Court of Queen's Bench of Alberta

Citation: R v B, 2019 ABQB 770

Date: 20191003
Docket: 180055626Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

MWB

Accused

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Reasons for Judgment
of the
Honourable Mr. Justice W.T. deWit

Introduction

[1] The applicant is charged with one count of break and enter with the intent to commit aggravated assault contrary to s. 348(1)(b)/268 of the *Criminal Code* and one count of break and enter with the intent to commit mischief to property contrary to s. 348(1)(b)/430 of the *Criminal Code*. The applicant wishes to avail himself of the argument that he is not guilty of these offences because he was so impaired by the consumption of magic mushrooms, psilocybin, that his actions were involuntary and he did not have the necessary *mens rea* for conviction. However, s. 33.1 of the *Criminal Code* does not allow for such a defence if accused are in a self-induced intoxicated state, which rendered them unable to control their behaviour and they interfere with the bodily integrity of another person. In this case it means that the applicant can bring the defence of extreme intoxication with respect to the count of break and enter charges with the intent to commit mischief, but not the aggravated assault charge.

[2] The applicant argues that s. 33.1 offends ss. 7 and 11(d) the *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, is not saved by s. 1 of the *Charter* and that this court should strike the section and declare it to be of no force and effect.

Facts

[3] Redacted.

[4] Redacted.

[5] Redacted.

[6] Redacted.

[7] Redacted.

[8] Redacted.

History of Section

[9] Section 33.1 states:

> 33.1(1) When defence not available
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> It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
>
> (2) Criminal fault by reason of intoxication
>
> For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

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

[10] Prior to the enactment of section 33.1 the ***Leary*** rule from ***Leary v The Queen***, [1978] 1 SCR 29, 1977 CarswellBC 314 (WL) set out the common law rule that intoxication was not a defence to a general intent offence, such as sexual assault. In *Leary*, as is the situation in many of these types of cases, the defence could not prove that the accused was so intoxicated that they could not form the necessary intent to commit the crime. The Court cited English law which had stated that a person should be criminally answerable for actions which they committed when, of their own volition, they consumed a substance which caused them to cast off the restraints of reason and conscience: see ***Leary***, at 52 (para 9 in WL). This position replaces the intent to become intoxicated with the intent to commit the actual crime in cases where a person is too intoxicated to form the necessary intent or voluntariness.

[11] However, that common law rule was struck down by the majority in the case of ***R v Daviault***, [1994] 3 SCR 63, 1994 CarswellQue 10 (WL). The majority of the court held that the conviction of an accused person without proof of the mental element or voluntariness, required for conviction, offended sections 7 and 11(d) of the *Charter* and was not saved by section 1 of the *Charter*. The majority in ***Daviault*** held that the intention to consume alcohol or drugs, could not be a substitute for the requisite mental element of a crime and stated at 90 and 92 (paras. 42, 45-46 in WL):

> The substituted *mens rea* set out in *Leary* does not meet this test. The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime. Rather, the substituted *mens rea* rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, *mens rea* for a crime is so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice. See ***R. v. Vaillancourt***, [1987] 2 S.C.R. 636.
>
> [...]
>
> It was argued by the respondent that the "blameworthy" nature of voluntary intoxication is such that it should be determined that there can be no violation of the *Charter* if the *Leary* approach is adopted. I cannot accept that contention. Voluntary intoxication is not yet a crime. Further, it is difficult to conclude that such behaviour should always constitute a fault to which criminal sanctions should apply. However, assuming that voluntary intoxication is reprehensible, it does not follow that its consequences in any given situation are either voluntary or predictable. Studies demonstrate that the consumption of alcohol is not the cause of the crime. A person intending to drink cannot be said to be intending to commit a sexual assault.
>
> Further, self-induced intoxication cannot supply the necessary link between the minimal mental element or *mens rea* required for the offence and the *actus reus*. This must follow from reasoning in ***R. v. DeSousa***, [1992] 2 S.C.R. 944, and ***R. v.***

> ***Théroux***, [1993] 2 S.C.R. 5. Here, the question is not whether there is some symmetry between the physical act and the mental element but whether the necessary link exists between the minimal mental element and the prohibited act; that is to say that the mental element is one of intention with respect to the *actus reus* of the crime charged. As well, as Sopinka J. observes, the minimum *mens rea* for an offence should reflect the particular nature of the crime. See ***R. v. Creighton***, [1993] 3 S.C.R. 3. I doubt that self-induced intoxication can, in all circumstances, meet this requirement for all crimes of general intent.

[12] The minority decision in ***Daviault*** took the position that the minimal *mens rea* required for general intent offences could be proven in two ways. First the intent could be inferred from the *actus reus* for a general intent offence and it would be rare that a person would be so intoxicated that such an intent could not be inferred. Secondly if the level of intoxication was such that there was a doubt as to the necessary intent or voluntariness of the conduct, the blameworthiness of voluntarily becoming intoxicated was sufficient to prove a blameworthy mental state. The minority stated at 115-116 (para 100 in WL):

> [...] Application of the ***Leary*** rule in circumstances such as those of the case at bar obviously permits the accused to be convicted despite the existence of a reasonable doubt as to whether he intended to perform the *actus reus* of the offence of sexual assault. In my view this does not violate either s. 7 or s. 11(d) of the *Charter*. None of the relevant principles of fundamental justice requires that the intent to perform the *actus reus* of an offence of general intent be an element of the offence. In my opinion the requirements of the principles of fundamental justice are satisfied by proof that the accused became voluntarily intoxicated.

[13] The minority also took the position that there were exceptions to the general rule that the mental fault element of a crime must extend to the *actus reus* and that fundamental justice did not require a symmetry between the *mens rea* and the *actus reus*. The minority went on to recognize that punishment of the morally innocent offended the principles of fundamental justice but then stated at 118 (para 105 in WL):

> The first requirement of the principles of fundamental justice is that a blameworthy or culpable state of mind be an essential element of every criminal offence that is punishable by imprisonment. This principle reflects the fact that our criminal justice system refuses to condone the punishment of the morally innocent. As both McIntyre and Wilson JJ. pointed out in ***R. v. Bernard***, individuals who render themselves incapable of knowing what they are doing through the voluntary consumption of alcohol or drugs can hardly be said to fall within the category of the morally innocent. Such individuals possess a sufficiently blameworthy state of mind that their imprisonment does not offend the principle of fundamental justice which prohibits imprisonment of the innocent. [...]

[14] The minority further stated at 119 (para 106 in WL):

> The *Charter* calls for a similar response. Central to its values are the integrity and dignity of the human person. These serve to define the principles of fundamental justice. They encompass as an essential attribute and are predicated upon the moral responsibility of every person of sound mind for his or her acts. The

> requirement of *mens rea* is an application of this principle. To allow generally an accused who is not afflicted by a disease of the mind to plead absence of *mens rea* where he has voluntarily caused himself to be incapable of *mens rea* would be to undermine, indeed negate, that very principle of moral responsibility which the requirement of *mens rea* is intended to give effect to.

[15] The minority then recognized that a further principle of fundamental justice was that punishment must be proportionate to the moral blameworthiness of an offender but then stated at 119-120 (para 108 in WL):

> 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 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.

[16] Lastly, the minority in ***Daviault*** considered whether voluntariness was a required element of the *actus reus* and stated at 120 (para 109 in WL):

> It is further contended that the *Leary* rule violates the presumption of innocence because it permits an individual to be convicted despite the existence of a reasonable doubt as to whether or not that individual performed the *actus reus* of his or her own volition. This argument is premised upon the assumption that voluntariness is a constitutionally required element of the *actus reus* of an offence of universal application. Again, I do not think that this assumption is warranted.

[17] Parliament responded to the ***Daviault*** decision in 1995, approximately one year later by enacting section 33.1 of the *Criminal Code*. Parliament clearly adopted the reasoning of the minority of the Supreme Court that one could substitute the mental fault of becoming intoxicated for the mental fault of a criminal offence when the following comments were made by the honourable Allan Rock at the House of Commons Standing Committee on Justice and Legal Affairs ("Justice Committee") meetings on April 6, 1995:

> Mr. Justice Sopinka wrote a strong judgment for the dissent and for the minority. He was able to conclude that the moral blameworthiness in the act of inducing

> your own intoxication was sufficient as a link to criminal liability for the harm charged in the offence.
>
> The majority concluded that it's not good and perhaps not right to get yourself completely intoxicated to the point where you're an automaton. That having been said, if you're before the court and charged with sexual assault, the fault or blameworthiness involved in intoxicating yourself is different in character and different in point of time and place from the fault involved in the sexual assault.
>
> So you can't take this fault and move it over there and say even though you may not have known what you were doing, you're guilty of sexual assault because you shouldn't have got yourself drunk. There is no link between the two.
>
> The minority didn't have that difficulty and felt that someone who had committed a morally blameworthy act and intoxicated themselves should not be able to defend themselves on that basis when charged with a criminal offence.
>
> What this legislation does is provide the link through legislation the majority did not see in the common law. It says if you intoxicate yourself to the point where you are not consciously aware or you have no voluntary control over what you are doing, then you have departed from the standard of care shared by all Canadians, and departed markedly from it. That's an element of fault that is sufficient to deprive you of the answer in criminal law when you are charged with an offence you committed in that state.
>
> We have given Parliament an opportunity in the context furnished by the preamble to furnish that legislated link. I believe we have therefore gone directly to the logic of the majority. We have changed an essential component of its analysis. We have furnished a different basis on which to examine the question and we have provided that the fact you get yourself intoxicated will no longer be a response if you are charged with a crime.

[18] Since being enacted in 1995, s. 33.1 has been challenged in 11 cases country wide and all of these cases have held that s. 33.1 offends ss. 7 and 11(d) of the *Charter*. The courts have been divided with respect to whether s. 33.1 is saved by s. 1 of the *Charter*. Five have held that s. 33.1 is saved by s. 1 and six have held that s. 33.1 is not saved by s. 1 of the *Charter*: ***R v McCaw***, 2018 ONSC 3464; ***R v Chan***, 2018 ONSC 3849; ***R v N(S)***, 2012 NUCJ 2; ***R v Dow***, 2010 QCCS 4276, rev'd on other grounds 2014 QCCA 1416; ***R v Flemming***, 2010 ONSC 8022; ***R v Cedeno***, 2005 ONCJ 91; ***R v Jensen***, 2000 CarswellOnt 6489; ***R v Dunn***, 1999 CarswellOnt 3544; ***R v Brenton***, 1999 CarswellNWT 109, rev'd on other grounds 2001 NWTCA 1; ***R v Decaire***, [1998] O.J. No. 6339; ***R v Vickberg***, 1998 CarswellBC 954. To my knowledge, no appellate Court has ruled on this issue as of this time.

s. 7 of the *Charter*

[19] The applicant has the onus to prove on a balance of probabilities that there has been a breach of the *Charter*. Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[20] The Crown takes no issue with the applicant's position that MWB's right to liberty is clearly engaged in the circumstances of this case. However, the Crown does not concede that MWB's liberty is being deprived in contravention of the principles of fundamental justice.

[21] One of the most basic foundational principles of criminal law is that the Crown must prove both the *actus reus* and *mens rea* of an offence beyond a reasonable doubt in order to obtain a conviction. That is, the offender must have intended to commit the offence and his or her actions in committing the *actus reus* must have been voluntary. These basic principles have been recognized as principles of fundamental justice in Canadian jurisprudence: see ***Re BC Motor Vehicle Act***, [1985] 2 SCR 486; ***R v Stone***, [1999] 2 SCR 290. In fact, Justice Cory specifically stated in ***Daviault***, when considering the intoxication defence, that the concept of *mens rea* is fundamental to our criminal law at 89-90 (para 40 in WL):

> In my view, the strict application of the *Leary* rule offends both ss. 7 and 11(d) of the *Charter* for a number of reasons. The mental aspect of an offence, or *mens rea*, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law. That element may be minimal in general intent offences; nonetheless, it exists. In this case, the requisite mental element is simply an intention to commit the sexual assault or recklessness as to whether the actions will constitute an assault. The necessary mental element can ordinarily be inferred from the proof that the assault was committed by the accused. However, the substituted *mens rea* of an intention to become drunk cannot establish the *mens rea* to commit the assault.

[22] Justice Cory further discussed the substitution of the *mens rea* for the consumption of alcohol with the *mens rea* of committing an assault and as stated earlier at 90 and 92 (paras 42, 45-46 in WL), held that such a substitution was not possible. The majority in ***Daviault*** was in direct contradiction of the minority, which held that there was no breach of fundamental justice if the *mens rea* and voluntariness were not proven. I am bound to follow the principle of *stare decisis* and assess the legislative response in light of the majority in ***Daviault***, especially where subsequent cases from the Supreme Court of Canada have held that *mens rea* and voluntariness are principles of fundamental justice.

[23] Under section 7 a balancing of both the rights of the individual accused and the public interest including the protection of the public needs to be done in order to determine the content and scope of the principles of fundamental justice: see for example *R v Malmo-Levine*, 2003 SCC 74, 2003 CarswellBC 3133 at paras 96-97). This will include the protection of women and children for instance.

[24] The Crown argues that the Supreme Court of Canada has held in a number of cases that it is not a breach of the principles of fundamental justice to impose criminal liability for harmful conduct that departs markedly from a standard of reasonable care. The argument appears to be that other cases have allowed for conviction based on a fault element that is not purely subjective and by stating, in section 33.1, that the defence of extreme intoxication was not available to an accused where they departed markedly from the standard of care recognized in Canadian society, there was no breach of the principles of fundamental justice that intent and voluntariness must be proven by the Crown.

[25] The Crown also refers to the defences of provocation, self-defence and duress as requiring an objective component that limits the applicability of these defences. An objective element can become part of a defence, however, the defences are not completely eliminated.

[26] The Crown refers to the cases of ***R v Creighton***, [1993] 3 SCR 3,1993 CarswellOnt 115 (WL), ***R v DeSousa***, [1992] 2 SCR 944,1992 CarswellOnt 100 (WL) and ***R v Hundal***, [1993] 1 SCR 867,1993 CarswellBC 489 (WL). In ***Creighton***, the accused was convicted of unlawful act manslaughter for which offence not only required that the Crown prove the *mens rea* and *actus reus* of the unlawful act but also the *mens rea* of the underlying offence that bodily harm was foreseeable according to the standard of a reasonable person. The Court went on to say that an objective standard with respect to the consequences of the unlawful act was acceptable as long as that negligent conduct constituted a marked departure from the standard of a reasonable person. This objective standard does not change with the background and predisposition of each accused. However, in ***Creighton*** the majority stated that a uniform objective standard was subject to one exception, the incapacity to appreciate the nature of the risk which the activity entails.

[27] In ***DeSousa***, the accused was charged with unlawfully causing bodily harm and the Court again considered the *mens rea* with respect to the consequences. A conviction could be based on any violation of a federal or provincial statute. The *mens rea* for the offence requires two separate requirements, the mental element for the underlying offence and whether a reasonable person would realize that the underlying unlawful act would subject another person to a risk of bodily harm. This does not eliminate a defence but imposes an objective standard.

[28] In ***Hundal***, the offence was dangerous driving and a conviction requires that the Crown prove beyond a reasonable doubt, that viewed objectively, the accused was driving in a manner that was dangerous to the public. The Supreme Court stated that because of the nature of driving, an objective test was appropriate. Such driving would have to meet the standard of a marked departure from the standard of care that a reasonable person would observe in the accused's situation. However, the Court clearly stated that this modified objective test also takes into consideration evidence from an accused and whether the accused had an explanation for their actions.

[29] These cases all deal with a lowered form of *mens rea* based on an objective standard akin to criminal negligence. In ***Creighton*** and ***DeSousa*** that lowered standard is in relation to consequences not the actual unlawful acts. In ***Hundal***, the defence can provide explanations regarding the objective test; *mens rea* remains arguable and the accused can at least raise a defence based on the objective test. Section 33.1 does not deal with the consequence of criminal acts, but with whether the Crown need prove the *mens rea* and *actus reus* of the criminal acts themselves.

[30] Section 33.1 does not provide a situation where an objective standard is applied notwithstanding that the section used the words "marked departure". The section does not allow for the defence to provide any evidence rebutting the presumption of *mens rea* and simply eliminates any evidence and argument regarding the *mens rea* and voluntariness of the accused. The section sets out what a marked departure from the standard of care is which is not an objective standard and can never be met by the defence. In my view there is no analogy between the cases mentioned or the defences of provocation, self-defence and duress which would allow s. 33.1 to comply with s. 7 of the *Charter*.

[31] In light of the majority in ***Daviault***, section 33.1 offends section 7 of the *Charter* because an accused can be convicted for a general intent offence in the absence of proof that the act committed was intended or voluntary. I also note that although not unanimous on the question as to whether it was saved under section 1, my opinion is shared by other colleagues from other provinces who have concluded that section 33.1 breaches section 7 of the *Charter*.

[32] Generally, I should also add that s. 7 violations are not easily justified under s. 1. However, in some situations the state may be able to demonstrate that the public good justifies a s. 7 breach: *Carter v Canada (AG)*, 2015 SCC 5 at para 95.

s. 11(d) of the *Charter*

[33] Section 11(d) of the *Charter* provides as follows:

> Any person charged with an offence has the right
>
> [...]
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[34] Section 11(d) provides an accused the right to make full answer and defence and the right to be presumed innocent unless the Crown proves their guilt beyond a reasonable doubt. Section 33.1 as currently worded allows for the conviction of an accused even though there is a reasonable doubt as to an essential element of the offence that is the *mens rea* or voluntariness.

[35] Counsel did not provide extensive submissions with respect to s. 11(d), but in essence the argument is that section 33.1 eliminates the need for the Crown to prove the *mens rea* and voluntariness without the possibility for the defence to rebut it. Under s. 33.1, the defence cannot argue or provide evidence regarding the *mens rea* or voluntariness where self-induced intoxication occurs while committing an offence of general intent 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.

[36] As already discussed, the argument that voluntary consumption of an intoxicant to the point of extreme intoxication would necessarily provide the necessary intention for the offence in question has been rejected by the majority in ***Daviault*** and many of the other cases dealing with the constitutionality of section 33.1. Justice Cory, in ***Daviault*** stated at 90-91 (para 43 in WL):

> In that same case it was found that s. 11(d) would be infringed in those situations where an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence; see ***Vaillancourt***, *supra*, at pp. 654-56. That would be the result if the *Leary* rule was to be strictly applied. For example, an accused in an extreme state of intoxication akin to automatism or mental illness would have to be found guilty although there was reasonable doubt as to the voluntary nature of the act committed by the accused. This would clearly infringe both ss. 7 and 11(d) of the *Charter*. 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.

[37] Section 33.1 allows for the conviction of a person even when there may be reasonable doubt as to the intention to commit the crime and the voluntariness of the accused's actions. Therefore, in my view section 33.1 also breaches section 11(d) of the *Charter*.

Section 1 of the *Charter*

[38] Legislation that offends *Charter* rights may nonetheless be upheld under s. 1 of the *Charter* which provides that *Charter* rights and freedoms are guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[39] The case of ***R v Oakes,*** [1986] 1 SCR 103, 1986 CarswellOnt 95 (WL), sets out the test to be applied to determining whether legislation is upheld pursuant to section 1 of the *Charter*. The test set out in ***Oakes*** describes a two-part test with the second part involving three factors. The first part involves a consideration of the objective of the legislation and whether this objective is of sufficient importance to override a constitutional right. That is, whether it is a pressing and substantial objective. The second part of the test puts the onus on the Crown to prove on a balance of probabilities that the infringing law is proportional. The Supreme Court listed three factors to consider in determining whether the infringing legislation is proportional. Firstly, are the measures adopted rationally connected to achieving the objective in question? Secondly do the measures or means impair the freedom or right as little as possible? Thirdly, are the deleterious effects of the means proportional to the salutary benefits of the law?

[40] The ***Oakes*** test is now well-established and was for instance discussed in ***R v Bedford***, 2013 SCC 72, 2013 CarswellOnt 17681 (WL) where the Court stated at para 126:

> [...] Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

[41] In ***RJR-Macdonald Inc. v Canada (PG)***, [1995] 3 SCR 19, 1995 CarswellQue 119 (WL) the Supreme Court was clear that the ***Oakes*** test must be applied flexibly and considered within the factual and social context of the circumstances. In addition, the Court stated that judges must

give deference to parliament's policy choices and recognize that courts are not specialists in policy-making. However, in ***RJR-Macdonald*** the Court stated at para 136:

> As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

Pressing and Substantial Objective

[42] When determining whether the objective of the infringing provision is pressing and substantial, the Court must look at whether the objective is sufficiently important to be capable in principle of justifying an infringement of the *Charter* right: ***RJR-Macdonald*** at para 143.

[43] The 11 cases which have considered section 33.1, are divided with respect to whether the legislation should be upheld under section 1 of the *Charter*. Those cases are also divided with respect to what is the objective of section 33.1. In this case, the Crown takes the position that the objective of section 33.1 is set out in the enacting act's preamble and that the objective is to protect vulnerable persons, particularly women and children, from violent intoxicated offenders and holding perpetrators of intoxicated violence accountable for their actions. This is held to have been the objective by courts which have upheld the constitutionality of section 33.1.

[44] The applicant, takes the position that the objective of section 33.1 is much narrower and is to prohibit an accused person, who does not possess the voluntariness and/or requisite criminal mental state necessary to commit a violent offence, from claiming a lack of *mens rea* or voluntariness as a defence. This objective is similar to those found in the cases which did not uphold section 33.1 and concluded that it was of no force and effect. According to those cases the true object of the legislation is to remove the defence.

[45] In ***RJR-MacDonald***, the Court discussed the objective of the infringing measure and was clear that the objective should not be overstated because if it were, the importance would be exaggerated and as a result the analysis would be compromised: ***RJR-MacDonald*** at para 144.

[46] The objective of s. 33.1 set forth by the Crown is broad and no one can seriously question that protection of vulnerable persons, women and children, from violence by intoxicated offenders and holding those intoxicated offenders accountable for their actions is not a substantial and pressing objective.

[47] However, if the objective is to simply remove the defence of self-induced extreme intoxication in cases of assaultive behaviour, that is rarely used and rarely successful, then the argument for s.33.1 being a pressing and substantial objective is less clear.

[48] The defence argues that when one considers the objective, it is the objective of the infringing measure and not the objective of Parliament that the Court must consider. In ***Oakes*** the Court explained at 140 (para 77 in WL) that the starting point is the nature of Parliament's interest or objective which accounts for the passage of the legislation.

[49] As stated above, in ***RJR-MacDonald*** the Court used the wording "the objective of the infringing measure".

[50] In ***Bedford*** the Supreme Court referred to the objective as "the government's goal" and that the "law's goal must be pressing and substantial".

[51] In my view, whether one refers to the objective as the government objective, or parliament's objective or the objective of the infringing measure, the idea is the same. As conceded by the defence, a court should consider all of the interpretative tools including the actual wording of the infringing statute, the wording of the preamble to the Act, Hansard materials and evidence presented and comments made at Justice Committee hearings. These are tools that can be used to determine the objective of the infringing legislation. It must be remembered that legislation may have a different effect than its objective. The effect of the legislation can be of importance when considering whether the legislation meets the proportionality test. However, a court should not conflate the effect of the legislation with its objective.

[52] Section 33.1 prevents accused from showing that they were unaware of or incapable of consciously controlling their behaviour with respect to a general intent offence which threatens or interferes with the bodily integrity of another person, if the evidence indicates that there was self-induced intoxication.

[53] The preamble to the enacting legislation which amended the *Criminal Code*, adding section 33.1, refers to the recognition that women and children are more likely to be negatively affected by violence and that they have a right to be protected. The preamble goes on to recognize that violence and intoxication can be related and that people should be held accountable for their violent actions while in the state of self-induced intoxication.

[54] During Justice Committee meetings, evidence was presented and submissions were made regarding the effect of violence on women and children. It was clearly stated that section 33.1 was a direct response to the ***Daviault*** decision. Evidence was provided regarding the effect of alcohol on violence and although most people consume alcohol without becoming violent, consumption of alcohol is often a contributing factor towards violent actions. During debates and comments in the House of Commons, members of Parliament voiced that the principle of accountability should be continued to be reflected in the measures taken by the government. There can be no doubt that there was a public concern about self-intoxicated individuals not being held responsible for their actions.

[55] In my view the objective of section 33.1 is to protect vulnerable persons, particularly women and children, from violent offenders who because of self-induced intoxication are unaware of their actions, and holding such perpetrators of intoxicated violence accountable for their actions. The protection of members of society and holding offenders accountable is a broad goal. Many criminal provisions have these same goals. However, s. 33.1 deals with a specific type of offender which narrows the scope of the objective.

[56] It was argued that these types of cases are rare and therefore do not raise a pressing or substantial concern, thus a responsive measure cannot meet a pressing and substantial objective requirement. However, one must remember that deterrence is an important objective of criminal legislation. In my view the objective of s. 33.1 is pressing and substantial. It is a basic principle of Canadian society that people should be held responsible for their actions and should not commit violence on others. In my opinion, the question regarding the elimination of the defence or the effect on accused's rights, should be determined under the second part of the ***Oakes*** test.

Proportionality

[57] Having determined that the objective of s. 33.1 is pressing and substantial, the ***Oakes*** test now requires that the court determine whether there is proportionality between the objective and the means used to achieve it. This determination requires the court to consider three factors; (1) whether there is a rational connection between the section and its objective, (2) whether the legislation impairs the protected right no more than is reasonably necessary to accomplish the objective and (3) whether the salutary benefit outweighs the deleterious effects of the legislation.

Rational Connection

[58] The applicant argues that there is no rational connection between the stated objective of protecting vulnerable victims from severely intoxicated offenders because an offender in that condition cannot be deterred from violence. However, the deterrence effect is with respect to the offender getting into that severely intoxicated state. In addition, as conceded by the applicant, alcohol and violence are associated even though a causative relationship is less clear. Some of the caselaw which have considered this issue, concluded that it was difficult to determine whether section 33.1 protects the vulnerable individuals such as women and children or other members of society. The deterrent effect of legislation is difficult to measure. As stated in ***RJR-MacDonald*** a court may find a connection based on reason and logic where direct proof is not available. There is likely some deterrent effect from s. 33.1. In my view there is likely a connection between the objective of protecting vulnerable individuals and what is stated in section 33.1.

[59] The legislation clearly holds offenders accountable for their actions. The effect of section 33.1 is that it removes a defence, lack of intent and/or lack of voluntariness, and holds those accountable who commit violent acts while intoxicated. The defence concedes that there is a rational connection between section 33.1 and the objective of accountability.

[60] In my view the Crown has proven on a balance of probabilities that there is a rational connection between section 33.1 and its objective.

Minimal Impairment

[61] The second step of the proportionality analysis requires the Crown to prove on a balance of probabilities that the legislation enacted impaired the guaranteed *Charter* rights under sections 7 and 11(d) as minimally as possible in attempting to achieve its objectives. In ***RJR-MacDonald*** McLachlin J was of the opinion that the process of enacting legislation involves a careful tailoring so that rights are impaired no more than necessary, but Parliament must be given some latitude. As McLachlin J. stated at para 160:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor the objective to the infringement [...]. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [citations omitted]

[62] The question here is whether there is there a less harmful means of protecting vulnerable victims and holding individuals accountable who become so intoxicated that they cannot control their actions and harm others, than the elimination of the right to only be convicted where the actions are intended and voluntary.

[63] In ***Daviault*** which was about extreme intoxication of the accused who was an alcoholic, Justice Cory proposed a remedy for the *Leary* rule being unconstitutional and stated at 100-101 (paras 61-63 in WL):

> I would add that it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk.
>
> The appellant in this case is an elderly alcoholic. It is difficult if not impossible to present him in a sympathetic light. Yet any rule on intoxication must apply to all accused, including the young and inexperienced drinker. The strict rule in *Leary* is not a minor or technical infringement but a substantial breach of the *Charter* eliminating the mental elements of crimes of general intent in situations where the accused is in an extreme state of intoxication. I would think that this judge-made rule should be applied flexibly, as suggested by Wilson J., so as to comply with the *Charter*. Such an approach would mean that except in those rare situations where the degree of intoxication is so severe it is akin to automatism that drunkenness will not be a defence to crimes of general intent.
>
> It should not be forgotten that if the flexible "Wilson" approach is taken, the defence will only be put forward in those rare circumstances of extreme intoxication. Since that state must be shown to be akin to automatism or insanity, I would suggest that the accused should be called upon to establish it on the balance of probabilities. This court has recognized, in ***R. v. Chaulk***, [1990] 3 S.C.R. 1303, that although it constituted a violation of the accused's rights under s. 11(d) of the *Charter*, such a burden could be justified under s. 1. In this case, I feel that the burden can be justified. Drunkenness of the extreme degree required in order for it to become relevant will only occur on rare occasions. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of his drinking.

[64] Instead of adopting such a rule, Parliament chose to eliminate exactly what Justice Cory proposed. The effect of s. 33.1 was to simply remove any defence related to intoxication – caused by alcohol or otherwise - if it involved a general intent offence with violence. It eliminates the Crown's longstanding requirement to prove the mental element in offences of general intent involving violence. During the Justice Committee hearings there was little discussion of the infringement of s. 7 and s. 11(d) of the *Charter* and how those infringements

could be minimized. Any discussions regarding the fundamental principles underlying the theory of criminal responsibility were few and far between during the Justice Committee hearings. In fact, many during the hearings commented that the legislation should be broader and include specific intent offences.

[65] During the Justice committee hearings regarding section 33.1, the suggestion of specific offences for acts of criminal intoxication was also discussed and reasons were given for rejecting these types of offences as opposed to enacting section 33.1. It is not the Court's role to second-guess Parliament's decision not to enact offences of criminal intoxication. I will refrain from further commenting in that regard.

[66] As stated earlier, perhaps the most important goal of s. 33.1 is to hold people responsible for their actions in committing acts of violence when intoxicated to such an extent that they are unaware of their actions. It appears that Parliament recognized that the majority in ***Daviault*** took the position that intent to become intoxicated could not be substituted for the intent to commit a certain general intent offence, but intended for s. 33.1 to be the link to allow such a substitution. That intended link is that accused who are intoxicating themselves to the point where they are unaware of, or incapable of controlling their behaviour depart markedly from the standard of care. The idea is that the "criminal fault by reason of intoxication" taken in the context where accused interfere with bodily integrity justifies the deprivation of the rights which would otherwise be protected, whether the behaviour is voluntary or not.

[67] This is not a modified objective standard which considers the circumstances of the situation and the offender, such as was adopted in ***Hundal***. In ***Hundal***, the Supreme Court discussed the issue of the necessity of *mens rea* in order for a section to be compliant with s 7 of the *Charter*. The Court held that *mens rea* could be satisfied by proof of negligence measured on a modified objective standard. This modified objective test allowed for an accused to be convicted for dangerous driving if their actions were a marked departure from the standard of care of a reasonable person in the circumstances. However, if the accused offers an explanation for their actions, "the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused": see ***Hundal***, at 888-889 (paras 32-33 in WL).

[68] Section 33.1 simply adopted the reasoning of the minority in ***Daviault*** that the *mens rea* in cases of self-induced intoxication could be substituted for the intent to commit a general intent offence of violence. This supposed standard of care did nothing to lessen the infringement of the constitutional rights guaranteed under ss. 7 and 11(d) of the *Charter*.

[69] The right not to be convicted if there is a reasonable doubt with respect to the *mens rea* or voluntariness which needs to be proven by the Crown is, at its heart, based on our system's abhorrence in convicting the morally innocent. During Justice Committee hearings regarding s. 33.1, Minister Rock discussed automatism in cases where a person suffered from a mental illness and indicated that the difference between that situation and section 33.1 is that the person who has a mental disorder is somebody who,

> by no reason of anything he did, was incapable of forming an intention. It was a physical problem. It wasn't something he chose or did to himself.
>
> Here we're dealing with a principle. Here's somebody who intoxicates herself or himself and then does harm to somebody else while having caused the condition

> that causes him to lose voluntary control or conscious awareness of their conduct. That's a very different case.

[70] During the Justice Committee hearings, the focus was on the consumption of alcohol and as stated by Minister Rock scientific experts were of the opinion that the level of intoxication needed to induce automatism could not be reached by the consumption of alcohol. The understanding was that the morally innocent would not be convicted because s. 33.1 set out that people had the ability to choose not to become so drunk that they were not aware of their behaviour or incapable of consciously controlling that behaviour. The, assumption that a person could not reach the stage of becoming an automaton by the consumption of alcohol, leads to a conclusion that moral culpability can be attributed to the consumption of alcohol.

[71] Dr. John Bradford appeared before the committee and made comments regarding automatism where he stated:

> The Canadian psychiatric Association, however, would acknowledge that there have to be limitations to the automatism defence, and the principle here is that any responsible individual who is aware of a condition he has that may lead to a state of automatism has a responsibility to avoid those situations when it might occur and therefore avoid circumstances that may lead to physically causing harm to himself or to other people. [...] The principle behind this is the same in that a responsible individual, indeed most members of Canadian society, are fully aware of the effects of alcohol and how it may affect their behaviour in various ways, such as impairing the ability to operate a motor vehicle and may be associated with various acts of violence. It's therefore incumbent on individuals to avoid a state of intoxication if they are concerned about these consequences and therefore responsible for any behaviour that may flow out of it.

[72] Our criminal justice system does not allow for intoxication as a defence for criminal actions, in almost all cases. The principle that people are responsible for their actions continues to be an underlying principle of our law, as it should be. However, there are circumstances where the moral culpability of becoming intoxicated does not equate with the moral culpability of committing certain violent offences. In the case of alcohol, most people will be aware of the effects of alcohol consumption and that if one consumes past a certain point they may lose all control. Those who knowingly go to this extreme are not morally innocent. However, as stated in ***Daviault***, at 91 (para 43 in WL), the law must also apply to all accused and a young inexperienced drinker may consume too much alcohol before they know what the effects will be.

[73] During the Justice Committee hearings in 1995, Dr. Harold Kalant also gave evidence and discussed different types of automatism such as sleepwalking, hypnosis and dissociative disorders and testified that some consciousness is necessary to be able to perform complex physical tasks. Dr. Harold Kalant also referred to an example where automatism may arise even out of a small quantity of alcohol:

> There are some instances in which intoxication can probably trigger automatism due to other factors. One known as pathological intoxication, or as it's now called alcohol idiosyncratic intoxication, does carry with it a behaviour that probably can properly be called automatism, a marked behavioural change including inappropriate belligerence or assaultiveness. But the important features are that it is triggered by a small quantity of alcohol that is not enough to produce the usual

> signs of intoxication. There's marked confusion, disorganization of thought, incoherent or deluded speech, and an explosive outburst of fury in which homicide or suicide is possible; it is followed by deep sleep and partial or total amnesia for the events in question.
>
> Not all experts accept that this really happens, but the majority do. The important thing is that it is brought on by a small amount of alcohol, which does not produce the typical signs of intoxication. So if one looks at a case in which there is clearly a characteristic pattern of intoxication of the ordinary kind, that does not qualify as a case of pathological intoxication.

[74] Thus section 33.1 as is currently worded likely allows for the conviction of an individual who consumes a minimal amount of alcohol even though their actions in consuming the alcohol are not morally reprehensible.

[75] The use of drugs was not discussed to any great degree at Justice Committee hearings regarding section 33.1. During the hearings, Minister Rock also recognized that there was evidence that distinguished alcohol from other intoxicants. He stated that maybe there are some drugs that do cause automatism, but found that alcohol did not apparently do so. It is clear from the facts in this case and other cases that the ingestion of a small amount of drugs can have significant impact including a dissociative state akin to automatism. In addition, the courts and the media report numerous incidences of certain drugs being laced with other substances which result in extremely unusual behaviour.

[76] In today's society, the use of illegal drugs by young people has become much more prevalent. The use of these drugs can be unpredictable. The amount of intoxication, from such drugs is not necessarily dependent on the amount consumed. According to section 33.1 the circumstances of the offence and the offender matters not when self-induced intoxication renders the person unaware or incapable of consciously controlling their behaviour. The level of moral culpability under s. 33.1 is irrelevant even though the circumstances of the offence and the offender could be very different.

[77] Parliament did not adopt the suggestion of Justice Cory, in ***Daviault***, to shift the burden by allowing an accused to establish that they were in a state of intoxication akin to automatism which would only provide a defence in rare cases in any event and would likely comply with s. 1 of the *Charter*.

[78] Self-induced intoxication has been defined so that it does not allow for a defence when a person does not know exactly what they are consuming and what the effects might be. n ***R v Chaulk***, 2007 NSCA 84, 2007 CarswellNS 317 (WL), the accused consumed a mixture of illegal drugs and then, broke into an apartment by smashing the front door. At some point he took all of his clothes off and then destroyed property as well as threatened members of a family and attacked a victim. The trial judge acquitted the accused on the basis that he was in an automaton and that his intoxicated state was not self-induced. The Court of Appeal overturned the trial judge and based their decision on a finding that all that was needed to prove self-induced intoxication was that one voluntarily ingested a substance and knew that it could intoxicate them even though they may not know the extent of that intoxication. This test for voluntary intoxication required that an accused knew the risk of being intoxicated or the risk should have been within his or her contemplation. This test employed an objective element to the issue of self-induced intoxication.

[79] In my view, the most contentious issue that differentiates the positions regarding the constitutionality of s. 33.1 is the principle of accountability. Many take the position that unaccountability for violent acts that occur as a result of intoxication is unacceptable. As stated earlier, the minority in *Daviault* and members of the Justice Committee who first drafted s. 33.1 all took the position that where an individual intoxicated themselves to the point that they are an automaton, they should be held responsible for that choice. However, there will be situations where a choice was not made to be an automaton on a modified objective standard.

[80] In my view, if Parliament wishes to hold those accountable for departing from a certain standard of care and minimally impair *Charter* rights, that standard of care could be for instance an objective standard of care similar to what was held to be constitutionally compliant in dangerous driving cases. That is, that it considers the circumstances under which intoxication took place to determine whether objectively the person knew the consumption of drugs or alcohol could leave them in a state where they could become unaware of, or incapable of consciously controlling their behaviour and then interfere or threaten to interfere with the bodily integrity of another person. This would truly be a link between the *mens rea* of becoming intoxicated and the *mens rea* for the underlying offence.

[81] In ***Hundal***, Justice Mclachlin, in concurring reasons, stated at 875 (para 44 in WL):

> If, as my colleague suggests, McIntyre J. was describing a modified objective test in *R. v. Tutton*, [1989] 1 S.C.R. 1392, at p. 1432, the language and example used indicate that his concern too was to ensure that in applying the objective test all relevant circumstances, including those personal to the accused be considered. He reaffirms the objective test by asserting that only "an honest and reasonably held belief" can exonerate the accused. In other words, it is no defence to say, on the subjective level, "I was being careful", or "I believed I could do what I did without undue risk". The defence arises only if that belief was reasonably held. McIntyre J. goes on to offer the example of a welder who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is nearby. The welder charged in connection with a subsequent explosion, McIntyre J. asserts, should be allowed to introduce evidence that he believed there were no combustible or explosive materials on the premises. This is an objective test; the fact that the welder had been told there were no combustible or explosive materials on the site is one of the circumstances which a jury should take into account in determining what a reasonable person would have thought and done. Was it reasonable for the welder in these circumstances to turn his torch on in the enclosed space? The answer, on the objective test, is "of course."

[82] Examples of such evidence would be an accused's experience and knowledge with respect to the effects of certain drugs or alcohol. An accused would have to do more than assert that they believed they could consume the drug or alcohol without undue risk. Evidence would have to be provided that such a belief was reasonable. Such a requirement would ensure that the morally innocent are not convicted and important *Charter* rights not unduly impaired.

[83] In my view, section 33.1 does very little to minimally impair the sections 7 and 11(d) *Charter* rights that every court dealing with this question have unanimously found that it impairs. Therefore, the Crown has not proven on a balance of probabilities that section 33.1 impaired the

guaranteed *Charter* rights under sections 7 and 11(d) as minimally as possible in attempting to achieve its objectives.

Salutary Effect Versus Deleterious Effect

[84] Section 33.1 failed the minimal impairment test, but I will nonetheless look at the final inquiry of the proportionality which weighs the negative effects of the infringing legislation on people's rights against the beneficial impact of the legislation with respect to its objective.

[85] When considering the negative effects of the infringing legislation it is important to remember that we do not consider the negative effects to society generally but with respect to individuals. In ***Hutterian Brethern of Wilson Colony v Alberta*** 2009 SCC 37, 2009 CarswellAlta 1094 (WL), the Court discussed, at para 76, the importance of the fourth stage of the proportionality analysis and stated that even where the legislation may pass the first stages - pressing goal, rational connection, and minimum impairment - it may not pass the last stage. That is because the first three stages focus on the law's purpose while the last stage "takes full account of the severity of the deleterious effects of a measure on individuals or groups".

[86] Before considering the beneficial and deleterious effects of section 33.1 it is important to recall the comments of Cory J. in ***Daviault*** where he stated at 101 (para 63 in WL) that a rule against the use of intoxication as a defence could withstand section 1 *Charter* scrutiny if the accused had the onus to prove the defence on a balance of probability by providing the circumstances of consumption and expert evidence as to the effect of that consumption. As stated earlier, this defence would rarely be successful. In ***Daviault***, Justice Cory cited Australian and New Zealand studies which showed that there were only 3 acquittals in 510 trials even though the defence of extreme intoxication is available in those countries.

[87] The salutary effect of the legislation is that it ensures the conviction of an intoxicated individual who commits an assaultive criminal offence. The objectives of this legislation are to protect vulnerable victims and hold accountable those accused that commit assaults while intoxicated. As argued by the applicant, the vast majority of people who become intoxicated and commit assaults have no defence of intoxication. A defence could only be available if the accused could prove on a balance of probabilities that they were intoxicated to such an extent that they were in a state akin to automatism. This is so rare that in 25 years only a handful of cases have come before the courts and the majority of those have not resulted in acquittals. Nonetheless, vulnerable victims continue to be assaulted by intoxicated individuals who are not in the state of automatism. Courts recognize that legislation has a deterrent effect towards the commission of crimes and section 33.1 likely has some effect towards the protection of vulnerable victims, although that effect is probably minimal.

[88] Some have argued that without section 33.1 some vulnerable victims would be less likely to report crimes committed against them by intoxicated attackers, because these victims would believe that the perpetrator would have a defence and their reporting would be of no avail. In my view, it is unlikely that vulnerable victims would be cognizant of the nuances of intoxication versus intoxication that rendered a person an automaton. As stated above this defence would only rarely be successful that it would unlikely affect a victim's decision to report an assaultive crime to the police on the basis that an acquittal might occur.

The other salutary effect of s. 33.1 is that it holds offenders accountable who commit assaultive offences while intoxicated. There can be no doubt that section 33.1 is effective in that respect

considering that it removes any defence of intoxication and therefore holds individuals accountable for their actions whether they are morally innocent or not. As stated in the preamble to the legislation, Canadian society expects people to be held accountable for their criminal activity. In *Leary*, it was held that an individual who consumed alcohol was morally culpable for their actions as a result of that consumption. This principle was absolutely rejected by the majority in ***Daviault***. Nonetheless, Parliament, in enacting section 33.1 clearly stated that there is criminal fault as a result of the consumption of intoxicants which renders the person unaware of, or incapable of consciously controlling, their behaviour. I have discussed the incorporation of a modified objective standard of care and will not repeat my comments again, but such a standard would significantly reduce the deleterious effect of s. 33.1.

[89] The deleterious effect of s. 33.1 is that it offends some of the basic underlying principles of our system of justice. These were stated by Justice Cory in ***Daviault*** at 89 and 91 (paras 40 and 43). The requirement that the Crown prove the *mens rea* and voluntariness of the *actus reus* are an integral part of proving an offence beyond a reasonable doubt and is so ingrained in our system of justice. These rights are sacrosanct principles which are integral to our system of justice and are the bedrock for the principles underlying the presumption of innocence. These are present in order to ensure that the morally innocent are not convicted. It is difficult to think of a more serious limit of integral principles to a free and democratic society than that the accused could be convicted even though there could be a reasonable doubt as to the elements of the offence and their moral innocence.

[90] As mentioned above under the previous factor a person who consumed a minimal amount of alcohol or drugs could be convicted even though their moral culpability is quite low. Section 33.1 also removes the defence of a person who consumed a minimal amount of alcohol even if that consumption results in a mental disorder In ***R v Bouchard-Lebrun***, 2011 SCC 58 at para 91:

> Section 33.1 *Cr. C.* therefore applies to any mental condition that is a direct extension of a state of intoxication. It is also important to understand that no distinction based on the seriousness of the effects of self-induced intoxication is drawn in this provision. The appellant's suggestion that it applies only to the "normal effects" of intoxication is wrong. There is no threshold of intoxication beyond which s. 33.1 *Cr. C.* does not apply to an accused, which means that toxic psychosis can be one of the states of intoxication covered by this provision. It is so covered in the case at bar. The Court of Appeal therefore did not err in law in holding that s. 33.1 *Cr. C.* was applicable rather than s. 16 *Cr.*

[91] Of course, people should be held accountable for their actions, especially where they willfully or recklessly place themselves into a state where they cannot control their actions. However, the morally innocent or those whose moral culpability is very low should not be convicted by eliminating the mental element in breach of ss. 7 and 11(d) of the *Charter*. Eliminating the defence so that everyone who become so intoxicated that they are unaware of their actions and commit violent offences can be systematically convicted is, in my view, a serious infringement. Requiring a modified objective standard with respect to the consumption of intoxicants and their effects, would reduce some of the deleterious effects of removing the Crown's burden of proving the *mens rea* and voluntariness of certain general intent offences. However, the deleterious effect of section 33.1, as it now reads, outweighs its salutary effect.

[92] In light of the foregoing I find that s. 33.1 of the *Criminal Code* is inconsistent with ss. 7 and 11(d) of the *Charter* in a manner not justified under s 1 and I declare it to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*. As a result, the applicant will be able to raise the defence formerly not available under s. 33.1.

Heard on the 19th, 20th, 21st, 22nd and 23rd day of August, 2019.
Dated at the City of Calgary, Alberta this 3rd day of October, 2019.

W.T. deWit
J.C.Q.B.A.

Appearances:

Deborah Alford and Mathew Block
for the Crown

Sean Fagan
for the Accused