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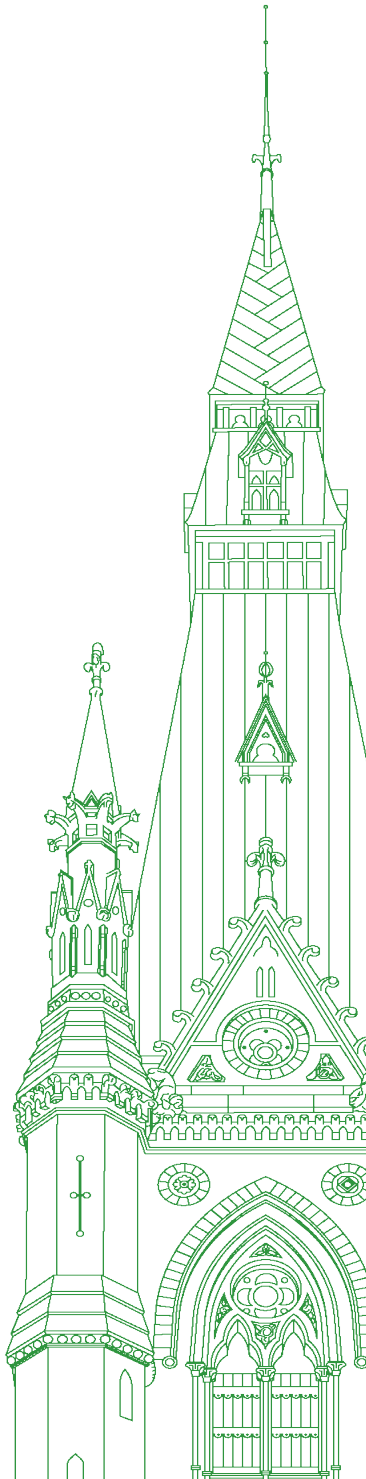

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Thursday, October 27, 2022

● (1610)

[*English*]

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

Welcome to meeting number 34 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to Standing Order 108(2) and the motion 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 using the Zoom application.

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

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

I will remind you that 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 well as we can. We appreciate your patience and understanding in this regard.

I would also like to inform the members that all tests involving the witnesses have been performed successfully.

Also, I use a little cue card system. When you have 30 seconds left, I'll raise the yellow card. When you're out of time, I'll raise the red. I ask that you conclude in that time so I don't have to interrupt you. I don't want to wreck the flow of your conversation.

I'd now like to welcome our witnesses appearing today.

For the first hour, we have Elizabeth Sheehy, professor emerita of law, University of Ottawa; Kerri Froc, associate professor, University of New Brunswick; and Isabel Grant by video conference.

Welcome to the committee. You each have five minutes. Afterwards, we'll have subsequent rounds of questions.

We'll begin with Ms. Sheehy for five minutes—or whoever would like to start. It's your choice.

Dr. Kerri Froc (Associate Professor, University of New Brunswick, As an Individual): Mr. Chair, if it's all right, I would like to go first.

Good afternoon, Honourable Chair and members of the committee.

My name is Dr. Kerri Froc and I'm an associate professor at the faculty of law at the University of New Brunswick. My area of research is constitutional law and I specialize in women's rights.

Both professors Sheehy and Grant are nationally and internationally recognized experts and authors on violence against women and criminal law, particularly in relation to sexual assault, and I would urge you to give very serious attention to what they have to say about the knock-on effects of section 33.1's onerous burden on the Crown and how to fix it.

I am the chair of the National Association of Women and the Law, but I am here in my personal capacity. However, if you have factual questions in relation to the lack of consultation before Bill C-28 was introduced—and to be clear, the consultation with NAWL was a sham—I can answer them because I was there.

However, if you take nothing else away from my presentation, I want you to hear this. Parliament has other options than simply to legislate in identical words to those used by the Supreme Court in Brown. The court has recognized that Parliament is a constitutional interpreter in its own right and that its interpretations are worthy of respect. Indeed, in Brown, it recognized that its suggestions were simply that, suggestions, and that Parliament will be afforded deference when it comes up with a fix. It did not guarantee that if Parliament followed either of its two suggestions it would be charter-proof, nor did it maintain that Parliament must follow one of its suggestions using identical words to describe the threshold fault standard for the amendment to be constitutionally sound.

When the Supreme Court declares a piece of legislation unconstitutional, the response is usually, as it was here, for Parliament to go back to the drawing board to address its objective in a constitutional way using the court's ruling as guidance. When the court analyzes second-try legislation, it gives due deference to Parliament's attempt to solve a complex social problem in a way that respects individuals' rights. This does not mean that Parliament has carte blanche to violate rights on a second try, but it does mean that the court respects the separation of powers. Parliament is engaged in a process where all stakeholders are heard, the government attempts to reconcile disparate interests for the collective good, and democratic representatives—you all—deliberate. Ideally, that's how it works. Courts are confined to the parties before them and the legal issues brought forward by these parties, sometimes perhaps guided by intervenors. They interpret the Constitution and apply it. That's all.

In Brown, Justice Kasirer said, “I am aware that Parliament is entitled to deference in this analysis. Indeed, in crafting a new legislative response to the problem of intoxicated violence, it is up to Parliament to decide how to balance its objectives while also respecting Charter rights as much as possible”. He also said, “I am mindful that it is not the role of the courts to set social policy, much less draft legislation for Parliament, as courts are not institutionally designed for these tasks.”

The court said, in relation to amending section 33.1, that one academic, Hugues Parent, whom I understand you will be hearing from, “proposed no less than four variations” in how to satisfy the minimum criminal standard. Justice Kasirer also called the standalone offence of criminal intoxication “not a viable alternative” in terms of achieving Parliament's objectives. Therefore, the “two options” mantra that you have heard over and over is a mischaracterization in more ways than one.

Last, I want to suggest that there might be very good reasons for Parliament not to abdicate its role in legislating and give it over to the Supreme Court. Contrary to its own jurisprudence, the Supreme Court did not give women's rights consideration in the constitutional analysis, at least not due consideration and equal consideration.

● (1615)

Professor Sheehy's and my paper, which we provided to the clerk in advance of the hearing today, and which I hope you'll have the opportunity to read, provides this critique in detail. I can explain it or elaborate upon it today.

I know that ensuring that women's rights are given at least as much consideration as the rights of accused persons is very much in keeping with the tenor of your questions and discussions on the bill to date. Professor Grant's recommendations do just that, while adhering to the court's guidance in Brown.

The Chair: Thank you.

Dr. Kerri Froc: I understand that she's under some time constraints, so it may be that you decide to direct the first round of your questions to her, but I leave that to you.

Thank you very much.

The Chair: Thank you, Dr. Froc.

We now go over to Professor Sheehy.

Professor Elizabeth Sheehy (Professor Emerita of Law, University of Ottawa, As an Individual): Good afternoon, and thank you for inviting me to speak to the amendment to section 33.1 of the Criminal Code.

My main point is that the defence of extreme intoxication will be invoked most frequently for crimes of male violence against women, with consequential effects for the reporting, policing, and prosecution of these crimes. If you examine the evidence in Brown and Chan, as examples, you will see that the new law will be largely incapable of limiting the extreme intoxication defence.

In the 12 months between the release of the Daviault decision and the enactment of the original section 33.1, the defence was advanced at least 30 times in reported cases, and they represent the tip of the iceberg. Almost half, 12 of these cases, involved clear violence against women: six sexual assaults, five spousal assaults, and the murder of a woman in the sex trade. Another two involved attacks on women. One man brutally beat his mother, and another attacked a woman in a nightclub. The majority of these claims were rejected for want of proof, but of the six cases where the defence succeeded, four were spousal assault cases.

Advocates on behalf of women who experience men’s violence readily understood that the extreme intoxication defence seamlessly colludes with narratives around violence against women that suggest that it is never men’s fault, but rather women’s fault, or somehow an agentless crime that is simply an inevitable feature of life.

Had section 33.1 not been enacted in 1995, we might have seen at least 30 reported cases a year of attempts to use this defence, and over 26 years, that would have been a minimum of 780 cases. The original section 33.1 put a near halt to this defence, but, even so, in that 26-year period, we found 86 cases where section 33.1 was mentioned, either to consider its constitutionality, or at least as one reason for rejecting an intoxication defence.

While one author reports that only four could have succeeded, because most failed the Daviault proof standard, that doesn't account for the fact that section 33.1 barred the defence, such that lawyers could hardly have been expected to invest in the resources required to both launch a constitutional challenge and substantiate the defence with expert evidence.

Of the 86 cases, 35 involved sexual assault, and another five involved men who attacked their current or former partners. Beyond those 40 cases of clear violence against women, there were another 23 cases where women were victimized, either as the sole target of the accused's violence, or as another victim in addition to male victims. Altogether, 63 of 86 cases involved female victims. Of the perpetrators, 80 were men and six were women. These numbers bear up even in the three cases before the Supreme Court of Canada in Brown, Sullivan, and Chan: three male perpetrators, three female victims, and one male victim.

Although we cannot predict how often the extreme intoxication defence will succeed, the harms to women extend to men's attempts to invoke this defence. There's a serious risk that women will be deterred from reporting these crimes where perpetrators are intoxicated, because they will not be in a position to assess whether an extremely out-of-it perpetrator can be held accountable.

Further, the trauma caused to complainants by lengthened trials based on the extreme intoxication defence being advanced, the resulting diminished confidence of women in the justice system, as well as the wasted judicial and Crown resources, all must be considered as negative implications of this now unleashed defence.

Police and prosecutors will need to account for the extreme intoxication defence in their charging and prosecutorial decisions. It may also have an impact on cases involving lower levels of intoxication. Of course, currently, anything short of extreme intoxication is no defence to crimes of general intent, like sexual assault and manslaughter, but when the Crown or police are deciding whether to lay charges, they do not know exactly how intoxicated the accused was. They may not have solid evidence about whether that intoxication crossed the line to extreme intoxication. That evidence is uniquely in the hands of the accused. The Crown has no access to it unless they were able to test his blood immediately after the occurrence, which is rare.

They know that these trials are going to require expert evidence and be resource-intensive. This could lead to charges not being laid where a high level of intoxication is involved, particularly in provinces like B.C., where the charge approval standard is substantial likelihood of conviction.

● (1620)

In turn, we will have no way to track the impact of the extreme intoxication defence on crimes of violence against women.

Thank you.

The Chair: Thank you, Professor Sheehy.

Next we have Professor Grant from UBC.

Professor Isabel Grant (Professor, As an Individual): Thank you very much, and thank you for giving me an opportunity to speak to you today.

I've been a criminal law professor for 35 years. My research was cited by the Court of Appeal of Alberta and the Supreme Court of Canada in Brown, and I was retained many years ago by the Department of Justice to examine the question of whether Parliament could constitutionally limit the defence of extreme intoxication for crimes of violence against women and girls.

I believe that the response to Brown that you have before you in section 33.1 was ill-conceived and rushed, and as Professor Sheehy has explained, I'm worried that it will have effects beyond cases of extreme intoxication. I think the lack of concern that we've heard from the defence bar about this legislation gives us a signal about how effective it will be in protecting women and girls from male violence.

I'd like to raise a couple of problems specifically with section 33.1 and suggest to you that there are some pretty easy fixes. The first problem is that the legislation missed the opportunity to codify Daviault and to say that the burden of proof is on the accused when he is raising a defence of extreme intoxication. Now I hope that most judges will assume this and read it in, but it was an oversight not to codify that in section 33.1.

However, the bigger problem is the standard in subsection 33.1(2). You have the legislation before you. Subsection 33.1(1) sets out the test that the Crown has to prove, the marked departure test. That is a constitutional minimum from which we cannot depart because the Supreme Court of Canada has indicated that. Subsection 33.1(2) really complicates the situation. Subsection 33.1(2) says that a judge "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."

Now, it's not entirely clear what this means. What does it mean that a judge has to consider a legal standard? What if the judge considers it? Is the judge free to reject it? Is it determinative of the issue? It's a confusing standard for courts to apply, and it's not clear to me why it's even necessary or helpful.

However, the bigger problem with subsection 33.1(2) is that the standard of objective foreseeability of the risk of harm is unprovable by the Crown. What that means, of course, is that there won't be any cases in which this defence is denied—in other words, section 33.1 is not putting a limit on extreme intoxication.

The reason it's unprovable is that extreme intoxication is more likely to lead to unconsciousness or sleep or some other response on behalf of the accused. Violence is not a common response to extreme intoxication. What that means is that an accused can always say, "I've been intoxicated before, and I wasn't violent then, so how could I have foreseen that I would be violent this time?" or "I've never been extremely intoxicated before, so how could I possibly have foreseen that this time it would lead to violence?"

When you're dealing with relatively rare events, having a standard of objective foreseeability of harm is completely unworkable. So, unless you have an accused who's consumed the same amount of drugs and alcohol in the same circumstances and committed violence in the past, it's almost never going to be reasonably foreseeable that harm to another person would result.

As I mentioned earlier, I think there are some easy fixes to this. The simplest one is just to get rid of subsection 33.1(2). It isn't necessary. It's confusing for judges. It's telling them how to do their jobs. Judges apply the marked departure standard all the time. They know from case law that they have to look at all the circumstances of the offence and the circumstances in which that offence took place. Judges don't need Parliament telling them that they have to consider another legal standard. Maybe that's different from applying it, but they have to consider it, and without saying what that actually means.

● (1625)

The simplest response would be to get rid of subsection 33.1(2). It's confusing. It could result in section 33.1 being completely useless.

A second option, though, if you think it's important to retain subsection 33.1(2), would be to change the "foreseeability" standard and require foreseeability of a loss of control over one's actions instead of foreseeability of harm. As I said, when you're dealing with foreseeability of—

The Chair: Thank you, Ms. Grant.

I'm sorry, but your time is up. Hopefully, we will be able to extract—

Prof. Isabel Grant: I'm sorry. I didn't see the warning. Maybe we can pursue this in questioning.

Thank you.

The Chair: Thank you.

We'll go to our first round of questioning.

Mr. Moore, you have six minutes.

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

Thank you to all our witnesses. I really appreciate the input you're giving today.

Professor Grant, you were just finishing a thought. I have only six minutes to work with, and I do have a number of questions I want to get to, but if you want to finish your thought, I'll give you the time to do that now.

Prof. Isabel Grant: Thank you very much.

Very briefly, I was saying that there are three ways to fix this problem. One is to get rid of subsection 33.1(2). The second way is to change the foreseeability standard to loss of self-control rather than foreseeability of harm. The third option is to insert a reverse onus clause that requires the accused to show whether or not the harm was foreseeable. That's been upheld as constitutional in Daviault and in the context of the mental disorder defence as well.

Those are the three options.

Hon. Rob Moore: Thank you for that.

I guess this goes back to you, Dr. Froc, to a comment you made around consultations. To me, there's really no excuse to not have extensive consultations. When we have serious decisions before the court, it's easy to contemplate that the court is going to make a decision and government has to respond. Some of these, if there's no suspension of invalidity, can have immediate and wide-reaching consequences, as this situation did. It resulted in Bill C-28.

I think the kind of discussion we're having today, and the kind of really detailed input that you have given.... Did you have the opportunity to provide that level of detail to the minister or to the department as they were contemplating drafting a response to this decision?

Dr. Kerri Froc: I mean, we were consulted by a junior member of the Department of Justice on June 14. We provided a very detailed proposal to them by 5 p.m. that day, but of course the first reading of Bill C-28 happened on June 17. The horse was already out of the barn, at that point. It was "thank you for your input", but it was obvious that it wasn't taken into account in any way whatsoever.

I don't know when other groups were consulted. That might be something you want to ask them. All I can tell you is that we were consulted within days before the bill was introduced. We had another very brief consultation on June 17, I believe. Luke's Place was invited to a Department of Justice consultation. I had about 15 minutes' notice that it was happening. I just happened to be able to get on the call.

Again, our suggestions were dismissed fairly summarily, but I can tell you that we provided a lot of technical detail on very short notice during that.

● (1630)

Hon. Rob Moore: Speaking of the horse being out of the barn, we now have legislation that's currently in place. This study that we're doing is backwards. Normally, committees study bills and get the type of evidence we're getting from you now as the bill is proceeding through the House and then goes on to the Senate. This is reversing that order. It presents challenges for us. We want to make sure that we as parliamentarians, as you rightly illustrated, do our job, which is to draft legislation that's going to work.

You mentioned, as all of our witnesses mentioned, the disproportionate impact on women. We've seen that in these cases. We've seen it when this defence is used. How do you respond to the support of LEAF, the Women's Legal Education and Action Fund, for Bill C-28?

Dr. Kerri Froc: I think you'll be hearing from LEAF, so you can ask them those questions on whom they consulted for their analysis and upon what basis they made it. All I can tell you is what we did.

Professors Grant and Sheehy are before you. There are others we consulted. I'm rather partial, because Professor Sheehy was my master's supervisor. I can tell you that both of them were cited by the court in Brown. They not only have decades of experience doing the analysis of criminal law and constitutional law, but they are also very well regarded in the women's community of organizations dealing with violence against women. I'm a relatively new professor in relation to them, but I would just encourage you to listen to them very seriously.

Hon. Rob Moore: Yes, and that's exactly what we're doing here today. We're listening very intently to what you have to say.

Professor Sheehy, perhaps you'd like to respond to this. It's been described that Parliament was really given only two options with the Supreme Court decision. You can pick lane A or lane B, and there were reasons why lane A was picked and not lane B. You're saying that this was a false choice, that there are other options.

Do you want to just quickly respond to that?

Dr. Kerri Froc: I don't want to hog the microphone, but I can respond to that.

Again, just to reiterate, the court said that lane A wasn't a viable option of creating a stand-alone defence. The reason it said this wasn't a viable option is that the objectives of protecting women and girls, and also having enough accountability.... It simply wasn't a viable alternative.

What they were really saying is that the only thing that would satisfy the objective of Parliament is amending section 33.1. It never said that you have to follow lockstep with its suggested wording—for a very good reason, because it knows that Parliament can engage in the kinds of consultations that you're doing right now. What it did say is that it needs to be a minimum criminal standard, and there are a number of ways you can do that.

The Chair: Thank you.

Dr. Kerri Froc: Again, they cited one academic who said there were four ways. We proposed other ways as well that we believe are constitutional. Again, it's up to you to make that assessment based on what we're telling you might be some of the effects of getting this wrong—

The Chair: Ms. Froc, unfortunately you're out of time. We'll try to get it with someone else.

Next we have Mrs. Brière for six minutes.

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

[*Translation*]

Thank you to all the witnesses for being here today. I commend you on your work in constitutional law, especially to protect women's rights.

As you know, Bill C-28 was introduced in response to the Supreme Court of Canada's decision in R v. Brown, which struck down section 33.1 of the Criminal Code, a provision which prevents a defence based on intoxication akin to automatism.

First of all, since the section was struck down, do you think the Supreme Court's decision created a legal vacuum?

Second, do you not think Bill C-28 remedies the situation?

● (1635)

[*English*]

Prof. Isabel Grant: Can I respond to that briefly?

Yes, the decision in Brown definitely left a vacuum, but I don't know what defence this legislation will limit. I think that vacuum is just as serious today as it was before this legislation was drafted. I don't understand what hypothetical accused will be denied a defence under this legislation. I don't think it will happen, and that's why we're here today, because we're very worried about that.

[*Translation*]

Mrs. Élisabeth Brière: Thank you.

[*English*]

Would you like to add something?

Prof. Elizabeth Sheehy: I would certainly agree with Professor Grant's comment. We had a vacuum; we have a vacuum. I don't think justice is served by rushing a solution, because a bad solution is not going to address the issue.

I'm just repeating, I think, what Isabel just said.

Mrs. Élisabeth Brière: Dr. Froc, go ahead.

Dr. Kerri Froc: I think the point that both Professor Grant and Professor Sheehy are making is that you need to get this right, because the potential consequences of getting it wrong are very serious. They're not only in terms of reported cases. We've told you that there are 86 reported cases, with most of them coming out even after section 33.1 was enacted. It's also in relation to the charging decisions and the prosecutorial decisions. Some of those we will never see, and it will be very difficult to know exactly what the implications are from leaving the defence so open.

[*Translation*]

Mrs. Élisabeth Brière: Do you agree that it is completely unacceptable for someone to voluntarily or negligently put themselves in a state so dangerous that they cannot control their actions, do harm to someone else and not face the consequences?

[*English*]

Prof. Elizabeth Sheehy: Well, I think what we're saying is that it's actually discriminatory to shift the burden of that harm onto the shoulders of women. I mean, the individuals who've engaged in over-consumption of alcohol and drugs, and who have in consequence caused very serious and sometimes life-altering injuries to other people, are able under this defence to shed all responsibility, and that's then left on the shoulders of women. I guess what we're saying is that that's discriminatory.

Mrs. Élisabeth Brière: Thank you.

[*Translation*]

After the decision in R v. Brown, it became clear that a lot of misinformation was floating around, online especially. Young women, for example, really thought that the law offered them no protection if they were assaulted.

I'd like to hear your thoughts on that misinformation.

[*English*]

Prof. Isabel Grant: I think clearly the example you give would be misinformation, but you have to put yourself in the position of a busy Crown counsel who's deciding whether to lay a charge. A young woman comes forward and says she was sexually assaulted by a very intoxicated man, and that's all she knows. She doesn't know how much he consumed or what he consumed. Crown counsel has to make a decision on whether we are going to lay charges in that circumstance. I'm not sure that in many of the cases they will.

We already know that sexual assault is vastly undercharged in this country, so I think what was overblown was the degree to which this was in fact misinformation. We don't know the impact of this decision, and we don't know how we're going to study it if the consequence is that charges are never laid in the first place.

● (1640)

Mrs. Élisabeth Brière: Thank you.

Dr. Froc has a comment.

Dr. Kerri Froc: In my past life, I was a practitioner in Saskatchewan, and it's kind of incomprehensible to me that the way you counteract misinformation on social media is that you enact amendments to a very complicated area of law. There are quite a few other ways that one can engage in public education. Giving core funding to women's groups might be one of them, so that they can run their education campaigns. You don't do it by amending the Criminal Code.

The Chair: Thank you, Madame Brière.

We have Monsieur Fortin for six minutes.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Thank you, Mr. Chair.

I, too, want to thank the witnesses for taking part in our study. As Mr. Moore said, it's pretty unusual to be studying a bill after it has come into force, but that's how we have to do it.

As the witnesses have seen, we have a limited amount of time, so I want to use my six minutes to talk about subsection 33.1(2).

Ms. Froc, you talked a bit about objective foreseeability. In the bill, it says that, in order to determine "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."

I'm going to play devil's advocate for a moment. Objectively, when someone consumes an intoxicating substance, isn't there always a risk? The provision isn't about determining whether it was obvious that consuming the substance would cause extreme intoxication; it's about determining whether the risk was objectively foreseeable. When I first read it, I thought courts might determine that, when someone consumes an intoxicating substance, there is necessarily an objective and foreseeable risk that they are putting themselves in a situation of extreme intoxication.

I'd like to hear your view on that, Ms. Froc.

[*English*]

Dr. Kerri Froc: Certainly, and I would defer to professors Sheehy and Grant on this.

One problem with that is that you have the Supreme Court in Brown using risk of harm and risk of extreme intoxication disjunctively. We're using it conjunctively here, where you're essentially saying that the Crown has to prove both. That's one issue.

The other issue is, and you've heard the Minister of Justice say it, that this was a contextual analysis in terms of what the objective foreseeability is. What does that mean? Does that mean someone in the shoes of the person who has consumed the intoxicants? Does that mean, as Professor Grant said, that if you've never become extremely intoxicated before, you could not have foreseen it? If you have, objectively...but contextually objectively. That's the problem.

Prof. Elizabeth Sheehy: All you have to do is look at the expert evidence in both Brown and Chan.

In Brown, the trial judge decided that, although Mr. Brown testified that he had consumed between 13 and 17 drinks and snacked on handfuls of magic mushrooms all evening, it was unforeseeable that he would lose the power of self-control. We're not even talking about harming someone.

The cases before us demonstrate that this is going to be really difficult, because the defence can get experts who are prepared to say that the person was in a state of extreme intoxication, but they're not prepared to say—or they feel they cannot say—that it was foreseeable because they don't know exactly how much he consumed. They don't know how much psilocybin was in that particular dose of magic mushrooms. They don't know the rate at which he consumed. They don't know his experience with drugs.

All of these factors mean it's going to be very hard for the Crown to prove even foreseeability of loss of control.

● (1645)

[*Translation*]

Mr. Rhéal Fortin: I think Ms. Froc was saying that one of the solutions would be to get rid of subsection 33.1(2).

Assuming that the provision isn't going anywhere, how would you phrase it, Ms. Sheehy? How should the provision be written?

[*English*]

Dr. Kerri Froc: I'd defer to Professor Grant on that because she's the expert on the reconstruction.

Prof. Isabel Grant: I was the person who suggested that you get rid of subsection 33.1(2), because it's not necessary. The standard that the Crown has to prove to remove the defence is already in subsection 33.1(1). Judges know that they have to consider the circumstances.

I think the test, if we wanted to just change that standard.... Even foreseeability of a loss of control would be a more workable standard than a foreseeability of harm. Where it is foreseeable that you will lose control of your actions, then you should bear the risk that those actions are going to seriously harm another person. That burden should not be placed on the victims, who are disproportionately women and girls.

[*Translation*]

Mr. Rhéal Fortin: Let's assume that the idea is to provide an acceptable and valid defence to individuals accused of this type of crime and that it is possible for someone to advance the defence that the self-induced extreme intoxication was not foreseeable. Should we not, at the very least, restrict that foreseeability, as is being done, here?

If it's not restricted, one possibility is that there would be no defence for self-induced extreme intoxication. I might agree with that. I'm not expressing a view one way or the other. I'm trying to consider the matter objectively. Another possibility—

The Chair: Thank you, Mr. Fortin.

[*English*]

Prof. Isabel Grant: The standard is in subsection 33.1(1). It is not in subsection 33.1(2).

The Chair: Thank you.

Next we go to Mr. Garrison for six minutes.

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

I want to thank the witnesses for being here today and for their very valuable testimony.

Certainly, part of the agreement to act quickly, for me, was contingent on holding these hearings, so I think many of us around this table understood that we were acting quickly and would not have agreed to taking that quick action without the guarantee that we were coming back to look at this more carefully. I think you're already demonstrating today why that was necessary.

On the question of the vacuum created, I have just one question. Did it do anything to fill the vacuum by requiring the accused to prove or provide expert evidence that they were in a state of extreme intoxication in order to try to avail themselves of this defence? Was that any sort of improvement?

Prof. Elizabeth Sheehy: I'll just say really quickly—

Prof. Isabel Grant: The Supreme Court of Canada did that in Daviault many years ago. That's always been the case. The Crown simply cannot prove whether the accused was extremely intoxicated, because it does not have access to what the accused consumed or how much, and we cannot compel an accused to provide that evidence to the state. That was already done by Daviault. Section 33.1 does not do that at all. I think section 33.1 does not narrow the vacuum in that regard.

Mr. Randall Garrison: Professor Sheehy, you were going to make similar remarks, I suspect, so please do.

Prof. Elizabeth Sheehy: The new version of section 33.1 doesn't add anything. The Supreme Court of Canada had already established that the burden of proof is on the accused on a balance of probabilities to prove that they were in this state of extreme intoxication. The revised version doesn't add anything.

As Professor Grant pointed out, if the Daviault standard of proof is not incorporated into the new section 33.1, there is a risk that some judges will drop that. That was the first point in her presentation, that we might want to actually have that rearticulated in the section itself.

Mr. Randall Garrison: If I'm understanding correctly, that section maybe should have been a bit more extensive in incorporating the Daviault decision.

Prof. Elizabeth Sheehy: That was Professor Grant's point, yes. There was no vacuum created by the Brown decision with respect to that standard of proof, but in the new version of the legislation, it might be wise to rearticulate that standard of proof.

● (1650)

Mr. Randall Garrison: Okay.

Prof. Isabel Grant: That standard of proof was upheld as constitutional in Daviault.

Mr. Randall Garrison: Right. In the sort of hierarchy of fixes that you suggested, I guess my view of that is that if we could act quickly to enact Bill C-28, we should be able to act quickly on any of these fixes. That would be my hope.

Is there a hierarchy in those fixes, not just in terms of their simplicity, but in terms of their certainty for narrowing the defence?

Dr. Froc, you laid out those three, so maybe I can just ask you that.

Dr. Kerri Froc: As a matter of fact, it was Professor Grant, so I'll allow her to answer.

Mr. Randall Garrison: I'm sorry. Okay.

Prof. Isabel Grant: Thanks. I think I listed them in the order of preference. I think the simplest, but also the most effective, is to get rid of subsection 33.1(2). Judges know how to apply a marked departure standard. They've been doing it for decades in other criminal contexts, like criminal negligence. My preference would be to get rid of it altogether.

The second choice would be to clarify what the standard is but also to reiterate that the burden of proof in showing that something wasn't foreseeable should be on the accused and not on the Crown.

Mr. Randall Garrison: Would the third, then, be the least favourable from your point of view?

Prof. Isabel Grant: The third would retain a standard that's unworkable, but it would shift the burden onto the accused. The best thing to do is to get rid of the standard, but if you want to keep the standard, it needs to be clear that the burden is on the accused to show why he couldn't possibly have foreseen the likelihood of harm. Making the Crown prove that beyond a reasonable doubt is impossible. It's a very high threshold to prove that beyond a reasonable doubt.

That's what we do in the context of the mental disorder defence. An accused who's saying they are not responsible for a crime because they were mentally ill has to prove it on a balance of probabilities. I would say the same should apply here. The courts have upheld that as constitutional in a case called Chaulk and Morrissette.

Mr. Randall Garrison: On the question of the foreseeability standard, shifting that to loss of control rather than the foreseeability of harm—Professor Grant was arguing this—is that narrowing the ability to use the defence or simply clarifying it?

Prof. Isabel Grant: I think it's narrowing it a little bit, but not very much. I think the standard is problematic, and that's why I think either of the other options would probably be better.

I think it narrows the defence by allowing a chance that the Crown will be able to meet its burden and deny the defence to an accused in a particular case. I still think the Crown is going to have a lot of problems with any standard, given the things we've seen in cases like Daviault, Chan and Sullivan.

I think it gives the Crown a bit of a better chance, but getting rid of it gives the Crown a better chance.

Mr. Randall Garrison: Thanks very much.

I know I'm out of time at this point. I want to come back in the next round to the problem of charging that exists.

The Chair: Thank you, Mr. Garrison.

For the next round, we have Mr. Caputo for five minutes.

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, all three professors, for being here.

I think it was Professor Grant who talked about British Columbia. Everybody around this table knows, but I'll repeat it for the benefit of our witnesses, that I was a prosecutor in British Columbia and most of what I did was regarding sexual offences against children. For the benefit of our report writing, what generally happens is that, in some jurisdictions, the police lay the charge, but in British Columbia, the charge comes through a report to Crown counsel and then a prosecutor will look at that. They have to evaluate all defences and whether a legal threshold is met, which is a substantial likelihood of conviction. That's actually quite high a threshold. It's not just likelihood; probably around 90% is what most people would put it at.

If I understand your comments, particularly those of Professor Grant and Professor Sheehy, you're asking how a charge can be laid under the circumstances, because you don't know what might be around the proverbial legal corner when it comes to a defence.

Do I have that correct?

● (1655)

Prof. Elizabeth Sheehy: The complaint is its own evidence....

Go ahead.

Prof. Isabel Grant: Unless you've been able to apprehend the accused immediately, do all the tests and ensure what his alcohol and drug levels were, which is rarely the case in sexual assault, the Crown simply won't have the information as to how intoxicated the accused was at the time of the event. It's just not going to be there.

Given this legislation, meeting that threshold of substantial likelihood of conviction is going to be very difficult in cases where the accused was very intoxicated, even where the standard of extreme intoxication might not necessarily be met.

Mr. Frank Caputo: It's because this is information that is 100% in the hands of the accused.

Prof. Isabel Grant: Yes.

Mr. Frank Caputo: Right.

How can proof beyond a reasonable doubt occur when theoretically this defence could be raised after the Crown's case is in? Do you understand what I mean by that?

Prof. Isabel Grant: Yes.

Mr. Frank Caputo: In other words, the Crown has put its full case in, and then the defence could raise this in its evidence without the Crown being aware.

Does that accord with your understanding of how this might play out?

Prof. Isabel Grant: My worry would be that the complainant has told the Crown, “He seemed really drunk” or “He seemed out of it” or “He seemed high”, so that the Crown will have some indication that this is an issue, and that may impact charging decisions.

I'm less worried about the cases that make it to trial. I worry for the reasons I set out about the standard being unprovable. A woman may be put through a trial with no chance that the perpetrator is going to be convicted. In terms of the impact on sexual assault more widely, I'm worried that the charge won't even be laid to begin with.

Mr. Frank Caputo: You're worried that, at the charge approval or consideration stage, there would be consideration that intoxication, or extreme intoxication, is a live issue here. We may have proven beyond a reasonable doubt not necessarily that there was an assault of a sexual nature but that this person wasn't so intoxicated as to negate the general intent of the offence.

Prof. Isabel Grant: We know that if you're very drunk and sexually assault someone, that's no defence in Canadian law. If you're very, very, very drunk and [*Technical difficulty—Editor*].

Mr. Frank Caputo: I'll pause here.

I believe it was mentioned in Professor Froc's written comments—I may be mistaken—that, in reality, somebody who is in a state akin to automatism by virtue of alcohol.... I don't know how a person who is that drunk, in a state of intoxication, gets to that point, physically.

Professor Froc, do you have a comment on that?

Dr. Kerri Froc: I do indeed.

The problem is that the Supreme Court of Canada, in Brown, specifically addressed that particular situation. Professor Sheehy was a witness before the committee at the time, after Daviault. We know very well that a number of experts have come out to say that alcohol will very seldom get you to that stage, but the Supreme Court said we're not going to rule it out, either. That's one of the problems.

The problem is when you get a combination of alcohol and other drugs, as well, which is appearing with fair frequency in the cases we've seen. We invited, as NAWL, to even put that.... If it never happens that it's only alcohol, why not put that right in section 33.1? That wasn't something taken up.

The Chair: Thank you, Ms. Froc.

Mr. Frank Caputo: I greatly appreciate your time. Thank you.

The Chair: Thank you, Mr. Caputo.

We'll now go to Ms. Dhillon for five minutes.

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): My question will be to any and all of the witnesses.

Can you outline for us the importance of being clear that simple intoxication is not a defence for a crime, which both the Supreme Court of Canada and the government have made clear?

Prof. Elizabeth Sheehy: Yes. That issue is not up for grabs. It's very clear that simple intoxication is not a defence for any of the kinds of crime we're talking about, general-intent crimes. It is a defence for specific-intent crimes, such as murder, for example, but not a defence for these crimes.

The issue, however, from the point of view of complainants, police or prosecutors, is how to tell the difference. Are we dealing with a simply intoxicated person or a person who was extremely intoxicated? That's the difficult thing and a matter of expert evidence. You're not going to know the answer to that until you actually have the expert witnesses before you.

● (1700)

Ms. Anju Dhillon: May I follow up with the next question?

As you know, the onus is on the defendant to prove they were in a state of automatism, not the Crown or the victim. Could you please explain your thoughts on that?

Prof. Elizabeth Sheehy: As Professor Grant pointed out, it's entirely appropriate that the burden of proof be on the accused to prove, on the balance of probabilities, that they were in such a state. It's information and evidence in their hands, not the hands of the prosecution.

Furthermore, it's not considered to be a normal state, that kind of state where the person is not operating with their body and mind together. We require that the accused be the one to bring forward evidence to prove they were in such an unusual state.

Ms. Anju Dhillon: How do you feel about the fact that, with this bill, the prosecutor will have additional means of establishing a commission of the offence, by establishing that the accused's voluntary extreme intoxication constituted criminal negligence?

Prof. Elizabeth Sheehy: I think the difficulty with this legislation is that it suggests the Crown has to prove the foreseeability of loss of control and risk of harm. In particular, I think the second standard is going to be impossible for the Crown to prove. They're going to have to prove it beyond a reasonable doubt, and that's a very high standard of proof. The Crown's going to need two experts, at least, to counter the accused person's two experts. I think proving that a particular drug was likely to lead to violence is impossible. There are no studies, for example, that demonstrate links between specific drugs and crimes of violence.

Ms. Anju Dhillon: Would you have anything to add to that, Dr. Froc?

Dr. Kerri Froc: I've watched your questioning in other hearings and I have reflected on it. I counted, actually.... In the Supreme Court, they said at least two or three times that mere intoxication is not a defence for assault and sexual assault, so in terms of using a complicated area of law to correct misinformation on Twitter or other social media, that is not on.

I would just implore you, particularly because there are these inadvertent effects that we are talking about, which you will probably never see.... It is going to be very difficult to collect data, for instance, on how many charges weren't laid or how many prosecutions weren't done because a defence of extreme intoxication is in the offing. You need to get this right, now.

To say that we needed to act because of misinformation on Twitter.... I agree that something needed to be done after Brown, but you now have the opportunity to fine-tune that and make sure you don't have these unintended consequences.

I just implore you to do that.

Ms. Anju Dhillon: All right. I think that's it for time. Thanks.

The Chair: Thank you, Ms. Dhillon.

Next we'll go to Monsieur Fortin for two and a half minutes.

[*Translation*]

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

Professor Sheehy, you probably know that, in June 2022, Professor Parent, a Université de Montréal professor, said that it may be necessary to expand the definition. According to him, limiting the defence to extreme intoxication does not take into account other states of intoxication that are not necessarily extreme, but that cause a person to completely lose touch with reality, such as psychosis.

I'd like to hear your thoughts on this. Is Professor Parent right to be concerned that the definition of extreme intoxication is too narrow and that it does not cover cases where an individual cites the absence of mens rea owing to psychosis as a defence?

● (1705)

[*English*]

Prof. Elizabeth Sheehy: It seems to me that extreme intoxication will be available for drug-induced psychosis, from what I can tell.

I'm not sure if I am answering your question.

[*Translation*]

Mr. Rhéal Fortin: Professor Parent said that, by limiting extreme intoxication to a state akin to automatism, the government was discounting states of intoxication that do not disrupt the individual's awareness, but that affect their relationship with reality, such as psychosis.

Professor Sheehy, I'd like to hear your take on Professor Parent's view, seeing as you're an expert on the law. Since I have just 20 seconds left, please keep your answer brief.

[*English*]

Prof. Elizabeth Sheehy: I'm sorry. I guess I don't understand the context of his remarks.

Is he suggesting that the new legislation is too narrow or that our understanding of the defence of extreme intoxication is too narrow?

[*Translation*]

Mr. Rhéal Fortin: In his view, the definition of extreme intoxication is too narrow and may need to be expanded to include other states of intoxication, ones that are not extreme but that cause the person to lose touch with reality, such as psychosis.

[*English*]

Prof. Elizabeth Sheehy: Well, I guess I can only repeat what I said, which is that I believe that drug-induced psychosis—because it does involve a break from reality—has the potential to be the basis for an extreme intoxication defence. I think the case law may be evolving to accommodate his concern that it's too narrow.

The Chair: Thank you, Monsieur Fortin.

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

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

Two and a half minutes, obviously, is very short.

On the question of the impact on charging, if we fine-tune this with any of the three options that Professor Grant has suggested to us today, will that have an impact on the potential reduction of the number of charges that are laid?

I guess Professor Grant would be the logical one to answer that.

The Chair: I believe she had to leave.

Mr. Randall Garrison: Perhaps either one of you two could answer that, then.

Prof. Elizabeth Sheehy: The hope would be that any of those amendments would change the worrisome spectre of prosecutions being dropped. This is not an exact science, obviously, drafting legislation and expecting to produce particular results. I think it's fair to assume that a change in the legal standard, as explained in the legislation, would have an impact on prosecutorial decisions.

Mr. Randall Garrison: I know the expertise you have is in constitutional law, but I have a question about whether there could be a way prosecutorial guidelines could be used, both in terms of extreme intoxication cases and more broadly in sexual assault cases, to ensure that more charges are laid.

Prof. Elizabeth Sheehy: Some of this is a policing issue. As you know, we have a very widespread, profound and persistent problem of police unfounding of sexual assault in Canada. The rates in some jurisdictions remain very high. Prosecutorial guidelines won't change that for those provinces that use police as their charging decision-makers.

Yes, prosecutorial guidelines can be helpful. I imagine most provinces actually have prosecutorial guidelines on sexual assault, and I'm sure that some provinces will be issuing ones that include extreme intoxication as part of their effort to guide Crown prosecutors in making their decisions in these cases.

Mr. Randall Garrison: Great. Thank you.

I'm sure there's nothing meaningful left of time, so thanks very much.

The Chair: Thank you, Mr. Garrison.

Thank you to the witnesses—Professor Sheehy, Professor Froc and Professor Grant, who had to leave a short time ago.

This concludes our first round. We'll take a minute to suspend and get our next witness on board. Then, for the sake of members, we'll be going to about 5:40. We'll have a slightly shorter round, but we only have one witness.

Thank you. I'll suspend briefly.

● (1710)

_____(Pause)_____

● (1710)

The Chair: We will now resume with our second panel.

Our second panel consists of Ms. Suzanne Zaccour of the National Association of Women and the Law.

Ms. Zaccour, you can speak for five minutes, and then we'll begin our round of questions.

Ms. Suzanne Zaccour (Head of Feminist Law Reform, National Association of Women and the Law): Thank you.

Hi everyone. My name is Suzanne Zaccour, and I am the head of feminist law reform at NAWL, the National Association of Women and the Law, L'Association nationale Femmes et Droit.

NAWL is a national not-for-profit organization that advocates for women's rights in Canada. We've been doing this work since 1974, and have consulted many times with many governments on the development of legislation that protects women's rights, including major reforms of sexual assault law in the 1980s and the 1990s.

The National Association of Women and the Law has three major concerns regarding this bill.

First, we need to consider all impacts of the law, not just its impact on acquittals. Even if an accused does not have a valid defence, he can still claim extreme intoxication to influence the victim, the police, and prosecutors in their decision to report, charge, and plea bargain. I probably don't have to remind you that most sexual assault and domestic violence cases never make it to trial, so it's really important to consider the law's impact before the court process. We are particularly concerned about cases not being brought forward because the accused was drunk. To make things really clear to victims, to police and to prosecutors, we have recommended that the law explicitly state that alcohol is presumed not to cause extreme intoxication. Also, adequate training and public information will be necessary.

Second, we are concerned about the Crown's ability to prove marked departure, given the bill's mention of the foreseeability of both the risk of extreme intoxication and the risk of harm. Will the use of any street drug guarantee the success of the defence because there is no way to know what's really in there? Or will an accused who has taken these drugs before say it wasn't foreseeable because he has done this before and he didn't lose control? Or will an accused who has not taken these drugs before say the same thing: "I've never done these drugs before, so how was it foreseeable that my body would react in this way?" Will a man who regularly assaults his wife while drunk say that losing control on that particular occasion wasn't foreseeable because he's a habitual drinker and he has never reached extreme intoxication before? The courts, but also police and prosecutors, must receive proper guidance on these issues.

Our third point is that we need a commitment to reviewing the law after these hearings and documenting the use of the defence, because a lot of the conversation around this bill has been about how this defence is allegedly very rare. That's what we keep hearing, but how could we know that if most accused have been completely barred from raising the defence for the past 27 years? You've heard research presented by Professor Sheehy in the previous panel that suggests that the extreme intoxication defence could be used more regularly than anticipated. And, as was made clear, we don't know what the impact will be of this defence outside of the trial, for example in charging decisions.

The bill has now passed. How are we going to find out if the defence is indeed rare and working as intended or if it becomes the new cover-up for drunk violence against women? Are repeat abusers using the defence? Does it succeed when alcohol alone is involved? Are the courts strict or permissive? We need answers to those questions.

We ask that your committee recommend a three-year review of the law. I'm speaking with you today at a time when it's too late to amend the provisions, but there is still time to get this issue right.

I thank you for listening and thank you for giving this issue the consideration it deserves.

● (1715)

The Chair: Thank you.

I believe I have Mr. Brock for six minutes.

Mr. Larry Brock (Brantford—Brant, CPC): Thank you, Chair.

Thank you, Ms. Zaccour, for your presentation today. I have a few questions for you. I'm going to give you an opportunity right from the outset. Is there anything you want to expand upon with those three key suggestions that you finished off with in terms of how this bill can be improved?

Ms. Suzanne Zaccour: Absolutely. Thank you for the opportunity.

I want to maybe add something more on the use of alcohol alone in causing extreme intoxication. There has been mention of the fact that it is doubtful at a scientific level that alcohol alone can cause extreme intoxication. However, for the law to cause damage, you only need one expert to say, yes, it happens. You don't even need that. You only need one police officer or one prosecutor or one victim to think that an expert could say that.

Our organization really wants to emphasize that it's not just how the law is designed to work, but how it will actually work in practice that should really receive proper consideration.

Mr. Larry Brock: This probably explains why there's an emphasis, in your mind, that a three-year review would be warranted in the circumstances. We're wading into new territory right now. Given the lack of meaningful consultation with numerous groups across this country, we can all agree this particular piece of legislation was hastily put together. There was no urgency. There was a requirement for the government to react, but there wasn't that pressing urgency by which we have the bill that is now before us.

I appreciate your commentary, and I really appreciate your first point about the impacts of the law. I'm a former prosecutor. I have 30 years of prosecutorial experience. I prosecuted a number of offences involving women as the victims—sexual assault, aggravated assault—where these types of defences came up. I only had one case where I actually lost to a section 33.1 defence, but I'm aware of the overall impact that it has for victims.

Given the vagueness with which this legislation has now been drafted, I foresee the availability of this defence to open up much more litigation than we have currently seen. Inherently with that, that means more victims are going to be traumatized by the length of time by which these defences are going to be drawn out in courts.

Do you share that concern in terms of the delay issue and the overall impacts on victims?

● (1720)

Ms. Suzanne Zaccour: Absolutely.

I want to emphasize the fact that the law I learned in law school is really different from what I hear from victims. I've heard from victims. They said they're not pressing charges because there's a limitation. It's prescribed, which, of course, doesn't make sense for sexual assault. I've had victims say that they're not going to press charges because there was no penetration, which also doesn't make sense with the state of the law.

It's really important to consider that the law is not always applied in this very sophisticated way. The way the Supreme Court applies the law is not the same way that police officers or prosecutors across the country will necessarily apply the law.

Mr. Larry Brock: Another concern I have is the issue regarding alcohol as being the sole intoxicating substance. I seem to recall, long before the Supreme Court of Canada issued the Brown decision, the jurisprudence made it abundantly clear to prosecutors, particularly in Ontario, that alcohol alone would never succeed in a defence under section 33.1. Now, with this new legislation, and some of the reports I'm reading from some of the professors who testified before you, it would appear that alcohol is indeed open to that type of consideration.

Would you agree with that?

Ms. Suzanne Zaccour: Yes. The discourse we have heard from the Supreme Court and from commentators is that alcohol is unlikely to lead to extreme intoxication. That means that as soon as someone proves there was extreme intoxication, there's no way to prove the foreseeability. Everyone is saying it's not foreseeable that alcohol would lead to extreme intoxication.

The other issue is that.... NAWL has consistently advocated for judicial training. There's been some progress on this, but it continues to be of concern. Again, just because an academic says something in an article or the Supreme Court even says something, it doesn't mean that it will reach all judges and that it will be applied consistently.

Mr. Larry Brock: That's the problem, because judges will see things much differently. There often is not that consistency that one would expect, particularly in this area of the law, and I think that's why the professors really stressed ultimately tightening up the legislation to make it abundantly clear what authority the judges have in these circumstances.

Ms. Suzanne Zaccour: The more the law is clear, obviously, the better it is for everyone. We shouldn't trust that people will just know all the jurisprudence very well. The law should be very clear and easy to interpret, in my opinion.

Mr. Larry Brock: Right. You also, I believe—

The Chair: Thank you.

Mr. Larry Brock: Oh, is my time up?

The Chair: Yes.

Mr. Larry Brock: All right. Thank you, Mr. Chair.

The Chair: Next, for six minutes, we have Mr. Naqvi, please.

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

Thank you for appearing, and I also want to thank the witnesses who were before us earlier.

I'm going to ask a few questions because I am a bit confused. I was talking to Dr. Froc earlier as well, just to alleviate my confusion and better understand.

Let's just start with some really basic thoughts of yours on the defence and the law that we're speaking of. Did you agree with the defence under section 33.1 that existed before it was struck down by the Supreme Court of Canada?

● (1725)

Ms. Suzanne Zaccour: Do you mean, did I think it was a good policy choice, or did I think it was constitutional?

Mr. Yasir Naqvi: That's a good question. Tell me about both.

Ms. Suzanne Zaccour: I know that NAWL, our organization, was involved in pushing for this legislation, so it's definitely something that we believed should be addressed. We believe that the defence of extreme intoxication shouldn't just be available without safeguards.

Obviously, the Supreme Court of Canada has ruled this provision to be unconstitutional, so it's not an option to go back there, but, as Professor Froc has explained, it doesn't mean that there are no other options on the table.

Mr. Yasir Naqvi: What was your reaction to the Supreme Court of Canada's decision in the Brown case? Did you agree with the analysis? Do you agree with the decision, or do you have concerns about the court's reasoning when dealing with the previous section 33.1?

Ms. Suzanne Zaccour: We believe that women's rights and interests could have received more consideration. I also want to add that it wasn't a complete surprise. There has been commentary for a while saying that these provisions might be unconstitutional, and, obviously, the litigation doesn't get.... Someone who raises constitutionality to the Supreme Court doesn't get a decision in a day. It often takes many years.

It was, I might say, reasonably foreseeable that we could be put in this situation. That's why NAWL's primary concern, or one of the things we've been most vocal about, has been why the consultations hadn't taken place before. If there was such a need to act so quickly, which is hard to understand given the minister's insistence that the defence is so rarely used, then why weren't these consultations started much earlier with women's groups?

Mr. Yasir Naqvi: I've heard that argument before. I don't know if one could presuppose a Supreme Court decision and be ready for all eventualities at all times. I don't 100% agree with that thought process, but that's just my opinion.

Don't you think, by the fact that the Supreme Court decision came, that there was a gap, a vacuum, that needed to be addressed as quickly as possible in order to protect women? Was the position that all parliamentarians took by fast-tracking the drafting and passage of the legislation, in your view, not an appropriate way to move forward? Should we have delayed it? Would that have been a good public policy?

Ms. Suzanne Zaccour: I think it's one way or another. Either it's such a rare defence that it doesn't matter that the standard is very high for the Crown, because it's such a rare defence that it never comes up and hasn't come up since the Brown decision, or this is a very urgent matter for which there is no time to even have these hearings we're having today.

I don't think it is fair to women's groups, which have been instrumental in working toward just getting our basic sexual assault provisions in the Criminal Code, to rush these consultations. As Professor Froc explained, we felt that the way we were consulted was a little bit after the fact. I don't want to presume the intention for these consultations, but we definitely felt that a couple more weeks to make sure it was done better would have been preferable.

It also depends on whether you are going to go away from this committee and then make amendments to the law or if we're being heard after the fact. There have now been consultations, but we want meaningful consultation so that it's not just us talking at you. We want our concerns to be, ideally, integrated in the law-making process.

Mr. Yasir Naqvi: I appreciate that. Thank you for that.

I also heard in your remarks that you're concerned about the law, of course, but also, critically, about the application of the law. Am I correct that in a lot of the women's groups the bigger concern...? The law may be good or perfect, but how it's applied by the police, prosecutors and judges is a bigger concern because its applicability across the country has not been identical or the same. Is that a big issue for your organization?

● (1730)

Ms. Suzanne Zaccour: Yes. As a sexual assault law scholar, I can say that application is always our biggest concern. I wouldn't say that the law is perfect and the problem is application. We have concerns with the law. We believe that the law is feeding and giving possibilities for the application to be even worse because of the lack of clarity.

Mr. Yasir Naqvi: A lot of the conversation in our earlier panel was around subsection 33.1(2) and whether there should be a standard or not. This is where I'm getting a little concerned and confused. I think that providing for a standard in subsection 33.1(2) will allow for a more uniform application of the law versus the absence of a standard, where different judges, prosecutors and police officers may interpret the law differently.

Ms. Suzanne Zaccour: Can I answer?

The Chair: Yes, answer very briefly, Ms. Zaccour.

Ms. Suzanne Zaccour: It's not a standard. As Professor Grant explained, the standard is “marked departure”. What is given in the subsection we're criticizing is factors. It's always the question, why these two factors? What were all of the other factors that you decided not to include in the law, and why? How are these factors to be weighed? That's what we think will lead to inconsistent and problematic application.

Mr. Yasir Naqvi: Thank you very much.

The Chair: Thank you, Mr. Naqvi.

It's over to you, Monsieur Fortin, for six minutes.

[*Translation*]

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

Ms. Zaccour, thank you for being here.

You said the minister didn't consult you before bringing in these provisions. If he had, what would you have told him?

Ms. Suzanne Zaccour: We probably would have told him what we said today. We would have highlighted the importance of making sure not only that the Crown can prove the standard, but also that the factors are clear and relevant.

It's reasonable to say that someone is being irresponsible when they become intoxicated knowing there is a risk that the intoxication could lead them to cause harm to another person. Similarly, someone is being irresponsible when they become intoxicated knowing that they are at risk of losing all control over their behaviour. Why, then, include both aspects? Professor Grant pointed this out: Are both necessary? Is it a standard? Are they factors?

We will have to push hard to get the law clarified. Since the beginning, we've criticized the necessity of proving that the risk of harm was foreseeable.

Mr. Rhéal Fortin: Subsection 33.1(2) states that “the court must consider the objective foreseeability of the risk”. This is a rare situation to begin with, and every factor makes it that much rarer. The objective foreseeability of the risk that the person's consumption of intoxicating substances could cause extreme intoxication has to be proven. That strikes me as a very rare situation.

Do you disagree?

Ms. Suzanne Zaccour: That's a big question.

It depends, to some extent, on the degree of risk that has to be proven. I don't think the law makes that clear. Is it necessary to prove that it was possible that it could happen? Probable? Plausible? That is where the law is open to interpretation.

A judge could easily consider that there is always a risk of losing control when a person becomes intoxicated. Others might argue that most people who become intoxicated do not become violent, as was mentioned earlier. Regardless, some people definitely become violent before reaching a state of extreme intoxication.

Ultimately, it's never foreseeable. That is why my recommendation is to monitor how the law ends up being interpreted, because the parameters proposed for guiding the courts could obscure the meaning of the law, rather than clarify it.

● (1735)

Mr. Rhéal Fortin: Besides getting rid of subsection 33.1(2) altogether, what amendments would you make to the provision if you could?

Ms. Suzanne Zaccour: Professor Grant talked about getting rid of it, which is certainly a worthwhile suggestion.

Assuming that the provision was here to stay, I would say that the risk of an individual becoming violent and the risk of them losing control over their behaviour are each sufficient, on their own, to hold the person responsible for their actions. I said that earlier. In my opening remarks, I gave the example of a man who regularly assaults his wife while drunk. The fact that he becomes violent when he drinks is foreseeable, but it's not necessarily foreseeable that he will reach a state of extreme intoxication. Regardless, even when he is in control of his behaviour, he is violent towards his wife.

That is why this dual standard is excessive, in my view. My recommendation would certainly have been to clarify it, so as not to leave it up to the courts to determine what a reasonable person would have done and whether it amounted to a marked departure. I think the degree of risk should have been assessed, so that it was clear whether it was possible, plausible or probable.

Those are things I encourage you to think about.

Mr. Rhéal Fortin: I realize that the case law covers a range of viewpoints, but we're talking about people who consume intoxicating substances and reach a state of extreme intoxication. Those are pretty serious circumstances.

Do you not agree that, once a person has consumed enough of an intoxicating substance, they are necessarily at risk of reaching a state of extreme intoxication and thus causing harm to someone else? I'm not saying that it will necessarily happen; I'm simply saying that there is an objective risk.

I don't know how much of an intoxicating substance amounts to extreme intoxication, but it goes without saying that it's a lot. Some might argue that it's not a problem. Nevertheless, when an individual consumes a large quantity of the substance, isn't it automatically foreseeable that the person could reach a state of extreme intoxication?

[*English*]

The Chair: Thank you, Monsieur Fortin.

I will give you a few seconds to answer that really quickly, Ms. Zaccour.

[*Translation*]

Ms. Suzanne Zaccour: One of the problems is that a good many people become intoxicated but don't necessarily know what they are consuming or how much. How many beers does it take for extreme intoxication to become foreseeable? Is it five, 10, 15, 20, 25 or 30 beers? I don't know. That's why the people consuming the substances have to be experts.

As an advocate for women's rights, I'm always concerned about the risk that someone who puts themselves in this type of situation and loses control over their behaviour could become violent towards a woman or someone else.

Mr. Rhéal Fortin: Thank you, Ms. Zaccour.

[*English*]

The Chair: Thank you, Monsieur Fortin.

Mr. Garrison, we'll go over to you for the last round.

Mr. Randall Garrison: Thank you very much, Ms. Zaccour.

You did say, sort of offhand, “a couple more weeks”. I have to respond as a parliamentarian: In parliamentary terms, another couple of weeks would have meant missing the spring session completely, and we would have been here this fall, at this time, trying to deal with this.

I know that's sometimes hard for people to contemplate, but for Parliament to move as fast as we did was a minor miracle. If we hadn't at that point, we would likely be here now. We're in a minority Parliament, so we also risk the instability of a minority Parliament not getting to act at all. I think sometimes there is a greater risk than is generally understood, if we had not acted.

I guess that leads to my question again of whether there was or still is a vacuum to fill. I think I know your answer, but I would like you to address that directly.

Ms. Suzanne Zaccour: Thank you.

If I could, I will just maybe react to the preamble to your question. It had a preamble, contrary to the law—we advocated for it to have a preamble.

I guess the question I can send back to you is, were we useful today? How useful were we? I say “we” meaning NAWL and the law professors you heard previously. Was it worth the delay? That's a question you can answer because you have been listening.

I do recognize the difficulty in getting this machine to work fast. We're certainly hoping.... We're advocating on a lot of issues and I can tell you that many women are concerned that the most harm and violence they receive are not addressed by this action. We would like to see this commitment in other issues, which I know you believe in, too.

I forgot the actual question. I only answered your preamble. I'm sorry.

● (1740)

Mr. Randall Garrison: Do we still have a vacuum?

Ms. Suzanne Zaccour: We believe it is still worth taking the time, now that perhaps the dust has settled. I know that misinformation was a concern for Parliament. We believe there's still good reason to amend the law and to close a gap, but also to clarify and make the law easier to apply.

Mr. Randall Garrison: I know at the time we had our discussions, holding these hearings was a gesture of good faith. It wasn't just for the sake of holding hearings, but if we needed to make further adjustments, these hearings would inform us about that and provide that possibility.

Ms. Suzanne Zaccour: We certainly hope so.

Mr. Randall Garrison: I'm sometimes viewed as overly optimistic, but I've only been in Parliament for 11 years. Sometimes I've seen us do the right thing.

My last specific question, because I know we're running out of time, is on the standard of foreseeable harm versus the loss of control, which was very clear in the previous panel. Would you see it useful for us, if we weren't going to eliminate the section, to rewrite it so the focus is on foreseeability of loss of control rather than harm?

Ms. Suzanne Zaccour: Certainly the argument can be made that if it's foreseeable that you're going to lose control.... If we believe the necessity of this defence, and the whole premise is that when you lose control, you lose control and there is no telling what you're going to do, then it seems sufficient to hold someone responsible if the intoxication was voluntary.

Perhaps one or the other could also be sufficient, but we feel that having to prove that beyond a reasonable doubt, with the concerns we have regarding how courts will interpret who this reasonable person is and what kinds of risks they take in a society where most of these intoxicants are legal but people still take it.... What does the reasonable person do in these circumstances?

These are very difficult questions, and the courts have not always seen eye to eye with women's organizations in terms of what kind of risk is reasonable to place women in.

Mr. Randall Garrison: Thanks very much.

I do take seriously what both you and the other panel said, and the Native Women's Association of Canada, that there are many other aspects surrounding this where we need better supports, better education. I know we will all take those suggestions seriously in our future work.

Thanks very much.

The Chair: Thank you, Mr. Garrison.

I want to thank our witness, Ms. Zaccour, for a very informative session, and I want to thank all our members.

Before we adjourn, I want to remind members that for the Thursday, November 3, meeting, if there are any witness names they haven't sent in, to send them in. Currently we have three confirmed, so just have your whips please look into that if there are any witnesses who need to be informed.

Thank you very much for a successful meeting.

The meeting is adjourned.