

**Criminal**

## Ottawa proposes narrower self-induced extreme intoxication defence to violence to 'fill legal gap'

By **Cristin Schmitz**

(June 20, 2022, 12:56 PM EDT) -- Federal Justice Minister David Lametti says the Liberal government's proposed law to impose criminal negligence liability on those who commit violent offences after becoming extremely intoxicated fills "a gap" left last month when the Supreme Court of Canada struck down the *Criminal Code's* s. 33.1 ban on raising the defence of non-mental disorder automatism to general intent violence-based offences, including sexual assault.

"Bill C-28 fills that gap; it does so in a way that is both constitutional and fair," Lametti said at Parliament Hill news conference, after he proposed the law in the House of Commons June 17.

The single-provision bill addresses fallout from the Supreme Court's 9-0 decisions May 13, in *R. v. Brown*, 2022 SCC 18 and *R v. Sullivan* 2022 SCC 19.



Justice Minister David Lametti

In the decisions' wake, "an accused person who proves they were in a state of extreme intoxication when they committed a violent offence could escape criminal consequences, even when they acted negligently," the government said. "Through this proposed legislation, people who negligently reach this state of extreme intoxication and harm others can be held criminally responsible. To be negligent means the person has not taken enough care to avoid a reasonably foreseeable risk of a violent loss of control."

According to a Department of Justice backgrounder, Bill C-28 would create criminal liability for extreme intoxicated violence "based on the judicially recognized standard of criminal negligence, a well-understood standard used in several other offences, including dangerous driving and failing to provide necessities of life to a child."

In particular, "individuals could be held responsible for general intent violent offences (e.g., sexual assault, manslaughter) if they harm others while in a state of extreme intoxication, where their conduct fell far below the standard expected of reasonable persons in consuming intoxicants — a 'marked departure,'" the government explained. "In determining if there was a marked departure, courts would be required to assess if a risk of extreme intoxication leading to harm was objectively foreseeable, and to consider all the relevant facts and circumstances unique to each case, for

example where the substance was consumed; the accused person's state of mind; the quantity of the substance; and length of time over which it was consumed."

Bill C-28 would amend the *Criminal Code* "so that an individual would be held responsible for the violence they commit while in a state of extreme intoxication if they ended up in that state through their own criminal negligence," Lametti told reporters.

He acknowledged, in response to their questions, that the Liberal government harbours hope for quick passage of Bill C-28, with opposition support, before the Commons and Senate adjourn for the summer this month.

"I think that as parliamentarians, we can all work together. We all have an interest in doing this," Lametti said. "There's a wide swath of Canadian society that wants us to move quickly on this, whether they be victims' groups, whether they be great groups like [the Women's Legal Education and Action Fund] LEAF, whether they be ... persons traditionally associated with the Conservative party who want us to be tough on crime," he remarked. "There is a point of agreement here, and I think ... we can move this forward."

LEAF executive director and general counsel Pam Hrick, who appeared alongside Lametti, said her group, which intervened at the Supreme Court to advocate for the equality rights of survivors of sexual and physical violence (who are disproportionately women and children) believes what "the government has proposed today is a thoughtful, nuanced and constitutional response" to the Supreme Court of Canada's decisions.

"If adopted by Parliament, we'll be looking to the courts to apply this new, narrower bar to the defence of self-induced extreme intoxication in a similarly thoughtful way, one that also takes into consideration the circumstances of accused persons who are particularly marginalized and who we know the criminal law disproportionately targets, including Black, Indigenous and racialized people," she said.

Hrick stressed, however, that the Supreme Court's decisions "created a very narrow gap in the law ... something that would not be relevant to the overwhelming majority of cases where an accused person was drunk or otherwise intoxicated."

Calgary defence counsel Sean Fagan, who represented the successful appellant accused in the court's lead judgment in *Brown*, said the proposed law, if passed, "will ensure criminal accountability for individuals who consume intoxicants in circumstances where they ought to know that automatism and violence could result."

"It is laudable for Parliament to target this group of people, but the question is: does this group exist?" Fagan queried. "In extreme intoxication cases, we typically see violence from a non-violent accused against an individual who the accused has no animus towards. In all successful extreme intoxication defences thus far, the accused had little reason to foresee violence or the rare state of automatism."

Fagan said that the state of automatism seen in criminal courts is typically not caused by alcohol but by hallucinogens, like psilocybin magic mushrooms. "The scientific evidence suggests that hallucinogen use is not highly correlated, let alone causative, of violence, making the condition precedents in Bill C-28 difficult to satisfy," he observed.

Fagan predicted "the limit to the extreme intoxication defence proposed in Bill C-28 will only be invoked in the rarest of an already rare set of circumstances."

In striking down s. 33.1, the Supreme Court of Canada unanimously held that despite Parliament's "laudable purpose" and legitimate goals of protecting crime victims and holding the extremely self-intoxicated accountable, the path legislators chose in enacting the provision resulted in "grave" and unjustified violations of the Charter's ss. 7 and 11(d) guarantees of fundamental justice and the presumption of innocence.

This was because of the real risk that the "morally innocent" could end up wrongfully convicted, e.g. where no reasonable person would anticipate the risk of automatism so that whatever

blameworthiness that comes from the person's voluntary intoxication is relatively low and likely disproportionate to the punishment the individual would face if convicted for an offence committed in a state akin to automatism.

However, the top court also advised Parliament that legislators could devise a constitutionally compliant new law to hold extremely intoxicated people accountable for violent crimes. It could address the fatal flaw of s. 33(1) by building in a criterion of objective foreseeability, so that it would be possible to discern "who, among those who voluntarily ingest intoxicants, has the degree of blameworthiness that would justify the stigma and punishment associated with the underlying offence with which they are charged."

"Options have been advanced that would trench less on the rights of the accused, including a stand-alone offence of criminal intoxication," Justice Nicholas Kasirer explained for the top court. "Alternatively, a path to liability for the underlying violent offence might be based on a criminal negligence standard that would allow the trier of fact to consider whether a loss of control and bodily harm were both reasonably foreseeable at the time of intoxication. This latter option could allow an accused to be convicted for the underlying violent act and not simply negligent or dangerous intoxication while achieving the minimum objective fault standard required by the Constitution."

According to a government backgrounder, Bill C-28 aims to protect the public and hold accountable individuals who negligently enter a state of self-induced extreme intoxication and harm others. It said provinces and territories, women's and victim's organizations, and the general public have called for a legislative response that would close the legal gap while respecting the Charter.

Headed "Self-induced Extreme Intoxication," the proposed new s. 33.1 in Bill C-28 states that:

### **Offences of violence by negligence**

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

- (a) all the other elements of the offence are present; and
- (b) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.

### **Marked departure — foreseeability of risk and other circumstances**

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

### **Offences**

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

### **Definition of extreme intoxication**

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

The provision that was invalidated by the Supreme Court of Canada, was headed "Self-induced Intoxication" :

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of

self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

*If you have any information, story ideas or news tips for The Lawyer's Daily, please contact Cristin Schmitz at [Cristin.schmitz@lexisnexis.ca](mailto:Cristin.schmitz@lexisnexis.ca) or call 613 820-2794.*

---

© 2022, The Lawyer's Daily. All rights reserved.