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• (1105)

[English]

The Chair (Mr. Randeep Sarai (Surrey Centre, Lib.)): I call this meeting to order.

Welcome to meeting number 33 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to Standing Order 108(2) and adopted on September 22, the committee is meeting to begin its study of the subject matter of Bill C-28, an act to amend the Criminal Code (self-induced extreme intoxication).

Today's meeting is taking place in a hybrid format, pursuant to the House order of June 23, 2022. Members are attending in person in the room and remotely by using the Zoom application.

I'd like to take a few moments to make a few comments for the benefit of the witnesses and members.

Please wait until I recognize you by name before speaking. For those participating by video conference, please click on the microphone icon to activate your mike. Please mute yourself when you are not speaking. For interpretation for those on Zoom, you have the choice at the bottom of your screen of either floor, English or French. For those in the room, you can use the earpiece and select the desired channel. All comments should be addressed through the chair.

For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the "raise hand" function. The clerk and I will manage the speaking order as best we can. We appreciate your patience and understanding in this regard.

I'd also like to let you know that I will be using a few cue cards. When you have 30 seconds left in your speaking time, I'll raise this book. It's just a yellow background for now. When your time is up, I'll use this red folder, which indicates that your time is up.

Without further ado, I'd like to welcome our first witness for the first hour—

Go ahead, Mr. Fortin.

[Translation]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Mr. Chair, were sound tests performed before the meeting started for the witnesses participating by video conference?

Were the results satisfactory? I did not hear you say anything.

[English]

The Chair: The clerk acknowledges that they were all tested. They have all passed the sound test.

[Translation]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

[English]

The Chair: Thank you.

Without further ado, I would ask our Minister of Justice, the Honourable David Lametti, to begin for five minutes.

[Translation]

Hon. David Lametti (Minister of Justice and Attorney General of Canada): Thank you, Mr. Chair.

Thank you for inviting me to participate in the study on the subject matter of former Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication).

Assisting me today are Department of Justice lawyers Matthew Taylor, Chelsea Moore and Joanne Klineberg, to whom I am grateful.

As you know, this bill came into effect on June 23, 2022, less than six weeks after the Supreme Court of Canada rendered its decision in *R. v. Brown*, *R. v. Sullivan*, and *R. v. Chan*.

In these decisions, the Supreme Court found the former version of section 33.1 of the Criminal Code unconstitutional because it precluded the defence of extreme intoxication in all cases, regardless of whether the person acted negligently or was at fault while consuming intoxicating substances.

• (1110)

[English]

The Supreme Court reinstated the defence of extreme intoxication as a full defence for violent crimes and allowed accused persons to escape liability even when they negligently consumed drugs or other intoxicants. The quick passage of this law reflected the desire of all parliamentarians to close the gap in the law left by those decisions.

Following Bill C-28, the law now provides that those who are criminally negligent in their voluntary consumption of intoxicants can be held liable for the harm they cause to others while in a state of extreme intoxication. Former Bill C-28 was described by the Women's Legal Education and Action Fund, LEAF, as a “thoughtful, nuanced, and constitutional” solution to the small but important gap left in the law by the Supreme Court decisions.

The objectives of former Bill C-28 are the same as the previous version of section 33.1, adopted in 1996, to protect victims of intoxicated violence by holding accountable those who negligently self-intoxicate and cause harm to others. The court in *Brown* recognized these objectives as legitimate and pressing, and suggested two constitutionally viable pathways that Parliament could adopt to ensure liability in appropriate cases. We chose one of those approaches, which allows a conviction for a crime of violence, such as manslaughter or sexual assault. This approach will hold offenders accountable, as victims rightly expect, while also respecting the charter.

Under proposed section 33.1, the Crown may seek a conviction for violent crime by proving that the accused hurt someone while in a state of extreme intoxication resulting from their own criminally negligent consumption of intoxicants. The person would be held criminally liable if they were proved to have departed markedly from the standard of care expected of a reasonable person in those circumstances. A “marked departure” means that a person's conduct fell far below what a reasonable person would have done in those circumstances to avoid a foreseeable risk—in this case, the risk of a violent loss of control.

[*Translation*]

You will recall that extreme intoxication is a rare mental state akin to automatism when the accused loses control of their actions, but is still capable of acting. Let me clarify once again that this condition is exceptionally rare, and that intoxication, even to an advanced degree, does not meet the definition of extreme intoxication. Again, intoxication alone is never a defence in crimes such as sexual assault.

[*English*]

I want to say this in English as well, because it is critical for everyone to understand: Intoxication is never a defence for crimes like sexual assault. That was the case after the Supreme Court decisions; it remains the case today.

Using extreme intoxication as a defence is very difficult. In order to succeed, the accused has to meet a higher evidentiary threshold that normally applies, first by convincing the judge on the balance of probabilities, and with expert evidence, that they were extremely intoxicated at the time of the violence. Drunkenness or intoxication in and of itself is not a defence. Extreme intoxication is a rare and extreme state. The Supreme Court has made it clear that it is nearly impossible to end up in a state of extreme intoxication through the consumption of alcohol alone. Bill C-28 closed a narrow but important gap in the law to ensure that the use of this defence remains exceptionally rare.

Some have suggested that the new provision will be hard to enforce, claiming it would be too much of a challenge for the Crown

to prove that the risk of violence was foreseeable. I disagree. In my view, this new law is eminently enforceable. Parliament has sent a clear signal that anyone who voluntarily consumes intoxicants in circumstances showing gross disregard for the safety of others will be held accountable if they go on to commit violence.

I note specifically that the law only requires “a risk” of violent loss of control. Properly interpreted, this is a lower threshold than we find in other provisions of the Criminal Code, which require that a particular outcome be likely, such as under section 215, when a person who is likely to cause permanent health injuries to another may be liable for failing to provide the necessities of life. Crowns successfully prove that offence, despite the higher “likely” standard, so I'm confident that they will be able to prove that there was a risk of a violent loss of control as well.

Keep in mind that the Crown does not need to prove any of this unless the accused has already met the very high bar of proving they were in a state of extreme intoxication. If the accused can't prove that, they will be guilty of the offence, like anyone else.

• (1115)

[*Translation*]

Reasonable Canadians want to know the risks—even rare risks—associated with the intoxicants they plan to use and with how they plan to use them. All reasonable Canadians are concerned about the safety of others when their actions pose a risk.

[*English*]

When we saw the level of misinformation following the Supreme Court decision, we knew it was important to act quickly. There was a lot of conversation that simple intoxication could be used as a defence for horrific crimes, such as sexual assault. This unintentional misinformation and the sometimes intentionally alarmist reporting style come with very serious consequences for women across the country, adding to the stigma that survivors already face when reporting gender-based violence.

We acted quickly to ensure that this sort of narrative did not remain in the public realm, as it is important for all Canadians to feel safe. I am pleased that all parliamentarians were able to come together and act swiftly to prevent the misinformation from taking deep roots.

I will be closely following your study on this important issue and I look forward to reading your final report. In the meantime, we will continue to work closely with our federal, provincial and territorial partners to ensure the effective implementation of the legislation.

Thank you.

The Chair: Thank you, Minister.

Now we'll go to our first round of questions, beginning with Mr. Moore for six minutes.

Hon. Rob Moore (Fundy Royal, CPC): Thank you, Chair.

Thank you, Minister, for appearing today on this important study.

People may wonder why we're having this study today. It was because of a Supreme Court decision, the Brown ruling, that frankly put Canadians, particularly women, at risk. I know that MP Vecchio and MP Brock—who serves on this committee—along with MP Caputo and I wrote a letter to you urging that you act quickly and offering any assistance we could give to close what was, I feel, a very serious condition in our Criminal Code and a serious gap created by the decision.

There will be a lot of questions today about the bill. I want to ask a broader question, though. Your government does respond to things when they see fit. For example, when there was a vacancy for the ombudsman for prisoners, it was filled the next day. When there was a vacancy for the ombudsman of victims of crime, it took a full year to fill that important position. I would like to have had the benefit of hearing from the ombudsman of victims of crime in the process around Bill C-5, around this and around other criminal justice legislation.

We've just completed a study in which we heard witness testimony on victims of crime. One of the most high-profile cases in Canada in recent memory was that of Sharlene Bosma, whose husband, Tim, was killed. It captured the attention of all Canadians. The individual who took his life was also convicted of killing his own father and his ex-girlfriend. Thanks to legislation that was put in place to allow for consecutive periods of parole ineligibility, he received a parole ineligibility period of 75 years.

However, as a result of the Supreme Court decision in Bissonnette, this individual will be eligible for parole after 25 years. The clock started ticking on that, I think, almost a decade ago. When Sharlene Bosma was here, she said the one bit of light that she hung on to in the whole situation was knowing that thanks to what she and the Crown prosecutor and other witnesses did, her daughter would never have to go to parole hearings. We heard over and over how parole hearings revictimize victims and their families.

Minister, you responded, and we co-operated with you to get swift passage of Bill C-28. This hearing is part of that, to see if there are ways it can be improved.

My question is this: Will you and will your government respond to the Supreme Court decision in Bissonnette?

• (1120)

Hon. David Lametti: Thank you, Mr. Moore, for that question.

Obviously, whether it's survivors of the mosque shooting in Quebec City or the Bosma family or others who have been victims of these horrific acts, our sympathy goes out to them. We do our best to make the system work as quickly as possible.

We diligently tried to fill the position of ombudsperson for victims of crime. Sometimes there are things that turn out to be out of your control in the way those processes work at an individual level. I won't go any further into detail, but we did our best from the beginning to fill that position. We have now done so. I think everyone agrees that the person we have picked is very good.

The difference between the Bissonnette decision and this case is that the Supreme Court gave us a couple of paths to move forward. The Bissonnette decision, again, doesn't change the actual sentence that the convicted killer got in that case. It only adds eligibility for parole. I appreciate that this is important, but eligibility for parole does not mean the person will get parole. We did our best to defend that case as part of the discretion a judge has to impose that kind of sentence. That was the argument the Attorney General of Canada made in that case in front of the Supreme Court. The court didn't accept it by a 9-0 decision.

I'm open to suggestions, but it doesn't have a path, or two paths in the case we're looking at today, with Brown and Sullivan. It doesn't have an easy or clear path. The decision of the Supreme Court was pretty clear in terms of the interpretation of the Constitution.

I would just underline that eligibility for parole is not parole. It doesn't guarantee parole, and the sentence as it exists still stands.

Hon. Rob Moore: Thank you, Minister.

I would urge, and we're urging, that the same minds that came together to respond to the decision in Brown and looked at the possible choices—and we're going to have time to discuss the pros and cons of the different options in Brown—turn to the Bissonnette ruling.

We've heard testimony from multiple victims and their families that the parole process in and of itself, and knowing that their children have to take part in it, is a revictimization.

In my own constituency just recently, someone on parole for killing my constituent's daughter when she was 16 years old was at large. Nobody even knew where he was. Now we understand that he's up for parole again, even though he was unlawfully at large.

The parole process in and of itself is a revictimization. We need to turn those same minds to a response to the Bissonnette ruling. I would certainly urge that.

The Chair: Thank you, Mr. Moore. Unfortunately, we're out of time.

We'll now go to Ms. Diab for six minutes.

Ms. Lena Metlege Diab (Halifax West, Lib.): Thank you very much, Mr. Chair.

[*Translation*]

Thank you, Minister. We really appreciate your appearing before the committee to clarify Bill C-28.

[*English*]

I would like to ask a few directed questions because I find there's a lot of confusion and misunderstanding. When you talk about the legal terminology and everything else, I can see why normal people really get confused by a lot of this stuff.

At the last meeting we had, I very much appreciated the fact that MADD Canada was present. Their very clear and concise testimony was that the legislation would not impact them whatsoever. I think that is very important for Canadians to understand.

In your testimony today, you said that it will never apply to crimes of sexual assault. That kind of testimony and facts are what we need Canadians to really understand.

Can you clarify this for Canadians in normal English or French in language that is not technical? I used to belong to the access to justice committee in Nova Scotia. In one of the first meetings, maybe because English and French were not my first languages, I very much appreciated understanding things in very simple, clear language.

What is extreme intoxication? What is self-induced intoxication? What are we talking about here, Minister?

• (1125)

Hon. David Lametti: Thank you, Ms. Diab, for the question.

“Self-induced” means you took the intoxicant yourself, whether it's alcohol, drugs or whatever. Self-induced refers to how you took them and that you took them of your own accord. Hence, that puts a bracket around what we're doing.

“Extreme intoxication” has been interpreted by the courts as something akin to a state of automatism. This means your body is functioning, but you're not in control of it. I think that's the easiest way to put it. Your limbs are moving and in rare cases you are capable of doing extreme acts, but you're not controlling yourself anymore. It is a rare set of circumstances. Legally, it has been carved out of a number of different things, so there is a carve-out here.

What we are doing is recognizing that the manner in which you entered that state of automatism matters, even though you did it yourself. In most cases, when it was reasonable for you to predict that there might be a loss of control, that there would be a loss of self-control, or that there might be a violent outcome, you will still be held responsible for whatever you did. If it was sexual assault, you will still be responsible for sexual assault. If it was manslaughter, you will still be responsible for manslaughter.

The only rare exception is if there was something that meant you couldn't have known, shouldn't have known or ought not to have known according to an objective, reasonable standard. If you got prescription pills for the first time and it couldn't have been predicted—nobody would have known or you couldn't possibly have known—that you would have this outcome, you might have a chance, if it provoked that state of automatism.

Again, you have to reach that state and you have to prove that state. Then it's up to the Crown to show that you could have predicted, should have known or otherwise ought to have known.

Ms. Lena Metlege Diab: Thank you, Minister.

With my time left, I have two more questions. How will Bill C-28 make Canadians and victims safer when it comes to crime? How commonly is this self-induced extreme intoxication used as a defence by alleged perpetrators, based on what you've been told?

Hon. David Lametti: It is rarely used as a defence, and even more rarely invoked successfully. There have been no reported cases since we've amended the legislation. Since the earlier Supreme Court decision, it was only rarely used, and was very, very infrequently successful.

It makes women safer and it makes men safer from acts that are perpetrated while in a state of self-induced intoxication, in the sense that it holds more people criminally responsible and only carves out those who had no way of knowing that this could have or should have happened. It helps us in a larger sense to deliver the message that intoxication is not a defence. You are responsible for what you do when you get intoxicated. I think that is as important as the Criminal Code amendment itself. It is sending out that message to everybody to counter the false narrative that somehow you could get off if you were drunk or if you were high. That is simply not the case.

• (1130)

Ms. Lena Metlege Diab: Okay. Thank you so much. That is much appreciated.

The Chair: Thank you, Ms. Diab.

Next we'll go to Monsieur Fortin for six minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Good morning, Minister. I am happy to see you here this morning.

We, at the Bloc Québécois, applaud this decision because we believe that this loophole in the law needed to be closed. I think it's important. I think the text is interesting.

However, I have a couple of questions. In fact, from the beginning, I've been wondering a lot about the notion of voluntary intoxication. Is there not a loophole there? Have you, for example, looked at the case of someone who says they meet the criteria but says they didn't voluntarily get intoxicated, where drugs were added to their drink or a stronger substance was added to the joint they thought was just cannabis? Have you looked at this aspect of extreme intoxication that is supposedly unintentional, but may be questionable?

Hon. David Lametti: Thank you for your question, Mr. Fortin.

We're talking about self-induced intoxication. If another person is proven to be the cause of the intoxication, that could be a defence. Everything depends on the facts, and that does indeed raise another issue.

However, given that the person should have known, under the circumstances, that there was a risk, it would be much more difficult for them to prove their innocence. I am not talking here about the way the joint was made or the source of the intoxication, regardless of what it was. It's the context that will determine it. Jurisprudence contains specific standards to reinforce the message that self-induced intoxication is not a defence and exceptions are rare.

Mr. Rhéal Fortin: Thank you, Minister.

In section 4, you propose a definition of self-induced extreme intoxication, which is "intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour."

This definition seems somewhat vague to me. In your opinion, is it sufficient for the courts to reach a consensus? Would it have been possible to better define the term "extreme"?

Hon. David Lametti: Thank you. That is a good question.

This is a prescribed definition. We took it from the old version of the act. Furthermore, jurisprudence also defines extreme intoxication akin to automatism, which renders a person incapable of conscious self-control. This interpretation is easier to understand. It is in fact a standard recognized in the field, and it works well.

Mr. Rhéal Fortin: Thank you and I will change the subject.

As you know, last week we heard from organizations about Bill C-28. One comment, which came up more than once, surprised me somewhat. We were talking about consultations, and certain individuals seemed to think that they had not been consulted or had not been sufficiently consulted.

Could you tell us about consultations done by your department before tabling Bill C-28? Who was consulted, and on which aspects

of the bill where they consulted? What were the comments by consulted organizations or individuals?

• (1135)

Hon. David Lametti: Thank you.

We conducted consultations quickly, but we had already conducted some previously. Let me give you the list of consulted organizations.

[*English*]

They were the following: Women's Shelters Canada, Luke's Place, Pathway Group, Ontario Network of Victim Service Providers, La Fédération des maisons d'hébergement pour femmes, Farrah Khan, Canadian Women's Foundation, LEAF, Robin Parker, National Association of Friendship Centres, Native Women's Association, Action Now Atlantic, Students for Consent Culture, Kent Roach, Janine Benedet, Frances Chapman, Gerry Ferguson, Michael Plaxton, Hugues Parent, Canadian Association of Black Lawyers, Criminal Lawyers' Association, Association des Avocats de la Défense de Québec, Criminal Trial Lawyers' Association, Tony Paisana, Jody Berkes, Women's Law Association of Ontario and the National Association of Women and the Law.

[*Translation*]

We held consultations, and the vast majority of organizations supported our process, whether it be officially or unofficially.

Mr. Rhéal Fortin: Were any specific concerns raised by consulted organizations regarding Bill C-28?

Hon. David Lametti: I can tell you that the National Association of Women and the Law was one of the groups not in favour of the bill. The association wanted something closer to the old version of the act.

[*English*]

The Chair: Unfortunately, we're out of time.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

[*English*]

The Chair: Thank you, Monsieur Fortin.

Mr. Garrison, go ahead for six minutes.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thank you very much, Mr. Chair.

Thank you to the minister for being with us today.

I want to emphasize that I think the context we were working with here was the creation of a gap in the law, which was maybe smaller than the public perceived, and the degree of co-operation and quick action in Parliament.

Sometimes as an institution we have a bad reputation for not being able to get things done. In this case, the consultations form an impressive list. We know that they weren't as fexstensive as they might have been because of the speed that was necessary. Otherwise, we'd be sitting here now having consultations and having these hearings with the gap having been in existence for months on end. I appreciate the leadership you showed in approaching all of us to get this done.

The Supreme Court essentially gave Parliament two choices. I'd like you to talk for a minute about those two choices. In common language, the court said you could either create a new offence or fix the existing section. Can you talk a bit about why the choice was made to fix section 33.1 rather than create a new offence?

Hon. David Lametti: Thank you for the question, and thanks to all of you for the support.

There was only one article, so there was an advantage there in making the consultations more efficient.

It was also a known problem. There had been legal scholars who felt that this provision was unconstitutional from the time of the Daviault decision. The court gave us two options: We could create a new law that basically framed this kind of situation or we could take the old law and address the situation they were worried about, which was the person who innocently goes into that state without any ability to have known that this might happen—or shouldn't have known, on an objective standard.

We felt that the second option was easier, because it contained known standards, first of all, and for judges or Crown prosecutors or defence attorneys it had less potential for unforeseen consequences. When you create a new standard, when you create a new law, there will be periods of interpretation: What's the scope? How far will this go? What does this include?

In part, it was that. The other part was what the victims themselves said: "The person sexually assaulted me. I want the person to be charged with sexual assault. I don't want them to be charged with some form of criminal negligence. It doesn't carry the same stigma." I think that was probably determinative.

Mr. Randall Garrison: Because of scheduling, we had an unusual circumstance in the sense that we heard some of the witnesses as part of this consultation before we heard from you today, Mr. Minister. This is something that doesn't usually happen. It might be a little bit unfair.

We heard from the Native Women's Association of Canada, from Ms. McBride and from Mr. Bond. It was quite eloquent testimony that while they felt that this was a good solution, the action from government was not sufficient in the context of the overall number of indigenous women in Canada who face violence

What they were saying was that they hoped the fact that this has come up at the Supreme Court level might lead to broader consideration, a broader strategy, for dealing with the root causes of violence against indigenous women in this country. Do you have any response to that testimony, which was quite moving?

• (1140)

Hon. David Lametti: I would say that I don't disagree with any of that. I do think we need a broader response across a variety of different levels to address the social determinants of crime, the factors that lead to it, and better support for victims as well, particularly in more remote communities where it's doubled in terms of impact.

If I had the solution, I would have done it a long time ago. I am working with colleagues—with all of you—to find other solutions, and I certainly agree with the tenor of those remarks.

Mr. Randall Garrison: One of the things that Ms. McBride said quite clearly is that there's a real lack of capacity in most first nations to deal with some of these root causes of violence, and that capacity-building funding for those community-level organizations is what's really needed. I know that doesn't necessarily come from your ministry, but it seemed quite insightful in that she was emphasizing that each first nation might have a different way of dealing with those causes of violence, but that without the capacity building, they weren't able to address it.

Hon. David Lametti: Again, I agree with the observation and the sentiment. I do my best to get funding for things like community justice centres. I've had some success with getting that funding for community justice centres, particularly in the indigenous context but also in the context of the children's advocacy centres and that sort of thing. I do try to convince my colleagues that we need more funding across the board in a variety of different ground-up organizations because I think the observation is right: That's the only way that we will be able to effectively combat this.

Mr. Randall Garrison: I have maybe 30 seconds, so quickly, have you heard from organizations about the sufficiency of this action since we passed this law? In other words, with regard to those who were consulted originally, have you heard back from them about whether they think the solution that we suggested is enough?

Hon. David Lametti: I think we're all watching carefully. I think the defence was invoked once without success and certainly has not been invoked successfully. Obviously, we're still in dialogue. I think the groups that initially supported it are still supportive and the groups that initially had reservations still have reservations. You're going to hear that in your committee.

Certainly, we're watching and monitoring our dialogues carefully.

Mr. Randall Garrison: Thank you.

The Chair: Thank you, Mr. Garrison.

Next we have Mrs. Vecchio for five minutes.

Mrs. Karen Vecchio (Elgin—Middlesex—London, CPC): Thank you very much, Mr. Chair.

I am so glad to be here to talk about Bill C-28. As the minister knows, we talk a lot about this in my work as the shadow minister for women and gender equality and also as the chair of the status of women committee. We know that with intimate partner violence, the statistics are showing that in many of cases, the violence is men versus women. If we're looking at extreme intoxication with alcohol or drugs, we once again know that those statistics are very high.

Minister, you spoke about members such as LEAF and organizations that were receptive of this, but we also note that there were groups that were not. I have a list of at least 20 here that were not. I think the one thing I want to say is this: Let's make sure we listen to them all.

I know we have this preconceived notion, and to anybody who's out there, the question is this: Why are we studying a bill after it has passed? Just as Mr. Moore has said, it's important that we do this. However, I'm really hoping that we're taking these lessons as learned and that if there need to be changes, we're actually going to do them, because the women's voices need to be heard.

We're looking at two similar organizations, LEAF versus the National Association of Women and the Law. One is very supportive and one is not. Can you describe to me the conversations that you've had with the National Association of Women and the Law and the things that they would like to see you change?

Hon. David Lametti: I know that they're concerned that there's no preamble to this piece of legislation. Our view is that the preamble remains the same, and the court found in its decisions in *R. v. Brown* that there was a legitimate legislative purpose, so we didn't feel we needed to change the preamble. We feel the preamble still applies, so I guess we respectfully disagree, but we certainly understand.

• (1145)

Mrs. Karen Vecchio: Minister, have you spoken to them personally? During the consultations, did you speak to them?

Hon. David Lametti: This happened so quickly that we fanned out across my team, but my team did speak to members of NAWL.

Mrs. Karen Vecchio: If we're talking about the consultations, how many consultations would you have participated in?

Hon. David Lametti: I participated in a few, but very few, actually, given the timing of it. It was my political team reaching out.

Mrs. Karen Vecchio: Fair enough.

Hon. David Lametti: In terms of my team, we do this extensively across the board on a number of pieces of legislation. Given the timing of it, and given the urgency of it.... I received a letter from you, thankfully, and from Mr. Moore.

Mrs. Karen Vecchio: Absolutely.

I think you and I both agree that we need to make sure we do close these gaps, because we know that right now, approximately 6%.... When I look at the statistics, this is something that's very concerning.

As we talk about extreme intoxication, we received testimony last week from Jennifer Dunn from the London Abused Women's Centre. If anyone knows me, they know that this is the statistic I usually refer to. She said, "We know from Statistics Canada that

only 6% of sexual assault cases are reported to police, and of those 6%, only one in five results in a trial."

I think these are some of the concerns we see, as we already know we have a problem when we come into the court systems. When we see that people are not reporting, what are you and your department are doing to ensure that it's more welcoming and that it's better for victims of crime when they come forward and that they are going to be supported by the law itself?

Hon. David Lametti: Since coming into power in 2015, we've made a number of changes to sexual assault definitions, for example, in the Criminal Code to prevent revictimization and to channel the kinds of examination and cross-examination that are legitimate, again with a view to helping protect victims when they do come forward—

Mrs. Karen Vecchio: Fair enough, Minister—

Hon. David Lametti: No, these are critical, because—

Mrs. Karen Vecchio: Absolutely—

Hon. David Lametti: The treatment of victims—

Mrs. Karen Vecchio: Excuse me. Time. I'm going to—

Hon. David Lametti: Let me just finish the answer.

Mrs. Karen Vecchio: No, it's okay, sir. It is my time. As the chair of the status of women committee, I know my role. I'm just going to move on to the next question, if you don't mind.

Hon. David Lametti: But you've asked me the question. I do want to answer it.

Mrs. Karen Vecchio: I'm going to move on to the next question, because my time is very slight.

Hon. David Lametti: Okay.

Mrs. Karen Vecchio: I'm looking at the training of judges.

I know that we have in the room today the sponsor of Bill C-233, and I know that you yourself have put through something. What are we seeing on the uptake of judges? I think one of my biggest concerns is that when people come into the system, they do not feel they are going to adequately get what they need. Victims aren't coming forward because they do not trust the system.

Where are we at when it comes to training judges?

Hon. David Lametti: We now have passed a bill that requires any new federally appointed judge to agree to take on training that includes and primarily focuses on sexual assault as part of their application. They have to do it in order to be named a judge. They get it immediately afterwards.

That's going well. The National Judicial Institute has taken that on, and we're—

Mrs. Karen Vecchio: Can I ask a quick question on that?

They have to take it. How long is that course? Is it something that continuously gets built on? For instance, social media wasn't here 20 years ago, and heck, has it ever changed our lives now. How frequently do they have to take it? Once they've taken it a first time, do they need to take it again? Do they need to continue with their skills and improvements on sexual assault and things of that sort?

Hon. David Lametti: We had put that bill into place precisely to get people to agree to do it before they became a judge, because once they become a judge, the principle of judicial independence says we can't force them. Chief justices do their best to ask their judges to be retrained. This is having a positive impact, because it has sent out a message that this is important.

Finally, it's creating an impetus, I think, for provincial court judges, who deal with most of the criminal cases in Canada, to do the same thing. There's a real set of standards that are being set.

Finally, the National Judicial Institute is world-renowned for judicial training. They train judges from around the world, including Canada. They continually update their offerings.

The Chair: Thank you, Ms. Vecchio.

We'll now go to Mr. Naqvi for five minutes.

Mr. Yasir Naqvi (Ottawa Centre, Lib.): Thank you.

Good morning, Attorney General. Thank you for being here.

I know that there were questions asked by my colleagues about stakeholders that have been consulted on this bill. Will you be able to table a list of the stakeholders for the benefit of this committee so that we have it?

Hon. David Lametti: I certainly can.

Mr. Yasir Naqvi: That would be great. Thank you very much.

I was listening especially to your comments around misinformation when the Supreme Court decision came about. The things that I was hearing through legal circles were of real concern in the immediate aftermath of the decision.

Can you share with us what you were hearing from people you collaborated with and consulted with around the impact and the message that this particular decision from the Supreme Court was having in the community writ large?

• (1150)

Hon. David Lametti: Thank you for that question.

In fact, it was probably one of the most important factors that pushed us to move quickly. There was a great deal of misinformation on social media in particular—we all saw bits of it without seeing all of it—that all of a sudden, if you were intoxicated, this was a “get out of jail free” card. This was a pass.

It was an explosion of misinformation. We needed to correct it quickly. Even though this was only a rare case and even though that wasn't true, it didn't matter; people felt it was.

By closing this admittedly small gap, we could reinforce the larger message, which is that if you get drunk, you will be held re-

sponsible. That's a critically important message that people needed to hear.

I wish we didn't have to do that, quite frankly. I wish that there wasn't that level of misinformation out there. Whether it's erroneous or deliberate is inconsequential; it is there, so we needed and still need to fight that message constantly. We all have a responsibility to do that.

Closing this gap helped us to do that; closing it quickly helped us to reinforce that even more.

Mr. Yasir Naqvi: Thank you.

I think the message is an important one and a strong one in terms of preventing gender-based violence. The manner in which Parliament acted in unison in such an expedient manner, with all political parties combining forces together, speaks volumes of the collective motivation on behalf of our constituents and all Canadians.

I'm also quite interested in the process by which you determined the recourse to take. There were some calls for you to invoke the notwithstanding clause. You chose not to do so, and I appreciate that. You were quite surgical and methodical in terms of the solution you came up with.

Can you walk us through the kind of deliberation that you and your department go through in matters of a constitutional nature like these to make a determination as to how to remedy a law based on a decision that's offered to us by the Supreme Court of Canada?

Hon. David Lametti: Thank you for that question. It's an interesting process question.

First of all, I'm surrounded by a great group of lawyers, both in the Department of Justice and on my political team. We're generally quite attuned to this.

In this kind of case, we were given a road map by the Supreme Court of Canada. The notwithstanding clause is possible. It is part of the Constitution. I believe it's meant to be used only as a last resort—that's what the framers wanted in 1982—and only when there aren't other options, because with the notwithstanding clause, you're infringing on people's rights. Here, they gave us two ways to do it without infringing on people's rights, and we took one of them.

This particular clause also had the advantage of having been studied since the Daviault case in 1993. There was a body of existing opinion out there that we knew of from people who had already felt that it was, in particular, unconstitutional, so we had a head start.

Once that happens, the usual processes within the justice department and the consultation process allowed us to come up with something using the Supreme Court road map fairly expeditiously.

Mr. Yasir Naqvi: I very much appreciate that. I appreciate the thoughtfulness that must go into reviewing and then complying with Supreme Court decisions and the kind of surgical approach that you took in this particular instance, as opposed to using a broad-brush way of remedying the situation.

I ask because that thought process is missed in terms of the broader public's understanding of the kind of delicate steps that government and especially the Department of Justice needed to take. I sincerely appreciate that.

The Chair: Thank you, Mr. Naqvi. Your time is up.

I will next go to Monsieur Fortin for two and a half minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Minister, I would like your opinion on a matter that is somewhat broader than Bill C-28.

When we study certain aspects of legislation involving criminal law, the main problem is that victims often have the impression that they were not consulted and not taken into account in the judicial process.

While reviewing Bill C-28 on self-induced extreme intoxication, it seemed to me that the most virulent criticisms of this bill will come from victims, and probably with good reason. They will say that they have been raped, injured or something else by a person, man or woman, claiming to have been in a state of involuntary extreme intoxication. This aspect of the bill may be vulnerable to criticism by victims. Have you reviewed it?

Shouldn't victims of these crimes, especially violent crimes, be given greater consideration in the judicial process? For example, they could be part of the process and participate in decisions if they wanted to. I know that the administration of justice falls under provincial jurisdiction, and you understand that I don't want to lead you down that path. However, when it comes to substantive legislation in criminal law, aren't there certain aspects that the federal government could cover, for example in the Criminal Code, so that victims have greater consideration?

• (1155)

Hon. David Lametti: Thank you for the question.

I think that is exactly what we are doing. We are giving victims the greatest opportunity to have someone's culpability recognized based on our legal system's known standards.

Current standards make it difficult to establish that the accused was in a state of extreme intoxication, which we are currently reinforcing. We are attempting to minimize the chance that another defence could be used once extreme intoxication is established. So I think that...

Mr. Rhéal Fortin: Shouldn't victims participate...

[*English*]

The Chair: Thank you, Monsieur Fortin. Unfortunately, your time is up.

Mr. Garrison, you have two and a half minutes.

Mr. Randall Garrison: Thank you, Mr. Chair.

Mr. Minister, I'm going to ask you a question that I actually didn't intend to ask you, but our colleagues have broadened the discussion here.

We've just had a report that this is the seventh consecutive year of an increase in intimate partner violence and an increase in the severity of the violence. In 2019, for instance, we saw 77 homicide victims in intimate partner cases. In 2020, we saw 84, and in 2021, it was 90 of those cases. This committee has twice recommended to the government a package of measures to deal with intimate partner violence, and one of the things suggested was making coercive controlling behaviour a criminal offence.

Do you think that making coercive controlling behaviour in intimate partner relationships a criminal offence would be a useful tool for combatting intimate partner violence?

Hon. David Lametti: First of all, generally on intimate partner violence, I share the broad concerns here. We've tried a number of measures. We're open to a number of measures, and I am open to creating an offence of coercive control and to look at other jurisdictions. I know that's what the committee was doing, and that's what we need to do. I'm certainly open to that and I think it could be a very useful addition to the tools that we have.

Mr. Randall Garrison: In terms of—I hate “whole of government”—whole-of-government responses across the country, one of the problems seems to be the differing ways that provinces provide services and supports to victims of intimate partner violence.

Has there been any consideration given to some kind of task force that would look at best practices and minimum standards for jurisdictions across the country?

Hon. David Lametti: I would certainly be open to that. I've just come back from a federal-provincial-territorial first ministers meeting, and they did actually congratulate us on this piece of legislation—all of us collectively, for having worked together—so thank you.

We did also discuss, as one of the topics, how we support... Quebec, for example, is trying specialized courts, which seems to me to be a good idea. Much of the administration of justice is in provincial and territorial hands, so we're there as a willing partner, but I would be open to ideas for making sure that we have the best practices recognized across the country and have those standards met.

• (1200)

Mr. Randall Garrison: Thank you, Mr. Minister.

The Chair: Thank you, Mr. Garrison.

We have one more round. I don't have the Conservative name, but I'll ask the clerk who would like to speak for the first five minutes.

The Clerk of the Committee (Mr. Jean-François Lafleur): I have Mr. Caputo. Sorry about that.

The Chair: Maybe I do have it.

Mr. Caputo, I'm sorry about that. You have five minutes.

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, Mr. Chair.

Thank you, Minister, for being here. It's always a pleasure to have you here.

I want to pick up on your first statements that intoxication doesn't excuse sexual assault. I think that's something that all of us around this table would universally state. We really do have an epidemic on this issue, not only with education but also with how frequently this occurs.

My colleague Ms. Diab picked up on this, and I want to clarify. I took your statement as being a moral statement to say that just because you have had something to drink or a lot of drinks, it does not excuse the fact that you take someone's sexual dignity and that you don't have their consent to do this. Really what we have—and section 33.1 recognizes it—is an excuse in extreme intoxication. It may be rarely used, but it still does exist.

Am I making sense when I say that?

Hon. David Lametti: It is possible only—and you would know this as a former prosecutor—in a very rare and particular set of circumstances, because as the accused you have to establish, first of all, according to the Daviault test, that you were in a state of extreme intoxication. You have to do that with expert evidence, and only once you do that can the Crown disprove it, and if they disprove it, then your defence is done. Otherwise, you then move to the point we're on today, which is to go to the criminal negligence standard for how you entered into that state.

Therefore, only a very rare set of circumstances would put you there. The court has said, jurisprudence has said and we have said around this table that intoxication is not a defence for crimes like sexual assault. I can say this to you—again, as a former prosecutor—that it's a general intent defence, so it's not going to be a defence, and we need to make that clear.

Mr. Frank Caputo: I do take your point because on a basic level, I don't understand—and this is just on a human level, not speaking as a lawyer—how somebody can be in a state of extreme intoxication akin to automatism, as in you don't know what you're doing, where you're going and what you're saying, and still commit a sexual assault. On a basic human level, I just don't understand how that is the case.

Hon. David Lametti: Just to reinforce that, if it's alcohol, it's probably impossible for you to get to that state and still be functioning, right? The point here is about some kinds of drugs, and we're working out those standards. Again, the standard example that I use is the prescription drug that you take because the doctor tells you to take it, and there's no way you could have known that this would happen. If there are known potential side effects and you knew about them, that probably negates your defence.

Mr. Frank Caputo: The reason I used intoxication by alcohol is that, as I recall, that was Daviault. Those were the facts.

For me personally, this is an area of significant concern. That's why, two weeks ago, I put forward Bill C-299, which would raise the maximum sentences for all sexual offences—or not all, but all

most all sexual offences—proceeding by indictment to life imprisonment to reflect this epidemic and to reflect the seriousness of this, to reflect that victims themselves are often put into a psychological life imprisonment when they are sexually assaulted.

Is that something you could see yourself supporting?

Hon. David Lametti: I'm happy to take a look at it. As you know, my problem is with minimum mandatories. We have raised maximum penalties in other areas. I will undertake to look at it with an open mind.

Mr. Frank Caputo: Thank you. Perhaps we can chat at a future date.

One of the issues we have with new legislation—and you'll be aware of this—is that we have 10 provinces and three territories, and this law will be tested in every single one of those. It gets tested at the trial level. Then it goes to the court of appeal, and then it has to go to the Supreme Court of Canada. This costs probably hundreds of millions of dollars in litigation.

There's one way around this, and that's with a reference case to the Supreme Court of Canada, who could say that revised section 33.1 is, in its view, constitutional or unconstitutional. Was there any thought given to that? One of the things that we're hearing about in consultations, in my view, and one of the things that we're talking about today, is uncertainty. A reference case would give us certainty.

My question is this: Was there any thought given to a reference case to the Supreme Court of Canada?

• (1205)

Hon. David Lametti: In this particular case, I'll be honest: no, because the court gave us such a clear road map of either A or B, and we took B. It was also because there are so few cases that invoke this particular defence. Over 20 years, there have been fewer than 10, if I am correct.

I think it is highly unlikely that we're going to see the successful invocation of this defence, except in the most extreme—I don't want to say “extreme”—the rarest of circumstances.

The Chair: Thank you, Mr. Caputo.

Last, we'll have Ms. Brière for five minutes.

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Mr. Chair.

Minister, thank you for being with us today.

We have just concluded our study on the Canadian Victims Bill of Rights. Do you think that the new section 33.1 of Bill C-28 strikes the appropriate balance between the rights of the accused and protection of the victim?

Hon. David Lametti: Thank you for your question.

Yes, I think so, from a legal standpoint. As I was just saying to Mr. Fortin, we are currently expanding as much as possible the scope to establish an intoxicated person's guilt.

There were obviously many more elements in the answers I gave to Mr. Garrison. More must be done to support victims.

Mrs. Élisabeth Brière: In the new section, to decide if a person has departed markedly from the standard of care, the court may consider any relevant circumstance, including anything that the person did to avoid the risk.

To which circumstances are we referring? Do you think that this clarification could, for instance, allow the courts to consider the situation of an accused from a marginalized group that is disproportionately targeted by the criminal justice system, or indigenous or racialized persons?

Hon. David Lametti: The short answer is yes.

A contextual analysis of the circumstances based on an objective standard, like that of criminal responsibility, is always required.

Possible factors include the environment, the nature and the quantity of substances consumed, the individual's state of mind, as well as measures taken to avoid the risk, if any. However, we leave it to the courts to determine if people meet the objective standard. This way of doing things has worked well in the past. These cases are relatively rare, and I think the courts will fulfil their duty.

Mrs. Élisabeth Brière: In practice, on the ground, what does it mean for police officers involved and for prosecutors in terms of the burden of proof? What kind of workload will this add for them?

Hon. David Lametti: Foremost, the accused will be required to present expert evidence confirming that they were in a state of extreme intoxication. Then, it will be up to the prosecutor to determine that was not the case or that the accused departed from the standard outlined in section 33.1. This means they cannot use this defence.

Prosecutors already recognize these standards and are used to them, so it should therefore work pretty well. Judges are also used to them, especially since the Daviault ruling and the previous version of section 33.1. The specifics included in Bill C-28 will facilitate their deliberations.

• (1210)

Mrs. Élisabeth Brière: To what other context does the Criminal Code's standard of predictable criminal negligence apply?

Hon. David Lametti: We use it in the case of offences arising from specific behaviours, such as dangerous driving or failing to provide the care necessary for life, specifically for young children. This standard is known and applied. I think that we are targeting the same type of offences here.

Mrs. Élisabeth Brière: Thank you, Minister.

I am done, Mr. Chair.

[English]

The Chair: Thank you, Ms. Brière.

I want to thank Mr. Lametti for attending and generously staying a little longer, as we started slightly late. We thank you.

I think his officials will continue, so I will give him a minute to leave.

In the meantime, we will have Matthew Taylor, general counsel and director, criminal law policy section, and Joanne Klineberg, senior counsel, criminal law policy section. I think Joanne is by video conference. We also have Chelsea Moore, counsel, criminal law policy section, for the remaining hour.

Thank you once again, Mr. Lametti.

We will now go to Mr. Caputo on Zoom for the first six-minute round.

Mr. Frank Caputo: Thank you, Mr. Chair.

Thank you very much, Ms. Moore, and Mr. Taylor, for being here. I had one more question for the minister, so I will direct it your way. It is regarding the reference case.

I'm certainly not an expert in constitutional litigation. My understanding—and correct me if I'm wrong—is that if somebody wants to challenge the legislation, it need not be based on the specific instance before the court. It could be on a reasonable hypothetical. Is that in accord with your understanding as well?

It is.

The minister did speak about the fact that, in his words—and I'm paraphrasing—they will be quite rare, but a reasonable hypothetical doesn't necessarily have to come before the court with that rare case; it can simply be argued with that rare case.

Do you get where I'm going with that? Okay.

This isn't an instance of our simply being in a situation of a rare case that's going to be litigated and even more of a rare case that strikes it down; this is an instance in which it could be a rare case that is litigated and put forward as a reasonable hypothetical that's not before the court.

Would that not suggest that perhaps we should be going to the Supreme Court of Canada on a reference case to ensure that we get this right? I obviously voted for the legislation, so you know where I stand, but I just want to have the tightest legislation possible.

If you could comment on that, please, I would appreciate it.

Mr. Matthew Taylor (General Counsel and Director, Criminal Law Policy Section, Department of Justice): Sure.

I think Minister Lametti has already spoken to the thought process that he took in terms of the decision to introduce the bill and the decision not to put a reference to the court.

As he said, we did have a bit of a road map from the Supreme Court and from the Brown decision. Certainly that informed the work that the department did to support the government in introducing the legislation, noting that charter considerations are detailed in the charter statement. As you know, the law that was passed in Bill C-28 is informed by the law that came before it.

Perhaps the last thing I could say, and my colleagues could jump in, would be that the criminal negligence standard is a well understood and accepted minimum fault requirement for criminal law, and that's based on Supreme Court guidance as well.

I think all of those things taken together provide some context as to why the route was taken as it was.

• (1215)

Mr. Frank Caputo: Thank you.

I'm sorry. I neglected to recognize our witness by video as well. Is that correct? I apologize for that. I'm looking at the screen here. I do apologize for that.

You spoke about the road map. As my colleague Mr. Garrison pointed out, there were two paths, and we took one path. Again, I voted for the legislation, but I would be remiss if I didn't ask this question, because it has to be asked.

I'm looking at paragraph 98 of the Brown decision and I'm going to quote it here.

It may be that the voluntariness problem could be avoided if Parliament legislated an offence of dangerous intoxication or intoxication causing harm that incorporates voluntary intoxication as an essential element—in this hypothetical offence, the gravamen of the offence is the voluntary intoxication, not the voluntary conduct that follows.

Then later in the paragraph:

This, however, is not what Parliament enacted in that s. 33.1 exposes the accused to jeopardy for the underlying offence, not for extreme intoxication which is not, in itself, an unlawful act.

What I'm seeing there is almost an invitation from the court to go down that path. I am mindful, as are all of us, of parliamentary sovereignty in that we dictate our own journey, if you will, and I'm also mindful of the minister's comments that you would have to charge two offences instead of one. You would have to charge sexual assault and then you would have to charge criminal negligence caused by extreme intoxication, to wit, sexual assault.

Was there a concern that perhaps the court was sending us in that direction? Is there any concern that maybe the court was saying, "Look, this is the most airtight way to do it?"

I invite your comments on that.

Ms. Chelsea Moore (Counsel, Criminal Law Policy Section, Department of Justice): Thank you for the question.

As you mentioned, two choices were provided by the Supreme Court of Canada, and Parliament made a decision about the choice to take.

The thing with the stand-alone offence, the option you just talked about, is that it would actually be something like a stand-alone offence for dangerous intoxication, for example. The thing with that is that the person would not actually be convicted of the underlying

offence of violence, such as sexual assault or assault. They would instead be convicted of dangerous intoxication.

Concerns were expressed when this issue was raised back when the initial provision was drafted in 1995 that this would be like a drunkenness discount because the person might not have the same stigma or might not get the same range of sentencing that they would if they were charged with the underlying offence of sexual assault.

The other issue with the stand-alone offence is that only the accused is going to have possession of the evidence that goes to their intoxication, meaning the substances they consumed, so it would be very difficult for the Crown to prove dangerous intoxication because the Crown wouldn't necessarily have possession of that evidence.

Mr. Frank Caputo: I believe we're out of time. I don't mean to cut you off.

Thank you for that clarification. I really appreciate your time.

The Chair: Thank you, Mr. Caputo.

Now we have Ms. Dhillon for six minutes.

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): Thank you, Chair.

I will continue with Ms. Moore. With my colleague you were explaining that it's only the defendant who would have the evidence, as opposed to the prosecutor.

Could you explain to us what this evidence would consist of? Would it be blood tests or other indications that there was extreme intoxication?

Ms. Chelsea Moore: It could be evidence from blood tests. It's unlikely an accused would have that type of evidence. It would likely be in the sense of testimony that the accused provides about what they consumed. There could be other witnesses who might testify as to the state that the person was in at the time. The reason the accused must prove the defence on a balance of probabilities and with expert evidence is that the accused will be in possession of that type of evidence. That's why the common-law rule sets out that the accused must first prove that they were in that state before the court will accept the defence.

• (1220)

Ms. Anju Dhillon: That's very similar to an alibi defence, when it's up to the accused to prove that there was a mitigating factor.

Ms. Chelsea Moore: Yes. For the defence of extreme intoxication, the burden is on the accused to prove that they were in that state.

Ms. Anju Dhillon: Can you explain that to us in laypersons' language? I've heard during testimony—and this is in the same vein that our colleague Ms. Diab spoke about—about the difference between intoxication and extreme intoxication, and I'm hearing the words "dangerous intoxication" being used interchangeably. Is there a different level to all three?

Ms. Chelsea Moore: I was using the term “dangerous intoxication” to refer to the approach that was suggested by the Supreme Court, one of the two approaches whereby there could be a stand-alone offence, but there are some rules in the common law about the different degrees of intoxication, and those were established in the 2007 decision, I believe, in *R. v. Daley*. It's a Supreme Court of Canada decision, and they go over the three degrees of intoxication in the criminal law.

There's mild intoxication, which is never a defence to any crime in Canada. There's advanced intoxication, which could be a defence to specific-intent crimes like murder. Then there's extreme intoxication, which can be a defence to crimes of general intent, violent offences such as sexual assault or assault. Those are the three degrees of intoxication that we have in the common law.

It's important to note that even advanced intoxication, in which someone is very inebriated—they can't tie their shoes and they have difficulty driving—would not be a defence in the vast majority of violent offences in the Criminal Code that are general intent offences.

Ms. Anju Dhillon: As the minister mentioned before, it's very rare that this defence, even when invoked, is successful.

Ms. Chelsea Moore: That is correct, given the significant evidentiary burden that's placed on the accused—they need to call expert evidence—but also the test that they need to meet. They need to prove it on a balance of probabilities, which, in other words, means that they were more likely than not in a state of extreme intoxication at the time that the violence was committed. They need to prove it on a balance of probabilities, which is the most rigorous test that we have for raising a defence in the criminal law. It is considered to be quite an onerous test to meet. In that case, it could rarely be successful.

The other thing is that the former provision in section 33.1 has effectively prevented the defence from being successfully used since it was enacted in 1995, so we don't have a lot of data with respect to the defence over the last 20 years or so.

Ms. Anju Dhillon: This is the *R. v. Brown* case, in which the Supreme Court spoke about the two different options.

Can you please state to us the advantages and disadvantages we would see?

Ms. Chelsea Moore: My apologies—you are talking about the advantages and disadvantages of...?

Ms. Anju Dhillon: I mean of the creation of the offence of dangerous intoxication or intoxication causing harm.

Ms. Chelsea Moore: I can't necessarily speak to the merits of the policy option that was taken. As I mentioned, the stand-alone offence option wouldn't necessarily allow for the same sentencing range or the same level of stigma that the option proposed, the option that was actually enacted in section 33.1, would allow.

I think that's all I'm going to say on that. Thank you.

Ms. Anju Dhillon: Thank you.

Maybe I will ask this to all of our witnesses: Could you cite a concrete example of when this defence was successful, and maybe

in what conditions the person was found to be, as opposed to when it was not successful at all? I'm just looking for a concrete example.

Ms. Chelsea Moore: To our knowledge, it has not been successfully invoked since section 33.1 was originally enacted in 1995. It's been raised on many occasions, but it hasn't been successfully invoked.

There were approximately 12 to 15 cases that considered the constitutionality of the provision leading up to *Brown and Sullivan and Chan*, and in those cases, I think six or seven of them struck down the provision and allowed the defence to be pursued. In all of those cases, however, the defence was rejected on the merits, so we didn't have, from the time the original provision was enacted in 1995, a case up until *Brown and Sullivan and Chan* in which the defence was successfully used.

• (1225)

The Chair: Thank you, Ms. Dhillon.

Next we have Monsieur Fortin for six minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

I will continue along the same lines as Ms. Dhillon. In fact, she kind of stole my question.

Don't you think it somewhat contradictory for an individual to choose to put themselves in a state of extreme intoxication—a very rare situation, according to the minister—then be able to commit a crime, but claim afterwards that they could not be found guilty because they were in a state of extreme intoxication?

In the case of involuntary intoxication, if someone drugged my drink, I can understand. However, we are talking here about an individual who chose to become intoxicated. Not just someone who drank five glasses of wine and whose blood alcohol level is over the allowable limit of 0.08% to drive, but someone who is in a state of extreme intoxication and chose to put themselves in that situation.

I know that this defence can be used unsuccessfully. However, do you have any examples of cases where it could have been used successfully? I am having a great deal of difficulty imagining it.

Ms. Chelsea Moore: Thank you for your question. I will ask my colleague, Ms. Klineberg, to answer.

Ms. Joanne Klineberg (Senior Counsel, Criminal Law Policy Section, Department of Justice): I'm talking about the current act, after the new section 33.1 came into force. It is true that it is somewhat contradictory, because the accused must prove that they were in a state of automatism and also that the risk of falling into such a state was not foreseeable.

Based on our understanding of the Brown ruling, and after the new section 33.1 came into force, the only circumstances that could lead to a finding of not guilty, meaning that the defence was used successfully and there was no proof of negligence, are those in which it was demonstrated that a reasonable person could not have foreseen what would happen in a state where they were not aware of what they were doing or was not in control of their actions. In other words, the effect or consequences on their mental state were neither foreseen nor reasonably foreseeable. Those circumstances led the Supreme Court to conclude that there was a rights violation under the Canadian Charter of Rights and Freedoms.

Although this is possible from a theoretical point of view, it is extremely improbable that a reasonable person would not foresee these kinds of risks.

Mr. Rhéal Fortin: Thank you.

I agree that it is possible on a theoretical level, but once again, on a practical level, I cannot imagine such a situation. I am therefore wondering if we are currently working on something that is entirely virtual and interesting to law professors in university faculties. On the shop floor, so to speak, it would be just about impossible to use this defence.

I understand from your testimony that you do not have any examples to give me of situations where the defence of self-induced extreme intoxication could have been used. No known example exists, if I understand correctly.

• (1230)

Ms. Joanne Klineberg: Everything depends on the facts, the evidence and the quality of the evidence. It is therefore difficult to presume a verdict or the outcome of a trial, because if a small part of the evidence changes, the verdict could change. It really is a calculation that has to be done at each trial based on the evidence presented and its quality.

We think it is very rare for someone to be able to prove that they were in a state of extreme intoxication, without the Crown being able to establish the risk of finding oneself in a similar state or committing a violent act against the people present.

Mr. Rhéal Fortin: Thank you.

In just a few seconds...

[English]

The Chair: Thank you, Monsieur Fortin. We're out of time, unfortunately.

Next is Mr. Garrison, for six minutes.

Mr. Randall Garrison: Thank you very much, Mr. Chair.

I have a question about the data on a number of cases. I think you've answered that, but I want to make sure I understood correctly.

In all of the time that section 33.1 was in place, there were only about 12 to 15 cases that raised the constitutionality of the section, and none of those were successful until the most recent three cases. Is that correct?

Ms. Chelsea Moore: To the best of our knowledge, yes.

Mr. Randall Garrison: The minister said that since this law was passed, there have been no cases before the court. I'd like to confirm that this is true.

Ms. Chelsea Moore: Yes, that's correct. There have been no reported cases that have required the use of the new section 33.1.

Mr. Randall Garrison: Great, thanks.

I want to ask a question about the wording of this new provision, which says,

The court must...consider all relevant circumstances, including anything the person did to avoid the risk.

I have two different questions about this section.

With regard to "anything the person did to avoid the risk", are there any established legal standards for avoidance of risk that would apply?

Ms. Chelsea Moore: Since this legislation has not yet been tested and negligence cases tend to be very fact-specific, what a court considers to be relevant in terms of the steps that the accused took will vary depending on the circumstances. Courts may look at things like the state of mind of the accused at the time.

In terms of steps, they might expect that a person who's about to consume intoxicants would want to know what the potential effects of those intoxicants are and would want to learn about those effects and how they can be more careful when they take intoxicants. A court could expect a person to remove their weapons if they're going to take intoxicants. They could expect them to want to isolate themselves from other people or to ask a sober person to supervise them, for example.

These are the kinds of things that we might expect courts to look at here.

Mr. Randall Garrison: My second question is probably considered even more rare, but in all relevant circumstances, how would that interplay with the Gladue principles? In other words, Gladue principles require judges to consider relevant circumstances. Will that come into play, then, with this offence?

Mr. Matthew Taylor: I'll start. If I understand the question, I think Ms. Moore might have already spoken to it, or Minister Lametti.

The assessment of whether the individual acted in a criminally negligent way won't be personalized. It's not simply a question of their unique circumstances.

I think the answer is that it doesn't intersect, but perhaps I've not understood correctly.

• (1235)

Mr. Randall Garrison: You understood. That's the answer I was hoping for.

Again, I accept that what we've done here is to chart some new ground, and given the rarity of the cases, it may be quite a long time before we can answer a lot of these kinds of questions.

Mr. Chair, I have no further questions for the witnesses.

The Chair: Great, Mr. Garrison.

Next we will go to Mr. Van Popta for five minutes.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Chair. Thank you to the witnesses for being here.

We're talking about the defence of extreme intoxication, and when and under what circumstances it is available for an accused person.

The minister in his earlier testimony today clarified that in order for an accused person to use this defence, he would first have to prove, using expert evidence, that he was indeed in a state of extreme intoxication. Mr. Lametti colloquially defined that as being that his body is functioning, but he's not in control of it, so I think that's useful everyday language. My understanding is that once he has proven that to the satisfaction of the judge or the jury, the burden of proof then shifts to the Crown to prove that he acted negligently.

We have a comment from Professor Kerri Froc from the University of New Brunswick, who, discussing that, recognizes the “problematic aspects of the bill, which we fear will pose nearly impossible hurdles for prosecution of intoxicated perpetrators of violence against women.” Then she goes on to suggest that maybe section 33.1 could be further revised to reverse the onus, to leave it up to the accused to prove that he had not acted unreasonably, because it's so difficult for the Crown to prove and easier for the accused to defend against. What do you say about that? It seems like a reasonable option.

Ms. Chelsea Moore: I can't speak to the specific merits of that policy approach, but I can provide some legal considerations to think about when it comes to the burden of proof.

To start, in the criminal law, for the most part, it's the Crown that needs to prove all the elements of the offence beyond a reasonable doubt, and any reasonable doubt must result in the acquittal of the accused. That was first recognized in the 1935 House of Lords decision in *Woolmington*. It's also known as the presumption of innocence, which was incorporated into the Canadian charter in 1992. The jurisprudence on the presumption of innocence has been pretty straightforward in the sense that any time a person may be convicted without a reasonable doubt, courts would likely find there to be a violation of the presumption of innocence that would then need to be justified under section 1 of the charter.

Something you might want to think about is that the reason we have this reversal of the burden with respect to the accused raising the defence of extreme intoxication is that in those cases—as it would be if someone had a mental disorder or non-mental disorder automatism and had, for example, committed an offence while sleepwalking or having a seizure—we're dealing with the internal mental impairment of the accused. The Supreme Court indicated that in those types of cases, it would be very difficult for the Crown to prove internal mental impairment of the brain of the accused, and the Supreme Court justified having the reversal of the burden in those cases to require the accused to prove on a balance of probabilities that they were in that state, so there are special considerations as to when such a reversal of a burden of proof could be justified under section 1 of the charter.

Those are some things you might want to consider.

Mr. Tako Van Popta: Right, and those are very important considerations. I appreciate the complexity of that and how section 1 of the charter operates, yet here we have a professor of law saying that the burden on the Crown is almost impossible. For example, if we were to take *R. v. Brown*, the Crown might have advanced pretty compelling evidence that Brown ought to have known what the effect of consuming vast amounts of alcohol and combining that with magic mushrooms might be and would have to prove that beyond a reasonable doubt, but then Mr. Brown, on a balance of probabilities, would have to prove only that he was not acting unreasonably—maybe he had never consumed magic mushrooms before, for example, so he could not have known what the effect would be—and he would walk away a free man. It seems unreasonable to common people, non-lawyers. Do you have a comment about that?

• (1240)

Ms. Chelsea Moore: As the minister mentioned in his opening remarks, the level of risk doesn't need to be probable or even more likely than not. It's not whether an accused should have known that the drug “would” lead to a violent loss of control but whether the accused should have known that the drug “could” lead to a violent loss of control, and the court's going to look at this from the perspective of a reasonable person. A reasonable person is not someone who's going to testify as to what they knew or what they did. It's going to be assessed on a case-by-case basis.

The “reasonable person” is a concept that's well known to the criminal courts. It's someone who's prudent, who thinks before they act, and who takes steps to prevent harm when they see it happening. Courts are going to make a determination about the reasonable person by drawing inferences from the available facts and the evidence, and so the fact that the—

The Chair: Thank you.

Ms. Chelsea Moore: Okay, I'll stop there.

Thank you.

The Chair: I'm sorry about that. I gave you a bit of time.

Thank you, Mr. Van Popta. Now we have Ms. Brière, for five minutes.

[Translation]

Mrs. Élisabeth Brière: Thank you very much, Mr. Chair.

Mrs. Moore, can you explain to us why the first version of section 33.1 was declared unconstitutional based on *actus reus*, *mens rea* and the presumption of innocence?

Furthermore, how does the new version address these shortcomings?

Ms. Chelsea Moore: Thank you. I will ask my colleague, Joanne Klineberg, to answer that question.

Ms. Joanne Klineberg: Thank you for your question.

According to the Supreme Court, the former version of section 33.1 presumed negligence on the part of the accused at the time of consumption, without the Crown having to prove it. The former version therefore allowed an individual to be found guilty if they had been in a state of intoxication similar to automatism, but could not have foreseen that it would happen, and they committed an act of violence against another person while intoxicated. The intent of former section 33.1 was to find an individual guilty of the act of violence, such as a sexual assault or manslaughter.

However, the old version could have convicted a person who had committed an act of violence while in an altered mental state and unable to control their actions. That is the main reason invoked to claim a violation of fundamental rights.

The new version of section 33.1 corrects the problem by redefining sexual assault, assault and manslaughter offences. The new definition rests not on the intentional and voluntary nature of the act of violence committed by an individual, but on the negligent nature of consuming an intoxicating substance that could lead an individual to lose control and become violent.

Henceforth, the Crown must prove that there was negligence linked to consumption, creating a risk of violence. That is now an essential point. If the Crown establishes that the individual was not sufficiently diligent while consuming, and if the resulting violence diminishes an hour later, the individual may be found guilty of this violence due to negligence on their part while they were consuming.

• (1245)

Mrs. Élisabeth Brière: You said that negligence during consumption must be proven. Do we have any data on the quantity of alcohol or drugs that a person must consume before we can talk about extreme intoxication?

Ms. Joanne Klineberg: The science on this issue is constantly evolving. It's a complicated issue.

The level of intoxication depends specifically on the nature of the ingested substance, which may have a different effect on each person. The individual's mental state when consuming an intoxicating substance can also have an effect. During a trial, the Crown must prove it.

There is a great deal of public documentation showing people how to consume these substances safely.

Mrs. Élisabeth Brière: We cannot forget that we're talking about the self-induced nature of the intoxication, because...

[English]

The Chair: Thank you, Ms. Brière.

Last, we will now have Mr. Fortin for two and a half minutes.

[Translation]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

I will continue along the same lines as Mrs. Brière.

It seems to me that this situation is so rare, we cannot find a single example where someone could successfully use it as a defence. Aren't you concerned that, since this defence is so difficult to use,

the Supreme Court will end up telling us yet again that it's unconstitutional? Doesn't the difficulty of imagining a situation where this could apply mean that the provisions under section 33.1 could be deemed non-charter compliant?

Mr. Matthew Taylor: I'll ask Ms. Klineberg to answer.

Ms. Joanne Klineberg: Unfortunately, I didn't quite understand your question, Mr. Fortin. Could you ask it again, please?

Mr. Rhéal Fortin: We're having trouble finding good examples. I consider all of you to be experts in this area, and there are even a few legal experts on the committee, but I don't think anyone has been able to come up with examples of situations where this defence could be used.

There is a principle of interpretation. It is said that legislators are never supposed to speak for nothing and that the legislation we pass must serve a useful purpose.

Are we putting ourselves in a situation where section 33.1 could be struck down because it's impossible to use that defence? Could section 33.1 be considered to be without legal force? Is there not a fear to that effect?

Ms. Joanne Klineberg: I think I understand your question.

The Supreme Court rendered its decision in *R. v Brown* just a few months ago. The Court believed that there might be circumstances in which a person would be able to establish that they were in a state of self-induced extreme intoxication akin to automatism, but that they were not able to foresee that they might fall into that state.

Section 33.1 doesn't create the defence. It doesn't define the defence or the process for invoking it. Therefore, section 33.1 doesn't directly affect the availability of the defence. Rather, it creates a rule of criminal liability and defines the elements of culpability.

Instead, the question is whether or not the elements of culpability in section 33.1 are constitutional. As the Minister said, it was the Supreme Court that suggested this option as constitutional.

• (1250)

[English]

The Chair: Thank you, Mr Fortin.

I want to thank all the witnesses for their great testimony today and for helping us to understand Bill C-28. We thank you for that.

I have some members work to do, some housekeeping. The witnesses are dismissed. You are more than welcome to stay and listen to this, but you are free to go.

I wanted to give an agenda for the coming few meetings. For Thursday, October 27, in the first hour we have professors Elizabeth Sheehy, Kerri Froc and Isabel Grant. The second hour so far is Suzanne Zaccour.

For Monday, October 31, we have Hugues Parent, from Action Now Atlantic. In the second hour, we have the Women's Legal Education & Action Fund with Farrah Khan.

So far, we have three witnesses who declined our invitation. They are the Canadian Bar Association, the Barreau du Quebec, and Robin Parker.

I also want to let you know that the Manitoba Prosecution Service would like to be a witness for this, although they were not invited. I will ask if there's consensus to invite them. Unless I hear otherwise, I will invite them and have them appear either then or on November 3. I think we have a slot on November 3.

Hearing no objections, I'll invite them.

That leaves us with this additional witness for our November 3 meeting, which should be a two-hour meeting. After that, we'll get drafting instructions from our analyst on that.

Mr. Clerk, is there anything I've missed?

The Clerk: Mr. Chair, there might be some other suggestions for November 3.

The Chair: Sure. Do you have any suggestions, Mr. Anandasangaree or Mr. Moore?

Mr. Gary Anandasangaree (Scarborough—Rouge Park, Lib.): Since we're not filling all the slots, I'm wondering if maybe the clerk could give us a sense by party distribution of how many witnesses we can add on, just to have a full two-hour panel on November 3.

The Clerk: Sure. Yes. If November 3 is a full two-hour meeting, it would be good to have five or six more witnesses, in terms of giving us room if any decline or whatnot.

The Chair: Mr. Clerk, can you distribute that among the parties? Is there any party that has not given their full roster or how many each of us should give? I think that's what Mr. Anandasangaree is trying to establish.

The Clerk: Do you mean who has confirmed for November 3 so far?

Mr. Gary Anandasangaree: Basically, it's based on who has confirmed and those who have declined. If there is a party.... Maybe you can send just a breakdown to us this afternoon. If we're giving you six names, then it should be two Liberals, two Conservatives, or what have you. If you could break that down for us, then we could maybe have the names to you by the end of day, Wednesday, by five o'clock.

The Clerk: Yes, I can do that.

The Chair: Is there anything else that I might have missed, or is anybody in the room wishing to speak?

Mr. Clerk, can you have a look? No? We're good?

Thank you, ladies and gentlemen. We'll see you on Thursday.

The meeting is now adjourned.

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