



Department of Justice
Canada

Ministère de la Justice
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Ottawa, Canada
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TABLED DOCUMENT NO. 24-12 (7) TABLED ON FEB 27 1995

SELF-INDUCED INTOXICATION AS CRIMINAL FAULT

INFORMATION NOTE

FEBRUARY, 1995

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INFORMATION NOTE

THE AMENDMENTS

This bill contains proposals for amendments to the *Criminal Code* that have the result of removing the defence of extreme intoxication for general intent crimes of violence.

This issue of intoxication as a defence was recently addressed by the Supreme Court of Canada in the case of *Daviault v. The Queen*. The common law rule was that self-induced intoxication is never a defence to a crime of general intent. The Supreme Court in the *Daviault* case maintained the common law rule, but recognized an exception to it, by which intoxication may be a defence to a general intent crime if the intoxication is so extreme that the person is in a condition akin to automatism or insanity. The Court concluded, in the absence of legislation associating self-induced intoxication with criminal fault, that to convict a person who was in a condition akin to automatism or insanity would violate the *Canadian Charter of Rights and Freedoms*. The Court observed that it is open to Parliament to legislate in this area of intoxication and criminal fault.

When the Supreme Court released its decision, review of the defence of intoxication was already underway through the project to recodify the General Part of the *Criminal Code*. Broadly-based consultations disclosed the deep-seated moral view, which the government shares, that people who do violence to others while in a state of self-induced intoxication to the point of loss of control or awareness of their behaviour, should be held criminally responsible for that violence. Those consultations also raised questions about the extent to which alcohol intoxication leads to loss of control or awareness.

These amendments would accept and reflect that moral view, by legislating for the first time in our criminal law a legal concept of criminal fault based on extreme self-induced intoxication, in relation to crimes of violence.

The amendments would address the most pressing issue of intoxication as a defence to "general intent" crimes of violence. Other issues relating to intoxication as a defence will be addressed over the longer term in the more comprehensive reform of the General Part of the *Criminal Code*.

The Standard of Reasonable Care

The new law would for the first time set out a standard of care to apply to self-induced intoxication. It would declare that people who voluntarily become so

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intoxicated that they lose conscious control of their behaviour or become unaware of what they are doing, and who cause harm to others, breach the standard of reasonable care generally recognized in Canadian society. The new law would define this breach as criminal fault sufficient for criminal liability, and that fault would prevent the intoxication defence from being used.

This would mean that for any crime of violence, the defence of extreme self-induced intoxication could not be used to show that the person doing the criminal harm did not act voluntarily or with the basic intent to do the harmful act. The defence could not be used because Parliament would have declared that to voluntarily become so intoxicated and cause harm to others is grossly unreasonable and criminally blameworthy.

The new standard of care would reflect in the criminal law the widely-shared moral values of Canadians as to the responsibility of intoxicated individuals for harm they do to others.

Crimes of Violence

The amendments would apply to the basic intent element in all crimes of violence. These crimes, which include sexual violence and domestic assaults, have the gravest effect on their victims, and therefore most concern the public.

Intoxication is found in close association with violence, not necessarily causing violence, but often creating an environment in which violence is more likely to occur. The new standard of care would reinforce the obligation of all Canadians not to do violence to others and would make clear that this obligation applies even in situations of extreme intoxication.

Violence and the threat of violence have played a significant role in placing women and children at risk and in denying women and children the right of equal participation in society. The new standard of care would require all members of society to take responsibility for not harming others, thus helping to protect the rights of all Canadians to security of the person and to equal benefit and protection of the law.

A Preamble

The bill includes a preamble to set out Parliament's intention in amending the *Criminal Code* in this way. The preamble will be a useful guide to courts applying the amendments, and will also provide a record of Parliament's reasons and considerations for legislating, which include:

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- **grave concern about the incidence of violence in society**
- **the particularly disadvantaging effect of violence on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by the *Charter***
- **the close association between violence and intoxication, and the concern that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children**
- **the well-known potential effects of alcohol and certain drugs on human behaviour, and scientific evidence that many intoxicants, including alcohol, may not cause a person to act involuntarily**
- **the moral view of Canadians that people who violate the physical integrity of others while in a state of self-induced intoxication are blameworthy in relation to their harmful conduct and should be held criminally accountable for it**
- **the intention to legislate a concept of criminal fault in relation to incapacity due to self-induced intoxication, and to promote and help to ensure the *Charter* rights of all Canadians, including victims of violence**
- **recognition of the continuing existence of the common law principle that intoxication short of loss of control or awareness is never a defence to a crime of general intent**
- **the need to legislate a standard of care, the breach of which constitutes criminal fault.**

LEGAL BACKGROUND

Our *Criminal Code* does not include a defence of self-induced intoxication. This defence has been developed by the courts in the case law. Before the September 30, 1994 decision of the Supreme Court of Canada in the *Daviault* case, intoxication could be a defence to crimes of "specific" (or special) intent, but could not be a defence to crimes of "general" (or basic) intent. Specific intent offences require a special purpose in addition to the basic intent to do the act.

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Examples of specific intent offences are murder, theft, robbery, and break and enter with intent to commit an indictable offence. Examples of general intent offences are manslaughter, sexual assault, and assault.

In the *Daviault* sexual assault case, the Supreme Court examined the common law rule that intoxication is no defence to crimes of general intent, and found an exception to it. The Court said that extreme intoxication which results in a condition akin to automatism or insanity may be a defence to any crime, even a general intent crime. To come within this exception, the intoxication must be so severe that the person is incapable of forming even the most basic or simple intent to do the act.

The Supreme Court was of the view that cases of extreme intoxication resulting in a condition akin to automatism or insanity will be rare and exceptional. To restrict the defence, the Supreme Court added two requirements to this exception to the common law rule. First, the accused person must bear the burden of proving the defence on a balance of probabilities (normally the prosecution must disprove defences beyond a reasonable doubt). Second, there must be expert evidence (from, for example, a toxicologist) to support the defence. Otherwise, the Supreme Court upheld the common law rule that intoxication is not a defence to crimes of general intent.

THE NEED FOR REFORM

The Supreme Court in *Daviault* emphasized that its ruling involved the interpretation of a common law rule, not Parliamentary legislation. It noted that there was no legislation making voluntary intoxication the basis of criminal fault, and noted that Parliament is entitled to legislate to deal with the matter of intoxication in the criminal context.

The initiative to recodify the General Part of the *Criminal Code* had already begun its review of the defence of intoxication and provided a convenient forum for the development of a response. In November, the Minister of Justice released a consultation paper which discussed the defence of intoxication as one of many General Part issues, and offered a number of options for reform.

Initial responses to the widely-distributed consultation paper indicated a strong public desire that Parliament respond quickly to the issue raised in the *Daviault* case. The consultations also disclosed a strong and broad societal view that people who voluntarily become intoxicated to the point of losing control or awareness and doing harm to others are blameworthy in relation to that harm. Significantly, that general view also clearly considers that the level of the person's blameworthiness is not reduced by their intoxication. The government shares that view.

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OTHER OPTIONS CONSIDERED

Various options to implement these policies were examined from the perspective of reflecting this basic moral view in a manner which is legally strong and effective.

Many of the consultants assumed at first that the best response would be a new offence, such as "criminal intoxication", to fill the void when an accused has a successful defence of intoxication. If a person is found not guilty, of for instance sexual assault, because of their intoxication, they could be convicted of the new crime of "criminal intoxication". In recent years in Canada and in other common law jurisdictions there has been much discussion of possibilities along these lines.

After much consideration and consultation with legal and other experts and the general public, this option was not adopted to address the immediate issue, for several reasons.

First, the penalty. It became clear that the maximum penalty for any new offence of "criminal intoxication" should be the same as the maximum penalty for the original offence. Otherwise, the new offence would be offering what has been called a "discount for drunkenness", which is considered to violate collective notions of responsibility and accountability. But, if the maximum penalty for the new offence of criminal intoxication were to be the same as the maximum penalty for the original offence, this would essentially be a long and complicated way of saying that intoxication is no defence.

The second reason for not pursuing the option of creating a new offence of "criminal intoxication" relates to the "labelling" of the offence. The "criminal intoxication" option rests on the person being found not guilty of the original offence (for instance, assault), and instead found guilty of the new offence of criminal intoxication. The consultations disclosed the view that a person who voluntarily becomes intoxicated to the point of losing conscious control or awareness, and assaulting another, is at fault for the assault, and should be held criminally accountable for that offence and nothing less. To acquit the person of the assault, and convict them instead of a new offence of criminal intoxication, would send the message that they were not criminally responsible for the assault.

Third, detailed examination of the "criminal intoxication" option in its various forms, and consultation with criminal law experts, indicated that many of the *Charter* and legal theory problems identified by the Supreme Court in relation to the common law rule (as related to basic intent) would apply with almost as much force to any such new offence. The legal and practical concerns include:

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- (if the new offence were required to be charged) there would be no opportunity to lay the charge where, as often occurs, the issue of intoxication does not arise until trial
- (if, on the other hand, the new offence were to operate as an included offence, with conviction to follow automatically from acquittal of the main offence) a successful defence to the main offence (which needs to be proven by the accused only on a balance of probabilities) would be taken as proof beyond a reasonable doubt of the new offence of criminal intoxication - this may raise *Charter* problems
- (if conviction for an included offence of criminal intoxication were to be at the discretion of the judge or jury) would the simple fact of acquittal on the basis of intoxication be sufficient, or would the Crown be required to adduce additional evidence of intoxication, and if so how?
- would the new offence include an element of causation (that the intoxication caused or led to the harm in question), and, if so, would that element be conceptually sound and capable of proof?
- how would the new offence accommodate multiple defences without being overly complex?
- the Crown could be obliged to argue contradictory positions at trial (i.e. first, that the accused was not intoxicated enough to be acquitted of the main offence, but second, that the accused was so intoxicated that he or she should be convicted of the new offence.)

THE OPTION OF A REFERENCE TO THE SUPREME COURT OF CANADA

The proposed amendments would reflect Canadian values about justice and criminal accountability. They are designed to be fair and just, not only to victims of violence but also to accused persons who would be held accountable for intoxicated acts of violence on the basis of a clear legislated standard of fault.

The Supreme Court in *Daviault* examined a common law, judge-made rule, not a legislated statement of Parliamentary policy. The new law would provide a basis in law for an approach to criminal fault and intoxication that did not exist previously in the common law. Before this bill, there was no legislation declaring self-induced intoxication to be criminally blameworthy.

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The public policy considerations underlying the new standard of care were not presented to the Supreme Court, and therefore could not be factored into the Court's *Charter* analysis, particularly as it related to sections 7, 11(d), and 1. The Court in *Daviault* was not asked to examine a Parliamentary statement of well-developed and widely-supported public policy, such as in this bill: it examined a pre-existing common law rule on the basis of legal theory, not Parliamentary policy.

There will inevitably be some uncertainty with respect to the state of the law after the amendments are passed into law. The Supreme Court has not yet had an opportunity to rule on the approach which these amendments would take. One of the options available to the Minister of Justice is to ask the Supreme Court, on a reference, to review these amendments immediately after they are passed by Parliament, but before they come into force. A decision has not yet been made as to whether to refer the amendments to the Court.

A reference would provide an early opportunity for the Court to consider the legislation, in the light of the extensive information that will be gathered in the Parliamentary Committee proceedings.

On the other hand, the advantages of a reference may possibly be outweighed by those of the immediate implementation of the amendments.

PARLIAMENTARY COMMITTEE STUDY

Whether or not the Minister of Justice refers the bill to the Supreme Court before its coming into force, the record of Parliamentary Committee proceedings will be enormously helpful to the courts in their application of the bill and in the event of a *Charter* challenge.

Evidence in Committee will explain the policy of the bill, and will supply background information as to such matters as the nature and extent of the problem of violence in our society, its association with intoxication, and its particularly disadvantaging effect on the equal participation of women and children in society.

It is expected that the Parliamentary Committees will wish to explore the medical relationship between extreme intoxication and automatism. The Committees may find it helpful to hear evidence on the medical effects of intoxicants, including that extreme intoxication by some intoxicants, such as alcohol, may not lead to the hallucinatory or dissociative state associated with automatism.

These and other issues can be fully aired in Committee, generating a detailed record of the underlying legal, empirical, and policy considerations to assist the application and any review of the new legislation.

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ገጠው, 1995

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