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SELF-INDUCED EXTREME INTOXICATION AND SECTION 33.1 OF THE *CRIMINAL CODE*

Report of the Standing Senate Committee on Legal and Constitutional Affairs

The Honourable Brent Cotter, *Chair*
The Honourable Pierre-Hugues Boisvenu, *Deputy Chair*
The Honourable Pierre J. Dalphond, *Member of Steering Committee*
The Honourable Dennis Glen Patterson, *Member of Steering Committee*

APRIL 2023

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For more information please contact us:
by email: *LCJC@sen.parl.gc.ca*
by mail: The Standing Senate Committee on Legal and Constitutional Affairs
Senate, Ottawa, Ontario, Canada, K1A 0A4
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TABLE OF CONTENTS

THE COMMITTEE MEMBERSHIP

The Honourable
Brent Cotter
Chair

The Honourable
Pierre-Hugues
Boisvenu
Deputy Chair

The Honourable Senators

Denise Batters

Bernadette Clement

Pierre J. Dalphond

Renée Dupuis

Mobina S.B. Jaffer

Marty Klyne

Kim Pate

Dennis Glen Patterson

Ex-officio members of the committee:

The Honourable Senator Marc Gold, P.C. and/or Raymonde Gagné

The Honourable Senator Donald Neil Plett and/or Yonah Martin

Other Senators who have participated in the study:

The Honourable David Arnot

The Honourable Peter Harder, P.C.

The Honourable Scott Tannas

Parliamentary Information and Research Services, Library of Parliament:

Michaela Keenan-Pelletier, Analyst

Julian Walker, Analyst

Senate Committees Directorate:

Mark Palmer, Clerk

Aoife Mc Donald, Administrative Assistant

Senate Communications Directorate:

Amely Coulombe, Communications Officer

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Thursday, June 23, 2022:

The Honourable Senator Gold, P.C., moved, seconded by the Honourable Senator LaBoucane-Benson:

That, notwithstanding any provision of the Rules, previous order or usual practice:

1. if the Senate receives a message from the House of Commons with Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication), the bill be placed on the Orders of the Day for second reading on June 23, 2022;

2. if, before this order is adopted, the message on the bill had been received and the bill placed on the Orders of the Day for second reading at a date later than June 23, 2022, it be brought forward to June 23, 2022, and dealt with on that day;

3. all proceedings on the bill be completed on June 23, 2022, and, for greater certainty:

(i) if the bill is adopted at second reading on that day it be taken up at third reading forthwith;

(ii) the Senate not adjourn until the bill has been disposed of; and

(iii) no debate on the bill be adjourned;

4. a senator may only speak once to the bill, whether this is at second or third reading, or on another proceeding, and during this speech all senators have a maximum of 10 minutes to speak, except for the leaders and facilitators, who have a maximum of 30 minutes each, and the sponsor and critic, who have a maximum of 45 minutes each;

5. at 9 p.m. on Thursday, June 23, 2022, if the bill has not been disposed of at third reading, the Speaker interrupt any proceedings then before the Senate to put all questions necessary to dispose of the bill at all remaining stages, without further debate or amendment, only recognizing, if necessary, the sponsor to move the motion for second or third reading, as the case may be; and

6. if a standing vote is requested in relation to any question necessary to dispose of the bill under this order, the vote not be deferred, and the bells ring for only 15 minutes; and

That:

1. the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the matter of self-induced intoxication, including self-induced extreme intoxication, in the context of criminal law, including in relation to section 33.1 of the *Criminal Code*;

2. the committee be authorized to take into consideration any report relating to this matter and to the subject matter of Bill C-28 made by the House of Commons' Standing Committee on Justice and Human Rights;

3. the committee submit its final report to the Senate no later than March 10, 2023; and

4. when the final report is submitted to the Senate, the Senate request that the government provide a complete and detailed response within 120 calendar days, with the response, or failure to provide a response, being dealt with pursuant to the provisions of rules 12-24(3) to (5).

After debate,

The question being put on the motion, it was adopted.

Interim Clerk of the Senate

Gérald Lafrenière

Extract from the *Journals of the Senate* of Thursday, March 9, 20223:

The Honourable Senator Cotter moved, seconded by the Honourable Senator Deacon (*Nova Scotia*):

That, notwithstanding the order of the Senate adopted on Thursday, June 23, 2022, the date for the final report of the Standing Senate Committee on Legal and Constitutional Affairs in relation to its study on self-induced intoxication be extended from March 10, 2023, to April 30, 2023.

The question being put on the motion, it was adopted.

EXECUTIVE SUMMARY

The Standing Senate Committee on Legal and Constitutional Affairs (the committee) has studied various issues pertaining to section 33.1 of the *Criminal Code.* Parliament amended this section in 2022 with Bill C-28, an Act to amend the Criminal Code (self-induced intoxication), soon after the Supreme Court of Canada had struck down the previous version of the section in *R. v. Brown* for being unconstitutional. The amendment was passed quickly by Parliament, without the opportunity for committee studies to be undertaken during the legislative process.

In brief, section 33.1 applies in rare circumstances when a person commits the act of a violent crime while in state of self-induced extreme intoxication that is akin to automatism. It establishes how the accused can be found guilty of the crime, despite lacking the general intent or voluntariness to commit the act that is ordinarily required under Canada's criminal laws. The accused can be convicted if they were criminally negligent in consuming the substances that made them extremely intoxicated. The Crown must prove that the accused demonstrated a "marked departure" from the standard of care a reasonable person would have exercised when consuming intoxicants.

This report summarizes this complex area of law and considers the challenges it presents. It examines the views of the witnesses who appeared before the committee. It makes 6 recommendations designed to address the concerns shared by the committee and witnesses.

Many witnesses raised various concerns about the current section 33.1, including that:

- it lacks clarity and precision and will result in uncertainty about the law and the spread of misinformation;
- this uncertainty could result in more accused persons attempting to put forward an extreme intoxication defence;
- prosecutors will face difficulties in establishing guilt;

- it will have a disproportionate impact on victims of gender-based violence, in particular Indigenous, racialized, economically disadvantaged, and other marginalized women; and

- it could contribute to existing problems in Canadian society and our legal system that discourage women from coming forward when they are victims of gender-based violence.

There was no consensus among witnesses about the best approach to these challenges, but many witnesses were of the view that continued work is needed to find a better solution. Many felt the consultations held by the federal government in preparation for Bill C-28 were insufficient. They noted that further consultations would allow for deeper consideration of possible solutions, including making amendments to section 33.1 and the possibility of creating new offences targeting self-induced intoxication that results in harm to others.

Some witnesses noted that more research and better disaggregated data regarding accused persons and victims is needed. Further work on these issues can also be done by the Law Commission of Canada and by Parliament.

The Government of Canada can also help address some of these challenges by establishing public awareness campaigns and a robust education plan to inform Canadians about criminal laws pertaining to sexual assault and gender-based violence, and also to address deep-seated myths and stereotypes related to these matters that persist in our culture.

Canadians need a justice system that respects the rights of the accused, but that also ensures that women are safe and have access to justice. The committee's recommendations are intended to prompt further action by the Government of Canada and Parliament to ensure that these various concerns and challenges are effectively and meaningfully addressed.

The committee makes 6 recommendations, which are set out in full at the end of this report. In brief, the committee recommends that:

1. **The Government of Canada begin a new review and consultation process of section 33.1 and related issues, including gender-based violence;**

2. **The Minister of Justice without further delay give due consideration to the possible merits of creating self induced and other intoxication offences (including as laid out in Appendix D);**

3. **The Government of Canada refer the intersecting topics of section 33.1 of the *Criminal Code*, crimes involving intoxication, and gender-based violence to the Law Commission of Canada immediately for an independent study;**

4. **The Government of Canada establish public awareness campaigns and a robust education plan designed to inform Canadians about the relevant key elements of criminal laws pertaining to sexual assault and gender-based violence, and to address related deep-seated myths and stereotypes that persist in our culture;**

5. **That the Government of Canada establish an action plan and commit the necessary resources to conduct research, collect disaggregated data, monitor, and report to Canadians concerning section 33.1 and the broader impact of intoxication due to alcohol and other drugs on crime and gender-based violence, including reasons why victims and survivors are reluctant to report violence; and**

6. **That a parliamentary review of section 33.1 of the *Criminal Code* be undertaken three years after it came into force to assess its effectiveness in meeting Parliament's objectives and its impact on victims of crime.**

Introduction

Section 33.1 of the *Criminal Code* and the Committee's Study

On 23 June 2022, the Standing Senate Committee on Legal and Constitutional Affairs (the committee) received an order of reference to the effect that, after the passing of Bill C-28, an Act to amend the Criminal Code (self-induced intoxication), the committee would be authorized to "examine and report on the matter of self-induced intoxication, including self-induced extreme intoxication, in the context of criminal law, including in relation to section 33.1 of the Criminal Code." Bill C-28 received Royal Assent that same day, amending section 33.1 of the *Criminal Code* (Code)[1] with respect to self-induced extreme intoxication. Parliament enacted the bill following a Supreme Court of Canada decision that struck down the previous version of section 33.1.

Section 33.1 of the Code establishes how an accused person can be found guilty of a violent crime they performed while in a state of self-induced extreme intoxication, despite lacking the general intent or voluntariness ordinarily required to commit it. This section applies when an accused person demonstrates to a court that their extreme intoxication caused them to be in a state that is akin to automatism.[2] This does not simply mean they were very drunk or very high on drugs. Extreme intoxication is meant to apply to specific, rare circumstances that have been recognized by medical experts and courts to refer to a state where a person has no control over or awareness of their actions.[3] The common law defence of automatism has been based on the rationale that if the accused's actions were involuntary, it follows that they would not have had the necessary level of intention or the moral blameworthiness to be held criminally liable.

The current section 33.1 nonetheless allows for a person to be held liable for their violent actions if they were criminally negligent in consuming the substances that made them extremely intoxicated. To establish criminal negligence, the Crown must prove that the accused demonstrated a "marked departure" from the standard of

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[1] *Criminal Code*, R.S.C., 1985, c. C-46.

[2] See *R. v. Brown*, 2022 SCC 18 at paras. 26-27.

[3] Standing Senate Committee of Legal and Constitutional Affairs (LCJC), *Evidence*, 2 February 2023 (Professor Steven Coughlan); *R. v. Brown*, at para 4; and *R. v. Daviault*, [1994] 3 SCR 63.

care a reasonable person would have exercised in the circumstances (i.e., when consuming intoxicants).

In *R. v Brown*,[4] the Supreme Court held that former section 33.1, which prevented an accused charged with a violent offence from using the defence of extreme intoxication, was unconstitutional because it violated the rights of the accused under the *Canadian Charter of Rights and Freedoms* (the Charter).[5]

Bill C-28 was introduced in the House of Commons on 17 June 2022 by the Honourable David Lametti, Minister of Justice and Attorney General of Canada. It passed quickly through both houses of Parliament and received Royal Assent that same week.

During its post-enactment study, the committee held four days of hearings and heard from 15 witnesses, including Minister Lametti. The witnesses are listed in Appendix B. The committee notes that several organizations who were invited to appear declined, some informing the committee that this was because Bill C-28 had already passed. This report summarizes the committee's hearings and provides six recommendations.

Main Issues and Key Messages from Witnesses

The possibility of a person being found to have performed the act of a violent crime, but then being found not guilty despite having willingly intoxicated themselves raises challenging issues. Our justice system requires balancing the principles of fundamental justice and the presumption of innocence guaranteed in the Charter with the need to hold perpetrators accountable for violence against others.[6] Cases where an accused who was extremely intoxicated is found not guilty of a violent act are undoubtedly challenging for victims, who "will feel that the violence against them is not being responded to, recognized, or acknowledged."[7]

Generally speaking, witnesses' main concerns were not about the constitutionality of section 33.1 or whether Bill C-28 was in keeping with the Supreme Court's reasoning

[4] *R. v. Brown*.
[5] The *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.
[6] See Sections 1, 7, and 11(d) of the Charter.
[7] LCJC, *Evidence,* 1 February 2023 (Professor Isabel Grant).

and proposed legislative solutions in *R. v. Brown*. Rather, their concerns pertained to a lack of clarity and precision in the new section 33.1. Some witnesses worried that law enforcement, Crown prosecutors, and judges might have difficulty interpreting and applying it. Some also felt that this uncertainty could result in more accused persons attempting to put forward an extreme intoxication defence or making arguments challenging the constitutionality of the section. Some proposed ways to fix the section, but there was no consensus on the best approach.

Witnesses were also concerned about the impacts that section 33.1 could have on victims of gender-based violence. As women are significantly more likely than men to be victims of intoxicated violence,[8] these challenges must be considered through a gender-based lens and addressed accordingly. Most gender-based violence goes unreported in Canada.[9] It is a particular concern for Indigenous, racialized, economically disadvantaged, and other marginalized women, who are disproportionately overrepresented as victims of violence. Many survivors of violence do not come forward because of fears that they will not be believed by law enforcement, that the justice system will not support them, that coming forward may be re-traumatizing, or that it may be very difficult to get a conviction. When the Supreme Court found the former section 33.1 to be unconstitutional, many Canadians were concerned that this would allow for some violent crimes to go unpunished. Some witnesses were concerned that this perception will continue despite the amendments made to the current section 33.1. It is imperative that this concern be addressed by the federal government and other stakeholders to ensure that it does not cause more women to be apprehensive about pursuing justice when they are survivors of violence.

The committee is very concerned about how the issues examined during its study have a significant impact on Canadian women, especially Indigenous, racialized, economically disadvantaged, and other marginalized women. We must create a justice system in Canada that respects the rights of the accused, but that also ensures that women are safe and have access to justice. Greater action is required by the Government of Canada to ensure that women in Canada feel that the justice system is working for them. It must address the lack of clarity about the law and any

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[8] LCJC, *Evidence*, 7 December 2022 (Honourable David Lametti, Minister of Justice and Attorney General of Canada).
[9] LCJC, *Brief* submitted 23 January 2023 (Honourable David Lametti, Minister of Justice and Attorney General of Canada), at p. 7.

misinformation that suggests that men who consume alcohol and other drugs are not criminally responsible for their violence.

The committee heard from witnesses that more needs to be done to ensure that section 33.1 is clear and unambiguous, that it holds perpetrators accountable for their blameworthy actions, and that it does not adversely impact the safety of women. The committee's recommendations are intended to prompt further consultation and investigation by the Government of Canada to ensure that its actions and any future version of section 33.1 ultimately address these concerns.

Background

Legislative History

A full review of the history of section 33.1, the relevant jurisprudence, and Bill C-28 is beyond the scope of this report. The committee notes that more in-depth summaries of this history are contained in the House of Commons Standing Committee on Justice and Human Rights' (JUST) 2022 report: *The Defence of Extreme Intoxication Akin to Automatism: A Study of the Legislative Response to the Supreme Court of Canada Decision R. v. Brown*,[10] as well as the *Legislative Summary* of Bill C-28 prepared by the Library of Parliament.[11] A brief overview is necessary to present the evidence heard by the committee in context.

Bill C-28's speedy passage through Parliament was due to the Supreme Court of Canada's decision on 13 May 2022 in *R. v. Brown*.[12] The court struck down the former section 33.1 of the Code as unconstitutional and declared it of no force and effect. That section had, in brief, established that the defence of self-induced

[10] House of Commons Standing Committee on Justice and Human Rights (JUST), *The Defence of Extreme Intoxication Akin to Automatism: A Study of the Legislative Response to the Supreme Court of Canada Decision R. V. Brown,* December 2022.

[11] Chloe Forget, *Legislative Summary of Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication),* Library of Parliament, 29 June 2022.

[12] *R. v. Brown*, 2022 SCC 18. The Court also released its decision in *R. v. Sullivan*, 2022 SCC 19, on the same day, in which it applied the *R. v. Brown* decision.

intoxication akin to automatism could never be raised in cases of certain violent offences of general intent identified in section 33.1(3).[13]

Parliament added section 33.1 to the Code in 1995 in response to the Supreme Court's decision in *R. Daviault.*[14] In that decision, the court interpreted common law principles and found that the defence of automatism was available for a person charged with an offence of general intent who, at the time of the offence, was in a state of extreme intoxication akin to automatism.[15]

Later, in *R. v. Brown,* the Supreme Court held that former section 33.1 violated section 7 of the Charter by allowing a person whose actions were involuntary and who did not have criminal intent to be found guilty of a crime. Section 7 guarantees everyone the right to not be deprived of life, liberty, or the security of the person, unless this is done in accordance with the principles of fundamental justice. It is a principle of fundamental justice that a person must have some degree of moral fault to be convicted of a criminal offence.[16] The Supreme Court explained that the minimum level of fault requirement under section 7 is that of criminal negligence, which involves a marked departure from the standard of care of a reasonable person. It found that this minimum requirement was absent from former section 33.1.[17] The Supreme Court also considered how former section 33.1 breached the right to be presumed innocent until proven guilty guaranteed by section 11(d) of the Charter. These violations were not saved under section 1 of the Charter (which

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[13] *R. v. Brown*, at para. 76. Specifically, former section 33.1(3) stated that the section applied "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." Current section 33.1 uses the same language. For a discussion of general intent, see *R v. Tatton*, 2015 SCC 33, at para 27: "because [general intent] crimes involve minimal thought and reasoning processes, even a high degree of intoxication short of automatism is unlikely to deprive the accused of the slight degree of mental acuity required to commit them."

[14] See: *R. v. Daviault.* The court found that it would infringe s. 7 of the Charter if an accused who was not acting voluntarily due to extreme intoxication could be convicted of a criminal offence. A crime requires that the prohibited act be performed voluntarily as a willed act. A person in a state of extreme intoxication akin to automatism cannot perform a voluntary act. For more see: *Legislative Summary of Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication),* Section 1.1: "Elements of a Crime in Canadian Law".

[15] The common law provides for the defence of automatism, where an individual, while capable of action, does not voluntarily control their actions. An accused cannot be found guilty of an offence if they were in a state where they could not voluntarily commit a guilty action or have a guilty mind." Automatism is "a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action" (*R. v. Stone*, [1999] 2 S.C.R. 290, at para. 156).

[16] *R. v. Brown*, at para 24.

[17] Ibid., at para 90.

allows for violations of Charter rights when these can be demonstrably justified in a free and democratic society).

In its analysis, the Supreme Court considered options for Parliament to replace section 33.1 that would be "manifestly fairer to the accused" while achieving Parliament's objectives to protect victims of extremely intoxicated violence and hold offenders accountable for the harm they cause.[18] The two main legislative options were:

- To establish a stand-alone offence of criminal intoxication that would impose criminal liability for "the voluntary intoxication, not the involuntary conduct that follows;"[19] or
- To adapt the legal standard of criminal negligence to require "proof that both of the risks of a loss of control and of the harm that follows were reasonably foreseeable."[20]

Bill C-28 enacted the latter option.

New Section 33.1

As mentioned earlier, new section 33.1 of the Code allows an accused person to be held criminally responsible for a violent crime, despite being in a state of self-induced extreme intoxication akin to automatism and lacking the general intent or voluntariness ordinarily required to commit an offence, provided they negligently consumed intoxicating substances. The accused is negligent if they departed markedly from the standard of care that is expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.

The prosecution must demonstrate that the accused was negligent in order to secure a conviction. The legal standard of criminal negligence that the court "must consider" is the objective foreseeability of the risk that consuming intoxicating substances could cause extreme intoxication and lead a person to harm another person. The court must also consider all relevant circumstances, including anything that the accused did to avoid the risk. The inclusion of the word "consider" implies that these

[18] Ibid., at paras. 11 and 36.
[19] Ibid., at para. 98.
[20] Ibid., at para. 11.

are not determinative criteria. Section 33.1 applies to any offence of general intent that includes violence or the threat of violence against another person. It defines extreme intoxication as "intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour."

Rare Cases

As noted by the Supreme Court[21] and repeated by witnesses, the circumstances to which section 33.1 might apply are extremely rare.[22] It is not a defence for accused persons who commit crimes while drunk or otherwise intoxicated, but rather for rare situations where a person loses the awareness or control of their actions to such an extent that they are in a state akin to automatism. As the Supreme Court noted in the *Daviault* decision, they are in "such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning."[23] In that case the court noted that the accused's blood-alcohol ratio would normally cause death or a coma in an ordinary person.

Minister Lametti submitted a summary of relevant data compiled by Justice Canada to the committee, including a review of the jurisprudence involving former section 33.1.[24] 187 cases have cited the section since it was first legislated 27 years ago, but some of these only reference the section, and others rejected the defence for lack of evidence. The submission added that:

> In roughly 15 cases, the constitutionality of section 33.1 was challenged (excluding R v Brown, and R v Sullivan and Chan), enabling the defence to be raised approximately 7 times. The defence was not successful in any of those cases and, since 1995, has not resulted in an acquittal until the SCC decisions in R v Brown and R v Sullivan and Chan.[25]

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[21] See: *R. v. Brown,* at para. 50; *R. v. Daviault,* at paras. 92-93; and, *R. v. Sullivan,* at para. 118.
[22] See for example LCJC, *Evidence,* 7 December 2022 (Honourable David Lametti, Minister of Justice and Attorney General of Canada); LCJC, *Evidence,* 8 December 2022 (Professor Hugues Parent; Richard Fowler, Canadian Council of Criminal Defence Lawyers); LCJC, *Evidence,* 1 February 2023 (Dr. Giles Chamberland); LCJC, *Evidence,*2 February 2023 (Professor Steve Coughlan).
[23] *R. v. Daviault*.
[24] LCJC, Brief submitted 23 January 2023 (Honourable David Lametti, Minister of Justice and Attorney General of Canada).
[25] Ibid., at p. 1. Note that *R. v. Sullivan and Chan* is the same decision as *R.v. Sullivan,* 2022 SCC 19.

What the Committee Heard

Consultations in Preparation for Bill C-28

Since Bill C-28 was introduced only a month after the Supreme Court's *Brown* decision and passed within a week, the Government of Canada's consultation process was undertaken in a very short time period. This committee did not study the bill; it was considered in the Senate by the Committee of the Whole.[26] Consequently, the bill did not receive the same scrutiny that a bill would be given in the normal course of committee hearings with witnesses.

According to Minister Lametti, consultations that informed this bill had in fact started much earlier in a "variety of legal circles after the *Daviault* decision" as it had "been widely speculated for many years" that former section 33.1 was "unconstitutional."[27] He said that his team and Justice Canada reached out "at a national and provincial level to sectoral groups, to work with them to come to what we felt was the best conclusion in the shortest period of time." He added that the majority of groups they consulted, including victims' groups, were "in favour of the path we chose," though he claimed that the National Association of Women and the Law (NAWL) and Professor Kerri Froc were "amongst the very few critics of the bill."

Professor Froc, who is also a member of NAWL, indicated that Minister Lametti was incorrect when he stated that only NAWL had objected to the legislative solution selected for Bill C-28. She added that: "In the span of approximately 12 hours, from the time that support for NAWL's position was made an issue on the floor of the Senate, we had over a dozen women's organizations support our open letter to you."[28] She expressed disappointment about how the consultations were held "in a meaningless way to check a box". Furthermore, she found it problematic that the organization had to "spend time and efforts" preparing for the consultations, when its input was not meaningfully considered. She urged the committee "not to accept uncritically the government's stance that it was necessary to push through Bill C-28 to counter misinformation that would affect the reporting of sexual assault."

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[26] Senate of Canada, *Frequently Asked Questions – What is a Committee of the Whole?*.
[27] Unless otherwise stated, all witness testimony is taken from the committee's hearings, as set out in Appendix B.
[28] National Women and the Law, *Bill C-28: Letter to Senators*, 21 June 2022.

Suzanne Zaccour, appearing on behalf of NAWL, also expressed concerns that there had been insufficient consultation, given that only a few days were provided for views to be shared with the government before it tabled Bill C-28. She confirmed that NAWL and 19 other women's rights organizations expressed concerns about consultation efforts.[29] She noted that there was a contradiction between the federal government's need for haste and the message that there was little need to worry because these matters "would rarely be litigated." "If it's so rare," she asked, "why can't we take our time?" She asked for broader consultations and "some kind of willingness to amend the law."

Professor Elizabeth Sheehy agreed that a more engaged consultation process would have yielded a better understanding of "the legal landscape" and jurisprudence. Professor Hugues Parent observed that members of the medical community were not consulted. He indicated this is part of "a long-standing challenge" where "psychiatrists and legal experts don't speak the same language at all." Professor Michelle S. Lawrence also recommended hearing from medical experts.

Benjamin Roebuck, the Federal Ombudsperson for Victims of Crime, encouraged continued meaningful consultation to produce revisions as necessary and as concerns are identified: "The diverse perspectives of Canadians emerging throughout the study of Bill C-28 need to shape the legislation."

Extreme Intoxication

As already noted, under section 33.1 the defence of extreme intoxication is only available where an accused can prove that they were in the rare state of self-induced extreme intoxication that is akin to automatism. Professor Steve Coughlan thinks "there is a fair amount of skepticism and misunderstandings in the general public" about the terms "automatism" and "intoxication akin to automatism." He added that "our experts say they are real and the courts have accepted that they are, and I think that that obliges us to act appropriately."

Doctor Gilles Chamberland, a psychiatrist from the Institut national de psychiatrie légale Philippe-Pinel, explained how section 33.1(4) defines extreme intoxication as rendering a person incapable of conscious self-control or awareness of his or her

[29] LCJC, *Evidence*, 8 December 2022 (Suzanne Zaccour, National Association of Women and the Law).

conduct. According to some psychiatrists, intoxication makes people unable to control their impulses. Dr. Chamberland added that people take substances because it allows them "to do things they wouldn't otherwise do." His concern is that having a criterion that says that the person is no longer able to consciously control himself or herself seems to be extremely broad and might lead to many people putting forward an extreme intoxication defence.

In examining the scope of extreme intoxication, some witnesses discussed how the Code treats mental disorders quite differently from drug-induced states, though there may be similar attributes in an accused person's state of mind. Several witnesses referenced section 16 of the Code,[30] which establishes a defence for persons who committed an act, but due to a mental disorder, did not appreciate the nature of the act committed and/or did not know what they were doing was wrong.[31] If an accused has been found guilty but this defence is established, the court must find the accused not criminally responsible on account of a mental disorder. In general, courts have determined that voluntary, self-induced intoxication cannot be the basis of this defence, as this provision is for cases where the source of the accused's incapacity was a mental disorder.[32]

Professor Parent was emphatic that section 33.1 is very likely to be challenged in court on constitutional grounds because it does not address "extreme intoxication bordering on insanity." In other words, it does not allow for situations where an accused person was "under the influence of pronounced delusions or hallucinations as a result of their voluntary drug use" or are in "a state of toxic psychosis." Such a person may remain physically aware of their actions and be able to consciously control their conduct – unlike someone in a state of automatism. Consequently, they could not rely on the defence of extreme intoxication akin to automatism.[33] However, they may not know that their actions were wrong nor have the requisite level of intent. As their incapacity is due to voluntary intoxication and not a mental disorder, they would not be able plead the defence of mental disorder in section 16

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[30] *Criminal Code, s. 16.*

[31] "Mental disorder" is defined in section 2 of the *Criminal Code* as a "disease of the mind."

[32] See for instance: *R. v. Bouchard-Lebrun*, 2011 SCC 58.

[33] Professor Parent noted in his testimony and in his written submissions that in *R. v. Brown,* the Supreme Court stated that "extreme intoxication akin to automatism is an exigent defence requiring the accused to show that their consciousness was so impaired as to deprive them of all willed control over their actions. This is not the same as simply waking up with no memory of committing a crime…Nor is it the same as suffering a psychotic episode where physical voluntariness remains intact."

of the Code. An accused person in such a situation may choose to challenge the law because it does not permit them to put forward a defence to their charges, despite not having the requisite level of intent for an offence. In his written submissions, he stressed: "Convicting such an individual is a violation not only of principles of fundamental justice, but also of laws on committing a crime while in a state of automatism."[34]

To protect against future constitutional challenges, Professor Parent recommended that section 33.1 (4) should define extreme intoxication as "extreme intoxication akin to automatism or insanity." He noted that adding "insanity" is in keeping with the Supreme Court's decision in *R. v. Daviault* and "covers both facets or manifestations of extreme intoxication." He clarified that he remained "in favour of holding people who voluntarily decide to become intoxicated" responsible, and felt that it was "unfortunate that owing to a shortcoming in the wording, most extremely intoxicated people will be able to avoid being subject to the provision."

Minister Lametti responded to Professor Parent's concerns,[35] stating that Bill C-28 was drafted in keeping with the Supreme Court's jurisprudence with respect to insanity and extreme intoxication. He explained that the Court

> has gone towards the extreme automatism standard and treats insanity effectively on different grounds, not criminally liable grounds. There is a whole body of jurisprudence that takes care of the insanity questions, if you will. The path that the court has chosen, referring to automatism, goes to the voluntariness of intent, the general idea that it negates voluntariness. That's where the court has gone and that's what we're following in using this terminology and using this conceptual structure of automatism. The insanity part is well taken care of by other jurisprudence.

Professor Lawrence disagreed with Professor Parent that his proposed changes are necessary. She explained that in *R. v. Brown*, the Supreme Court held that "the attribution of responsibility where there is the absence of voluntariness or the absence of general intent" is unconstitutional. Then she explained that it is possible

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[34] LCJC, *Brief,* submitted 6 December 2023 (Professor Hugues Parent).

[35] Professor Parent had previously raised the same concerns before JUST. See: JUST, *Evidence*, 31 October 2022, (Professor Hugues Parent).

that psychotic acts could be voluntary.[36] In a typical case where there is a diagnosis of substance-use psychosis, a defence of extreme intoxication would not be available under section 33.1, but section 16 could apply. If the psychosis was the product of substance abuse and not mental disorder, however, she added that "there is no defence in this country."[37]

Professor Parent also underscored that there is a need to clarify how the law and psychiatry define these different states, the language used, and how these apply to analyses of criminal acts. As noted above, he called for better consultation in these matters with medical experts to improve how the law is drafted.

Professor Kent Roach recommended that the newly re-established Law Commission of Canada[38] could examine "how we deal with a range of mental disorders" and drug use. Professor Lawrence also recommended that the committee consider a revision to the Code to address some of these concepts, including codifying common law presumptions regarding automatistic states and volitional impairment: "Ideally, a codification could supplement section 16 and align well with the new section 33.1."

Foreseeability and the Standard of Care

If an accused has established on a balance of probabilities that they were in a state of extreme intoxication akin to automatism at the relevant time, then the next step is to answer the question of whether they were criminally negligent when they voluntarily consumed the intoxicants that brought on this state.[39] Witnesses provided various opinions on how easily courts will be able to determine the foreseeability of the risk that extreme intoxication would result from the accused's consumption, and the standard of care that a reasonable person would have demonstrated in the circumstances.

As noted above, Section 33.1 (1)(b) requires the Crown to demonstrate that the accused showed a marked departure from meeting the level of care that a reasonable person would have shown under the circumstances. Section 33.1(2) adds

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[36] LCJC, *Evidence*, 8 December 2022 (Professor Michelle S. Lawrence). See also *R. v. Brown*; *R. v. Paul*, 2011 BCCA 46 (CanLII).

[37] She noted that the court would use *R. v. Bouchard-Lebrun* to determine these questions about whether section 16 applies in this case.

[38] *Law Commission of Canada*.

[39] *R. v. Brown*, at para. 56.

that in this respect the court "must consider" the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the accused did to avoid the risk.

Several witnesses questioned whether an objective analysis about the foreseeability of extreme intoxication or harm to others is possible. Richard Fowler, representing the Canadian Council of Criminal Defence Lawyers, believes that courts are "very familiar with objective standards of care" when determining whether an accused person has shown a failure to take basic steps to ensure the safety of others in such situations as those involving driving or firearm use. He questioned how such an objective analysis would be possible when we are dealing with "something that is considerably rarer and outside of the knowledge and experience of the hypothetical reasonable person." As a result, the "burden will fall upon the prosecutors to gather as much evidence to present to the court as possible to assist the judge." He added that it could take a long time to see a body of court decisions that could assist with such determinations.

Dr. Chamberland said it would be "very difficult" to prove foreseeability, given that an accused could argue that this result had not happened during any previous consumption of intoxicants or they might point to how many other people had used the drug without becoming violent. As a result, the outcome could not have been foreseeable. Additionally, it would be even easier to plead extreme intoxication if an accused had never previously consumed that particular drug. He added that the worse the crime, the less likely it would be foreseeable that a person would commit it.

Professor Isabel Grant and Ms. Zaccour noted that the Crown will have to show that it was foreseeable that the intoxication would lead the person to harm another person. As Ms. Zaccour illustrated:

> Imagine an accused who has taken these drugs before and says that it wasn't foreseeable because they have done this before and they didn't lose control. Now imagine an accused who has not taken these drugs before and says, "I've never done these drugs before, so how could anyone know that my body would react in this particular way?" The law will not fulfill its objective if getting a conviction becomes virtually impossible.

Professor Grant added:

> So unless you have a very unlikely scenario of someone who has consumed the same amount of the same kind of drug and/or alcohol and committed violence in the past, it's going to be very hard, if not impossible, for a judge to ever conclude that harm to another person was foreseeable.

She also raised how the level of proof required to assess "the predictability of the risk of committing violence and being extremely intoxicated" is unclear.

Professor Sheehy emphasized how existing case law demonstrates how difficult it could be for prosecutors to present evidence to satisfy section 33.1(2). She noted that street drugs can vary in their potency and effects on different individuals, both from how intoxicated they may get, whether they experience a toxic psychosis, and whether they produce violent behaviour.[40]

Professor Parent explained that "most drug users (cocaine, amphetamines and so on) know that they could have a bad trip, and delusions or hallucinations, but are unaware that they can fall into a state of automatism, since this is an extremely rare consequence." He added that "no one will tell you that there is an objective foreseeability that a person who uses drugs will fall into an unconscious state of automatism."

Professor Grant was concerned that section 33.1(2), which lists factors a court must consider when applying the standard of care, is "confusing." She added that, as judges know how to apply the marked departure test, this section is unnecessary and "runs the risk of being interpreted as creating an absolutely unprovable burden of proof on the Crown."[41] She noted that some witnesses before the JUST committee had assumed it places a burden of proof on the Crown to prove the elements of 33.1(2).[42] This concerned her as judges might make the same mistake. Professor Sheehy agreed with Professor Grant that this subsection "doesn't say the judge 'must

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[40] Her examples included *R. v. Brown* and *R. v. Chan* and magic mushrooms: "There are no scientific studies to indicate what dose of psilocybin tends to trigger toxic psychosis in the normal population."

[41] Suzanne Zaccour was also concerned about "the Crown's ability to prove marked departure given the lack of clarity in the law ... As written, the legislation can be read to suggest that the Crown has to prove beyond a reasonable doubt that the risk of harm and the risk of extreme intoxication were foreseeable or even likely." LCJC, *Evidence*, 8 December 2022 (Suzanne Zaccour).

[42] Professor Grant also noted witnesses were interpreting it differently, which indicates that "judges may have a hard time interpreting it, and you may get inconsistent caselaw." LCJC, *Evidence*, 1 February 2023 (Professor Isabel Grant).

find' or 'must determine' beyond a reasonable doubt that those foreseeability standards were met."

Professor Grant's suggested solution, which was supported by Professors Sheehy and Froc, is to simply delete section 33.1(2). Ms. Zaccour agreed that, if removed, judges could then consider whether the accused's behaviour demonstrates a marked departure from an appropriate standard of care, rather than the unclear criteria in the current wording. It might then be sufficient for the prosecution to demonstrate the foreseeability that a person could behave violently. She provided the example of a hypothetical man who "habitually assaults his wife while intoxicated." Their violent behaviour could therefore have been foreseeable.

Professor Grant added that if this section is not removed, a secondary proposal would be to re-draft it

> to change the test from foreseeability of harm to foreseeability of a loss of control over one's actions. Harm is quite remote from the intoxication. It's a rare event. Foreseeability of loss of control may still be difficult for a judge to be satisfied on, but it at least gives the Crown a chance to meet the marked departure test that is set out in subsection (1).

The committee notes that the JUST committee's Recommendation # 4 recommends considering this option as a part of a parliamentary review of section 33.1 three years after Bill C-28 came into force.[43]

Professors Coughlan and Roach disagreed with this proposal, and argued that section 33.1(2) is necessary because it provides an element of fault.[44] Professor Coughlan noted that the Supreme Court had struck down the old section 33.1 because it

> said that a person could be convicted of the offence simply if their behaviour interfered or threatened to interfere with the bodily integrity of another person. It took out any requirement for a fault element, took out any

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[43] JUST Committee, *The Defence of Extreme Intoxication Akin to Automatism: A Study of the Legislative Response to the Supreme Court of Canada Decision R. v. Brown,* at p. 25. The report recommends undertaking a parliamentary review to ensure that the application and interpretation of new section 33.1 adequately fulfills Parliament's objectives, and to evaluate its impact on victims of crime.

[44] Professor Coughlan explained that "without subsection (2), it wouldn't be clear enough that the departure is a departure related to fault elements." He referred to this as an objective "fault element which will be constitutionally sufficient to solve the fault element problem identified in Brown."

> requirement for a blameworthy state of mind and said the person was still guilty. So it treated the offence as absolute liability even in the case of serious offences like sexual assault. It used a low-stakes approach in a high-stakes situation, and that was properly seen as a problem.

Professor Roach stated that eliminating section 33.1(2) "would essentially be punishing people for extreme and negligent intoxication." He explained that:

> It's basically saying that if you have the fault of negligent intoxication, that is good enough for the fault of manslaughter, sexual assault or assault. … In my view, if you do that, then you are going to be back here in the exact same situation in a couple of years because the Supreme Court is going to tell you, again, that what you have done is unconstitutional.

He did not believe that courts would have difficulty determining whether a reasonable person could foresee both extreme intoxication and harm to others. He explained that courts "are likely to require the reasonable person to be cautious, especially when combining drugs." He warned that we should be concerned about convicting people when there is a reasonable doubt, and if the accused had to address both the foreseeability of intoxication and of harm on a balance of probabilities, then this could amount to "two reasonable doubts." His recommendations to address this issue were to

> either enact the old section 33 or abolish the defence of extreme intoxication to general intent offences, which was, in fact, the law before R. v. Daviault. In my view, given the Supreme Court's unanimous decision in R. v. Brown, this would require an override of sections 7 and 11(d) of the Charter."[45]

His alternative recommendation is to

> expand the mental disorder defence under section 16 by providing that extreme intoxication is a mental disorder. This would be contrary to the Supreme Court of Canada's 2011 decision in R. v. Bouchard-Lebrun, but this

[45] Presumably, his reference to "override" suggests that Parliament would need to invoke the notwithstanding clause (section 33 of the Charter) to prevent his suggested legislative option from being declared unconstitutional. The notwithstanding clause allows Parliament to deviate from certain sections of the Charter, including sections 7 and 11. Once invoked, it effectively precludes judicial review of the targeted legislation's compliance with the Charter. For more see: Marc-André Roy and Laurence Brosseau, *The Notwithstanding Clause of the Charter*, Library of Parliament, 2018.

could be done without the Charter override because Bouchard-Lebrun, unlike Brown, was not an interpretation of what is permissible under the Charter.

Intoxication-Based Offence

The other legislative option presented by the Supreme Court in *R. v. Brown*, and not chosen by the Government of Canada for Bill C-28, was to enact a new intoxication-based offence. Witnesses had differing opinions about the merits of creating offences that criminalize voluntary extreme intoxication and harming others.

Professor Coughlan argued that an intoxication-based offence could be a better option than the one adopted in Bill C-28. He also submitted a proposal in writing as to how such an offence (or offences) could be drafted.[46] He explained that an intoxication-based offence could hold an individual responsible for an act they committed while extremely intoxicated, even though it may have been involuntary. He further emphasized that this would target the "real concern," or the voluntary "blameworthy act," which would be "not taking adequate care to not fall into" a state of extreme intoxication.[47] He then illustrated how creating an intoxication-based offence could be similar to existing offences for the dangerous operation of a conveyance (i.e., a vehicle).[48] These offences have the potential for harsher penalties depending on the circumstances. For instance, impaired operation of a vehicle is an offence on its own, with greater degrees of punishment available for the offences of operation causing bodily harm and operation causing the death of another person.[49]

According to Professor Coughlan, intoxication-based offences could also have different levels of liability such that "the consequences themselves could justify a harsher penalty." This option would address both the general intent issue, because the intent would have been satisfied by the intoxication; and the voluntariness, because it would go to the choice to at least do the things that led to intoxication." These offences could be based on criminal negligence and remove the need for a

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[46] Steve Coughlan, Standing Senate Committee on Legal and Constitutional Affairs, *Brief*, 2 February 2023.

[47] Professor Coughlan also explained why he considers it is missing "the point" to refer to a "defence" of self- intoxication. Extreme intoxication is different from duress or defence of the person (self-defence); rather it is a recognition that required elements of an offence are not proven.

[48] Offences relating to dangerous operation of a motor vehicle are found in Part VIII.1 of the *Criminal Code* concerning "Offences Relating to Conveyances".

[49] See Part VIII.1 of the *Criminal Code*, and in particular section 320.13 (Dangerous operation) and 320.14 (Operation while impaired).

defence of extreme intoxication. Instead, the prosecutor would have the burden of proof to demonstrate that the accused's level of intoxication created a risk that a reasonable person would have foreseen.

Professor Coughlan provided the committee with a written submission that laid out a draft proposal for how an intoxication-based offence could be drafted, with various optional wording. This submission was provided after hearings were concluded, and is included as Appendix D.

Professor Roach explained how he had previously thought that an intoxication-based offence was a good alternative, but now agrees that an intoxication-based offence "would devalue violence against women." He added that even if such an offence had the same penalty as assault or sexual assault, in "the real world of plea bargaining" and in societal perceptions, "this could make offences such as assault and sexual assault seem less serious." He summarized his view as follows:

> I agree with feminist colleagues that we already have three levels of sexual assault; the vast majority are pled out at the lowest level, so to introduce a fourth level, however you define the maximum penalty, will lead to that kind of devaluation.

Ms. Zaccour added that

> most or all women's groups have opposed this second avenue because the sanction and the labelling of someone who commits, say, murder or sexual assault as someone who is just negligently drunk, for example, would not satisfy the purpose of the criminal law to adequately label that offender. This was described as "the drunkenness discount" in the sense that the person would not get a full conviction for sexual assault or murder, but would get one for what would likely be a lower offence.[50]

[50] The Supreme Court of Canada referenced the phrase "drunkenness discount" in *R. v. Brown* at para. 138, citing criticisms that a stand-alone offence might lead to lesser sentences and could "fail to recognize the true harm committed by an offender and would send the message that an offender should not be held accountable for the harm that is inherent in the underlying offence."

Professor Coughlan's written proposal addressed concerns about violence against women by setting out how he thought his proposal would "much more directly be aimed at that concern." He wrote that:

> the offence could provide a penalty specific to the case of a person who commits a sexual assault while in a state of criminal intoxication. A clear benefit to such an approach is that it would be more likely to serve an educative purpose than the current section 33.1: it straightforwardly states that committing sexual assault while intoxicated, no matter to what degree, is an offence. That is an easy public message to convey.[51]

Lastly, Professor Coughlan addressed concerns about how the two legislative options described in *R. v. Brown* might impact racialized communities and those who are economically disadvantaged. He noted that there could be "the danger of reliance on stereotypes" with either approach. With his proposal, he acknowledged that with the burden on the Crown to provide the expert evidence about extreme intoxication, there "might be a potential benefit to an economically-disadvantaged accused of being in a better position to negotiate a plea agreement or joint submission." He added that such a conclusion is "speculative."

Gender-Based Violence

The Government of Canada's Gender-Based Analysis Plus (GBA+) summary states that: "The amendments in Bill C-28 seek to protect victims of self-induced extreme intoxication."[52] The summary uses Statistics Canada data to show that women disproportionately experience the most severe forms of intimate partner violence, such as being choked, being assaulted or threatened with a weapon, or being sexually assaulted. Furthermore, it comments that:

> Research shows that there are clear links between the gendered nature of violence, particularly sexual and intimate partner violence, and intoxication. For instance, between 2007 and 2017, 63% of women and girls who were killed died at the hands of an intoxicated aggressor (Statistics Canada, 2018). In addition, the World Health Organization has recently identified the harmful

[51] Steve Coughlan, Standing Senate Committee on Legal and Constitutional Affairs, *Brief*, 2 February 2023.
[52] LCJC, *Brief* submitted 23 January 2023 (Honourable David Lametti, Minister of Justice and Attorney General of Canada), at p. 7.

> use of alcohol as a risk factor for both sexual and intimate partner violence (World Health Organization, 2021).[53]

The report notes that Statistics Canada has no data regarding victims of self-induced extreme intoxicated violence given that it is so rare. It also acknowledges some of the challenges in collecting data about the impacts of intoxicated violence, including reasons why victims and survivors are reluctant to report violence:

> The failure to address the gap in the law created by the SCC decisions may have meant that victims of lesser intoxicated violence, who are disproportionately women and children, may have been even more reluctant to report given the perception that the law is stacked in favour of the accused and that reporting would not likely result in a conviction. As well, it would be impossible for a victim to know the precise degree of intoxication of the perpetrator, and therefore they may not want to risk reporting and going through the criminal court process only for the perpetrator to be acquitted because they were in a state of extreme intoxication. This could have had serious adverse effects for the reporting of sexual assault, which is already severely underreported; it is estimated that only 5% of sexual assaults are reported to the police...[54]

Witnesses also discussed gender-based violence and intoxication at length. Professors Sheehy and Grant were concerned that section 33.1 will not help protect victims who are seriously injured or killed by intoxicated men, provide them recourse to the criminal justice system, or help them see that justice has been done. Professor Sheehy added that section 33.1 will result in "lengthened trials or appeals, acquittals, or police or Crown decisions not to lay charges or prosecute."

While some witnesses emphasized how rare these cases will be, Professor Grant stressed the following questions: "How many victims are too many before we say this is a problem? If we have 5, 10 or 20 beaten, raped or even dead women each year, is that too many?" Sheehy noted that "the extreme intoxication defence will have disparate impacts on specific subgroups of women." She explained that "the women most vulnerable to sexual and wife assault are racialized, Indigenous women,

[53] Ibid.
[54] Ibid, at p. 9.

marginalized women" and how they often have "the least credibility in terms of persuading police and prosecutors to go forward with charges."

Professor Froc raised how only a small minority of sexual assaults are reported by complainants:

> The extensive literature about why women do not report shows that their reluctance to report is based on cultural views about what real rape looks like and their realistic assessment of how the justice system is likely to treat their victimization given pervasive gender bias.

Ms. Zaccour raised the importance of giving further attention to how section 33.1 will affect women coming forward. She added that: "in some cases, simply raising a potential defence of extreme intoxication may influence the victim, the police or the prosecutor in their decision not to report, not to charge or to negotiate a response to the charge."

Research and Monitoring

Several witnesses mentioned how important it will be to monitor and collect relevant data about the use of section 33.1 and related issues to fully understand its impact, and the impact of intoxication on crime and gender-based violence. Mr. Roebuck underscored this point and recommended that mechanisms to monitor the use of the provision and gather intelligence should be set up immediately. He also discussed how cases of violence and intoxication reveal just one aspect of partner violence, and that there are other indicators of coercive and controlling behaviour that should not be overlooked when examining these issues. Ms. Zaccour and Professors Grant and Froc all noted that research that focuses on jurisprudence alone will not capture the charging decisions made by police officers and Crown prosecutors when intoxication is involved.

Minister Lametti's submissions provide an overview of the type of data being collected by Statistics Canada. He also noted that there is an awareness in the federal government about the need to "do better" and to address the "gap" in terms of collecting disaggregated data including "the specific profile of an accused (e.g.,

economic status, race, legal representation) and the circumstances of their offences (e.g., intoxication status of accused)."[55]

Education

Several witnesses stressed the importance of addressing many of the challenges raised during the committee's hearings through increased public education and judicial training. Ms. Zaccour noted the need to address misinformation about section 33.1, such as the mistaken impression that ordinary intoxication could be a defence to sexual assault.[56] Mr. Roebuck stressed how, given the impact these issues have on girls and women, "we have an obligation to the public to have some clarity" around what section 33.1 means for everyone and how to address misinformation about it. As "misconceptions as well pose an additional risk, ... it becomes more difficult for people to understand their rights and the protections provided to them through the legislation." After recalling high schoolers protesting after the Supreme Court's decision, he recommended that "with whatever public awareness actions are taken, that there be a focus particularly on young people, which also lays a foundation for public awareness as people age."

Professor Roach also observed that public education could help address concerns around alcohol consumption and, for court cases, help establish what type of care a reasonable person should exercise when consuming alcohol and other drugs.

Professor Froc stressed that while voluntary education is "a great thing," she advocated for "having a judiciary that reflects the diversity of our population" to address misogyny in the criminal justice system. Professor Grant also added that "we need a criminal justice system to be there for the people who fall through the cracks." Professor Coughlan remarked that the hard part with education will be "reaching the people who aren't looking to be reached." He noted it is easy for people to get into "an echo chamber where they're just hearing the things they want to hear."

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[55] Ibid, at p. 1. As previously explained by Minister Lametti before the committee, the Government of Canada's Budget 2021 "committed $6.7 million over five years and $1.4 million ongoing for the collection and use of disaggregated data." LCJC, *Evidence*, 21 September 2022. For more see: Government of Canada, *Justice Data Modernization Initiative*.

[56] For more see the testimony of Suzanne Zaccour (National Association of Women and the Law).

Mr. Roebuck also underscored the importance of "recognizing indicators of coercive and controlling behaviour in partner violence," in addition to physical violence, and the need to train judges to understand these matters.

The committee notes that the JUST committee's first recommendation called upon the Government of Canada to undertake a "public awareness campaign in plain language the conclusions of the Supreme Court of Canada decision in *R. v. Brown*, the new version of section 33.1 of the *Criminal Code* and its practical effects."[57]

Marginalized, Racialized, and Economically Disadvantaged Individuals

Witnesses touched on various other ways in which marginalized, racialized, and economically disadvantaged individuals may be impacted differently by the issues raised during the committee's hearings relevant to drug consumption, gender-based violence, and mental health.

Professor Lawrence and Mr. Fowler described how it is necessary to address broader social and health challenges related to how Canada approaches drug use in order to identify solutions for intoxicated violence. Mr. Fowler called for "greater access to meaningful treatment," for those with addiction problems, adding that when it comes to current approaches to drug policy, "criminalizing what is essentially a health problem is not going to solve the health problem." Professor Lawrence also questioned whether the "the firm hand of the law is an appropriate response if intoxication and intoxicated offending is the product, in whole or in meaningful part, of mental disorder." Further to her point that "many – if not most" individuals who are "criminal actors" are "struggling with serious substance-use disorders and other mental disorders," she cited a recent study of British Columbia inmates that showed that "75% had either a substance- use disorder or some other kind of mental disorder, while 32% had both concurrently." She recommended "diversionary tools for use in sentencing" and "increasing the pathways for them from the criminal justice system to the forensic mental health system, if not for the sake of the offender's dignity, then critically for the safety of the public."

Witnesses also noted in order to invoke the defence of extreme intoxication, accused persons face a reverse onus where they must prove that they were extremely

[57] JUST committee, *The Defence of Extreme Intoxication Akin to Automatism: A Study of the Legislative Response to the Supreme Court of Canada Decision R. v. Brown*, at p. 24.

intoxicated to the point of automatism. Witnesses noted that this will require two expert opinions, something that not every accused would be able to afford. Legal services can be expensive. Dr. Chamberland and Professor Roach also noted how legal aid varied by province, resulting in differences in what is available to accused persons. Not all Canadians will have access to legal aid.[58]

Mr. Roebuck said he appreciated that privilege was being raised in the committee's discussions, and Professor Coughlan did not see this as "a misplaced concern." Professor Lawrence talked about her research into the "circumstances of accused persons who were presenting in our criminal justice system with substance-induced psychosis." Often, these required a factual determination as to whether the psychosis was due to either a mental disorder or substance use that turned on the evidence, such as a clinical record. She noted how this process will have different outcomes depending on the accused's ability to access mental health services:

> if an accused was so fortunate as to be born into circumstances, into a family or into a place where they had access to mental health services, they were on a trajectory that was more likely to result in a not criminally responsible on account of mental disorder, or NCRMD, outcome than a trajectory that was likely to result in that avenue being foreclosed and only the defence of intoxication being available.

Further Review of Section 33.1

One of the inherent challenges in monitoring section 33.1 is that cases have been relatively rare. It could be a long time before there is enough data and jurisprudence to assess how it is being interpreted and applied in courts. As noted by Minister Lametti, concerns that former section 33.1 was unconstitutional had been around for a long time. The *Daviault* decision was rendered by the Supreme Court almost 30 years ago in 1994. Professor Roach noted how the "constitutionality of this provision took way too long to decide."

While many witnesses recognized these cases are very rare, some were concerned that more accused persons may claim the current section 33.1 defence applies to

[58] Dr. Chamberland noted that in Quebec, legal aid would assist with obtaining an expert's opinion for an accused's defence, or there might be cases where expertise could be offered by a hospital.

them. Ms. Zaccour questioned how we can say that the extreme intoxication defence will be rarely used when this is a new provision and the extreme intoxication defence was "unavailable" or the most part for the past 27 years. Dr. Chamberland predicted an increase in the number of accused persons relying on the defence of extreme intoxication moving forward, adding: "I think a big door is being opened and that it would be worthwhile to quickly review the legislation to see whether it has been opened too wide."

Professor Grant noted that she was already aware of a guilty plea in *R. v. Duck* that was withdrawn on the basis of *Brown.*[59] Also, the committee is aware that another court decision was released during its study whereby a person was successful in putting forward the defence of extreme intoxication in a case that involved intimate-partner violence . In *R. v. Perignon*,[60] the Supreme Court of British Columbia considered the common law defence of automatism in the context of extreme intoxication, which was barred by the former section 33.1. This decision was rendered after the Supreme Court of Canada had declared former section 33.1 unconstitutional in *Brown*, but the new version under Bill C-28 could not be applied because it is not retroactive legislation. So, while this case is not indicative of how the new section 33.1 will be interpreted, it did raise concerns for two witnesses. Professors Froc and Sheehy wrote an article in the *Toronto Star* noting the committee's study was underway, and adding:

> Canadians were assured when Brown was released that use of the defence would be rare and that feminists were misleading women and traumatizing survivors of male violence by warning about its gendered impact. Yet we based our prediction on the evidence: reported case law, about real women whose lives have been changed forever by violence perpetrated by extremely intoxicated men, and whose trials had been affected, in one way or another, by men's use of the defence.[61]

As noted above, one of the JUST committee's recommendations was that a parliamentary review of the law take place in three years. Mr. Roebuck supported this proposal. Ms. Zaccour agreed that this "would give women's organizations who

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[59] *R. v. Duck,* 2022 MBQB 181. The name of the case was confirmed after the committee's hearings concluded.
[60] *R. v. Perignon*, 2023 BCSC 147 (CanLII).
[61] Elizabeth Sheehy and Kerri Froc, "*The return of the 'extreme intoxication' defence - as warned*," *Toronto Star*, 5 February 2023.

were not sufficiently consulted before the bill was passed some reassurance that any problems and adverse consequences of the law can be addressed."

Others did not think it was appropriate to wait three years. Professor Grant was concerned that waiting for a review was "basically saying to victims that they will have no recourse to the criminal justice system while we figure out if we have gotten it right or not." In her view, it would be better to work to get the bill "right" without delay. Professor Roach suggested that, rather than waiting, the Government of Canada could refer the constitutionality of section 33.1 to the Supreme Court for a "second chance to articulate what is, in its view, required under the Charter."

Observations and Recommendations

The committee's study demonstrated that there remains a lack of consensus concerning whether the current section 33.1 of the Code is the best legislative solution to address the challenges presented when a person who has voluntarily consumed alcohol and/or other drugs becomes extremely intoxicated and commits violence against another person.[62] Witnesses raised important concerns as to why other options need to be considered.

The committee is concerned that in the Government of Canada's haste to enact legislation after *R. v. Brown*, fully adequate consultations were not undertaken. In particular, the concerns of many women's and legal rights organizations do not appear to have been given the consideration they merit. A thorough consultation process must therefore be performed now.

These consultations must be informed with better and more complete disaggregated data. There remain significant gaps in what we know about the use of section 33.1 and the impact of intoxication on crime and gender-based violence, including data pertaining to the profiles of accused persons and victims and to the circumstances surrounding the commission of these offences. This data must be shared publicly as it becomes available.

[62] As the Supreme Court noted in *R. v. Brown* at para. 62, "the parliamentary record and facts of this appeal and the *Sullivan* and *Chan* appeals suggest that the defence of extreme intoxication akin to automatism will generally not be relevant in cases involving alcohol alone."

The committee stresses that the work that is needed to ensure a better legislative approach must commence immediately. As the committee heard, the current situation will serve to exacerbate many of the challenges women face regarding intoxicated violence. Most victims of sexual assault and other forms of gender-based violence (including intimate partner violence and domestic violence) are women. It is imperative that Canadians understand that drunkenness is not a defence to violence or sexual assault charges. Witnesses raised important concerns that the current section 33.1 could result in an increased number of accused persons attempting to put forward an extreme intoxication defence. Even if these largely prove unsuccessful, the committee is concerned that this could discourage women from coming forward with complaints when they are victims of assault as well as resulting in uncertainty surrounding the law and further delays in criminal proceedings.

Dispelling misconceptions, myths and harmful stereotypes pertaining to sexual assault remains an ongoing concern for Canadian legislators and the Government of Canada. These are matters that continue to have a deep impact on Canadians, while requiring complex and challenging legal solutions. Education and public awareness programs are crucial to ensuring that Canadians understand these sexual assault laws and how our society can work to ensure the safety of women.

In completing its study, the committee had the benefit of reading the House of Commons Standing Committee on Justice and Human Rights' report on the subject matter of Bill C-28. That committee made four recommendations,[63] which are included as Appendix C.

The committee concurs with these four recommendations. Its additional recommendations are intended to expand on these, but also to emphasize that further action is required without delay.

Recommendation #1 - A Thorough Consultation Process

The committee recommends that the Government of Canada begin a new review and consultation process regarding section 33.1 and related issues, including gender-based violence.

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[63] JUST Committee, *The Defence of Extreme Intoxication Akin to Automatism: A Study of the Legislative Response to the Supreme Court of Canada Decision R. v. Brown*, at p. 24-25.

- **This review should begin as soon as possible and include consultations with relevant legal, medical, and psychological experts; women's and legal rights organisations; victims of sexual assault or domestic violence; law enforcement; and, other relevant stakeholders.**

- **This review should utilize the disaggregated data collection and research referred to in recommendation #5. It should consider:**

    - **the current wording of section 33.1, as well as alternative options, including the proposal for intoxication-based offences outlined in Appendix D;**

    - **the impact of intoxicated violence on women, including with particular attention to Indigenous, racialized and other marginalized Canadians;**

    - **whether broader legislative reform should be implemented to improve or replace the existing framework concerning intoxication, insanity, and mental disorders under the *Criminal Code;***

    - **ways the Government of Canada can address gender-based violence, including how to increase supports for victims of gender-based violence and intoxicated violence and increase supports for individuals struggling with drug-addiction through evidence-based programming; and**

    - **other relevant matters.**

- **The Government of Canada should report back to Canadians on this review, its findings, and propose further action in response.**

Recommendation #2 – Intoxication Offences

The committee recommends that the Minister of Justice without further delay give due consideration to the possible merits of creating self-induced and other intoxication offences including as laid out in Appendix D.[64]

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[64] See: LCJC, *Evidence*, 7 December 2022 (Honourable David Lametti, Minister of Justice and Attorney General of Canada); *Evidence*, 8 December 2022 (Suzanne Zaccour, Head of Feminist Law Reform National Association of Women and the Law); *Evidence*, 1 February 2023 (Kent Roach, Professor, Faculty of Law, University of Toronto); *Evidence*, 2 February

Recommendation #3 - Reference to the Law Commission of Canada

While conducting its own consultations and research in accordance with recommendation #1, the Government of Canada should also refer the intersecting topics of section 33.1 of the *Criminal Code*, crimes involving intoxication, and gender-based violence to the Law Commission of Canada immediately for an independent study.

Recommendation #4 - Education and Public Awareness

The Committee recommends that the Government of Canada establish public awareness campaigns and a robust education plan designed to inform Canadians about the relevant key elements of criminal laws pertaining to sexual assault and gender-based violence, and to address deep-seated myths and stereotypes related to these matters that persist in our culture. These campaigns should be adapted to target different groups, particularly youth and young adults.

- **The Committee concurs with the House of Commons Standing Committee on Justice and Human Rights' recommendations #1 calling upon the Department of Justice to launch a public awareness campaign to communicate in plain language the conclusions of the Supreme Court of Canada decision in *R. v. Brown*, the new version of section 33.1 of the *Criminal Code* and its practical effects.**

- **The Committee also concurs with the House of Commons Standing Committee on Justice and Human Rights' recommendations #2, which calls upon the Government of Canada to ensure that a public communication plan is in place and implemented to accompany the decisions of the Supreme Court of Canada when they have significant consequences for the public, including victims of crime.**

Recommendation #5 - Data Collection, Monitoring and Research

The committee recommends that the Government of Canada establish an action plan and commit the necessary resources to conduct research, collect disaggregated data (including the data for which there are currently gaps as

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2023 (Steve Coughlan, Professor, Schulich School of Law, Dalhousie University); and, *Brief*, 2 February 2023 (Steve Coughlan, Professor, Schulich School of Law, Dalhousie University).

discussed in the section on Research and Monitoring of this report), monitor, and report to Canadians concerning:

- **the use, interpretation, and application of section 33.1 by accused persons, law enforcement, Crown prosecutors, courts, legal experts, and other relevant stakeholders;**
- **the impact of section 33.1 on Canadians; and**
- **the broader impact of intoxication due to alcohol and other drugs on crime and gender-based violence, including reasons why victims and survivors are reluctant to report violence.**

- **The committee concurs with the House of Commons Standing Committee on Justice and Human Rights' recommendations #3 that calls upon the Department of Justice to compile data on the use of the defence provided in section 33.1 of the Criminal Code.**

Recommendation #6 – Parliamentary Review

The committee recommends a parliamentary review of section 33.1 of the *Criminal Code* three years after it came into force to assess its effectiveness in meeting Parliament's objectives and its impact on victims of crime.

- **The committee also recommends that this parliamentary review should give due consideration to the possible merits of creating self-induced intoxication offences, including as laid out in Appendix D.**[65]
- **The committee underscores that the timing of this review should not delay the Government of Canada's action in response to the committee's other recommendations, and acknowledges that this review would be impacted by any further legislative changes introduced to address concerns about the current section 33.1.**
- **The committee concurs with the House of Commons Standing Committee on Justice and Human Rights' recommendations #4 that calls upon Parliament to carry out a formal review of the legislation amending section 33.1 of the**

[65] Ibid.

Criminal Code three years after it came into force to ensure that the application and interpretation of this new provision adequately fulfills Parliament's objectives, and to evaluate its impact on victims of crime. It also calls upon Parliament to, while conducting this review, consider the option of amending the legal standard of criminal negligence in new section 33.1 of the _Criminal Code_ to require only foreseeability of a loss of control of an individual's actions, instead of "foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person".

APPENDIX A – Section 33.1 of the *Criminal Code*

Self-induced Extreme Intoxication

Offences of violence by negligence

33.1 (1) A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if

(a) all the other elements of the offence are present; and

(b) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.

Marked departure — foreseeability of risk and other circumstances

(2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

Offences

(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.

Definition of extreme intoxication

(4) In this section, *extreme intoxication* means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour.

APPENDIX B – Witnesses

Wednesday, December 7, 2022

The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada, Department of Justice Canada

Joanne Klineberg, Acting General Counsel, Criminal Law Policy Section, Policy Sector, Department of Justice Canada

Chelsea Moore, Counsel, Criminal Law Policy Section, Department of Justice Canada

Matthew Taylor, General Counsel and Director, Criminal Law Policy Section, Department of Justice Canada

Thursday, December 8, 2022

Richard Fowler, Board Member, Representative for Vancouver, British Columbia, Canadian Council of Criminal Defence Lawyers

Michelle S. Lawrence, Associate Professor and Director, Access to Justice Centre for Excellence, University of Victoria, As an individual

Hugues Parent, Full Professor, Université de Montréal, As an individual

Suzanne Zaccour, Head of Feminist Law Reform, National Association of Women and the Law

Wednesday, February 1, 2023

Dr. Gilles Chamberland, Psychiatrist, Philippe-Pinel National Institute of Forensic Psychiatry, As an individual

Kerri Froc, Associate Professor, University of New Brunswick, National Association of Women and the Law, As an individual

Isabel Grant, Professor, University of British Columbia, As an individual

Kent Roach, Professor, Faculty of Law, University of Toronto, As an individual

Elizabeth Sheehy, Professor Emerita of Law, University of Ottawa, As an individual

Thursday, February 2, 2023

Steve Coughlan, Professor, Schulich School of Law, Dalhousie University, As an individual

Benjamin Roebuck, Federal Ombudsperson for Victims of Crime, Office of the Federal Ombudsperson for Victims of Crime

APPENDIX C – Recommendations made by the House of Commons Standing Committee on Justice and Human Rights[66]

Recommendation 1

That the Department of Justice launch a public awareness campaign to communicate in plain language the conclusions of the Supreme Court of Canada decision in *R. v. Brown*, the new version of section 33.1 of the *Criminal Code* and its practical effects.

Recommendation 2

That the Government of Canada ensure that a public communication plan is in place and implemented to accompany the decisions of the Supreme Court of Canada when they have significant consequences for the public, including victims of crime.

Recommendation 3

That the Department of Justice compile data on the use of the defence provided in section 33.1 of the *Criminal Code*.

Recommendation 4

That Parliament carry out a formal review of the legislation amending section 33.1 of the *Criminal Code* three years after it came into force to ensure that the application and interpretation of this new provision adequately fulfills Parliament's objectives, and to evaluate its impact on victims of crime. During this review, Parliament should consider the option of amending the legal standard of criminal negligence in new section 33.1 of the *Criminal Code* to require only foreseeability of a loss of control of an individual's actions, instead of "foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person".

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[66] JUST Committee, *The Defence of Extreme Intoxication Akin to Automatism: A Study of the Legislative Response to the Supreme Court of Canada Decision R. v. Brown*, at p. 24-25.

APPENDIX D – Submission from Professor Steve Coughlan

Senators:

Thank you for the opportunity to propose language which might better deal with the issues addressed in *R v Daviault* and *R v Brown*, and the problem of extreme intoxication.

To briefly reiterate some of what I said, it arguably misses the real point to think about this issue in terms of whether a "defence" of extreme intoxication should or should not be available. Saying that an extremely intoxicated person could not be convicted was not meant as a "defence" in the sense that duress or defence of the person is a defence: it was just a recognition that, as a factual matter, the required elements could not be proven. Opposition to that result has not been based on the premise "yes they are proven". Rather, it is based on the premise "even if the elements are not proven, becoming *that* intoxicated was in itself blameworthy".

Creating a free-standing offence of criminal intoxication is therefore addressed directly to the real concern. In drafting such an offence, much of section 33.1 could be retained: all that is required is alteration of the "nonetheless commits the offence" language in subsection 33.1(1), and the addition of offence-creating subsections. The final product could look much like this:

> **33.1** (1) A person is in a state of criminal intoxication if, by reason of self-induced extreme intoxication, they lack the general intent or voluntariness ordinarily required to commit an offence, and before they were in a state of extreme intoxication they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.
>
> (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

> (3) In this section, *extreme intoxication* means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour.
>
> (4) A person who, while in a state of criminal intoxication, commits what would except for that state be 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 is guilty of an [indictable] offence, and is liable to…
>
> (5) A person who, while in a state of criminal intoxication, commits what would except for that state be an offence under this Act or any other Act of Parliament that causes bodily harm is guilty of an [indictable] offence, and is liable to…
>
> (6) A person who, while in a state of criminal intoxication, commits what would except for that state be an offence under this Act or any other Act of Parliament that causes death is guilty of an [indictable] offence, and is liable to…

This draft of the offence follows the model of many other provisions in the *Criminal Code*, in having a "predicate offence/predicate offence plus bodily harm/predicate offence plus death" scheme, but that is only one option. Another possibility would be to model the provision on criminal negligence. Although "criminal negligence" is defined in section 219, it is not an offence in itself: it only become an offence if it results in bodily harm (section 221) or death (section 220). That approach would in essence just remove subsection 4 above.

A different option (one which on reflection I think I personally prefer) would allow for "calibrating" this offence in a way which more directly reflects the concerns about violence against women and children which motivate it. A subsection could state:

> (4) A person who, while in a state of criminal intoxication, commits what would except for that state be an offence under section 271, 272 or 273 is guilty of an [indictable] offence, and is liable to…

That is, the offence could provide a penalty specific to the case of a person who commits a sexual assault while in a state of criminal intoxication. A clear benefit to such an approach is that it would be more likely to serve an educative purpose than

the current section 33.1: it straightforwardly states that committing sexual assault while intoxicated, no matter to what degree, is an offence. That is an easy public message to convey.

That point addresses Senator Pate's request for input on the manner in which violence against women is treated: I believe this approach would much more directly be aimed at that concern. Senator Pate also asked for thoughts on the impact of this approach on racialized communities, and on the economically disadvantaged. I suspect that there is little difference either way in terms of reducing the danger of reliance on stereotypes: on either approach, the current section 33.1 or a stand-alone criminal intoxication offence, there is a danger that stereotypical reasoning could enter into the assessment of whether a particular accused was or was not negligent.

Similarly, the impact on the economically disadvantaged might not differ greatly on either approach. I suggested in my appearance that there might be a benefit, in the sense that the burden would be on the Crown to provide the expert evidence about extreme intoxication. Looked at practically, however, it is possible that in many cases Crown prosecutors would lay parallel charges: the underlying offence or in the alternative committing that underlying offence while criminally intoxicated. It is likely that the latter offence will have a lower penalty, so realistically it might fall to the accused to argue "my state of intoxication means that I can only be guilty of the criminal intoxication charge". So even if legally the onus is on the Crown, in most cases it is the accused who would perceive a benefit to leading the evidence of extreme intoxication. There *might* be a potential benefit to an economically-disadvantaged accused of being in a better position to negotiate a plea agreement or joint submission, but that is speculative.

I hope the Committee finds this helpful. Please do not hesitate to contact me if I can be of further assistance.

Steve Coughlan

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