

Innocent if Intoxicated? Part 2: The *Brown* Decision

A Breakdown of the Supreme Court's Decision in *R v Brown*

This is the second article in a two-part series on the criminal defence of extreme intoxication in Canada. Part 1 focused on the history of the defence as well as the creation of section 33.1 of the *Criminal Code*. This section prohibited a person accused of a general intent offence from using the extreme intoxication defence if the intoxication was self-induced and their actions threatened the bodily integrity of another person.[\[1\]](#)

This second article will focus on the Supreme Court of Canada's decision to invalidate section 33.1 in the recent case of *R v Brown* (2022).

Matthew Brown Consumes Magic Mushrooms and Goes on a Rampage

On a winter's night Matthew Brown went to a friend's party and consumed alcohol as well as several portions of magic mushrooms. At around 3:45am Mr Brown removed his clothing and ran barefoot into the cold.[\[2\]](#) Shortly afterwards, while in an intoxicated state, he broke into a nearby house and violently attacked the resident with a broken broom handle. The resident was left with cuts, contusions, and broken bones in one of her hands.[\[3\]](#)

Mr Brown subsequently broke into another house where the police found him on the bathroom floor with visible injuries to his bare feet. He was whispering to himself and appeared confused. He would later state that he had no recollection of his actions at either home.[\[4\]](#)

Mr Brown was charged with two counts of breaking and entering, one count of aggravated assault, and one count of mischief to property over \$5000. Evidence indicated that the magic mushrooms caused his delirium.[\[5\]](#)

At trial, Mr Brown argued he should be found not guilty by reason of automatism, since his intoxication was so severe that he was deprived of the ability to control himself and to *intentionally* commit criminal acts. The Crown, however, invoked section 33.1, which precluded Mr Brown from using the extreme intoxication defence for the charge of aggravated assault (the defence was available, however, for the mischief charge).[\[6\]](#) In response, Mr Brown challenged the constitutionality of section 33.1, arguing that it violated sections 7 and 11(d) of the *Charter of Rights and Freedoms* (the *Charter*). He was successful at trial and was acquitted of the mischief and assault charges. However, the Alberta Court of Appeal overturned the lower court's ruling and convicted Mr Brown of aggravated assault.[\[7\]](#) Mr Brown then appealed to the SCC.

The Supreme Court Strikes Down Section 33.1

In a weighty 9-0 decision, Justice Kasirer, writing on behalf of the Court, struck down section 33.1 as unconstitutional. By denying the extreme intoxication defence to those accused of certain general intent offences, the Court held, Parliament had unjustifiably violated the *Charter of Rights and Freedoms*.

A poorly drafted provision

One of the key issues the SCC faced in *Brown* was the interpretation of section 33.1. The Crown's lawyers argued that section 33.1 not only eliminated the extreme intoxication defence for certain crimes, but also created a new "predicate" offence of extreme intoxication. This would allow an individual to be held criminally responsible for violent conduct if they "knew or ought to have known" that consuming an intoxicant could cause them to lose control and harm others.^[8] However, the Crown (and various interveners) admitted that a plain reading of section 33.1 did not support this argument, conceding that the section's drafting was "odd" and "inelegant."^[9] The Crown instead encouraged the SCC to "read words into the text to overcome"^[10] these defects, thereby giving effect to the law's underlying purpose: to "create... a new mode of liability."^[11] Justice Kasirer, however, refused this invitation. As he put it: "To do [this] would strain the meaning beyond what the text can reasonably bear."^[12]

Mr Brown's section 7 and 11(d) rights were violated by section 33.1

Years before Mr Brown's case made its way through the courts, one legal scholar claimed that sections 7 and 11(d) of the *Charter* were clearly violated by section 33.1 of the *Criminal Code*, and that it should be uncontroversial to say so.^[13] In *Brown*, the Supreme Court seemed to agree.

Section 7 states that a person's liberty cannot be infringed except in accordance with the principles of fundamental justice.^[14] In *Brown*, the SCC noted that it is a principle of fundamental justice that an individual will only be convicted of a crime where there is "proof of fault reflecting the offence and punishment faced by the accused."^[15] Section 33.1 violated this principle, the Court said, because it would allow someone to be convicted — and deprived of their liberty — even if the harm they caused was not a reasonably foreseeable consequence of their intoxication. For example, a person could be convicted if they simply had a bad reaction to prescribed painkillers or if they took a drug that is not known to cause such adverse reactions.^[16] In other words, section 33.1 would allow a court to convict an accused despite a lack of *mens rea* (i.e. a "guilty mind").^[17]

The Court also held that section 33.1 violated a second principle of fundamental justice: the requirement that individuals are only held criminally responsible for *voluntary* conduct. Section 33.1 violated this requirement by allowing someone in a state of automatism — someone who is *incapable* of voluntary action by definition — to be convicted of a crime.^[18]

Finally, the Court then considered Mr Brown's argument that section 33.1 violated section 11(d) of the *Charter*. Section 11(d) protects an accused's right to be presumed innocent

until proven guilty, which means that all essential elements of the offence must be proven beyond a reasonable doubt.[\[19\]](#) However, under section 33.1, the intent to commit certain violent offences was effectively replaced by the intent to become intoxicated, thereby establishing what the Court called a “guilt-by-proxy” regime.[\[20\]](#) Section 11(d) prohibits this substitution, the Court said, because it “cannot be said that, ‘in all cases’ ... the intention to become intoxicated can be substituted for the intention to commit a violent offence.”[\[21\]](#) As mentioned above, an individual may innocently “consume legal intoxicants for personal or medical purposes”[\[22\]](#) without being able to foresee the risk that they would then commit a violent offence. In such cases, the blameworthiness of the individual cannot be proven simply by proving their earlier intent to consume intoxicating substances.

Section 33.1 cannot be saved under section 1

Having found that section 33.1 infringed the rights protected under sections 7 and 11(d) of the *Charter*, the Court then turned to the question of whether the provision was nonetheless legally justified under section 1 of the *Charter*. As noted in the previous article, a law that infringes fundamental rights can be saved under section 1 of the *Charter* if it is justified under an analysis referred to as the *Oakes test*.[\[23\]](#) In order for the law to be saved, it must have a pressing and substantial objective and meet a three-part proportionality test:

1. It must be rationally connected to its objective;
2. It must be minimally impairing of *Charter* rights, and;
3. It must be proportionate, meaning that there must be an overall balance between its “deleterious” and “salutary” effects.[\[24\]](#)

In *Brown*, the SCC noted that section 33.1 had two pressing and substantial objectives: first, to protect victims of intoxicated violence (especially women and children), and second, to hold accountable those who voluntarily ingest intoxicants and create a risk to others through doing so.[\[25\]](#)

Having identified and validated these objectives, the Court then moved on to the application of the aforementioned proportionality test. The first prong of this test, assessing whether the law is rationally connected to its objectives, was easily satisfied. The Court noted that the threat of criminal sanction provided for by the law would have at least some deterrent effect, which makes it relevant to its protective purpose. Further, the law clearly holds accountable those who become extremely intoxicated and commit a violent crime, thus connecting it to its second objective.[\[26\]](#)

However, the Court found that the second step of the proportionality analysis, the minimal impairment step, was not met. In this regard, Justice Kasirer noted that there were “real and substantial” alternatives to achieving Parliament’s objectives that were less impairing of *Charter* rights.[\[27\]](#) These alternatives included the creation of a stand-alone offence (an offence of criminal intoxication) or a new standard of criminal negligence.[\[28\]](#)

Finally, the Supreme Court turned to weighing the law’s salutary benefits and deleterious

effects.^[29] To begin with, the Court noted that section 33.1 did have substantial benefits, especially insofar as it helped ensure equal protection of the law for women and children. However, for the Court, these benefits were ultimately outweighed by the law's deleterious impact on fundamental rights. As Justice Kasirer wrote, it is "difficult to imagine more serious limitations than the denial of voluntariness, mens rea, and the presumption of innocence all in one."^[30] The Court accordingly invalidated section 33.1 on the basis that its impact on fundamental rights was too severe to be justified under section 1 of the *Charter*.

Parliament Responds With Bill C-28

The *Brown* ruling provoked outcry across the country,^[31] and Parliament accordingly moved quickly to introduce new legislation on the extreme intoxication defence.

On Friday June 17th, the government introduced Bill C-28, which appears to address the issues that resulted in section 33.1 being struck down. Under these new rules, the extreme intoxication defence will no longer be available if an accused departed from a reasonable standard of care with respect to the consumption of an intoxicating substance before committing the offence. That departure must be assessed by a court based on numerous factors, including foreseeability of risk and whether the accused took steps to minimize the risk.^[32] Therefore, it is likely that someone who has an adverse and unexpected reaction to prescription medication, for example, would still be able to use the defence.

In creating this new framework, Parliament seems to have taken its cues directly from the SCC, which had opined in *Brown* that the creation of a standard of criminal negligence would allow Parliament to pursue section 33.1's objectives without falling foul of the Constitution. If Bill C-28 is enacted, the extreme intoxication defence will again be restricted in Canada, but this time in a way that has less of a detrimental impact on individuals' *Charter* rights.

^[1] *Criminal Code*, RSC 1985, c C-46, s 33.1.

^[2] *R v Brown*, 2022 SCC 18 paras 15-16 [*Brown*].

^[3] *Ibid* at para 17.

^[4] *Ibid* at para 18.

^[5] *Ibid* at paras 19-20.

^[6] *Ibid* at paras 20-21.

^[7] *Ibid* at paras 22-29.

^[8] *Ibid* at para 73.

[9] *Ibid* at para 74.

[10] *Ibid*.

[11] *Ibid* at para 73.

[12] *Ibid* at para 88.

[13] Michelle S Lawrence, “Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the Criminal Code” (2017) 40:3 MLJ 391 at 415.

[14] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

[15] *Brown*, *supra* note 2 at para 95.

[16] *Ibid* at paras 91-93.

[17] *Ibid* at para 95.

[18] *Ibid* at para 96.

[19] *Charter*, *supra* note 14, s 11(d).

[20] *Brown*, *supra* note 2 at para 103.

[21] *Ibid* at para 104.

[22] *Ibid*.

[23] *Charter*, *supra* note 14, s 1.

[24] *Brown*, *supra* note 2 at para 110.

[25] *Ibid* at paras 119-122.

[26] *Ibid* at paras 132-134.

[27] *Ibid* at para 141.

[28] *Ibid*.

[29] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 122.

[30] *Brown*, *supra* note 2 at para 155.

[31] Warren Kinsella, “Supreme Court ruling makes Canada a less-safe place”, *Toronto Sun*, May 17, 2022; Elizabeth Sheehy, Isabel Grant & Kerri A Froc, “Supreme Court of Canada ruling a setback for women”, *Toronto Star*, May 13, 2022.

[32] Bill C-28, *An Act to amend the Criminal Code (self-induced extreme intoxication)*, 1st

Sess, 44th Parl, 2022, cl 33.1.