

# ***Daviault* Dialogue: The Strange Journey of Canada's Intoxication Defence**

***Dennis Baker and Rainer Knopff\****

*In 1994, the Supreme Court of Canada found that Henri Daviault had unconstitutionally been denied the defence of being so intoxicated that he could not form the minimal intent necessary to commit sexual assault. In response, Parliament swiftly amended the Criminal Code to disallow the defence of extreme intoxication for violent crimes. It did so without using the Charter's section 33 notwithstanding clause. This set the stage for a subsequent, "second look" case pitting the Court's Daviault judgment against Parliament's modification of it by ordinary statutory means. That two decades have gone by without this issue being clearly addressed by the Supreme Court has puzzled many observers. One explanation for the puzzle is that direct second looks have, for a variety of reasons, thus far stalled in the lower courts. A second explanation may lie in strategic behaviour by the Supreme Court, which has arguably decided the constitutional issue indirectly (and with little fanfare) under the guise of statutory interpretation.*

*En 1994, la Cour suprême du Canada conclut que Henri Daviault avait inconstitutionnellement été refusé le moyen de défense d'avoir été dans un état d'ébriété si avancé qu'il ne pouvait pas former l'intention minimale requise pour commettre une agression sexuelle. En réponse, le Parlement modifia promptement le Code criminel afin de rejeter le moyen de défense de l'état d'intoxication extrême pour les crimes violents. Il le fit sans avoir recours à la disposition de dérogation de l'article 33 de la Charte. Ceci prépara le terrain pour une cause de "réexamen" ultérieure opposant le jugement Daviault de la Cour à la modification de celui-ci par le Parlement à l'aide de moyens législatifs ordinaires. Le fait que deux décennies se sont écoulées sans que la Cour suprême aborde clairement cette question a laissé perplexe de nombreux observateurs. Une explication de ce mystère est que les réexamens directs sont jusqu'ici restés, pour diverses raisons, au point mort dans les tribunaux inférieurs. Une deuxième explication pourrait résider dans le comportement stratégique de la Cour suprême qui, on peut soutenir, trancha la question constitutionnelle indirectement (et sans fanfare) sous couvert d'interprétation législative.*

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The mechanics of the inter-institutional “dialogue” between courts and legislatures under the *Canadian Charter of Rights and Freedoms* can be more subtle and strategic than is generally understood. This paper explores the somewhat surprising dialogic twists and turns generated by the Supreme Court’s 1994 *Daviault* judgment, which established a new defence of extreme drunkenness for such crimes as sexual assault. Parliament’s 1995 “legislative sequel” — s 33.1 of the *Criminal Code of Canada*<sup>1</sup> — which overruled *Daviault* without using the *Charter*’s section 33 notwithstanding clause, has long been expected to generate a “second look” at the issue by the Supreme Court. Twenty years have passed, however, and that second look has not occurred, at least not directly. Why not? We offer some answers.

Parliament’s response to *Daviault* exhibited a much higher level of disagreement with the Court than do most legislative sequels. Generally, legislatures exploit the room for manoeuvre provided by the section 1 “reasonable limits” clause of the *Charter*.<sup>2</sup> That is, legislatures seek a more reasonable limit than the one that has been judicially rejected: a limit that more minimally impairs the relevant right(s).<sup>3</sup> Whether the legislature has gone far enough in fine-tuning the law may be further litigated in so-called ‘second look cases’, which review “the validity of legislation enacted to replace a law” found unconstitutional “in a previous *Charter* decision.”<sup>4</sup> However, Parliament was not interested in such fine-tuning of reasonable limits within parameters established by *Daviault*. Instead, s 33.1 of the *Criminal Code* overruled *Daviault* by explicitly denying the extreme drunkenness defence for “bodily integrity” crimes, including sexual assault.

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

2 Peter W Hogg & Allison A Bushell, “Charter Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing after All)” (1997) 35 Osgoode Hall LJ 75 [Hogg & Bushell]; Kent Roach, “Dialogue or defiance: Legislative reversals of Supreme Court decisions in Canada and the United States” (2006) 4 Int J Constitutional Law 347 [Roach, “Dialogue or Defiance”]; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*].

3 This process of “section 1” or “reasonable limits” dialogue can sometimes have several iterations. A good example is the ongoing dialogue over medicinal marijuana. The recent decision of the Ontario Court of Appeal in *R v Mernagh*, 2013 ONCA 67 at para 1, 295 CCC (3d) 431, notes that it is the third time in a decade that the appellate court has been “asked to decide whether Parliament’s attempts to restrict the use of marihuana for medical purposes are constitutional.” The judgment also describes the iterative legislative tailoring undertaken in response to judicial invalidations on s 1 grounds (*ibid* at paras 2-7).

4 Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “Charter Dialogue Revisited — or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1 [Hogg *et al.*] at 19.

The *Charter* provides a mechanism for this level of disagreement with judicial rulings. If a legislature disagrees outright with a judicial decision based on sections 2 and 7-15 of the *Charter*, it may re-enact the invalidated rule with a section 33 notwithstanding clause. There is a five-year limit on a notwithstanding clause, but it can be renewed. Such section 33 dialogue puts an end to additional *Charter* litigation on issues covered by the notwithstanding clause unless and until that clause is allowed to lapse. There are no second look cases while a notwithstanding clause is in effect.

Yet, Parliament's sequel to *Daviault* did not contain a section 33 notwithstanding clause. The legitimacy of this kind of dialogue with the judiciary, which has also occurred in other instances,<sup>5</sup> is controversial. Because it involves a "legislative reversal of judicial decisions" that is achieved through "simple statutory amendments," it has been termed by some scholars as "notwithstanding-by-stealth."<sup>6</sup> Others have called it an "in your face" response.<sup>7</sup> In such circumstances, second look cases pose a more dramatic question than they do with respect to "reasonable limits" dialogue.<sup>8</sup> With the legislature re-enacting precisely what the Court has invalidated, the real issue concerns the extent to which the judges will stick to their guns or back down.<sup>9</sup>

This paper examines the long-standing inter-institutional standoff arising out of the *Daviault* case and Parliament's "in your face" legislative sequel. Should Parliament's legislative disagreement with the Court be struck down because it omits a notwithstanding clause, or is it a legitimate dialogic

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5 *R v Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321 [*Mills*]; *R v Hall*, 2002 SCC 64, 3 SCR 309 [*Hall*]. See generally Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010) [Baker].

6 James B Kelly & Matthew A Hennigar "The *Canadian Charter of Rights* and the minister of justice: Weak-form review within a constitutional Charter of Rights" (2012) 10:1 Int J Constitutional Law 35 [Kelly & Hennigar] at 36.

7 See Roach, *Supreme Court on Trial* *supra* note 2 at 274-77 and Gerry Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (Paper, delivered at the Annual Constitutional Cases Conference held by Osgoode Hall Faculty of Law, Toronto, 4-5 May 2012), Benjamin L Berger & James Stribopoulos, eds, *Unsettled Legacy: Thirty Years of Criminal Justice Under the Charter*, (Markham: Lexis-Nexis, 2012) at 145 [Ferguson] at 167.

8 Both the "in your face" and "notwithstanding-by-stealth" formulations imply that this form of Parliamentary response is illegitimate unless the notwithstanding clause is invoked. We do not share this view: see Baker *supra* note 5; and Dennis Baker & Rainer Knopff, "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 21 Windsor YB Access Just 347 [Baker & Knopff]. A full airing of this disagreement is beyond the scope of this paper, but we direct readers to the discussion of coordinate constitutional interpretation in Baker *supra* note 5.

9 The courts retain the power to reject any legislative response that does not comply with their precedent; from this perspective, the legislative sequel might be better considered simply as a testing of the court's resolve. See Baker *supra* note 5 at 112.

response? Two decades have now passed without this question coming to our highest Court in a second look case. The strange and seemingly incomplete journey of Canada's intoxication defence has puzzled many observers.

We offer a twofold explanation for the puzzle. First, several second look cases have actually been launched, but have, for a variety of reasons, stalled in the lower courts and failed to reach the Supreme Court. Second, and perhaps more important, while the constitutional issues have not come to the Supreme Court directly and explicitly, they have arguably been indirectly decided by that court under the guise of statutory interpretation. The case of *R v Bouchard-Lebrun*,<sup>10</sup> we maintain, can be understood as a less dramatic, indirect (and probably strategic) second look. When legislatures engage in “notwithstanding by stealth,” the Supreme Court sometimes takes a “camouflaged second look.” In our view, *Bouchard-Lebrun* implicitly (though controversially) accepts the legitimacy of Parliament's “in your face” sequel to *Daviault*. Before turning to stalled or camouflaged second looks, however, we need a full understanding of the *Daviault* judgment and Parliament's legislative sequel.

## The *Daviault* dialogue

In 1994, the Supreme Court of Canada ordered a new trial for Henri Daviault, who had been convicted of sexually assaulting a 65-year-old and partially paralyzed woman. In the Court's view, Daviault had wrongly been denied the defence of intoxication — that he had been too drunk to form the *mens rea* (guilty mind) necessary to be convicted of a serious crime.

The trial judge had denied the intoxication defence to Daviault based on the judge-made common law rule, confirmed in *R v Leary*,<sup>11</sup> that while intoxication could be a defence for so-called “specific intent” criminal offences, it was unavailable for “general intent” offences. To be guilty of a general intent offence, one must intend a particular prohibited act or conduct, such as striking someone. To be guilty of a specific intent offence, one must intend something in addition to the immediate act — for example, one must intend not only to strike someone, but also that the victim should die as a result. As the Court of Appeal of England and Wales has put it, specific intent is “a state of mind addressing something beyond the prohibited act itself, namely

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10 2011 SCC 58, 3 SCR 575 [*Bouchard-Lebrun*].

11 [1978] 1 SCR 29, 33 CCC (2d) 473 [*Leary*].

its consequences.”<sup>12</sup> Thus, if one intends only to strike, one is guilty of one of two general intent offences: assault or manslaughter (the latter if death unintentionally results). However, if one intends not only to strike but also to kill, then one is guilty of either murder or attempted murder (both specific intent offences). According to the *Leary* rule, drunkenness might indeed make it impossible to form the extra level of intent required for specific intent offences, but it was no defence against the simpler, general intent to undertake a prohibited action (e.g., striking). Since assault (including sexual assault) is a general intent offence, Daviault’s drunkenness was no excuse.

The Supreme Court disagreed. Daviault’s lawyers claimed that he had imbibed enough alcohol to reduce himself to an automaton. If this proved to be true, surely he could not form even a general intent to commit sexual assault; we would not convict a true automaton (a self-operating machine, or robot) of a crime, and neither should we convict an individual who was acting in a state of automatism. The same principle lies behind s 16 of the *Criminal Code*, which allows an insanity defence since the criminal act cannot be considered voluntary if it stems from a “disease of the mind.” Because voluntary intoxication is not a disease of the mind for the purposes of s 16 (as we shall see below), individuals might legitimately be faulted for drinking too much. But according to Justice Cory’s majority opinion in *Daviault*, we must not substitute the wrongful intention to become dangerously drunk for the *mens rea* to commit the crime of sexual assault. Justice Cory’s opinion thus found the *Leary* rule to be unconstitutional as it applied to the kind of extreme intoxication claimed by Daviault. “To deny that even a very minimal mental element is required for sexual assault,” wrote Justice Cory, “offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*.”<sup>13</sup>

The distinction between offences of general and specific intent is somewhat fuzzy and controversial. For example, in Canada, the offence of assaulting a police officer has been found to be a crime of both general intent (on the grounds that drunkenness cannot excuse a physical assault) and specific intent (because one might be too drunk to know the victim was a police officer).<sup>14</sup> In other common law jurisdictions, perverse situations arose when sexual assault of a minor was considered a crime of specific intent, meaning that drunken-

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12 *R v Heard*, [2007] EWCA Crim 1253 at para 31.

13 *R v Daviault*, [1994] 3 SCR 63, 93 CCC (3d) 21 [*Daviault*] at para 47.

14 Alan D Gold, *Halsbury’s Laws of Canada: Criminal Offences and Defences*, 1<sup>st</sup> ed (Markham: Lexis-Nexis, 2012) at 531 [Gold, *Halsbury’s*]; Alan D Gold, “An Untrimmed ‘Beard’: The Law of Intoxication as a Defence to a Criminal Charge” (1977) 19 Crim LQ 34 at 66–68 [Gold, “Beard”].

ness could be a defence to sexual assault of a minor but not to the sexual assault of an adult.<sup>15</sup> This distinction is “unprincipled, illogical and arbitrary.”<sup>16</sup> Although the Court’s *Daviault* judgment did not completely abandon the distinction, it did set it aside with respect to the defence of extreme intoxication, which would now apply to both kinds of offences. Perhaps this appealed to lawyers and jurists seeking a more principled basis for criminal jurisprudence.

Whatever attractions the *Daviault* judgment may have had to lawyers, it failed to convince the attentive public, who saw the decision as essentially permitting drunken men to rape with impunity. *The Toronto Star* reported that “judges across Canada admit to being under fire because of the perception that the Supreme Court of Canada has given drunk men an excuse to rape women.”<sup>17</sup> One British Columbia judge suggested that the ruling “wreaked havoc on the public view of judges,” and bemoaned that “[y]ou can’t go for a coffee or to lunch or a party without being attacked” over the decision.<sup>18</sup> The fiery reaction was fueled in part by a series of cases soon after the Supreme Court decision where the accused successfully used the new intoxication defence.<sup>19</sup> This seemed to belie Justice Cory’s claim — repeated nine times in the *Daviault* decision — that the extreme intoxication defence could be used only in the “rarest” of cases. With the decision widely derided, there was a clear opportunity and popular justification for Parliament to undertake a dialogic response.

In fact, the majority in *Daviault* appeared to invite a legislative sequel. Cory J wrote that “it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk,” noting also

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15 Ferguson *supra* note 7 at 157.

16 *Ibid.*

17 David Vienneau, “Judges under fire for drunkenness defence Top court ruling ‘wreaked havoc’ on other judges”, *Toronto Star* (9 November 1994) A2 online: Toronto Star Archives <<http://pqasb.pqarchiver.com/thestar/doc/437142750.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Nov+09%2C+1994&author=David+Vienneau+Toronto+Star&pub=Toronto+Star&edition=&startpage=&desc=Judges+under+fire+for+drunkenness+defence+Top+court+ruling+%27wreaked+havoc%27+on+other+judges>> [Vienneau]; Robin Room, “Drinking, violence, gender and causal attribution: a Canadian case study in science, law and policy” (1996) 23 *Contemp Drug Probs* 649 [Room] at 651.

18 Vienneau *ibid.*

19 See for example *R v Blair*, [1994] AJ No 807 (QB); *R v Compton* (2 November 1994), Prince Edward Island (unreported); and *R v Thériault* (1994), Quebec (unreported). Reliance is placed on newspaper accounts for the unreported decisions in *R v Compton* and *R v Thériault* in Room, *supra* note 17 and Elizabeth Sheehy, “The intoxication defense in Canada: why women should care” (1996) 23 *Contemp Drug Probs* 595 [Sheehy]. See also Elisabeth Grant, “Second Chances: Bill C-72 and the Charter” (1995) 33 *Osgoode Hall LJ* 379 [Grant] at 402.

that “voluntary intoxication is *not yet* a crime.”<sup>20</sup> In other words, although Cory J was adamant that one should not allow intent to become drunk to stand in for intent to commit assault, he seemed quite open to a new crime of becoming dangerously drunk. Indeed, Cory J and the majority may have been alert to a problematic aspect of their decision: unlike the insanity defence in s 16, which may lead to coercive hospitalization and treatment (as opposed to criminal punishment), the intoxication defence would result in a complete acquittal and no consequences for the accused, criminal or otherwise. Given this troubling outcome, the majority’s approach begged for a new offence. The new crime suggested by Cory J would still be connected to the commission of another criminal act (e.g., assault). In other words, we would not convict people *only* for being drunk, but we would punish the culpable drunkenness, not the resulting assault (which the drunkard could not have intended).

An implicit corollary of Justice Cory’s suggestion is that the new intoxication offence would have to provide a penalty proportionate to the blameworthiness of getting voluntarily intoxicated, which would certainly be lower than the blameworthiness of committing assault. As legal scholar Gerry Ferguson suggests, the penalty, while still dependent on the criminal act committed while intoxicated, could be a proportional x% of the maximum penalty for the act absent intoxication.<sup>21</sup> The more lenient penalty to match diminished culpability would be consistent with the principle of proportionate punishment required by the *Charter*’s section 7 principles of fundamental justice (e.g., the lesser penalties that must be contemplated for offences committed by a youth).<sup>22</sup> What apparently is not open to Parliament, in Justice Cory’s view, is a return to the *Leary* rule, where the intoxicated culprit would face the same penalty as his sober counterpart. In sum, Cory J envisioned, and tried to guide, a process of “reasonable limits” dialogue in which the legislature works within judicially set boundaries to craft a more carefully tailored, minimal impairment of *Charter* rights.

Parliament was not prepared to follow Justice Cory’s lead, however. Instead, it took the one option that seemed foreclosed by the decision. After flirting with the idea of putting the policy alternatives before the Supreme Court in a reference case, the Chrétien Government enacted section 33.1 in 1995, nine months after the decision in *Daviault*.<sup>23</sup> Section 33.1 of the *Code*

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20 *Daviault* *supra* note 13 at paras 61 and 42 [Emphasis added].

21 Ferguson *supra* note 7 at 178.

22 *R v DB*, 2008 SCC 25, 2 SCR 3 [*D.B.*].

23 Grant, *supra* note 19 provides a good overview of Bill C-72’s development and the legislative process leading to the enactment of enacting s 33.1.

denies the intoxication defence if (a) the offence "includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person;" and (b) the intoxication was self-induced and "departs markedly from the standard of reasonable care generally recognized in Canadian society" inasmuch as it "renders the person unaware of, or incapable of consciously controlling, their behaviour."<sup>24</sup>

Although it is sometimes said that s 33.1 essentially re-enacts "the very same common law rule that was held unconstitutional,"<sup>25</sup> it is more accurate to say that it re-enacts *part* of what *Daviault* found unconstitutional. Whereas the intoxication defence was not available for *any* general intent offences under *Leary*, s 33.1 excludes the defence only for bodily integrity crimes (e.g., assault) and not for other kinds of criminal behaviour (e.g., breaking and entering). Thus, s 33.1 does not *fully* restore the *Leary* rule; rather, it denies the intoxication defence in a narrower range of circumstances than *Leary* did. That said, the tension between s 33.1 and the majority decision in *Daviault* is obvious. The Supreme Court said *Daviault* was entitled to claim the intoxication defence; however, under s 33.1, an accused charged with sexual assault would be precluded from using that defence, even though he lacked *mens rea*. With respect to precisely the kind of bodily integrity offence at issue in the *Daviault* case, s 33.1 offends the *Charter* in the same manner as the *Leary* rule, a manner considered by the *Daviault* Court's majority to be "so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*."<sup>26</sup> Parliament enacted this 'drastically' unconstitutional law, moreover, without a notwithstanding clause. This was what both Roach and Ferguson characterized as an "in your face" response, or what Kelly and Hennigar called "notwithstanding by stealth."<sup>27</sup>

Given this tension, observers were primed for a second look case that would pit the Court's constitutional judgment against Parliament's statutory modification of it. In their original 1997 article introducing "dialogue" in the Canadian context, Hogg & Bushell mentioned s 33.1 and noted that "it will be interesting to see how the courts will respond when the issue comes before them for a second time."<sup>28</sup> Roach anticipated a second look by the

24 *Code supra* note 1.

25 *R v Brenton* (1999), 180 DLR (4<sup>th</sup>) 314, 44 WCB (2d) 48 (NWT Sup Ct) [*Brenton*] at para 53.

26 *Daviault supra* note 13 at para 47.

27 See Roach, "Dialogue or Defiance" *supra* note 2 at 277; Ferguson *supra* note 7; Kelly & Hennigar *supra* note 6 at 36. For a contrary view on the applicability of the notwithstanding clause to s 33.1, see Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52 Univ of Toronto LJ 221 [Kahana] at 270-72.

28 Hogg & Bushell, *supra* note 2 at 104.



Supreme Court, noting that “most of the lower courts that have considered the issue have invalidated the section.”<sup>29</sup> In 2007, upon the tenth anniversary of the introduction of the ‘dialogue’ concept to Canadian literature, Hogg returned to s 33.1, observing again that it “basically enacted without modification the very propositions of law that the Court rejected,” and that it “reads like a rebuttal of the majority’s position in *Daviault*.”<sup>30</sup> They argue that in a second look case, “the courts would have to determine whether a more convincing demonstration of section 1 justification had been advanced”; that is, they would have to be convinced that the violation of *Charter* rights was not actually “so drastic and so contrary to the principles of fundamental justice” that it could not be justified as a reasonable limit under s 1.<sup>31</sup> If this more convincing justification was not forthcoming, “the reply legislation would have to be struck down.”<sup>32</sup>

In fact, as Roach noted, second look cases had already come before trial courts, some of which, seeing no reason to reconsider *Daviault*, invalidated s 33.1. Others, as we shall see, did reconsider *Daviault* and upheld s 33.1. Normally, we would expect such a mixed record of trial cases to present a second-look opportunity to the Supreme Court. Yet Hogg et al were still awaiting such a case in 2007, a full 12 years after the enactment of s 33.1. And we continue to wait. Writing in 2012, Ferguson found it “very surprising that 17 years after its enactment, no appellate court in Canada has yet ruled on the constitutionality of s 33.1.”<sup>33</sup> As we shall see, two appellate courts have been given the opportunity, but the results have thus far been inconclusive. For the most part, second look cases that explicitly address the constitutionality of the legislative sequel to *Daviault* appear to have stalled in courts below the Supreme Court, and mostly in trial courts.

## Stalled ‘second look’ cases

As of this writing, there are nine reported decisions in which trial judges explicitly addressed the validity of s 33.1.<sup>34</sup> These judges are unanimously of the

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29 Roach, “Dialogue and Defiance” *supra* note 2 at 360.

30 Hogg *et al.* *supra* note 4 at 173.

31 *Ibid.*

32 *Ibid.*

33 Ferguson *supra* note 7 at 170

34 Legal databases such as LawSource, which was used here, only include decisions that have been “reported.” Often judges make decisions that are delivered orally (with reasons never recorded) and some decisions are considered routine and do not attract the attention of the commercial reporters. All appellate judgments in Canada are reported, but databases of trial court judgments are notoriously incomplete. For the purposes of this paper, we have chosen to exclude unreported

view that s 33.1 infringes the *Charter*, but they are divided on whether the section can be saved as a reasonable limit under section 1. In four cases, s 33.1 was found to be a “reasonable limit” and was thus upheld.<sup>35</sup> In five cases, s 33.1 was struck down for not complying with the Court’s decision in *Daviault*, thus allowing the accused to put forward the intoxication defence.<sup>36</sup>

If one assumes (as the judges in *Jenson*, *Cedeno* and *Fleming* do) that lower court precedents will be given weight by other lower court judges in the same jurisdiction, then s 33.1 is constitutionally valid in Quebec (*Dow*), British Columbia (*Vickberg*), Saskatchewan (*B.J.T.*) and Nunavut (*S.N.*), but constitutionally infirm in Ontario (*Dunn*, *Jenson*, *Cedeno*, *Fleming*) and the Northwest Territories (*Brenton*). One might normally expect the Supreme Court to weigh in on this kind of provincial variation to ensure that the criminal rights of an accused in British Columbia are the same as those of one in Ontario. And yet only two of the nine trial court decisions on the constitutionality of s 33.1 (*Brenton* and *Dow*) have been appealed to a higher court, and, as we shall see, those two second looks are unclear or inconclusive. For the time being, at least, no clear second look case seems headed for the Supreme Court.

The explanations for the outcomes of these nine cases differ depending on whether the trial court invalidated or upheld s 33.1, and whether the defendant was acquitted or convicted. Table 1 below locates the cases with respect to these two dimensions.

One reason that trial judgments on the constitutionality of s 33.1 do not proceed up the judicial hierarchy is that sometimes the party that loses on that issue nevertheless wins the overall case and thus has no incentive to appeal. In table 1, cells 1 (top left) and 4 (bottom right) portray circumstances in which this occurs. In the two cases in cell 1 (*Vickberg* and *S.N.*) the trial judge

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cases because we have little reliable way of knowing the reasoning of the trial court judgment, even if the decision is mentioned in the literature (e.g., *R v Decaire* as cited in Kelly Smith, “Section 33.1: Denial of *Daviault* Defence Should Be Held Constitutional” (2000) 28 CR (5<sup>th</sup>) 350 [Smith]). Our list of cases here also only includes cases where the constitutionality of s 33.1 was expressly discussed. Some appellate judgments mention s 33.1 but fail to discuss its constitutionality, such as *R v Frechette*, 1999 BCCA 46, 132 CCC (3d) 1 [*Frechette*]; *R v Martin*, [1999] OJ 5066 (Ont CA) [*Martin*]; *R v B(SJ)*, 2002 ABCA 143, 166 CCC (3d) 537 [*SJB*]; *R v Chaulk*, 2007 NSCA 84, 223 CCC (3d) 174 [*Chaulk*].

35 See *R v Vickberg* (1998), 16 CR (5<sup>th</sup>) 164, 54 CRR (2d) 83 (BC SC) [*Vickberg*]; *R v T(BJ)*, 2000 SKQB 572, 4 WWR 741 [*B.J.T.*]; *R v Dow*, 2010 QCCS 4276, 261 CCC (3d) 399 [*Dow*]; *R v N(S)*, 2012 NUCJ 2, 99 WCB (2d) 841 [*S.N.*].

36 See *R v Brenton*, *supra* note 25; *R v Dunn*, [1999] OJ No 5452, 28 C.R. (5<sup>th</sup>) 295 (Ont Ct J (Gen Div)) [*Dunn*]; *R v Jensen*, [2000] OJ No 4870 (Ont Sup Ct J) [*Jensen*]; *R v Cedeno*, 2005 ONCJ 91, 195 CCC (3d) 468 [*Cedeno*]; *R v Flemming*, 2010 ONSC 5169, OJ No 5987 [*Flemming*].

**Table 1: Trial Court Outcomes Involving section 33.1**

	<b>s 33.1 found constitutional at trial</b>	<b>s 33.1 found unconstitutional at trial</b>
<b>Defendant acquitted at trial</b>	<p>1. <u>No incentive to appeal s 33.1 ruling</u></p> <ul style="list-style-type: none"> <li>• <i>Vickberg</i></li> <li>• <i>S.N.</i></li> </ul>	<p>2. <u>Crown has incentive to appeal s 33.1 ruling</u></p> <ul style="list-style-type: none"> <li>• <i>Brenton</i> (crown appeals)</li> </ul>
<b>Defendant convicted at trial</b>	<p>3. <u>Defendant has incentive to appeal s 33.1 ruling</u></p> <ul style="list-style-type: none"> <li>• <i>B.J.T.</i> (defendant does not appeal)</li> <li>• <i>Dow</i> (defendant appeals)</li> </ul>	<p>4. <u>No incentive to appeal s 33.1 ruling</u></p> <ul style="list-style-type: none"> <li>• <i>Dunn</i></li> <li>• <i>Jensen</i></li> <li>• <i>Cedeno</i></li> <li>• <i>Fleming</i></li> </ul>

found s 33.1 to be constitutional but nevertheless acquitted the accused, thus making it unnecessary for the accused to appeal his loss regarding the constitutionality of s 33.1. In *Vickberg*, the trial judge upheld s 33.1 (a loss for the defendant) but also found that the accused (lacking knowledge about the effect of his prescription drugs) had been involuntarily intoxicated. Had *Vickberg* understood the effect of his drugs, he would have been voluntarily intoxicated and s 33.1 (having been found constitutional) would have prevented the intoxication defence. Because he was involuntarily intoxicated, however, s 33.1 did not apply and he was acquitted. *S.N.* was also acquitted at trial despite the judge finding s 33.1 to be constitutional, though we do not know precisely why because the reasons for acquittal were not reported (though the judgment regarding the constitutionality of s 33.1 was reported). In both *Vickberg* and *S.N.*, the defendant, having won his case, had no incentive to appeal his loss on the constitutional issue.

The mirror image of this situation occurs in cell 4, where the crown lost the constitutional issue but nevertheless won the case by securing a conviction. The four cases in this cell<sup>37</sup> all come from Ontario, where crown prosecutors

37 See *Dunn* *ibid*; *Cedeno* *ibid* where *Cedeno* convicted in the same judgment that found s.33.1 unconstitutional; *Jensen* *ibid*; *Flemming* *ibid*. See also QMI Agency, "Rare defence, tried but fails", *St. Thomas Times Journal* (7 May 2011) online: *St. Thomas Times Journal* <<http://www.stthomastimesjournal.com/2011/05/07/rare-defence-tried-but-fails>> [QMI Agency] which describes the *Flemming* conviction; and Jake Gadd, "Judge quickly rejects drunkenness defence",

regularly adduce strong evidence that the situation envisioned by the *Daviault* majority — self-intoxication by alcohol alone leading to automatism — is medically impossible.<sup>38</sup> The intoxication defence is unlikely to succeed in the face of such compelling evidence.<sup>39</sup> Thus, as long as this evidence is admitted, the Crown in right of Ontario is unconcerned with s 33.1 invalidation since, from its perspective, there is no practical consequence beyond a slightly longer proceeding. Ironically, although Ontario trial courts may insist on the continued availability of the intoxication defence to cases of extreme intoxication, they invariably also rule that the degree of automatism-inducing intoxication required for the defence has not been met. In these circumstances, there is little incentive for the crown to appeal a s 33.1 invalidation.

This means that only three of the nine trial judgments — those in cells 2 and 3 of Table 1 — could plausibly generate a second-look appeal regarding the constitutionality of s 33.1.

In cell 2, we find the Northwest Territories case of *Brenton*, in which s 33.1 was found to be unconstitutional at trial and the accused was acquitted. Here the Crown had an incentive to appeal the acquittal and did so. Although the Court of Appeal addressed the constitutional decision of the trial judge, it avoided making a substantial decision on the validity of s 33.1 itself. Finding that “there was an insufficient factual foundation at trial upon which to mount a constitutional challenge,” the Court of Appeal concluded that “this was not a proper case in which to engage this important constitutional issue” and simply vacated the trial judge’s finding that s 33.1 was unconstitutional.<sup>40</sup> At the same time, the Court of Appeal found that the evidence did not support a finding of “extreme intoxication,” and thus gave the accused little reason to think he would succeed in a further appeal because even if s 33.1 was unconstitutional, the evidence would be insufficient to trigger the *Daviault* defence.<sup>41</sup>

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*The Globe and Mail* (6 October 2000) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/jury-quickly-rejects-drunkenness-defence/article597876/>> [Gadd] which discusses the Jensen trial.

38 See Harold Kalant, “Intoxicated Automatism: legal concept vs scientific evidence” (1996) 23 *Contemp Drug Probs* 631 [Kalant]. This evidence was available at the time of the *Daviault* decision but not submitted at trial; instead, the scientific question was more authoritatively settled by the expert testimony made to Parliament in the process of enacting s 33.1 according to Smith *supra* note 34.

39 Smith *ibid.*

40 *R v Brenton*, 2001 NWTCA 1 at para 1, 199 DLR (4<sup>th</sup>) 119.

41 *Ibid* at para 9.

Cell 3 is the mirror image of cell 2, with the defendant rather than the Crown having an obvious incentive to appeal the decision on the constitutionality of s 33.1. In *B.J.T.*, for example, the accused was clearly convicted *because* s 33.1 was found constitutional. Both the accused and the complainant in this case were inebriated to the point that neither could remember the sexual intercourse (confirmed by DNA evidence) that took place between them during an alcohol-fueled overnight party. The complainant's sister, who observed the accused doing up his pants while he was lying with the complainant on the floor, triggered the sexual assault charges. Not surprisingly, the defence introduced expert evidence that the accused was so "grossly intoxicated" that he was effectively unconscious during the alleged assault. Since the Crown in Right of Saskatchewan did not call any rebuttal expert evidence — i.e., nothing like Ontario's readily-available and compelling evidence was admitted — Justice Baynton put aside his "reasonable doubt about whether the accused was intoxicated as he claims he was" and ruled that "on a balance of probabilities his extreme level of self-induced intoxication rendered [the accused] incapable of making a conscious decision to have sexual intercourse with the complainant with or without her consent."<sup>42</sup> In this context of one-sided evidence, Baynton J notes that "[w]ere it not for s.33.1... [he] would have acquitted him" because of the *Daviault* defence.<sup>43</sup> However, because s 33.1 existed, Baynton J decided to convict rather than acquit the accused.

Justice Baynton's conviction of the accused, of course, assumes the constitutionality of s 33.1. In fact, Baynton J did more than assume constitutionality; he explicitly addressed the issue, despite the fact that it had not been argued before him. Devoting thirteen paragraphs (of a forty-paragraph decision) to the constitutional question, Baynton J found s 33.1 to be constitutional (although no one asked him to find otherwise) on the grounds that the "public outcry and Parliamentary response ... strongly indicate that such a provision is not only consistent with the objectives of the *Charter* but is justifiable and essential in a free and democratic society."<sup>44</sup>

Because the accused in *B.J.T.* was convicted explicitly because of s 33.1, this case is an obvious candidate for generating an appeal challenging the constitutionality of the *Daviault* sequel. Stated differently, *B.J.T.* seems well suited to give appeal courts (including the Supreme Court) a second look at

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<sup>42</sup> *BJT* *supra* note 35 at para 16.

<sup>43</sup> *Ibid* at para 39.

<sup>44</sup> *Ibid* at para 35.

the constitutional issues addressed in *Daviault*. Yet, for whatever reason, the *B.J.T.* trial judgment, now fourteen years old, was not appealed.

In *Dow*, the other case in cell 3, s 33.1 was also found constitutional and the accused was convicted.<sup>45</sup> Dow appealed the ruling and the Quebec Court of Appeal heard the appeal in December 2013.<sup>46</sup> Might *Dow* be the case that finally pushes a direct and explicit second look at the constitutionality of s 33.1 up the judicial ladder? It seems unlikely, if only because in addition to finding s 33.1 constitutional, the trial judge also found that the evidence of “extreme intoxication” did not have an “air of reality,” meaning that, even if s 33.1 was found unconstitutional, Dow would still have been unable to use the *Daviault* defence.<sup>47</sup> This gives the Quebec Court of Appeal the opportunity to replicate what the Northwest Territories Appeal Court did in *Brenton*: namely, to find that the factual circumstances are not appropriate for a ruling on the constitutional issue. Even if the Quebec Court of Appeal chooses to fully engage the constitutional issue in *Dow*, however, it will likely be too late to matter. As we argue in the next section, the Supreme Court has already settled the issue for all practical purposes, though it did so indirectly (and probably strategically). The Court’s response to Parliament’s “notwithstanding by stealth” took the form of a strategically camouflaged second look.

### ***Bouchard-Lebrun* (2011): A strategically camouflaged second look**

Although the constitutionality of s 33.1 has remained stalled in lower courts, the question of how to interpret s 33.1 (presuming its constitutionality) came before the Supreme Court in the case of *Bouchard-Lebrun*.<sup>48</sup> As a statutory interpretation case, *Bouchard-Lebrun* does not qualify as a true second look case in Hogg’s sense. It does not give the Court an opportunity to be convinced of a better section 1 justification for not requiring *mens rea* in bodily integrity

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45 Bertram Dow, in fact, was convicted twice of the 2004 murder of Russell Duguay: having been convicted of murder in 2006, Dow, an anglophone, successfully appealed his conviction to the Quebec Court of Appeal on the grounds that the sporadic use of French by the trial judge and the prosecution violated his right to a trial in English (the Supreme Court denied leave to appeal in 2009). The Court of Appeal granted a new trial and it was only at this second trial in 2010 that Dow raised the issue of intoxication and the constitutionality of s 33.1.

46 At the time of writing, a decision in *Dow* had not yet been delivered by the Quebec Court of Appeal.

47 *Dow supra* note 35 at para 155.

48 *Bouchard-Lebrun supra* note 10. The Court has also discussed s 33.1 in *R v Daley*, 2007 SCC 53, 3 SCR 523, and in *R v ADH*, 2013 SCC 28, 2 SCR 269. But unlike in *Bouchard-Lebrun*, s 33.1 did not play a role in upholding a conviction in either of those cases.

offences or, if unconvinced, to strike the law down. Instead, the Court addresses only the question of statutory interpretation explicitly before it, leaving the constitutional questions for another time. In fact, *Bouchard-Lebrun* has, we contend, implicitly settled the constitutional issues. Given the Court's interpretation and application of s 33.1 in *Bouchard-Lebrun*, it is difficult to imagine how it could strike the law down in a later case. If *Bouchard-Lebrun* is not technically a second look case, it amounts to one in practice.

Tommy Bouchard-Lebrun committed aggravated assault under the influence of drugs. The drugs, taken shortly before the assault, put him in a state of self-induced and temporary toxic psychosis so severe that he could not have formed the minimal general intent to commit assault. If s 33.1 applied to him, his intoxication would not be a defence. Instead of challenging the constitutionality of the provision, however, Bouchard-Lebrun argued that it did not apply in his case and that he should be found "not criminally responsible" by reason of insanity under s 16 of the *Code*.

Because temporary self-induced toxic psychosis qualifies for the s 16 insanity defence only if it results from a more general "underlying disease of the mind," Bouchard-Lebrun claimed that "any toxic psychosis, even one that results . . . from a single episode of intoxication, must be considered a 'mental disorder' within the meaning of s 16."<sup>49</sup> If s 33.1 applied to such cases, argued Bouchard-Lebrun, it would deprive him of the s 16 insanity defence. Accordingly, he insisted that s 33.1, properly interpreted, applies only to more "normal" kinds of self-induced intoxication, not to the kind of extreme toxic psychosis that, in his view, always entails a more general mental disorder.

The Supreme Court obviously had to determine the validity of Bouchard-Lebrun's interpretation of s 33.1, but it did not have to determine any other issues concerning the provision. In other words, because Bouchard-Lebrun had raised "no arguments regarding the constitutionality of s. 33.1, ... only the interpretation and application of that provision [were] in issue."<sup>50</sup> Since there was no need to address its constitutionality, the Court did not do so. This is why *Bouchard-Lebrun* is not technically a second look case.

Writing for a unanimous Court on the issue of statutory interpretation, Justice LeBel rejected the "suggestion that [s 33.1] applies only to the normal effects of intoxication."<sup>51</sup> He saw "no threshold of intoxication beyond which

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49 *Bouchard-Lebrun* *ibid* at para 26 (emphasis in original).

50 *Ibid* at para 28.

51 *Ibid* at para 41.

s. 33.1 *Cr. C.* does not apply to an accused, which means that toxic psychosis can be one of the states of intoxication covered by this provision.”<sup>52</sup> This did not mean, however, that s 33.1 had altered and limited the insanity defence. That would indeed have been its effect if extreme self-induced toxic psychosis — which is covered by s 33.1 — always entails the kind of disease of the mind targeted by s 16 of the Criminal Code, as *Bouchard-Lebrun* has maintained. But this, too, was a mistaken interpretation: “[a] malfunctioning of the mind that results *exclusively* from self-induced intoxication,” wrote Justice LeBel, “cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual’s inherent psychological makeup.”<sup>53</sup> Bouchard-Lebrun’s psychosis was entirely temporary: he was normal before taking the drug and returned to a normal state soon afterward. Other normal people — i.e., those who clearly have no underlying mental disease — would be likely to fall into the same psychosis upon taking the same drugs. Nor would normal people who fell into such a temporary psychosis pose the kind of continuing danger associated with some kinds of mental illness. Thus, “an accused whose mental condition at the material time can be attributed exclusively to a state of temporary self-induced intoxication and who poses no threat to others is not suffering from a ‘mental disorder’ for the purposes of s. 16.”<sup>54</sup>

Justice LeBel concluded that while s 33.1 will not apply to cases of extreme intoxication when “the accused ... was incapable of appreciating the nature and quality of his or her acts *by reason of a mental disorder*,” it *will* apply to an otherwise normal person who “lacked the general intent or the voluntariness required to commit the offence *by reason of self-induced intoxication*.”<sup>55</sup> Since Bouchard-Lebrun’s psychosis resulted from self-induced intoxication, he was not eligible for the s 16 insanity defence, meaning that he *was* subject to the s 33.1 limitation of *Daviault*. Because of s 33.1, Bouchard-Lebrun would be convicted despite lacking “the general intent or the voluntariness required to commit the offence.”<sup>56</sup>

Recall that for Justice Cory in *Daviault*, “[t]o deny that even a very minimal mental element is required for sexual assault offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*.”<sup>57</sup> In *Bouchard-*

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52 *Ibid* at para 91.

53 *Ibid* at para 85.

54 *Ibid* at para 84.

55 *Ibid* at para 37 (emphasis in the original).

56 *Ibid* at para 89.

57 *Daviault supra* note 13 at para 47.



*LeBrun*, the Court quotes this passage and then unanimously allows s 33.1 to lead to a criminal conviction in precisely the manner considered unconstitutional by the *Daviault* majority.

Does *Bouchard-LeBrun* therefore affirm the constitutionality of legislation that seemed so “drastically” unconstitutional to the *Daviault* majority? Technically, the answer is ‘no’ because, as we have seen, the constitutional issue was not before the Court. It is thus possible that the Court’s interpretation and application of s 33.1 is purely provisional, pending a direct constitutional challenge in a true second look case.

If and when such a challenge does come before the Court, however, it seems unlikely that it would strike down s 33.1. We find it difficult to imagine that the Court would permit a formal technicality — that the issue of constitutionality had not been explicitly argued — to generate what it actually considered to be an unconstitutional conviction, and perhaps many more such convictions, before a proper second look case came before it. The Court is not known for letting the norms of judicial minimalism (deciding no more than necessary, including no more than what is explicitly raised by the facts and the litigants) get in the way when it thinks a publicly important issue requires its input. It decides moot issues when it considers the issue important enough,<sup>58</sup> it grants public interest standing to non-traditional litigants for the same reason,<sup>59</sup> and it decides issues not raised by the facts of the case before it.<sup>60</sup> In other words, the Court could easily have done what Justice Baynton did in *B.J.T.*, which was to address the constitutional issue even though it had not been explicitly argued. It could have done so in *Bouchard-LeBrun*, as criminal law professor Don Stuart points out, by ordering “a new hearing with intervenors to consider [the constitutional] issue and to decide whether the Court is still committed to the *Daviault* principles.”<sup>61</sup> Indeed, Stuart thinks this is exactly what the Court should have done.

In other words, had the Supreme Court really thought s 33.1 was unconstitutional, and that *Bouchard-LeBrun* would have been subject to an unconstitutional conviction as a result of its statutory interpretation, it would surely have found a way to say so and to grant *Bouchard-LeBrun* a new trial

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58 *R v Daigle*, [1998] 1 SCR 1220, 127 CCC (3d) 129 [*Daigle*]; *M v H* [1999] 2 SCR 3, 171 DLR (4th) 577 [*M v H*].

59 *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, 2 SCR 524.

60 *R v Smith*, [1987] 1 SCR 1045, 34 CCC (3d) 97 [*Smith*].

61 Don Stuart, “Annotation to *R v Bouchard-LeBrun*” Westlaw Canada (2011 CarswellQue 12785) [Stuart] at para 3.

in which he could claim the *Daviault* intoxication defence. We conclude that in *Bouchard-Lebrun*, the Court has quietly and implicitly accepted the constitutionality of s 33.1.

We find further support for this conclusion in Justice LeBel's emphasis that s 33.1 was a judiciously tailored response to *Daviault* rather than simply a revival of the *Leary* rule. That is, instead of codifying "the position taken by the dissenting judges in *Daviault*" (which *would* have revived *Leary*), s 33.1 "limited the scope of the rule stated by the majority."<sup>62</sup> The following passage from the judgment of LeBel J illustrates this proposition:

This means that the principles set out in *Daviault* still represent the state of the law in Canada, subject, of course, to the significant restriction set out in s. 33.1 *Cr. C.* *Daviault* would still apply today, for example, to enable an accused charged with a property offence to plead extreme intoxication.<sup>63</sup>

That is, as we have already noted, s 33.1 reversed *Daviault* only with respect to those general intent offences involving "the bodily integrity of another person." Justice LeBel illustrates this with respect to Bouchard-Lebrun himself, who was acquitted, on the basis of *Daviault*, of the lesser general intent "property offence" of breaking and entering.<sup>64</sup> He was denied the new *Daviault* defence (and thus convicted) only on the bodily integrity offence of assault.<sup>65</sup> In underlining this tailored dimension of s 33.1, Justice LeBel seems to suggest that it is a more legitimate response than a complete "in your face" rejection of a majority judicial opinion in favour of the *status quo ante*. The legislature was trying to find a middle ground.

Of course, an even more tailored legislative sequel can be imagined. We noted above that in *Daviault*, Justice Cory had suggested a new offence giving a lesser punishment for voluntarily becoming so dangerously intoxicated as to trigger an involuntary offence. While it is certainly true that s 33.1 is no simple revival of *Leary*, it seems equally true that it at least revived *Leary's* denial of "even a very minimal mental element" for the serious crime of assault, the very kind of *Charter* infringement that Cory J considered "so drastic and so contrary to the principles of fundamental justice that it cannot be justified

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<sup>62</sup> *Bouchard-Lebrun supra* note 10 at para 35.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Lower courts have followed the Supreme Court's lead in this respect: in the 2013 Newfoundland case of *R v Wells* (2013), 334 Nfld & PEIR 263, 105 WCB (2d) 407, the accused was found guilty of bodily integrity offences by virtue of s 33.1, but was acquitted of two counts of unlawful entry, a property offence.

under s.1 of the *Charter*.<sup>66</sup> Again, the *Bouchard-Lebrun* Court is allowing the very kind of conviction that the *Daviault* majority found constitutionally intolerable. And again, we cannot believe that the Court might return to Justice Cory's position and strike down s 33.1 in a true second-look constitutional case.

In sum, just as Parliament settled on a middle ground between the majority and dissenting opinions in *Daviault*, so did the unanimous Court in *Bouchard-Lebrun* — and it was the same middle ground! Differently stated, the *Bouchard-Lebrun* Court accepted the middle ground struck by Parliament in its sequel to *Daviault*, even though that middle ground was still an “in your face” infringement of the Constitution as understood by the *Daviault* majority. Formally, a true second look case in which the constitutional issue is explicitly brought before the Court could return to the position of the *Daviault* majority (and thus strike down s 33.1). But if this is as practically inconceivable as we believe, then *Bouchard-Lebrun* amounts to the Supreme Court's *de facto* second look at the constitutionality of excluding an extreme intoxication defence for bodily integrity offences. If and when a true second look case does come to the Court, we expect it to confirm what the camouflaged second look of *Bouchard-Lebrun* has already effectively decided: that s 33.1 is constitutional.

This raises an obvious question: why did the Supreme Court not take the opportunity to explicitly confirm the constitutionality of s 33.1 in *Bouchard-Lebrun* itself? Why did it choose what Stuart calls the “startling” option of “simply not[ing] the lack of a *Charter* challenge and proceed[ing] to apply the section”?<sup>67</sup> We noted above that the Supreme Court was no more limited in addressing the constitutionality question than was Justice Baynton in *B.J.T.*, and that it would surely have tackled the question if it believed s 33.1 to be unconstitutional. Why, if it considered the law constitutional, did it not simply say so, as Baynton J had in *B.J.T.*?

As Lawrence Baum demonstrates, “judges’ motivation to win the approval of their audiences can explain a good deal about their choices as decision makers.”<sup>68</sup> Baum suggests a number of audiences judges might have in mind when writing their decisions: colleagues, the general public, legislatures and governments, the general legal community, policy groups, and the news

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66 *Daviault* *supra* note 13 at para 47.

67 Stuart *supra* note 61 at para 3.

68 Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2008) at 23.

media. When viewed through these lenses, the incentives for the Court to downplay its endorsement of s 33.1 are obvious. In other words, what seemed surprisingly “deferential and meek” to Stuart is likely to have been a strategic choice.<sup>69</sup>

In terms of public perception, high courts are always seeking to preserve the “diffuse support” that is necessary to ensure their institutional legitimacy.<sup>70</sup> *Daviault* had been an obvious mar on the Court’s reputation and, in the quasi-sequel case of *Bouchard-Lebrun*, the Court had the opportunity to place itself squarely on the side of popular opinion. It is not clear, however, what public approval the Court would have actually received with a full-throated endorsement of s 33.1. At best, it would be viewed as the overdue correction of a previous error. Moreover, it would provide reporters and editorialists the opportunity to rehash the *Daviault* decision — an exercise in jurisprudential historiography that would be unlikely to enhance the Court’s prestige. To the extent that the public and the media were relevant audiences for the *Bouchard-Lebrun* judgment, the Court was arguably best advised to do exactly what it did: tacitly allow s 33.1 to stand without drawing too much attention to it.

This strategic choice is consistent with the Court’s likely desire to avoid the kind of criticism it encountered from another relevant audience — legal scholars and jurists — the last time it explicitly accepted the constitutionality of an “in your face” legislative sequel. In *R v Mills*,<sup>71</sup> the Supreme Court accepted the constitutionality of a legislative sequel that was clearly unconstitutional according to its earlier majority decision in *R v O’Connor*.<sup>72</sup> *O’Connor* concerned the disclosure of therapeutic records of sexual assault in the hands of third parties (essentially, the notes of rape counsellors); the Court’s majority favoured a test that was defendant-centered (privileging the accused’s right to a fair trial) over the minority’s test, which acknowledged the privacy concerns and the societal interest of encouraging victims to seek assistance. Parliament responded to *O’Connor* with legislation that essentially enacted the minority’s test.<sup>73</sup> This law was as much “notwithstanding by stealth” as the sequel to *Daviault* was.

69 Stuart *supra* note 61 at para 3.

70 Gregory A Caldeira & James L Gibson, “The Etiology of Public Support for the Supreme Court” (1992) 36:3 American Journal of Political Science 635 [Caldeira & Gibson].

71 *Mills supra* note 5.

72 [1995] 4 SCR 411, 103 CCC (3d) 1 [*O’Connor*].

73 See Christopher P Manfredi & James B Kelly, “Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures” (2001) 64 Sask L Rev 323 [Manfredi & Kelly]; Baker & Knopf *supra* note 8; Janet Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2002) [Hiebert].

In *Mills*, after several invalidations at the lower court level, the legislative sequel was upheld by the Supreme Court despite the fact that the statute obviously strayed from the constitutional principles announced by the majority in *O'Connor*.<sup>74</sup> Jamie Cameron described *Mills* as “dangerous” and “likely to compromise entitlement and destabilize *Charter* rights.”<sup>75</sup> Kent Roach acknowledged the legislature’s aims but suggested that, without the use of the *Charter* s 33 override, the “in-your-face” reply should not be allowed to stand; he criticized the *Mills* court by suggesting that “political opposition does not make legislation reversing that decision constitutional.”<sup>76</sup> The scholarly reaction to *Mills* was heard on the bench and, in the next case mentioning dialogue, the Court was split with one side accusing the other of “transforming dialogue into abdication.”<sup>77</sup>

It is in this context that one can understand the Court’s desire to conduct its *Daviault* dialogue quietly and strategically. With the exception of a brief reference to dialogue in the context of statutory interpretation,<sup>78</sup> the Supreme Court of Canada has made no explicit use of dialogue theory since 2002 (after a raft of decisions citing it in the period between 1997-2002), which indicates that Hogg and Bushell’s dialogue metaphor is no longer an attractive rhetorical device for the Court. Manfredi has gone so far as to declare dialogue dead.<sup>79</sup> But that does not mean the inter-institutional push-and-pull over constitutional principles has ceased. Dialogue is not really dead, though it has certainly gone underground, as *Bouchard-Lebrun* demonstrates.

Will underground dialogue settle the s 33.1 issue? That depends on whether lower courts accept the Supreme Court’s hint in *Bouchard-Lebrun*. There is no guarantee that they will. For example, Ontario courts, relying on the fact that *Bouchard-Lebrun* did not formally address the constitutional issue, may continue to find s 33.1 unconstitutional. As long as alcohol is the source of intoxication, this will make little difference because Ontario’s well-prepared Crowns have reliable evidence to show the impossibility of alcohol-induced automatism, meaning that the defence remains theoretically available but will not succeed in practice. However, as indicated by some of the medical testimony before Parliament during the enactment of s 33.1, some intoxicants

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74 Baker *supra* note 5 at 22-24.

75 Jamie Cameron, “Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R v Mills*” (2000) 38 *Alta L Rev* 1051 at 1068.

76 Roach, *Supreme Court on Trial* *supra* note 2 at 280.

77 Hall *supra* note 5 at para 127.

78 *Ontario (Attorney General) v Fraser*, 2011 SCC 20, 2 SCR 3 at para 282.

79 Christopher P Manfredi, “The Day The Dialogue Died: A Comment on *Sauvé v Canada*” (2007) 45 *Osgoode Hall LJ* 105 at 105.

(e.g., PCPs) might in fact induce automatism.<sup>80</sup> In such cases, judges who consider s 33.1 to be unconstitutional can be expected to acquit the accused. One might then see the Crown appeal the acquittal, perhaps all the way to the Supreme Court. While such a case has not yet materialized, we would not bet against the pharmacological wonders that may ultimately produce a full and complete *Daviault* dialogue. If that happens, the Court's camouflage or cover will be blown. It will have to make Hogg's more explicit choice between upholding as a reasonable limit what it had previously found to be drastically unconstitutional, or striking down the *Daviault* sequel. In Stuart's terms, the Court will have to clearly indicate whether it is "still committed to the *Daviault* principles."<sup>81</sup> If, as we have argued, the outcome of such a direct second look case is now a foregone conclusion — i.e., that the Court is no longer committed to *Daviault* — that will not make it any less controversial.

## Bibliography

### Legislation

*Criminal Code of Canada*, RSC 1985, c C-46.

### Jurisprudence

*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, 2 SCR 524.

*M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577.

*Ontario (Attorney General) v Fraser*, 2011 SCC 20, 2 SCR 3.

*R v ADH*, 2013 SCC 28, 2 SCR 269.

*R v Blair*, [1994] AJ No 807 (QB).

*R v Bouchard-Lebrun*, 2011 SCC 58, 3 SCR 575.

*R v Brenton*, [1999] 180 DLR (4th) 314, 44 WCB (2d) 48 (NWT Sup Ct).

*R v Brenton*, 2001 NWTCA 1, 199 DLR (4th) 119.

*R v B(SJ)*, 2002 ABCA 143, 166 CCC (3d) 537.

*R v Cedeno*, 2005 ONCJ 91, 195 CCC (3d) 468.

*R v Chaulk*, 2007 NSCA 84, 223 CCC (3d) 174.

*R v Compton*, (2 November 1994), Prince Edward Island (unreported).

*R v Daigle*, [1998] 1 SCR 1220, 127 CCC (3d) 129.

*R v Daley*, 2007 SCC 53, 3 SCR 523.

*R v DB*, 2008 SCC 25, 2 SCR 3.

*R v Daviault*, [1994] 3 SCR 63, 93 CCC (3d) 21.

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<sup>80</sup> Kalant *supra* note 38 at 643.

<sup>81</sup> Stuart *supra* note 61 at para 3.

- R v Dow*, 2010 QCCS 4276, 261 CCC (3d) 399.  
*R v Dunn*, [1999] OJ No 5452, 28 C.R. (5<sup>th</sup>) 295 (Ont Ct J (Gen Div)).  
*R v Flemming*, 2010 ONSC 5169, OJ No 5987.  
*R v Frechette*, 1999 BCCA 46, 132 CCC (3d) 1.  
*R v Hall*, 2002 SCC 64, 3 SCR 309.  
*R v Heard*, [2007] EWCA Crim 1253.  
*R v Jensen*, [2000] OJ No 4870 (Ont Sup Ct J).  
*R v Leary*, [1978] 1 SCR 29, 33 CCC (2d) 473.  
*R v Martin*, [1999] OJ 5066 (Ont CA).  
*R v Mernagh*, 2013 ONCA 67, 295 CCC (3d) 431.  
*R v Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321.  
*R v N(S)*, 2012 NUCJ 2, 99 WCB (2d) 841.  
*R v O'Connor*, [1995] 4 SCR 411, 103 CCC (3d) 1.  
*R v Smith*, [1987] 1 SCR 1045, 34 CCC (3d) 97.  
*R v T(BJ)*, 2000 SKQB 572, 4 WWR 741.  
*R v Thériault*, (1994) Quebec (unreported).  
*R v Vickberg*, (1998) 16 CR (5<sup>th</sup>) 164, 54 CRR (2d) 83 (BC SC).  
*R v Wells*, (2013) 334 Nfld & PEIR 263, 105 WCB (2d) 407.

## Secondary Materials: Monographs

- Baker, Dennis, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010).  
Baum, Lawrence, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2008).  
Hiebert, Janet, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002).  
Roach, Kent, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

## Secondary Materials: Articles

- Baker, Dennis & Rainer Knopff, "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 21 Windsor YB Access Just 347.  
Cameron, Jamie, "Dialogue and Hierarchy in *Charter Interpretation*: A Comment on *R. v. Mills*" (2000) 38 Alta L Rev 1051.  
Ferguson, Gerry, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (Paper, delivered at the Annual Constitutional Cases Conference held by Osgoode Hall Faculty of Law, Toronto, 4 May 2012), Benjamin L Berger & James Stribopoulos, eds, *Unsettled Legacy: Thirty Years of Criminal Justice Under the Charter*, (Markham: Lexis-Nexis, 2012) at 145.  
Gadd, Jake, "Judge quickly rejects drunkenness defence," *The Globe and Mail* (6 October 2000) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/jury-quickly-rejects-drunkenness-defence/article597876/>>.

- Caldeira, Gregory A & James L Gibson, "The Etiology of Public Support for the Supreme Court" (1992) 36:3 American Journal of Political Science 635.
- Gold, Alan D, *Halsbury's Laws of Canada: Criminal Offences and Defences*, 1<sup>st</sup> ed (Markham: Lexis-Nexis, 2012).
- Gold, Alan D, "An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge" (1977) 19 Crim LQ 34.
- Grant, Elisabeth, "Second Chances: Bill C-72 and the Charter" (1995) 33 Osgoode Hall LJ 379.
- Hogg, Peter W & Allison A Bushell, "Charter Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)" (1997) 35 Osgoode Hall LJ 75.
- Hogg, Peter W, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited — or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1.
- Kahana, Tsvi, "Understanding the Notwithstanding Mechanism" (2002) 52 Univ of Toronto LJ 221.
- Kalant, Harold, "Intoxicated Automatism: legal concept vs. scientific evidence" (1996) 23 Contemp Drug Probs 631.
- Kelly, James B & Matthew A Hennigar "The *Canadian Charter of Rights* and the minister of justice: Weak-form review within a constitutional Charter of Rights" (2012) 10:1 Int J Constitutional Law 35.
- Manfredi, Christopher P, "The Day The Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45 Osgoode Hall LJ 105.
- Manfredi, Christopher P & James B Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask L Rev 323.
- QMI Agency, "Rare defence, tried but fails", *St. Thomas Times Journal* (7 May 2011) online: St. Thomas Times Journal <<http://www.stthomastimesjournal.com/2011/05/07/rare-defence-tried-but-fails>>.
- Roach, Kent, "Dialogue or defiance: Legislative reversals of Supreme Court decisions in Canada and the United States" (2006) 4 Int J Constitutional Law 347.
- Room, Robin, "Drinking, violence, gender and causal attribution: a Canadian case study in science, law and policy" (1996) 23 Contemp Drug Probs 649.
- Sheehy, Elizabeth, "The intoxication defense in Canada: why women should care" (1996) 23 Contemp Drug Probs 595.
- Smith, Kelly, "Section 33.1: Denial of *Daviault* Defence Should Be Held Constitutional" (2000) 28 CR (5<sup>th</sup>) 350.
- Stuart, Don, "Annotation to *R. v. Bouchard-Lebrun*" Westlaw Canada (2011 CarswellQue 12785)
- Vienneau, David "Judges under fire for drunkenness defence Top court ruling 'wreaked havoc' on other judges", *Toronto Star* (9 November 1994) A2 online: Toronto Star Archives <<http://pqasb.pqarchiver.com/thestar/doc/437142750.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Nov+09%2C+1994&author=David+Vienneau+Toronto+Star&pub=Toronto+Star&edition=&startpage=&desc=Judges+under+fire+for+drunkenness+defence+Top+court+ruling+%27wreaked+havoc%27+on+other+judges>>.