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Legislative Summary

BILL C-28:
AN ACT TO AMEND THE CRIMINAL CODE (SELF-INDUCED EXTREME INTOXICATION)

44-1-C28-E

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LEGISLATIVE SUMMARY OF BILL C-28: AN ACT TO AMEND THE CRIMINAL CODE (SELF-INDUCED EXTREME INTOXICATION)

1 BACKGROUND

On 17 June 2022, the Honourable David Lametti, Minister of Justice, introduced Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication), in the House of Commons.[1] The House of Commons and the Senate moved quickly to pass Bill C-28, and it received Royal Assent on 23 June 2022, a few days after it was introduced.

Bill C-28 is a response to the Supreme Court of Canada (SCC) decision in *R. v. Brown*.[2] In this case, the SCC ruled that section 33.1 of the *Criminal Code*, which prevents a defence based on intoxication akin to automatism for certain violent offences, breaches the principles of fundamental justice and the presumption of innocence guaranteed by section 7 and section 11(d) of the *Canadian Charter of Rights and Freedoms* (the Charter) and that these breaches are not justified within the meaning of section 1 of the Charter.[3] The SCC therefore declared section 33.1 of the *Criminal Code* unconstitutional and of no force or effect.

Bill C-28 amends section 33.1 of the *Criminal Code* to provide that a person in a state of extreme intoxication akin to automatism who commits a violent crime referred to in subsection 33.1(3) may be held criminally responsible for this crime if they negligently consumed intoxicating substances. The legal standard of criminal negligence incorporated into section 33.1 of the *Criminal Code* takes into account the objective foreseeability of the risk that consuming intoxicating substances could cause extreme intoxication and lead a person to harm another person.

1.1 ELEMENTS OF A CRIME IN CANADIAN LAW

The elements that make up a crime in Canadian criminal law are fundamental to understanding the amendments the bill makes to section 33.1 of the *Criminal Code*.

Each criminal offence consists of two elements that must be proven beyond a reasonable doubt by the Crown before an accused can be convicted of a criminal offence: the physical element and the mental element. The Crown must establish the physical element, that is, that the accused committed the forbidden act voluntarily (the *actus reus*).

> The physical element, which may be either an act or an omission, is known as the *actus reus* or guilty act. There can be no guilty act or *actus reus* unless an act is the result of a willing mind at liberty to make a definite choice or decision; in other words, there must be the will-power to do an act whether or not the accused knew that it was prohibited by law.[4]

The second element that must be established is that the accused committed the forbidden act intentionally or recklessly[5] (the *mens rea*).[6] The *mens rea* refers to the guilty mind. The criminal law concept of "intent" is based on the common law principle that there can be no criminal liability without criminal fault.

1.2 HISTORY OF SECTION 33.1 OF THE *CRIMINAL CODE*

1.2.1 *R. v. Daviault* (1994)

In 1994, the SCC issued the *Daviault* decision.[7]

The SCC was called upon to consider the case of Mr. Daviault, who was accused of sexual assault against an elderly woman. In this case, the defence submitted expert evidence showing that a person who consumes the same amount of alcohol as Mr. Daviault did the day of the assault

> might suffer an episode of "l'amnésie-automatisme," also known as a "blackout." In such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his actions when he is in such a state and will likely have no memory of them the next day.[8]

The SCC was asked to determine whether an extreme state of intoxication where an accused is in a condition akin to automatism or a disease of the mind constitutes a basis for defending a crime which requires only a general intent[9] such as sexual assault.

The SCC modified the common law rule, also known as the *Leary*[10] rule, that intoxication is not a defence for crimes of general intent. In fact, the SCC determined that the strict application of this common law rule breaches sections 7 and 11(d) of the Charter.[11] Section 7 of the Charter provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 11(d) of the Charter provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

The SCC therefore established an exception when the defence can be used to raise a reasonable doubt: regarding crimes of general intent, an accused is permitted to establish that, at the time of the offence, they were in state of extreme intoxication akin to automatism. The SCC determined that the accused bears the burden of proof, on balance of probabilities that they were in that state of extreme intoxication akin to automatism, and this will require expert testimony.[12]

The SCC justified creating this exception, which allows for a defence of self-induced extreme intoxication, in part by noting that such a state "would render an accused incapable of either performing a willed act or of forming the minimal intent required for a general intent offence."[13] The SCC reiterated that

> the mental aspect of an offence, or *mens rea*, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law. That element may be minimal in general intent offences; nonetheless, it exists.[14]

The SCC further explained that the intention of becoming intoxicated cannot substitute the *mens rea* of another offence such as committing a sexual assault, as this would be contrary to the Charter:

> The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime. Rather, the substituted *mens rea* rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, *mens rea* for a crime is so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice.[15]

The SCC added that voluntary intoxication is not yet a crime, and that, even assuming that such act is reprehensible, "it does not follow that its consequences in any given situation are either voluntary or predictable."[16]

Finally, the SCC noted the exception to the *Leary* rule will only be raised in rare occasions:

> Given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will usually be able to form the requisite *mens rea* and will be found to have acted voluntarily. In reality it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence.[17]

1.2.2 Section 33.1 of the *Criminal Code* (1995)

The *Daviault* decision generated a public outcry, notably from women's advocacy groups, and Parliament quickly adopted a legislative response[18] in 1995 by enacting section 33.1 of the *Criminal Code*, which read as follows:

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

Section 33.1 of the *Criminal Code* meant that the defence of self-induced intoxication akin to automatism could never be raised for violent crimes of general intent identified in paragraph 33.1(3).[19] Three conditions had to be met for section 33.1 of the *Criminal Code* to apply:

> (1) that the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) that the accused departed markedly from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person.[20]

In addition, the marked departure found in section 33.1(1) depended on proof of the two facts:

> First, that the person must be in a state of *self-induced intoxication* that renders them unaware of, or incapable of controlling, their behaviour. Second, the *violent act* must occur while they are in that state. These facts are best understood as conditions of liability and not measures of fault because neither of them import a criminal negligence standard.[21]

1.2.3 The *Brown* Decision (2022)

In *R v. Brown*, the SCC was asked to decide upon the constitutionality of section 33.1 of the *Criminal Code*

> in light of, on the one hand, the principles of fundamental justice and the presumption of innocence guaranteed to the accused by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and, on the other, Parliament's aims to protect victims of intoxicated violence, in particular women and children, and hold perpetrators to account.[22]

Particularly, the SCC had to consider

> the circumstances in which persons accused of certain violent crimes can invoke self-induced extreme intoxication to show that they lacked the general intent or voluntariness ordinarily required to justify a conviction and punishment.[23]

On 13 May 2022, the SCC issued its unanimous decision in which it concluded that section 33.1 of the *Criminal Code* infringes sections 7 and 11(d) of the Charter and that these infringements are not justified under section 1 of the Charter. The SCC therefore declared section 33.1 of the *Criminal Code* unconstitutional and of no force or effect.[24] On the same day, the SCC issued its decision in *R. v. Sullivan and Chan* in which it applied the *Brown* decision.[25]

Of note, the SCC confirmed in *R v. Brown* that "the rule that intoxication is not a defence to general intent crimes (such as assault and sexual assault) remains untouched by this appeal, except in the case of intoxication akin to automatism."[26] The SCC made clear that

> most degrees of intoxication do not provide a defence to crimes of general intent […]. Only the highest form of intoxication – that which results in a person losing voluntary control of their actions – is at issue here: extreme intoxication akin to automatism as a defence to violent crimes of general intent and, then again only intoxication that is self-induced.[27]

Moreover, the defence of self-induced extreme intoxication remains available for crimes of *specific* intent (such as murder), and Bill C-28 does not change this fact.

1.2.3.1 Violation of Section 7 of the Charter – Principles of Fundamental Justice

The SCC found that section 33.1 of the *Criminal Code* violates section 7 of the Charter since it allows convictions without proof of *mens reas*, that is without being mentally at fault.

The SCC explained that

> it is a principle of fundamental justice that proof of penal negligence, in the form of a marked departure from the standard of a reasonable person, is minimally required for a criminal conviction, unless the specific nature of the crime demands subjective fault.[28]

However, the SCC indicated that section 33.1 of the *Criminal Code* requires the intention of an accused to become intoxicated, but that "intention to become intoxicated to any degree suffices."[29] In addition, "it matters little that a person did not foresee their loss of awareness or control."[30]

The SCC also found section 33.1 of the *Criminal Code* in violation of section 7 of the Charter because it "directs that an accused person is criminally responsible for their involuntary conduct."[31] The SCC explained that "[b]ecause involuntariness negates the *actus reus* of the offence, involuntary conduct is not criminal, and Canadian law recognizes that the requirement of voluntariness for the conviction of a crime is a principle of fundamental justice."[32]

1.2.3.2 Violation of Section 11(d) of the Charter – Presumption of Innocence

The Supreme Court found that section 33.1 of the *Criminal Code* breaches section 11(d) of the Charter which protects the right to be presumed innocent until proven guilty since it

> improperly substitutes proof of self-induced intoxication for proof of the essential elements of an offence.
>
> As noted, s. 33.1 unequivocally removes a defence that the accused lacked the general intent or voluntariness to commit the offence. Accordingly, the fault and voluntariness of intoxication are substituted by s. 33.1 for the fault and voluntariness of the violent offence.
>
> …
>
> While an accused who loses conscious control and assaults another person after a night of substance abuse is undoubtedly morally blameworthy, s. 33.1 faces obvious difficulties. It does not discern, for example, between the accused and morally blameless individuals who

> voluntarily consume legal intoxicants for personal or medical purposes. It therefore cannot be said that, "in all cases" under s. 33.1, the intention to become intoxicated can be substituted for the intention to commit a violent offence. Moreover, even in the case of the accused who voluntarily ingested an illegal drug like magic mushrooms, proof of self-induced intoxication does not lead inexorably to the conclusion that the accused intended to or voluntarily committed aggravated assault in all cases.
>
> In sum, the effect of s. 33.1 is to invite conviction even where a reasonable doubt remains about the voluntariness or the fault required to prove the violent offence, contrary to the presumption of innocence under s. 11(d).[33]

1.2.3.3 Section 1 Analysis

The SCC indicated that

> [g]iven the patent risk that s. 33.1 may result in the conviction of an accused person who had no reason to believe that their voluntary intoxication would lead to a violent consequence … s. 33.1 fails at the proportionality step and thus cannot be saved under s. 1.[34]

The SCC determined that the purpose of section 33.1 of the *Criminal Code* is protecting "the victims of extremely intoxicated violence"[35] and, holding offenders "accountable for the harm they cause as a result of their choice to self-intoxicate."[36] The SCC found these objectives sufficiently pressing and substantial to warrant limiting sections 7 and 11(d) of the Charter.

The SCC found that there was a rational connection to the objective of section 33.1, but that the impairment of the rights protected by sections 7 and 11(d) were not minimal. Particularly, the SCC pointed out that there were other paths that could have been taken "to hold an extremely intoxicated person accountable for a violent crime when they chose to create the risk of harm by ingesting intoxicants."[37]According to the SCC, "some of these options would be manifestly fairer to the accused while achieving some, if not all, of Parliament's objectives."[38] The SCC alluded to two main options:

1. the establishment of a stand-alone offence of criminal intoxication (the gravamen of this new offence would be "the voluntary intoxication, not the involuntary conduct that follows"[39]);

2. the creation of a new legal standard of criminal negligence: "liability for the underlying offence would be possible if the legal standard of criminal negligence required proof that both of the risks of a loss of control and of the harm that follows were reasonably foreseeable."[40]

Finally, the SCC also found that section 33.1's "impact on the principles of fundamental justice is disproportionate to its overarching public benefits."[41]

2 DESCRIPTION AND ANALYSIS

Bill C-28 has a single clause, which amends section 33.1 of the *Criminal Code.*

It is worth noting at the outset that subsection 33.1(3) of the *Criminal Code* remains the same: it provides that section 33.1 applies only to violent crimes – offences under either the *Criminal Code* or another Act of Parliament – "that include[e] as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person."

The bill amends subsection 33.1(1) of the *Criminal Code* to stipulate that a person who commits a violent offence referred to in subsection 33.1(3) is deemed to have committed the offence even if, because of self-induced extreme intoxication, they lacked the general intent or voluntariness ordinarily required to commit it, provided that the following two conditions are met:

> (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.

The bill then amends subsection 33.1(2) of the *Criminal Code* to establish how a court must determine whether a person departed markedly from the standard of care expected of a reasonable person within the meaning of new paragraph 33.1(1)(b):

> 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.

Hence, new subsection 33.1(2) provides for a standard of criminal negligence. This standard appears consistent with the findings of the SCC, which stated in *R. v. Brown* that one legislative avenue for Parliament would be to establish a standard of criminal negligence that would require "proof that both of the risks of a loss of control and of the harm that follows were reasonably foreseeable."[42] The SCC wrote that this option would be more consistent with the rights set out in the Charter.

As explained above, subsection 33.1(2) of the *Criminal Code* currently provides that two elements must be proven to determine that a person markedly departed from the standard of reasonable care: "First, that the person must be in a state of *self-induced intoxication* that renders them unaware of, or incapable of controlling, their behaviour. Second, the *violent act* must occur while they are in that state."[43] This standard is not criminal negligence, but rather simply "conditions of liability."[44]

Finally, the bill creates subsection 33.1(4) of the *Criminal Code* to define the term "extreme intoxication" used in subsections 33.1(1) and 33.1(2) as follows: "*extreme intoxication* means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour." As the Department of Justice explained, the Supreme Court "has recognized that alcohol alone will almost never lead to a state of extreme intoxication. An accused person has to prove they were in a state of extreme intoxication akin to automatism, which requires expert evidence at trial."[45]

NOTES

1. Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication), 44th Parliament, 1st Session. The Minister of Justice tabled a Charter statement that same day.
2. *R. v. Brown*, 2022 SCC 18.
3. *R. v. Brown*, 2022 SCC 18; *Criminal Code*, R.S.C. 1985, c. C-46; and *Canadian Charter of Rights and Freedoms* (the Charter), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 7 and 11(d).
4. David B. Deutscher, *Criminal Law – Offences*, Canadian Encyclopedic Digest, 4th edition, February 2019.
5. Recklessness "is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance." *Sansregret v. The Queen*, [1985] 1 SCR 570, para 16.
6. David B. Deutscher, *Criminal Law – Offences*, Canadian Encyclopedic Digest, 4th edition, February 2019.
7. *R. v. Daviault*, [1994] 3 SCR 63.
8. Ibid.

9. Crimes of *general intent* require proof of minimal intent to commit the prohibited act. That means the Crown must prove that the accused knowingly wanted to do something that is prohibited by law. For example, section 265(1) of the *Criminal Code* provides that "a person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly." In this case, the Crown must prove the intent of the accused to apply force to another person. Crimes of *specific intent* usually include the pursuit of an additional goal. Sometimes, the wording of the offence includes a specific intent or motive. For example, section 151(a) of the *Criminal Code* provides that "every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year." In this case, the Crown must prove the accused's intention to touch directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years. In addition, the Crown must prove that the accused's acts were performed for sexual purpose.
10. *Leary v. The Queen*, [1978] 1 SCR 29.
11. The decision in *Daviault* was not unanimous. The dissenting judges were of the opinion that the *Leary* rule still stands. For them, "the requirements of the principles of fundamental justice are satisfied by proof that the accused became voluntarily intoxicated."
12. *R. v. Daviault*, [1994] 3 SCR 63, p. 103.
13. Ibid.
14. Ibid.
15. Ibid.
16. Ibid.
17. Ibid.
18. Bill C-72, An Act to amend the Criminal Code (self-induced intoxication), 35th Parliament, 1st Session (S.C. 1995, c. 32).
19. *R. v. Brown*, 2022 SCC 18, para 76.
20. Ibid., para 77.
21. Ibid., para 81.
22. Ibid., para 3.
23. Ibid.
24. Ibid., para 167.
25. *R. v. Sullivan*, 2022 SCC 19.
26. *R. v. Brown*, 2022 SCC 18, para 43.
27. Ibid., para 45.
28. Ibid., para 90.
29. Ibid., para 91.
30. Ibid.
31. Ibid., para 96.
32. Ibid.
33. Ibid., paras 102–105.
34. Ibid., para 114.
35. Ibid., para 119.
36. Ibid.
37. Ibid., para 10.

38. Ibid., para 11.
39. Ibid., para 98.
40. Ibid., para 11.
41. Ibid., para 166.
42. Ibid., paras 11 and 137. See also *R v B*, 2019 ABQB 770 (CanLII), paras 80–82.
43. *R. v. Brown*, 2022 SCC 18, para. 81.
44. Ibid.
45. Government of Canada, *Changes to section 33.1 of the* Criminal Code *on self-induced extreme intoxication*.