Substance-Induced Psychosis and Criminal Responsibility

by

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Abstract

Under investigation in this study are accused persons found to have committed criminal acts while in a state of substance-induced psychosis, where intoxication was voluntary. Its objectives were to determine the treatment at law and in practice of individuals in these circumstances, to identify any forensic and legal factors that contribute to differences in outcome in the criminal justice system, and to assess the extent to which these outcomes accord with underlying theoretical constructs and Charter values. Legal and qualitative research methodologies were employed, the latter of which took the form of interviews with criminal justice actors involved in the management of cases in British Columbia. The findings reveal a disconcerting degree of variation in approach, so much so that opposite results have been achieved in cases with relatively similar facts. In R. v. Bouchard-Lebrun, [2011] 3 S.C.R. 575, the Supreme Court of Canada clarified the law. It prescribed a legal framework for the application of the not-criminally-responsible-by-reason-of-mental-disorder defence (“NCRMD”) in cases involving substance-induced psychosis. Significant questions remain, however, not least of which is the constitutionality of the guilt-by-proxy regime embodied in section 33.1 of the Criminal Code. More problematic is the question of whether forensic psychiatrists are in a position to provide evidence of the relative impact of substance use and underlying neurobiological factors, and whether a prevailing lack of confidence in the forensic mental health system will deter legal counsel from recommending the defence of NCRMD, even if that evidence becomes available. The study concludes with recommendations for law reform and future research.

Keywords: Substance-induced psychosis; self-induced intoxication; criminal responsibility; defence of intoxication; defence of not-criminally-responsible-by-reason-of-mental-disorder; defence of automatism; sentencing
To RSB
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1. Introduction

The attribution of criminal responsibility is subject to the fundamental principle that no person shall be held liable for a criminal act without proof of criminal intent.\(^1\) Sir Edmund Coke captured this notion in the oft-quoted phrase, “\textit{actus no facit reum nisi mens sit rea},” meaning the act is not culpable unless the mind is guilty as well.\(^2\) In the case of \textit{The Queen v. Tolson}, Justice Wills of the English Court of Appeal elaborated:

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. “It is a principle of natural justice and of our law,” says Lord Kenyon, C.J. “that \textit{actus non facit reum, nisi mens sit rea}. The intent and act must both concur to constitute the crime:” \textit{Fowler v. Padget} [(1798), 7 T.R. 509, 514]. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong.\(^3\)

In Canada, this requirement has been recognized as a fundamental principle of justice guaranteed by section 7 of the \textit{Charter of Rights and Freedoms}.\(^4\)

Despite its apparent simplicity, however, this principle is controversial. Stuart observes that “more ink has been spilt over the guilty mind concept than any other

\(^{2}\textit{E. Coke, Institutes of the Laws of England} (London, UK: Robert H. Small, 1853) as cited in Hucker et al., eds., \textit{Mental Disorder and Criminal Responsibility} (Toronto, ON: Butterworths, 1985) at 2.}
criminal law topic ... There can be few subjects where the basic principles are the subject of such dispute." Perhaps no more apparent is this dispute than in the treatment of accused persons found to have committed criminal acts while in a state of substance-induced psychosis, where intoxication was voluntary. In such cases, the court must assess liability for conduct that results from the blend of voluntary action and involuntary factors. The ingestion of psychoactive substances may well constitute a culpable act on the part of an accused. However, a subsequent episode of psychosis may not have been foreseeable. Moreover, it may not be wholly attributable to those substances. Instead, it could have resulted from the interplay of substance use and an underlying mental disorder or neurobiological vulnerability over which the accused person had no prior knowledge and no actual control.

These cases take the courts into what preeminent B.C. litigation counsel, Robert Mulligan, Q.C., describes as “an unsettled area of criminal responsibility.” Indeed, there is a troubling degree of variation in the treatment of accused persons with substance-induced psychosis. At times, the approach of Canadian courts has been wholly contradictory. Opposite outcomes have resulted in cases with relatively similar facts. In some of these cases, the accused person has been found not-criminally-responsible-by-reason-of-mental-disorder (“NCRMD”) pursuant to section 16 of the Criminal Code. In others, the courts have convicted the accused on the view that substance-induced psychosis is excluded from the reach of the NCRMD defence. Some courts have allowed the Crown to rely on the guilt-by-proxy provisions of section 33.1 of the Criminal Code to prove mens rea. Yet others have declared section 33.1 to be an unwarranted violation of sections 7 and 11(d) of the Charter.

7 Criminal Code, R.S.C. 1985, c. C-46, s. 16.
8 Ibid., s. 33.1.
It is against the backdrop of these turbulent waters that this study emerged. Its primary objective was to ascertain and examine the treatment at law and in practice of accused persons in circumstances of substance-induced psychosis. Beyond that, it sought to identify any forensic and legal factors that contribute to differences in outcomes in the criminal justice system, and to assess the extent to which these outcomes accord with underlying theoretical constructs and Charter values. Legal and qualitative research methodologies were employed to this end, the latter of which took the form of interviews with criminal justice actors involved in the management of cases in British Columbia. The findings are reported herein. What arises from them is the view that, notwithstanding the clarification offered by the Supreme Court of Canada in the recent case of R. v. Bouchard-Lebrun, considerable uncertainty remains in the law itself. That uncertainty – and the corresponding risk of inconsistency in outcomes for accused persons in Canada - is exacerbated by shortcomings inherent in the available evidence, resource constraints within the criminal justice system, and the normative perspectives of those responsible for the management of cases in that system.

The thesis begins in Chapter 2 with a description of methods. It moves in Chapter 3 to a brief overview of the criminological theory underpinning this area of the law. The potential of rational choice theory as an operating framework for the attribution of criminal responsibility - even in cases of irrationality – is considered. Chapter 4 includes a synopsis of the diagnostic criteria that forensic psychiatrists apply to cases of substance-induced psychosis, as well as the critiques of medical scholars. The divergence between classification and clinical reality is highlighted. The results of the legal research component of the study are set out in Chapter 5. Included therein is a discussion of the defences that an accused person might advance at trial, as well as the disposition that he or she is likely to receive on conviction or declaration of NCMRD. Chapter 6 describes the findings of the qualitative component of the study. The recommendations that arise from these findings are reported in Chapter 7.

2. Methods

2.1. Objectives

The primary objective of the study was to ascertain and examine the treatment at law and in practice of accused persons in circumstances of substance-induced psychosis, where intoxication was voluntary. Included within this objective are the following research questions:

1. what are the forensic and legal factors that contribute to differences in outcome in the Canadian criminal justice system;

2. to what extent does the treatment of accused persons in these circumstances accord with underlying theoretical constructs and Charter values; and

3. what recommendations might be offered for law reform and future research?

2.2. Methodology

2.2.1. Legal research

Legal research was used to determine treatment at law. It proceeded in the form conventional to the expository tradition. Both deductive and inductive reasoning were employed for the purpose of identifying the applicable rules of law and determining the manner in which these rules of law are applied in circumstances of substance-induced psychosis. Due consideration was given to the precedential value of each case, and the quality of the reasoning set out therein.
Relevant case law and legislation were identified in legal texts, as well as through electronic searches (in English and in French) of Canadian judgment databases. Reliance was placed largely on the Quicklaw database. All statutes and cases were noted-up using both the Quicklaw and the CanLii databases, however, to minimize the risk of error. Analysis is limited to cases pronounced prior to 31 December 2013.

2.2.2. Qualitative research

Legal research is perhaps the only means by which treatment at law might be ascertained. There is otherwise no scholarship – legal or otherwise – on the issues under investigation in this study. However, there are inherent limitations to the methodology. Legal research is limited in scope, as it is based solely on reported case law. One might reasonably expect that future cases will be decided in accordance with the principles articulated in reported judgments. The doctrine of stare decisis operates so as to ensure a relatively high degree of consistency and predictability in this regard. Even so, not all judgments are reported, or even produced in written form. Moreover, the factual circumstances described in the reported case law are not necessarily common, nor are the outcomes realized in those cases necessarily typical. On the contrary, a case is more likely to be reported if it is perceived to be significant – rather than conventional - either because it sets a legal precedent or deals with an important legal issue. As a result, those cases that are reported cannot normally be considered representative, nor can any conclusions drawn from a quantitative assessment of them.

10 For example, jury decisions are not rendered in written form. Likewise, one would not expect the court to issue a written judgment if the matter proceeded by consent and in the absence of any substantive contest with respect to the evidence or law.

be considered generalizable. For that reason, complementary qualitative research was used to determine treatment in practice, particulars of which are set out below.\textsuperscript{12}

\subsection*{2.2.2.1. Sample}

For the purposes of the qualitative research component of the study, a sample of research participants was drawn from the communities of legal and medical professionals involved in the operation of British Columbia’s criminal justice system, namely, legal counsel with experience representing the Crown and accused persons as well as forensic psychiatrists involved in the assessment and treatment of accused persons. These individuals are well situated to report on the management of cases involving allegations of substance-induced psychosis, as well as those involving circumstances of co-occurring mental disorder and substance use generally. Moreover, they are easily identifiable, and their contact information accessible on public databases.\textsuperscript{13}

Potential research participants were located in two ways: through professional networks and through involvement in reported cases (either as counsel for a party or as an expert forensic psychiatric witness). Initially, it was expected that the sample would include a total of 12 – 15 lawyers and forensic psychiatrists. However, as the research progressed, additional research participants were recruited and further interviews were undertaken. In the result, a total of 19 individuals participated in the study. That sample was comprised of 15 legal counsel and four forensic psychiatrists. The differentiation in size between these two groups reflects the fact that the forensic psychiatric community in British Columbia is considerably smaller in size than the criminal litigation bar.


\textsuperscript{13} Names and contact information are included in databases administered by the Law Society of British Columbia and the College of Physicians and Surgeons of British Columbia. Links to these databases are posted on the websites of each of these organizations: “Find a Lawyer,” online: The Law Society of British Columbia <http://www.lawsociety.bc.ca/apps/lkup/mbrsearch.cfm> and “Find a Physician,” online: College of Physicians & Surgeons of British Columbia <https://www.cpsbc.ca/index.php?q=node/216>.  

6
In qualitative research, the sufficiency of the sample size is generally assessed in relation to the scope and design of the study itself, the nature of the issues under investigation, and the quality of the data available from each research participant. In this case, satiation was achieved (if not exceeded in relation to legal counsel), and was marked by redundancy within the new data and by the repeated referral of particular individuals reported to have specialized knowledge. Others were identified and recruited for participation in this study, but they were non-responsive, no longer in practice, or not willing to participate due to a lack of time, lack of experience or concerns about client confidentiality.

Included in Table 1 is descriptive information about the legal professionals in the sample. More particularized information has been excluded, given the relatively small number of practitioners with experience in this area of the law, and the consequent risk that particular research participants could be identified. As reported in Table 1, all of the lawyers in this study had more than ten years of experience. The majority (73%) had more than 20 years of experience. Four (27%) worked primarily as Crown counsel over the course of their careers. Five (33%) worked primarily as defence counsel. A further six had substantial experience as both Crown counsel and defence counsel (40%). One of the research participants also had prior experience in law enforcement. Two others had experience as legal scholars and law professors. Collectively, these research participants worked in every judicial district in British Columbia.

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Table 1: Descriptive information for sample of legal counsel

<table>
<thead>
<tr>
<th>Sample</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Role in Criminal Justice System</td>
<td></td>
</tr>
<tr>
<td>primarily as Crown counsel</td>
<td>4</td>
</tr>
<tr>
<td>primarily as defence counsel</td>
<td>5</td>
</tr>
<tr>
<td>substantial experience as both</td>
<td>6</td>
</tr>
<tr>
<td>Crown counsel and defence counsel</td>
<td></td>
</tr>
<tr>
<td>Years of Experience</td>
<td></td>
</tr>
<tr>
<td>0 - 9 years</td>
<td>0</td>
</tr>
<tr>
<td>10 - 19 years</td>
<td>4</td>
</tr>
<tr>
<td>20 years or more</td>
<td>11</td>
</tr>
</tbody>
</table>

Included in Table 2 is descriptive information about the forensic psychiatrists in the sample. It similarly excludes particularized information that could be used to identify the research participants. All but one of these research participants (75%) had more than 20 years of experience in psychiatric practice. The remaining research participant had more than 10 years of experience. All reported having substantial experience working as public practitioners (providing services through the Forensic Psychiatric Services Commission) and in private practice (providing services directly to patients). Each of these research participants had completed court-ordered assessments and served as expert forensic psychiatric witnesses in judicial proceedings in British Columbia.

Table 2: Descriptive information for sample of forensic psychiatrists

<table>
<thead>
<tr>
<th>Sample</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Role in Criminal Justice System</td>
<td></td>
</tr>
<tr>
<td>primarily as public practitioner</td>
<td>0</td>
</tr>
<tr>
<td>primarily as private practitioner</td>
<td>0</td>
</tr>
<tr>
<td>substantial experience as both</td>
<td>4</td>
</tr>
<tr>
<td>public and private practitioner</td>
<td></td>
</tr>
<tr>
<td>Years of Experience</td>
<td></td>
</tr>
<tr>
<td>0 - 9 years</td>
<td>0</td>
</tr>
<tr>
<td>10 - 19 years</td>
<td>1</td>
</tr>
<tr>
<td>20 years or more</td>
<td>3</td>
</tr>
</tbody>
</table>

The sample excludes accused persons and offenders. It perhaps should go without saying that no public database exists from which the names and contact information of these individuals could be extracted. The only names that are available are those included in the reported judgments. Neither lawyers nor forensic psychiatrists
are in the position to disclose the identities of additional accused persons or offenders without violating professional obligations of privilege and confidentiality. However, even if these individuals were known, accessible, and agreeable to participating in an interview, they could not speak to the management of cases other than their own. More importantly, participation in an interview could present more than a minimal risk for them, particularly if any aspect of their case is ongoing or if they are in fragile health.

2.2.2.2. Interviews

Interviews proceeded in a semi-structured format and canvassed the issues described in Appendices “B” and “C.” These issues were identified at the conclusion of the legal research component of the study. The language of the questions was adapted, and alternate lines of inquiry developed, as necessary, to accommodate the unique experiences of each research participant. Indeed, the principle reason for using the semi-structured interview format – and primary advantage of the format – is that it allows for a relatively high degree of flexibility.\textsuperscript{16} It also allows for the introduction of new and previously unforeseen issues. Flexibility of this nature was essential for the study. The purpose of the interviews was not simply to confirm analytic induction hypotheses developed from the review of reported case law. On the contrary, it was to uncover matters not apparent from those judgments, and to invite alternate interpretations and explanations to those derived by the researcher.\textsuperscript{17}

Interviews were conducted on various dates between July and December, 2012. Efforts were made to complete each of these interviews within 20 – 30 minutes, given the time constraints of the research participants. In the result, however, all but two of the interviews exceeded that time period. The average duration of the recorded interviews


was approximately 40 minutes. One interview exceeded an hour. All but two of the
interviews took place by telephone with a single research participant. One research
participant was interviewed in person. Another provided a written narrative on the
general topics under investigation in this study.

2.2.2.3. Analysis

All but one of the research participants agreed that the interview could be
recorded and transcribed. In that one case, notes were taken contemporaneously with
the interview and summarized immediately thereafter.\textsuperscript{18} In the result, the responses
provided by research participants in the course of the interviews were sufficiently
concise - and the transcripts sufficiently small in size – to allow for manual coding and
categorization. It was not necessary to employ computer software for this purpose.
Substantive content was noted, and considered both in the context of the individual
research participant’s reported experience and against the experiences reported by
others, so as to ensure a sufficient degree of interpretative and descriptive validity.\textsuperscript{19}
The findings were then organized by theme, and are described herein. Taken together,
they present the proverbial insider’s perspective on the questions under investigation.

2.3. Ethics

The legal research component of the study was exempt from ethics review
pursuant to section 1.4 of Simon Fraser University’s Ethics Review of Research
Involving Human Subjects: Policies and Procedures, as it was based exclusively on

\textsuperscript{18} Variation in practice did not diminish the quality of the data available for inclusion in this study,
given the focus of the investigation of substantive information provided by research
participants and not the manner in which that information was conveyed. For a discussion of
naturalized and denaturalized transcription, see Oliver et al., “Constraints and Opportunities
with Interview Transcription: Towards Reflection in Qualitative Research” (2005) 28(4)
Psychiatric Rehabilitation Journal 378.

\textsuperscript{19} See, \textit{inter alia}, Sandelowski, supra note 16, and J. Milne & K. Oberle, “Enhancing Rigor in
publicly available information. The qualitative research component was subject to ethics review, and was approved by the SFU Research Ethics Board.

Research participants consented to participate in the study on the terms set out in Appendix “D.” Included in those terms is the express provision that research participants not reveal privileged information. As noted above, lawyers and forensic psychiatrists are subject to professional obligations of privilege and confidentiality. Any research participant who failed to discharge his or her responsibilities in this regard could be subject to disciplinary proceedings by their professional governing body. Otherwise, research participants were assured that identifying information would be maintained in confidence and not disclosed to any third party unless required by law.

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3. **Theoretical foundation**

Underpinning the law of criminal responsibility are the theoretical constructs of the classical school. Classical criminology is premised on libertarian ideals and the belief that human behaviour is the product of rational choice. Bentham was among its leading theorists. He explained crime as the product of a form of hedonistic calculus, wherein the would-be offender weighs the potential benefits to be realized from a particular criminal event against the potential costs that he or she might suffer from the commission of the crime. Implicit in this theory is the presumption that offenders have some measure of reason, such that they can engage in a rational decision-making process, and some degree of free will such that they can act on a decision to commit a crime and restrain themselves otherwise.

Classical criminological theory enjoyed widespread currency in the Enlightenment era. Lilly et al. write that Bentham and his contemporaries “inspired revolutions and the creation of entirely new legal codes.” The popularity of their criminological theories was relatively short-lived, however, as the subsequent emergence of Darwin’s theory of evolution called into question the core assumptions of the classical school. Darwin suggested that criminal conduct was instead the product of primal instinct. In *Descent of Man*, he wrote that, “with mankind some of the worst dispositions which occasionally without any assignable cause make their appearance in

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22 Ibid. at 17.

23 Ibid.
families, may perhaps be reversions to a savage state, from which we are not removed by many generations.”

Darwin’s work in this regard set the stage for the development of biological explanations for criminal conduct. These found currency with the positivist school. Lombroso was among the first to advance a comprehensive biological theory, opining that criminals are born as atavistic beings distinguishable from non-criminals on the basis of cranial formation, facial shape and body type. His contemporary, Ferri, captured the essence of the positivist school and its departure from classical criminology in this passage:

The general opinion of classic criminalists...is that crime involves a moral guilt, because it is due to the free will of the individual who leaves the path of virtue and chooses the path of crime... How can you still believe in the existence of a free will, when modern psychology armed with all the instruments of positive modern research, denies that there is any free will and demonstrates that every act of a human being is the result of an interaction between the personality and the environment of man? And how is it possible to cling to that obsolete idea of moral guilt, according to which every individual is supposed [sic] to have the free choice to abandon virtue and give himself up to crime? The positive school of criminology maintains, on the contrary, that it is not the criminal who wills; in order to be a criminal it is rather necessary that the individual should find himself permanently or transitorily in such personal, physical and moral conditions, and live in such an environment, which become for him a chain of cause and effect, externally and internally, that disposes him toward crime.

The theoretical potential of the positivist school was never fully explored, however, owing in large part to methodological shortcomings and repugnant social

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25 Lilly et al., *supra* note 21, at 18-20.

26 E. Ferri, *The Positive School of Criminology: Three Lectures given at the University of Naples, Italy on April 22, 23 and 24, 1901*, trans. by E. Untermann (Chicago, IL: Charles H. Kerr & Company, 1908) at 21-22.
policies ostensibly supported by its endorsement of hard determinism. Mednick et al. describe these policies in the following terms:

At the turn of the century, biologically oriented speculation dominated the study of lawless human conduct. The speculations were inspired by Darwin’s theory of evolution. In some instances, the mechanistic and coldblooded applications of this theory to social conditions produced an attitude toward human beings that smacked of immorality. Spencer’s brand of social Darwinism, for example, suggested that the human species be improved by selective breeding and favored “shouldering aside the weak by the strong.” Social Darwinism was extended to support aspects of colonialism, racism, and limitation of social welfare. In the 1920’s, in the United States, this orientation provided the intellectual basis of discriminatory immigration laws. These laws contributed to the death of thousands who might have escaped Hitler’s extermination programs. Hitler’s master-race ravings are among the recent “biological” speculations of the causes of human social behavior.

Walsh observes that, in the result, “[a]ny approach smelling of biology [was] open to accusations of genetic determinism, of being in league with Hitler, being anti-immigrant (especially of brown- or black-skinned immigrants), being reactionary and/or racist, or simply of being insensitive.”

Subsequent breakthroughs in neuroscience and genetics precipitated a revival of interest in the biological perspective. Jeffrey reports that established theorists, even those previously committed to non-biological theories, came to accept that biology was at least a potential influencing factor on human behaviour. However, none went so far

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27 Goring is among those to have disproved Lombroso’s idea of an atavistic man. He concluded, on the basis of a comparison of 3,000 convicted criminals with a population of non-criminals in the United Kingdom, that there was no empirical support for the existence of a distinct criminal man. See Lilly et al., supra note 21, and N. Boyd, The Beast Within: Why Men are Violent (Vancouver, BC: Greystone Books, 2000).


30 C.R. Jeffrey, “Criminology as an Interdisciplinary Behavioral Science” (1978) 16 Criminology 149.
as to support the hard determinism attributed to the early positivists. Instead, modern criminology embraced what might be described as *soft determinism or compatibilism*, wherein criminal conduct is explained in part by deterministic factors, but not without due regard to the influence of the environment and the offender's own free will.\textsuperscript{31}

Even Clarke and Cornish, the architects of the rational choice framework, accept this concession. Not unlike their classical school predecessors, these theorists explain criminal acts with expected utility models. They say that crime is the product of a decision-making process wherein the offender weighs his or her desire to satisfy needs against the potential negative consequences of the proposed act.\textsuperscript{32} They also acknowledge, however, that the ability of the offender to engage in a truly rational decision-making process may be limited by his or her environment and, in particular, the “time, resources and information available.”\textsuperscript{33} Clarke and Cornish go on to say that an offender may be similarly limited by pathological elements.\textsuperscript{34} The offender might not make an *optimal* decision as a result of these limitations, but he or she nonetheless will elect the option that is sufficiently *satisficing*, given the capabilities that the offender does have and what is known at the relevant time.\textsuperscript{35}


\textsuperscript{33} *Ibid.* at 25. Williams & McShane, *supra* note 32, at 241 refer to bounded rationality as “soft free will.”


\textsuperscript{35} *Ibid.*
It is in this way that the essential aspects of rational choice theory dovetail with the law of criminal responsibility. As Norrie observes:

Although [Clarke and Cornish] themselves present their perspective as being limited in its scope and implications, as having heuristic and pragmatic value alone…, and decline to affirm any more general positions as regards questions of criminal responsibility and justice, there is surely no denying that the idea of the criminal as a rational decision maker lies foursquare with the traditional conceptions of criminal law and that doctrine's analysis of whether or not punishment is appropriate. Judges, at least, who frequently extol the virtues of pragmatism in dealing with questions of criminal responsibility themselves, are unlikely to be put off recognizing a kindred intellectual spirit by perfectly proper expressions of academic caution.36

Clarke and Cornish apparently share this view. They write that, if every act of crime involves some element of rational choice, then the offender “can be held responsible for that choice and can legitimately be punished.”37 In this way, rational choice theory offers a relatively straightforward operational framework for the attribution of criminal responsibility at law, even in cases of irrationality arising in circumstances of substance-induced psychosis.38


37 Clarke & Cornish, supra note 32, at 34. See also E. Silver, “Understanding the Relationship Between Mental Disorder and Violence: The Need for a Criminological Perspective” (2006) 30 Law and Human Behaviour 685 at 696-98 for a discussion of the potential utility of rational choice theory in analyzing crimes of violence committed by the mentally disordered.

38 For the most part, Canadian law mirrors the perspective of the rational choice theorists. It goes so far as to presume that the acts of accused persons are the product of rational choice. See, inter alia, G. Ferguson, “A Critique of Proposals to Reform the Insanity Defence” (1989) 14 Queen’s L.J. 135, at 140. In R. v. Ruzic, [2001] 1 S.C.R. 687, 2001 SCC 24 at para. 45, the Supreme Court of Canada described this presumption as a “fundamental organizing principle of our criminal law.”
4. Substance-induced psychosis

4.1. Classification of condition for diagnostic purposes

Included in the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* ("DSM-5") is a condition called *substance/medication-induced psychotic disorder* (hereinafter referred to as “substance-induced psychotic disorder”).\(^{39}\) It is defined by the following diagnostic criteria:

A. Presence of one or both of the following symptoms:
   1. Delusions.
   2. Hallucinations.

B. There is evidence from the history, physical examination, or laboratory findings of both (1) or (2):
   1. The symptoms in Criterion A developed during or soon after substance intoxication or withdrawal or after exposure to a medication.
   2. The involved substance/medication is capable of producing the symptoms in Criterion A.

C. The disturbance is not better explained by a psychotic disorder that is not substance/medication induced. Such evidence of an independent psychotic disorder could include the following:

   The symptoms preceded the onset of the substance/medication use; the symptoms persist for a substantial period of time (e.g., about 1 month) after the cessation of acute withdrawal or severe intoxication; or there is other evidence of an

independent non-substance/medication-induced psychotic disorder (e.g., a history of recurrent non-substance/medication-related episodes.)

D. The disturbance does not occur exclusively during the course of a delirium.

E. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.40

Listed as potential triggers are alcohol; cannabis;41 hallucinogens (including phencyclidine and related substances); inhalants; sedatives, hypnotics, and anxiolytics; and stimulants (including cocaine).42 It is noted in the DSM-5 that psychotic symptoms can arise in association with intoxication from certain classes of these substances, and withdrawal from others.43 The development and course of symptoms may vary:

For example, smoking a high dose of cocaine may produce psychosis within minutes, whereas days or weeks of high-dose alcohol or sedative use may be required to produce psychosis. Alcohol-induced psychotic disorder, with hallucinations, usually occurs only after prolonged and

40 Ibid. at “Substance/Medication-Induced Psychotic Disorder.”


42 DSM-5, supra note 39, at “Substance/Medication-Induced Psychotic Disorder.” In a study of out-of-treatment drug users in St. Louis, Thirthalli and Benegal observed prevalence rates as high as 85% for hallucinogens, 82% for phencyclidine, 80% for cocaine, 64% for cannabis, 56% for amphetamine, 54% for opioids, 41% for alcohol and 32% for sedatives. In the case of those severely dependent on cocaine, prevalence rose to 100%; J. Thirthalli & V. Benegal, “Psychosis Among Substance Users” (2006) 19 Curr. Opin. Psychiatry 239. C.f. Smith et al. report prevalence from users with no diagnosis of dependence to users with severe dependence at rates of 5.2%-100% for amphetamines, 12.4%-80% for cannabis, 6.7%-80.7% for cocaine and 6.7%-58.2% for opiates: Smith et al., “Prevalence of psychotic symptoms in substance users: A Comparison Across Substances” (2009) 50 Comprehensive Psychiatry 245. Variation in prevalence rates may be a function of the duration of prior use as well as the combined use of substances: McKetin et al., “Dose-Related Psychotic Symptoms in Chronic Methamphetamine Users: Evidence from a Prospective Longitudinal Study” (2013) JAMA Psychiatry 1.

43 Ibid.
heavy ingestion of alcohol in individuals who have moderate to severe alcohol use disorder and the hallucinations are generally auditory in nature.

Psychotic disorders induced by amphetamine and cocaine share similar clinical features. Persecutory delusions may rapidly develop shortly after use of amphetamine or a similarly acting sympathomimetic. The hallucination of bugs or vermin crawling in or under the skin (formicating) can lead to scratching and extensive skin excoriations. Cannabis-induced psychotic disorder may develop shortly after high-dose cannabis use and usually involves persecutory delusions, marked anxiety, emotional ability, and depersonalization. The disorder usually remits within a day but in some cases may persist for a few days.

Substance/medication-induced psychotic disorder may at times persist when the offending agent is removed, such that it may be difficult initially to distinguish it from an independent psychotic disorder. Agents such as amphetamines, phencyclidine, and cocaine have been reported to evoke temporary psychotic states that can sometimes persist for weeks or longer despite removal of the agent and treatment with neuroleptic medication. In later life, poly-pharmacy for medical conditions and exposure to medications for parkinsonism, cardiovascular disease, and other medical disorders may be associated with a greater likelihood of psychosis induced by prescription medications as opposed to substances of abuse.44

The DSM-5 distinguishes substance-induced psychotic disorder from the substance-related disorders of substance intoxication and substance withdrawal on the basis of insight:

The essential features of substance/medication-induced psychotic disorder are prominent delusions and/or hallucinations (Criterion A) that are judged to be due to the physiological effects of a substance/medication (i.e., a drug of abuse, a medication, or a toxin exposure) (Criterion B). Hallucinations that the individual realizes are substance/medication-induced are not included here and instead would be diagnosed as substance intoxication or substance withdrawal with the accompanying specific “with perceptual disturbances” (applies to alcohol withdrawal; cannabis intoxication; sedative, hypnotic, or anxiolytic withdrawal; and stimulant intoxication).45

44 Ibid.
45 Ibid.
Clinicians are directed to render a diagnosis of substance/medication-induced psychotic disorder - instead of substance intoxication or substance withdrawal - “only when the symptoms of Criterion A predominate in the clinical picture and when they are sufficiently severe to warrant clinical attention.”

The DSM-5 differentiates primary psychotic disorders on the basis of root cause. An individual with substance-induced psychosis may experience hallucinations and delusions in the same way an individual with schizophrenia, for example, might. For a diagnosis of substance-induced psychotic disorder, however, “the substance must be judged to be etiologically related to the symptoms.” In making this determination, clinicians are instructed as follows:

A substance/medication-induced psychotic disorder is distinguished from a primary psychotic disorder by considering the onset, course, and other factors. For drugs of abuse, there must be evidence from the history, physical examination, or laboratory findings of substance use, intoxication, or withdrawal. Substance/medication-induced psychotic disorders arise during or soon after exposure to a medication or after substance intoxication or withdrawal but can persist for weeks, whereas primary psychotic disorders may precede the onset of substance/medication use or may occur during times of sustained abstinence. Once initiated, the psychotic symptoms may continue as long as the substance/medication use continues. Another consideration

46 Ibid.
47 The nature of the hallucinations may be somewhat different, with individuals in a state of substance/medication-induced psychosis experiencing more visual hallucinations and individuals with other psychotic disorders experiencing more auditory hallucinations. Otherwise, the experience of the individual while in psychosis – whether symptomatic of substance-induced psychotic disorder or a primary psychotic disorder - is comparable See J. M. Fabian, "Methamphetamine Motivated Murder: Forensic Psychological/Psychiatric & Legal Applications in Criminal Contexts" (2007) 35 J. Psychiatry & Law 443 at 449-50; Caton et al., “Differences Between Early-Phase Primary Psychotic Disorders with Concurrent Substance Use and Substance-Induced Psychoses” (2005) 62 Arch Gen Psychiatry 137 at 141-142; Dignon et al., “Are There Differences Between Primary Psychosis and Substance-Induced Psychosis” (2009) 24 European Psychiatry 441; Fiorentini et al., “Substance-Induced Psychoses A Critical Review of the Literature” (2011) 4 Current Drug Abuse Reviews 228; and Dawe et al., “A Comparison of the Symptoms and Short-Term Clinical Course in Inpatients with Substance-Induced Pyschosis and Primary Psychosis” (2011) 40 Journal of Substance Abuse Treatment 95.
48 DSM-5, supra note 39, at “Substance-Induced Psychotic Disorder.”
is the presence of features that are atypical of a primary psychotic disorder (e.g., atypical age at onset or course). For example, the appearance of delusions de novo in a person older than 35 years without a known history of a primary psychotic disorder should suggest the possibility of a substance/medication-induced psychotic disorder. Even a prior history of a primary psychotic disorder does not rule out the possibility of a substance/medication-induced psychotic disorder. In contrast, factors that suggest that the psychotic symptoms are better accounted for by a primary psychotic disorder included persistence of psychotic symptoms for a substantial period of time (i.e., a month or more) after the end of substance intoxication or acute substance withdrawal or after cessation of medication use; or a history of prior recurrent primary psychotic disorders. 49

Embedded in these instructions is the view that substance-induced psychosis is generally short-lived and resolves with sobriety. 50 In the DSM-IV-TR, clinicians were advised that symptoms persisting beyond four weeks should be considered - “as a rule of thumb” – to result from an independent mental disorder. 51

4.2. Shortcomings of diagnostic criteria

The DSM-5 adopts the diagnostic criteria of the DSM-IV-TR, albeit with some revision to language and descriptive content. It does so notwithstanding criticism to the effect that the criteria are confusing, and that the lines drawn between substance-induced disorders (including substance intoxication, substance withdrawal, and

49 Ibid.
50 See Fiorentini et al., supra note 47, at 228-29. Clinicians are cautioned elsewhere in the DSM-5 that the psychotic symptoms produced by agents such as amphetamines, phencyclidine, and cocaine can persist for “weeks or longer despite removal of the agent and treatment with neuroleptic medication,” and that it can be difficult to properly distinguish substance-induced psychotic disorder from a primary psychotic disorder as a result. See DSM-5, supra note 39, at “Substance/Medication-Induced Psychotic Disorder.”
substance induced psychotic disorder) and primary psychotic disorders are incompatible with clinical realities.\textsuperscript{52} In this regard, Leong et al. report as follows:

For each diagnosis, the diagnostic criteria force a dichotomous choice between assigning causation to either the exogenous substance or a preexisting or independent mental disorder, when in clinical practice the contributions may be derived from a variety of factors, including acute or recent consumption of a substance and the individual's preexisting neurobiological matrix.\textsuperscript{53}

In some cases, the onset of psychosis may be attributable to the combination of substance use and underlying neurobiological factors,\textsuperscript{54} the relative impact of which may not be obvious or even capable of ascertainment.\textsuperscript{55}

\textsuperscript{52} Ibid. See also H. Ancharsäter, “Beyond Categorical Diagnostics in Psychiatry: Scientific and Medicolegal Implications” (2010) 33 Int'l J. Law & Psychiatry 59 for a critique of categorical diagnostics generally.


\textsuperscript{54} Recent research suggests that there may be a shared genetic risk between substance-induced psychosis and primary psychotic disorders. See Ikeda et al., “Evidence for Shared Genetic Risk Between Methamphetamine-Induced Psychosis and Schizophrenia” (2013) 38 Neuropsychopharmacology 1864.

\textsuperscript{55} The nature and extent of co-occurrence are well documented, as are the corresponding diagnostic challenges that assessing psychiatrists face. See, \textit{inter alia}, Regier et al., “Comorbidity of Mental Disorders with Alcohol and Other Drug Abuse: Results from the Epidemiological Catchment Area (ECA) Study” (1990) 264(19) JAMA Psychiatry 2511; Rabinowitz et al., “Prevalence and Severity of Substance Use Disorders and Onset of Psychosis in First-Admission Psychotic Patients” (1998) 28 Psychol Med 1411; Helseth et al., “Substance Use Disorders among Psychotic Patients Admitted to Inpatient Psychiatric Care” (2009) 63 Nordic Journal of Psychiatry 72, and Lambert et al., “The Impact of Substance Use Disorders on Clinical Outcome in 643 Patients with First-Episode Psychosis” (2005) 112(2) Acta Psychiatr Scan 141, as cited in Mathias et al., \textit{supra} note 51, at 358.
For this reason, Mathias et al. have suggested that the nomenclature of substance-*induced* psychosis be replaced with that of substance-*associated* psychosis:

This reflects the growing literature highlighting an association between substance use (particularly cannabis and stimulant use) and psychosis onset, while acknowledging that the underlying etiology still remains undetermined. In addition, ... it is exceedingly difficult to reliably differentiate substance-induced psychoses from schizophrenia-spectrum disorders, and it is clinically challenging, if not impossible, to accurately conclude that the presentation unreservedly reflects a substance-induced state. To this end, a diagnosis of [substance-associated psychotic disorder] implies an association between state and substance, rather than causation, which more accurately reflects our current understanding of the interplay between psychotic symptoms and substance use.\(^{56}\)

According to Carroll et al., there are at least four means by which psychosis may manifest *in association with* drug use:

- Psychotic symptoms may be part of an intoxication syndrome, and resolve rapidly with the excretion of the psychotogenic (that is, psychosis-causing) substance from the body.

- Relatively short-lived psychotic symptomatology may be judged to be due to the direct physiological effects of an ingested substance, and the symptoms may persist for a short period (days or weeks) after excretion of the substance...

- A person’s use of a psychoactive substance, either once or, more commonly, repeatedly, may be associated with the emergence of a psychotic illness, which then continues to have an independent long-term existence even in the absence of ongoing substance use.

- A person with an established psychotic illness may engage in substance abuse, which appears to precipitate psychotic relapses.\(^ {57}\)


\(^{57}\) Carroll et al., *supra* note 41, at 634.
However, even if the relationship between substance use and psychosis is recast as one of association and not simple causation, as Mathias et al. have suggested, it still may not be possible for clinicians to accurately differentiate between these four categories of association. As Feix and Wolber observe, it is “difficult, if not impossible to determine whether the psychosis was induced or released; in other words, did the drug cause the psychosis or did it merely weaken an existing tenuous ego structure, allowing for the breakthrough of a pre-existing, underlying psychosis?”

Fiorentini et al. attribute some of these complications to common neurobiological processes at play:

Substances with psychotomimetic properties (i.e. those whose acute or chronic use is capable of altering a subject’s psychic status) such as alcohol, cocaine, amphetamines, hallucinogens and cannabis0 [sic], are widespread, and their use or abuse can provoke psychotic reactions resembling a primary psychotic disorder. The psychotogenic effect of these substances is related to dopaminergic activity in the brain, and dopaminergic function correlates most closely with the symptomatic dimension of psychosis....

This dopaminergic activity underlies the sense of gratification and pleasure generated by the substances themselves, which is actively sought by their users. However, the mesolimbic dopaminergic circuits involved in the reward are the same as those involved in the development of psychotic symptoms and schizophrenia, and substances that increase

58 Jordaan et al. tested the hypothesis that alcohol-induced psychotic disorder is a discrete clinical entity that could be differentiated from schizophrenia and alcohol dependence on the basis of standardized clinical assessment, but found only modest support for that proposition. See Jordaan et al., “Alcohol-Induced Psychotic Disorder: A Comparative Study on the Clinical Characteristics of Patients with Alcohol Dependence and Schizophrenia” (2009) 70 Journal of Studies on Alcohol and Drugs 870.

59 Feix & Wolber, supra note 56, at 179. See also M.I Flaum & S. K.Schultz, “When Does Amphetamine-Induced Psychosis Become Schizophrenia” (2003) 1(2) Focus 205. In a recent study of NCR accused in Canada, Crocker et al. found that co-occurring diagnoses had been rendered in 49.2% of cases involving “serious violence offences,” approximately one third of which involved co-occurring psychotic disorders and substance use: Crocker et al., Description and Processing of Individuals Found Not Criminally Responsible on Account of Mental Disorder Accused of “Serious Violent Offences” (Montreal, PQ: Douglas Mental Health University Institute, March 2013), online: Douglas Mental Health University Institute <https://ntp-htp.org/NCRMD-SVO-NTPteam_March_2013.pdf>.
dopamine levels in these circuits can give rise to symptoms that qualitatively overlap schizophrenia.

...It is precisely because of the involvement of the dopaminergic system that the clinical presentation of an individual presenting with acute psychotic symptoms and substance abuse is similar to those presenting with symptoms indicative of a psychotic disorder in the absence of substance abuse.60

The authors conclude:

This leads to major problems of differential diagnosis. Furthermore, diagnosis is even more difficult when the onset of psychotic symptoms is not preceded by other psychiatric manifestation, and is concomitant with or immediately follows the use of psychoactive substances.61

Fiorentini et al. underline this point by reference to an early study of Fenning et al. involving patients with first episode psychosis. These researchers found that a clear diagnosis could not be made in almost 10% of cases.62 Fiorentini et al. suggest that the diagnostic process requires "longitudinal assessment after a period of sustained abstinence that is often impractical because of the relapsing nature of substance abuse and limited access to in-patient care."63 Indeed, in a subsequent study by Shaner et al., it was found that psychiatrists were unable to render a clear diagnosis in 78% of cases due to insufficient periods of abstinence.64

It is perhaps not surprising then to find a considerable degree of diagnostic instability in cases of substance-associated psychosis. In a study of patients admitted to psychiatric emergency departments in New York, Caton et al. found that 25% of cases changed within a one-year period from an initial diagnosis of substance-induced

60 Fiorentini et al., supra note 47, at 228.
61 Ibid.
63 Fiorentini et al., supra note 47, at 229.
psychotic disorder to an outcome diagnosis of primary psychotic disorder. In a British study conducted by Komuravelli et al., in which psychiatric patients were followed for a minimum of two years or until discharge, the diagnosis changed to schizophrenia, schizoaffective disorder, bipolar affective disorder, psychosis not otherwise specified, acute and transient psychosis or delusional disorder in 78% of cases. Braithwaite et al. examined the files of the Quebec Review Board for the period of 2000-05, and found that there was only a 33% chance that an initial diagnosis of substance-induced psychosis would be supported in subsequent Review Board proceedings. For that population, the likelihood of the diagnosis transitioning to schizo-spectrum disorder, bipolar disorder and/or substance use disorder was, collectively, 34.17%.

In Canada, section 672.14 of the Criminal Code limits the duration of psychiatric assessment orders to 30 days. Only in “compelling circumstances” may the court extend that period. Even then, however, it cannot allow the accused to be detained beyond 60 days. In these circumstances, diagnostic uncertainty and instability are particularly problematic. As set out below, the diagnosis that an accused person receives within that period – however uncertain or unstable – shapes the defences available at trial, and significantly impacts disposition.

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66 Komuravelli et al., “Stability of the Diagnosis of First-Episode Drug-Induced Psychosis” (2011) 35 The Psychiatrist 224. It is possible that these cases represent not a misdiagnosis but a conversion of the patient’s condition from one of substance-induced psychosis to a primary psychotic disorder. See Niemi-Pynttäri et al., “Substance-Induced Psychoses Converting into Schizophrenia: A Register-Based Study of 18,478 Finnish Inpatient Cases” (2013) 74(1) J Clin Psychiatry 94-9 for research on conversion risk..

67 Braithwaite et al., “Patterns of Diagnostic Stability in Quebec Review Board Files” (Barcelona, SP: 11th Annual Conference of the International Association of Forensic Mental Health Services, 2011).

68 Criminal Code, supra note 7, s. 672.14.

69 Ibid, s. 672.14(3).

70 Ibid.
5. **Treatment at law**

5.1. **Defence of intoxication**

5.1.1. **Beard Rules**

The defence of intoxication is a challenge to the *mens rea* elements of an offence. By advancing this defence, the accused is not claiming to be excused from criminal responsibility. Nor is the accused claiming to have been justified in committing the criminal act. On the contrary, the accused is alleging that he or she lacked the *mens rea* required for conviction by reason of impairment by drugs or alcohol. For the most part, the accused must show some evidence to this effect, in order for the defence to be considered by the trier of fact for the purpose of raising reasonable doubt. Otherwise, as will be seen, the burden of proof shifts to the accused in cases of extreme intoxication akin to automatism or insanity.

The origins of the intoxication defence can be traced to the 1920 decision of the House of Lords in the case of *D.P.P. v. Beard*.\(^{71}\) In his speech, Lord Birkenhead L.C. observed as follows:

> Under the law of England as it prevailed until early in the 19\(^{th}\) century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary

act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man.\textsuperscript{72}

This particular view subsequently evolved to the point that intoxication was accepted as a mitigating factor in cases of severe violent crime where the defendant faced a potential penalty of death or transportation, or in cases where the defendant otherwise garnered the sympathy of the courts.\textsuperscript{73}

In the result, the House of Lords held that a defence of intoxication should be available to accused persons, but only in limited circumstances. Lord Birkenhead articulated these circumstances, and the rules intended to govern the application of the defence, in his speech:

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. ....

2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.\textsuperscript{74}

These rules subsequently became known as the \textit{Beard Rules}.

The Supreme Court of Canada endorsed the latter two \textit{Beard Rules} in the 1931 case of \textit{MacAskill v. The King}.\textsuperscript{75} Taken together, they operate so as to allow an accused person to plead intoxication by way of defence to a specific intent offence, if the effects of intoxication rendered the accused incapable of forming the specific intent required for

\textsuperscript{72} Ibid. at 494.
\textsuperscript{74} Ibid. at 500-02.
conviction. For accused persons in these circumstances, however, intoxication offers only a partial defence. In reliance on the Beard Rules, an accused might be acquitted of a specific intent offence, but he or she could still be convicted of any lesser included general intent offence.\footnote{Naturally, this defence is not available in circumstances where the accused person deliberately consumes drugs or alcohol for the purpose of committing the offence (so-called "liquid courage"). See A-G for N. Ireland v. Gallagher, [1963] A.C. 349.}

The Beard Rules are subject to an important qualification subsequently recognized by the Supreme Court of Canada in \textit{R. v. Robinson},\footnote{\textit{R. v. Robinson}, [1996] 1 S.C.R. 683.} In that case, the Court concluded that the Beard Rules violated sections 7 and 11(d) of the Charter, and could not be saved under section 1, to the extent they required proof of incapacity on the part of the accused. Lamer C.J., writing for the majority, held as follows:

\begin{quote}
It is my opinion that the Beard rules incorporated in \textit{MacAskill} are inconsistent with our Charter. They violate ss. 7 and 11(d) because they create a form of constructive liability that was outlawed in \textit{R. v. Vaillancourt}, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636, and its progeny. As Professor Stuart notes in \textit{Canadian Criminal Law}, [3rd ed. Scarborough, Ont.: Carswell, 1995], at p. 393:

\begin{quote}
Taken literally the second Beard rule may lead to the startling result that the Crown does not have to prove beyond reasonable doubt the essential element of intent, but merely that the accused had the capacity to form the intent. Gold points out that in this way Beard imposes constructive liability in the case of specific intent offences.
\end{quote}

The Beard rules put an accused in jeopardy of being convicted despite the fact that a reasonable doubt could exist in the minds of the jurors on the issue of actual intent. Under these rules, if the jury is satisfied that the accused's voluntary intoxication did not render the accused incapable of forming the intent, then they would be compelled to convict despite the fact that the evidence of intoxication raised a reasonable doubt as to whether the accused possessed the requisite intent. \textit{MacAskill} precludes the jury from acting on that reasonable doubt and therefore the Beard rules violate ss. 7 and 11(d).\footnote{\textit{Ibid.} at paras 40-41.}
\end{quote}
Thus, the *Beard Rules* must be modified to allow the defence of intoxication to proceed as a complete defence to a specific intent offence, if there is reasonable doubt as to whether the defendant formed *actual* specific intent by reason of intoxication. In other words, it is sufficient for the accused to show a lack of intent. It is not necessary for the accused to go further to show *incapacity to form that intent*.

5.1.2. **R. v. Daviault**

Naturally, the question later arose as to whether a complete defence should be similarly available to accused persons charged with general intent offences. The Supreme Court of Canada considered this issue in *Leary v. The Queen*. The complainant testified that the accused was intoxicated when he forced her at knife point to submit to various sexual acts. In his instructions to the jury, the trial judge stated that “drunkenness is not a defence to a charge of this sort.” Several issues arose on appeal, including the viability of the distinction at law between specific intent offences and general intent offences. Of significance for the purposes of this analysis, however, is the ruling of the Court with respect to the availability of the defence of intoxication in circumstances where there is reasonable doubt as to whether the defendant formed even the minimal *mens rea* required for conviction of a general intent offence. The Supreme Court of Canada held that, in such circumstances, the *mens rea* of the general intent offence is satisfied by proof of voluntary intoxication. In other words, the Crown can rely on the recklessness associated with voluntary intoxication to establish fault on the part of the accused. In this way, the so-called *Leary Rule* allows for substituted *mens rea* or *guilt-by-proxy*. The effect of the *Leary Rule* is to facilitate the conviction of an accused person for a general intent offence even in the absence of proof beyond of reasonable doubt of the *mens rea* elements of the offence.

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80 Ibid. at para. 1.
Guilt-by-proxy is a concept not entirely foreign to Canadian law. The doctrine of transferred intent permits the transfer of *mens rea* from one offence to another, but only so long as the *actus reus* of each offence is the same. This is not the case with the *Leary Rule*. The transfer of the *mens rea* of voluntary intoxication to the *actus reus* of a criminal offence, such as assault or murder, is exceedingly more controversial. In the subsequent case of *R. v. Daviault*, Cory J. described the competing perspectives that arose in response to the *Leary Rule*:

The supporters of the *Leary* decision are of the view that self-induced intoxication should not be used as a means of avoiding criminal liability for offences requiring only a general intent. They contend that society simply cannot afford to take a different position since intoxication would always be the basis for a defence despite the fact that the accused had consumed alcohol with the knowledge of its possible aggravating effects. Supporters of the *Leary* decision argue that to permit such a defence would "open the floodgates" for the presentation of frivolous and unmeritorious defences.

Those who oppose the decision contend that it punishes an accused for being drunk by illogically imputing to him liability for a crime committed when he was drunk. Further, it is said that the effect of that decision is to deny an accused person the ability to negate his very awareness of committing the prohibited physical acts. That is to say the accused might, as a result of his drinking, be in a state similar to automatism and thus completely unaware of his actions, yet he would be unable to put this forward as a factor for the jury to consider because his condition arose from his drinking. In such cases, the accused's intention to drink is substituted for the intention to commit the prohibited act. This result is said to be fundamentally unfair. Further, it is argued that the floodgates argument should not have been accepted because juries would not acquit unless there was clear evidence that the drunkenness was of such a severity that they had a reasonable doubt as to whether the accused was even aware that he had committed the prohibited act...

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In the Daviault case, the Supreme Court of Canada was called upon to consider these arguments anew, and respond to the particular question of whether substituted mens rea was permissible under sections 7 and 11(d) of the Charter. These issues were not considered in Leary, as that case predated the enactment of the Charter.

The complainant in Daviault was a 65-year-old woman. She was partially paralysed and confined to a wheelchair. The accused was a friend whom the complainant had invited to her home. It was the evidence of the complainant that the accused arrived at approximately 6:00 p.m. with a 40-ounce bottle of brandy. She drank a small amount of that brandy before falling asleep. The complainant testified to the effect that, later in the night, the accused intercepted her en route to the bathroom, wheeled her to the bedroom, and sexually assaulted her. The accused was a chronic alcoholic. There was evidence at trial which suggested that the accused drank the entirety of the 40 ounce bottle of brandy (apart from the small amount he shared with the complainant) between the hours of 6:00 p.m. and 3:00 a.m. He allegedly consumed seven or eight bottles of beer earlier in the day. A pharmacologist testified that, if the accused had indeed consumed this quantity of beer followed by 35 ounces of brandy, his blood-alcohol ratio would have been between 400 and 600 milligrams per 100 millilitres of blood. It was the view of this expert that such extreme intoxication could trigger an episode of “l’amnésie-automatisme” wherein the individual experiences a break with reality and loses control over their actions.

Cory J., writing for the majority of the Court, affirmed the principle that criminal responsibility can be imposed only if the conduct of the accused was voluntary and intentional. He recognized this as a principle of fundamental justice, and held that it applies equally to general intent offences as it does to specific intent offences, even in cases involving voluntary intoxication. Cory J. reasoned as follows:

84 Ibid. at para. 73.
The mental aspect of an offence, or *mens rea*, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law. That element may be minimal in general intent offences; nonetheless, it exists… The necessary mental element can ordinarily be inferred from the proof that the assault was committed by the accused. *However, the substituted mens rea of an intention to become drunk cannot establish the mens rea to commit the assault.*

…

The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime. Rather, the substituted *mens rea* rule has the effect of eliminating the minimal mental element required for sexual assault. *Furthermore, mens rea for a crime is so well-recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice.*\(^{85}\)

[Emphasis added]

Consequently, the *Leary Rule* was found to violate both section 7 and 11(d) of the *Charter*. Further, in the words of Cory J. “to deny that even a very minimal mental element is required for sexual assault offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*.“\(^{86}\) In the result, the majority allowed the accused’s appeal from conviction and remitted the matter for a new trial.

In his judgment, Cory J. rejected the argument that voluntary intoxication could be substituted for the *mens rea* requirements of general intent offences without violating *Charter* rights:

I cannot accept that contention. *Voluntary intoxication is not yet a crime.* Further, it is difficult to conclude that such behaviour should always constitute a fault to which criminal sanctions should apply. However, assuming that voluntary intoxication is reprehensible, it does not follow

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\(^{86}\) *Ibid.* at para. 47.
that its consequences in any given situation are either voluntary or predictable. Studies demonstrate that the consumption of alcohol is not the cause of the crime. A person intending to drink cannot be said to be intending to commit a sexual assault.87

[Emphasis added]

Instead, Cory J. held, the Charter requires that a complete defence be available to accused persons, even in response to general intent offences. He described the parameters of the defence as follows:

In my view, the Charter could be complied with, in crimes requiring only a general intent, if the accused were permitted to establish that, at the time of the offence, he was in a state of extreme intoxication akin to automatism or insanity. Just as in a situation where it is sought to establish a state of insanity, the accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication. This will undoubtedly require the testimony of an expert. Obviously, it will be a rare situation where an accused is able to establish such an extreme degree of intoxication. Yet, permitting such a procedure would mean that a defence would remain open that, due to the extreme degree of intoxication, the minimal mental element required by a general intent offence had not been established. To permit this rare and limited defence in general intent offences is required so that the common law principles of intoxication can comply with the Charter.88

Hence, in reliance on the judgment of Cory J. in this case, an accused person could obtain a full acquittal to a general intent offence if the accused proved, on a balance of probabilities, that he or she was in a state of extreme intoxication akin to automatism or insanity, and lacked the requisite mens rea as a result.89

87 Ibid. at para. 45.
88 Ibid. at para. 67.
89 Cory J. acknowledged that the reverse onus violated section 11(d) of the Charter, but took the view that the violation was justified under section 1. C.f. G. Ferguson, “The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation” (2012) 57 S.C.L.R. (2d) 111 at paras 46-48, in which Ferguson argues that the reverse onus aspect of the Daviault defence is constitutionally infirm.
Sopinka J. wrote a forceful dissent in support of the *Leary Rule*, concluding that acts of self-induced intoxication are morally blameworthy and can justifiably be relied on by the Crown to prove the *mens rea* elements of an offence, even where the criminal acts of the accused were otherwise involuntary. His judgment in this regard is summarized in the following passage:

It is true that as a general rule, an act must be the voluntary act of an accused in order for the actus reus to exist... This, as in the case of *mens rea*, is a general rule of the criminal law, but when elevated to a principle of fundamental justice it too, exceptionally, is not absolute. One well-recognized exception is made relating to the defence of non-insane automatism. As I explain below, automatism does not apply to excuse an offence if the accused's state is brought on by his or her own fault. The condition of automatism deprives the accused of volition to commit the offence but the general rule gives way to the policy that, in the circumstances, the perpetrator who by his or her own fault brings about the condition should not escape punishment. An accused person who voluntarily drinks alcohol or ingests a drug to the extent that he or she becomes an automaton is in the same position. The rules of fundamental justice are satisfied by a showing that the drunken state was attained through the accused's own blameworthy conduct.\(^90\)

5.1.3. **Section 33.1 of the Criminal Code**

In direct response to the decision of the majority in *Daviault*, Parliament enacted section 33.1 of the *Criminal Code*. It provides as follows:

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.

Section 33.1 does not revive the Leary Rule, however, nor does it wholly eliminate the Daviault defence. Instead, section 33.1 operates so as to remove that defence from the reach of accused persons if they are charged with crimes involving personal violence and their intoxication is found to have been “self-induced.” That term has been interpreted to mean ingestion was voluntary, the accused knew or ought to have known the substance was an intoxicant, and the risk of intoxication was or should have been within the contemplation of the accused.91 The Daviault defence continues to be available to accused persons in all other circumstances.

Section 33.1 was introduced by way of Bill C-72, entitled An Act to amend the Criminal Code (self-induced intoxication).92 The governing Liberal Party tabled Bill C-72 on February 24, 1995, less than five months after the Supreme Court of Canada rendered its judgment in R. v. Daviault, in response to public criticism of the Daviault decision, particularly from those concerned about the reported correlation between alcohol use and violence against women. Grant describes that criticism as follows:


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.

It soon became apparent that the government had no choice but to act quickly...  

In his address to Parliament on the motion for second reading of the bill, then Minister of Justice Allan Rock explained the government’s motives behind the introduction of Bill C-72:

The Daviault judgment raised obvious concerns for members of Parliament and indeed for all Canadians. The whole question of accountability under the criminal law was brought into sharp focus.

Specific concerns related to crimes of violence against women and children. Indeed the Daviault case itself involved an allegation of sexual assault against a woman. In the weeks that followed the release of the Daviault case, there were other cases in various parts of Canada applying its principle, each case involving allegations of violence against women.

Concern grew that a person might be charged with murder and defend on the basis of intoxication. If the extent of intoxication was established to be sufficiently extreme, that person might walk out of the courtroom entirely free because they were incapable of performing a specific intent involving murder and because the intoxication was such that they were exculpated from the general intent crime of manslaughter. The result would be that they would face no sanction at all.

Concerns were also expressed that people might manipulate the legal principles so as to intoxicate themselves to some extent for the purpose of committing a crime. They would then intoxicate themselves further... 

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afterward before apprehension and rely upon the degree of intoxication overall to escape liability for the crime.\(^94\) These concerns are reflected in the unusually long preamble included Bill C-72, a complete copy of which is reproduced for reference in Appendix “A”. Of note are the following clauses:

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;

... WHEREAS the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it;

... AND WHEREAS the Parliament of Canada considers it necessary and desirable to legislate a standard of care, in order to make it clear that a person who, while in a state of incapacity by reason of self-induced intoxication, commits an offence involving violence against another person, departs markedly from the standard of reasonable care that Canadians owe to each other and is thereby criminally at fault;

Conspicuously absent from the preamble is any explanation as to how section 33.1 could operate without violating the Charter rights of accused persons as recognized by the majority in R. v. Daviault.

\(^94\) House of Commons Debates, No. 177 (27 March 1995) at 11037 (Hon. Allan Rock).
Historically, the law has viewed self-induced intoxication as the product of rational choice, for which the accused is morally culpable. In his classic text, *A Treatise of the Pleas of the Crown*, Hawkins wrote that no leniency should be afforded to accused persons who commit offences while in a state of voluntary intoxication, saying that such a person “shall be punished for [the offence] as much as if he had been sober.”

Section 33.1 is consistent with this norm, as it attributes criminal liability notwithstanding the fact that the act was both unintentional and involuntary. Arguably, however, for the reasons articulated by Cory J. in the *Daviault* case, doing so would constitute a direct and unjustifiable violation of sections 7 and 11(d) of the *Charter*. In his address to Parliament, Minister Rock stated that the decision of the Supreme Court of Canada in *R. v. Daviault* was not definitive of that question, as the Court did not have the benefit of the material evidence or full argument on the *Charter* issue. He went on to express his own opinion that section 33.1 was likely to survive any constitutional challenge.

Some legal commentators agree with this position. Others take the opposite viewpoint. Perhaps the only opinion shared among them is the certainty of a *Charter* challenge. In an article published shortly after the introduction of Bill C-72, Grant forecast that very outcome, stating that “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.” As it turns out, Grant was somewhat optimistic in her prediction. The question of the constitutionality of section 33.1 has indeed been raised in various criminal proceedings. However, almost 20 years later, and notwithstanding numerous lower court decisions on the question, the issue has yet to be argued before the Supreme Court of Canada.

5.1.4. **Charter of Rights and Freedoms**

The British Columbia Supreme Court was among the first to consider the constitutionality of section 33.1 of the *Criminal Code*. It did so in the 1998 case of *R. v. Vickberg*. The accused in that case was charged with attempted murder and assault with a weapon. He admitted these acts, but sought the benefit of the *Daviault* defence. The accused claimed to have been in a state of non-insane automatism, purportedly induced by the over-consumption of prescription drugs, namely Clonidine and Imovane. Owen-Flood J. accepted this evidence, and determined that section 33.1 was not applicable by reason of the fact that the accused had not intended to become intoxicated. Consequently, intoxication was not “self-induced.”

The Court nonetheless went on to consider the constitutionality of section 33.1. Owen-Flood J. concluded, albeit in *obiter*, that the provision violated both sections 7 and 11(d) of the *Charter*, but was saved by section 1. He held as follows:

The section effectively eliminates the minimal required mens rea for the general intent offences to which it applies. It substitutes proof of voluntary intoxication for proof of the intent to commit an offence of general intent, most commonly, assault. It is also obvious that the section, on its face, imposes criminal liability in the potential absence of any voluntariness in the actions of the accused. The legal explanations provided by Crown counsel in attempting to establish the constitutionality of this provision have not persuaded me that any other conclusion can reasonably be drawn. I hold that s. 33.1 of the Criminal Code violates ss. 7 and 11(d) of the Charter.

... 

I find that the objective of s. 33.1 relates to pressing and substantial concerns, that the measure is proportionate to the objective as measured by the tests of rational connection, minimal impairment and proportionality of effects. The means undertaken by Parliament to hold those who commit certain crimes while in a state of self-induced intoxication responsible for their actions is reasonable and demonstrably justified in a free and democratic society. Therefore, although I find that s. 33.1 of the

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Criminal Code violates ss. 7 and 11(d) of the Charter, the provision is saved by s. 1.100

Ferteryga J. of the Ontario Court of Justice (General Division) reached the same conclusion later that year in the case of R. v. Decaire.101 He expressly concurred with the reasoning of Owen-Flood J. in the Vickberg case with respect to the rational connection aspect of the Oakes test, and the view that “intoxication is a contributing factor to incidents of violence against women, children and others.”102

In the case of R. v. Dunn, handed down just one year after the Vickberg and Decaire decisions, the Ontario Superior Court of Justice reached the opposite result.103 Wallace J. adopted a narrow view of the objectives of Bill C-72, characterizing the assertions in the preamble as both “mis-statements” and “overstatements”:

First, respecting its 'mis-statement'. Based on its stated premise that violence negatively affects the equality rights of women and children, their security of person and their access to Principles of fundamental justice, the preamble represents that s. 33.1 will rectify the imbalance. The preamble invites a balancing of victims' interests against an accused's rights as it purports to ensure victims' protection guaranteed by s. 7 of the Charter. In fact, what s. 7 guarantees to all Canadians is that their lives will be safeguarded before the courts by principles of fundamental justice. Section 7 promises procedural and substantive justice. It is misleading, I respectfully suggest, for Parliament to draft a preamble to legislation that appears to equate victims' rights [with] society's interests, victims' are, undoubtedly, a component of society's interests but society's interests must also include a system of law, governed by the principles of fundamental justice.

Second, the preamble overstates society's interest to be addressed by s. 33.1. To say that it protects victims generally, and women and children particularly, against the combined effect of alcohol and violence, is a significant overstatement. The section cannot accurately be said to address victims' s. 7 rights; nor does it address any special needs of

100 Ibid. at paras 84 and 100.
102 Ibid. at para. 13.
women or of children; rather, it sets out to protect victims against intoxicated automatons who act violently.

And so, what are society's interests that s. 33.1 would offset against Mr. Dunn's compromised Charter rights? Despite the section's wording and its stated objectives, I find that the most society gains from s. 33.1 is the removal of one defence [from] violent, intoxicated automatons. This is the extent to which society's interests can be considered in any s. 7 analysis, when being compared to the accused's loss of individual rights.

No one wishes to see any victim short-changed by a system, for then, society is short-changed. Nevertheless, if there is to be a balancing with the s. 7 analysis, it must be that - a balancing. In my view, society's interests, when represented by the extremely narrow degree of protection afforded by s. 33.1, cannot outweigh the importance of preserving mens rea, and the concept of blameworthiness, as an essential element of Canadian criminal law.

Therefore, with or without a balancing exercise as part of the analysis, I conclude that s. 33.1 of the Criminal Code offends s. 7 of the Charter.  

Wallace J. went on to find that there is likely a rational connection between section 33.1 and the stated objectives of Parliament, given the reported link between intoxication and violence, and the disproportionate representation of women and children among victims of intoxicated offenders. However, section 33.1 otherwise failed the remaining branches of the proportionality test. On that question, Wallace J. held as follows:

How serious is the infringement? In my view, there are few infringements that could be more serious. When an accused can be convicted without proof that he intended his actions or without proof that his actions were voluntary, then absolute liability has become a component of Canadian criminal justice, the presumption of innocence is eroded and principles of fundamental justice are seriously compromised. In my view, there is no acceptable proportionality between the good that s. 33.1 may achieve and the serious infringement of individual rights that it creates.

Likewise, in the 1999 case of R. v. Brenton, Vertes J. of the Northwest Territories Supreme Court similarly concluded that section 33.1 violated the Charter, finding that “to

104 Ibid. at paras 31-35.
105 Ibid. at para. 53.
deny a defence of [extreme-intoxication-akin-to-automatism] offends the *Charter of Rights and Freedoms* in a manner that is so drastic and contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*.”

Then J., also of the Ontario Superior Court of Justice, reached the same conclusion in the 2000 case of *R. v. Jensen*.

Apart from these cases, and a 2005 decision of the Ontario Court of Justice in *R. v. Cedeno*, the issue lay dormant for almost a decade. In fact, in the *Cedeno* case, D.W. Duncan J.J. characterized the law – in Ontario at least – as settled. In reliance on the *Jensen* decision and notwithstanding academic commentary to the contrary, he held as follows:

Courts have given the section mixed reviews... However, the law in Ontario at this point appears to be that the section offends section 7 and 11(d) of the Charter and is not saved by section 1. It is therefore unconstitutional and of no force and effect...

The debate surrounding section 33.1 was subsequently revived with the 2010 decision of the Quebec Superior Court in *R. v. Dow*. In that case, the Quebec Superior Court rejected the accused’s claim of alcohol-induced automatism on a factual basis:

The Court reckons that the judicial definition of extreme intoxication akin to automatism given by the Supreme Court in *Daviault* is inconsistent with the scientific evidence tendered in the case at bar, for situations involving over-consumption of alcohol alone. The scientific basis in *Daviault*, which was taken for granted then and after, led to a wrong conclusion. The latter must be set aside.

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110 *Ibid*.
This Court's decision ... determines that the defence of extreme intoxication akin to automatism induced by an over-consumption of alcohol does not exist anymore in Canadian criminal law. Therefore, it cannot be put to the jury.\textsuperscript{112}

The Court nonetheless went on to consider the accused's challenge to the constitutionality of section 33.1. On that question, the Court adopted a broad view of the objectives of Bill C-72, finding that they concern the protection of women, the effects of violence and related alcohol consumption, and the accountability of intoxicated offenders for criminal conduct. It further held that these objectives were sufficiently pressing and substantial to satisfy the first branch of the \textit{Oakes} test. In relation to proportionality, the Court found that the means embedded in section 33.1 are rationally connected to the objectives of the legislation, that section 33.1 represents a minimal impairment of \textit{Charter} rights, and that any deleterious effect is proportionate to the salutary benefit of the legislation. With respect to the latter in particular, François Huot J.S.C. concluded:

\ldots[O]nly very few offenders could eventually be prejudiced by section 33.1, that is to say, those individuals:

1) charged with a general intent offence,
2) of violent nature,
3) committed after having voluntarily ingested,
4) one of the few drugs likely to bring about a state of automatism, and
5) being actually in a state of extreme intoxication.

What are the benefits, or salutary effects associated with the limitation? The most important is definitely the enhancement of the security and bodily integrity of Canadian citizens, and more particularly those of women and children. Studies tendered in evidence show that there is a close connection between violence and intoxication. Women and children represent particularly vulnerable targets for intoxicated offenders and deserve better protection in our free and democratic society.

Second, people who commit general intent crimes of violence while being in a state of extreme intoxication will not be allowed to rely on their intoxication to escape liability. They will be as criminally accountable for their behaviour as would be anybody performing the same acts while

\textsuperscript{112} \textit{Ibid.} at paras 101-2.
being sober. The Court agrees with the Intervener that it is reasonable for the legislator to impute blame on a perpetrator in such circumstances.

The legislation’s deleterious effects are not insignificant. However, balancing the salutary and harmful repercussions of section 33.1, the Court concludes that the impact of the limitation is proportionate.\textsuperscript{113}

In the result, the trial judge found that section 33.1 was saved by section 1. The Nunavut Court of Justice reached the same outcome in the recent case of \textit{R. v. S.N.}\textsuperscript{114}

However, in \textit{R. v. Fleming}, handed down one month after the \textit{Dow} decision, the Ontario Superior Court again took the opposite view.\textsuperscript{115} In that case, T.L.J. Patterson J. adopted the position previously expressed by the Ontario courts to the effect that section 33.1 violated both sections 7 and 11(d) of the \textit{Charter}, and endorsed the reasoning articulated in \textit{R. v. Dunn} concerning section 1. The Court specifically rejected the decision of the Quebec Superior Court in \textit{R. v. Dow} with respect to section 1, and held that section 33.1 could not be justified under that provision.\textsuperscript{116}

It is apparent from these decisions that there is a sharp divide in the reported case law on the constitutionality of section 33.1, much of which stems from normative perspectives on which judges might reasonably disagree. In the recent case of \textit{R. v. Bouchard-Lebrun}, the Supreme Court of Canada was asked to determine the effect of section 33.1 on the defence of NCRMD pursuant to section 16 of the \textit{Criminal Code}.\textsuperscript{117} With respect to the constitutionality of section 33.1, however, the Court noted only that the appellant “raises no arguments” on the question, “which means that only the

\textsuperscript{113} \textit{Ibid.} at paras 150-153.
\textsuperscript{114} \textit{R. v. S.N.}, 2012 NUCJ 02.
\textsuperscript{115} \textit{R. v. Fleming}, 2010 ONSC 8022.
\textsuperscript{116} \textit{Ibid.} at paras 25-34.
\textsuperscript{117} \textit{R. v. Bouchard-Lebrun}, supra note 9.
interpretation and application of that provision are in issue.”118 To the disappointment of scholars, the Supreme Court of Canada declined to initiate the Charter debate itself. Kaiser writes as follows:

[T]his is the second occasion that the Supreme Court has had to consider the broader implications of the section. Previously, Daley made short shrift of it, curtly determining that extreme alcohol-induced intoxication would be “extremely rare, and by operation of s. 33.1 of the Criminal Code, limited to non-violent types of offences.” It appears that a form of osmotic constitutionalization has occurred, which provides no firm guidance on the status of s. 33.1, other than to indicate that Charter arguments are probably non-starters.119

In the result, litigants are left to proceed without the benefit of any clear pronouncement on the constitutionality of section 33.1. Until this issue is decided, there remains a significant risk that the law will continue to be interpreted and applied by different courts in different ways, and that accused persons will realize radically different results depending largely on the province in which their matter proceeds and the perspectives of the judges before whom they are called to appear.

5.1.5. Application

It is apparent from this review of the case law that an accused person may advance the defence of intoxication in circumstances of substance-induced psychosis, regardless of whether the psychotic episode arose as a result of intoxication alone or a combination of substance use and underlying neurobiological factors. However, the relief available to the accused may be limited. The defence of intoxication offers only a


partial defence to specific intent offences. The accused person will succeed in that
defence if the evidence of intoxication raises reasonable doubt on the question of
whether he or she formed the actual specific intent required for conviction. The accused
may nonetheless be found guilty of any lesser included general intent offence.

In reliance on the Daviault decision, and subject to section 33.1 of the Criminal
Code, the defence of intoxication offers a complete defence only if the accused
establishes, on a balance of probabilities, that the level of intoxication was so extreme as
to be akin to automatism or insanity. The Daviault defence has yet to be applied in
circumstances of substance-induced psychosis. However, a compelling argument can
be made that psychosis is a state akin to insanity, and thus ought to be captured by the
Daviault defence. Although the Court did not consider this argument in Bouchard-
Lebrun, presumably it would not have applied section 33.1 unless the Daviault defence
was otherwise available to the accused in that case. Coughlan et al. argue, in reliance
on the reasoning of the Supreme Court of Canada in R. v. Landrey and R. v. Oommen,
that a defence ought to be available, as there can be no moral basis on which to convict
an accused in these circumstances. If they are correct in their analysis, as they would
appear to be on this reading of the Bouchard-Lebrun case, the question of whether an
accused might be convicted of a lesser included offence will then depend on the
application of section 33.1, the constitutionality of which has yet to be resolved.

The fact that the Supreme Court of Canada relied on section 33.1 in Bouchard-
Lebrun, without first assessing it for Charter compliance, suggests a certain level of
judicial comfort with the guilt-by-proxy regime embedded in that provision. Nonetheless,
at this time, the constitutionality of section 33.1 remains uncertain. Accused persons
face a patchwork system of justice in Canada, in which cases of similar facts may result
in wholly different outcomes. There are precedents in British Columbia, Quebec and
Nunavut on which the Crown can rely to support the application of section 33.1.
Meanwhile, there are precedents in Ontario and the Northwest Territories on which the

\footnote{120}{Coughlan et al., supra note 119, at 205-211.}
\footnote{121}{Ibid.}
accused person can rely for the opposite outcome. It is not unreasonable to expect that this situation will continue, at least until the Supreme Court of Canada renders a decisive ruling on the issue.

5.2. Defence of not-criminally-responsible-by-reason-of-mental-disorder

5.2.1. Section 16 of the Criminal Code

Section 16 of the Criminal Code offers a statutory defence to accused persons who, by reason of a mental disorder, lacked the guilty mind required to support a conviction. Lamer C.J. explained the rationale for the defence:

The rationale underlying the defence…rests on the belief that persons suffering from insanity should not be subject to standard criminal culpability with its resulting punishment and stigmatization. This belief, in turn, flows from the principle that individuals are held responsible for the commission of criminal offences because they possess the capacity to distinguish between what is right and what is wrong.122

Section 16 operates so as to exempt an individual from criminal liability.123 To hold otherwise, Le Bel J. wrote, would offend Canadian values:

...[I]t can also be said that an insane person is incapable of morally voluntary conduct. The person’s actions are not actually the product of his or her free will. It is therefore consistent with the principles of fundamental justice for a person whose mental condition at the relevant time is covered by s. 16 Cr.C. not to be criminally responsible under Canadian law. Convicting a person who acted involuntarily would undermine the foundations of the criminal law and the integrity of the judicial system.124

123 Ibid. at para. 22.
Consequently, if an individual successfully advances a defence under section 16, he will not be convicted.

However, in Canada, that individual also will not be acquitted. Instead, the accused will be declared “not-criminally-responsible-by-reason-of-mental-disorder” (“NCRMD”) and, pursuant to the provisions of Part XX.1 of the Criminal Code, be diverted to the forensic psychiatric hospital system for so long as he or she poses a significant threat to public safety. In the words of McLachlin J., (as she then was), “[t]hroughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with [the] goals of public protection and fairness to the NCR accused.” This particular sentiment reflects the underlying view that NCR accused persons are not morally blameworthy for conduct that otherwise would be considered criminal.

The origins of the NCRMD defence can be traced to the M’Naghten’s Case. M’Naghten was charged for the murder of Edward Drummond on January 20, 1843. He shot the deceased, mistakenly believing him to be the British Prime Minister, Sir Robert Peel, and under the delusion that Peel’s government was persecuting him. It was argued by way of defence that M’Naghten suffered from a form of insanity which deprived him of the powers of self-control. The jury acquitted. Subsequently, the question of the availability of a common law defence of insanity became the topic of debate in the House of Lords. This debate culminated with the referral of five questions to the Law Lords about the elements of the defence. In his response to these questions, Lord Chief Justice Tindal held as follows:

…[E]very man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of

125 Criminal Code, supra note 7, s. 672.54.
127 M’Naghten’s Case (1843), 8 E.R. 718 (H.L).
the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.  

The essential elements of this defence, as articulated by the Lord Chief Justice, were subsequently incorporated into Canada’s first Criminal Code. It operated at that time so as to excuse an accused person who, by reason of a “natural imbecility” or “disease of the mind,” was incapable of appreciating the nature and quality of his or her conduct and of knowing it was wrong.  

In 1992, section 16 of the Criminal Code was amended to its current form. It now reads as follows:

(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

It is open to either the Crown or the defendant to advance an application for a declaration of NCRMD. In R. v. Chaulk, the Supreme Court of Canada held this burden, when applied to the accused, infringes the presumption of innocence guaranteed by section 11(d) of the Charter. It is nonetheless saved by section 1.

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128 Ibid. at 722.
129 Criminal Code, S.C. 1892, c. 29, s. 11.
130 Criminal Code, supra note 7, s. 16 as amended by S.C. 1991, c. 43, s. 2.
131 R. v. Chaulk, supra note 122.
5.2.2. **R. v. Cooper**

Section 2 of the *Criminal Code* defines the term “mental disorder” to mean a “disease of the mind.” As Le Bel J. noted in *Bouchard-Lebrun*, this is a circular definition, and one which the courts have had to develop as a result. However, it is also a concept for which legal precedent is of limited utility. Whether a particular condition is a “disease of the mind” is a question for determination by the trial judge. In making that determination, the court will be informed by the evidence of medical and psychiatric experts as well as public policy factors, such as the need to protect the public in circumstances where a particular mental disorder presents a risk of recurring danger on the part of the accused. Such evidence may vary as between cases and evolve over time. As Dickson J. noted in the *Rabey* case:

> What is disease of the mind in the medical science of today may not be so tomorrow. The court will establish the meaning of disease of the mind on the basis of scientific evidence as it unfolds from day to day. The court will find as a matter of fact in each case whether a disease of the mind, so defined, is present.

As a result, it is incumbent on the party advancing the NCRMD application to tender the requisite evidence, and to persuade the trial judge to the requisite standard of proof on the basis of that evidence. Applicants cannot necessarily rely on earlier cases involving similar diagnoses. Theoretically, a condition previously excluded from section 16 may subsequently be recognized as a “disease of the mind” on the basis of new research. Likewise, a condition previously recognized as a disease of the mind may subsequently be excluded.

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132 *Criminal Code, supra* note 7, s. 2.
135 *R. v. Rabey, supra* note 133, at 552.
Generally speaking, however, the courts prefer a broad and liberal interpretation of the “disease of the mind” concept. In the oft-cited case of *R. v. Cooper*, Dickson J. formulated the following definition:

In summary, one might say that in a legal sense “disease of the mind” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.

In crafting this definition, Dickson J. relied, in part, on the writings of former Chief Justice of Australia Sir Owen Dixon. In his judgment, he reproduced the following excerpt:

The reason why it is required that the defect of reason should be “from disease of the mind”, in the classic phrase used by Sir Nicholas Tindal, seems to me no more than to exclude drunkenness, conditions of intense passion and other transient states attributable either to the fault or to the nature of man. In the advice delivered by Sir Nicholas Tindal no doubt the words “disease of the mind” were chosen because it was considered that they had the widest possible meaning. He would hardly have supposed it possible that the expression would be treated as one containing words of the law to be weighed like diamonds. I have taken it to include, as well as all forms of physical or material change or deterioration, every recognizable disorder or derangement of the understanding whether or not its nature, in our present state of knowledge, is capable of explanation or determination.

Dickson J.’s reference to self-induced intoxication is strictly *obiter*. The facts of the *Cooper* case did not include allegations of substance-induced psychosis or any other substance-related disorder. Nonetheless, Dickson J.’s definition of “disease of the mind”

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is consistent with the earlier decisions of the Ontario Court of Appeal in *R. v. Rabey* and the English Court of Appeal in *R. v. Quick*. In both cases, the Courts similarly excluded self-induced intoxication from their definitions of disease of the mind. In the *Rabey* case, Martin J.A. added an important qualification, stating expressly that this exclusion does not apply in cases “where alcoholic excess or drug abuse has brought about a disease of the mind.”

In reliance on the *Cooper* case, some Canadian courts have excluded substance-induced psychosis from the purview of section 16 and refused the NCRMD defence on the basis that intoxication was voluntary on the part of the accused person. The decision of the New Brunswick Provincial Court in *R. v. Johnson* is one example. In that case, the Court held that the accused was not eligible for the NCRMD defence, because substance-induced psychosis was excluded from the *Cooper* definition of disease of the mind “on policy grounds.” In other cases, however, the courts have taken the opposite approach. For example, in *R. v. Snelgrove*, the B.C. Supreme Court applied section 16 without even considering the possible exclusion of substance-induced disorders from the *Cooper* definition. In that particular case, it apparently did so with the agreement of the Crown.

### 5.2.3. *R. v. Bouchard-Lebrun*

Issues surrounding the scope of the *Cooper* definition, and the specific exclusion of substance-induced psychosis, came before the Supreme Court of Canada in the

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139 *R. v. Rabey, supra* note 133.


141 *R. v. Rabey, supra* note 133, at 55. The decision of the Ontario Court of Appeal in this case may represent an attempt by the court to broaden the scope of the term, “disease of the mind” so as to limit, in turn, the use of the defence of non-mental-disorder automatism.


The accused was charged with two counts of aggravated assault and assault, as well as breaking and entering with intent to commit a criminal offence and attempting to break and enter a place other than a dwelling house. Experts agreed that the accused was in a psychotic state at the time of the offences. They did not agree, however, on the etiology of the psychosis. The defence expert opined that the psychotic episode was triggered by a “mystical atmosphere” cultivated by the accused’s companion, and that the accused’s decision to use drugs on that occasion “was not made freely but was influenced in a way by the control his friend exercised over him.” The trial judge rejected that opinion, and instead accepted that of the Crown expert. He testified that the accused’s psychosis resulted from substance use. The accused’s particular mental state is described in the Court’s judgment as “toxic psychosis.” The accused was found to have consumed a combination of cannabis and amphetamines. He had no history of mental disorder.

At trial, in reliance of the evidence of extreme intoxication, the trial judge acquitted the accused on the charges of breaking and entering and attempting to break and enter. In relation to the assault charges, however, the trial judge relied on section 33.1 of the Criminal Code to convict the accused. The accused was sentenced to incarceration for a period of five years. The Quebec Court of Appeal dismissed the accused’s subsequent appeal from both conviction and sentence, at which time the accused attempted unsuccessfully to advance the NCRMD defence. The accused then appealed to the Supreme Court of Canada. As set out above, the accused did not challenge the constitutionality of section 33.1. Instead, he argued two grounds of appeal relating to the interpretation of section 16 and its interplay with section 33.1, namely, the specific questions of whether section 33.1 limits the scope of the NCRMD defence, and whether toxic psychosis resulting from voluntary intoxication is a “mental disorder” for the purposes of section 16.

147 Ibid. at para. 13.
With respect to the first of these issues, the accused argued that section 33.1 ought not to be applied to section 16 so as to remove the NCRMD defence from the reach of those whose intoxication was self-induced. Le Bel J. agreed:

... [T]he appellant is right to say that s. 33.1 Cr. C. should not be interpreted so as to limit the scope of s. 16 Cr. C. Intoxication and insanity are two distinct legal concepts. As defences to criminal charges, they have different logics and each of them is governed by its own principles.

First of all, it is important to understand that the application of ss. 16 Cr. C. and that of s. 33.1 Cr. C. are mutually exclusive. For s. 33.1 Cr. C. to apply, the court must reach a conclusion in law that the accused lacked the general intent or the voluntariness required to commit the offence by reason of self-induced intoxication. The absence of this intent or voluntariness would then preclude a finding that the incapacity of the accused was caused by a disease of the mind (R. v. Huppie, 2008 ABQB 539 (CanLII), at para. 21). Conversely, the fact that an accused was intoxicated at the material time cannot support a finding that s. 33.1 Cr. C. applies if the accused establishes that he or she was incapable of appreciating the nature and quality of his or her acts by reason of a mental disorder.148

[Emphasis added]

Le Bel J. nonetheless acknowledged that particular challenges arise in cases of co-occurring substance use and mental disorder, where the etiology of a psychotic episode is uncertain:

If the accused was intoxicated and in a psychotic condition at the material time, the problem the court faces is to identify a specific source for his or her mental condition, namely self-induced intoxication or a disease of the mind, and determine whether it falls within the scope of s. 33.1 or s. 16 Cr. C. This appears to be all the more difficult to do in cases in which the mental health of the accused was already precarious prior to the incident in question, even if his or her problems had not yet been diagnosed at the time, and in which the psychosis emerged while the accused was highly intoxicated. Yet this identification of the source of the psychosis plays a

148 Ibid. at paras 36-37.
key role, since it will ultimately determine whether the accused will be held criminally responsible for his or her actions.\textsuperscript{149}

The Court also acknowledged the obvious relationship between the mental states excluded from the \textit{Cooper} definition, by reason of the fact that they were induced by alcohol or drugs, and those included in the scope of section 33.1. It held that, in such cases, trial judges should first determine the NCRMD application, and rely on section 33.1 only if section 16 is found not to apply.\textsuperscript{150}

The question thus arises as to the circumstances in which substance-induced psychosis constitutes a mental disorder within the meaning of section 16. This was the second ground of appeal. Defence counsel, perhaps limited by the shortcomings of the evidentiary record and the lack of medical evidence on the various means by which psychosis can emerge in association with substance use, argued that toxic psychosis is “always” a disease of the mind. Understandably, the Supreme Court of Canada rejected this argument. Doing so, Le Bel J. wrote, would effectively result in verdict-by-diagnosis:

To argue that toxic psychosis must always be considered a "mental disorder" is to say that the legal characterization exercise under s. 16 Cr. C. depends exclusively on a medical diagnosis. If the appellant's position were accepted, psychiatric experts would thus be responsible for determining the scope of the defence of not criminally responsible on account of mental disorder. This argument conflicts directly with this Court's consistent case law over the past three decades and cannot succeed. It would shift the responsibility for deciding whether the accused is guilty from the judge or jury to the expert.\textsuperscript{151}

The Court characterized the circumstances in which toxic psychosis could result as “heterogeneous,”\textsuperscript{152} and considered the automatic inclusion of toxic psychosis within the definition of disease of the mind to be inappropriate as a result. Interestingly, the Court

\textsuperscript{149} \textit{Ibid.} at para. 38.
\textsuperscript{150} \textit{Ibid.} at para. 40.
\textsuperscript{151} \textit{Ibid.} at para. 65.
\textsuperscript{152} \textit{Ibid.} at para. 68.
did not rely on medical evidence for this particular finding of fact. Instead, it looked to prior case law:

An additional reason for rejecting the appellant's central argument has to do with the very diverse reality encompassed by the term "toxic psychosis". In the case law, this term usually refers to the symptoms of the accused as diagnosed by psychiatrists. However, medical science does not always identify the causes of toxic psychosis as precisely as is required in law. Although toxic psychosis is always related to exposure to a toxic substance, the circumstances in which it may arise can vary a great deal. This is readily apparent from a review of the case law on this point. (see R. v. Oakley (1986), 24 C.C.C. (3d) 351 (Ont. C.A.); R. v. Mailloux (1985), 25 C.C.C. (3d) 171 (Ont. C.A.), aff'd [1988] 2 S.C.R. 1029; R. v. Moroz, 2003 ABPC 5, 333 A.R. 109; R. v. Snelgrove, 2004 BCSC 102 (CanLII); R. v. Lauv, 2004 BCSC 1093 (CanLII); R. v. Fortin, 2005 CanLII 6933 (C.Q.); R. v. Paul, 2011 BCCA 46, 299 B.C.A.C. 85).

Many factors might contribute to a state of substance-induced psychosis, including the fact that symptoms of a paranoid personality disorder are active at the time drugs are taken (Mailloux), the combined effect of exposure to toxic vapours and a period of intense stress (Oakley), dependence on certain drugs, such as cocaine (Moroz and Snelgrove), heavy drug use during the days and hours leading up to the commission of the crime (Lauv and Paul), and withdrawal following a period of excessive drinking (R. v. Malcolm (1989), 50 C.C.C. (3d) 172 (Man. C.A.)). It seems that this diversity of circumstances can be attributed to variations in psychological makeup and psychological histories from one accused to another, as well as in the nature of the drug use that contributed to their psychoses. The quantity and toxicity of the drugs taken also seem to have a significant effect in this regard. As a result, in each new situation, the case turns on its own facts and cannot always be fitted easily into the existing case law.\footnote{Ibid, at paras 66-67.}

Given the many factors that might cause or contribute to the onset of psychosis in association with substance use, the Court endorsed a “contextual approach” to the specific question of whether the accused person’s psychosis is a disease of the mind for
the purposes of section 16. 154 Le Bel J. recommended the following framework of analysis:

When confronted with a difficult fact situation involving a state of toxic psychosis that emerged while the accused was intoxicated, a court should start from the general principle that temporary psychosis is covered by the exclusion from Cooper. This principle is not absolute, however: the accused can rebut the presumption provided for in s. 16(2) Cr. C. by showing that, at the material time, he or she was suffering from a disease of the mind that was unrelated to the intoxication-related symptoms. 155

Regrettably, Le Bel J. did not define “temporary psychosis.” It would appear from the language in this excerpt that “temporary psychosis” was considered by the Court to be a symptom of intoxication alone. This accords with DSM-5 criteria. Nonetheless, any party advancing the NCRMD defence could presumably distinguish its own case if it could show that the psychosis experienced by the accused person – however brief or transient it might have been – was attributable to underlying mental disorder.

Le Bel J. did not specifically address circumstances of co-occurrence. Instead, he suggested simply that the “more holistic approach” described by Bastarache J. in R. v. Stone be followed when assessing whether an accused discharged the burden of proof under section 16. 156 Particulars of that case are described below in the context of the automatism defence. Suffice it to say at this stage of the analysis that the Stone framework requires the court to consider whether the accused’s condition is a product of internal or external factors, and whether the accused represents a continuing danger by reason of that condition. Subject to any overriding policy considerations, those conditions which are attributable to external triggers, and which are not likely to recur independently, will generally fall outside the purview of section 16.

154 Ibid. at para. 68.
155 Ibid. at para. 69.
156 Ibid.
As set out above, in *Bouchard-Lebrun*, the evidence established as a matter of fact that the accused’s psychosis resulted from substance use.\(^\text{157}\) It did not show, nor did the accused argue, that his psychotic episode was triggered by a latent, co-occurring disease of the mind. That argument had previously been rejected by the lower courts.\(^\text{158}\) Instead, the accused argued that psychosis was an unusual or “abnormal effect” of drug use, and by that very fact ought to be treated as a disease of the mind.\(^\text{159}\) Le Bel J. found insufficient evidence in the record to support this claim. On the contrary, the evidence suggested that toxic psychosis is a “fairly frequent phenomenon that seems to result from the high toxicity of chemical drugs.”\(^\text{160}\) This view appears to be based on the evidence of a Crown expert to the effect that “half (50 percent) of subjects who take drugs containing PCP are likely to develop a psychotic condition when intoxicated.”\(^\text{161}\) Even higher prevalence rates are reported in the work of Thirtalli and Benegal, among others.\(^\text{162}\)

In the result, the circumstances of the case pointed to the drugs consumed by the accused as the specific external factor leading to psychosis. There was no evidence of any internal causal factor. There also was no evidence to suggest that the accused was inherently dangerous. On the contrary, he posed no threat to public safety so long as he abstained from further drug use. Le Bel J. noted, however, that the accused did not suffer from any drug dependence and that he might have reached a different conclusion in those circumstances.\(^\text{163}\) Nonetheless, given the facts at bar, the Court did not consider it necessary to resort to the protective scheme provided for in Part XX.1 of the *Criminal Code*. Those provisions, Le Bel J. wrote, are not intended to apply to

\(^{158}\) *Ibid.*
\(^{159}\) *Ibid.* at para. 78
\(^{160}\) *Ibid.* at para. 79.
\(^{161}\) *Ibid.*
\(^{162}\) See Thirthalli & Benegal, *supra* note 42 and Smith et al., *supra* note 42.
\(^{163}\) *R. v. Bouchard-Lebrun*, *supra* note 9, at para. 83.
“accused persons whose temporary madness was induced artificially by a state of intoxication.”\textsuperscript{164}

Accordingly, the Court concluded that the accused was not eligible for the defence of NCRMD. Le Bel J. held as follows:

A malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual's inherent psychological makeup. This is true even though medical science may tend to consider such conditions to be diseases of the mind. In circumstances like those of the case at bar, toxic psychosis seems to be nothing more than a symptom, albeit an extreme one, of the accused person's state of self-induced intoxication. Such a state cannot justify exempting an accused from criminal responsibility under s. 16 \textit{Cr. C}.\textsuperscript{165}

This particular outcome, Le Bel J. concluded, was supported by policy:

In light of [the Crown’s] expert assessment of the frequency of toxic psychosis in circumstances analogous to the ones in the instant case, the appellant's position, if adopted, would affect the integrity of the criminal justice system in ways that would be difficult to accept. If everyone who committed a violent offence while suffering from toxic psychosis were to be found not criminally responsible on account of mental disorder regardless of the origin or cause of the psychosis, the scope of the defence provided for in s. 16 \textit{Cr. C.} would become much broader than Parliament intended. These considerations reinforce the conclusion that the toxic psychosis of the appellant in this case is covered by Cooper's exclusion of "self-induced states caused by alcohol or drugs".\textsuperscript{166}

However, as noted above, the Court's decision in this case was simplified by the fact that the accused's psychosis was attributable solely to substance use. Le Bel J. was alert to the possibility of more complex facts emerging in subsequent cases. He cited, by way of example, circumstances in which an accused person presents with an

\textsuperscript{164} \textit{Ibid.} at para. 84.  
\textsuperscript{165} \textit{Ibid.} at para. 85.  
\textsuperscript{166} \textit{Ibid.} at para. 86.
underlying mental disorder, but nonetheless had consumed substances of a nature and quantity that could produce psychosis in a normal person. In such cases, Le Bel J. advised, the courts should be “especially meticulous” in applying the “more holistic approach” articulated in Stone.\textsuperscript{167}

5.2.4. **Lower court decisions**

In *Bouchard-Lebrun*, Le Bel J. stated that “no Canadian court has applied the defence provided for in s. 16 Cr. C. in the context of toxic psychosis without evidence showing that the accused suffered an underlying disease of the mind.” In rebutting the presumption in section 16(2), guidance might thus be drawn from prior cases in which lower courts considered the specific question of whether substance-induced psychotic disorder is a mental disorder. Le Bel J. cited eight such cases.\textsuperscript{168} Four additional cases were located in the course of this study. The particular evidence confronting the lower courts in these cases is summarized in Table 3, Table 4, and Table 5, and is described in further detail below.

\textsuperscript{167} *Ibid.* at para. 88.

\textsuperscript{168} Le Bel J. also cited the case of *R. v. Malcolm* (1989), 50 C.C.C. (3d) 172 (Man. C.A.) as one involving substance-induced psychosis. In fact, the diagnosis at issue in that case was one of delirium tremens. In *R. v. Larocque*, 2010 ABPC 317, M.L. Graham Prov. Ct. J. reached the same outcome where the accused person’s psychosis was found to have resulted from cannabis withdrawal.
5.2.4.1. Condition constitutes a “disease of the mind”

Table 3: Lower court decisions in which accused persons with substance-induced psychosis found to be suffering from a “disease of the mind”

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Substance</th>
<th>Mental Disorder</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Hilton</td>
<td>Phencyclidine</td>
<td>Potentially one or more of homosexual panic, pathological intoxication, dissociation, and schizophrenia.</td>
</tr>
<tr>
<td>R. v. Mailloux</td>
<td>Cocaine</td>
<td>Paranoid personality disorder.</td>
</tr>
<tr>
<td>R. c. S.L.</td>
<td>Cannabis</td>
<td>Prior cannabis-induced psychosis, underlying cognitive impairment, cannabis dependence, and personality disorders.</td>
</tr>
<tr>
<td>R. v. Baker</td>
<td>Crystal methamphetamine</td>
<td>Psychotic, paranoid, and delusional tendencies from prolonged drug use.</td>
</tr>
</tbody>
</table>

172 R. v. Lauv, 2004 BCSC 1093, 63 W.C.B. (2d) 64.
5.2.4.1.1. R. v. Hilton\textsuperscript{176}

The accused in this case appealed from a conviction of murder after a trial by jury. He had advanced defences of provocation, intoxication and insanity in reliance, in part, on expert psychiatric evidence to the effect that he was suffering from “one or more of four diseases of the mind, some of which may have been brought about by the ingestion of drugs or alcohol.”\textsuperscript{177} Regrettably, there is limited description in the judgment of the Ontario Court of Appeal with respect to the available medical evidence, apart from the following excerpt from the charge to the jury:

(ii) Then having said in his [i.e. Dr. Nassr’s] opinion at the relative time the accused had a disease of the mind he replied to Mr. MacIntyre’s question on cross-examination - he was asked if he could put a label on the disease of the mind which Hilton was suffering from, under s. 16, and he replied, as follows. He said: There are on the basis of his examination, at least, - I am quoting it - "I would require additional investigation to distinguish between two or three possible diseases of the mind that he would have had. Now the first thing I mentioned was that, one of these would be sufficient to account for his behaviour", and the first was homosexual panic. Now he was asked, "Are you saying that that is a disease of the mind?" and he answered, "Yes." Then he said pathological intoxication and a dissociative state and the fourth was a schizophrenic psychosis, due to the ingestion of phencyclidine. Now later evidence he gave, although he said all of these matters have to be considered together, later evidence that he gave listed these four conditions in the following priorities. Firstly, he said most probable was schizophrenic psychosis caused by the ingestion of phencyclidine. Now if this were the cause of the state of mind of Mr. Hilton, if this were the cause, then it would not be a case of insanity but a case of intoxication. That is what produced the disease of the mind. And then secondly and thirdly, dissociative state and homosexual panic. I put them together because he said they have to be considered in relation to each other and as I indicated to you, dissociative state can be a disease of the mind within s. 16. Now fourthly, pathological intoxication, is at the bottom of the scale of priorities. Now this, it is clear, is caused in a sense, in which I will indicate, entirely by the effect of drugs on the mind of a susceptible individual. I believe he said it is a case where the individual does not need much to really set him off. Of course, it requires a predisposed emotional

\textsuperscript{176} R. v. Hilton, supra note 169.
\textsuperscript{177} Ibid. at para. 2.
personality to have pathological intoxication, but there can be no such condition if there is no ingestion of alcohol or drugs.

(iii) So apart from the aspect of intoxication, which I think you will find is very important, Dr. Yaworsky's evidence could support a conclusion of insanity together with that of Dr. Nassr. However, this is important, as I understand both his evidence and that of Dr. Nassr's to a substantial extent, - of course, it is for you to determine - to be to the effect that the state of mind of Hilton was due to intoxication.178

Jessup J.A. held that the insanity defence is available to an accused person notwithstanding that his or her mental disorder is precipitated by substance use.179 The trial judge erred to the extent he instructed the jury to the contrary, and by failing to note that evidence of mental illness can otherwise be considered in the assessment of intent. In the result, the Ontario Court of Appeal allowed the appeal and ordered a new trial.

5.2.4.1.2.  R. v. Mailloux180

The accused shot the victims at close range. He was subsequently charged with two counts of second degree murder. Expert evidence was led at trial to the effect that the accused suffered a paranoid personality disorder. Prior cocaine use aggravated that disorder, and produced a psychotic episode. In particular:

The defence psychiatrists agreed that the appellant's paranoid personality became aggravated by the use of cocaine which resulted in a toxic psychosis, admittedly a very rare condition. One psychiatrist described this as a major mental illness which caused the appellant to break with reality and believe irrationally that he was acting in self-defence when he shot the persons in the car. The other equally eminent psychiatrist was also of the opinion that the toxic psychosis produced specific psychotic delusions which caused the appellant to believe that he was being set up by the victims and that he had to kill the people in the car in order to save himself.

178  Ibid. at para. 3.
179  Ibid. at para. 4.
180  R. v. Mailloux, supra note 170.
Both psychiatrists testified that the appellant at the material time, by reason of psychotic delusions, was incapable of appreciating the nature and quality of his acts and of knowing that his acts were wrong. They also agreed that the appellant was incapable of forming the specific intent necessary to commit murder.\(^\text{181}\)

That evidence was modified in cross-examination:

However, the opinions expressed in their evidence-in-chief were substantially qualified and diluted by the evidence which they gave during cross-examination, which was obviously accepted by the jury, to the effect that the appellant knew that pulling the trigger would cause the gun to fire and that he was able to appreciate the nature and quality of the act and to understand the immediate physical consequence which would flow from it, i.e., that someone would be killed. In particular, Dr. Orchard admitted in cross-examination that first the appellant was capable of knowing that the act was wrong and was also capable of forming the specific intent to kill.\(^\text{182}\)

The accused advanced the defence of NCRMD, and the defence of intoxication in the alternative. He was nonetheless convicted, and subsequently sentenced to life imprisonment without eligibility for parole for 15 years.

On appeal, the accused argued that the trial judge had failed to instruct the jury that toxic psychosis is a disease of the mind within the meaning of section 16 of the *Criminal Code*. Lacourciere J.A. reproduced the relevant portions of those instructions:

On the basis of his investigation and the evidence that he heard in court, the doctor [referring to Dr. Orchard] concluded that at the time of the shooting the accused was suffering from toxic psychosis as a result of the extended heavy use of cocaine. He has only seen two cases in seventeen years. He explained why there is still a great deal of unknown about the effects of cocaine.

Toxic psychosis is often confused with drug intoxication. But it is more than intoxication. It becomes a major mental illness -- a break with reality.

\(^\text{181}\) *Ibid.* at paras 4-5.
\(^\text{182}\) *Ibid.* at para. 5.
A toxic psychosis is a recognized illness from the medical point of view. [Dr. Rowsell] admitted that it was very rare and that it is often confused with drug intoxication. Unlike Dr. Orchard, he saw no signs of the psychosis when he examined the accused in May ...

You have heard the evidence of Dr. Orchard and Dr. Rowsell, both doctors and psychiatrists, that the accused was suffering at the time from a disease or condition known as cocaine toxic psychosis, a major mental illness which constitutes a break with reality.

First of all, on the question of the accused having a disease of the mind, the only two doctors who testified on this issue said that he had. They were speaking from a medical point of view. [sic] must tell you that there is a legal definition of disease of the mind which you must follow as best you can. The term does not apply to any ordinary human emotion such as passion or anger standing alone, but it does embrace any illness, disorder or abnormal condition which impairs the human mind and its functioning subject to exceptions which do not affect us here. That in law is a disease of the mind.

If the accused had a disorder or abnormal condition which resulted in a break with reality, then it seems to me that he had a disease of the mind. It is for you to decide whether it has been proved on the balance of probabilities that the accused was suffering from such condition at the time the alleged offence occurred. 183

[Emphasis added]

Counsel for the accused took issue with the use of the phrase “it seems to me” in that charge. He argued the jury ought to have been specifically directed that, as a matter of law, cocaine toxic psychosis constitutes a disease of the mind.

Surprisingly, the Court of Appeal agreed that a positive direction of this nature would have been preferable. It nonetheless considered the charge to be sufficiently clear. It held that the charge was similarly clear in relation to the issue of intoxication and, in particular, the fact that there was no burden on the accused to prove intoxication. In the result, the Court dismissed the appeal and upheld the convictions.

183 Ibid. at paras 6-7.
5.2.4.1.3. **R. v. Oakley**¹⁸⁴

The accused was charged with robbery, theft of gasoline, criminal negligence in the operation of a motor vehicle, and two counts of assaulting a peace officer. He was in a psychotic state at the time of these offences. Medical evidence was tendered at trial to the effect that the accused was suffering an acute paranoid episode, likely brought about by prolonged exposure to fiberglass toxins as well as emotional and financial stress. The accused had a prior history of psychosis. He previously experienced headaches and auditory hallucinations. The latter were treated with medication, but recurred. On November 2, 1984, the accused admitted himself to a psychiatric hospital for treatment. He left that hospital on November 5, 1984, contrary to the advice of his physicians. The offences took place on the following day.

At trial, the accused advanced the defence of non-insane automatism and was acquitted. The Crown subsequently appealed to the Ontario Court of Appeal. It argued, among other grounds, that the trial judge erred in finding that the accused’s particular mental condition was not a disease of the mind. On this issue, Martin J.A. writing for the Court, held as follows:

The medical evidence in this case was that the appellant was in a highly psychotic state during the episode and that it was a mental illness. The disturbance of mental function can scarcely be considered transient; the respondent had suffered from hallucinations for some time and they became so acute that the respondent sought medical assistance on November 2, 1984. It is abundantly plain that the illness was acute on [the offence dates of] November 5 and 6 and only subsided after anti-psychotic drugs had been administered to him at the hospital. Even if the acute mental illness from which the respondent suffered could be considered to be a transient disturbance, there was no external cause removing it from the concept of "disease of the mind".

…

The only factors relied upon by the judge were either emotional stress on the respondent caused by his being left alone when his parents came to

¹⁸⁴ *R. v. Oakley, supra* note 171.
Petroia to visit his brother, the respondent's financial problems, and the effect of toxic fumes to which the respondent was exposed in his work with fiberglass or a combination of both factors. It is clear that the emotional stress of the kind described was not an external factor sufficient to produce non-insane automatism: see Rabey v. The Queen, supra; Smith and Hogan, Criminal Law, 5th Ed. at 171.

The exposure to toxic fumes could be an external cause. However, there was no expert evidence that toxic fumes are produced by the formation of fiberglass or what their effects are. Dr. Tanay was unable to state as a medical opinion that the toxic fumes had produced the acute paranoid episode, although he considered that there was a likelihood that either toxic fumes or emotional stress or both combined had produced the psychotic episode. The appellant had been working for several years in the formation of fiberglass and certainly he had not been exposed to those fumes for several days, since he had admitted himself to the Regional Psychiatric Hospital in Cape Breton on Friday, November 2, 1984. If the exposure over a period of time caused brain damage, that would constitute a pathological condition like the brain damage in R. v. Revelle, supra. In any event, in our view there was evidence of a serious mental illness of considerable duration constituting disease of the mind and, as we have held, there was no evidence that toxic fumes had created a transient state of non-insane automatism.

Accordingly, the Court allowed the appeal. It dismissed the robbery charge, having found insufficient evidence to establish the actus reus of that offence. It otherwise set aside the acquittals and ordered a new trial.

5.2.4.1.4. R. v. Lauv

The accused was charged with 11 offences against eight complainants. These offences arose as a result of acts – described by the Court as “utterly bizarre” – that the accused committed after consuming more than ten ecstasy pills. Bauman J., (as he then was) summarized the particulars of the offences as follows:

Mr. Lauv began his spree by dancing somewhat uncontrollably, throwing himself against the walls of the dance hall and assaulting two women

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185 Ibid. at paras 26-29.
186 R. v. Lauv, supra note 172.
187 Ibid. at para. 2.
whom he knew well and with whom he was on good terms, Ms. Tighe and Ms. Flegel.

The most telling aspect of Mr. Lauv's behaviour that night was his repeated suggestion to various complainants that he was God and that they must bow down before him. This conduct continued with the intentional crashing of his car into a building, the ambulance garage in Cumberland, and his break and enter of the Griffiths/Ball residence. There Mr. Lauv smashed the window in the door of the home with his fists and he knelt in the broken glass. Mr. Lauv did not know these people, and his actions inside the home included the demand that Ms. Griffiths bow down before him because, in his words, "I am God."

The evening ended with various assaults, including the kicking of the infant Alexander Clippingdale at the home of Ms. Tighe.

When arrested without incident later, Mr. Lauv was dressed only in a T-shirt, and he was covered in his own blood.188

The accused was a frequent user of ecstasy, but had never before engaged in conduct of this nature. Bauman J. described his behaviour as "a reaction unique for him and unpredictable."189

At issue was the application of section 16 of the Criminal Code. The opinion of Dr. Ceresney, a consultant psychiatrist at the Forensic Psychiatric Hospital, was tendered to the effect that the accused suffered from psychosis 'not otherwise specified.' Differential diagnoses included ecstasy-induced psychosis with delusions with onset in intoxication, ecstasy-induced mania with onset in intoxication, schizoaffective disorder bipolar type, schizophrenia, and bipolar disorder. In her report, Dr. Ceresney summarized her opinion, and the likely cause of the psychosis, as follows:

Mr. Cheng Lauv is a 30-year-old man with a history of regular substance abuse which escalated in the month prior to the index offences being committed. He also gives a history of ingestion of a very large quantity of Ecstasy on the day of the index offences. From the descriptions of his behaviour before and during the commission of the offences, as well as the assessment since his incarceration, it appears that he is suffering

188 Ibid. at paras 8-11.
189 Ibid. at para. 7.
from a mental illness. This illness is characterized by rapid, disorganized and pressured speech, elevated and irritable mood and grandiose delusions. It appears to be temporally related to a substance abuse such that it is either entirely substance related or that substances may have precipitated the expression of an underlying mental illness. Given that his symptoms have persisted in the absence of any illicit drugs for over a month, there is an increased likelihood of an underlying, primary mental illness.  

At trial, Dr. Ceresney further testified that the accused’s condition could have resulted exclusively from drug use, or could be the symptom of an underlying mental disorder exacerbated by drugs.

The Court was nonetheless satisfied, on the basis of this evidence coupled with the evidence of the complainants and the accused, that the accused was suffering from a mental disorder for purposes of section 16. Bauman J. was apparently influenced by the decision of Justice Hood in R. v. Snelgrove in which “the Crown agreed, and my colleague Justice Hood accepted, that cocaine-induced psychosis constitutes a legal mental disorder.” He went on to cite other cases as well, including R. v. Mailloux, in which the courts had reportedly granted the NCRMD defence to accused persons whose “drug-induced psychosis was coupled, as suggested in the case at bar, with a pre-existing, underlying mental disorder.”

In the result, the Court concluded that the accused was suffering from a mental disorder at the time of the offences and, with the exception of a charge of operating a motor vehicle while impaired, was otherwise incapable of appreciating the nature and quality of his acts, or of knowing that they were wrong. In relation to the impaired driving charge, the Court found that the accused “apparently knew that he was driving the car, and in a fit of remorse he apparently crashed it into the building.” The Court did not

190 ibid. at para. 14.
191 ibid. at para. 18.
192 ibid.
193 ibid. at para. 25.
explain the impact of such evidence, except to say that it did not support the application of section 16. Presumably Bauman J. was able to infer that the accused – in "moments of some lucidity"194 - had sufficient capacity to appreciate the nature and quality of his actions and of knowing that they were morally wrong.

5.2.4.1.5.  *R. c. D.P.*195

The accused was charged with dangerous driving causing death and failure to stop at the scene of an accident. He was found to have been in a psychotic state at the time of the offences, and remained psychotic for several weeks after admission to the Institut Philippe Pinel de Montreal. However, the source of the psychosis was not determined. Louis Morrissette, a psychiatrist expert called by the defence, opined as follows:

Il est très possible que cette pathologie mentale ait été induite par l'utilisation régulière et en quantité importante de haschich. Il est possible aussi que cette pathologie soit en lien avec l'apparition chez lui d'une maladie schizophrénique qui débute (et pour laquelle il ne prenait plus régulièrement la médication).

Peu importe l'origine de cette pathologie, au moment des événements de mars 2008, son jugement était gravement perturbé par la présence chez lui d'une maladie mentale grave en phase active, en phase aiguë (psychose toxique).196

The accused had previously experienced psychotic episodes in association with cannabis use, and had received treatment at hospitals and outpatient clinics in the preceding three years. It was the view of John Wolwertz, a further psychiatrist called by the defence, that the accused ought to remain in the care of the forensic hospital:

... [J]'ai pris connaissance du rapport de police. M. P... a été longuement et attentivement observé par l'équipe traitante. J'ai eu l'occasion de le rencontrer au cours de plusieurs entrevues. Il a été soumis à une évaluation psychologique permettant de mieux saisir sa dynamique,

l'organisation de sa personnalité et son état mental, tel que noté et détaillé à partir de son admission à l'Institut Philippe-Pinel de Montréal, le 3 avril 2008. Ceci nous permet de conclure que lors de la commission des délits qui lui sont reprochés, il était totalement coupé de la réalité. Il était psychotique, comme il l’est demeuré durant plusieurs semaines après son admission à l'Institut Philippe-Pinel de Montréal. Précisons que lors de la commission des délits qui lui sont reprochés, il présentait une désorganisation mentale à tel point grave qu'elle perturbait son état de conscience et sa capacité de jugement.

Devant pareil tableau, une défense selon l'article 16 du Code criminel canadien doit être invoquée. Aussi, en vertu d'un mandat de la Commission d'examen (sous la supervision du Tribunal administratif du Québec), il doit être confié aux soins de l'Hôpital du Haut-Richelieu afin d'y poursuivre et recevoir des soins que son état mental requiert, alors que son séjour à l'Institut Philippe-Pinel de Montréal n'est plus justifié.197

In reliance on this evidence, and without further reasons, the Court declared the accused to be NCRMD.198

5.2.4.1.6. R. c. S.L.199

The accused was charged with a number of offences arising from three separate incidents in September 2008, including charges of abduction, false imprisonment and assault. He admitted to the conduct underlying the charges, but claimed to have acted by reason of mental disorder. The accused had a lengthy psychiatric history, including a prior diagnosis of cannabis-induced psychosis as well as underlying cognitive impairment, cannabis dependence, and personality disorders.200 There was competing expert evidence as to whether the accused was in fact in a psychotic state at the time of the offences. However, the Court preferred the evidence of the defence expert on this point, and found that the accused was suffering from a disease of the mind. Further, he was incapable both of appreciating the nature and quality of his acts, and of knowing they were wrong. Accordingly, the Court declared the accused to be NCRMD. The

197 Ibid. at para. 22.
198 Ibid. at paras 26-27.
200 Ibid. at paras 33-36.
Court relied on the decision of the Ontario Court of Appeal in *R. v. Mailloux* to find that substance-induced psychosis was a disease of the mind for the purposes of section 16.\(^{201}\)

**5.2.4.1.7.  *R. v. Baker*\(^{202}\)**

This case involved the appeal of the accused from a conviction of first-degree murder. The victim was pregnant at that time. In the months preceding the offence, the accused experienced delusions and auditory hallucinations with respect to the victim and her unborn child, including the belief that he had to kill the child in order to save humanity. It was agreed that the accused was in a psychotic state at the time of the offence, and that the psychosis was triggered by prior use of crystal methamphetamine. In the words of P.W.L. Martin J.A., although writing in dissent, “these toxins ravaged [the accused’s] mind, leaving him increasingly psychotic paranoid and delusional….the damage from these drugs left [the accused] in a mental state virtually indistinguishable from paranoid schizophrenia.”\(^{203}\)

The Crown apparently conceded that drug-induced psychosis of the nature experienced by the accused was a disease of the mind for the purposes of section 16. The issue for consideration by the jury was the question of whether the accused was incapable of knowing that his actions were morally wrong. On this point, the experts disagreed. In the result, the accused was convicted. The majority of the Alberta Court of Appeal dismissed the appeal from that conviction, holding that the trial judge did not err in his charge to the jury, and that the conviction was not unreasonable.

\(^{201}\) *Ibid.* at para. 60.

\(^{202}\) *R. v. Baker*, supra note 175.

\(^{203}\) *Ibid.* at para. 47.
5.2.4.2. Condition does not constitute a “disease of the mind”

Table 4: Lower court decisions in which accused persons with substance-induced psychosis not found to be suffering from a “disease of the mind”

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Substance</th>
<th>Mental Disorder</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Moroz(^{204})</td>
<td>Crack cocaine</td>
<td>Cocaine dependence.</td>
</tr>
<tr>
<td>R. v. Johnson(^{205})</td>
<td>Phencyclidine</td>
<td>No history of mental disorder.</td>
</tr>
<tr>
<td>R. v. Paul(^{206})</td>
<td>Alcohol, cocaine and cannabis</td>
<td>Transient life stressors.</td>
</tr>
</tbody>
</table>

5.2.4.2.1. R. v. Moroz\(^{207}\)

The accused in this case was charged with aggravated assault. He admitted to having repeatedly struck the victim on the head with a hammer. The victim suffered serious injuries as result. The accused admitted also to having consumed crack cocaine on the day prior to the offence, and daily in the preceding four months. He had no memory of the attack, or of his dealings with the victim in the moments leading up to it.

The report of an expert forensic psychiatrist was tendered in support of an application for an NCRMD declaration. It included the finding that the accused suffered from cocaine dependence. With respect to the mental state of the accused at the time of the offence, the expert wrote as follows:

... I believe that Mr. Moroz was in the throes of a cocaine-induced psychotic disorder, [with prominent delusions (i.e., delusions of reference and persecution), with onset during intoxication] at the time of his offence. There is convincing evidence from this man’s history that his psychotic symptoms developed during his cocaine intoxication and that this disturbance is not better accounted for by a psychotic disorder that is not substance-induced. In the case of the latter, it is my opinion that Mr. Moroz does not suffer from a primary/functional psychotic illness in that

\(^{205}\) R. v. Johnson, supra note 142.
\(^{207}\) R. v. Moroz, supra note 204.
his symptoms were not present prior to the onset of substance use, that
the symptoms resolved rather acutely after the cessation of severe
intoxication and that there is no other evidence suggesting the existence
of an independent non-substance-induced psychotic disorder (e.g. a
history of recurrent non-substance-related episodes). I surmise that Mr.
Moroz's psychosis had a negative impact on his judgment, impulse
control, emotional and behavioural self-restraint, and perception of reality
and thus likely contributed to the commission of a violent act which was
clearly out of character. The motivation for his actions are not particularly
clear as the subject does not have an accurate recall of the event and nor
does the police narrative provide a helpful description from any of the
witnesses.

On the basis of the opinions expressed in that report, along with viva voce evidence of
the expert and the accused, the trial judge concluded that the accused was not suffering
from a mental disorder. The accused was “in the throes of a cocaine induced psychotic
disorder” at the time of the offence, and this psychosis was “mild to moderate but tended
toward being mildly psychotic.” The trial judge distinguished these facts from those in
the Mailloux case, noting that the accused’s cocaine abuse had not “reached the stage
of what the Psychiatrist in Mailloux … described as the rare condition of toxic cocaine
psychosis.”

5.2.4.2.2. R. v. Johnson

The accused was charged with the attempted murder of his father. He applied
for a declaration of NCRMD. Experts agreed that the accused was in a psychotic state
at the time of the offences, but considered the etiology of the psychosis to be unclear.
The Crown expert, Dr. Huppé, offered the following opinion:

Our diagnosis is one of psychotic state induced by psychoactive
substances, including PCP. A PCP intoxication state quite often lasts
over 30 days after use. We also make a diagnosis of substance abuse

\[\text{208} \text{ Ibid. at para. 13.}\]
\[\text{209} \text{ Ibid. at para. 21.}\]
\[\text{210} \text{ Ibid. at para. 45.}\]
\[\text{211} \text{ R. v. Johnson, supra note 142.}\]
that has lasted for over three years. I also make a potential diagnosis of personality disorder of the antisocial type. However, quite often, this type of presentation develops into schizophrenia. Only time and evolution will tell.\textsuperscript{212}

Dr. Akhtar, on behalf of the accused, noted in his report that psychosis can manifest as a result of (i) an independent and pre-existing mental disorder, (ii) the ingestion of a psychoactive substance (which in this case was phencyclidine), or (iii) the combined effect of the substance and the accused’s latent neurobiological vulnerabilities. In relation to the accused’s case in particular, he opined as follows:

The evidence in support of (i) is meagre. There is no evidence that Mr. Johnson had shown any symptoms or signs of illness prior to the alleged offense. Psychotic symptoms produced by an ongoing mental illness do not disappear dramatically without treatment. Examination by Dr. Joshi on July 21, 2005, a week after the alleged offence did not reveal any overt psychotic features. Subsequent observations at Restigouche Hospital also failed to elicit psychotic symptoms or signs.

The second explanation is more plausible on the surface because of the sudden onset of psychosis, its subsidence without active antipsychotic treatment at Moncton Detention Centre and of course, by the history of Mr. Johnson's drug abuse. He asserts that the last time he took PCP was two or three weeks before the alleged offense. This does not, in my view, diminish the plausibility of such explanation as some drugs can last in the tissues for long periods of time.

The third explanation, although less appealing than the second, cannot be totally disregarded because of one significant development. On September 21, 2005, Mr. Johnson who had been without psychotic symptomatology since the alleged offence (and had, therefore, not received any antipsychotic medication) suddenly became psychotic again showing bizarre thoughts and behaviour such as urinating on doors, masturbating continuously, not knowing his family members, etc. I assume, that being in isolation at Moncton Detention Centre, he did not have access to illegal drugs and that this relapse into psychosis was not drug-induced. If my assumption is correct then it means that he has an underlying diathesis or tendency to psychotic decompensation under

\textsuperscript{212} \textit{Ibid.} at para. 25.
stress and drugs may precipitate but are not the primary or sole cause of his psychotic episodes.\(^{213}\)

The Court rejected the first explanation, on the grounds that the evidence fell short of the requisite standard of proof on a balance of probabilities. It further held that Dr. Akhtar’s second explanation, which explanation was supported by Dr. Huppé’s evidence, did not permit the application of section 16, as self-induced mental states were excluded from the Cooper definition of disease of the mind “on policy grounds.”\(^{214}\) With respect to the remaining explanation offered by Dr. Akhtar, the Court held as follows:

Thus, I am left with one explanation: the accused’ latent mental vulnerability which his use of drugs, triggered into a psychotic condition. Under that hypothesis the drugs would not be the psychosis’ primary or sole cause and therefore the accused would not fall under the Cooper exception. In my view that hypothesis presents other difficulties to the defence, however.

The first one is Dr. Akhtar's choice of words when referring to that explanation as being "less appealing than the second". Can a hypothesis which is less appealing than another one constitute proof on a balance of probabilities in relation to what it seeks to establish? I would think not. Clearly, Dr. Akhtar with his carefully chosen words sees the second explanation as being more probable (or appealing, to use his word) than the third.

The second perceived obstacle with this third explanation is that the opinion upon which it is based lacks evidentiary foundation on one very key assumption: that the accused while being held in isolation at the Moncton Detention Centre did not have access to illegal drugs and that his relapse into psychosis as documented on September 21st, 2005 was not drug-induced. That assumption is the cornerstone of Dr. Akhtar's opinion. In my view there had to be evidence led before this Court that he could not have had access to any drugs.

I have been urged at great length by counsel for the accused that by its very nature "isolation" proves or implies the accused could not have had access to drugs. With respect, I cannot agree. What is meant by "isolation" in the carceral system is not a matter for judicial notice and I am certainly not prepared to conclude that an accused held in isolation


could not have had access to illegal drugs without some proof as to what is meant by that term. Therefore on that third hypothesis, the defence must also fail.\textsuperscript{215}

In the result, the Court held that the accused had failed to prove on a balance of probabilities that he was suffering from a mental disorder at the time of the offence. His application for a declaration of NCRMD was therefore dismissed. However, by reason of intoxication, the Crown was unable to prove beyond a reasonable doubt that the accused had the specific intent required for conviction. In the result, the accused was convicted of the lesser included general intent offence of aggravated assault.

5.2.4.2.3. \textit{R. v. Paul}\textsuperscript{216}

The accused was convicted on three counts of second degree murder and two counts of attempted murder. At the time of the offence, the accused and victims were at a park, drinking beer and using cocaine. The accused began his drinking binge, and his use of both cocaine and marijuana, the prior day. At the park, the accused shot the victims, killing three and wounded two others. He then attempted suicide. He claimed to have acted on the instructions of a “man’s voice.” That voice directed the accused to kill his friends and himself, so that they might all “wake up to a better life.”\textsuperscript{217} The accused otherwise had a limited memory of the shootings. It was determined that his blood/alcohol reading would have been 202 to 232 milligrams in 100 milliliters of blood at the approximate time of the offences.\textsuperscript{218}

The accused did not advance the defence of NCRMD at trial. He elected instead to advance the defence of intoxication, arguing that he lacked the specific intent required for a conviction of murder or attempted murder, and was thus liable only for the lesser included offence of manslaughter and assault with a weapon. In doing so, he relied on

\textsuperscript{215} \textit{Ibid.} at paras 33-36.
\textsuperscript{216} \textit{R. v. Paul}, supra note 6.
\textsuperscript{217} \textit{Ibid.} at para. 31.
\textsuperscript{218} \textit{Ibid.} at para. 17.
the evidence of a psychiatrist named Dr. Lohrasbe, the essential aspects of which are summarized in the judgment of Ryan J.A. as follows:

... Dr. Lohrasbe testified he understood that at the time of the shootings the appellant had suffered from auditory hallucinations which had been preceded by depressive rumination about his father's death and the break up with his girlfriend. Dr. Lohrasbe said that this rumination was accompanied by a delusional interpretation of these events. He said that in his opinion getting the gun and shooting the victims was the result of a bizarre belief, prompted by the auditory hallucinations and his delusional interpretation of them, that by killing himself and the victims they would all awaken to a better world. The appellant's use of drugs and alcohol had a direct effect on his brain, resulting in the auditory hallucinations and the appellant's delusional interpretation of them. He said that Mr. Paul's psychotic symptoms (the auditory hallucinations) were extremely brief and context-dependent. He said that the appellant suffered from no ongoing psychotic symptoms and could not be diagnosed with any major mental disease.

Dr. Lohrasbe said that he could not say that Mr. Paul was "not criminally responsible by reason of mental disorder" ("NCRMD") because his psychotic symptoms resulted from massive substance and transient life stressors, not mental disease. He also testified that Mr. Paul did not suffer from insane or non-insane automatism [now known as mental disorder automatism] at the time of the offence because he had not suffered an immediate psychological blow nor had he suffered from the kind of dense amnesia typical of extreme dissociation.

Dr. Lohrasbe testified that at the time of the shootings the appellant was acutely and transiently psychotic. The appellant had lost contact with objective reality. Dr. Lohrasbe testified that when he used the word intent in this case he understood it to mean the capacity to focus on a formulated goal. He said that the capacity to focus on a formulated goal may become disrupted in the sense that mental dysfunction will cause abnormal or irrational goals. He said that the appellant's goal - to wake up in a better place - was psychotic and formulated in response to a psychotic experience. The appellant's objective was driven by an expectation of an outcome prompted by hallucinations.

Dr. Lohrasbe spent some time in his evidence explaining what he meant by intent. He said that in his view intention involves largely two components. The first, focusing on an outcome, and the second, having an actual goal - that is, "what you're actually trying to go for". Dr. Lohrasbe said that in the appellant's case he knew that he was getting a gun and knew he was shooting people. However, because the outcome, what he was going for, was a psychotic one, he did not have the second component of intent. Dr. Lohrasbe testified that if intentionality includes a
concept of realistic outcome, then the appellant had no intent or capacity to form intent in a realistic manner.\textsuperscript{219}

The Crown’s expert, Dr. Wanis, agreed that the accused was in a psychotic state. It was his view that the psychosis was attributable to self-induced intoxication:

In his testimony Dr. Wanis acknowledged that the appellant consumed a significant amount of alcohol, cocaine and also marijuana. He concluded that the appellant did not suffer from a mental disease and that, at the time of the shooting, he was in a self-induced state of intoxication, that he had a short psychotic episode and subsequently engaged "in complex and sequential behaviour". Dr. Wanis concluded that the appellant's "goal setting ability" was not impaired by his intoxication. Dr. Wanis agreed that the appellant did not suffer from a major mental disorder. In his opinion, the appellant had substance abuse issues. His role was to assess whether the appellant had the capacity to form intent "in a psychiatric view". He concluded the appellant was not NCRMD.\textsuperscript{220}

On appeal, the accused argued, \textit{inter alia}, that the trial judge erred by not properly instructing the jury on the "mental capacity required for criminal responsibility."\textsuperscript{221} Among other things, the trial judge allegedly erred in not putting the defence of NCRMD to the jury, even though the accused did not advance that particular defence at trial. In oral argument before the B.C. Court of Appeal, counsel for the accused conceded that "drug-induced temporary psychosis...does not fit nicely into the old language of s. 16 of the Code, or previous cases interpreting it" but urged the Court to "recognize that those in [the accused's] position ought to be found not criminally responsible by reason of mental disorder."\textsuperscript{222} Ryan J.A., writing for the Court, disagreed:

Mr. Paul's condition meets none of the criteria for mental disorder set out in \textit{Cooper}. Instead he fits within what is excluded from the definition. His condition was self-induced and transitory. He appreciated the nature and quality of his acts; that is, he knew he was trying to kill people. Furthermore, Mr. Paul did not testify, nor did the expert evidence suggest,

\textsuperscript{219} Ibid. at paras 38-41.
\textsuperscript{220} Ibid. at para. 42.
\textsuperscript{221} Ibid. at para. 59.
\textsuperscript{222} Ibid. at para. 60.
that he did not know that what he was doing was wrong. In my view, the
defence now postulated by counsel for Mr. Paul is not available without
changes to the *Criminal Code*.223

Ryan J.A. went on to reject the remaining grounds of appeal advanced by the accused,
and uphold the accused’s convictions. The Supreme Court of Canada subsequently
deprecated the accused’s application for leave to appeal. In *R. v. Bouchard-Lebrun*, Le Bel
J. nonetheless endorsed the decision of the B.C. Court of Appeal. The facts in the
*Bouchard-Lebrun* case, he held, were similar to those in the *Paul* case, and “as in *Paul*,
the only reasonable conclusion is that the appellant’s mental condition is covered by the
exclusion from *Cooper*.”224

224 *R. v. Bouchard-Lebrun*, supra note 9, at para. 87. The B.C. Court of Appeal rejected the
remaining grounds of appeal as well, and upheld the convictions of murder and attempted
murder. It did so notwithstanding the fact that the accused’s intent to kill was based on
psychotic delusions. Coughlan et al. take issue with this result:

The trial judge told the jury that the capacity to form “rational” (i.e. reality-based)
objectives was not part of the capacity to form an intent to kill. Put another way,
what the trial judge was saying is that a “psychotic intent to kill” is still in law a
sufficient intent. The Court of Appeal agreed with the trial judge on that point, but
with respect, I think that conclusion is wrong. The Court of Appeal stated ... that
the psychiatrist’s theory of intent conflated the concepts of intent and motive and,
as is well known in law, motive is not a requisite ingredient of intent. With
respect, the trial judge and Court of Appeal have missed the point.

See Coughlan et al., *supra* note 119, at 208. The authors go on to say that the court should
have considered the second branch of the *Daviault* defence. It will be recalled that, in
*Daviault*, Cory J. recognized a complete defence in cases of extreme intoxication akin to
automatism or insanity, where the effect of the intoxication is to negate the *mens rea* required
for conviction. The accused in Paul fits within the latter category.
5.2.4.3. Condition not psychosis

Table 5: Lower court decisions involving allegations of substance-induced psychosis, but accused found not to be psychotic at time of offences

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Substance</th>
<th>Mental Disorder</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Fortin²²⁶</td>
<td>Alcohol, methamphetamine and phencyclidine</td>
<td>No history of mental disorder.</td>
</tr>
</tbody>
</table>

5.2.4.3.1. R. v. Snelgrove²²⁷

The accused was charged with various offences arising from an altercation with his common-law wife, including charges of assault and unlawful confinement of both his common-law wife and her four month old daughter. The primary issue at trial was whether the accused was suffering from a mental disorder so as to be exempt from criminal responsibility pursuant to section 16 of the Criminal Code. The accused was an admitted drug addict. In the months preceding the offences, his usage progressed from heroin to cocaine, and then to increasing quantities of crack cocaine. The accused started to experience paranoid delusions. He sought treatment, and was successful in maintaining sobriety for a period of at least sixty days. In the course of treatment, he began to believe that these delusions were caused by cocaine use. However, after he left the treatment facility, the accused resumed his drug use and his delusions returned.

The accused claimed to have been in a psychotic state at the time of the offences. However, experts disagreed as to whether the accused’s condition was attributable to mental disorder or was merely as symptom of intoxication. Hood J. summarized the respective opinions of these experts as follows:

²²⁵ R. v. Snelgrove, supra note 144
²²⁷ R. v. Snelgrove, supra note 144.
... Dr. D. Eaves, a forensic psychiatrist, testified on behalf of the defence that in his opinion, at the time that the accused committed the acts complained of, he was suffering from a mental disorder, cocaine-induced psychosis, and gave the further opinion that the disorder rendered the accused incapable of appreciating the nature and quality of his acts or of knowing that they were wrong. In other words, he is not criminally responsible for those acts.

The Crown called Dr. J.H. Brink, also a forensic psychiatrist, who gave a contrary opinion. His opinion is that at the material time the accused was suffering from acute cocaine intoxication in addition to or superimposed on the cocaine-induced psychosis, and that on the night in question he was acting primarily because of the intoxication. His difficulties were of a transient nature due to the voluntary ingestion of cocaine. There was no underlying major mental illness. In his opinion the accused's difficulties were of insufficient severity at the time so as to deprive him of the capacity to appreciate the nature and quality of his actions or of knowing that they were wrong. He did not meet the criteria for a finding of not criminally responsible by reason of mental disorder under s. 16.228

The Crown had apparently conceded that cocaine-induced psychosis was a disease of the mind for the purposes of section 16.229 The primary issue for determination by the trial judge, as framed by counsel, was whether the accused was unable to appreciate the nature and quality of his actions, or of knowing they were wrong, by reason of mental disorder.

On the basis of the accused's own evidence, Hood J. rejected the claim that the accused was in a psychotic state at the time of the offences:

... I have concluded on the totality of the evidence that at the times of the acts complained of the accused had not developed a full blown psychosis and was not out of contact with reality as urged upon me by the defence. His problems at the time, whatever the label, were at most transient in nature and brought about by cocaine intoxication. He was, I am satisfied, on his own evidence, in contact with his surroundings.230

[Emphasis added]

Hood J. went on to find that, even if the accused was experiencing psychosis, “it was reality based factors which drove his behaviour and not his psychosis based delusions.” In other words, “at the time he was committing the acts, the accused knew that he ought not to be doing them and that they were morally wrong.”

5.2.4.3.2. R. c. Fortin

The accused was charged with multiple offences, including charges of sexual assault and uttering threats, against a seven year old girl and her six year old brother. He advanced the defence of NCRMD at trial, claiming to have been in a state of toxic psychosis induced by a combination of alcohol, methamphetamine and phencyclidine. He did not have any history of mental disorder. In his judgment, Lortie J. described psychosis as a recognized mental disorder:

La psychose figure parmi les maladies mentales reconnues. La personne atteinte vit en dehors de la réalité, l'intoxication pouvant conduire à un tel état. Cela est reconnu par la jurisprudence et la doctrine.

He nonetheless went on to find that the evidence fell short of establishing that the accused was in a psychotic state at the time of the offences. Accordingly, the application for the NCRMD declaration was denied.

5.2.5. Application

It is clear on this review of the jurisprudence that an accused person with substance-induced psychosis is not barred by statute from advancing the defence of NCRMD by reason of the fact that intoxication was voluntary. In Bouchard-Lebrun, the Supreme Court of Canada confirmed that section 33.1 has no direct effect on section 16. However, an accused may nonetheless be prevented from advancing that defence by

231 Ibid. at para. 164.
232 Ibid. at para. 257.
233 R. c. Fortin, supra note 226.
234 Ibid. at para. 57.
operation of common law. In order to succeed in an application under section 16, the applicant must prove on a balance of probabilities that the accused was suffering from a mental disorder – or “disease of the mind” – at the time of the offence. This is a threshold question. In the Cooper case, the Supreme Court of Canada defined “disease of the mind” to exclude mental states brought about by self-induced intoxication. It affirmed this definition in Bouchard-Lebrun, and applied it in the specific circumstances of substance-induced psychosis. It denied the NCRMD defence to the accused in that case because his psychosis resulted exclusively from voluntary substance use.

In the Bouchard-Lebrun case, the Supreme Court of Canada further held that “temporary psychosis” is presumptively excluded from the reach of section 16. An applicant seeking to rebut this presumption must show that the accused was suffering from an underlying disease of the mind “unrelated to the intoxication-related symptoms.” The Court endorsed a contextual approach to the question of whether a particular instance of substance-induced psychosis is a disease of the mind for the purposes of section 16. It directed trial courts to apply the “more holistic approach” articulated by Bastarache J. in R. v. Stone in relation to the automatism defence, namely, the consideration of whether the psychosis was a product of internal or external factors, whether the accused person represents a continuing danger by reason of his or her condition, and any overriding policy factors.

It remains to be seen how the courts will apply the “more holistic approach” in response to evidence of underlying neurobiological factors that might have contributed to the onset of psychosis. Some guidance can be drawn from prior lower court decisions, where declarations of NCRMD were granted in circumstances of co-occurring mental disorder. However, only cautious reliance should be placed on these cases. They were tacitly approved by the Supreme Court of Canada in Bouchard-Lebrun. Nonetheless, verdict-by-diagnosis can be problematic in cases of substance-induced psychosis, given the heterogeneous means by which psychosis can manifest in association with

substance use. Moreover, the courts in future cases may not necessarily defer to prior rulings, as medical evidence and policy considerations can vary from case to case and change with the effluxion of time. In light of the findings of the Supreme Court of Canada in Bouchard-Lebrun, one should expect only that the courts will give consideration to any evidence of the role that substance use played in the onset of the psychotic episode, as well as the risk of relapse on the part of the individual accused.\textsuperscript{236} It is essential that the applicant establish the evidentiary foundation of any assumptions on which its expert relies in this regard, and that it prove the existence of underlying neurobiological factors to the requisite standard of proof on a balance of probabilities.

If the accused is found to have been suffering from a “disease of the mind,” then the applicant must go on to show that the accused was unable to appreciate the nature and quality of his or her actions, or of knowing that they were morally wrong. It is apparent from the decision of the British Columbia Court of Appeal in the Paul case that these conditions will not necessarily be met by a diagnosis of psychosis alone. An accused person may be found to have formed the requisite criminal intent while in a psychotic state. Arguably, a higher mens rea threshold ought to be applied, at the very least in relation to serious offences like murder. Regardless, if the court rejects an NCRMD application, the accused may go on to argue that he or she nonetheless lacked the requisite intent. In relation to specific intent offences, evidence of mental disorder can have the same practical effect as evidence of intoxication in that it can be relied on to raise reasonable doubt on mens rea.\textsuperscript{237}

\textsuperscript{236}In R. v. Clough, [2010] QCA 120, the Queensland Court of Appeal adopted a strict and narrow approach to the question of criminal responsibility in cases of co-occurring mental disorder and substance use. It interpreted the relevant provisions of the Criminal Code so as to hold that accused persons are liable for acts or omissions committed as a result of the intentional intoxication, including the manifestation of the symptoms of an underlying primary psychotic disorder or the relapse of such condition. See R. Scott, “Amphetamine-Induced Psychosis and Defences to Murder” (2012) 15 Psychiatry, Psychology and Law 615.

5.3. Defence of automatism

5.3.1. R. v. Parks

The 1992 decision of the Supreme Court of Canada in *R. v. Parks* serves as a usual starting point for the examination of the defence of automatism.238 The accused in that case attacked his mother-in-law and father-in-law while they were sleeping. His father-in-law was seriously wounded as a result. His mother-in-law died from her injuries. The accused was subsequently charged with first degree murder and attempted murder. However, he was found to have committed these offences while sleepwalking. The accused reportedly rose from his own bed on the night of the offences, and travelled approximately 23 kilometers by car to his parents-in-law's residence where the attack took place. He then drove himself to a nearby police station, where he told the police what he had just done.

The accused had a prior history of sleepwalking. Lamer C.J. described that history, and the circumstances leading up to the attack, as follows:

The respondent has always slept very deeply and has always had a lot of trouble waking up. The year prior to the events was particularly stressful for the respondent. His job as a project coordinator for Revere Electric required him to work ten hours a day. In addition, during the preceding summer the respondent had placed bets on horse races which caused him financial problems. To obtain money he also stole some $30,000 from his employer. The following March his boss discovered the theft and dismissed him. Court proceedings were brought against him in this regard. His personal life suffered from all of this. However, his parents-in-law, who were aware of the situation, always supported him. He had excellent relations with them: he got on particularly well with his mother-in-law, who referred to him as the "gentle giant". His relations with his father-in-law were more distant, but still very good. In fact, a supper at their home was planned for May 24 to discuss the respondent's problems and the solutions he intended to suggest. Additionally, several members

238 *R. v. Parks*, supra note 85.
of his family suffer or have suffered from sleep problems such as sleepwalking, adult enuresis, nightmares and sleeptalking.\footnote{Ibid. at para. 1.} At trial, the accused advanced the defence of automatism and was acquitted. The Ontario Court of Appeal upheld the verdict. The Crown subsequently appealed to the Supreme Court of Canada. At issue on appeal was the question of whether sleepwalking was a “disease of the mind,” and therefore within the scope of section 16 of the \textit{Criminal Code}, or whether it was properly classified as a condition of “non-insane automatism” for which the accused was entitled to a full acquittal. Four separate decisions were written by the Court. La Forest J., writing for the majority, held that, the trial judge must first determine whether there is sufficient evidence of automatism to discharge the evidentiary burden and permit the defence to be put to the jury. If so, the trial judge must then ascertain whether, as a matter of law, the alleged condition was one of mental disorder automatism or non-mental disorder automatism. It falls to the jury at that point to decide whether the accused was in fact suffered from that condition at the time of the offences.

In distinguishing between the mental disorder automatism and non-mental disorder automatism, La Forest J. further held, consideration must be given to the relevant evidence as well as any overarching policy considerations. In the earlier case of \textit{R. v. Rabey}, Martin J.A. of the Ontario Court of Appeal noted that the latter relates to “(a) the scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and (b) the protection of the public by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state.”\footnote{Ibid. at para. 9, citing \textit{R. v. Rabey}, \textit{supra} note 133 at pp. 472-73.} La Forest J. characterized these as questions of whether the accused posed a continuing danger by reason of his condition and whether that condition resulted from internal or external factors. Neither of these two approaches precluded a finding of non-mental disorder in this particular case.
Lamer C.J. agreed with that conclusion. However, he questioned whether an acquittal was the appropriate result:

Although the expert witnesses were unanimous in saying that sleepwalkers are very rarely violent, I am still concerned by the fact that as the result of an acquittal in a situation like this (and I am relieved that such cases are quite rare), the accused is simply set free without any consideration of measures to protect the public, or indeed the accused himself, from the possibility of a repetition of such unfortunate occurrences. In the case of an outright acquittal, should there not be some control? And if so, how should this be done?  

Lamer C.J. took the position that, at common law and in the interests of preventive justice, the court had authority to impose restrictive conditions on the accused. Moreover, conditions such as these should be considered in the accused's case:

As I have already said, despite the unanimous and uncontradicted evidence that the chances of such an occurrence taking place again are for all practical purposes nil, I feel that all necessary measures should be taken to ensure that such an event does not recur. After all, before this tragic incident occurred, the probability of Mr. Parks' killing someone while in a somnambulistic state was infinitesimal. Yet this is precisely what took place.

Appropriate conditions, he held, might include reporting requirements to a specialist in sleep disorders, as well as maintenance of proper sleep hygiene. Lamer C.J. concluded that the case should be remitted to the trial judge for consideration of whether any such orders were warranted in the accused's case.

Only Cory J. concurred with Lamer C.J. on this point. The remaining justices disagreed, holding that the imposition of restrictive conditions was both inappropriate in the instant case and impractical generally. Sopinka J. held that it was nonetheless open to the Crown in such matters to apply for orders of the nature contemplated by Lamer

241 Ibid. at para. 31.
242 Ibid. at para. 34.
C.J. pursuant to section 810 of the Criminal Code, provided the Crown could establish “reasonable grounds” to fear for safety, and provided that the granting of the order was otherwise constitutionally compliant.243

5.3.2.  **R. v. Stone**

In 1999, with the decision of the Supreme Court of Canada in *R. v. Stone*, the defence of automatism evolved to include a legal presumption in favour of mental disorder.244 That case involved a charge of second degree murder. The accused admitted to stabbing his wife. By way of defence, he advanced alternative claims of mental disorder automatism, non-mental disorder automatism, lack of intent and provocation. He claimed that his wife’s behaviour in the lead up to the killing – described by one expert as “extreme insults”245 - triggered an automatistic state. One expert testified to the effect that the accused was in a dissociative state at the time of the offence, and that dissociation of this nature could be caused by a psychological blow of the nature experienced by the accused. Another expert took the contrary view, opining that the accused was not likely in a dissociative state at the time of the attack. Both experts agreed that there was no evidence of underlying mental disorder.

The trial judge nonetheless put only the defence of mental disorder automatism to the jury. He did not instruct the jury to consider the defence of non-mental disorder automatism on the view that the dissociation experienced by the accused was the product of an internal factor, that being anxiety. In the result, the accused was convicted of manslaughter and sentenced to seven years imprisonment (of which credit of three years was given for pre-trial detention). The British Columbia Court of Appeal dismissed the accused’s appeal. Among the issues raised on appeal to the Supreme Court of Canada was the propriety of the trial judge’s refusal to put the defence of non-mental disorder automatism to the jury.

243 *Ibid.* at para. 69, per Sopinka J.
244 *R. v. Stone*, supra note 134.
In response, Bastarache J., writing for the majority, defined automatism as a “state of impaired consciousness…in which an individual, though capable of action, has no voluntary control over that action.” He endorsed the two-step approach articulated by La Forest J. in *R. v. Parks*, and held that this approach ought to be applied in all cases involving claims of automatism. Accused persons, he further held, are subject to a presumption of voluntariness which, in cases involving automatism, must be rebutted to the standard of proof on a balance of probabilities. Hence, before the defence of automatism could be put to a jury, the accused must discharge the evidentiary burden by showing “evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities.” That will necessarily include expert psychiatric evidence. If the burden is discharged, the trial judge must then determine whether the accused’s condition is properly classified as mental disorder automatism or non-mental disorder automatism.

More importantly, however, this assessment is subject to a further presumption in favour of mental disorder automatism. In particular, Bastarache J. held as follows:

I take judicial notice that it will only be in rare cases that automatism is not caused by mental disorder. Indeed, since the trial judge will have already concluded that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities, there is a serious question as to the existence of an operating mind by the time the disease of the mind issue is considered. The foregoing lends itself to a rule that trial judges start from the proposition that the condition the accused claims to have suffered from is a disease of the mind. They must then determine whether the evidence in the particular case takes the condition out of the disease of the mind category.

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If the trial judge determines that the automatism experienced by the accused was indeed non-mental disorder automatism, then only the defence of non-mental disorder will be put to the jury.\(^\text{251}\) It then remains for the trier of fact to determine whether the accused was in fact acting involuntarily on a balance of probabilities.

Of particular significance for the purposes of this analysis is the decision of the majority to take judicial notice of the frequency of non-mental disorder automatism. This decision was apparently informed by the opinion of the Canadian Psychiatric Association, expressed in a brief submitted to the House of Commons Standing Committee on Justice and the Solicitor General.\(^\text{252}\) In that brief, the Association recommended that the defence of non-mental disorder automatism be eliminated.\(^\text{253}\) It was the view of the Association that all forms of automatism arise from mental disorder and, accordingly, should be classified as mental disorder automatism.\(^\text{254}\) Also significant is the practical result that follows from a finding of mental disorder automatism. As noted above, in such cases, NCR accused persons may be detained and supervised under the provisions of Part XX.1 of the Criminal Code as long as they pose a significant threat to public safety. They will not be eligible for a full acquittal, and therefore will not pose any of the risks identified by Lamer C.J. in the Parks case.

Bastarche J. did not consider it necessary to fully eliminate the non-mental disorder defence, preferring instead to rely on a presumption in favour of mental disorder automatism. Presumably he was not satisfied that automatism resulted exclusively from mental disorder. On the key question of whether the evidence of the accused rebutted the presumption, and thus satisfied the evidentiary burden required for the non-mental disorder automatism defence, Bastarache J. articulated a new, “more holistic

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\(^{254}\) *Ibid.*
approach...informed by the internal cause theory, the continuing danger theory and the policy concerns raised by the Court’s earlier decisions in *Rabey* and *Parks.*"\(^{255}\) Pursuant to the internal cause theory, the court may consider whether a similarly situated individual would have experienced the same automatistic reaction in response to the alleged trigger. If so, the accused’s mental state ought to be classified as non-mental disorder automatism. The continuing danger theory supports a finding of non-mental disorder automatism only if the accused does not present a recurring danger to the public by reason of his or her mental state. Evidence of continuing danger instead supports a finding of mental disorder automatism, and a declaration of NCRMD followed by detention or continued supervision for so long as the NCR accused poses a significant threat to public safety.\(^{256}\)

In his decision, Bastarche J. reconceptualised these theories:

> In my opinion, trial judges should continue to consider the continuing danger theory as a factor in the determination of whether a condition should be classified as a disease of the mind. However, I emphasize that the continuing danger factor should not be viewed as an alternative or mutually exclusive approach to the internal cause factor. Although different, both of these approaches are relevant factors in the disease of the mind inquiry. As such, in any given case, a trial judge may find one, the other or both of these approaches of assistance. To reflect this unified, holistic approach to the disease of the mind question, it is therefore more appropriate to refer to the internal cause factor and the continuing danger factor, rather than the internal cause theory and the continuing danger theory.\(^{257}\)

In specific reference to the continuing danger factor, Bastarche J. went on to hold that the psychiatric history of the accused will be particularly relevant, along with evidence of the likelihood that the trigger will recur.\(^{258}\) Further, in those cases where the internal cause factor and continuing danger factor are not conclusive of the issue, the court may take

\(^{256}\) *Ibid.* at para. 212. See also section 672.54 of the *Criminal Code,* *supra* note 7.  
into account other policy factors, including the apparent ease with which automatism can be feigned. These factors, collectively, are relevant to the central question for determination of the court in the disease of the mind inquiry, that being “whether society requires protection from the accused and, consequently, whether the accused should be subject to evaluation under the regime contained in Part XX.1 of the Code.”

In the result, the majority held that, notwithstanding flaws in reasoning, the trial judge reached the correct result in classifying the accused’s condition as mental disorder automatism and putting only that defence to the jury. It rejected the remaining grounds of appeal, and affirmed both the conviction and sentence for this particular accused. More broadly, however, the case had the effect of expanding the scope of section 16 beyond its statutory confines. It extended the defence to circumstances of volitional impairment, even though the language of section 16 itself is strictly limited to cognitive impairment.

5.3.3. **R. v. Fontaine**

In the more recent case of *R. v. Fontaine*, the Supreme Court of Canada considered the application of the defence of mental disorder automatism in circumstances of substance-induced psychosis. The accused was charged with first-degree murder for the fatal shooting of an individual named Robert Dompierre. The accused advanced the defence of mental disorder automatism. There was competing evidence with respect to the accused’s mental state at the time of the offence. Bastarache J. summarized that evidence in his judgment as follows:

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*ibid.* at para. 218.


[Fontaine] testified that he had acted involuntarily and related in detail the circumstances that gave rise to his state of mind at the time of the offence. He explained that he had "frozen" and had only a partial recollection of the facts concerning the murder of Dompierre.

Several psychiatric experts also gave evidence. Dr. Richard Laliberté testified that Fontaine had smoked marijuana excessively during the weeks leading up to the murder. According to Dr. Laliberté, certain aspects of Fontaine's story were indicative of paranoid delusions, though it was difficult to determine with certainty whether Fontaine's story was real or delusional.

Dr. Bruno Laplante, another psychiatrist, testified that Fontaine suffered from a chronic antisocial personality disorder and acute paranoid delusions, but did not fall within s. 16 of the Criminal Code.

Dr. Jacques Talbot, also a psychiatrist, was the main defence expert. He presented two reports. In the first, he concluded that Fontaine had a psychological condition characterized by delusions. These could be triggered by a chemical substance, including marijuana. Dr. Talbot found that it was difficult to determine to what extent Fontaine's belief that his life was in danger was fact-driven and to what extent it was delusional.

In his second report, which he adopted in his testimony, Dr. Talbot stated that Fontaine, at the time of the shooting, was in a psychotic state triggered by substance abuse. This episode, according to Dr. Talbot, had begun several days earlier and ended several days afterward. Dr. Talbot concluded that a major psychological problem had so affected Fontaine's judgment that he was unable to differentiate right from wrong.

Finally, Dr. Sylvain Faucher, yet another psychiatrist, testified for the Crown, in reply, that Fontaine was not psychotic at the time of the murder and was not psychotic at any time in 1999.

The trial judge refused to put the defence of mental disorder automatism to the jury. Instead, the trial judge instructed the jury that the facts of the case did not support either the defence of mental disorder automatism or the defence of non-mental disorder automatism. The accused was convicted. The Quebec Court of Appeal concluded that the evidentiary burden had in fact been satisfied, and that the defence of mental disorder automatism ought to have been put to the jury. It therefore quashed that conviction and ordered a new trial.

The Supreme Court of Canada agreed. Fish J., writing for the Court, held as follows:
The respondent gave evidence tending to establish that he was acting involuntarily at the time of the offence. He also adduced expert evidence to support his own testimony.

In this case, the evidence clearly went beyond a mere allegation of the existence of a defence. It included a relatively detailed description of the respondent’s perception of the facts at the moment of the criminal act. The respondent also testified as to the circumstances that gave rise to his state of mind at the relevant time.

Moreover, Dr. Talbot concluded that the respondent was suffering, at the time of the offence, from a psychotic episode induced by substance abuse. In his report, Dr. Talbot stated that the respondent had a serious mental disorder akin to psychosis, which seriously distorted his perception of reality. This, in turn, affected his judgment, and rendered him incapable of distinguishing right from wrong, legal from illegal.

Dr. Talbot also testified that, at the moment of the events of February 15, 1999, the respondent began to perceive reality abnormally, in a projective and interpretive manner.

Finally, Dr. Talbot explained that, in psychiatric jargon, this means that the respondent began to “see things” and to make pathological connection between people, situations and events.

*Taken as a whole, this evidence was in my view sufficient to discharge the respondent’s evidential burden on his defence of mental disorder automatism.* Whether the respondent’s actions were in fact involuntary was a matter for the jury to decide.⁶²

[Emphasis added.]

The Court’s reasoning conflates notions of cognitive and volitional impairment. Psychosis entails a detachment from reality. It is not associated with a loss of control over one’s actions. Thus, a strict application of the automatism defence is arguably wrong.

Nonetheless, it is noteworthy that the Supreme Court did not reject the defence summarily on the basis that the psychosis allegedly experienced by the accused was the product of self-induced intoxication. It did not apply the *Cooper* exclusion. On the

contrary, the Court was apparently willing to allow the defence of mental disorder automatism – and the remedies that flow from the application of section 16 - to be put to the jury notwithstanding that the accused’s mental state resulted from voluntary substance use.263

5.3.4. Application

Section 16 is limited to circumstances of cognitive impairment. That provision contemplates cases in which the accused is unable to distinguish between right and wrong. The language of section 16 does not capture cases of volitional impairment, where the accused is unable to exercise control over his or her action by reason of mental disorder. Notwithstanding the apparent intentions of Parliament in this regard, the Supreme Court of Canada has expanded the reach of the NRCMD defence. In Stone, it held that an accused person who commits criminal acts while in a state of dissociation arising from mental disorder may be declared NCRMD, and subject to detention and/or supervisory pursuant to Part XX.1 of the Criminal Code as a result. In that case, the Court went so far as to recognize a legal presumption in favour of mental disorder in cases involving dissociation. In other words, at law, dissociation is now presumed to arise from latent mental disorder. Only if the accused is able to rebut this presumption, by proving on a balance of probabilities that the episode of dissociation was not attributable to mental disorder, will he or she be eligible for a full acquittal.

In these cases, courts are required to apply the “more holistic approach” articulated by Bastarache J. in the Stone case. They must consider whether the accused’s mental condition is the product of an internal or external factor, whether the accused represents a continuing danger, and whether there are any overarching policy considerations that otherwise preclude a finding of non-mental disorder automatism. Infused in this test, and in the jurisprudence concerning the defence of automatism generally, is a concern for public safety. The judicial expansion of the NCRMD defence to include dissociation may well be a response to this concern. From the perspective of

the judiciary, Part XX.1 may be the preferred means by which individuals in these circumstances can be effectively monitored, and public safety thereby enhanced.

Part XX.1 likewise may be the better option for the management of individuals with substance-induced psychosis, particularly in cases of co-occurring mental disorder. The Supreme Court of Canada presumably was alert to that possibility when it decided the *Fontaine* case. Of course, it is questionable whether the same outcome would result in a future case of similar facts, as the *Fontaine* decision appears to contradict the *Bouchard-Lebrun* judgment. Nonetheless, in relation to substance-induced psychosis, the evolution of the automatism defence remains instructive. If medical evidence evolves to show a significant prevalence of underlying neurobiological factors in cases of substance-associated psychosis, and a relatively strong association between psychosis, substance use, and mental disorder, then the courts might be persuaded to recognize a presumption in favour of mental disorder akin to that recognized in *Stone*. No doubt it would be equally influenced by evidence that the condition could be effectively treated and managed – and risk to public safety thereby diminished – within the forensic psychiatric system.\(^{264}\)

### 5.4. Disposition

#### 5.4.1. On conviction

Part XXIII of the *Criminal Code* governs the disposition of accused persons on conviction. The fundamental purpose of sentencing is articulated in section 718 as follows:\(^{265}\)

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just,

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\(^{265}\) *Criminal Code, supra* note 7, s. 718.
peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

In furtherance of these objectives, courts are expected to apply the principles of sentencing articulated in the Criminal Code. Chief among these is the principle of proportionality. It is defined in section 718.1 as follows.\(^\text{266}\)

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Embodied in the principle of proportionality is the requirement that the sentence reflect the moral culpability of the offender. In other words, the sentencing court must take into account the degree of fault attributable to the accused.

In the case of R. v. C.A.M., the Supreme Court of Canada characterized proportionality as a principle of fundamental justice within the meaning of section 7 of the Charter.\(^\text{267}\) The Court held also that disproportionate sentences may offend section 12. In particular, Lamer C.J., writing for the Court, held as follows:

Within broader parameters, the principle of proportionality expresses itself as a constitutional obligation. As this Court has recognized on numerous occasions, a legislative or judicial sentence that is grossly

\(^{266}\) Ibid., s. 718.1.
disproportionate, in the sense that it is so excessive as to outrage standards of decency, will violate the constitutional prohibition against cruel and unusual punishment under s. 12 of the Charter.\textsuperscript{268}

Other sentencing principles are included in Part XXIII of the \textit{Criminal Code}, including directions in section 718.2 as to the various aggravating and mitigating factors that the sentencing court must consider in each case. Intoxication and mental disorder are not listed among these factors, nor are any of the circumstances that might lead vulnerable persons to abuse drugs or alcohol. Apart from section 718.2(a)(i), which deems hate-motivation as an aggravating factor, the additional principles of sentencing set out in the \textit{Criminal Code} do not address mental state.\textsuperscript{269}

At most, there is a general requirement in section 718.2(b) that sentencing courts consider the circumstances of the offender. That section provides that "a sentence should be similar to sentences imposed on \textit{similar offenders} for similar offences committed in \textit{similar circumstances}."\textsuperscript{270} Generally, circumstances that diminish the moral culpability of the offender generally mitigate in favour of a lesser sentence. In the case of \textit{R. v. Hamilton}, the Ontario Court of Appeal held as follows:

\begin{quote}

Trial judges have always entertained submissions to the effect that an offender is basically a good person whose crime is the product of a combination of circumstances, some of which are beyond the offender's control or responsibility. Put in the language of proportionality, these arguments are directed at lessening the personal culpability of the individual offender. If the trial judge accepts such arguments, the sentence imposed will be less onerous than it would have been but for those arguments. As Durno J. put it in \textit{R. v. Bennett}, \textit{supra}, a case very much like these cases, at pp. 14-15:

\begin{quote}
The offender's background is always a relevant factor on sentencing. A sentence must be appropriate for both the offence and the offender. A person with a disadvantaged
\end{quote}
\end{quote}

\textsuperscript{268} Ibid., at para. 41.
\textsuperscript{269} See \textit{Criminal Code}, \textit{supra} note 7, s. 718.2.
\textsuperscript{270} Ibid.
background, who has been subjected to systemic prejudices or racism, or was exposed to physical, sexual or emotional abuse, may receive a lower sentence than someone from a stable and peaceful background, where the offence is in some way linked to the background or systemic factors. The relevant factors in one person's background will be case specific. A single factor will rarely be determinative.  

However, the Court also cautioned against giving undue weight to such circumstances:

It must...be stressed that consideration of the circumstances which led an offender to commit a crime is only part of the overall assessment that must be made in determining personal culpability for the purposes of imposing a sentence which complies with the proportionality principle. Our criminal law rejects a determinist theory of crime... The blunt fact is that a wide variety of societal ills - including, in some cases, racial and gender bias - are part of the causal soup that leads some individuals to commit crimes. If those ills are given prominence in assessing personal culpability, an individual's responsibility for his or her own actions will be lost.  

The court concluded that the particular circumstances experienced by the offenders in this case, that being systemic racial and gender bias, were insufficient to detract from the seriousness of the offences committed by them. Consequently, the Court refused to treat the circumstances as mitigating.

In cases involving charges of murder, and in which evidence of substance-induced psychosis was accepted as proof of a lack of the specific intent otherwise required for a conviction, the courts have declined to allow such evidence to be mitigating in its effect on the resulting conviction of manslaughter. In R. v. Green, for example, Thackray J. held as follows:

[Defence counsel] referred to s. 718.1 of the Criminal Code. It provides that a sentence must be proportionate to the gravity of the offence and to the degree of responsibility of the offender. He conceded that the offence

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272 Ibid. at para.140.
is grave but contended that the degree of responsibility of Mr. Green, that is, his moral culpability, cannot be any greater where the killing took place in a state of cocaine-induced paranoia simply because the killing was particularly heinous.

This submission emphasizes the lack of intent. However, the lack of intent to cause death is the factor that allowed Mr. Green to plead to manslaughter. I hesitate to further reduce the sentence within the category called manslaughter because there was no intent to kill. That is the very essence of manslaughter.273

The reasons of Thackray J. reflect the general view that offenders in circumstances of substance-induced psychosis are less culpable and entitled to some degree of mitigation. Indeed, on the basis of that reasoning, one might reasonably expect concessions to be made on sentencing for offences where diminished responsibility is not otherwise accommodated in the form of a reduced charge.

However, in such cases, the courts have tended to characterize voluntary intoxication – and any consequent lack of intent - as either an aggravating factor274 or “not a mitigating factor.”275 In R. v. Hicks,276 for example, the B.C. Court of Appeal held that evidence of a lack of intent by reason of substance-induced psychosis ought not to overwhelm the harm associated with the offence itself. In that case, the accused was convicted of two counts of manslaughter. The killing was particularly brutal, with one victim dying after receiving six stab wounds and the other after more than 17 stab wounds. The accused was in a state of cocaine-induced psychosis at the time of the killings. In its decision on the appeal from sentence, the Court held as follows:


274 R. v. Bunker (1994), 149 A.R. 150 (C.A.). C.f. R. v. Berard, 2007 ABCA 80, 72 W.C.B. (2d) 697, at para. 3, in which the Alberta Court of Appeal affirmed the decision of the sentencing judge who regarded “the fact that the offence was out of character; that [the] appellant was in a ‘cocaine-induced’ psychotic state, although self-induced” as a mitigating factor.

275 R. v. Moroz, supra note 204.

There were submissions made by counsel in this case also about the lesser degree of moral blameworthiness that is attached to a criminal act committed in the course of cocaine-induced psychosis and also with respect to the fact that the consequences of death must, by the verdict of the jury, be taken to have been unintended. Both of these are relevant factors in deciding on the sentence that is commensurate with the gravity of the offence.

In the end we are left with a case where there has been vicious and intended assault with a stabbing instrument on two defenceless women without any proven intention to cause death; but the absence of the proven intention to cause death does not take away from the fact that this was a serious and vicious assault intending to cause bodily harm.277

Likewise, in the case of R. v. Bouchard-Lebrun, the Quebec Court of Appeal upheld a trial judge’s decision to sentence the accused to a period of incarceration of five years for aggravated assault and three months for assault, to be served concurrently. That sentence appears to have been justified largely by a concern for the denunciation and deterrence of drug use. France Thibert J.A. held that this sentence was “harsh, but demonstrably fit.”278 She reproduced the following excerpt from the trial judge’s decision in her judgment:

[TRANSLATION]

Some groups want to play down the seriousness of drug use, but it seems to me that it is irresponsible not to consider the disastrous and terrible consequences of drug use. It is neither "preaching" nor "moralizing" to often repeat that the vast majority of offences have close connections to the world of drugs. The case before us is a sad illustration of where drugs can lead, and the person named Patrick Thibeault, who sold those little pills to Tommy Lebrun, is no doubt one of those who will advocate tomorrow for clemency when facing drug trafficking charges.

It has often been said that sentencing is a judge's most difficult task. In this case, it is all the more challenging because the accused is not generally associated with criminal activity, he appears to be a serious

277 Ibid. at para. 15-16.
worker, and, in particular, he did not premeditate or plan the actions he committed. While it may be less complex to impose a sentence for a serious offence committed by a repeat offender with a significant risk of re-offending, that is not the case here. The accused never premeditated his action and of course never imagined that the state caused by taking psychotropic substances could lead to such results.

But all individuals must take responsibility for any actions they commit. People who drink and drive, thereby causing accidents and injury and/or death, do not deliberately seek out such results. But if they cause injury or death, they must assume the consequences. Here, the accused decided to take drugs, underestimated their effects, which were unknown and evidently dangerous, and did not consider the illegality of possessing these drugs; today, he must take responsibility for the horrible consequences of his actions (s. 718(f) Cr. C.). The social worker was correct to write that "his value system has long been elastic".279

These reasons import the rationale underlying the guilt-by-proxy framework embodied in section 33.1, and effectively endorse the attribution of culpability on the basis of voluntary substance use notwithstanding a lack of mens rea due to psychosis. It is questionable whether this approach could be applied with equal force in the face of evidence of addiction. As noted above, in Bouchard-Lebrun, the Supreme Court of Canada left open the possibility that conduct committed while in a substance-induced psychosis – where intoxication was motivated by addiction – might be exempt from criminal responsibility. A fortiori, addiction arguably should be recognized as a mitigating factor on sentence.

In cases where an order of probation is considered appropriate, the court may impose a Rogers Order, the terms of which emanate from the decision of Anderson J.A. in the 1990 case of R. v. Rogers.280 The offender in this case was sentenced to probation for a period of 15 months for a weapons-related offence. Included in the probation order was a requirement that the offender submit to psychiatric assessment or treatment as required. At issue was the propriety of that term. The B.C. Court of Appeal concluded that mandatory treatment orders of this nature violate section 7 of the Charter

279 Ibid. at para. 84. See also R. v. Abernathy, 2013 BCPC 61.
and cannot be saved by section 1. However, it is nonetheless open to the sentencing court to impose less restrictive terms. In this regard, Anderson J.A., writing for the court, held as follows:

While the rehabilitation of the appellant is important, the court must consider the risks involved in permitting the appellant to be at liberty on probation. In other cases, where the trial judge finds as a fact that an accused person is suffering from schizophrenia or a like illness and refuses to consent to prescribed treatment or medication, it might very well be that the trial judge would not consider probation. The risk to society might be too great and only incarceration may afford the necessary protection.

I do not think it is possible to say that a particular form of probation order will be appropriate for all cases. The sentence to be imposed on each offender must be based on the general principles of sentencing which include a consideration of the circumstances of the offence and of the offender. The result is that different conditions may be imposed in probation orders depending on the circumstances of each case. To the extent possible, the conditions should be designed to ensure the protection of the public. However, they should not compel an offender to undergo medical treatment including the compulsory taking of medication.\textsuperscript{281}

The offender suffered schizophrenia and had a long history of non-compliance with his treatment program. However, at the time of the appeal, he was under the care of a private physician and was consenting to treatment and medication. In the circumstances, the Court extended the probation order to a period of three years and varied its terms to provide as follows:

You will take reasonable steps to maintain yourself in such condition that:

(a) your chronic schizophrenia will not likely cause you to conduct yourself in a manner dangerous to yourself or anyone else; and

(b) it is not likely you will commit further offences.

\textsuperscript{281} \textit{Ibid.} at paras 14-15.
2. You will forthwith report to a Probation Officer at 275 E. Cordova St., Vancouver, B.C. and thereafter, if directed to do so, you will forthwith report to the Inter Ministerial project at 219 Main St., Vancouver, B.C.

3. You will thereafter attend as directed from time to time at the Inter Ministerial project for the purpose of receiving such medical counselling and treatment as may be recommended except that you shall not be required to submit to any treatment or medication to which you do not consent.

4. If you do not consent to the form of medical treatment or medication which is prescribed or recommended, you shall forthwith report to your Probation Officer and thereafter report daily to your Probation Officer. If directed to do so by your Probation Officer, you shall report to the Inter Ministerial Project at 219 Main Street, Vancouver, B.C. for the purpose of being monitored with respect to a possible breach of Condition 1 above.

5. You shall provide your treating physician with a copy of this order and the name, address and telephone number of your Probation Officer. You shall instruct your treating physician that if you fail to take medication as prescribed by him or fail to keep any appointments made with him, he is to advise your Probation Officer immediately of any such failures.

6. Except when eating in a restaurant you will not have any knife in your possession.

Variations of this order have been adopted by other sentencing courts in cases involving mental disorder, where ongoing treatment is considered desirable not only for rehabilitation but also for the protection of the public. It must be remembered, however, that probation orders are not available in all cases. Probation is an option in cases when the court discharges an accused under section 730(1) of the Criminal Code. Otherwise, the court may suspend the passing of sentence and impose a term of probation only if there is no minimum punishment prescribed by law, or as an addition to a fine or terms of incarceration so long as the latter does not exceed two years.

282 Ibid. at para. 17.
284 Criminal Code, supra note 7, s. 731(2).
285 Ibid., s. 731(1).
5.4.2. **On declaration of NCRMD**

Part XX.1 of the *Criminal Code* governs the disposition of NCR accused persons. 286 Section 672.54 provides, in relevant part, as follows:

Where a court or Review Board makes a disposition..., it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate. 287

It is apparent from the language of these provisions that fault is not relevant to disposition. This should not be surprising, given that the NCR accused persons have been exempted from criminal responsibility because they lacked moral culpability.

Instead, any decision of the Review Board (or court) must be based largely on an assessment of future harm. Pursuant to section 672.54(a), the Review Board must grant an absolute discharge unless it is satisfied that the NCR accused poses “a significant threat to the safety of the public.” In *Winko v. British Columbia (Forensic Psychiatric Institute)*, McLachlin J. interpreted this phrase as follows:

286 On November 25, 2013, Minister of Justice and Attorney General Peter MacKay introduced Bill C-14, entitled *An Act to Amend the Criminal Code and the National Defence Act (mental disorder)*, 2nd Sess., 41st Parl., Canada, 2013-present. It includes proposed amendments to Part XX.1, including the introduction of a unique regime for the disposition of cases involving “high-risk” NCR accused. If enacted, it also will impose a stipulation that “safety of the public” be the “paramount consideration” of the courts and Review Board.

287 *Ibid.*, s. 672.54.
A “significant threat to the safety of the public” means a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying. The conduct giving rise to the harm must be criminal in nature.  

She further held that, on disposition, the NCR accused need not prove the absence of threat. On the contrary:

There is no presumption that the NCR accused poses a significant threat to the safety of the public. Restrictions on his or her liberty can only be justified if, at the time of the hearing, the evidence before the court or Review Board shows that the NCR accused actually constitutes such a threat. The court or Review Board cannot avoid coming to a decision on this issue by stating, for example, that it is uncertain or cannot decide whether the NCR accused poses a significant threat to the safety of the public. If it cannot come to a decision with any certainty, then it has not found that the NCR accused poses a significant threat to the safety of the public.  

If the NCR accused is found to pose a significant threat to public safety, the Review Board must then consider whether to order the continued detention of the NCR accused or grant a conditional discharge. In selecting between these options, and between the various conditions that might be imposed in relation to each, the Review Board must choose the option and conditions that are the “least onerous and restrictive to the accused.”

One might expect that an NCR accused with substance-induced psychosis would not pose a significant threat to public safety after the psychoactive substance that triggered the psychotic episode is excreted, and so long as the NCR accused otherwise abstains from further substance use.  

An NCR accused might enjoy a relatively short tenure in the forensic mental health system as a result. Indeed, research suggests that

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289 Ibid.
NCR accused persons with substance-induced psychosis have greater prospects for full remission than those with primary psychotic disorders. In a one year longitudinal study of 319 patients with co-morbid psychosis and substance use, Caton et al. found remission of psychosis at a rate of 50% for those with a baseline diagnosis of primary psychotic disorder and 77% for those with substance-induced psychotic disorder.\textsuperscript{292}

In fact, NCR accused may be subject to lengthy periods of detention and/or supervision, particularly if substance use continues. In the case of \textit{Re Nadorozna},\textsuperscript{293} for example, the Board concluded that a detention order was appropriate - and was the least onerous and least restrictive alternative - where the NCR accused had ongoing challenges with the abstinence. The NCR accused in the case reportedly sought a declaration of NCRMD “with the full understanding that it would likely result in a longer period of detention than if he were found guilty of all of these charges” and with the “stated hope that the treatment he may receive in the forensic system will give him a better chance of successfully addressing his substance abuse problem.”\textsuperscript{294} The Review Board imposed a 12 month detention order.\textsuperscript{295} In such cases, the stated concern of the Review Board was the potential for relapse. It articulated this sentiment in the subsequent case of \textit{Re King}, wherein the Board held that the NCR accused’s “almost certain relapse to the use of psychostimulants would, as it had done in the past, again induce a psychotic episode rendering her a significant threat.”\textsuperscript{296} In the case of \textit{Re Goodfellow}, the B.C. Review Board declined to grant an absolute discharge for similar reasons. Instead, it issued a conditional discharge. It noted that the NCR accused “has been abstinent from taking drugs, at least, at the hospital and he has been free of psychotic symptoms since his admission to FPH...has demonstrated good insight by


\textsuperscript{294} \textit{Ibid.} at para. 8.

\textsuperscript{295} The Review Board also granted leave to the NCR accused to apply for an early hearing if his condition improved to the point that it would be managed in the community.

cooperating with pursuing counseling...has a solid placement in the community; the support of his parents.” An absolute discharge nonetheless would be “premature” given, *inter alia*, that “he has not been tested in the community and he has been on a secure ward in the hospital.”

The caution exercised by the Review Board in *Re Goodfellow* may have been informed by the outcome of the earlier case of *Re Laglace*. In that case, the Review Board granted an absolute discharge to an NCR accused with a diagnosis of substance-induced psychotic disorder, notwithstanding the finding that the NCR accused was “highly likely to relapse to significant multi-substance use or abuse.” The NCR accused in that case had been subject to detention orders for a period of seven years before being granted a conditional discharge. He was subsequently granted a series of conditional discharges, abbreviated by readmission on three occasions. The NCR accused admitted to continued cocaine use. However, he did not appear to require hospitalization, as he did not experience further episodes of psychosis. The Board concluded that the accused nonetheless was at some risk of relapse:

Despite the recent history that substances have not rendered him psychotic, if his use intensifies and is prolonged, it is expected that Mr. Laglace could, and indeed would, relapse to overt psychosis including paranoia and fear of others. It’s in those circumstances that his index offences have arisen; it is in those circumstances that the risk of future antisocial behaviour becomes most prominent.

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297 *Re Goodfellow*, [2010] B.C.R.B.D. No. 17 at para. 33. Arguably, this aspect of the Board’s reasons is inconsistent with the decision of McLachlin J. in *Winko* to the extent it suggests that the Board required some degree of assurance that the NCR accused *did not pose* a significant threat to public safety before granting an absolute discharge. As noted above, she interpreted section 672.54 as giving rise to a mandatory obligation on the part of the Board to grant an absolute discharge unless it was satisfied that the NCR accused posed such a threat. There is no presumption that the NCR accused is dangerous, and any ambiguity in that regard ought to have been resolved in favour of the NCR accused. See also, *inter alia*, *Re Page*, [2009] B.C.R.B.D. No. 162 and *Re Taylor*, [2007] B.C.R.B.D. No. 16.


For reasons that are far from compelling, the Board determined that an absolute discharge was appropriate:

...[W]e do take into account that despite his lengthy history the accused, even before coming under our jurisdiction, was in fact able to manage life in the community without amassing or gathering much in the way of a criminal history; certainly none involving significant violence or harm to others. Although he has from time to time, as a result of his personal fears, been found in possession of weapons, he has actually never used weapons against anyone.

His new relationship with an apparently alcohol-addicted female is expected to precipitate stressors. However, based on his wife's testimony and Mr. Laglace's capacity for engagement, the two might just as readily provide each other some measure of mutual support.

Taking into account the August 25th baseball bat incident, we note that Mr. Laglace indicates he wished to protect himself from another. The reports of his intentions in the context of that incident are founded on hearsay. Mr. Laglace has demonstrated independent living skills and indeed a certain amount of resourcefulness in terms of occasional financially gainful activities. We also note that in the past when Mr. Laglace has been beset by symptoms of his paranoid psychosis he has indeed, on occasions other than the fire-setting incident, sought to avail himself of medical and community-based treatment resources.

While it is of concern that Mr. Laglace tends to arm himself when he feels fearful, we acknowledge he has not ever retaliated or struck out at anyone despite having found himself the object of aggression. Mr. Laglace's AXIS II features appear to be decreasing in terms of their influence on his behaviour. Despite his relatively unremitting relapse to substances, Mr. Laglace appears to have developed something of a resistance to psychosis notwithstanding their use.301

It was the view of the Review Board that the NCR accused’s “likely future transgressions might best be dealt with by the criminal justice or corrections stream rather than specialized treatment-focused approach of the forensic or mental disorder scheme."302 It went so far as to issue a warning to law enforcement, saying that “authorities should be

vigilant in their highly predictable future contacts with Mr. Laglace.”\(^{303}\) Indeed, the NCR accused was subsequently arrested on a charge of second degree murder for the killing of Tammy-Lynn Cordone in West Vancouver in May 2009, less than six months following this discharge. He pleaded guilty to the lesser included offence of manslaughter and was sentenced to a 10½ year term of incarceration.\(^{304}\)

The Review Board may well have been correct in its judgment as to its own jurisdictional limits in the Laglace case. However, the fact that the NCR accused was released into the community with a clear expectation of future recidivism – and with a warning to law enforcement to that effect - is unsettling. It may suggest an unfortunate lack of understanding as to the risk of relapse among those with substance-induced psychosis. Alternatively, it points to a troubling gap in the operation of the mental health and criminal justice systems in Canada.

\(^{303}\) Ibid.

\(^{304}\) R. v. Laglace, 2013 BCSC 1044.
6. Treatment in practice

Set out below are the findings that emerged from the qualitative research component of the study. They are organized by topic, and attempt to document both common perspectives shared among research participants as well as points of disagreement. Individual research participants are referenced by their profession, coupled with a randomly assigned digit (i.e. “Legal Counsel 1”, “Forensic Psychiatrist 2”). All are described in the masculine gender.

6.1. Impact of constitutional frailties of section 33.1 of the Criminal Code

As noted above, the jurisprudence suggests a division among Canadian courts on the question of the constitutionality of section 33.1 of the Criminal Code. In particular, the courts of Ontario and the Northwest Territories have held that section 33.1 is not constitutional. Meanwhile, the courts of British Columbia, Quebec and Nunavut take the view that section 33.1 is valid and can properly be relied on by the Crown in applicable cases. The matter has yet to be resolved by the Supreme Court of Canada or by the appellate courts of any province or territory. Consequently, uncertainty remains as to whether or not section 33.1 is Charter compliant and capable of surviving a constitutional challenge.

Counsel were asked about the extent to which this uncertainty influences the positions that they take in British Columbia, particularly in the course of plea bargaining. Indeed, one might reasonably expect that defence counsel would advance the Charter argument and attempt to persuade the Crown to accept a plea to a lesser included
charge in order to avoid that challenge. In response to this question, one research participant stated simply that British Columbia counsel "treat [section 33.1] as constitutional." Another indicated that he is prepared to oppose any Charter challenge in his role as Crown counsel. However, it was his personal view that the provision "would likely not get past the Charter." Otherwise, the majority of research participants reported that neither the issue, nor the opportunity to raise such a challenge, had arisen in their practices. The latter was attributed to the fact that allegations of extreme intoxication are rare, and the scope of section 33.1 relatively narrow in its application. This was explained by one research participant as follows:

… [T]here are not too many cases that involve extreme intoxication, the kind that is contemplated in 33.1. So, there are a small number of cases like that. And secondly, at least for many, 33.1 is thought to limit or restrict or eliminate a defence that could be available to general intent crimes such as assault. But when you’re dealing with the most serious charges, such as murder with a specific intent, it’s believed, I think correctly, that extreme intoxication, or intoxication even less than that, can eliminate the mens rea for the highest form of crime, namely murder. So, it’s usually in play in the ordinary way, and 33.1 does not pose a problem.

The potential for a constitutional challenge was nonetheless acknowledged. This particular research participant went on to say that, if a case similar to Daviault did arise, it is "almost required that there be a challenge to [section] 33.1 on the basis that the imposition of criminal culpability, even for a general intent crime, is simply fundamentally unfair and unconstitutional, and the rationales given in the preamble to the amendments

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305 Legal Counsel 5. Telephone Interview. 1 August 2012.
306 Legal Counsel 2. Telephone Interview. 12 December 2012.
to the Code bringing in [section] 33.1 simply aren’t sufficient to justify [the] unconstitutional imposition of criminal culpability.\(^308\)

6.2. Impact of Bouchard-Lebrun decision on section 16 of the Criminal Code

The decision of the Supreme Court of Canada in \(R. v. Bouchard-Lebrun\) remains at this time the leading case on the treatment at law of accused persons in circumstances of substance-induced psychosis, where intoxication was voluntary. However, given its relative currency, the impact of that decision is not yet fully apparent.\(^309\) Accordingly, counsel were asked for their opinion as to the potential impact of the decision generally, and the extent to which they are likely to change their own practices as a result of that decision. In response, one research participant described the case as affirming the status quo, saying that it would be “business as usual” from the Crown’s perspective.\(^310\) Otherwise, the majority of research participants reported that they had either not read the case or had not yet formed an opinion about it.

Only one of the lawyers who participated in this study had prepared a section 16 application in reliance on the \(Bouchard-Lebrun\) decision. That application did not go forward to the court, apparently because a declaration of NCRMD was ultimately

\(^{308}\) Ibid.

\(^{309}\) In \(R. c. Tremblay, 2013 QCCQ 2260,\) in reliance on \(Bouchard-Lebrun,\) the court granted a declaration of NCRMD where the psychotic episode experienced by the accused was attributable to a combination chronic and prolonged polysubstance use and underlying genetic predisposition. In \(R. c. Turcotte, 2013 QCCA 1916,\) leave to appeal refused [2014] S.C.C.A. No. 7, the Quebec Court of Appeal set aside a declaration of NCRMD, and ordered a new trial, on the view that the trial judge failed to properly instruct the jury on the impact of the evidence of self-induced intoxication. The accused in that case was found to have adjustment disorder, and to have ingested methanol as part of a suicidal attempt, before killing his children out of an apparent desire to “amener avec lui” (para. 24). In \(R. c. Faucher, supra\) note 91, the court rejected the defence of NCRMD where the accused’s mental state was found to be a direct result of voluntary intoxication by alcohol, notwithstanding the co-contributing effect of the psychotropic medication that the accused had been taking at that time. See also \(R. c. Côté, supra\) note 118.

\(^{310}\) Legal Counsel 7. Telephone Interview. 26 July 2012.
determined to not be in the client’s best interests. This research participant was nonetheless optimistic that trial courts would expand the reach of the NCRMD on the strength of that precedent to incorporate, among others, accused persons with dual diagnoses and underlying neurobiological vulnerabilities.311 Another research participant expressed a similar view, noting that the defence is likely to be applied to accused persons whose primary disorder is drug dependency. However, he was critical of this result. It was his view the defence of NCRMD should be reserved for individuals dealing with disorders other than drug dependency, saying that he would not like to see “addicts screwing it up for the truly sick.”

One research participant expressed pointed concern that the Crown, in reliance on Le Bel J.’s endorsement of the British Columbia Court of Appeal’s decision in R. v. Paul, might attempt to extend the guilt-by-proxy principle to specific intent offences. He argued that the application of this principle to specific intent offences – and charges of murder in particular - would be wrong. He summarized his reasoning as follows:

[W]e’ve got difficulty with this idea of temporary psychosis based on voluntary consumption of hard drugs, the most chronic use of hard drugs, in recognizing it. And part of the reason we don’t want to seem to recognize it in the criminal law area…is our sense that the person is responsible for their condition, and therefore they are blameworthy. And that is okay, to at least talk about the possibility that we might justify the blameworthiness of getting … in such bad shape and substitute it for the amount of blame necessary for a general intent crime. That’s an argument you could make. But it’s harder to make that – I say it’s not possible to satisfactorily make it – when you’re talking about the kind of thought required for a high level crime like murder. …

And I keep going back to what the Supreme Court of Canada did in the area of constructive murder – Vaillancourt and Martineau and all those cases – where the reasoning was murder is a high level crime. It must have a high level of blameworthiness. It must have a subjective mens rea. …

311 Legal Counsel 3. Telephone Interview. 17 October 2012.
312 Legal Counsel 1. Telephone Interview. 21 December 2012.
...[M]y view is that in the cases involving even voluntary consumption of dangerous drugs that result in temporary psychosis, that if the criminal culpability is going to be applied it must be manslaughter, not murder, and those judgments I mentioned were decided...on [the] principle that applies even now to the question of what we do with an individual who is out of their mind because of voluntary consumption of a drug. I think you just can't properly convict him of murder.\textsuperscript{313}

It remains to be seen whether the Crown will in fact advance this argument. Like Bouchard-Lebrun, the Paul case is relatively recent and has been applied in a limited number of reported judgments, none of which consider the issue identified by this research participant.

### 6.3. Impact of evidence of mental disorder on case management

As noted above, evidence of mental disorder may be tendered in support of a section 16 application for a declaration of NCRMD. If successful, the matter will be disposed of pursuant to the terms of Part XX.1 of the Criminal Code. Evidence of mental disorder also can be relied on for the purpose of raising reasonable doubt with respect to the formation of specific intent. In that case, the accused may be acquitted of the specific intent offence but convicted of any lesser included general intent offence. It falls to counsel to recommend a particular course of action. Accordingly, research participants were asked to identify those factors which incline (or disincline) them from advancing the defence of NCRMD, either generally or in cases of substance-induced psychosis in particular, assuming the evidence required to satisfy the section 16 test is otherwise available. This question was put to both Crown counsel and defence counsel, given that either may initiate a section 16 application in any given case.

\textsuperscript{313} Legal Counsel 13, \textit{supra} note 307.
6.3.1.  **General disinclination to advance NCRMD defence**

The NCRMD defence was described by one of the forensic psychiatrists who participated in this study as a “legal loophole” that could be “exploited by some who are not, do not truly have, a major mental illness” and are otherwise able to “get off...in a very premature fashion.” That individual might be surprised to learn that the vast majority of those research participants in a position to report on the experience of defence counsel indicated that they are generally disinclined to recommend the NCRMD defence, even where evidence is otherwise available to satisfy the section 16 test, because of the risk that their client will be subject to indeterminate detention or supervision within the forensic psychiatric system. In the words of one such research participant:

I would never ever consider it on any case virtually whatsoever where it’s of a minor nature no matter whether ... it would be [a] clearly inappropriate perspective to take on the ... mens rea aspect of the offence because it just is such an onerous and difficult disposition.

Another research participant explained:

... [I]f someone is found to be not criminally responsible, then... that means that they go into this system where there’s a Review Board and they may be in custody and the time period is not—it may not be definitely known. So I think there’s just a general concern that that result, the NCRMD verdict, can lead to consequences that are less certain and in some cases are more prejudicial than the traditional criminal law system.

Yet another research participant stated simply that defence counsel would “obviously never run an NCRMD defence” if the accused is not likely to go to jail or if the accused

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314 Forensic Psychiatrist 4. Telephone Interview. 16 October 2012. This view may be shared by other forensic psychiatrists in British Columbia. Another research participant reported that “there’s a sense [among assessing psychiatrists that] these people are malingering...[I]t seems that some doctors like to raise that, in these cases, and unfortunately it just feeds into a system that’s already under resourced and isn’t exactly flush with providing treatment to people who need it.”: Forensic Psychiatrist 2. Telephone Interview. 20 October 2012.

315 Legal Counsel 3, supra note 311.

316 Legal Counsel 11. Telephone Interview. 20 July 2012.
faces a relatively short period of incarceration (i.e. “days or months”). Otherwise, “the outcome can be worse for your client than if he is found guilty on the facts.”

In some cases, the concerns of defence counsel with respect to disposition are compounded by a lack of familiarity with the Review Board’s process. One research participant expressed this view in the following terms:

... [C]ounsel are very familiar with [the traditional criminal law system] and they know what result they’re likely to achieve. And depending on the case, it can be a very good result. It may not—may even not result in a permanent criminal record. Versus the idea of going through the NCRMD result, and then putting your client into a system that you’re not familiar with and you lose control over what happens to them. And they’re at the mercy of a Review Board. ... [W]hat the Review Board does is going to depend on the client and how he or she is doing subsequent to ... your involvement. There’s a lot less certainty.

In other words, counsel continued, “I’ll go with what I know, with the criminal law – traditional criminal law result, guilty or not guilty in sentencing, versus the NCRMD.”

Research participants identified three exceptions. Firstly, defence counsel may recommend a section 16 application in response to serious charges for which the accused person might otherwise face a lengthy period of incarceration in the correctional system. In this regard, one research participant reported as follows:

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317 Legal Counsel 5, supra note 305.
319 Legal Counsel 11, supra note 316.
320 Ibid.
But where ... you do have relatively minor crime, it would be sensible to at least consider not raising NCRMD and try to have the client, if he or she is to be sentenced, sentenced to a modest ordinary sentence associated with the nature of their crime, and if they need mental help that be obtained outside of the criminal justice system rather than getting them involved in the NCRMD process, which might well turn out to be a long, difficult, arduous, disproportionate involvement in a state imposed regime which comes with NCRMD. Whereas if you’re dealing with a serious crime, you might well say that would be better than a long time in a penitentiary.\footnote{Legal Counsel 13, \textit{supra} note 307.}

[Emphasis added]

It was the recollection of another research participant that he had advanced section 16 applications only in response to charges of murder.\footnote{Legal Counsel 15. Telephone Interview. 3 October 2012.} Yet another reported that he would not encourage a client to pursue the NCRMD defence unless the charges involved “murder or something similar.”\footnote{Legal Counsel 10. Telephone Interview. 11 October 2012. \textit{C.f.} Crocker et al., \textit{supra} note 59, wherein researchers found that only 8.2\% of NCRMD cases in British Columbia, in the period of May 1, 2000 to April 30, 2005, involved charges of homicide or attempted murder: \footnote{Ibid.}}

Secondly, defence counsel may recommend the NCRMD defence if the accused person has a transitory mental disorder which is likely to resolve within a relatively short period of time. In those cases, as one counsel noted, “you could make the argument based on good evidence and reason that the person ought not to be interfered with, not necessarily long by the state, because they’ve now recovered, and they are healthy, and there is no cause for doing so.”\footnote{Legal Counsel 5, \textit{supra} note 305.} By contrast, as another observed, the NCR accused might be “locked away indefinitely” if the condition is chronic.\footnote{Ibid.}

Finally, defence counsel may be inclined to recommend a section 16 application – irrespective of the sentence the accused person is likely to receive in the traditional
criminal law system - if extended treatment within the forensic psychiatric system is perceived to be in the client’s best interest, and without which the client would inevitably find himself or herself in repeated conflict with the law. One research participant observed as follows:

... [Defence counsel] understand that it may be in their client’s best interest to have an NCRMD finding, be sent to the review board, and get the medical help they need because they’ll be subject to the review board and then get psychiatrists and psychologists helping them, etcetera. Whereas if you simply do a disposition in the traditional way in the provincial court and get a probation order you’re likely not to get that medical assistance and even though you may have a [counselling] condition [the client] won’t have access to the same doctors and psychologists, etcetera.326

Another research participant noted that the quality of treatment currently available within the British Columbia forensic psychiatric system exceeds that which an offender is otherwise likely to receive in either the federal or provincial correctional systems.327 Many reported also that the treatment options and support services previously available to mentally disordered individuals in British Columbia’s civil mental health system have diminished in recent years.

The majority of research participants reported that Crown counsel generally defer to competent defence counsel and support whatever strategy results in the preferred outcome for the accused, whether that be disposition pursuant to Part XX.1 or sentencing in the normal course. Indeed, it was estimated by one Crown lawyer that as many as 95% of section 16 applications proceed by consent.328 This same lawyer agreed that it was “sensible” for defence counsel not to advance the defence of NCRMD if the offence was of a relatively minor nature and the outcome in the forensic mental

326 Legal Counsel 13, supra note 307.
327 Legal Counsel 8. Telephone Interview. 19 October 2012.
328 Legal Counsel 1, supra note 312.
health system likely to be more prejudicial that the sentence handed down on conviction.\textsuperscript{329} However, another Crown lawyer took direct issue with this approach:

\begin{quote}
I don’t care whether or not it’s a minor offence or a serious offence. To do it that way is to have a results oriented approach rather than one that’s based on the evidence and the test laid out under Section 16.\textsuperscript{330}
\end{quote}

He nonetheless conceded that he had never found himself in a situation where he was compelled to bring an application for a declaration of NCRMD in opposition to the position advanced by the defence.\textsuperscript{331} Indeed, Crown applications are rare. It is estimated that they make up less than 2-4\% of all section 16 applications advanced in British Columbia within any given year.\textsuperscript{332} Crown counsel may be required to initiate section 16 applications with greater frequency in the future, particularly if the number of self-represented accused persons in the criminal justice system increases.

Indeed, it was reported that accused persons are also disinclined to advance the defence of NCRMD. In some cases, the accused may not agree with the diagnosis provided by the assessing psychiatrist or otherwise refuse to accept that he or she has a mental disorder. One research participant observed as follows:

\begin{quote}
Many do not want to have that defence. They don’t see themselves as mentally ill and they don’t want to advance that as a defence. So many of them will refuse to say that they’re mentally ill and agree that they’re mentally ill.\textsuperscript{333}
\end{quote}

Another research participant reported that accused persons with schizophrenia face particular challenges in this regard by reason of the disorder itself. In his words, “[t]hey

\textsuperscript{329} Ibid.
\textsuperscript{330} Legal Counsel 12. Telephone Interview. 22 July 2012.
\textsuperscript{331} Ibid.
\textsuperscript{332} Legal Counsel 1, supra note 312. Crocker et al. report that British Columbia had an average of 62 NCRMD findings in the period between May 1, 2001 and April 30, 2005: Crocker, supra note 59. The number of NCRMD applications is undoubtedly higher, as that study includes only those matters for which a declaration of NCRMD was granted. It does not include those cases in which a section 16 application was advanced, but ultimately denied by the court.
\textsuperscript{333} Legal Counsel 5, supra note 305.
have a blind spot…90% of them will never really truly come to accept that they have a major mental illness or that they require long term [or] life long treatment with medication. ”

These challenges may be exacerbated in cases involving symptoms of paranoia. These symptoms can frustrate the assessment process, as the accused person may be guarded and not make full disclosure to a court-appointed forensic psychiatrist. They can likewise contribute to distrust in counsel, and diminish the confidence that an accused person might otherwise have in the advice of his or her own lawyer. One defence counsel expressed concern that many of the Crown lawyers whom he had worked across, and members of the bench who previously served as Crown counsel, appeared to have little appreciation of these challenges, nor patience for the additional procedural steps that they might be required to take as a result. Indeed, many research participants identified the inability of counsel to obtain meaningful instructions from clients with mental disorder as a potential barrier to access to justice in these cases. It is a client group described by one defence counsel as “completely in chaos in almost every part of their life.”

In other cases, the accused person may accept the diagnosis of mental disorder, but feel that he or she is able to effectively manage the condition outside of the forensic psychiatric system. One research participant recalled a case in which he was instructed to delay proceedings, so as to allow the accused person sufficient opportunity to obtain treatment and show that he could manage his condition independently. He did just

334 Forensic Psychiatrist 4, supra note 314.
335 Legal Counsel 4. Personal Interview. 25 October 2012. Research participants observed accused persons taking unexpected (and sometimes) prejudicial steps in the course of the proceedings. Among the examples cited by counsel were the decisions of accused persons to take the stand contrary to the advice of their lawyers and the refusal of accused persons to made reasonable admissions as to guilt notwithstanding a stated intention to consent to a declaration of NCRMD: Legal Counsel 14. Telephone Interview. 10 October 2012 and Legal Counsel 13, supra note 307.
336 Legal Counsel 3, supra note 311.
337 Legal Counsel 8, supra note 327.
that. On the strength of the evidence that emerged in this period, and the accused’s record of success in treatment, this research participant was then able to persuade the Crown to accept a plea to a lesser included charge and convince the sentencing judge to grant an absolute discharge. Other research participants described similar strategies in their own practices, all of which were aimed at facilitating treatment during the period of judicial interim release – described by one research participant as “therapeutic bail”338 - and developing an evidentiary record on which they could rely to obtain a favourable disposition.

6.3.2.  Preference for alternate relief

Counsel reported that, rather than advance a defence of NCRMD, they generally prefer to make use of evidence of mental disorder for other purposes. Among the examples provided by research participants was the use of such evidence to raise reasonable doubt on the issue of intent or challenge the voluntariness of statements made to law enforcement on arrest or detention. It was noted by one defence counsel that conflict in the expert evidence is less problematic in circumstances such as these, as the burden on the accused in those cases is merely to raise reasonable doubt. In other cases, counsel might reserve evidence of mental disorder for sentencing purposes. The mitigating effect of such evidence may be limited if the offence is subject to a mandatory minimum sentence and where a conditional sentence order is not available. However, in the absence of any such restriction, evidence of mental disorder will generally result in a reduced sentence. It might also provide a basis on which counsel can argue for the inclusion of a Rogers Order as a term of any conditional sentence or probation order.

Crown counsel encourage the defence bar to bring forward evidence of mental disorder at the earliest opportunity, even prior to charge approval. One research participant reported having done so to the advantage of his clients. He described his practice in this regard as follows:

338 Legal Counsel 3, supra note 311.
... [The Crown’s charge] approval standard is a two-pronged test... [I]s there a substantial likelihood of conviction ... and ... is it in the public interest? So, I always try and take a little time get hopefully the client out on what I call therapeutic bail, where they’re getting the care they need, and then I go to [the Crown] later ... and say, look, where is the public interest in continuing with the prosecution of this? Can we not [agree to disposition on a lesser included charge?] And so there’s always another ... way to try and get a resolution that I will look to before I will ever go to NCRMD.339

As this research participant noted, a stay of proceedings may be warranted in some cases. In others, alternative measures might be more appropriate. Otherwise, Crown counsel might be persuaded to accept an early plea to a lesser included offence or to the imposition of a peace bond pursuant to section 810 of the Criminal Code.

6.3.3. Impact of resource constraints

Research participants identified a lack of defence-side funding as a factor that can frustrate the successful advancement of a section 16 application. As one research participant noted:

... [T]he NCRMD process is a lot more difficult ... in the sense that it takes a lot of resources. You need to have experts assess the client and then the experts need to testify in the proceedings. It can be more expensive and a lot more complicated than the traditional approach.340

It was reported, however, that the majority of clients who might benefit from the NCRMD defence do not have sufficient personal resources or family support to fully fund their defence. They must rely instead on legal aid monies provided by the Legal Services Society of British Columbia (“LSS”), the provision and sufficiency of which was the subject of much criticism.

339 Legal Counsel 3, supra note 311.
340 Legal Counsel 11, supra note 316.
In relation to cases involving mental disorder in particular, research participants identified two primary shortcomings in the legal aid regime in British Columbia. Firstly, those in the position of defence counsel often could not be certain whether, in any given case, the cost of expert witness fees would be covered. Moreover, the application process for pre-approval of these costs was “bureaucratic.” One research participant described his experience as follows:

[W]henever I have to deal with LSS – and I know there’s going to be any kind of a mental state defence that requires a psychiatrist – I know I’m going to have to butt heads with some bureaucratic functionary who may not be a lawyer, probably won’t be a lawyer, who’ll want to know why I need a psychiatrist. And the fact that you’ve done 40 murders trials and you know what you’re doing doesn’t count, you still have to explain to somebody who doesn’t do what you do why you need a psychiatrist. And, you know, you may get turned down. And part of the reason for that is that LSS suffers from chronic underfunding at the hands of the government. So, they just have their rules and it’s a major hurdle to deal with in a serious case where you want to run a mental state defence. And it’s a major drain on the resources of the defence in terms of time and energy, apart from anything else, just trying to deal with these problems and get around them.

One research participant went on to say that he prefers to pay these costs himself, as he was “tired of having to try to defend the case and fight [LSS] at the same time.” Another said that he would rather take on cases pro bono than under the legal aid system.

Indeed, in at least two cases, research participants were reportedly left to pay expert witness fees from their personal resources after LSS declined to cover all of the costs associated with the retainers. Both of these lawyers considered themselves to be professionally and ethically obliged to pay these costs. In the words of one defence

341 Legal Counsel 3, supra note 311.
342 Legal Counsel 15, supra note 322.
343 Ibid.
344 Legal Counsel 10, supra note 323.
345 Legal Counsel 8, supra note 327.
counsel, “[i]t’s a write off, but it’s the right thing to do…”  In one of the cases conducted by these counsel, the expert’s evidence proved critical to the defence, and was accepted by the court as grounds for granting the NCRMD defence. The amount which counsel personally paid was more than $10,000.\textsuperscript{347} One of the forensic psychiatrists who participated in this study similarly reported that he has “learned not to take on a case until [counsel] get written confirmation that they’ve got legal aid for me, and the number of hours I need, because I’ve been burned and not paid.”\textsuperscript{348} In one instance, payment was delayed by approximately one year. This research participant is still pursuing payment owed to him for work that he undertook in another case two years ago.

Secondly, research participants expressed frustration with respect to the low tariff rates paid by LSS, both for expert witness fees and for defence counsel preparation. One research participant recalled an occasion when he “couldn’t find [a forensic psychiatrist] who was prepared to take the case, and [he] tried every one, based on the tariff rate.”\textsuperscript{349} One forensic psychiatrist estimated that his private rate was “one and one half times” the amount he could expect to receive from LSS.\textsuperscript{350} However, as another research participant observed, while forensic psychiatric experts may be paid a low tariff rate, they nonetheless earn “somewhere around eight, sometimes ten times more” than defence counsel.\textsuperscript{351} Moreover, counsel receive less remuneration on a per hour basis for cases involving mental disorder than those that do not. He explained as follows:

\[\ldots\text{[O]ne of the reasons I’m so busy is because nobody wants to do these cases, because I get paid the same as the lawyers who meet their clients on the first day, says [sic] “Hi, how are you? Let’s set up for trial. Don’t call me till the trial date.” And then they go to trial. I get the same money}\]

\textsuperscript{346} Legal Counsel 10, supra note 323.
\textsuperscript{347} LSS officials did not respond to requests for information about their policy for the funding of forensic psychiatric experts.
\textsuperscript{348} Forensic Psychiatrist 2, supra note 314.
\textsuperscript{349} Legal Counsel 5, supra note 305.
\textsuperscript{350} Forensic Psychiatrist 2, supra note 348.
\textsuperscript{351} Legal Counsel 3, supra note 311.
for my 15 court appearances while I adjourn and jockey and wait and gather my psychiatric consultations, my family conversations, the 1400 calls from the client who’s been distressed and needs assurance, meetings with Crown. … [I]t’s very hard on defence counsel because we just don’t get paid for the work we do.

And so … when I talk to young counsel, I say to them … there is nothing wrong with wanting to get paid for the work you do. Just don’t take these cases because you’re not going to be, and you have to do that kind of work to get the best result.\textsuperscript{352}

Another research participant added that, apart from concerns about remuneration, the high quantity of work required in these cases may alone deter some lawyers from advancing section 16 applications.\textsuperscript{353}

Research participants did not report comparable limits on the resources available to Crown counsel, noting only that the approval of a supervisor might be required before trial counsel could seek a second opinion or be granted additional time to work on a particular case. As one research participant explained:

You can’t always get the defence psychiatrist to hang around and listen to any rebuttal evidence that’s called by the Crown [due to financial limits imposed by LSS]. But the Crown, as far as I’m aware, there’s no impediment financially to retaining psychiatrists and having that psychiatrist participate in proceedings to the maximum extent deemed appropriate.

…

And I’m sure, in fact I’d bet my shorts on this, that there isn’t any psychiatrist whose been retained by the Crown who got stiffed for his bill at the end of the day…\textsuperscript{354}

Moreover, according to another research participant, Crown counsel have the ability to pay their experts at rates higher than those permitted under the legal aid tariff.\textsuperscript{355}

\textsuperscript{352} Ibid.
\textsuperscript{353} Legal Counsel 11, supra note 316.
\textsuperscript{354} Legal Counsel 15, supra note 322.
\textsuperscript{355} Legal Counsel 5, supra note 305.
addition, Crown lawyers have access to designated counsel with specialized knowledge and experience in cases involving mental disorder. In the words of one such lawyer, 
“[t]here’s always someone at the organization … who has dealt with it before.”

The situation with respect to legal aid funding in British Columbia was described by one Crown lawyer as “scandalous,” and one which he hoped was ameliorated, at least in part, by the “evenhandedness” of Crown counsel. The issue is discussed in greater detail in the 2011 report of the Public Commission on Legal Aid Funding in British Columbia. Individuals with mental disabilities are specifically identified in that report as a community for which targeted strategies are needed to ensure adequate legal representation. Indeed, the lack of funding available to accused persons under the LSS system was noted by many research participants as potentially the most significant barrier to access to justice for the population of accused persons in British Columbia dealing with mental disorders.

6.3.4. Concerns with respect to expert evidence

Research participants were asked about the uncertainty and instability reportedly associated with a diagnosis of substance-induced psychosis. The impact of an erroneous diagnosis on outcome in the criminal justice system is significant. If an episode of psychosis is attributed to a primary psychotic disorder, then the accused person may be diverted to the forensic psychiatric system. If it is attributed exclusively to self-induced intoxication, then the accused may be convicted and sentenced. As noted above, despite the importance of this distinction at law, Feix and Wolber observe, it is “difficult, if not impossible” in practice to determine whether psychosis is the product

356 Legal Counsel 14, supra note 335
357 Legal Counsel 1, supra note 312.
of substance use or a symptom of underlying mental disorder.\textsuperscript{359} Indeed, in the aforementioned study of Shaner et al., it was found that a clear diagnosis could not be made in as many as 78% of cases.\textsuperscript{360}

On this issue, one of the forensic psychiatrists who participated in this study stated simply that “[i]f both a psychotic mental illness and intoxication are present, then I am aware of what symptoms arise from both and am able to say which disorder was the most prominent feature at the time of the offense.”\textsuperscript{361} Others found the task of distinguishing between psychotic symptoms arising from intoxication and those arising from underlying mental disorder to be challenging. One said that “[i]t can be difficult, and it can take quite a while, by which I mean weeks and several weeks, to tease out substance induced psychosis from an underlying schizophrenic illness, for example.”\textsuperscript{362} This particular research participant went on to say that, if necessary, he will request an extension of the assessment period. Many indicated a clear preference for longitudinal assessment in these cases.

The length and quality of the typical assessment reportedly varies depending on whether the assessment proceeds on an inpatient or outpatient basis,\textsuperscript{363} the nature of any collateral information available to the forensic psychiatrist (i.e. toxicology screens, family history, medical records,\textsuperscript{364} prior pre-sentence reports),\textsuperscript{365} the nature of the

\textsuperscript{359} Feix & Wolber, supra note 56.
\textsuperscript{360} Shaner et al., supra note 64.
\textsuperscript{361} Forensic Psychiatrist 3. Written Narrative. 25 October 2012.
\textsuperscript{362} Forensic Psychiatrist 1. Telephone Interview. 23 November 2012.
\textsuperscript{363} Also of potential relevance is the degree to which the accused person has access to drugs or alcohol in the assessment period. As one forensic psychiatrist noted, abstinence cannot necessarily be assumed, even in relation to those accused persons housed in correctional facilities: Forensic Psychiatrist 4, supra note 314.
\textsuperscript{364} One research participant indicated that some medical professionals refuse to disclose their patients’ records, even though they are required to do so pursuant to court order, on the basis of a perceived obligation to protect patient confidentiality. In some cases, there is insufficient time to persuade the medical professional otherwise, and the forensic psychiatrist is required to complete the assessment without the benefit of those records.
substances consumed by the accused. The reliability of the diagnosis rendered by the forensic psychiatrist likewise may vary on the basis of these same factors. For example, as one forensic psychiatrist noted, it can be “extremely difficult” to differentiate the symptoms of amphetamine-induced intoxication from those of schizophrenia. These symptoms can be “indistinguishable.” As a result, additional time – “sometimes a month or two” – may be required to complete the assessment. Similar challenges arise in cases involving crystal methamphetamine and protracted cocaine use.

Despite these challenges, and notwithstanding the uncertainties and instability associated with a diagnosis of substance-induced psychosis, the majority of counsel indicated that the opinions they receive are generally categorical in nature, with a clear statement of diagnosis on a balance of probabilities standard. One research participant described the expert opinions that he had seen as “ultimately fairly binary.” On the question of whether the diagnostic uncertainties reported in psychiatric literature are conveyed to the court, this individual responded as follows:

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365 One research participant reported that, in his role as defence counsel, he is not permitted to give additional information to the assessing psychiatrist, even if that information is critical to the proper assessment of the accused. He must instead retain an independent forensic psychiatrist to provide an independent assessment which takes that additional information into account: Legal Counsel 3, supra note 311.

366 Some of the research participants reported that, as Crown counsel, they may attempt to mitigate the risk of error, at least in relation to those accused persons who are arrested relatively close in time to the alleged criminal act, by seeking the remand of the accused pursuant to section 516 of the Criminal Code and immediate forensic assessment. Observations made by the assessing psychiatrist at that time may assist in any subsequent assessment for the purposes of a section 16 application.

367 Forensic Psychiatrist 1, supra note 362. It remains to be seen whether similar challenges will arise in relation to the use of methylenedioxy(pyrovalerone (also known as MDPV or “bath salts”), which is relatively new to the North American recreational drug market. See M. V. Stoica & A. R. Felthous, “Acute Psychosis Induced by Bath Salts: A Case Report with Clinical and Forensic Implications” (2013) J. Forensic Sci. 530.

368 Ibid.

369 Legal Counsel 12, supra note 330.
The vicissitudes and difficulties or any flux in the state of research doesn’t, in my recall, wind up translated into an opinion. Because ultimately the opinion giver … can offer up one of three opinions: “yes,” “no,” “I can’t tell.” …I haven’t seen one which is “I can’t tell.”

Others had received reports of the latter nature, although apparently on rare occasions. One forensic psychiatrist considered it to be his professional obligation to determine whether an episode of psychosis was attributable to substance use or underlying mental disorder, saying that “it is of little use to the court to leave that for the judge to decide.” Another expressed the opposite view, saying that he is “quite happy to leave the decision to the judge.” In his words, “you just go as far as you can and when you can’t go any further you leave a gap…some people are willing to jump the gap though.”

One research participant shared his suspicion that, in past cases, accused persons in British Columbia may have been declared NCRMD on the basis of a diagnosis of a primary psychotic disorder, when in fact they ought to have been diagnosed with crystal methamphetamine intoxication. Had they been properly diagnosed, they would have been convicted. The situation, he said, was “not good for the accused.” He recalled one case in which an NCR accused person spent prolonged periods in detention and under the supervision of the Review Board not because of any psychotic disorder, but because of other disorders with which he was subsequently diagnosed. One of the forensic psychiatrists confirmed that NCR accused persons in these circumstances are being detained in British Columbia on the basis of subsequently diagnosed personality disorders. Detention is apparently justified on the grounds that the NCR accused was “still dangerous...just because they’re [not] psychotic, they’re still a psychopath.”

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370 Ibid.
371 Forensic Psychiatrist 1, supra note 362.
372 Forensic Psychiatrist 2, supra note 348.
373 Legal Counsel 1, supra note 312.
374 Forensic Psychiatrist 2, supra note 348.
Another research participant expressed concern about the number of erroneous diagnoses that he had encountered in cases involving adolescent accused persons. He found that assessing psychiatrists tended to diagnose adolescent accused persons with substance-induced psychosis or anti-social personality disorder, when in fact the accused’s symptoms were attributable to an evolving primary psychotic disorder. He described his experience as follows:

... [W]hen people label it personality disorder or ... substance-induced psychosis, take it with a pinch of salt, because [the accused is] going to keep turning up and eventually it’s going to be clear that they’ve got a major mental illness. And I think that’s largely because they present in an anti-social way... [T]he bias is toward ... anti-social personality. And all of them use drugs so it must be drug induced. And it’s quick and dirty and an easy diagnosis. And my own experience is that I look back at reports that have been done ... and I think “Oh come on, look at this! ... It’s an evolving illness!”

And that’s particularly a problem if they’re adolescents when they first present, because ... schizophrenia develops in adolescence. It interferes with personality development and then the schizophrenia itself is coloured by the immaturity of the individuals. So, schizophrenia appears like an anti-social adolescent in some ways, and the personality then doesn’t go on to develop and mature as it should do because it’s been arrested by the inter-current schizophrenia. ... I look back at those labels that were applied years ago and I think, no that was schizophrenia.375

This research participant added that, in cases where drugs are involved, forensic psychiatrists too often assume that any episode of psychosis is attributable to those substances. He was critical of this assumption. It was his view that some of the assessments provided by the Forensic Psychiatrist Services experts in such cases were not sufficiently thorough. He explained as follows:

I’m not perfect. I’ve missed lots of things in my time, but I’m quite diligent in spending time with someone to listen to their psychotic symptoms to see if they’re there. If you don’t talk to some people for long enough you don’t get those symptoms... But because there are drugs involved, it’s assumed that those were drug-induced symptoms and no one’s delved

375 Ibid.
deeply enough in the assessment to see if it’s an ongoing psychosis. So, they just get turned around really quickly, and say well, they’re not psychotic anymore, discharge them. Whereas they are psychotic just no one’s talked to them long enough. And that’s a bit of an indictment.376

Interestingly, one lawyer made a comparable complaint against forensic psychiatrists who act for the defence, saying that these psychiatrists “don’t always … check enough collateral sources, or check the information that they’re being provided by the accused.”377 Instead, they rely on the self-reported – and potentially false – information provided to them by the accused.

One research participant noted the need for “responsible, professional, independent” experts in this particular area of the criminal law, and the “unfortunate history within the criminal justice system where experts … saw their role as more of an advocate for the Crown than as an independent expert to assist the court.”378 It was the view of another research participant that bias of this very nature is prevalent among the roster of experts available through the Forensic Psychiatric Services Commission. These forensic psychiatrists, he claimed, could not be relied on to write objective reports. He expressed the view – which view he felt was common among defence counsel - that their reports “are likely going to be biased in favour of the Crown’s position.”379 He

376 Ibid.
377 Legal Counsel 2, supra note 306.
378 Legal Counsel 11, supra note 316. Another said that the problem had been sufficiently serious in British Columbia that the drafters of the new B.C. Rules of Civil Procedure included a requirement that experts formally declare their neutrality: Legal Counsel 4. Telephone Interview. 31 July 2012. Indeed, Rule 11-2(1) stipulates that an expert has “a duty to assist the court and is not to be an advocate for any party.” Rule 11-2(2) further requires that the expert certify in his or her report that he or she “aware of the duty…. has made the report in conformity with that duty, and will, if called on to give oral or written testimony, give that testimony in conformity with that duty.” See Supreme Court Civil Rules, BC Reg 168/2009, Rule 11-2.
379 Legal Counsel 5, supra note 305.
characterized his own decision to send a client to the Forensic Psychiatric Hospital for assessment as a “mistake.”

This research participant summarized the perceived disadvantages of using Forensic Psychiatric Services Commission experts – and the corresponding advantages of hiring independent experts - as follows:

You just send [the accused person] away, you don’t know who’s going to write the report. Maybe it will be good, maybe it will be bad. Maybe they’ll see their position more in tune with the Crown, more a gate-keeper than anything else.

Whereas somebody you hire you’ll know their credentials. You’ll know who they are. You know their experience level before you hire them. You can discuss the case with them in advance before they interview your client so that you can get some sort of sense whether they can give you a preliminary diagnosis. And you can discuss the case afterwards, so you can find out the level of their confidence in their findings. That’s not available if you send them to Forensic. You get who you get.

…

And the other problem is that you’re sending somebody who’s truly psychotic to Forensic, where they’re truly paranoid schizophrenic, or have those attributes because of the drug they were on. They … can become quite guarded. They will not necessarily reveal themselves to somebody that they think is part of authority, because … sometimes they’ll think they’re part of the conspiracy. So they’ll be sometimes guarded with them about what they reveal about how they’re thinking, which doesn’t happen so often when … they’re being interviewed by somebody they think is on their side in some way. They feel that they can open up more to them.\[381\]

Another research participant indicated his own preference for private psychiatrists for the following reasons:

I usually retain a private psychiatrist, not one of the forensic psychiatrists, usually, and then I can give them everything I have, everything I’ve

380 Ibid.
381 Ibid.
gathered, all the … collateral information, family information. I can just give it all to them. And it’s not even … because I think I’m going to get a better answer at the end of the day. It’s just that I can’t do that if it’s a court order. They don’t allow an opportunity for me to give to the forensic commission psychiatrist additional information, and that often is what’s needed to really paint a picture of where the client’s at, who they are, who’s out there for them, and that kind of thing.  

One of the research participants who acted primarily for the Crown took issue with the allegation that the Forensic Psychiatric Services Commission experts are biased in favour of the Crown. He suggested instead that the Crown is deferential to these experts. In other words, rather than the expert tailoring his or her opinion to accord with the position of the Crown, the Crown tailors its position to accord with the opinion of the expert. It was his experience that Crown counsel generally accept the psychiatrist’s opinion as independent and neutral, and afford appropriate professional deference to it as a result. Another Crown lawyer similarly reported that “we generally do accept the professional’s report,” even if “we don’t always agree with the outcome.”

Yet another research participant questioned whether the level of deference given by Crown counsel to the Forensic Psychiatric Services Commission experts was appropriate. In his view, these experts appear to be influenced by resource limitations. It was further suggested that the forensic system is overtaxed as a result of the reduction of services in the civil mental health system. As a result, Commission experts render more diagnoses likely to result in convictions. He described this dynamic in the following terms:

[T]he domino effect is civil mental health, they’re limited and they’re going to push [the accused person] back, and then forensics becomes overloaded, and they’re pushing back, and these people are ending up in

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382 Legal Counsel 3, supra note 311.
383 Legal Counsel 1, supra note 312.
384 Legal Counsel 9. Telephone Interview. 1 August 2012.
jail. And then you have no hope of figuring what really, really is wrong because they’re in an absolutely, highly distressing situation.\textsuperscript{385}

This research participant went on to say that these experts appear also to be more likely to attribute an episode of psychosis to drug use in those cases where the patient is expected to pose a “management problem.”\textsuperscript{386} He recalled being told by one such expert that it was preferable that the accused person “fight with the jail guards than the nurses.”\textsuperscript{387}

\textsuperscript{385} Legal Counsel 3, supra note 311.
\textsuperscript{386} Ibid.
\textsuperscript{387} Ibid.
7. **Recommendations**

7.1. **Resolve the constitutional question**

As Kaiser rightly notes, the Supreme Court of Canada’s decision to proceed with the application of section 33.1 in the *Bouchard-Lebrun* case, without consideration of the *Charter* argument, is tantamount to “osmotic constitutionalization.” The Court’s reliance on section 33.1 might signal an underlying comfort with the provision, and foreshadow a future decision upholding it. Nonetheless, this result cannot be assumed. A decisive ruling on the issue is needed, failing which discrepancies in the application of section 33.1 are likely to continue. Lower courts of different jurisdictions will no doubt continue to apply the law in different ways, to the extreme benefit of some accused persons and the extreme prejudice of others. In the result, justice for individuals in these circumstances may turn largely on geography.

It is open to the Attorney General of Canada to submit a reference question to an appellate court for its determination. Admittedly, there may be little appetite among elected officials for such a reference. It nonetheless bears noting that procedural mechanisms exist for such a question to be put directly to the court. Minister Rock recognized this option in his address to Parliament on the motion for second reading of Bill C-72. He stated at that time as follows:

I have already identified as an option which the government is considering the prospect of referring the legislation, after its enactment and before its proclamation, to the Supreme Court of Canada to establish

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its validity before it is proclaimed in force. That judgment will be exercised once we have the opinions of Canadians on the issue of validity. If we feel there are significant questions which require reference we will keep that option in mind.

Above all, we are anxious to have this law in place to restore certainty and particularly accountability to criminal law. Instead, the constitutionality of section 33.1 has proven to be far from certain. Given the reported infrequency with which allegations of extreme intoxication arise, and the discrete factual matrix required to support a constitutional challenge, this uncertainty could remain extant for some time unless a reference is initiated by government.

In those rare cases where section 33.1 is engaged, the accused may advance a Charter challenge both at trial and on appeal to the appellate court of the province or territory concerned, or to the Supreme Court of Canada. Alternatively, the court may raise the issue on its own initiative. Either way, that challenge would test the constitutional propriety of guilt-by-proxy in the form set out in section 33.1. More particularly, it would require the court to determine whether section 33.1 minimally impairs an accused’s Charter rights and whether there is proportionality between the effects of the provision and its objectives. This would necessarily involve consideration of the alternate means by which Parliament could achieve the stated objectives of section 33.1. Particulars of one such alternative are discussed below. More general would be the question of whether – or in what circumstances - culpability can fairly be assigned on the basis of voluntary intoxication alone.

It is difficult to predict the outcome of that question. The Supreme Court of Canada was divided on the issue in the Daviault case, and may be equally divided in any future case. No doubt much would depend on the factual matrix on which the challenge proceeds, including the nature and quantity of the substances consumed by the accused, the correlation between usage of these substances and subsequent violence, and the specific mens rea requirements of the offences for which the accused.

\[390 \text{House of Commons Debate, supra note 94, at 11039.}\]
is charged. It is open to the court to exempt particular accused persons in particular factual circumstances from section 33.1, and otherwise leave the question of its general application to later proceedings. Regardless, until a decisive ruling is rendered, defence counsel can properly make use of this uncertainty in the law while negotiating with the Crown for the early resolution of a case. In some cases, the Crown may well be persuaded to accept pleas to less serious charges in order to avoid a Charter challenge.

7.2. Consider alternate offence of criminal intoxication

In the cases of R. v. Penno and R. v. Daviault, the Supreme Court of Canada discussed – albeit only in passing – the creation of a new offence for those who engage in harmful behaviour as a result of wilful, reckless, or negligent intoxication. The Law Reform Commission of Canada previously recommended the development of such an offence in 1982. Similar recommendations were included in, inter alia, the 1975 Report of the U.K. Committee on Mentally Abnormal Offender. The offence reportedly exists already in Germany and parts of common law Africa.

Prior to the enactment of Bill C-72, one Public Bill was introduced into the Senate, and two Private Members’ Bills were introduced in Parliament, all of which

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393 See Articles 18.51-18.59 of Secretary of State for the Home Department & Secretary of State for Social Services, Report of the Committee on Mentally Abnormal Offenders (London, UK: Her Majesty’s Stationery Office, 1975) for a considered formulation of the proposed offence.
proposed that the *Criminal Code* be amended to include this offence. Bill S-6\(^{395}\) and Bill C-303\(^{396}\) proffered an offence of “dangerous intoxication,” the elements of which were formulated in Bill C-303 as follows:

(1) Every one who, intentionally or not, while in a state of self-induced intoxication caused by alcohol or a drug, commits, or attempts to commit, a prohibited act is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding fourteen years; or

(b) an offence punishable on summary conviction.

(2) Intoxication is not self-induced for the purposes of subsection (1) if the intoxication is due to fraud or coercion.\(^{397}\)

Subsection (3) of the draft provision defined “prohibited act” to mean sexual interference, sexual exploitation, incest, causing bodily harm by criminal negligence, culpable homicide, killing a child, assault, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, assaulting a peace officer, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, kidnapping and forcible confinement, hostage taking, robbery, breaking and entering, and arson. It invoked the notwithstanding clause in section 33 of the *Charter*, by specifying that the section would “operate notwithstanding sections 2 and 7 to 15 of the *Charter.*” Bill C-305, which was introduced subsequently, proposed the creation of an offence of “voluntary intoxication.”\(^{398}\) It was drafted in terms identical to that of Bill C-303, apart from the addition of “reasonable mistake” as an exempting circumstance in subsection (2) and an expanded list of offences in subsection

\(^{395}\) Bill S-6, *An Act to amend the Criminal Code (dangerous intoxication)*, 1\(^{st}\) Sess., 35\(^{th}\) Parl., Canada, 1994-96.

\(^{396}\) Bill C-303, *An Act to amend the Criminal Code (dangerous intoxication)*, 1\(^{st}\) Sess., 35\(^{th}\) Parl., Canada, 1994-95.

\(^{397}\) Ibid.

\(^{398}\) Bill C-305, *An Act to amend the Criminal Code (voluntary intoxication)*, 1\(^{st}\) Sess., 35\(^{th}\) Parl., Canada, 1994-95.
(3). Bill C-305 excluded any reference to the notwithstanding clause, presumably on the view that the proposed legislation would be Charter compliant. 399

Neither of these Private Members’ Bills proceeded beyond first reading in the House of Commons. Instead, the Liberal Government lent its support to Bill C-72. Minister Rock explained his government’s reasons as follows:

The first reason was the penalty. Clearly, it was the view of the government that if there was to be accountability in the criminal law, then the maximum penalty for any new offence of criminal intoxication would have to be the same as the maximum penalty for the original offence. Otherwise, we have the spectre of having created a drunkenness discount which would give people who intoxicate themselves an option to have a lesser penalty for the same crime. That obviously is unacceptable. ...

The second reason for not pursuing the option of creating the criminal intoxication offence related to the labelling of the offence. The criminal intoxication option rests on the person being found not guilty of the original offence and instead found guilty of the new offence of criminal intoxication. The government believes that a person who becomes voluntarily intoxicated to the point of losing conscious control or awareness and in that state causes violence to another person is at fault for the assault and should be held criminally accountable for that offence and for 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 itself. This would feed into the syndrome of blaming the alcohol instead of the man for the act of violence.

Third, a detailed examination of the criminal intoxication option in its various forms established that many of the charter [sic] and legal theory problems identified by the Supreme Court in relation to the common law rule as it applies to basic intent would apply with almost as much force to any such new offence.

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399 See also House of Commons Debates, supra note 94, at 11040 wherein Minister Rocks references a similar bill reportedly introduced in the Senate.
Last, the prospect of the charge of criminal intoxication raised the spectre of the prosecuting crown attorney being required to argue contradictory positions at trial. One position would be that the person was not so intoxicated as to escape responsibility but in the alternative the person was intoxicated and therefore should be convicted of criminal intoxication. \(^{400}\)

Minister Rock went on to say that his government examined the option of amending the charging provisions for criminal negligence to include self-induced intoxication, but rejected it because “[i]t avoided accountability for the central misconduct and provided a lesser label for the underlying harm which we believe should be addressed directly.” \(^{401}\)

Minister Rock’s reasons reflect a relatively simplistic view of substance use, and one which appears to overlook entirely the complexities that arise in cases of co-occurring mental disorder. Arguably, his reasons centre more on procedural and legal aesthetics than on substantive rights and meaningful remedies. In any event, it is doubtful whether the Charter issues that Minister Rock anticipated in relation to the new offence would be any less controversial than those presently at issue in relation to section 33.1, or whether they could not likewise be resolved by way of a reference to an appellate court. Minister Rock emphasizes in this passage, and later in his address, the significance of accountability on the part of the offender for any offences committed while intoxicated. Arguably, the creation of a new offence – however called or prosecuted - would achieve just that in a more appropriate and measured way by marrying the mens rea of criminal intoxication with a corresponding actus reus.

Regardless of the merits of his position, however, the Department of Justice should remain prepared to respond to future calls for the creation of this offence, as Parliament may have little choice other than to adopt this alternative if section 33.1 is struck down.

\(^{400}\) Ibid. at 11037-38.
\(^{401}\) Ibid. at 11038.
7.3. Ensure access to material evidence

Bastarache J. observed in the Stone case that courts are often required to proceed on the basis of imperfect evidence, and that appropriate weight has to be assigned to each piece of evidence accordingly. In cases involving allegations of intoxication or mental disorder, the court may have little more than the version of events as reported by the accused, and the subjective opinion of the assessing psychiatrist based on that singular version of events. Potentially, that opinion could also be based on imperfect science. In the result, there is a risk that accused persons could end up with convictions not because of a lack of underlying mental infirmity, but due to a lack of reliable evidence on that very question. There is likewise a risk that the court could grant a declaration of NCRMD where a conviction is otherwise justified. As noted above, this risk is particularly acute for adolescent accused persons. Indeed, it is a risk that apparently materialized in prior years, at least in British Columbia, when the psychoactive effects of intoxication by crystal methamphetamine were not well known or easily distinguishable from symptoms of primary psychotic disorders.

In such cases, and in order to mitigate the risk of perverse verdicts, it is essential that the court and the parties have access to all material evidence. As a starting point, assessing psychiatrists should take particular care to disclose in their reports information

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403 Potentially, the reports of an accused person might not only be self-serving, but also incomplete. See R. v. O.V., 2013 BCSC 57 at para. 40, where the defence expert noted his “ability to comment on the [accused’s] mental state is limited by [the accused’s] inability to recall the acts with which he is charged… and was further confounded by his inconsistency as a historian, when viewed within the context of limited collateral information.”
404 One might imagine that these limitations could one day be overcome – or at least ameliorated - by the use of neuroimaging techniques, the results of which might assist psychiatrists in identifying the etiology of psychosis and the impact of mental disorder on the accused’s decision-making process. See G. Meynen, “A Neurolaw Perspective on Psychiatric Assessments of Criminal Responsibility: Decision-Making, Mental Disorder, and the Brain” (2013) 36 Int’l J. Law & Psychiatry 93. For an example of research on first-episode psychosis using magnetic resonance imaging technology, see Ruef et al., “Magnetic Resonance Imaging Correlates of First-Episode Psychosis in Young Adult Male Patients: Combined Analysis of Grey and White Matter” (2012) J Psychiatry Neurosci 1.
with respect to all of the factors that influenced their opinion as to diagnosis, including any information which might call their own diagnosis into doubt and any applicable scholarship on the issue of diagnostic uncertainty and instability. They ought not to simply subsume this information into their balance of probabilities assessment. Counsel must be in a position to test the expert’s opinion in court. Evidence may likewise be extracted from the expert on cross-examination, or tendered in the form of rebuttal evidence from another expert. Either way, it is essential that counsel have sufficient resources to retain and consult independent experts. It would appear that those resources are currently available to Crown lawyers. However, in British Columbia, the resources provided to defence counsel through the legal aid system are reportedly lacking.

In appropriate cases, counsel also may consider procedural steps and strategies which result in the deferral of the ultimate hearing to allow time for further assessment. Fiorentini et al. take the position that longitudinal observation is essential for a proper diagnosis.\textsuperscript{405} It is not clear how long might be required in any given case. No doubt that period will vary depending on the particulars of the accused person’s condition and circumstances in the post-assessment period. The diagnostic process may be thwarted, for example, by continued substance use. Presumably any delay sought by the defence for this purpose would not be attributed to the Crown, and would not put the case at risk of a subsequent challenge based on delay pursuant to section 11(b) of the Charter.\textsuperscript{406} In the result, one would not expect that the Crown would oppose an adjournment sought for these reasons, so long as public safety was properly protected during the pre-trial period and the evidence required for trial otherwise preserved.

It is trite law that the duty of the expert is to assist the court and not be an advocate for any party. Indeed, these recommendations assume independence on the part of the assessing psychiatrists. However, the results of the qualitative component of

\textsuperscript{405} Fiorentini et al., supra note 47.
this study reveal a perceived bias on the part of those experts drawn from the roster of forensic psychiatrists employed by the B.C. Forensic Psychiatric Services Commission. As noted above, it is the view of certain members of the defence bar that these experts favour the Crown. Allegations of this nature are significant and should be tested. If true, they place the accused in potential jeopardy and bring the administration of justice into disrepute.

In relation to this allegation, it is noteworthy that the B.C. Forensic Psychiatric Services Commission is constituted pursuant to the *Forensic Psychiatry Act*, section 5 of which stipulates that the Commission shall “provide forensic psychiatric services to the courts in British Columbia and to give expert forensic psychiatric evidence”\(^407\) as well as provide forensic psychiatric services and treatment for “(i) accused persons remanded for psychiatric examination, (ii) persons held at the direction of the Lieutenant Governor in Council under the *Criminal Code*…; and (iv) persons held under a court order.”\(^408\) It is not clear from this provision, nor any other provision of the Act, that the personnel responsible for these two functions are distinct, or that the independence of the assessing psychiatrist staff is otherwise guaranteed. One might reasonably question whether those involved in the provision of treatment, and particularly those responsible for ensuring that operations are carried out within a limited budget, stand in an apparent or actual conflict of interest.

### 7.4. Challenge perverse verdicts on fresh evidence grounds

In those cases where the diagnosis accepted by the court is subsequently determined to have been erroneous, an accused person may advance an application for

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\(^407\) *Forensic Psychiatry Act*, R.S.B.C. 1996, c. 156, s. 5(a).

\(^408\) *Ibid.*, s. 5(b) and (c).
relief from the resulting wrongful conviction or declaration of NCRMD.\textsuperscript{409} The accused in \textit{R. v. Evans} did just that.\textsuperscript{410} He was charged with robbery and possession of a dangerous weapon arising from an incident that occurred in March 2005. The assessing psychiatrist concluded that the accused suffered from schizophrenia, poly-substance abuse, and anti-social personality disorder. At his trial in August 2005, the accused plead guilty to the robbery charge and, on the strength of the psychiatric opinion, consented to a declaration of NCRMD. The Crown did not proceed with the weapons charge.

It was subsequently determined that the accused did not suffer from schizophrenia, and that the more appropriate diagnosis was substance-induced psychosis. Despite a series of expert opinions to this effect produced between 2007 and 2011, and notwithstanding evidence that the accused was functioning well without medication, the Ontario Review Board refused to grant a discharge. At the time of his appeal, the accused had been in custody for more than seven years. At the request of counsel for the accused, the Court of Appeal agreed to reopen the case, and allow the new medical evidence to be admitted. On that appeal, the accused argued that the NCRMD verdict was a miscarriage of justice and that he ought to have been convicted instead. The Court of Appeal agreed. S.E. Pepall J.A., writing for the Court, held as follows:

In this case, the appellant was found to be NCRMD on the basis that he suffered from schizophrenia. That diagnosis has been ruled out by the appellant's treatment team. Additionally, Dr. Komer has testified that the "best fit" for the appellant at the time of the offence was a substance-induced psychosis. The respondent concedes that a self-induced

\textsuperscript{409} In those cases where appeal rights have expired, the accused person may apply for an extension of the time periods in which an appeal may be brought: \textit{Court of Appeal Act}, R.S.B.C. 1996, c. 77, s. 10(1) and \textit{Supreme Court Act}, R.S.C. 1985, c. S-26, s. 40(4) and 59(1). In British Columbia, in those cases where an appeal has not been heard on the merits but has been dismissed for want of prosecution, the Court of Appeal may exercise its inherent jurisdiction to reopen the appeal if the interests of justice so require. See \textit{R. v. Henry}, [1997] 100 B.C.A.C. 183. Otherwise, discretionary remedies are available from the Minister of Justice of Canada pursuant to the provisions of Part XXI.1 of the \textit{Criminal Code}.

substance-induced psychosis would not support an NCRMD finding. In these circumstances, the NCRMD verdict cannot be sustained and should be set aside. It amounts to a miscarriage of justice.\textsuperscript{411}

The Court of Appeal substituted a conviction and sentenced the accused to one day in custody, noting that the seven years spent by the accused in detention was “outside the range of any sentence he would have received had he pled guilty to the robbery charge in August 2005.”\textsuperscript{412}

Comparable cases reportedly exist in British Columbia. Relief may be available to the individuals involved, if they can persuade the B.C. Court of Appeal to adopt the reasoning in the \textit{Evans} case. That case illustrates the hardship and prejudice that can flow to accused persons who are declared NCRMD on the basis of an erroneous diagnosis, and offers a compelling and persuasive precedent which other courts might well adopt. It also showcases the inherent limitations of forensic psychiatry. It is open to offenders to make a similar argument to that advanced in \textit{Evans} in circumstances where an erroneous diagnosis resulted in a conviction rather than a declaration of NCRMD. Indeed, hardship and prejudice might arise if the accused is denied an NCRMD application, particularly if the sentence imposed on the accused is for a significant period of time and the accused is otherwise amenable to treatment in the forensic psychiatric system.

\textbf{7.5. Test evidence of addiction}

As noted above, in his judgment in \textit{Bouchard-Lebrun}, Le Bel J. suggested that the \textit{Cooper} exclusion might not apply in circumstances where the accused suffered substance dependence. It is through this portal that enterprising counsel can test the impact of evidence of addiction in cases of substance-induced psychosis and, in

\textsuperscript{411} \textit{Ibid.} at para. 15.
\textsuperscript{412} \textit{Ibid.} at para. 18.
particular, the availability of the defence of NCRMD where intoxication was motivated by drug dependency. As Le Bel J. observed, there may be continuing danger to the public if the accused person is at risk of relapse as a result of his or her addiction.

Counsel may find some support in the work of the National Institute on Drug Abuse, which organization takes the position that addiction is a “brain disease” and that, while the initial decision to take a substance may be voluntary, the disease itself renders continued drug use by the addict entirely involuntary. However, it is important to note that this view is not universally endorsed by the psychiatric community. Bonnie writes as follows:

What is meant when it is said that drug use becomes involuntary after “the switch is flipped”? Does the disease cause drug use in the way that a brain lesion causes epileptic seizures or loss of cerebral blood flow causes loss of consciousness? This is the language of mechanism, and the language of choice, or voluntariness, has no place in it. Clearly, however, something more is involved with addiction than mechanism. Addiction is not just a brain disease. The link between brain and behavior is mediated through consciousness. Thus, when we say that the addict’s drug use is “involuntary” and symptomatic of disease, we mean something different from what is meant when we say that having a seizure is involuntary. In terms of responsibility, this is a very important distinction.

Fingarette goes even further, saying that the courts are “ill-served by those psychiatrists who have promoted the notion that addiction is involuntary.” It is the view of these scholars that, however vulnerable an individual might be to the onset of addiction, and however strong that individual’s internal compulsions might be for continued use, he or

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415 H. Fingarette, “Addiction and Criminal Responsibility” (1975) 84(3) Yale Law Journal 413 at 443. He suggests that psychiatrists do so as a means of promoting a medical model over the use of a criminal justice model for the management of addiction-motivated behaviour in society.
she still has the “experience of choosing.” In this regard, Bonnie summarizes his position as follows:

Even within the realm of conscious experience, there are situations in which one can properly say that a person has no “real” choice (like grasping the edge of a cliff, when the inevitable effects of muscular fatigue will prevail, no matter how hard the victim chooses to resist). Again, this is the language of mechanism, but this is not what is meant by “loss of control” in addiction. Loss of control means that, due to neurobiological processes deep in the brain over which the addict no longer has control, he or she is experiencing a strong need for or desire for the substance, a desire so great that it is unlikely that he or she will be able to resist it. This is the language of choice and compulsion, not of mechanism and causation.\(^{416}\)

Thus, addiction is characterized as an experience analogous to duress, wherein the individual faces a hard choice, but a choice nonetheless.\(^{417}\) An individual may be predisposed to addiction and to relapse, but he or she nonetheless is “not an automaton, responding mindlessly to environmental cues.”\(^{418}\)

For this reason, addiction-motivated behaviour is perhaps better described as a condition of volitional impairment and not one of true involuntariness.\(^{419}\) A key question for the court in a future case will be whether the degree of volitional impairment was such that intoxication could no longer be characterized as “self-induced” and the consequent episode of psychosis thus attributable to an internal factor. Equally relevant will be the question of whether the accused is in a position to exercise any degree of self-control in relation to future use, and thus mitigate the risk of continuing danger by relapse through self-restraint. As a matter of policy, the courts may prefer not to exempt accused persons from criminal responsibility unless the degree of volitional impairment is grave. Otherwise, the court would be further expanding the NCRMD beyond its


\(^{417}\) Ibid. at 407.

\(^{418}\) Ibid.

\(^{419}\) Ibid.
statutory confines, and effectively exempting accused persons from criminal responsibility even if their conduct is not wholly involuntary. On the other hand, where the risk of relapse is significant, the administration of justice may be better served through treatment in the forensic psychiatric system, where there is potential both for detention and ongoing supervision for that purpose. Indeed, doing so is more consistent with a medical model in the treatment of addiction as a disease and not a failing of the will. If the court elects to take this course, however, provincial governments must be prepared to respond with the resources needed to accommodate the diversion of this population from the correctional system to the forensic psychiatric system.
8. Limitations

This study proceeded on the basis of legal and qualitative research alone. The inherent shortcomings of these methodologies are well-documented, and apply to this aspect of the research study without exception.\textsuperscript{420} Three particular limitations nonetheless bear note.

8.1. Limits on access to data for quantitative assessment

The information provided by the research participants was not sufficient for quantitative assessment and, could not be compared to cases within the criminal justice system other than those that appear in reported judgments. Attempts were made to locate alternate sources of data. Inquiries were made of both the B.C. Ministry of the Attorney General and the B.C. Review Board. Neither bore fruit. The Ministry of the Attorney General does not catalogue its case files according to diagnosis, nor does it otherwise have a means by which it could distinguish those cases in which evidence of substance use and/or mental disorder is at issue. Consequently, Ministry officials were not in a position to identify all potentially relevant files, or even an appropriate subset from which a representative sample could be examined. These shortcomings apply equally to case files housed with the B.C. Provincial Court and B.C. Supreme Court registries.

It might have been possible to identify all potentially relevant case files in the possession of the B.C. Review Board, using data collected by Crocker et al. as part of

\textsuperscript{420} See, \textit{inter alia}, Berg, \textit{supra} note 16, and Lofland et al., \textit{supra} note 16.
the National Trajectory Project. However, both the scope and the content of those case files would have been insufficient for the purposes of this study. Firstly, they would be limited to those cases in which the accused person was declared NCRMD and referred to the Review Board for disposition. They would not include cases in which the accused person was denied that defence, those for which an NCR accused person was discharged by the court, or those for which evidence of substance-induced psychosis was tendered for other purposes. Secondly, case files in the possession of the B.C. Review Board do not necessarily include the complete trial record.

8.2. Limits on sample population

Attempts were made to recruit lawyers and forensic psychiatrists with general experience in criminal litigation as well as those identified as having specialized knowledge in cases involving co-occurring mental health and substance-induced disorders. However, not all of these individuals participated. Some were non-responsive, no longer in practice, or not willing to participate. Consequently, it cannot be said that the sample is exhaustive. It may not even be representative.

At best, the sample constitutes a subset of a larger community of practitioners in the legal and forensic psychiatrist community. The findings based on the views of this subset may be skewed as a result. However, given the relatively small number of specialists in this area, the degree of any such skew is probably limited. On occasion, research participants offered what they expected to be the views of their colleagues. Those views are not included in this study, as they could not be confirmed. It nonetheless bears noting that these views – although hearsay – were consistent with the information provided by other research participants. No potential outliers were identified.

421 For a description of that study, see “The National Trajectory [sic] Project: A Study of Individuals Declared Not Criminally Responsible on Account of Mental Disorder in Canada” online: McGill University <http://crocker.mcgill.ca/docpdf/NTP_EN.pdf>.
It also bears note that the sample excludes judges and members of the British Columbia Review Board. It was assumed that these decision-makers speak fully and clearly through their judgments, and that they otherwise would be restricted in any disclosure that they might be able to make in the course of a research interview. It is nonetheless acknowledged that individuals in these roles may have an alternate perspective to offer, drawn from their observations of counsel and expert witnesses. However, even then, their vantage point would be relatively limited, as it would be confined to the events that take place in the course of a hearing. These individuals would not be in a position to speak to the extra-legal factors that influence the management of a case outside of the court or Review Board process.

8.3. Limits on ability of research participants to make full disclosure

Research participants might have been subject to constraints on disclosure. In some cases, the research participants had limited time and were cursory in their disclosure as a result. In other cases, however, the research participants might have been restrained by professional duties of confidentiality and privilege. The extent to which they withheld information in compliance with these duties is not known. In some instances, they might be prevented from disclosing only the names of a particular client or witness. In other cases, they might have been further barred from making reference to the facts of a case, particularly if identifying information could be extrapolated from those facts.

Efforts were made in the course of the interviews to mitigate any shortcomings arising from this limitation. In particular, questions were put to research participants only

in general terms. They did not call for the description or analysis of individual cases in which the research participants had been involved. On the contrary, they invited research participants to provide opinions based on collective experiences rather than those based on singular cases. Research participants may nonetheless have described a case by way of illustration. However, they were not required to do so.

Fortunately, the veracity of the research participants is not suspect. On the contrary, these research participants are members of professional communities and may be subject to disciplinary action for improper conduct. Moreover, their participation in this study was wholly voluntary. They were not induced to participate, nor influenced in any way that might lead them to knowingly distort the results of this research.
9. Conclusion

The results of this study reveal a disconcerting level of variation in approach to the treatment of accused persons in circumstances of substance-induced psychosis. As noted at the outset, and as reported herein, so significant is the variation that opposite outcomes have emerged in cases with relatively similar facts. It would appear that differences in outcome are attributable to a multitude of forensic and legal factors. Perhaps the most striking legal factor at play in these cases is the manner in which Canadian courts have interpreted and applied sections 16 and 33.1 of the Criminal Code. The latter provision is particularly controversial, as it allows the Crown to rely on the mens rea of voluntary intoxication to prove the mens rea elements otherwise required for conviction. Not surprisingly, some courts have declared the provision to be unconstitutional. Others have upheld it, largely in reliance on normative perspectives on the moral blameworthiness of substance use. Yet other courts have applied section 33.1 without considering the Charter issue. In the result, accused persons in Canada have received – and will undoubtedly continue to receive until this issue is finally resolved – contradictory outcomes depending largely on the jurisdiction in which their case proceeds. Historically, there has been similar discrepancy in the interpretation and application of section 16 of the Criminal Code, with some courts granting the NCRMD defence in cases of substance-induced psychosis and others excluding the condition on policy grounds. The decision of the Supreme Court of Canada in Bouchard-Lebrun brings much-needed clarification to this area of the law. One might reasonably expect, in reliance on this case, that section 16 applications will be denied in future proceedings where psychosis is found to have resulted exclusively from substance use.

It is not clear whether the courts will apply the “more holistic approach” prescribed in Bouchard-Lebrun with equal consistency. That issue will undoubtedly be decided on a case-by-case basis, given the heterogeneity of substance-induced psychosis. The results of this study suggest that the most significant factor contributing to outcome in these cases will be the nature and quality of the expert evidence. The
central determinant of the defenses available at trial, and disposition on conviction or declaration of NCRMD, is the etiology of the psychotic episode experienced by the accused person at the time of the offence. However, in cases where psychosis manifests in association with substance use, etiology can be elusive and enigmatic. The outcome that an accused person realizes in the criminal justice process will turn on the approach of the forensic psychiatrist to the diagnostic process, and the standard that he or she applies to the disclosure of uncertainty. It likewise will be influenced by the strategies which legal counsel employ in response to that evidence, and the resources available for that purpose. In some cases, the pursuit of justice may be frustrated – perhaps wholly impeded – by a lack of legal aid support. It nonetheless bears note that, even if the best evidence is available, the course of action that defence counsel recommends will be shaped by attitudes toward the forensic psychiatric system. The findings of this study suggest a troubling lack of confidence in that system, at least in British Columbia. With limited exception, counsel are more likely to recommend a course of action that results in a conviction, rather risk an indeterminate period of detention and/or supervision within the forensic psychiatric system.

Canadian law departs from the theoretical underpinnings of rational choice to the extent it permits the conviction of accused persons in circumstances where the individual lacked the mens rea of the offence by reason of psychosis. It is not surprising that the substitution of the mens rea of voluntary intoxication is controversial. In order to fit within this framework, intoxication must be characterized as a product of rational choice. Moreover, to comply with Charter principles, it must also be sufficiently blameworthy. In cases of substance-induced psychosis, however, the onset of psychosis may be due to underlying neurobiological factors over which the accused person had no prior knowledge and no actual control, and the relative impact of which may be impossible to ascertain. In these circumstances - even if intoxication can properly be characterized as voluntary, self-induced, and culpable - the framework of rational choice comes under strain. The viability of that theory requires, at the very least, actual or imputed knowledge of the risks of psychosis manifesting in association with substance use.

It is not known what underlying neurobiological factors, and what degree of impairment, might justify an exemption from criminal responsibility on the application of the “more holistic approach” to section 16 of the Criminal Code. It is not even clear that
psychiatrist and neuroscientific research is sophisticated enough at this point in time to allow for the identification of these factors and the measurement of their relative impact. This is an area of forensic medicine – and an issue of law – in need of further investigation. At most, existing research supports the reconceptualisation of causation from one of inducement to one of association. However, it falls far short of supporting any radical restructuring of the framework of criminal liability. It does not even support the recognition of a legal presumption in favour of mental disorder. Arguably, in the absence of any reliable science of fault, the courts have little choice but to accept the crude assumptions of rational choice for operational purposes, and otherwise proceed in the attribution of criminal responsibility on a policy basis.

It cannot be said that guilt-by-proxy – either in principle and as expressed in section 33.1 of the Criminal Code - is obviously right or obviously wrong. It is based on one normative perspective, and represents but one approach to the problem of proving mens rea in cases of voluntary intoxication. The proposed offence of criminal intoxication offers another. The Cooper exclusion of substance-induced mental states from the purview of section 16 constitutes a further approach to the attribution of criminal responsibility. Any expansion of that defence to include cases of co-occurring mental disorder (including addiction) or neurobiological vulnerability would embody yet another. These are reasonable approaches on which reasonable people can disagree. Indeed, the Supreme Court of Canada in Daviault – which sat as a bench of nine jurists on that occasion - was sharply divided on this question. Canadian law must await further cases in which courts can consider these issues in the specific context of substance-induced psychosis and in light of emerging research. That should not take long. Carroll et al describe substance-induced psychosis as a phenomenon of “epidemic” proportions.\(^\text{423}\) The courts and criminal justice actors will have to contend in these cases with the

\(^{423}\) Carroll et al., supra note 41, at 637. The BC Centre for Excellence in HIV/AIDS use the same language to describe the drug situation in Vancouver. One might expect these cases to surface in growing numbers in British Columbia, given the reported increase in the popularity of psychoactive substances among drug users. See Urban Health Research Initiative of the British Columbia Centre for Excellence in HIV/AIDS, Drug Situation in Vancouver (October 2009), online: <http://uhri.cfenet.ubc.ca/images/Documents/dsiv2009.pdf>.
increasing shades of grey that advancements in psychiatry and neuroscience will undoubtedly reveal. The doors are open to the receipt of this evidence on the application of the “more holistic approach” articulated in Bouchard-Lebrun. One would expect the courts to give due regard to it, but hope also that appropriate caution will be given to any limitations inherent in the research. It is apparent from this study that the imperfections of science can produce perverse verdicts in any given case. These same imperfections can lead to gross injustice if further relied on for far-reaching reform.

Until then, law and policy makers might be inspired to shift the focus of this debate from considerations of culpability to concerns of public safety. After all, criminal law is premised on principles of fault and harm. The fault principle supports criminal sanction if the actor is culpable. However, it does not stand alone. It operates in concert with the harm principle. That principle supports the criminalization of behaviour that is inherently harmful and the detention of offenders for so long as they pose a threat to public safety. Regardless of the degree of fault that may be attributable to an accused person, questions arise as to whether – as a matter of policy – cases of substance-induced psychosis should be managed in the forensic psychiatric system or the correctional system. Is the public interest served by relatively short periods of incarceration in the correctional system where opportunities for treatment are limited? Is it better served within the forensic health system, even though tenure in that system may be prolonged and uncertain? Is the ongoing deprivation of liberty justified for treatment purposes? These questions may be largely academic, at least in British Columbia, where defence counsel are apparently disinclined to advance the NCRMD defence except in the most serious cases. Nonetheless, given the rights at stake, and the vulnerability of the populations involved, they present issues worthy of further study.

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Appendices
Appendix A

An Act to amend the Criminal Code (self-induced intoxication)

R.S.C. 1996, c. 36

Preamble

WHEREAS the Parliament of Canada is gravely concerned about the incidence of violence in Canadian society;

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;

WHEREAS the Parliament of Canada recognizes that the potential effects of alcohol and certain drugs on human behaviour are well known to Canadians and is aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily;

WHEREAS the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it;

WHEREAS the Parliament of Canada desires to promote and help to ensure the full protection of the rights guaranteed under sections 7, 11, 15 and 28 of the Canadian Charter of Rights and Freedoms for all Canadians, including those who are or may be victims of violence;

WHEREAS the Parliament of Canada considers it necessary to legislate a basis of criminal fault in relation to self-induced intoxication and general intent offences involving violence;

WHEREAS the Parliament of Canada recognizes the continuing existence of a common law principle that intoxication to an extent that is less than that which would cause a person to lack the ability to form the basic intent or to have the voluntariness required to commit a criminal offence of general intent is never a defence at law;

AND WHEREAS the Parliament of Canada considers it necessary and desirable to legislate a standard of care, in order to make it clear that a person who, while in a state of incapacity by reason of self-induced intoxication, commits an offence involving violence against another person, departs markedly from the standard of
reasonable care that Canadians owe to each other and is thereby criminally at fault;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The ** Criminal Code** is amended by adding the following after section 33:

   **Self-induced Intoxication**

   **When defence not available**
   
   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).

   **Criminal fault by reason of intoxication**
   
   (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.

   **Application**
   
   (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.

2. This Act shall come into force on a day to be fixed by order of the Governor in Council.
Appendix B

Interview instrument for legal counsel

<table>
<thead>
<tr>
<th>Research Study:</th>
<th>Substance-induced psychosis and criminal responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Researcher:</td>
<td>Michelle S. Lawrence, LL.M., Ph.D. Candidate</td>
</tr>
<tr>
<td>Supervisor:</td>
<td>Simon N. Verdun-Jones, J.S.D.</td>
</tr>
</tbody>
</table>

Defence of Intoxication

Legal scholars have argued that section 33.1 of the *Criminal Code* is vulnerable to constitutional challenge. To what extent do these vulnerabilities – actual or perceived - influence the positions counsel take in relation to the defence of intoxication?

Defence of NCRMD

What factors incline counsel in favour (or against) applications for declarations of not-criminally responsible-by-reason-of-mental-disorder (NCRMD) pursuant to section 16 of the *Criminal Code* (i.e. nature of offence, length of expected sentence, nature of reported disorder)?

What is the extent of counsel’s knowledge of the reported uncertainties and diagnostic instability associated with substance-induced psychosis (substance intoxication or substance-induced psychotic disorder). To what extent do these uncertainties influence the positions counsel take in relation to the defence of NCRMD?

To what extent are counsel likely to change their general positions and/or practices in light of the Supreme Court of Canada’s decision in *R. v. Bouchard-Lebrun*, 2011 SCC 58?

Access to Justice

Have counsel identified any potential barriers to access to justice for the population under investigation? Do counsel have access to the resources required to effectively prosecute or defend these cases?
Appendix C

Interview instrument for forensic psychiatrists

**Research Study:** Substance-induced psychosis and criminal responsibility
SFU Research Ethics Board No. 2011s0812

**Researcher:** Michelle S. Lawrence, LL.M., Ph.D. Candidate

**Supervisor:** Simon N. Verdun-Jones, J.S.D.

**Diagnostic Process**

In cases involving symptoms of psychosis in association with substance use, how do forensic psychiatrists distinguish between a diagnosis of substance-induced psychosis (substance intoxication or substance-induced psychotic disorder) and a primary psychotic disorder?

What is the optimal period of time, and the optimal circumstances, that forensic psychiatrists require to differentiate between cases of substance-induced psychosis (substance intoxication or substance-induced psychotic disorder) and a primary psychotic disorder?

**Court Process**

How confident can forensic psychiatrists reasonably be in the diagnoses rendered within the circumstances and period of time provided under the *Criminal Code* for assessment (up to 60 days)? What factors contribute to uncertainty?

How does the forensic psychiatrist convey uncertainty to counsel and the court?

**Access to Justice**

Have forensic psychiatrists identified any potential barriers to access to justice for the population under investigation?
Appendix D

Consent to participate in research study

Research Study: Substance-induced psychosis and criminal responsibility
SFU Research Ethics Board No. 2011s0812
Researcher: Michelle S. Lawrence, LL.M., Ph.D. Candidate
Supervisor: Simon N. Verdun-Jones, J.S.D.

The purpose of this research study is to ascertain the treatment at law of individuals who commit offences in British Columbia while in a state of substance-induced psychosis, where intoxication was voluntary. Your participation is sought by reason of your involvement as a professional involved in the resolution of such cases in the criminal justice system.

The study is conducted with the permission of the Simon Fraser University Research Ethics Board. The chief concern of the Board is the health, safety and psychological well being of research participants. Your participation does not entail any identifiable risks. Nonetheless, should you wish to obtain information about your rights as a participant or the responsibilities of researchers generally, or if you have any questions, concerns or complaints about the manner in which you were treated in this study, you are invited to contact Dr. Simon Verdun-Jones by email at [redacted] or by telephone at [redacted]. Alternatively, you may contact Dr. Hal Weinberg of the Office of Research Ethics by email at [redacted] or by telephone at [redacted].

Your signature on this form signifies that you agree to participate in an interview for use in the research study. You understand that you may stop the interview at any time without penalty or decline to answer any question.

You understand that the researcher will maintain all identifying information in confidence and shall not disclose that information to any third party unless required by law. You will not disclose privileged information to the researcher.

The researcher will retain a transcript of the interview, and a copy of any documents provided by you in the course of the interview, for a period of two years following completion of the research study. All such transcripts and documents will be destroyed promptly thereafter. In the interim, the researcher will store these materials in electronic format on a secure hard drive, which hard drive will be housed in a locked cabinet in the researcher’s sole custody.

You may request further particulars of research protocols, and may obtain the results of the study, from the researcher by email at [redacted] or by telephone at [redacted].