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Self-Induced Intoxication as a Defence

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In 1991 a Quebec provincial court judge acquitted Henri Daviault, a seventy-two-year-old man, of sexual assault (on a sixty-five-year-old wheelchair-bound woman) because he had a reasonable doubt about whether the accused, by virtue of his extreme intoxication, possessed minimal intent to commit the offence. The Crown then decided to appeal the case, and in 1993 a Quebec court of appeal judge overturned the previous Daviault ruling (acquittal), finding him guilty of sexual assault.

Henri Daviault appealed to the Supreme Court of Canada. The Supreme Court heard the *Daviault* appeal on 4 February 1994, and the decision announced on 30 September 1994, was a six to three judgment (*R. v. Daviault*, [1994] 3 S.C.R. 63). The majority decision was that it was consistent with the principles of law to permit the accused to raise his state of intoxication in his own defence. Furthermore, it was considered, the defence could be successful if the accused was able to demonstrate that his state of intoxication was extreme to the point of being akin to automatism or insanity at the time he committed the offence. The Supreme Court judgment ordered that Daviault receive a new trial. (It was determined later that the accused could not fairly be retried because of the intervening death of the alleged victim. As a result, the accused was acquitted.) Because of the Supreme Court decision, it became permissible for the first time for accused persons to use the defence of self-induced intoxication for general intent crimes such as sexual assault.

This decision provoked strong negative responses from among the general public, women's organizations, and members of Parliament. This eventually led to hearings and consultations and new criminal legislation – the Self-Induced Intoxication Act.

Self-induced intoxication as a defence in criminal cases had already been highlighted for discussion in a process of law reform, proposing a significant overhaul of the General Part of the Criminal Code of Canada (Bondy 1996).¹ The relevant passages in these discussion documents did not make explicit reference to the issue raised by *Daviault* (i.e., did not explicitly address automatism linked with alcohol use as well as with sexual assault simultaneously) but did present a complete draft of legislation that might have addressed the *Daviault* decision. Parliament then enacted a new law to eliminate self-induced intoxication as a defence for crimes such as sexual assault (House of Commons of Canada, Bill C-72, 1995).

This case study examines the events and process leading to the new law. It is quite different from the cases reviewed in the previous chapters as it deals with a policy change focusing on specific individuals rather than population-oriented policy. Also, the intervention involved punishment rather than prevention. Further, this issue appeared to have arisen suddenly and to have reached a definitive legislative conclusion equally rapidly. And, while this case deals with alcohol-related harm just as do many of the other cases, it involves other actors and issues, including violence against women (women's groups, which are a major political power in Canada, mobilized to change the law); alcohol addiction or abuse as a disease rather than a crime; and fair treatment in the courts for disadvantaged populations. The case involved players not involved in other case studies considered in *Sobering Reflections*. The key events of the case study are summarized in Table 18.1.

Since there is a growing interest in more individually tailored interventions and prevention efforts, the *Daviault* case provides a worthy opportunity for study. It serves as a contrast to the other cases presented and, thus, functions to illuminate some aspects of the social process involved in policy making.

THE GENERAL PART OF THE CRIMINAL CODE AND THE DEFENCE OF SELF-INDUCED INTOXICATION FOR ASSAULT CASES

Intoxication as a defence emerged in case law under the British common law tradition (which applies in Canada), with decisions made by judges under case law being enshrined every now and then in legislative codes. Within this system the legislature could overturn the decisions of the judges. However, with the adoption of the Canadian Charter of Rights and Freedoms in 1982 the situation fundamentally changed. Since then, any legislative enactment has been subject to review by judges on whether it conforms to the charter.

The General Part of the Criminal Code of Canada defines crimes of general intent and crimes of specific intent along with the defences available for

those crimes. For instance, for the specific intent crime of murder, conviction requires at least an intent of causing grievous bodily harm. To be convicted of a crime of general intent requires demonstration of a lower degree of volition and calculation. Under general intent crimes the only volition necessary may be that the physical acts of the crime were carried out voluntarily or under the control of the perpetrator. Often, specific intent crimes have lesser offences included under them – crimes that require only general intent and that carry lesser penalties. Thus, a charge of manslaughter is automatically included with a charge of murder and comes into play when evidence of the specific intent for murder is not demonstrated. However, as we shall discuss, there is no lesser crime included within the general intent crime of sexual assault.

Before *Daviault*, intoxication could be argued to show that the defendant wasn't sufficiently in his or her right mind to form a specific intent, but this defence could not be raised in defence of crimes of general intent. The justification offered for this in the precedents prior to *Daviault* was that the fact of having taken a drink at all was sufficient evidence of a "guilty mind." This idea that taking the first drink should be assumed to indicate a general intent to commit a crime has bothered a number of judges in modern times, as it did the prevailing side in the Supreme Court in the *Daviault* decision.

The very distinction in law between crimes of general and specific intent, historically, emerged as British courts struggled with the issue of intoxication as an excuse. The exception whereby intoxication could be an excuse for specific intent crimes was worked out around murder, when judges starting getting uncomfortable sentencing someone to death who had been "out-of-their-skull" drunk at the time of their offence. A person who was intoxicated and killed someone could use the defence of being intoxicated to show that she/he did not have the "guilty mind," or specific intent to murder, and could then be found guilty of a lesser included offence (manslaughter), which requires only general intent. Intoxication was no defence for the general intent crime of manslaughter, which required only a level of intention that could be equated with drinking.

The *Daviault* case happened to be at the cross-roads between two problems in the law. First, sexual assault is a general intent crime. Its classification as a crime of general intent is viewed by some to have beneficial effects for women's rights. Because it does not require "specific intent" there are no "lesser" included offences, as in the case of murder. Thus the accused is either guilty of sexual assault or not guilty at all. This all-or-nothing character of the law heightened the importance of issue of whether intoxication could serve as an excuse for a crime.

Thus, at the time of *Daviault*'s conviction, intoxication could not be raised in defence either of sexual assault or of other crimes of general intent. Intoxicated offenders are permitted to argue in court that they were

incapable of forming the sophisticated intent needed for specific intent crimes but not that they were incapable of forming the minimal intent for such offences as sexual assault.

Offenders do have other defences they can use for general intent crimes, including insanity and automatism. The latter refers to a state that renders one incapable of consciously controlling one's behaviour, a state wherein one is incapable of forming the minimal intent required for general intent crimes. The Supreme Court decision in *Daviault* connected the intoxication defence with the automatism defence for a general intent crime. Under the decision a defendant could argue that his extreme intoxication caused him to behave like an automaton; therefore, he was incapable of forming the general intent to commit sexual assault.² Applying the standard of behaving "like an automaton" to intoxication was new with the Supreme Court's *Daviault* decision, which is why the case was returned for a new trial under the new standard.

THE DAVIAULT SUPREME COURT CASE

The Majority Decision

The majority decision was that the intoxication defence could be successful if the accused could "demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity," as Mr Justice Peter Cory wrote. Until the Supreme Court judgment in *Daviault*, the general rule was that self-induced drunkenness could not be a defence against a sexual assault charge or other crimes of general intent. Mr Justice Cory said that a narrow exception to the rule was necessary in order to avoid infringing on an accused's constitutional right to life, liberty, and security of the person as well as her/his right to be presumed innocent. If the accused was so drunk that he did not know what he was doing, then he could not have had the required guilty mind to have voluntarily committed an illegal act. Supporting Cory were the court's two women justices, Claire L'Heureux-Dube and Beverly McLachlin, as well as Chief Justice Antonio Lamer and Justices Frank Iacobucci and Gerard La Forest.

The court ruled that it was in contravention of the rights of the accused to not permit evidence of intoxication if that state resulted in a mental impairment akin to automatism or insanity. In other words, they ruled that evidence of extreme intoxication would be admissible in such cases if the offence itself had occurred as the result of behaviour over which the accused had no conscious control (such as sleepwalking or a psychotic episode). The ruling describes it as the "rarest" of situations in which such a defence would be successful. The ruling resulted in ordering a new trial of the original offence.

The Dissent Opinion

Justices John Sopinka, Charles Gonthier, and Jack Major dissented. In a stinging dissent, Mr Justice John Sopinka wrote that one of the main purposes of the criminal law is the protection of the public, and he maintained that voluntary drunkenness should not be an excuse to commit rape.

Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community. The fact that the accused has voluntarily consumed intoxicating amounts of alcohol cannot excuse the commission of the criminal offence unless it gives rise to a mental disorder ... Individuals who render themselves incapable of knowing what they are doing through the voluntary consumption of alcohol or drugs possess a sufficiently blameworthy state of mind that their imprisonment does not offend the principle of fundamental justice which prohibits imprisonment of the innocent.

(R. v. Daviault, [1994] 3 S.C.R. 63)

MEDIA REPORTS AND PUBLIC REACTION

This case likely generated more media, public, and legislative attention over a short term than any other Canadian court decision in recent decades. The reactions from major players were decisive and typically unequivocal, as is noted below. Table 18.1 provides a chronology of events, particularly those pertaining to lobbying activities, decision milestones, and events leading up to the new legislation.

The *Daviault* case received a great deal of media attention. The number of articles on self-induced intoxication as a defence skyrocketed in 1994 and 1995. The majority of articles presented health (including alcohol abuse), public opinion, and legal arguments (see Figure 18.1) and the main actors mentioned were the federal government (including the justice minister), judges, defendants, victims, and private citizens (see Figure 18.2).

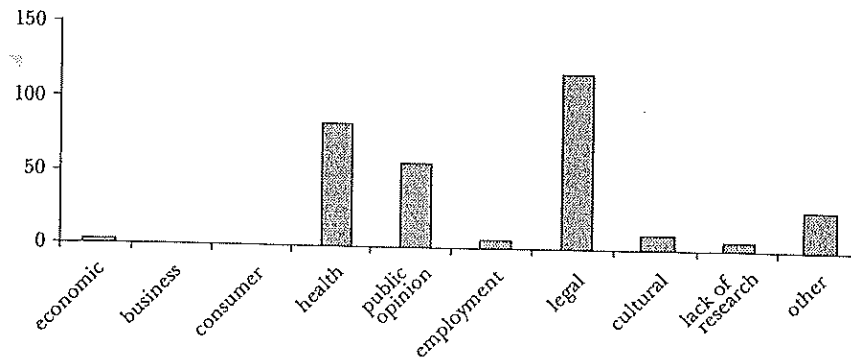
The day after the *Daviault* decision, many newspapers across Canada wrote front-page news stories. The front page of the *Edmonton Journal* read, "Too-Drunk Defence Allowed: Rape Ruling Outrages Women" (Bindman 1994a). The front page of the *Toronto Star* carried the headline "Drinking Ruled a Rape Defence: Feminists Outraged at Supreme Court Decision" (Vienneau 1994a) and presented the issues from the point of view of women in law. Vienneau (1994a, A1) wrote that the executive-director of the National Action Committee on the Status of Women, Beverly Bain, said that the ruling was "absurd," that "it sets a bad precedent" and "gives a green light" to men to claim they were intoxicated when they raped a woman. She also maintained: "the reality is that getting drunk is really a matter of choice." This article also reported that a Queen's University law professor,

Table 18.1

Chronology of events: Intoxication as a defence for sexual assault

1987-93	<ul style="list-style-type: none"> • The General Part of the Criminal Code is criticized for no longer reflecting the values and concerns of contemporary Canadian society.
1991	<ul style="list-style-type: none"> • Quebec provincial court judge acquits Daviault of sexual assault because he had a reasonable doubt about whether the accused, by virtue of his extreme intoxication, had possessed the minimal intent to commit the offence.
1993	<ul style="list-style-type: none"> • Minister of justice begins Criminal Code Reform Process. • 28 June. A consultation "White Paper," "Proposals to amend the Criminal Code (general principles)," proposes changes to the General Part of the Criminal Code. • Quebec court of appeal judge overturns the <i>Daviault</i> ruling and finds him guilty.
1994	<ul style="list-style-type: none"> • 4 Feb. Supreme Court of Canada <i>Daviault</i> appeal is heard. • 30 Sept. Supreme Court Decision on <i>Daviault</i>, the appeal is allowed and a new trial is ordered. • Oct. Technical report no. 1 discusses options for dealing with self-induced intoxication as a defence, comments requested by 28 Feb. 1995. • Nov. Toronto women's groups declare 25 February a National Day of Action to protest <i>Daviault</i> decision. • 12 Nov. Technical report no. 2 poses specific questions to guide the public submissions. • 16 Nov. Bill S-6 introduced by Senator Gigantes (creates a new offence, whereby committing a criminal act while intoxicated is a criminal offence). • Dec. Justice minister reported looking at the possibility of amending the Senate bill as the basis for a new bill. • 9 Dec. Consultations on intoxication held by the justice department in Ottawa, with key women's groups. • 28 Dec. Justice minister reports that, with the defence being used successfully again, he will have a new law ready by early February 1995.
1995	<ul style="list-style-type: none"> • Jan. Public submissions for intoxication and automatism are considered. • 24 Feb. Bill C-72, first reading. • 27 Mar. Bill C-72, second reading. • 9 May. Justice department meets with key women to discuss Bill C-72. • 6, 7, 13, and 15 June. Standing Committee on Justice and Legal Affairs hears public submissions on Bill C-72. • 8 June. Consultation on Violence against Women held by the justice department in Ottawa. • 16 June. Standing Committee on Justice and Legal Affairs reports to Parliament with two revisions to Bill C-72. • 22 June. Revised Bill C-72 passed as the Self-Induced Intoxication Act. • Aug. Justice minister decides not to refer the new act to the Supreme Court. • 15 Sept. Self-Induced Intoxication Act comes into effect.

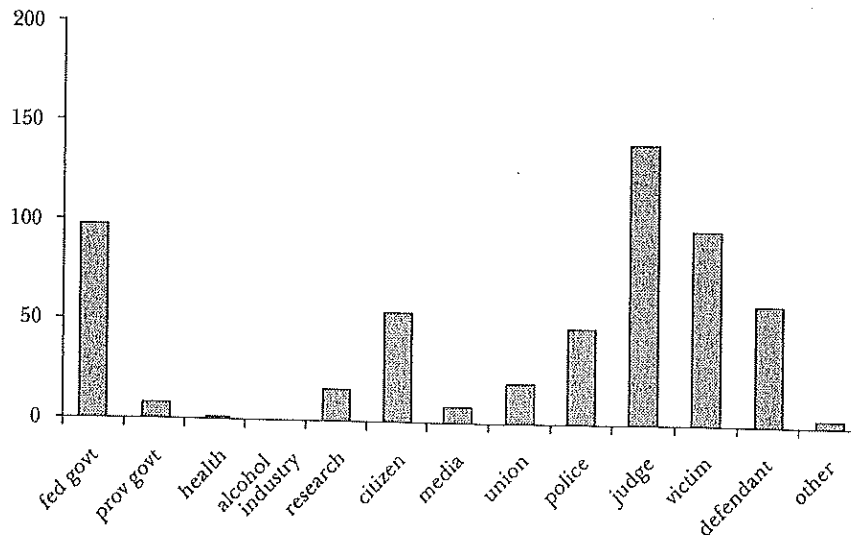
Fig. 18.1. Policy rationales in newspaper coverage of intoxication as a defence (n = 165)



Sheila McIntyre, commented: "this pure law they've just registered says the robot should be deemed innocent – and the person he injured doesn't fit into the law's construction." (Vienneau, 1994a, A1).

Several editorial articles were written in the first two months (*Toronto Star* 1994a, 1994b; *Edmonton Journal* 1994a, 1994b, 1994c). In the article, "Drunkness Can't Be Excuse for Rape," (*Toronto Star* 1994a, A22), the editor wrote:

Fig. 18.2. Policy actors mentioned in Canadian newspaper articles, intoxication as a defence (n = 165)



Canada's highest court has declared open season on women. The ruling is appalling on several levels. Obviously the court was aware of the time bomb buried in the *Daviault* decision. To defuse it, along with their guilt about the ruling no doubt, the justices advised us not to worry because the defence wouldn't be used very often. Justice Minister Allan Rock says a discussion paper with various options will be released soon. There is reason to move swiftly on this issue. As it stands, a man who can prove he was sufficiently drunk walks free on rape charges. In contrast, an extremely intoxicated person charged with murder still can be found guilty of manslaughter. The fact that the Supreme Court imagines it being raised only occasionally is no guarantee that lower court judges will interpret the case properly.

The negative media attention resulted in all judges being brought under fire (Vienneau 1994b).

In contrast to many media accounts, Clayton Ruby (1994), a prominent criminal defence lawyer, wrote in the *Toronto Star* that the defence will not be used often and only in the most extreme cases. He felt that the media were overreacting to the Supreme Court's decision.

One news story summed up some key issues in this complex case (Vienneau 1995a, E1):

It was the most controversial Charter ruling so far, surpassing even the 1988 decision that threw out the abortion law. Those committed to criticizing the Charter insisted the drunkenness ruling was yet another example of unelected judges imposing their will on the majority. For police, it was just further erosion of their power to fight crime. Why can unelected judges make decisions that so obviously defy common sense? The answer is that the Charter enshrined in law equality rights, legal protections for accused persons and guarantees such as freedom of speech and association that had previously been guaranteed only by tradition. It allowed judges to strike down laws that were discriminatory. Even so the Supreme Court is not the final voice. There is a constitutional safety valve, formally known as Section 33, the notwithstanding clause, that allows politicians to override the court's Charter decisions.

This article went on to say that some critics feel that the court is making decisions contrary to the public good, and they want government to start using the notwithstanding clause. "But outside of Quebec, the clause has only been used once, and then by Saskatchewan, not Ottawa" (Vienneau 1995a, E1).

PUBLIC OUTCRY AND SUCCESSFUL USE OF THE DEFENCE

Although the Supreme Court and the government stated that the *Daviault* ruling would not result in widespread use of the defence, the outcry from many sectors, especially groups concerned with women's issues, was great.

After the defence was used successfully in several cases in the following two months (Vienneau 1994c), public outcry increased, and members of Parliament brought several petitions against the use of this defence to the government. Also, a group of Toronto women's groups declared 25 February 1995 a "National Day of Action" to protest the Supreme Court decision. Bindman (1994c) summed up the public attention given this issue in an article entitled "Supreme Court of Canada: Drunkenness Defence Takes Centre Stage: Top Rulings," in which she points out that, "although the country's top court handed down more than 90 judgments in 1994, there was only one as far as most Canadians were concerned – the use of extreme drunkenness as a defence to crimes" (Bindman 1994c, A3).

Framing the Issue as "Violence Against Women"

Right from the start, the public and media outcry over the *Daviault* Supreme Court decision framed it as a "violence-against-women" issue. Many women's groups were very vocal in the media regarding the danger of such a decision. Furthermore, the Department of Justice (1995a, 1995b) consulted representatives of the women's movement in the drafting of the bill, in particular women in the law, and held a two-day consultation meeting with women's groups (e.g., Status of Women Council of the Northwest Territories). One respondent recalls, "they [the justice department] constituted us as a group to give them advice on what we thought ought to be done." The Canadian Advisory Council on the Status of Women commissioned a position report analyzing the implications of *Daviault* for women from a legal viewpoint (Sheehy 1995a, 1995b),³ while the Yukon Women's Directorate commissioned a report (McKay 1994) that analyzed these implications from the viewpoint of Aboriginal women.

Women's Groups' Recommendations

Women's groups from across Canada were brought to Ottawa and were consulted by the justice department. Most of the women in this large group were involved with the National Association of Women and the Law. They held that extreme intoxication as a defence excuses male violence against women by attributing blame to alcohol. They argued that it was in the public's interest to eliminate this defence (National Association of Women and the Law 1995). One respondent noted that the justice department's initial draft bill was "creating a new criminal offence of intoxication, criminal intoxication. Or this idea of an included offence of intoxicated ... sexual assault, intoxicated homicide, intoxicated whatever ... I think we surprised them by rejecting those ideas and giving them reasons why we rejected them." One media report quotes the justice minister as saying, "Women

worry that, in terms of sexual assault, if it is called 'criminal intoxication,' it then becomes a different kind of offence, a technical one from which the victim and her circumstances and the consequences of the act are divorced" (Bindman 1994b, A3).

After seeing the government's proposal and the Senate bill, these influential women made their own recommendations to the justice department at their consultation meetings (Department of Justice Canada 1995a, 1995b), providing reasons why the government should enact a law making it illegal to use the defence. One respondent provided the following analysis:

The reason why you can go ahead and override *Daviault* is that the Supreme Court didn't engage in a Charter analysis. It didn't consider equality implications, implications for women or for people with disabilities who are going to be more vulnerable to intoxicated violence. And on that basis that was their legal hook for 33.1 ... And we also had Aboriginal women at that consultation who said any new offence of intoxicated violence, a new offence with new police powers and all that, will rebound negatively on the Aboriginal community ... And that was really important to hear because that was something I hadn't really thought about myself. Many women on this committee hadn't. So that's why it's so important to have that kind of broad-based consultation. And Corrine McKay's paper helped too in this respect. For us to say ... "actually what justice is proposing is a bad strategy."

Another informant was cynical about the government's attempt to appease women's groups:

So here we have the federal government, in an effort for short-term political expediency, introducing legislation to undo a decision based on bad science, knowing full well that the legislation was gonna be struck down under the Charter ... If the federal government really wanted to protect and eliminate this defence, they could have done it, "notwithstanding the Charter" ... That would have forced them to take political heat, from the Bar Association, the Civil Liberties Association, from every lawyer and defence counsel. So why would they do that? They could buy off the women's movement with dumb legislation which they knew was invalid. They could leave the courts to overturn it.

THE CRIMINAL CODE REFORM PROCESS

Reform in the area of criminal law was under way before *Daviault*, but the process of addressing issues such as intoxication and mental illness was accelerated after the Supreme Court decision in that case. From 1987 to 1993, prior to the *Daviault* case, several studies concluded that the General Part of the Criminal Code of Canada no longer reflected the values and concerns of contemporary Canadian society and that reforms were overdue

(Law Reform Commission of Canada 1987; Canadian Bar Association 1992; House of Commons of Canada Standing Committee on Justice and the Solicitor General 1992). Significantly, the Canadian Charter of Rights and Freedoms, enacted in 1982, is not yet reflected in the General Part of the Criminal Code. Following a report of the parliamentary subcommittee on recodification of the General Part of the Criminal Code, on 28 June 1993 the minister of justice released a consultation document for committee and general discussion, a White Paper, outlining a proposed new General Part in the form of a draft bill (Minister of Justice 1993).

In this proposed act of Parliament, entitled "Proposals to Amend the Criminal Code (General Principles)," the provisions were defined, for the most part, by case law and interpretation of the charter. In defining what constituted an offence, Section 12.1, Paragraph 2, of the White Paper says, "no person commits an offence unless that person commits the act, or makes an omission, voluntarily." Section 35 defined the nature and availability of the defence of self-induced intoxication, and Section 16.1 specified the defence of automatism and how it would be used. This refers to a state of unconsciousness or partial consciousness that renders one incapable of consciously controlling one's behaviour, and the burden of proof lies with the accused.

FEDERAL GOVERNMENT ACTIONS

Immediately following the Supreme Court decision on *Daviault*, the federal minister of justice reacted cautiously and said that the issue would be dealt with as part of consultations for the White Paper. Hence, in the following few weeks, the minister released Technical Report No. 1 and Technical Report No. 2 to guide public submissions for 28 February 1995.

The first technical document was entitled "Toward a New General Part for the Criminal Code of Canada: Details on Reform Options" (Department of Justice Canada 1994; Department of Justice Canada and O'Reilly 1994) and was released in October 1994. Submissions were requested from the public. This document discussed different options for dealing with self-induced intoxication as a defence:

- 1 Codify case law including the *Daviault* provision.
- 2 Allow the defence in a limited way attached to specific offences.
- 3 Create a new offence of criminal intoxication.
- 4 Create a special verdict that would apply when intoxication is used as a defence.

On 12 November 1994 a second technical document was released, entitled "Reforming the General Part of the Criminal Code: A Consultation Paper"

(Department of Justice Canada 1994), posing specific questions to guide the public's submissions:

- 1 Should automatism be incorporated into the provisions for mental disorder? If so, how could it be incorporated (i.e., should "not guilty by reason of automatism" result in acquittal *or* a special verdict which would allow the court to make an order of discharge or custody)?
- 2 If a *Daviault*-type (self-induced intoxication) situation arose, should it result in an acquittal *or* a special verdict with the possibility of a court order to a hospital?
- 3 Should we create a new crime of intoxication, how should it be structured, and what should the punishment be?

However, by the end of November several cases successfully used the defence of intoxication and people were acquitted of sexual assault charges, generating extensive media attention (as noted above). The justice department moved quickly. It brought key women's groups from across Canada to Ottawa for consultations on intoxication on 9 December 1994. It also moved the deadline for public submissions up to January 1995.

After the *Daviault* decision several experts were contacted by a group of civil servants in the criminal law section of Justice Canada. Staff held private consultation meetings with the National Association of Women and the Law and other women's groups as well as with experts in pharmacology and psychiatry.

The government's initial proposal to deal with the issue was to create a category to be known as criminal intoxication. The justice minister was reportedly revising a bill introduced by Senator Gigantes (Bill S-6, Senate of Canada 1994), which would have made committing a criminal act while intoxicated a separate criminal offence.

On 24 February 1995, following extensive consultation, the government introduced a new bill – Bill C-72, an Act to Amend the Criminal Code (Self-Induced Intoxication) – to overturn the *Daviault* judgment (House of Commons of Canada 1995a). The preamble to the bill provides the following reasoning for introducing it: because alcohol and violence are problems in society, because we need to protect the most vulnerable groups (such as women and children) from this violence, and because alcohol does not cause automatism. The bill says that self-induced intoxication cannot be used as a defence in cases of assault.

The bill received its second reading on 27 March (House of Commons of Canada 1995b). It then went to the House of Commons Standing Committee on Justice and Legal Affairs for discussion and public input (see below). As noted above, on 9 May 1995 the justice department met with a select group of women to discuss recommendations on Bill C-72 and, on 8 June 1995, it held a "Consultation on Violence against Women" with various

women's groups. The bill received third reading and was enacted on 22 June 1995 (House of Commons of Canada 1995c).

Standing Committee on Justice and Legal Affairs

First, the Standing Committee on Justice and Legal Affairs heard public submissions responding to technical document no. 2 for defences of intoxication and automatism in January 1995 (Addiction Research Foundation 1995; Canadian Psychiatric Association 1995; Sheehy 1995a). Second, after Bill C-72 received its second reading, this committee met for several weeks in June 1995 to hear public submissions on it. Several organizations provided submissions, including: the Addiction Research Foundation (ARF) (Kendall 1995); Harold Kalant, Pharmacology Professor Emeritus, University of Toronto and Addiction Research Foundation (Kalant 1995); the Canadian Psychiatric Association (1995); Metro Action Committee on Public Violence against Women and Children (Bazilli 1994); National Association on Women and the Law (1995b); the Canadian Bar Association; the Quebec Bar Association; and the criminal law section of the department of justice.

The following arguments, sometimes intermingled, were used in these submissions:

- This bill violates the Charter of Rights and Freedoms (i.e., the constitutional rights of the defendant).
- This bill is in the public's interest (i.e., we need to reduce violence against women).
- We need to have workable legislation that is not vulnerable to a court challenge (i.e., don't waste time, energy, and money on vague and vulnerable laws).
- There is no scientific basis that alcohol intoxication produces automatism.

Mr MacLellan (parliamentary secretary to the minister of justice and the attorney general of Canada) presented to the committee four issues with which the government had to grapple (House of Commons of Canada Standing Committee on Justice and Legal Affairs 1995). If these four issues were not dealt with, he argued, then the bill would be weakened from a charter point of view. The first issue was a moral one: "People who voluntarily become intoxicated to the point of losing control or awareness and causing harm to others are criminally at fault." The second issue was a medical one: "leading medical opinion indicates that many intoxicants, including alcohol, do not in fact cause the type of condition that is automatism or akin to automatism, testified to in cases that have recognized an extreme intoxication defence." The third issue was a social one: "intoxicated vio-

lence is of pressing concern to most Canadians, particularly as it disadvantages women and children. It calls for that specific legislative solution. For one thing, I think women's groups have asked for that specific legislative solution. For one thing, women's groups didn't want the criminal intoxication, because that did not address the concerns women have. This one does." The fourth issue involved equality: "the restriction of the defence of extreme intoxication is required to protect the rights of women and children as actual or potential victims of violence."

Bill C-72: Self-Induced Intoxication Act

The standing committee reported to Parliament with two revisions to Bill C-72 on 16 June 1995 (House of Commons of Canada 1995a, 1995b). As noted above, the revised Bill C-72 received third reading on 22 June 1995 and passed in the House of Commons as the Self-Induced Intoxication Act (House of Commons of Canada 1995c).

The act amended the Criminal Code of Canada with regard to "self-induced intoxication" by adding Section 33.1. It created a basis for criminal fault in the context of intoxication and set out a "standard of care" pertaining to self-induced intoxication that did not previously exist in the Criminal Code. Breaching this standard of care was defined as criminal fault sufficient for criminal liability; in such cases, the defence of extreme intoxication was not applicable. In fact, intoxication itself is seen as the basis of criminal fault for the crime. This act covered violent crimes of general intent, such as aggravated sexual assault. In lay language, this new law held that, because a defendant who took a substance to the point of intoxication knew that this could cause him/her to harm others, the defendant could not use the defence that he/she was so intoxicated that he/she was behaving as an "automaton."

In light of criticisms that this act infringed on the constitutional rights of the accused,⁴ there were reports that the minister of justice was considering whether or not to refer it to the Supreme Court for an immediate opinion on whether it violated the charter. In August the justice minister announced that he would not refer the new act to the Supreme Court because legal experts had not raised "serious questions" and it was not in the public interest to wait for the court's ruling. On 15 September 1995 the act came into effect.

ROLE OF SCIENTIFIC AND MEDICAL EXPERTISE

Both critics and supporters of Bill C-72 used research data in support of their public submission arguments to the standing committee. Scientific expertise was a component in many aspects of this issue.

The Supreme Court majority decision on *Daviault* reported some research, mainly criminological. The Cory opinion cited many research references (e.g., Saskatchewan Alcohol and Drug Abuse Commission 1989, 8). However, a problem with many of the reports is that, when they claim that "alcohol does not cause crime," their view of causation – at least from an epidemiological perspective – is too narrow (see Room and Rossow 2001). Furthermore, Justice Cory's analysis did not take into account the new information on the crime-alcohol linkage that has been emerging in the epidemiological and psychological alcohol research literature over the past twenty years.

The Supreme Court makes decisions based on the evidence brought forward in the case and does not question the research basis of expert testimony. The expert testimony in *Daviault*'s defence – that extreme intoxication causes one to behave as an automaton – was based on the incorrect linkage of automatism to a blackout; however, the expert witness's qualifications or the validity of his testimony was not questioned by the Supreme Court. The lack of scrutiny of the qualifications of expert witnesses was mentioned in the standing committee hearings as a problem requiring attention (Kalant 1995, 1996). The Supreme Court majority decision was partly based on the mistaken understanding that there was no contrary scientific evidence to the conclusion that extreme intoxication produces automatism.

Research also played some role in the Criminal Code reform process; for example, several research studies or books were cited in the justice minister's "White Paper." As well, Justice Minister Allan Rock used research as a basis for introducing Bill C-72 and as supporting evidence for its necessity (e.g., a 1993 survey of violence against women found that 40 percent of assailants had been drinking).

The justice department went to great lengths to get scientific expert opinions to back up its decisions and actions. A prominent pharmacologist working at the Addiction Research Foundation and the University of Toronto, Harold Kalant, was asked to provide a review that he presented to the committee. In his brief he concluded: "From the foregoing review of clinical and scientific evidence, it is clear that no basis exists for the concept of automatism due to alcohol intoxication *per se*" (Kalant 1995, 11). He stated that what the courts call automatism is "characterized by a sudden onset of a brief period of absence of consciousness, inappropriate behaviour that is usually repetitive and of low complexity, absence of real communication with other people during the attack, confusion and disorientation during the recovery phase, and subsequent amnesia for the period of the attack. There is rarely violent behaviour, and even more rarely a sufficiently organized pattern of violence to sustain an attack on another person" (Kalant 1995, 11; 1996, 637). This conclusion likely fit very well with the expectations and perspective of justice department staff. A law reform committee in

Australia found expert testimony that pointed in a different direction: "We believe it is possible to distinguish between the mental impairment that is induced [by sleepwalking, spasms, or convulsions] and the mental impairment induced by intoxicants in the context of forming criminal intent" (Parliament of Victoria Law Reform Committee 1999, 112). Though the committee cited other articles from the same thematic issue of the journal *Contemporary Drug Problems*, its report did not cite Kalant's (1996) article.

The ARF submission focused on the relationship of violence to alcohol, asserting that "anyone who drinks alcohol assumes a burden of increased risk of harm to themselves and others" (Addiction Research Foundation 1995). Perry Kendall, president of ARF, stated: "there is an individual and societal responsibility to attempt to diminish alcohol- and drug-related harm. We believe that social controls and laws are potent mechanisms for society to effect those controls ... Individuals must take responsibility for their drinking behaviour, and the federal government must send that message with clarity and conviction. Bill C-72 is the vehicle for that today" (House of Commons of Canada Standing Committee on Justice and Legal Affairs, 1995).

One critic points out that ARF, in not mentioning alcoholism or addiction or psychiatric dependence, appeared to presuppose that drinking alcohol is always a willed act. This may have been different "if the experts involved had been clinicians used to diagnosing addiction/dependence disorder" (Valverde 1998, 193). However, Kalant (1995, 9) did touch on alcoholism, noting that "the consumption of alcohol is not always wholly voluntary and deliberate: by definition, some one who suffers from clinically diagnosed alcoholism has impaired ability to abstain from drinking, despite knowing that he or she should do so, and in many cases despite wishing to do so. Nevertheless, that person's consumption of alcohol is conscious, and with knowledge of the probable or possible consequences." Kalant was making a clear distinction between unconscious behaviour (as in automatism or sleepwalking) and addictive behaviour.

John Bradford's submission for the Canadian Psychiatric Association (1994) held that voluntary intoxication should not be a defence (except as it exists in the current defence of drunkenness or if the perpetrator is already not criminally responsible on the basis of a mental disorder). Automatism should only be considered as a defence when states of severe intoxication exist in addition to some underlying organic mental disorder. He also referred to the issue of amnesia in the case of *Daviault*, stating that amnesia could be caused by intoxication but that it occurs in retrospect and does not mean that, at the time of the offence, the perpetrator was not able to form the intent to act under his free will.

Women's groups representatives used research on violence against women in their arguments, and research was often reported by the media.

For example, one article was entitled, "Drunkenness Ruling Said Based on Error: Intoxication Doesn't Cause 'Automatism,' Researcher Says" (Vienneau 1995b).

Despite the instances cited above, it does not seem likely that science and research played a decisive role in the major developments. Justices of the Supreme Court, particularly Corey, referred to some criminological literature that supported their perspective. Staff of the justice department drew on experts in medicine and pharmacology who supported their conclusions. Other relevant fields of science, such as epidemiology, were barely considered.

It appears that both sides sought out scientific information to support their particular view rather than as a way of challenging it. As has been a common finding in several other policy case studies in *Sober Reflections*, the role of science may have been more decorative than substantive.

A Comparison Case: A Brief Note

The Canadian Supreme Court decision in the *Daviault* case relied considerably on citations of Australian decisions, notably a 1980 decision by the Australian High Court that held that self-induced intoxication could negate the intent needed for conviction for any criminal offence (the *O'Connor* case). At the time of the *Daviault* case, the *O'Connor* decision, within the context of other notorious cases, came under political attack in Australia. One 1995 case involved a drunken man shooting and killing a woman's sleeping son and receiving a sentence of manslaughter (R. v. Paxman, New South Wales District Court, 21 June 1995). The result of this was that New South Wales⁵ adopted new legislation that essentially overturned the *O'Connor* decision (Parliament of Victoria Law Reform Committee 1999, 31). Also in 1995 the Australian federal criminal code was amended to restore the situation prior to the *O'Connor* ruling, but with provisions to take effect in March 2000 (Parliament of Victoria Law Reform Committee 1999, 36-7).

In 1997 a professional rugby player, charged with punching two women in the face while very drunk, was acquitted on the grounds that he had been unable to form the intent to perform the acts. In the wake of a public furore, urgent legislation was passed at the federal level in 1998 to implement the 1995 amendments immediately (Parliament of Victoria Law Reform Committee 1999, 38). However, efforts to pass laws nullifying the *O'Connor* rules in other Australian jurisdictions – the Australian Capital Territory, South Australia, and Victoria – were unsuccessful (Parliament of Victoria Law Reform Committee 1999, 38-42).

In Australia criminal law is primarily a state, rather than a federal, function. As a result, the task of mobilizing the political will to overturn court decisions requires decentralized action. The issue also seems to have been

less explicitly defined as a feminist issue in Australia than it was in Canada. Although the Australian public seemed to be just as hostile as did the Canadian public to the legal reasoning that resulted in intoxication serving as a defence, the legal establishment in Australia had more success in defending the decisions against political action under pressure of public opinion.

Case Law since Enactment of the Self-Induced Intoxication Act

A few years ago a legal review of Section 33.1 appeared in *Criminal Law Reports* (Smith 2000), describing four cases that had arisen since the new act went into force. Smith found two opposing camps: one determining that the act is constitutional under Section 1⁶ of the charter (*R. v. Vickberg*; *R. v. Decaire*) and the other determining that it is not (*R. v. Dunn*; *R. v. Breton*). He was very critical of the reliance on the "existence" of the condition of intoxicated automaton that underlay the judges' arguments in *Dunn* and *Breton*. Smith observed that, in the lower courts, the judges in *Vickberg*, *Decaire*, *Dunn*, and *Breton* all accept that alcohol can induce legal automatism. These decisions would seem to require that the scientific body of evidence brought to the parliamentary standing committee needs to be tendered in every case where Section 33.1 is to be challenged (Smith 2000). Smith also reviewed several Supreme Court cases in relation to other laws that would have a bearing in an ultimate Supreme Court decision on section 33.1, and concluded that it should be held constitutional.

CONCLUSION

In Canada the most active players in the *Daviault* case did not frame it within the context of alcohol policy generally. Only one submission (Addiction Research Foundation 1995) made reference to general alcohol policy or alcohol consumption in society. The media and public generally regarded this case as an issue of individual responsibility and alcohol abuse. The very nature of criminal laws – to control the behaviour of individuals by punishing actions, laying blame, and finding guilt – strongly influenced how the *Daviault* issue was framed. Interestingly, the alcohol industry did not make any comments on this case. This fits in with an individualistic orientation with regard to alcohol problems and the common view of the alcohol industry: alcohol problems are primarily caused by the few who choose to become intoxicated or who are addicted. Table 18.2 provides a summary of this case on several dimensions.

In contrast to the other cases we considered, *Daviault* dealt with the criminal law – specifically, intoxication and criminal responsibility. The issue moved from the political stream (under the Criminal Code Reform Process) to the problem stream after the Supreme Court of Canada (*R. v. Daviault*)

Table 18-2

Analytical dimensions and intoxication as a defence for sexual assault

DIMENSIONS	<i>Intoxication as a defence for sexual assault – Daviault Supreme Court Judgment</i>
Time period	1991-95
Key issues	Extreme intoxication as a defence for committing assault.
Key actors	Quebec court. Supreme Court of Canada. Federal Government: Minister of Justice, Standing Committee on Justice and Legal Affairs. Women's Advocacy groups (e.g., Women in Law).
Key forum	Québec court. Supreme Court of Canada. Federal Government: Standing Committee on Justice and Legal Affairs.
Policy entrepreneurs	Lawyer for Daviault uses defence of extreme intoxication leading to automaton behaviour.
Precipitating event and dynamics	Decision by lower court in Quebec. Public outrage about <i>Daviault</i> and subsequent use of the defence.
Constraints	Public opinion
Instruments	Contesting decisions of courts. Government initiating consultations. Review and commissioning of research. New act of Parliament.
Media reporting	Reporting strongly opposed to Supreme Court decision, with extensive editorial commentary.
Role of research	Submissions by Canadian Psychology Association, ARF, Women's groups.

made a judgment that allowed an expansion of the intoxication defence. The issue garnered a great deal of media attention. Following the Supreme Court decision, the defence of intoxication for assault offences became a matter of public outcry, particularly after several defendants successfully used the defence. In the *Daviault* case itself the defence remained untested (Bindman 1995b).

The debate that took place was not confined to experts or judges; "public opinion was mobilized as if a war had been declared" (Valverde 1998, 193). This case was framed as a "violence-against-women" issue from the start – a major social and political issue. Women were central players in the debates and their outcome, and women's groups exerted a great deal of influence over the final resolution of the problem. These groups were very well organized, were sought out by the justice department, and met several times to provide input to the government before it drafted the legislation.

The government sought scientific opinion to support its actions. However, the role of research was minor in comparison to the role of women's

groups. The alcohol industry did not get involved at all. The Bar Association of Canada and other legal experts criticized the new law for violating the defendant's rights under the Charter of Rights and Freedoms. However, the National Association of Women in the Law and other women legal experts' opinions in support of the draft legislation had more influence.

When the issue broke onto the public scene, intoxication as a defence was already under investigation by the Department of Justice as part of the law reform process, the preferred or ideal process for dealing with legal defences under the Criminal Code. The *Daviault* decision and the subsequent interpretation of that decision by lower court judges resulted in acquittals in several criminal cases. This created an exceptional "window of opportunity" for dealing this alcohol policy issue. Valverde (1995, 194) describes the forces at play as follows: "The convergence of epidemiological studies of alcohol risk, the victim's movement's emphasis on harm rather than intention, the rise of neoconservative morality, and the growing influence of feminist concerns about violence against women – supplemented by the unexpected testimony of experts who no longer believe in addiction – resulted in a very powerful movement for law reform." The federal government was under pressure by the public, particularly women's groups; as a result, what some legal experts describe as a bad law won by default.

The outcome of *Daviault* – the Self-Induced Intoxication Act, which sets out greater responsibility for one's behaviour and is, in fact, the first ever legal "standard of care" – reinforces Canadians' belief that alcohol intoxication is no excuse for violence. It states that individuals consciously and voluntarily consume alcohol and understand that extreme intoxication may lead them to violent behaviour: "The public debate across Canada showed an overwhelming belief in the resurrection of the free will" (Valverde 1998, 194).

The quick and efficient manner in which the government acted to develop new legislation to eliminate the intoxication defence in just a few months stands in stark contrast to previous case studies. The consultative approach taken by the Department of Justice successfully and quickly dealt with the problem, in collaboration with a well organized coalition of women's interest groups.

After passing the law, the justice minister decided against referring it to the Supreme Court directly in order to ensure it did not violate the Charter of Rights and Freedoms. Some legal experts have concluded that the decision to enact the law without an "a priori" test of its fairness put public policy goals and political interests ahead of the constitutional rights of the defendant.

With regard to *Daviault* one could argue that alcohol control policy or the public good won out over individual rights, even though the decisions were not informed by general alcohol policy perspectives. Some legal experts

hold that this law may yet fail to pass a charter challenge, but it will likely be some years before this is tested in the Supreme Court.

NOTES

- 1 Criminal law in Canada is federal jurisdiction; enforcement and the courts with regard to criminal law involve both federal and provincial jurisdictions.
- 2 The original Quebec expert witness said that Daviault could have been in a state of "amnesie-automatisme." This seemed to be aimed at establishing a separate "automaton" defence through the route of amnesia, or "blackout," not intoxication per se.
- 3 The federal government funded the Canadian Advisory Council on the Status of Women, which has since been abolished.
- 4 Section 7 of the Canadian Charter of Rights and Freedoms: "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 11(d) of the Charter: "11. Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."
- 5 In Australia, criminal law is a state rather than a federal matter.
- 6 Section 1 of the Charter: "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

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