” (2003) 20 S.C.L.R. (2d) 113, at p. 127.

legislative attempts to establish rules restricting risky conduct in the interest of public safety,³³ or enact laws to protect vulnerable groups, such as women and children.

B. Accountability is a pressing and substantial objective, targeted at redressing the inequality experienced by women and children

14. While all three judges at the Court of Appeal found that accountability is a pressing and substantial objective, their analysis failed to recognize or engage with the extensive evidence before Parliament about the need for accountability *as a means to redress the inequality experienced by women and children* in the context of intoxicated gender-based violence. 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 groups³⁴ – a reality that should weigh heavily in the analysis of s. 33.1.³⁵

15. Accountability is not simply a matter of securing convictions or punishing offenders. Equally, if not more importantly, it plays a communicative role. It tells victims of intoxicated violence that they are entitled to the equal protection of the law. It also gives notice to those who decide to consume extreme amounts of intoxicants that they – and not their potential victims – will bear the consequences if their decision causes them to lose control of their behaviour and harm others. Accountability sends a message about who and what our society values and is willing to protect, and at whose expense.³⁶

16. There was ample evidence at the Committee hearings about the pressing social reasons for holding intoxicated offenders accountable for violence against women; its connection to protecting

³³ This concern has been raised following this Court’s decision in [Bedford](#) – which has been described as now focusing “relentlessly on the individual claimant” at least when assessing rules of instrumental rationality: see, e.g. *R. v. Michaud*, [2015 ONCA 585](#) at paras. 78-80; 146-154. See also Colton Fehr, [“Rethinking the Instrumental Rationality Principles of Fundamental Justice”](#) (2020) 58:1 Alberta Law Review 133 at p. 134, 140-143.

³⁴ *R. v. Keegstra*, [\[1990\] 3 S.C.R. 697](#), at 756. See also *R. v. Butler*, [\[1992\] 1 S.C.R. 452](#) at 509.

³⁵ As occurred in *Mills*, *supra* note 5 at paras 55, 60; and *Darrach*, *supra* note 12 at paras 11, 22.

³⁶ *R. v. M.(C.A.)*, [\[1996\] 1 S.C.R. 500](#), at para. 81.

the ss. 7, 15, and 28 *Charter* rights of women and girls;³⁷ and the importance of the public message that s. 33.1 would send. For example, 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.”³⁸ 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.”³⁹ 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].⁴⁰

17. Section 33.1 sends an important message. Parliamentarians emphasized that holding offenders accountable would convey that violence against women is not tolerated, thereby encouraging women to report these crimes.⁴¹ This was particularly important because, as one Committee member noted, only 10% of sexual assaults were being reported.⁴² The Committee also heard evidence that the availability of the defence could affect decisions about the “founding” and

³⁷ See e.g. *Minutes*, No 97 (5 April 1995) at 10 (Prof Christine Boyle); *Minutes*, No 158 (6 June 1995) at 12 (Prof Elizabeth Sheehy); see also [National Association of Women and the Law’s brief](#) [“NAWL Brief”] (6 June 1995), at 10; *Minutes*, No 98, at 6 (per Hon Allan Rock); *Minutes* No 163 (15 June 1995), at 3 (Hon Russell MacLellan).

³⁸ *Minutes*, No 97 (5 April 1995) at 10 (Prof Christine Boyle).

³⁹ *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).

⁴⁰ *Minutes*, No 98 (6 April 1995) at 22 (Hon Allan Rock). Although Minister Rock’s statement refers to alcohol (given that it was the drug at issue in [Daviault](#)), the same comments apply in equal, if not greater, measure to other intoxicants.

⁴¹ *House of Commons Debates*, 35–1, vol 8 (27 March 1995) at 11044 (Hon Christiane Gagnon), and at 11039 (Hon Allan Rock).

⁴² *Minutes*, No 98 (6 April 1995) at 16 (Hon Sue Barnes).

prosecution of these crimes when women choose to report.⁴³ Parliament was thus attuned to the link between accountability and promoting access to justice for women and girls, as well as its role in redressing the inequality they experience because of intoxicated violence.

18. Through s. 33.1, Parliament was seeking to balance the rights of the accused with the rights of women and girls. The role s. 33.1 plays in redressing the inequality experienced by women and girls must be given significant consideration under s. 1, including under the assessment of whether Parliament’s objectives were pressing and substantial. The Court of Appeal’s analysis failed to do so.

19. The need for accountability – and the ways in which it reduces the inequality experienced by women and girls – remains as pressing today as it was when Parliament enacted s. 33.1. Gender-based violence continues to have a shattering impact on women, children, and communities. Between 2016 and 2020, 761 women and girls were killed in Canada – an average of one every 2.5 days.⁴⁴ In 2015, almost 90 percent of victims of police-reported sexual assaults were women. Women impacted by violence were most likely to be victimized by someone they knew, either intimate partners (42%) or other family members and acquaintances (43%).⁴⁵ In 2018, only about 5% of the most serious incidents of sexual assault came to the attention of police.⁴⁶ In 2019, this Court recognized that “[s]exual assault is still among the most highly gendered and underreported crimes” and that sexual violence against women, particularly Indigenous women, remains “tragically common” and results in “devastating” consequences.⁴⁷ In order to address gender-based violence, it must be recognized that alcohol and drugs remain closely linked to that violence.

⁴³ [NAWL Brief](#), at 10–11; *Minutes*, No 158 (6 June 1995) at 7 (Prof Elizabeth Sheehy).

⁴⁴ Myrna Dawson *et al.*, [#CallItFemicide – Understanding sex/gender-related killings of women and girls in Canada, 2020](#), Centre for the Study of Social and Legal Responses to Violence, 2021, at p. 11.

⁴⁵ Tina Hotton Mahony, Joanna Jacob and Heather Hobson, “[Women and the Criminal Justice System](#)”, *Women in Canada: A Gender-Based Statistical Report*, Statistics Canada, 6 June 2017, at 6.

⁴⁶ Adam Cotter and Laura Savage, “[Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces](#)” *Juristat*, 5 December 2019, at 20. While women may have various reasons for choosing not to report to police, their decision should not be encumbered by concerns that there is no point in doing so since their perpetrator will not be accountable due to self-induced intoxication.

⁴⁷ [Barton](#), *supra* note 9 at para. 1; [Goldfinch](#), *supra* note 21 at para. 37.

Between 2007 and 2017, 63% of women and girls who were killed died at the hands of an intoxicated aggressor.⁴⁸ The World Health Organization has recently identified harmful use of alcohol as a risk factor for both sexual and intimate partner violence.⁴⁹

20. This Court has opined that a law that violates s. 7 could be justified under s. 1, particularly if it involves an important legislative goal and competing societal interests that are themselves protected under the *Charter*.⁵⁰ 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.”⁵¹ The longstanding problem of violence against women and children, and the role of intoxicated violence in perpetuating their marginalization, must be given serious consideration in any s. 1 analysis. Holding individuals accountable for violent crimes committed in a state of self-induced extreme intoxication is a pressing and substantial objective, given that a failure to do so excuses such violence and discourages reporting as an option for survivors.

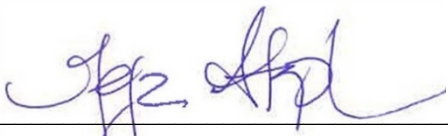
PART IV – SUMISSIONS ON COSTS

21. LEAF is a non-profit organization represented on this appeal by counsel acting *pro bono*. LEAF does not seek costs and asks that no costs be ordered against it.


PART V – ORDER

22. LEAF requests that this appeal be determined in accordance with the above submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October 2021.



Megan Stephens



Lara Kinkartz

Counsel for the Intervener Women’s Legal Education and Action Fund

⁴⁸ Shana Conroy, “[Police Reported Violence Against Girls and Young Women in Canada, 2017](#)” (Canadian Centre for Justice Statistics, Statistics Canada: 2017), at 16.

⁴⁹ World Health Organization, [Violence Against Women \(9 March 2021\)](#); World Health Organization, [Global Status Report on Alcohol and Health 2018](#) (2018).

⁵⁰ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 518; *Bedford*, *supra* note 8 at para. 129; *Carter*, *supra* note 17 at para. 95.

⁵¹ *Dagenais*, *supra* note 10 at 890.

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PART VII – STATUTES, REGULATIONS, ETC.

See Part VI above.