

# SECOND CHANCES: BILL C-72 AND THE *CHARTER*<sup>®</sup>

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This paper examines the legislative response to the Supreme Court of Canada's decision in *R. v. Daviault*. The author argues that Bill C-72, which limits the defence of extreme intoxication, is constitutional because of its strong underpinnings in equality. The author reviews the statistics on violence against women and the role of intoxication in that violence to illustrate why the defence of intoxication raises issues of sex equality. The author argues that a court assessing the constitutionality of Bill C-72 should consider this strong foundation in equality and the fact that the Bill is the result of a careful balancing of the interests at stake by a democratically elected legislature.

Cet article examine la réponse législative à la décision de la Cour suprême du Canada dans *R. c. Daviault*. L'auteure affirme que le projet de loi C-72, qui limite la défense de l'intoxication extrême, est constitutionnel en vue de son fondement solide dans l'égalité. L'auteure considère les statistiques sur la violence contre les femmes et le rôle de l'intoxication dans cette violence pour montrer pourquoi la défense de l'intoxication soulève des questions d'égalité sexuelle. L'auteure soutient que la constitutionnalité du projet de loi C-72 doit être déterminée tout en prenant en considération son fondement dans l'égalité et le fait que le projet de loi résulte d'une pondération attentive des intérêts en jeu par une assemblée législative et démocratique.

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## I. INTRODUCTION

For decades, our courts have grappled with the issue of whether intoxication should mitigate criminal responsibility. Parliament, on the other hand, has avoided dealing with this controversial issue, preferring to leave it in the hands of judges. In the past year, however, significant developments have taken place at both these levels. The Supreme Court of Canada, in *R. v. Daviault*,<sup>1</sup> constitutionalized the defence of intoxication and Parliament stepped in to respond, with *Bill C-72*,<sup>2</sup> raising concerns about equality and violence against women. This paper reviews these developments and seeks to place the criminal defence of intoxication in a context of sex equality.

Prior to *Daviault*, the intoxication defence was only available to accused persons charged with specific intent offences.<sup>3</sup> Specific intent offences are generally those which have a further purposive element to them beyond the minimal mental element for the commission of the *actus reus*. While intoxication could negate the specific intent for the offence, most of these offences had included offences for which intoxication would not be a defence. Thus an accused who could not be convicted of, for example, murder because of intoxication, could still be convicted of manslaughter.

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<sup>1</sup> [1994] 3 S.C.R. 63 [hereinafter *Daviault*].

<sup>2</sup> *An Act to amend the Criminal Code (self-induced intoxication)* 1st Sess., 34th Parl., 1995 (proclaimed 15 September 1995) S.C. 1995, c. 32 [hereinafter *Bill C-72*].

<sup>3</sup> *R. v. Leary*, [1978] 1 S.C.R. 79. In *R. v. Bernard*, [1988] 2 S.C.R. 833, Wilson J. (L'Heureux-Dubé J. concurring) suggested that *Leary* might allow intoxication to be considered for crimes of general intent where the accused was so intoxicated as to be in a state akin to automatism or insanity. It was this reasoning that Cory J. elaborated on in *Daviault*.

In *Daviault*, the Supreme Court of Canada, by a 6:3 majority, *per* Cory J.,<sup>4</sup> expanded the defence of intoxication such that extreme intoxication would be a defence even to a general intent offence such as sexual assault. An accused who could prove, on a balance of probabilities, that he was so intoxicated as to be in a state akin to automatism or insanity could not be convicted of an offence.

In the wake of a vocal public outcry, Parliament responded quickly to *Daviault* and enacted Bill C-72, limiting the defence of extreme intoxication.<sup>5</sup> This Bill is likely to be the subject of a *Charter* challenge, either by way of a constitutional reference or by way of a challenge by an accused denied the defence. The purpose of this paper is to examine the constitutionality of Bill C-72. Specifically, I will argue that an approach which fully incorporates principles of equality and which gives due attention to the Supreme Court's penal negligence cases, would result in upholding Bill C-72.

I will begin with a very brief review of the decision in *Daviault*. I will then move on to examine Bill C-72 and its constitutionality in more detail.

## II. THE DECISION

*Daviault* involved the sexual assault of a sixty-five year old woman who was partially paralyzed and confined to a wheelchair. The accused was an elderly alcoholic. On the night in question the victim phoned the accused's wife to ask if she would bring her some brandy. When the wife was unavailable, the victim accepted the accused's offer of assistance. The accused bought the victim a bottle of brandy of which she drank part of a glass before falling asleep in her wheelchair. When she awoke during the night, the accused pushed her wheelchair into the bedroom, threw her onto the bed and sexually assaulted her. After the assault, the empty brandy bottle was found in the home. The accused testified that he could remember drinking one glass of brandy but could remember nothing else until he woke at four a.m. and found himself naked in the victim's bed. He also testified that he had drunk seven or eight beers earlier that afternoon. A toxicologist testified that the

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<sup>4</sup> Lamer C.J., La Forest, L'Heureux-Dubé, McLachlin, and Iacobucci JJ. concurring. Note that Lamer C.J. and La Forest J. both wrote separately, agreeing with Cory J.'s result but preferring to rest the analysis on *actus reus* principles.

<sup>5</sup> This legislation came into force on 15 September 1995.

amount of alcohol allegedly consumed by the accused would, for the average person, lead to coma or death.

The accused argued at trial that he was so intoxicated as to be in a state akin to automatism. The trial judge had a reasonable doubt that this was true and acquitted. The Quebec Court of Appeal substituted a conviction and the accused appealed to the Supreme Court of Canada.

At the core of the majority's judgment in *Daviault* was the concern that the blameworthiness for becoming intoxicated cannot be substituted for the fault for the particular offence. An accused who becomes extremely intoxicated may be blameworthy, but that blameworthiness cannot be equated with the fault for a criminal offence. Because extreme intoxication could negate either the *mens rea* or the *actus reus* of an offence, it would be contrary to sections 7 and 11(d) of the *Charter* to permit a conviction where one of these elements had not been proved beyond a reasonable doubt.

The majority concluded that the violation of section 7 was "so drastic"<sup>6</sup> that it was not a reasonable limit under section 1 of the *Charter*. After conducting a very terse section 1 analysis, the majority went on to hold that it was not necessary even to consider section 1 when evaluating a common law rule. Because there was no need to show deference to a legislative body, the Court could re-fashion a common law rule which complied with the *Charter* without engaging in a section 1 analysis.<sup>7</sup> The newly formulated rule stipulated that, if an accused could prove, on a balance of probabilities, that he was so intoxicated as to be in a state akin to automatism, he would be entitled to an acquittal.<sup>8</sup>

The dissenting judgment of Sopinka J.<sup>9</sup> held that there is no principle of fundamental justice that there must be exact symmetry between the *mens rea* and the *actus reus* for a general intent offence. The principles of fundamental justice can be satisfied "provided the definition of the offence requires that a blameworthy mental element be proved and that the level of blameworthiness not be disproportionate to the seriousness of the offence."<sup>10</sup> The dissent, as such, found no

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<sup>6</sup> *Supra* note 1 at 92.

<sup>7</sup> *R. v. Swain*, [1991] 1 S.C.R. 933.

<sup>8</sup> The new rule developed by the Court was also found to be contrary to sections 7 and 11(d) of the *Charter* because it put the burden of proof on the accused. However, the Court went on to uphold it under section 1, ignoring its own advice that the Court should re-write a common law rule that violates a *Charter* right rather than subject it to section 1 scrutiny.

<sup>9</sup> Gonthier and Major JJ. concurring.

<sup>10</sup> *Supra* note 1 at 118.

violation of section 7 of the *Charter* and thus did not need to go on to address section 1.

The result in the case was that Mr. Daviault was sent back for a new trial because the evidence of extreme intoxication had never been subjected to the reversed burden of proof on the accused. Subsequently, because his victim died before the new trial could take place, the charges against him were dismissed.<sup>11</sup>

### III. THE REACTION

The Supreme Court decision in *Daviault* evoked a vocal public response and extensive media attention.<sup>12</sup> The suggestion that someone could be too drunk to be convicted of sexual assault shocked the public's sense of justice and common sense. The facts of the case, that the victim was elderly and disabled, and that she was literally dragged from her wheelchair and sexually assaulted, brought the issue into stark focus for the public. Women's groups were outraged and most media reports of the decision were negative. Even a United States State Department Country Report on Human Rights implicated *Daviault* as hindering the enforcement of laws prohibiting violence against women.<sup>13</sup>

It soon became apparent that the government had no choice but to act quickly in response to *Daviault* and that it could not afford to wait until the reform of the General Part of the *Code* was complete. Several options were discussed, but the one most commentators thought the government was likely to pursue was an offence of criminal intoxication,

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<sup>11</sup> (1995), 39 C.R. (4th) 269. For a more detailed description of the *Daviault* decision itself, see I. Grant, "Developments in Substantive Criminal Law: The 1994-95 Term" (1996) 7 Supreme Court L.R. (2d) [forthcoming].

<sup>12</sup> See, for example, "Drinking Ruled a Rape Defence, Feminists Outraged at Supreme Court Decision" *The Toronto Star* (1 October 1994) A1; and "Criminal Defence of Drunkenness an Offence to Reason" *The Vancouver Sun* (5 October 1994) A10. The decision has also received widespread attention in the American media, which is unusual for Canadian jurisprudence: see, for example, R. Blassnig, "Canada's Courts Debate Criminal Intoxication" *The Buffalo News* (9 October 1994) 12; C.H. Farnsworth, "Use of Drunkenness Defense Prompts Outrage in Canada" *The Houston Chronicle* (13 November 1994) A38; C.H. Farnsworth, "Women in Canada Upset by Court Rulings on Drunkenness" *The New York Times* (10 November 1994) A7; "Canada Women Irked Over Drunkenness as Defense" *The Phoenix Gazette* (10 November 1994) A2; and, S. Delacourt, "Novel Defenses Put System on Trial" *The Tampa Tribune* (20 November 1994) 10.

<sup>13</sup> United States, Department of State, *Country Reports on Human Rights Practices for 1994* (Washington: U.S. Government Printing Office, 1995) at 776. The Report describes Canada as prohibiting violence against women, including spousal abuse but notes that "[e]nforcement may be hindered, however, by a recent Supreme Court ruling which established extreme drunkenness as a valid defense."

whereby an intoxicated individual would not be convicted of the substantive offence committed but rather of an offence of criminal intoxication. Criminal intoxication could be structured as an offence in and of itself or as an included offence such that if an accused were acquitted of the offence charged on the basis of intoxication, he could be convicted of the included offence of criminal intoxication.<sup>14</sup>

There were at least two difficulties associated with this option. The first problem related to the appropriate penalties to be attached to the offence. If the sentence for the included offence were the same as for the substantive offence then there would be no difference between an offence of criminal intoxication and excluding the defence of intoxication, except perhaps the stigma attached to the conviction. If the penalties were less, the law would be in essence creating a drunkenness discount for those who commit violent offences while intoxicated. Second, an included offence of criminal intoxication shifts the focus away from the blameworthiness for the violent actions towards the blameworthiness for becoming intoxicated. The government indicated that it would prefer an option where the accused could be held responsible for the violent offence and not merely for the intoxication.<sup>15</sup>

One other option would have been to create a special verdict, akin to that resulting from a successful mental disorder defence, whereby an accused could be found not criminally responsible by reason of intoxication.<sup>16</sup> Various dispositions, such as mandatory treatment, could be attached to such a verdict. This option was also problematic. First, and most importantly, the analogy to the mental disorder defence would cast extreme intoxication as a medical issue and thus shift the focus away from the moral responsibility of an accused for his violent actions towards a “sickness” model where the accused is to be treated

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<sup>14</sup> In fact, Quebec Liberal Senator P.D. Gigantes introduced a private bill in the Senate, Bill S-6, *An Act to amend the Criminal Code (dangerous intoxication)* (1st Sess., 35th Leg., Canada, 1994), which would have made it an offence to commit a number of enumerated offences while intoxicated. The offence would have attracted a maximum sentence of 14 years imprisonment.

<sup>15</sup> Department of Justice News Release (24 February 1995) at 20-21 (QL). This point is particularly relevant to the constitutional question of stigma, discussed below.

There are also practical problems with this option. For example, it would be difficult to charge such an accused with the offence as evidence of intoxication might not arise until trial. Furthermore, *Charter* concerns would arise if an accused could be convicted of this offence with only proof on a balance of probabilities of the intoxication. Finally, as *Daviault* itself reveals, there might be difficult issues about the causal relationship between intoxication and violence.

<sup>16</sup> See A. Mewett, “Extreme Drunkenness” (1995) 37 C.L.Q. 385, where the author argues that the issue should be construed as one of capacity for conscious action and should form the basis of a special verdict.

but not blamed. Second, on a practical level, not all those who raise the defence of extreme intoxication need or are amenable to “treatment.”<sup>17</sup>

Largely as a result of pressure from women’s groups, the government ultimately chose to focus on the issue of violence against women and the impact of that violence on women’s struggle for equality. In the words of Justice Minister Allan Rock:

[I]n my view the time has come for us to speak directly of such matters and to recognize that women are not equal in this society, for a number of reasons. One of the symptoms of that inequality is the extent to which they are victims of violence by men, and alcohol is very much tied up in that, statistically ... and factually and demonstrably. Let’s say so expressly. Let’s also acknowledge that inequality is depriving them of the very charter rights contemplated in the sections that are mentioned [in the preamble to Bill C-72].<sup>18</sup>

*Daviault* was handed down on 30 September 1994 and Bill C-72 was introduced in Parliament on 24 February 1995. In the following section, I will examine the most important components of the legislation.

#### IV. BILL C-72

The Bill adds the following section to the *Code*:

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

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

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

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<sup>17</sup> There might also be constitutional concerns about forcing treatment on an individual, both in terms of the federal government’s legislative jurisdiction to do so and in terms of the *Charter*. Note that the *Code* does not provide for mandatory treatment of those found not criminally responsible on account of mental disorder: see s. 672.55(1).

<sup>18</sup> Canada, House of Commons, Standing Committee on Justice and Legal Affairs, “Bill C-72, An Act to amend the Criminal Code” in *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 97 (5 April 1995) at 22.

Precisely how does Bill C-72 change the law as established in *Daviault*? The Bill, which has been carefully and narrowly crafted to respond to the limited defence developed in *Daviault*, in language borrowed directly from the penal negligence cases, has several notable features.

First, Bill C-72 applies only to attempts to negate the “general intent” or the requirement of voluntariness for an offence. Intoxication remains a defence to specific intent offences such as murder. The Bill originally referred to “basic intent” but there was some concern in the Committee hearings that the use of the words “basic intent” would not equate with “general intent” and that the courts might find that the legislation excludes the defence for crimes of specific intent as well. The concern was not that this would be too broad an exclusion but rather that this would lead a court to find the legislation unconstitutional.<sup>19</sup> The Minister of Justice indicated that the choice of “basic intent” was taken from the majority in *Daviault* and confirmed the government’s intent, as indicated in the preamble, to limit the provisions to crimes of general intent.<sup>20</sup> The change to “general intent” was presumably made to avoid any possible confusion.

It is not immediately apparent why the provision needs to be limited to “general intent” offences. While an attempt to remove the defence of intoxication for crimes which have been labelled “special stigma,” such as murder and attempted murder, would almost certainly be invalidated, it could be argued that specific intent offences which are not special stigma offences are no different constitutionally from general intent offences. In particular, there are certain sexual offences, involving sexual contact with children, which have been labelled as specific intent and, under Bill C-72, intoxication will remain a defence to these crimes.<sup>21</sup> It is clear from this limit, however, that the government tailored its response to the decision in *Daviault* and was not prepared to address legislatively the bulk of the defence of intoxication.

Second, the provision only applies to crimes involving an element of “assault or any other interference or threat of interference by a person with the bodily integrity of another person.” Thus, the *Daviault*

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<sup>19</sup> *Ibid.*, No. 97 (5 April 1995) at 12-13.

<sup>20</sup> *Ibid.*, No. 98 (6 April 1995) at 17, 19, and 20.

<sup>21</sup> See, for example, sections 151, 152, and 153 of the *Criminal Code*.

defence for general intent property crimes remains.<sup>22</sup> In the Preamble we are told that it is crimes of violence, and particularly crimes of violence against women and children, that are the targets of Bill C-72. Someone who drinks himself into a state of automatism and commits, for example, mischief, will not be held criminally liable.<sup>23</sup>

Third, the Bill specifically defines a standard of fault. One who “departs markedly” from “the standard of reasonable care generally recognized in Canadian society” is criminally responsible for one’s actions. This standard derives directly from the Court’s penal negligence jurisprudence which will be discussed below.<sup>24</sup>

Fourth, and most importantly, the legislation deems that one who is so intoxicated as to be unaware of or incapable of controlling his or her behaviour and who interferes with or threatens to interfere with the physical integrity of another person *has* markedly departed from the standard of reasonable behaviour expected from Canadians. This aspect of the legislation is crucial. It is not up to the trier of fact in each case to determine whether the accused, in becoming extremely intoxicated and assaulting another person, did depart from a specified standard of care. The fact of extreme intoxication, coupled with a threat to the integrity of another person, is incontrovertible proof that the standard of fault has been met.

Given the breadth of *Daviault*, it is virtually inevitable that Bill C-72 will make its way up to the Supreme Court of Canada, either by way of a constitutional reference or a *Charter* challenge by an accused denied the defence. In the following section, I will examine the constitutionality of the new legislation and argue, specifically, that a full

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<sup>22</sup> Concern was also raised in Committee about the possible difficulties in interpreting this clause and some expressed a preference for a list of offences rather than a general definition of the kind of offence for which the defence of extreme intoxication would be precluded: *supra* note 18, No. 97 at 20. The Minister indicated, *ibid.* No. 98 at 26, that he would prefer to leave it to the courts to work out which offences would be caught by the new provisions, recognizing that in some cases a particular crime might be a crime of violence and in other cases not; for example, breaking and entering with intent.

<sup>23</sup> This attempt to limit the ambit of the legislation, presumably to provide some ammunition for asserting that it is a narrowly tailored minimal restriction on rights (if the analysis gets to the section 1 stage) has also been used to criticize the inherent rationality of the Bill. If the accused who drinks himself into automatism cannot be held responsible for property crimes, how can he be held responsible for crimes of violence? This search for doctrinal consistency ignores the serious social problem of violence against women and the involvement of intoxication in much of that violence. While excluding the defence for specific intent crimes of violence would have been a stronger statement against intoxicated violence, such exclusion would have made it more likely that Bill C-72 would be found unconstitutional.

<sup>24</sup> See below Part V.B.2.b).

examination of all the rights implicated by the issue of intoxicated violence, including equality, should lead to the law being upheld.

## V. THE *CHARTER* AND BILL C-72

In *Daviault*, the only *Charter* rights addressed were those of the accused—sections 7 and 11(d). Equality was not mentioned, either by the majority or the dissent.<sup>25</sup> In the preamble to Bill C-72, on the other hand, the federal government has expressly appealed to concepts of equality to justify the limits it would place on the *Daviault* decision. Why does the availability of the defence of extreme intoxication for crimes of violence implicate equality for women?

### A. *Intoxicated Violence and Equality*

While the decision in *Daviault* presents a problem for all potential victims of violence, it is particularly problematic for those vulnerable to being harmed on the basis of their membership in a group; for example, women. Violence against women is one way in which women are denied full participation in society, furthering women's inequality.

That violence against women is an issue of sex equality is recognized in the General Assembly of the United Nations' *Declaration on the Elimination of Violence against Women*.<sup>26</sup> That declaration states, *inter alia*, that

violence against women is a manifestation of the historically unequal power relations between men and women, which has led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position with men.<sup>27</sup>

A brief perusal of the statistics illustrates that violence against women is an important sex equality issue. In a 1993 Statistics Canada survey of twelve-thousand and three-hundred women, fifty-one per cent reported having experienced at least one incident of physical or sexual

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<sup>25</sup> On this point, see Grant, *supra* note 11.

<sup>26</sup> 23 February 1994, 33 I.L.M. 1049.

<sup>27</sup> *Ibid.* at 1051.

violence since the age of sixteen.<sup>28</sup> Twenty-five per cent of women reported experiencing violence at the hands of their spouses or common law partners and twenty-one per cent of these women were also assaulted during pregnancy. Violence against women, and the threat of violence against women, affect the lives of women on a daily basis. Over sixty per cent of women indicated that they were afraid to walk in their own neighbourhood at night.<sup>29</sup>

More importantly in this context, the role of alcohol/drugs was also evident in the results. The perpetrator of violence was drinking in more than forty per cent of reported incidents.<sup>30</sup> The rate of wife assault was three times higher amongst regular drinkers than non-drinkers and six times higher in heavy drinkers than in non-drinkers. Women who experienced violence at the hands of intoxicated partners were more likely to perceive the violence as life threatening than women whose partners were not drinking when violent (forty-one versus twenty-seven per cent).<sup>31</sup>

The Supreme Court of Canada has also noted women's disadvantage *vis-à-vis* male violence. In *Conway v. Canada (A.G.)*,<sup>32</sup> La Forest J., for a unanimous Court, stated that "[t]he reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors."<sup>33</sup>

Violence against women is an integral part of women's subordination in our society. Statistics indicate that alcohol, in particular, is implicated in that violence. Thus, the law's response to intoxicated violence is a reflection of the status given to women as rights'

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<sup>28</sup> Statistics Canada, "The Violence Against Women Survey" *The Daily* (18 November 1993) at 2.

<sup>29</sup> Violence against women is also hurting children. Thirty-nine per cent of women in violent marriages reported that their children witnessed the violence. The survey also indicates that male violence is generational in that men with abusive fathers were much more likely to assault their partners. Thus, the impact on children will remain throughout their lives.

<sup>30</sup> Alcohol and drugs are also highly implicated in homicide in Canada although the gendered nature of this is less clear. Fifty-four per cent of all accused charged with homicide had consumed alcohol, drugs, or both at the time of the offence: Statistics Canada, *Homicide in Canada: A Statistical Perspective (1993)* (Ottawa: Canadian Centre for Justice Statistics Law Enforcement Program, 1994) at 18.

<sup>31</sup> Juristat, "Drug Use and Crime" (Ottawa: Canadian Centre for Justice Statistics, 1994) vol. 14 at 7-8.

<sup>32</sup> [1993] 2 S.C.R. 872.

<sup>33</sup> *Ibid.* at 877.

bearers. With these equality considerations in mind, how might Bill C-72 fare in a constitutional challenge?

B. *Bill C-72 and Section 7 of the Charter*

Section 7 is likely to be at the heart of any *Charter* challenge, with the arguments against the Bill coming directly from the *Daviault* decision itself. Section 7 provides that “[e]veryone 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.”

1. Liberty

The first step in any section 7 analysis is to determine whether there has been a deprivation of life, liberty or security of the person. This stage of the analysis was assumed without discussion in *Daviault*. It appears obvious that a law preventing the accused from raising intoxication deprives him of liberty because it removes a defence that would otherwise be available and thus enhances the chances of conviction and imprisonment. Thus, this threshold requirement of section 7 is met.<sup>34</sup>

2. The Principles of Fundamental Justice

In *Daviault*, the Court made it clear that removing the possibility of a defence of intoxication where the accused was so intoxicated that he could not form the necessary minimal mental element or a voluntary *actus reus* would be contrary to the principles of fundamental justice. The majority indicated that the limit on the defence was a “substantial breach” of section 7. The focus of the majority’s concern was the substitution of the fault for becoming intoxicated for the fault/voluntariness requirement of the offence. An accused who starts drinking does not necessarily foresee nor ought he necessarily to foresee, that he is going to commit a crime. It is thus constitutionally improper to substitute the intent to get intoxicated with the intent to commit an offence.

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<sup>34</sup> Reference Re s. 94(2) of Motor Vehicle Act [1985] 1 S.C.R. 486.

The most obvious attack on Bill C-72 will stem directly from this reasoning. It could be argued that the Bill suffers from precisely the same defect as the *Leary* rule—that of substituting for the general intent to commit the crime of violence, or for the voluntariness of the *actus reus*, the state of self-induced extreme intoxication. In the following section, I review how a section 7 analysis which incorporates principles of equality might be developed in the context of Bill C-72.

a) *The Principles of Fundamental Justice and Equality*

There are numerous authorities which support the proposition that societal interests in general and other *Charter* rights, specifically, should be incorporated into any definition of the principles of fundamental justice.

In *Rodriguez v. British Columbia (A.G.)*<sup>35</sup> Sopinka J., writing for a majority of the Court, held that it is appropriate to balance the interests of the state and of the individual under the principles of fundamental justice.<sup>36</sup> One of the societal interests Sopinka J. was referring to was the state interest in providing protection for vulnerable individuals, *i.e.*, the severely disabled, who might feel pressured to end their lives. Thus, although he did not expressly incorporate section 15 into his section 7 analysis, he used section 15 values to inform his section 7 analysis.<sup>37</sup> One of the cases Sopinka J. relied on in *Rodriguez* was *Cunningham v. Canada*.<sup>38</sup> *Cunningham* dealt with a section 7 challenge to a change in the *Parole Act* which effectively denied the appellant early release from prison. Writing for a unanimous Court, McLachlin J. found that, while there was a deprivation of liberty, it was in accordance with the principles of fundamental justice. She held that the principles

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<sup>35</sup> [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*].

<sup>36</sup> *Ibid.* at 593.

<sup>37</sup> McLachlin J. took a different view in her dissent in *Rodriguez*, arguing that while the person asserting the violation of the *Charter* may have to show that long established necessary practices do not accord with the principles of fundamental justice, in an inquiry as to whether a legislative scheme is arbitrary, societal interests should come up at the section 1 stage. She did not elaborate on this distinction and she is writing only for herself and L'Heureux-Dubé J. Note also that she did not preclude the possibility of other *Charter* rights being considered at the stage of the principles of fundamental justice, a proposition which finds support in her judgments in other cases.

<sup>38</sup> [1993] 2 S.C.R. 143 [hereinafter *Cunningham*].

of fundamental justice encompass not only the interests of the person whose liberty has been deprived, but also the protection of society.<sup>39</sup>

The argument that societal interests and other *Charter* rights should inform the principles of fundamental justice also finds support in the majority judgment of McLachlin J. in *R. v. Seaboyer*.<sup>40</sup> In *Seaboyer*, McLachlin J. made the following observation:

The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and “against the applicable principles and policies that have animated legislative and judicial practice.” ... The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.<sup>41</sup>

She also addressed the argument that the rights of sexual assault complainants to security of their person and equal benefit of the law should also be considered under section 7:

It has been suggested that s. 7 should be viewed as concerned with the interest of complainants as a class to security of person and to equal benefit of the law as guaranteed by ss. 15 and 28 of the *Charter*; ... Such an approach is consistent with the view that section 7 reflects a variety of societal and individual interests.<sup>42</sup>

However, having referred to the importance of equality, she went on to note that a measure which denies the accused the right to present a full and fair defence would violate section 7 of the *Charter*.

*Seaboyer* was cited in the plurality decision of Cory J. in *R. v. Osolin*.<sup>43</sup> This case dealt with a challenge under section 7 to the trial judge’s decision not to permit the accused to cross-examine the victim on her mental health records. Although Cory J. concluded that the cross-examination should have been allowed, he did support incorporating section 15 values into the section 7 analysis. He also stressed the gendered nature of sexual assault:

[Sexual assault] is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender-based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.

The reality of the situation can be seen from the statistics which demonstrate that 99% of the offenders in sexual assault cases are men and 90% of the victims are women. We

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<sup>39</sup> *Ibid.* at 151-52 [citations omitted].

<sup>40</sup> [1991] 2 S.C.R. 577.

<sup>41</sup> *Ibid.* at 603 [citations omitted].

<sup>42</sup> *Ibid.* at 603-04 [citations omitted].

<sup>43</sup> [1993] 4 S.C.R. 595 [hereinafter *Osolin*].

have seen that the accused's rights to a fair trial and to cross-examine are protected by the common law and given constitutional sanctity by ss. 7 and 11(d). However, in the context of sexual assault the rights of the complainant cannot be completely overlooked. The provisions of section 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant.<sup>44</sup>

Thus it appears to be established that other *Charter* rights, and section 15 in particular, can be considered in giving meaning to the principles of fundamental justice. However, while the Court pays lip-service to women's equality, it has not yet been willing to fully incorporate it in developing the principles of fundamental justice. Equality is often subordinate to and not fully incorporated into the liberty rights of male accused persons. Note, for example, that Cory J. in *Osolin* qualified his remarks by noting that while sections 15 and 28 should be taken into account, they should not be determinative. Women's equality rights, which are often asserted by an intervenor rather than the parties to the case, are often referred to as "societal" concerns or "victims' rights" and given lip-service without having any real impact on the outcome (for example, *Seaboyer* and *Osolin*), or are relegated to the section 1 analysis.<sup>45</sup> In this sense, section 15 has been treated as subordinate to other rights in the *Charter*.<sup>46</sup>

This practice is particularly troubling in light of the Court's decision in *Canadian Broadcasting Corporation v. Dagenais*,<sup>47</sup> which held that all *Charter* rights are of equal importance and that there is no hierarchy of rights. In rejecting the assertion that fair trial rights automatically trump rights to freedom of the press, Lamer C.J.C held that it would be inappropriate for the Court to apply a common law rule

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<sup>44</sup> *Ibid.* at 669. See also *R. v. O'Connor* (1994), 90 C.C.C. (3d) 257 (B.C.C.A.), leave to appeal to the S.C.C. as of right filed April 29, 1994; and *Pacificador v. Philippines (Republic of)* (1993), 14 O.R. (3d) 321, where the Ontario Court of Appeal, at 226, expressed "no doubt that the equality rights created by section 15 are principles of fundamental justice."

<sup>45</sup> See, for example, *Canadian Newspapers v. Canada (A.G.)*, [1988] 2 S.C.R. 122 [hereinafter *Canadian Newspapers*]; *R. v. Keegstra* [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; and *R. v. Butler*, [1992] 1 S.C.R. 452 [hereinafter *Butler*]—three cases which pitted equality rights against section 2(b) freedom of expression.

<sup>46</sup> See C. Boyle, "The Role of Equality in Criminal Law" (1994) 58 Sask. L. Rev. 203. The majority in *R. v. Heywood*, [1994] 3 S.C.R. 761 [hereinafter *Heywood*], set an extraordinarily high standard of justification under section 1 of the *Charter* for a violation of section 7. It is thus important that equality be considered in giving meaning to section 7 rather than limiting it to the section 1 stage of the analysis.

<sup>47</sup> [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

which automatically favoured section 11(d) rights over section 2(b) rights:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publications bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.<sup>48</sup>

In rejecting a “clash” model of competing rights, the Chief Justice implied that rights must be defined with reference to the content of other rights. If this approach is followed, section 15 should play a prominent role in assessing the constitutionality of Bill C-72, particularly given the clear statement in the preamble that Bill C-72 is motivated in large part by a concern for equality.

The Preamble to Bill C-72 is particularly instructive in this regard. Two clauses are worth citing in full:

Whereas the Parliament of Canada recognizes that violence has a particularly disadvantaging impact 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 sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*

Whereas the Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children.<sup>49</sup>

I have outlined above why violence against women in general, and intoxicated violence against women in particular, are issues of sex equality. In *Daviault* there is no reference to, nor was argument heard on, the need to guarantee women equal protection of the law and equal benefit of the law in a society where women have historically been targets for male violence because they are women. There was no reference in the case to the gendered nature of sexual assault nor to the fact that ninety-nine per cent of sexual assaults are committed by men and that ninety per cent of the victims are female. Nor was any reference made to the incidence of domestic assault or to the role of intoxication in aggravating such assaults. Nor was reference made to the

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<sup>48</sup> *Ibid.* at 877.

<sup>49</sup> *Supra* note 2 at 1. The National Association of Women and the Law (NAWL), in its Brief on Bill C-72, expressed concern that the preamble would not be included in the *Code* and recommended that a specific statement of purpose, including the key features of the Preamble, be included in the General Part of the *Code*: see E. Sheehy, “A Brief on Bill C-72: An Act to Amend the *Criminal Code*” (National Association of Women and the Law, 1995) at 13 [unpublished].

impact on women if they are told that should they be harmed by extremely intoxicated men, that harm will not be recognized and punished by the criminal justice system. The only rights mentioned in *Daviault* were those of the accused. His disabled, elderly female victim was virtually invisible.

Surely the principles of fundamental justice require that individuals should be held responsible for harm they cause to more vulnerable individuals when they have put themselves into a state where they are unable or unwilling to show respect for the physical integrity of others. Sopinka J., for the dissent in *Daviault*, reaches a similar principle, although not in the context of an equality analysis:

Central to [the *Charter's*] values are the integrity and dignity of the human person. These serve to define the principles of fundamental justice. They encompass as an essential attribute and are predicated upon the moral responsibility of every person of sound mind for his or her acts. The requirement of *mens rea* is an application of this principle. To allow generally an accused who is not afflicted by a disease of the mind to plead absence of *mens rea* where he has voluntarily caused himself to be incapable of *mens rea* would be to undermine, indeed negate, that very principle of moral responsibility which the requirement of *mens rea* is intended to give effect to.<sup>50</sup>

The Court has, in other contexts, accepted the serious social problem involved in drinking and undertaking dangerous activities. In *R. v. Penno*,<sup>51</sup> for example, a majority of the Court held that intoxication is no defence to impaired driving. Bill C-72 represents a legislative attempt to deal with another pressing social problem: violence against women and the role of intoxication in that violence. While *Penno* could be said to carve out a *de facto* exception to the rule in *Daviault*, the exception in Bill C-72, based on equality rights, should be given at least as much credence.

#### b) *The Principles of Fundamental Justice and Fault*

Equality has not figured prominently in the Court's section 7 jurisprudence. Rather, the focus has been on the "moral blameworthiness" of an accused and on the potential for convicting the

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<sup>50</sup> *Supra* note 1 at 119.

<sup>51</sup> [1990] 2 S.C.R. 865 [hereinafter *Penno*]. Some newspaper stories suggested that one result of *Daviault* is that drunkenness will now be a defence to drunk driving; for example, *The Vancouver Sun* (5 October 1994) A10. This is not at all clear from the majority judgment in *Daviault*, which says nothing about repudiating *Penno*. Until the Court says otherwise, *Penno* should be followed and intoxication should not be a defence to drunk driving.

“morally innocent.” It is thus necessary to consider how Bill C-72 might fare in light of this jurisprudence.

The outcome of the section 7 analysis would be highly influenced by how the Court framed the principle of fundamental justice at stake in limiting the defence of intoxication. The primary concern of the majority in *Daviault* was the substitution of the fault in becoming extremely intoxicated for the fault for the substantive offence. This substitution in turn meant that an accused could be convicted despite a reasonable doubt as to whether the minimal mental element or the voluntary *actus reus* for the offence is present. Sopinka J. in dissent, on the other hand, held that the requisite blameworthiness could be found in the voluntary intoxication of the accused charged with a general intent offence.

Neither judgment in *Daviault* suggested that an accused who commits an offence while extremely impaired is morally innocent. The difference lies in whether the fault must correspond precisely to the elements of the *actus reus*. The majority focussed on whether an intoxicated accused was *blameworthy enough* to warrant conviction for the substantive offence. The dissent, on the other hand, focussed on whether an intoxicated accused was *morally blameless*.

The majority judgment expressly provided that Parliament could legislate an offence punishing someone who commits an offence while intoxicated. The majority does contemplate punishment for someone who causes harm while extremely intoxicated. Thus, it is implicit that someone who commits an offence while intoxicated is blameworthy and deserving of criminal sanction, although, in the majority’s view, perhaps to a lesser degree than one who commits an offence while sober.<sup>52</sup>

Given the Court’s unanimity that some criminalization of extreme intoxication is legitimate, the differing degrees of

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<sup>52</sup> Anne Stalker, in a comment on *Daviault*, suggests that perhaps the public has a different conception of criminality than is generally reflected in traditional criminal law. She notes, in “Intoxication and the Criminal Law” Moot Hall (University of Calgary Faculty of Law Magazine) (Spring 1995) 7:

[T]he Supreme Court suggests that a person who commits an offence while extremely intoxicated is liable to criminal sanctions, but those sanctions should be at a level commensurate with the wrongness of getting that intoxicated. Society feels the need to measure the sanctions at the level in accordance with the harm actually caused; otherwise the intoxication appears to act as an excuse, not a wrong. To a large degree, the Supreme Court starts with the offender and requires a reason to associate them with the culpability of the offence, while the public starts with the offence and requires a reason to disassociate the accused from the culpability for it. The Supreme Court has been satisfied with more and more fragile connections of late but has been unwilling to give up the connection altogether.

blameworthiness could be accounted for in the sentencing process. The exclusion of a defence is functionally equivalent to creating an included offence of criminal intoxication. The ultimate impact of both would be that intoxication could not negate liability but would be considered at the sentencing stage. While the majority judges might argue that the stigma would be different, this should not be a constitutional barrier for those crimes that are not special stigma offences.<sup>53</sup>

The flexibility of sentences for most violent crimes and particularly those classified as “basic intent” is also highly significant in addressing the stigma argument. Except where offences have mandatory minimum sentences, such as murder, or fall into the category of “special stigma” offences, which require a specific subjective mental state, the Supreme Court of Canada has held that different gradations of blameworthiness can be punished within one substantive offence definition. In *R. v. Martineau*,<sup>54</sup> when dealing with a special stigma crime, Lamer C.J. asserted a principle that intentional conduct should be punished more severely than unintentional conduct.<sup>55</sup> This had particular significance in the context of murder because of the mandatory minimum sentences and lack of discretion for the sentencing judge. However, the Court has retreated from this principle as a general rule in *Creighton*,<sup>56</sup> *R. v. Finlay*,<sup>57</sup> and *R. v. Naglik*.<sup>58</sup> It now appears that where there is flexibility in the sentencing range, the sentence can be tailored to fit all the circumstances of the offence. As Lamer C.J. noted in *Naglik*:

The lack of a minimum penalty means that the sentencing judge can tailor the sentence to the circumstances of the particular offence and offender, eliminating the danger of the accused being punished to a degree out of proportion to the level of fault actually found to exist.<sup>59</sup>

It is not uncommon for different degrees of blameworthiness to be punished within one offence definition. For example, manslaughter includes within it someone who *actually* foresaw the possibility (but not the probability) of death, someone who *ought* to have foreseen death

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<sup>53</sup> See *R. v. Creighton* [1993] 3 S.C.R. 3 [hereinafter *Creighton*].

<sup>54</sup> [1990] 2 S.C.R. 633 [hereinafter *Martineau*].

<sup>55</sup> *Ibid.* at 645-46.

<sup>56</sup> *Supra* note 53.

<sup>57</sup> [1993] 3 S.C.R. 103 at 118-19 [hereinafter *Finlay*].

<sup>58</sup> [1993] 3 S.C.R. 122 [hereinafter *Naglik*].

<sup>59</sup> *Ibid.* at 145.

and someone who *ought* to have foreseen mere bodily harm. Similarly, sexual assault includes within it offences ranging from an improper touching to forced sexual intercourse and, under our new sexual assault law, covers persons who actually knew the victim was not consenting as well as those who failed to take reasonable steps to inquire as to consent. It is not a violation of section 7 to cover a range of *blameworthy* mental states within one offence definition.

It is particularly noteworthy that Bill C-72 does not attempt to alter the availability of the defence of intoxication for crimes of specific intent. To date, all crimes which have been labelled special stigma, such as murder, attempted murder and theft, are also categorized as specific intent crimes for which intoxication is a defence and to which Bill C-72 does not apply.<sup>60</sup>

With respect to other crimes of violence, it is unlikely that the Court will add significantly to its list of special stigma crimes. We know from *Creighton* that manslaughter is not a special stigma offence and hence by definition that assault does not fall within this category. The dissent in *Daviault* specifically stated that sexual assault is not a special stigma crime and nothing in the majority judgment reflects disagreement with this. In fact, the majority judgment supports the conclusion that sexual assault is not a special stigma crime because the majority held that the fault requirement for sexual assault can only be negated by the most extreme intoxication and upholds the characterization of sexual assault in *Bernard* as a general intent crime.<sup>61</sup>

In the penal negligence cases of 1993, the Court was unanimous in requiring that individuals engaged in dangerous activities be required to exercise reasonable care. Thus, for example, in *Finlay*, Lamer C.J.,

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<sup>60</sup> During hearings on Bill C-72, a number of Committee members expressed the view that the Bill did not go far enough and that the defence should also be excluded for crimes such as murder. However, such a law would have a much more difficult time constitutionally. There is a small group of offences that have been designated as "special stigma" crimes requiring a subjective mental state attached to the elements of the *actus reus*. These include murder (*Martineau supra* note 54), attempted murder (*R. v. Logan*, [1990] 2 S.C.R. 731), and crimes against humanity (*R. v. Finta*, [1994] 1 S.C.R. 701). While it is true that the Supreme Court of Canada developed its constitutional jurisprudence on fault in the absence of any equality analysis of whether the constitutional requirement of subjectivism failed to show sufficient respect for the equality and security interests of women and other groups particularly vulnerable to violence, it is unlikely that the Court will retreat from its well entrenched position on murder in particular, especially in light of the mandatory penalties. Even the dissent in *Daviault* supported the defence of intoxication in the context of specific intent offences and specifically referred to the constitutional dimension of the defence for crimes of special stigma.

<sup>61</sup> See C. Boyle & I. Grant, "Equality, Harm and Vulnerability: Homicide and Sexual Assault Post-*Creighton*" (1993) 23 C.R. (4th) 252.

for a majority on this point, stressed that “[t]hose who have the capacity to live up to a standard of care and fail to do so, in circumstances involving inherently dangerous activities[,] ... cannot be said to have done nothing wrong.”<sup>62</sup>

McLachlin J. made a similar point in *Creighton* about requiring persons to take reasonable care when engaging in dangerous activities:

In a society which licenses people, expressly or impliedly, to engage in a wide range of dangerous activities posing risk to the safety of other[s], it is reasonable to require that those choosing to undertake such activities and possessing the basic capacity to understand their danger take the trouble to exercise that capacity. ... Not only does the absence of such care connote moral fault, but the sanction of the criminal law is justifiably invoked to deter others who choose to undertake such activities from proceeding without the requisite caution.<sup>63</sup>

If someone cannot drink without ensuring that he or she does not lose control of the ability to show respect for the physical integrity of other persons, then that person should not drink. Perhaps we need to start looking at drinking as a potentially dangerous activity and impose a duty of care on those undertaking this activity to ensure that they do not become so intoxicated as to not be responsible for their actions. There is undoubtedly an important societal interest in requiring those who drink to do so with reasonable care and concern for the consequences.<sup>64</sup>

Bill C-72 relies expressly on a standard of penal negligence. Suppose that section 33.1 simply said that there would be no defence where the accused, in becoming extremely intoxicated, departed markedly from the standard of a reasonable person. Surely this would be constitutional, again outside the context of special stigma crimes.

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<sup>62</sup> *Supra* note 57 at 115.

<sup>63</sup> *Supra* note 53 at 66.

<sup>64</sup> Difficulties with this principle arise when the reason the individual is unable to show reasonable care relates to a disability; for example, an addiction. Arguments may be posed under the new legislation that an individual’s intoxication was involuntary because he or she was unable to control their addiction. The views expressed in the literature on whether alcoholics have any choice about becoming impaired is mixed: see, for example, H. Fingarette, *Heavy Drinking: The Myth of Alcoholism as a Disease* (Berkeley: University of California Press, 1988); and H. Fingarette, “Alcoholism: Can Honest Mistake About One’s Capacity for Self Control Be An Excuse?” (1990) 13 *J. L. & Psych.* 77, where the author argues that alcoholics, while constrained by other factors, do exercise choice over the amount of alcohol they consume. Fingarette, at 81, suggests that this premise has been scientifically substantiated. He then explores whether an alcoholic’s honest belief that he or she cannot control his or her drinking should form the basis of a defence.

It is noteworthy that all of the experts testifying before the Parliamentary Committee, including those involved in treating addicts, supported the premise of Bill C-72 that individuals be held responsible for the consequences of their actions while intoxicated: see *infra* note 69.

However, section 33.1 mandates that proof of extreme self-induced intoxication, coupled with a threat to the integrity of another person constitutes incontrovertible proof of a marked departure from the standard of behaviour of a reasonable Canadian. In section 33.1, Parliament is simply defining one form of behaviour that markedly departs from the standard of behaviour expected of Canadians. No one could deny that drinking oneself into a state of automatism and threatening another person's physical integrity departs markedly from what is expected of reasonable Canadians.

Having made an argument that Bill C-72 is not in violation of section 7, it is difficult to predict how the Supreme Court would decide this question. On the one hand, given the Court's record of privileging the accused's liberty interests over women's equality (*Seaboyer, Osolin, Daviault*), it is possible that a section 7 violation would be found and the case resolved under section 1 of the *Charter* where deference to Parliamentary decisions can be given more weight. On the other hand, the express invocation of equality, and the fact of Parliament's swift and decisive response to *Daviault* may have an impact on the Court.

### C. *Bill C-72 and Section 1 of the Charter*

Section 1 of the *Charter* provides: "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."

As mentioned above, only a very rudimentary section 1 analysis was applied in *Daviault*. Because the Court was dealing with a common law rule, the majority held that no deference to Parliament was necessary and thus that it was free to refashion the common law rule. In fact, the majority noted that section 7 rights could not be limited in this way by a "judicially developed policy."<sup>65</sup>

Violations of section 7 are particularly difficult to justify under section 1. A majority of the Supreme Court of Canada in *Heywood*<sup>66</sup> set a very rigorous standard for justifying a section 7 limitation under section 1. There, the majority noted that the Court "has expressed doubt about whether a violation of the right to life, liberty or security of the person, which is not in accordance with the principles of fundamental justice, can ever be justified, except perhaps in times of war

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<sup>65</sup> *Supra* note 1 at 91.

<sup>66</sup> *Supra* note 46.

or national emergencies.”<sup>67</sup> The majority stressed that this was particularly true where the issue was the overbreadth of a legislative provision.

There are several ways to argue that this should not apply to an analysis of section C-72. One argument might be that where the legislative provision is a clear attempt to promote the equality of a disadvantaged group, section 1 cannot be discarded so easily. Another argument might be that where a legislative provision has been narrowly drafted to deal with a particularly pressing social problem, this sweeping language should not be applied since overbreadth is clearly not the issue. Finally, the Court does not seem to follow this position in *Daviault* itself, where the majority crafted a new common law rule which violated sections 7 and 11(d) but went on to uphold it, without analysis, under section 1.

Bill C-72 is the first time the Canadian Parliament has legislated on the defence of intoxication directly. The strong preamble shows that Parliament has considered sections 15 and 28 as well as the rights of the accused. The focus has been firmly placed on a recognized pressing social problem: violence against women and the need for the law to repudiate intoxication as an excuse for such violence.<sup>68</sup> Criminal intoxication was rejected as an option because it shifted the focus away from responsibility for the violence and harm caused. The subjectivist/culpability approach of *Daviault* has been rejected in favour of an approach that focusses on the harm caused to victims of violence at the hands of extremely intoxicated offenders.

Extensive evidence at the Committee hearings indicated that the empirical findings of the Supreme Court of Canada in *Daviault* were scientifically suspect. One expert from the Addiction Research Foundation in Toronto, for example, suggested that there “is no scientific evidence whatever that [automatism] can be caused directly by

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<sup>67</sup> *Ibid.* at 802 [citations omitted].

<sup>68</sup> The U.N. General Assembly *Declaration on the Elimination of Violence against Women* 23 February 1994, 33 I.L.M. 1049, recognizes the urgent need to take measures to end such violence. Article 4(d) of the *Declaration*, at 1053, requires members to develop

penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered.

alcohol intoxication in the absence of some other condition.”<sup>69</sup> He suggested that the Supreme Court erred in equating an alcoholic blackout with automatism: “Blackout means nothing more than a subsequent failure to remember some events that occurred previously during the period of intoxication. It does not imply that the person was not conscious of what was being done at the time.”<sup>70</sup> Evidence was also cited suggesting that memories can be elicited when the individual returns to an intoxicated state. Another expert indicated as follows:

We concur with what you have heard from the Canadian Psychiatric Association ... : alcohol in and of itself cannot induce a state akin to automatism. The so-called *Daviault* decision would *de facto* seem to have created the legal defence of alcohol-induced intoxication akin to automatism, which is indefensible in scientific terms.<sup>71</sup>

Given the above equality analysis and this new scientific evidence, what might an *Oakes* analysis look like for Bill C-72?

### 1. The Objective

In *Daviault*, the majority asserted that there was not even a compelling objective to justify limiting the defence of extreme intoxication since the defence would arise so rarely. This illustrates most starkly the Court’s failure even to consider the equality issues involved and trivializes the plight of the victims in the cases that have been successful.<sup>72</sup> It also flies in the face of the Court’s decision this term in *Dagenais*, where Lamer C.J. noted that, where the legislative objective is

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<sup>69</sup> Testimony of Dr. Harold Kalant, Canada, House of Commons, Standing Committee on Justice and Legal Affairs, “Bill C-72, An Act to amend the Criminal Code”: These proceedings are only available on the World Wide Web at <http://www.parl.gc.ca/committees/jula/jula-160-cover-e.html>.

<sup>70</sup> *Ibid.*

<sup>71</sup> Testimony of Dr. Perry Kendall of the Addiction Research Foundation: *ibid.*

<sup>72</sup> See, for example, *R. v. Blair*, [1994] A.J. No. 807 (Q.B.) (QL) (assault); *R. v. Misquadis* (1995), 27 W.C.B. (2d) 4 (Ont. Ct. (Prov. Div.)) (assault causing bodily harm); and *R. v. Theriault* (17 November 1994) *National General News*[unreported] (assault). The defence has been raised in several cases unsuccessfully: see, for example, *R. v. Belmore*, [1994] O.J. No. 2868 (Ont. Ct. (Gen. Div.)) (QL) (aggravated assault); *R. v. H.S.*, [1995] O.J. No. 1428 (Ont. Ct. (Gen. Div.)) (QL) (sexual assault and killing a dog); *R. v. O’Flaherty* (1995), 26 W.C.B. (2d) 582 (Ont. Ct. (Gen. Div.)) (breaking and entering); *R. v. Watt*, (1995) 39 C.R. (4th) 263 (Alta. Prov. Ct.) (QL) (forcible entry); and *R. v. Compton* (*The Vancouver Sun*, 22 November 1994) (P.E.I. Prov. Ct.) (unreported) (sexual assault).

itself the protection of another constitutional right, such an objective will be seen to be of “exceptional importance.”<sup>73</sup>

There is ample support in the case law for considering section 15 and other *Charter* rights at the section 1 stage of the analysis. Perhaps the best example of this can be found in *Keegstra*<sup>74</sup>. There, the Court considered the relevance of other *Charter* rights in assessing whether a violation of section 2(b) freedom of expression could be justified under section 1. In *Keegstra* Dickson C.J. looked at sections 15 and 27 as reflecting a strong commitment to the values of equality and multiculturalism. He said that section 15 is not limited to situations where an equality right can be invoked by an individual against the State. It also shows our dedication to promoting equality and is thus relevant in assessing the importance of a governmental objective under section 1. He thus concluded that the principles underlying section 15 are integral to a section 1 analysis.

The Women’s Legal Education and Action Fund (LEAF) had argued that the provision prohibiting the promotion of hatred against members of an identifiable group was enacted to promote equality and that, because equality is guaranteed by section 15, the objective under consideration deserved special constitutional consideration. Dickson C.J. agreed: “In light of the *Charter* commitment to equality, and the reflection of this commitment in the framework of section 1, the objective of the impugned legislation is enhanced insofar that it seeks to ensure the equality of all individuals and Canadian society.”<sup>75</sup>

The Court also used equality rights to inform the section 1 analysis in *Butler*,<sup>76</sup> which involved a challenge to the *Criminal Code*’s obscenity provisions. As Sopinka J. noted:

The objective of the legislation, on the other hand, is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.<sup>77</sup>

Unlike at the section 7 stage, in the cases where section 15 has been raised in aid of section 1, the arguments have been quite successful.

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<sup>73</sup> *Supra* note 47 at 890.

<sup>74</sup> *Supra* note 45.

<sup>75</sup> *Ibid.* at 756.

<sup>76</sup> *Supra* note 45.

<sup>77</sup> *Ibid.* at 509.

The limit on *Charter* rights was upheld in *Keegstra Butler*, and *Canadian Newspapers*<sup>78</sup> albeit none of these cases involved limits on an accused's section 7 rights.

How might this case law be used to support Bill C-72? The objective of the Bill is to protect people, and particularly women, from violence by preventing an accused from relying on intoxication as an excuse for that violence. I have already presented data to illustrate the seriousness of the social problem of violence against women and the role of alcohol in aggravating that problem. As mentioned above, twenty-five per cent of women reported experiencing violence at the hands of their spouses or common law partners. The perpetrator of violence was drinking in more than forty per cent of reported incidents. The rate of wife assault was three times higher among regular drinkers than non-drinkers and six times higher in heavy drinkers than in non-drinkers.<sup>79</sup>

Another concern about the decision in *Daviault* is that it may deter women from reporting male violence where alcohol has been involved, fearing that the trauma of the legal process will only result in an acquittal on the basis of intoxication. The availability of the *Daviault* defence could lower the already low rates of reporting domestic and sexual violence against women. Similarly, the decision could influence police and prosecutorial decisions about which cases to prosecute. The avoidance of these problems is surely a compelling objective.

## 2. Rational Connection

In *Daviault*, the majority held that there was no rational connection between the objective of limiting the defence and the means of accomplishing the limit because there is no proof that alcohol causes violence. It should not be necessary to establish that intoxication causes violence in order to establish a rational connection. While it is true that people (and mostly men), not alcohol, cause violence, alcohol is highly implicated in violence even if the relationship cannot clearly be shown to be a causal one. The Violence Against Women Survey reveals that wife assault is more harmful when drinking is involved. Over one-half (fifty-six per cent) of violent men who were drinking at the time of the incident physically injured their spouses and forty-seven per cent of these women required medical attention. In comparison, one-third of violent men who were not drinking physically injured their spouses and

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<sup>78</sup> *Supra* note 45.

<sup>79</sup> *Supra* note 28.

thirty-seven per cent of these injuries required medical attention. When women were asked to describe how a violent incident usually started, twenty-nine per cent mentioned words synonymous with alcohol.<sup>80</sup> As noted, above, women who experienced violence at the hands of intoxicated partners were more likely to perceive the violence as life-threatening than women whose partners were not drinking when violent (forty-one versus twenty-seven per cent).<sup>81</sup> Thus, while alcohol may not cause violence, intoxicated men may inflict more serious injuries on their victims than non-intoxicated violent men and women are more afraid of intoxicated violent men.<sup>82</sup>

Furthermore, intoxicated violence is not necessarily random behaviour and may in fact be very directed behaviour:

With regard to the gender of the victim, discriminating use of violence by a drinking assailant was at least as pronounced as that by a sober one (such as it was). This finding contains rather clear evidence of the continued importance of conditional socio-contextual cues and normative factors in the determination of the types of aggression and physical violence after drinking.<sup>83</sup>

Testimony before the Parliamentary Committee also supported the involvement of alcohol in violence:

Research shows that while alcohol is neither a sufficient nor a necessary cause for violence, alcohol and violence do co-exist. They do go together. The consumption of alcohol at the societal level does contribute to the incidence and prevalence of violence among certain individuals.<sup>84</sup>

Bill C-72 will further the objectives stated above of holding people responsible for the harm they cause and of encouraging women and other victims of violence to report incidents of violence. There is evidence, for example, that when women believe that the legal system will fail to respond to an assault, they are less likely to report it.<sup>85</sup> A law which tells women that their harm is to be taken seriously will encourage reporting incidents of violence and may even make it easier for women

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Supra* note 31.

<sup>82</sup> For similar results see K. Pernanen, *Alcohol in Human Violence* (New York: The Guilford Press, 1991) at 194-95.

<sup>83</sup> *Ibid.*, cited in E. Sheehy, "The Intoxication Defence in Canada: Why Should Women Care?" (Canadian Advisory Council on the Status of Women, 1994) at 7.

<sup>84</sup> *Supra* note 72.

<sup>85</sup> R. Gunn & C. Minch, *Sexual assault: the dilemma of disclosure, the question of conviction* (Winnipeg: University of Manitoba Press, 1988) at 48. See also Sheehy, *supra* note 83 at 12.

to extricate themselves from violent relationships. Ideally, it may even deter some intoxicated violence.

### 3. Minimal Impairment

In *Daviault*, the majority indicated that a rigorous section 1 analysis was not warranted where the Court was assessing a common law rule. In contrast, legislative provisions, such as Bill C-72, are entitled to much more judicial deference. Lamer C.J. explained this in *R. v. Swain*,<sup>86</sup> particularly in the context of the “minimal impairment” branch of the test.

In cases where legislative provisions have been challenged under section 52(1) of the *Constitution Act, 1982*, this court has been cognizant of the fact that such provisions are enacted by an elected body which must respond to the competing interests of different groups in society and which must always consider the policentric aspects of any given course of action. For this reason, the court has indicated that Parliament need not always choose the absolutely least restrictive means to obtain its objective, but must come within a range of means which impair *Charter* rights as little as is reasonably possible. However, as was indicated above, in cases where a common law, judge-made rule is challenged under the *Charter*, there is no room for judicial deference.<sup>87</sup>

There is no doubt that the minimal impairment test has become more flexible since *Oakes*, out of a concern for deference to legislative decision-making. It should also be noted that in *R. v. Downey*,<sup>88</sup> Cory J., for the majority of the Court, held under section 1 that rigid and inflexible standards should not be imposed on legislators attempting to resolve a difficult and intransigent social problem. With respect to the minimal impairment branch specifically, he held that Parliament is not required to choose the absolutely least intrusive alternative in order to satisfy this branch of the analysis. Rather, the issue is “whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively.”<sup>89</sup> It is thus clear that Parliament does not have to choose the least restrictive way of limiting rights if it chooses a reasonable response to a pressing problem that is effective in accomplishing its objective.

One of the problems identified under this branch of the test in *Daviault* was that the *Leary* rule precluded the defence for all general

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<sup>86</sup> *Supra* note 7.

<sup>87</sup> *Ibid.* at 983.

<sup>88</sup> [1992] 2 S.C.R. 10.

<sup>89</sup> *Ibid.* at 37, quoting from *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1341.

intent crimes. Bill C-72 does not. Parliament has targetted the most serious problem: crimes of violence. Not only are specific intent offences not affected, but general intent crimes of property are also outside the scope of the Bill.<sup>90</sup>

While crimes of violence against women are the particular concern, the government could have run into equality challenges if it limited the Bill to crimes of violence against women.<sup>91</sup> Furthermore, while women are systematically targetted for violence, they are not the only group so targetted. Children, persons with disabilities, gay men and lesbians, and members of racial/cultural minorities may also be particularly vulnerable to violence in our society. A provision limited to violence against women ignores these other forms of disadvantage and as such would not have been as effective an alternative as the means chosen.<sup>92</sup>

Section 33.1 will not have an easy time under this branch of the test. The provision removes the relevance of intoxication from the liability stage *entirely* and less restrictive alternatives, such as the reversal of the burden of proof in *Daviault*, could be envisaged. However, the *Daviault* alternative, as well as the option of an included offence of criminal intoxication, do not protect the equality rights of vulnerable victims as well as does the option chosen by Parliament. For example, a reversal in the burden of proof (*Daviault*) would still lead to acquittals for persons who become extremely intoxicated and threaten the physical integrity of others. An included offence would not be as effective in ensuring equality rights because it punishes an accused for being

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<sup>90</sup> There is some empirical support for the proposition that the link between alcohol and violent crime is greater than the link between alcohol and property crime: see, for example, H.M. Cookson, "Alcohol Use and Offence Type in Young Offenders" (1992) 32 Brit. J. Crim. 352. She states, at 359, that "it appears from all data sources that drinking and delinquency tend to go together, and that this is true for all types of crime. When criminal incidents are examined, alcohol is clearly involved more frequently in crimes of violence than in crimes of acquisition."

In fact, all of the cases in which the *Daviault* defence has been successful at trial thus far involve crimes of violence: see, *supra* note 72, *Blair* (assault); *Misquadis* (assault causing bodily harm); *Theriault* (assault); and *Compton* (sexual assault).

<sup>91</sup> This was, in fact, the recommendation put to the Minister of Justice by a "group of women activists and lawyers": see the NAWL Brief, *supra* note 49 at 11.

<sup>92</sup> A unidimensional focus on gender may also miss the subtlety involved in disadvantage. For example, First Nations women, who are particularly vulnerable to violence, may perceive that vulnerability as being related to their race and not only to their gender.

Similarly, a woman with a disability who is targetted for violence may perceive her vulnerability as being a function of her disability as well as of her gender. For a discussion of the particular vulnerability to violence of women with disabilities, see The Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Poverty-Achieving Equality* (Ottawa: Minister of Supply and Services, 1993) at 68-70.

intoxicated, leaving the violent offence unrecognized in law. It is also important to note that Bill C-72 does not exclude the relevance of intoxication altogether as it still may be considered relevant to sentencing. Thus if a judge in a particular case sees intoxication as mitigating, he or she can consider that in sentencing.<sup>93</sup>

#### 4. Proportionality

There is not a lot to add to this branch that was not considered above under the minimal impairment test. A law that is a reasonable and minimal impairment on rights is likely to pass this stage as well. The Court's primary concern will not be whether the objective is sufficiently important but rather with the negative effects on an accused's section 7 rights. It would thus be important to stress the benefits of Bill C-72 for all members of society and for women and children in particular. The negative effects of the violation could be minimized by the fact that evidence of intoxication will still be taken into account in sentencing.

### VI. CONCLUSION

Bill C-72 may well present the Supreme Court with a second chance to consider the appropriateness of allowing extreme intoxication to excuse violence. There are two central differences between the situation in *Daviault* and a *Charter* challenge to Bill C-72. First, with respect to the section 7 analysis, the *Charter* was not argued in *Daviault* and there was no consideration of the equality implications of allowing a defence of intoxication for all crimes. If the principles of fundamental justice had been developed in *Daviault* with a view to reconciling section 7 with the section 15 right of equal protection of the law for women, the result might have been different.

Second, any such challenge would be to a legislative provision reflecting an elected body's conclusions on how best to balance the various interests at stake. A careful section 1 analysis would have to be undertaken, recognizing that the prevention of violence against women is an extremely important objective in our society, and one which itself

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<sup>93</sup> This may be problematic with the few crimes that have mandatory minimum sentences. If Bill C-68, *An Act respecting firearms and other weapons* (3rd Sess., 35th Parl., 1995 (debated at 2d reading of the Senate, 20 June 1995)), were passed, for example, there would be mandatory minimum sentences for a number of general intent offences committed with a firearm such as, for example, manslaughter, wounding, and sexual assault.

has constitutional status. The legal recognition of intoxicated violence, through Bill C-72, is one important part of the government's attempt to deal with that larger social problem. Bill C-72 is a cautious, narrowly tailored response to *Daviault* which excludes the defence only for violent general intent offences, most of which have flexible sentences. It should not be forgotten that the defence of intoxication for specific intent crimes is not diminished by Bill C-72.

It is difficult to predict whether the Court would give sufficient weight to equality, given its section 7 findings in *Daviault* and given its retrenchment in recent equality cases.<sup>94</sup> However, an equality analysis is not the only way to uphold Bill C-72. A more thorough analysis of the Court's recent *Charter* jurisprudence might reveal that the decision in *Daviault* was not the inevitable result of this case law. In recent years, the Court has moved away from an exclusive focus on culpability towards an increasing recognition that the state, through the criminal law, has a legitimate role in protecting the particularly vulnerable from harm. *Naglik*<sup>95</sup> imposed a duty to behave reasonably in caring for one's children and *Finlay*<sup>96</sup> in using firearms; it would not be a big jump to say one has to behave reasonably when indulging in alcohol or drugs.<sup>97</sup> The Court does not often get the benefit of second chances. One can only hope that it rises to the occasion.

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<sup>94</sup> See, for example, *Thibaudeau v. Canada (M.N.R.)*, [1995] 2 S.C.R. 627; and *Egan v. Canada*, [1995] 2 S.C.R. 513.

<sup>95</sup> *Supra* note 58.

<sup>96</sup> *Supra* note 57.

<sup>97</sup> It could be said that *Creighton* *supra* note 53, has already established a duty to use reasonable care in using dangerous drugs.