

**IN THE SUPREME COURT OF CANADA**  
**(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

**HER MAJESTY THE QUEEN**

*Applicant*  
*(Respondent)*

– and –

**DAVID SULLIVAN**

*Respondent*  
*(Appellant)*

AND

**HER MAJESTY THE QUEEN**

*Applicant/  
Respondent on Cross-Appeal*  
*(Respondent)*

– and –

**THOMAS CHAN**

*Respondent/  
Applicant on Cross-Appeal*  
*(Appellant)*

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**MEMORANDUM OF ARGUMENT**  
**(Filing Party: Thomas Chan)**

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## **PART I – OVERVIEW AND FACTS**

### ***Overview***

1. This case raises fundamental issues about fault and responsibility in the criminal law. More specifically, it concerns the constitutionality of s. 33.1 of the *Criminal Code*, Parliament’s attempt to legislatively override the constitutional principles articulated by this Court in *R. v. Daviault*.<sup>1</sup> The Respondent, Thomas Chan, agrees that leave to appeal should be granted. The constitutionality of s. 33.1 is clearly a matter of public importance requiring resolution by this Court.

2. However, the Respondent submits that leave to cross-appeal should be granted as well. Although the Court of Appeal overturned the Respondent’s conviction and ordered a new trial, a proper application of the doctrines of moral voluntariness and criminal responsibility should have led to the entry of an acquittal or, in the alternative, a finding of not criminally responsible (“NCR”). A proper consideration of the overlapping issues at stake in this appeal requires the Court to have the full panoply of remedial options at its disposal, which requires leave to cross-appeal on the question of remedy.

3. A family tragedy is at the heart of this appeal. Thomas Chan killed his father and severely wounded his stepmother while in the grips of psychotic delusions brought about – wholly unexpectedly – by his consumption of “magic” mushrooms. He dearly loved his father, enjoyed a positive relationship with his step-mother, and had no rational motive to commit these horrific acts. In the words of the trial judge:

Mr. Chan is a really good person. And something really bad happened to him and to some of the people closest to him in his life. [...]

Mr. Chan is not a danger to the public. He is a good kid who got super high and did horrific things while experiencing a drug-induced psychosis.<sup>2</sup>

4. Notwithstanding that Mr. Chan’s psychotic break and violent actions were neither foreseen *nor* reasonably foreseeable, s. 33.1 required the trial judge to find him criminally liable for these

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<sup>1</sup> [R. v. Daviault, \[1994\] 3 S.C.R. 63](#)

<sup>2</sup> [Reasons for Judgment](#), at paras. 136, 141

acts just the same as if he had acted in full possession of his faculties. And this Court's jurisprudence, including most recently *R. v. Bouchard-Lebrun*,<sup>3</sup> precluded a verdict of NCR because the cause of his psychosis was primarily "external" – i.e. brought about by his consumption of mushrooms. Furthermore, and somewhat paradoxically, the very fact that the Respondent poses no ongoing danger to the community militated in favour of *conviction* as it negated any "continuing danger" in the NCR analysis.

5. The question on appeal was whether Canadian law really does require such an unjust result. The Court of Appeal for Ontario held that it does not. Moral voluntariness is an indispensable prerequisite for criminal responsibility in a civilized system of justice and is therefore constitutionally mandated by s. 7 of the *Charter*. To be guilty of a criminal act, the person must have been able to make a moral *choice* – to commit the act itself, or at least to do something that made commission of the act reasonably foreseeable. By purporting to substitute the intent to ingest an intoxicating substance for the intent to commit the offence charged, Parliament has unjustifiably eroded this fundamental protection and criminalized conduct that lacks both moral voluntariness and criminal intent.

6. The Court of Appeal therefore ordered a new trial for Thomas Chan. It properly recognized that his voluntary act of consuming mushrooms could not, consistent with *Charter* principles, provide the intent required for manslaughter and aggravated assault. However, the Court of Appeal declined to enter an acquittal because the trial judge had found that the psychosis rendered Mr. Chan incapable of knowing that his actions were wrong, *not* that his actions were "involuntary." In other words, Mr. Chan was "insane" but not an "automaton." This distinction was the difference between an acquittal and a new trial.

7. What the Court of Appeal did not consider is the implications of this holding for the possible outcomes of a new trial. Assuming that the same core factual finding is made – i.e. that Mr. Chan experienced psychotic delusions but not automatism – the new trial judge will be caught in a double-bind. On the one hand, the trial judge will be bound by the constitutional principles in *Daviault* and elsewhere not to enter a conviction: after all, in a civilized society, a person acting in the grips of insanity cannot be criminally convicted. On the other hand, the trial judge will be

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<sup>3</sup> [R. v. Bouchard-Lebrun, 2011 SCC 58, \[2011\] 3 SCR 575](#)

required by this Court's decisions in *Cooper*<sup>4</sup> and *Bouchard-Lebrun* not to enter a verdict of NCR because the psychosis had a primarily "external" cause. Accordingly, on the Court of Appeal's own analysis, it would appear that the *only legally available result* would be an acquittal. The utility of a new trial is mysterious.

8. The Court of Appeal could not solve the jurisprudential double-bind caused by the combination of *Daviault* and *Bouchard-Lebrun*, but this Court can. In order to do so, this Court will need to take a fresh look at how the various doctrines concerning criminal responsibility – NCR, non-mental disorder automatism, moral voluntariness, and others – can be rendered mutually coherent. The constitutionality of s. 33.1 cannot be properly evaluated without considering how the constitutional principles at stake in that determination affect the availability of other outcomes when the defence of extreme intoxication is raised. Leave to cross-appeal should therefore be granted so that this Court can consider *all* of the potential remedial options where an accused's extreme intoxication renders him or her incapable of forming criminal intent, acting voluntarily, or knowing right from wrong.

### ***Summary of the Facts***

9. The Applicant's terse overview of the facts fails to give an accurate picture of what happened to Mr. Chan and his family. In particular, the Crown's contention that Mr. Chan's psychosis was a "reasonably foreseeable" result of consuming magic mushrooms has no basis in the record.<sup>5</sup> The following summary, drawn principally from the trial judge's undisputed findings, gives the necessary background for understanding the constitutional and doctrinal issues at stake in this appeal.

10. On December 27, 2015, the Respondent was 19 years old.<sup>6</sup> He had just finished his first semester at St. Lawrence College, where he was studying Police Foundations, and he was home

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<sup>4</sup> [R. v. Cooper, \[1980\] 1 S.C.R. 1149](#)

<sup>5</sup> Applicant's Memorandum of Argument, at para. 6

<sup>6</sup> [Reasons for Judgment](#), at para. 61

with his family for the holidays.<sup>7</sup> He was staying at his mother's home in Peterborough, along with his sister, Christina Chan.<sup>8</sup>

11. The Respondent's parents, Rosalia Vastano and Dr. Andrew Chan, had been separated since 2008.<sup>9</sup> Although the Respondent had lived with his mother, he remained close with his father, who also lived in Peterborough, just around the corner from Ms. Vastano.<sup>10</sup> His father was "the easygoing parent", someone his two children could turn to for help with problem-solving.<sup>11</sup> The Respondent had a respectful and loving relationship with his father's girlfriend, Lynn Witteveen.<sup>12</sup>

12. The Respondent and his sister spent parts of Christmas Day with both their parents. They went to see Star Wars with their father and Ms. Witteveen, on Boxing Day.<sup>13</sup>

13. On December 27, 2015, the Respondent spent time with his friends in his mother's basement. They went out for beer and to watch the hockey game. They returned around 8:30 p.m., and at some point, the group decided to take magic mushrooms.<sup>14</sup> What quantity of magic mushrooms the group obtained was not entirely clear. Dylan Purves, who purchased the drugs for the group, said that he asked for enough for "four guys".<sup>15</sup>

14. The Respondent and two of his friends took a dose of mushrooms around 10:00 p.m.<sup>16</sup> About 30 minutes after taking the initial dose, the Respondent observed that while his friends were feeling the effects of the mushrooms, he was not. He took a second dose.<sup>17</sup> At first, the Respondent and his friends had a good evening. They played video games, went outside for a while, then came back to the basement and prepared for sleep.<sup>18</sup>

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<sup>7</sup> [Reasons for Judgment](#), at paras. 86-87; C. Chan, in-chief, Vol. 3, p. 33, ll. 5-10 [Application Record ("A.R.") Tab 3]

<sup>8</sup> C. Chan, in-chief, Vol. 3, p. 36, l. 15 to p. 37, l. 2 [A.R., Tab 3]

<sup>9</sup> C. Chan, in-chief, Vol. 3, p. 16, ll. 2-6 [A.R., Tab 3]

<sup>10</sup> [Reasons for Judgment](#), at para. 87; C. Chan, in-chief, Vol. 3, p. 24, ll. 4-11 [A.R., Tab 3]

<sup>11</sup> C. Chan, cross-examination, Vol. 3, p. 57, ll. 29-30 [A.R., Tab 3]

<sup>12</sup> [Reasons for Judgment](#), at para. 88

<sup>13</sup> [Reasons for Judgment](#), at para. 87

<sup>14</sup> [Reasons for Judgment](#), at para. 13

<sup>15</sup> [Reasons for Judgment](#), at para. 14

<sup>16</sup> [Reasons for Judgment](#), at para. 15

<sup>17</sup> [Reasons for Judgment](#), at para. 15

<sup>18</sup> [Reasons for Judgment](#), at para. 17

15. The Respondent's friends noticed a change in his behaviour around 2:00 a.m.<sup>19</sup> He spoke in gibberish. He attempted to change the length of one friend's hair by gesturing. He said that he was scared and ran upstairs.<sup>20</sup>

16. The Respondent went to his mother's room. It was 3:18 a.m. He turned on the light and sat on her floor. Ms. Vastano and her boyfriend, Jeff Phillips, were in bed. She told the Respondent to turn off the light, but he refused. She got up and turned out the light herself. She was naked. The Respondent did not react.<sup>21</sup>

17. The Respondent returned to his bedroom on the second floor. Ms. Vastano followed him. The Respondent's sister heard the commotion and came out of her bedroom. The Respondent called his mother and sister "the devil" and "Satan". He ran down the stairs and out the front door, without a shirt, shoes, or a coat despite the winter weather.<sup>22</sup>

18. Ms. Vastano chased after the Respondent on foot. Mr. Phillips and Mr. Christianson, one of the Respondent's friends, followed her in Mr. Phillips's car.<sup>23</sup>

19. The three of them found the Respondent near Dr. Chan's residence, where the Respondent yelled that his mother was the devil, tried to fight Mr. Christianson, and approached the car holding a rock.<sup>24</sup> He smashed the driver's side window, at which point Mr. Phillips drove back to Ms. Vastano's home. The Respondent yelled after them that they were the devil and he was god.<sup>25</sup>

20. Several of Dr. Chan's neighbours awoke during the commotion. They reported hearing a male voice yelling. The phrases they heard included "This is God's will. This is God's way."; "I am God. I am trained to do this and I will do it every Sunday"; and "Nobody can stop me. I am God."<sup>26</sup>

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<sup>19</sup> [Reasons for Judgment](#), at para. 17

<sup>20</sup> [Reasons for Judgment](#), at paras. 18-19

<sup>21</sup> [Reasons for Judgment](#), at para. 20

<sup>22</sup> [Reasons for Judgment](#), at para. 21

<sup>23</sup> [Reasons for Judgment](#), at paras. 22-23

<sup>24</sup> [Reasons for Judgment](#), at paras. 24-26

<sup>25</sup> [Reasons for Judgment](#), at para. 26

<sup>26</sup> [Reasons for Judgment](#), at para. 27

21. The Respondent entered Dr. Chan's residence. He entered by breaking a window, rather than using the garage door which was set up to allow him access.<sup>27</sup> He did not appreciate where he was. He woke up his father and Ms. Witteveen by kicking in their bedroom door. He screamed that it was "the day of reckoning."<sup>28</sup>

22. The Respondent's interactions with his father and Ms. Witteveen were both terrifying and heartbreaking. Most of this horrific scene was captured by motion-activated cameras in the main living area that sent a video and audio feed to Dr. Chan's iPhone.<sup>29</sup>

23. The Respondent and his father ended up in the kitchen. Dr. Chan said to the Respondent, "Thomas, it's Daddy, it's Daddy." The Respondent did not recognize his father, and he stabbed him repeatedly.<sup>30</sup> Dr. Chan's last words were an expression of concern for his son: "Oh, Tom."<sup>31</sup>

24. The Respondent then attacked Ms. Witteveen. As he slashed at her with a knife, she said to him, "Thomas, it's Linnie, it's Linnie, I love you." He did not recognize her. He stabbed her in the abdomen, arm, back, and chest.<sup>32</sup>

25. Ms. Witteveen ran to the bedroom and called 911. The Respondent entered the room. She told him again that she loved him. The Respondent responded to her in a deep, unfamiliar voice. He said that he loved her. He then stabbed her in the right eye.<sup>33</sup> The Respondent left the bedroom for a time, then returned and slashed Ms. Witteveen's neck.<sup>34</sup>

26. Around this time, Ms. Vastano and Christina Chan arrived at Dr. Chan's residence. Ms. Vastano ran to Dr. Chan's front door. Through a window, she could see a person pacing and then sitting down. She heard someone yelling, "I am God, you are the devil." She ran back to the car.<sup>35</sup>

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<sup>27</sup> [Reasons for Judgment](#), at para. 29

<sup>28</sup> [Reasons for Judgment](#), at para. 31

<sup>29</sup> [Reasons for Judgment](#), at para. 30

<sup>30</sup> [Reasons for Judgment](#), at para. 32; [Reasons for Sentence](#), at para. 69

<sup>31</sup> [Reasons for Sentence](#), at para. 71

<sup>32</sup> [Reasons for Judgment](#), at para. 33

<sup>33</sup> [Reasons for Judgment](#), at para. 34

<sup>34</sup> [Reasons for Judgment](#), at para. 35

<sup>35</sup> [Reasons for Judgment](#), at para. 28



27. Ms. Vastano began ringing the doorbell. The Respondent yelled at her to stop. He said, “I love you all, so much, I don’t want to do this.” He also said, “Get the fuck away, stay the fuck away. This is a holy fucking place. A holy place.”<sup>36</sup>

28. Police arrived moments later.<sup>37</sup> Multiple officers reported that the Respondent said that he was God. He also yelled, “You are the Devil.” He said that he had carried out God’s will.<sup>38</sup>

29. Dr. Chan died of his injuries.<sup>39</sup> Ms. Witteveen was severely injured but survived.<sup>40</sup>

30. Contrary to the Applicant’s implication, no evidence was led that would suggest that what happened was a foreseeable consequence of ingesting magic mushrooms. In fact, as found by the trial judge, it was “entirely unforeseeable”.<sup>41</sup> The Respondent had taken mushrooms before. He had enjoyed the experience and found it gave him a new perspective on life.<sup>42</sup> There was no evidence that he had a “bad trip”, let alone experienced a violent and dissociative psychosis. None of his friends experienced adverse effects after taking a dose of the same mushrooms.<sup>43</sup>

31. Nor was there any kind of evidence that suggested the Respondent had a history of reacting poorly to other intoxicating substances, nor did he have any aggressive or violent history. The Respondent was affectionate when drinking.<sup>44</sup> Smoking marijuana simply made him unmotivated.<sup>45</sup>

32. Similarly, it was undisputed that the Respondent had no reason whatsoever to kill his father and injure Ms. Witteveen.<sup>46</sup>

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<sup>36</sup> [Reasons for Judgment](#), at para. 36

<sup>37</sup> [Reasons for Judgment](#), at para. 36

<sup>38</sup> [Reasons for Judgment](#), at para. 38

<sup>39</sup> [Reasons for Sentence](#), at para. 11

<sup>40</sup> [Reasons for Sentence](#), at paras. 12-13

<sup>41</sup> [Reasons for Sentence](#), at paras. 20, 69

<sup>42</sup> [Reasons for Judgment](#), at para. 1

<sup>43</sup> [Reasons for Judgment](#), at para. 120

<sup>44</sup> R. Vastano, in-chief, Vol. 3, p. 103, ll. 19-23 [A.R., Tab 3]

<sup>45</sup> C. Chan, in-chief, Vol. 3, p. 35, l. 31, to p. 36, l. 7 [A.R., Tab 3]

<sup>46</sup> [Reasons for Judgment](#), at para. 85

33. The Respondent was a popular, gentle, and funny young man.<sup>47</sup> As emphasized by the trial judge, he is a good person.<sup>48</sup> Since these events, the weight of the suffering he has caused has been “crushing” the Respondent.<sup>49</sup> He continues to struggle with feelings of self-loathing, and the knowledge that he is both the person who committed these acts.<sup>50</sup>

## **PART II – QUESTIONS IN ISSUE**

34. The issue on this application is whether the decision below raises an issue of public importance that ought to be decided by this Court. The Respondent agrees with the Applicant Crown that the answer is “yes.”

35. In order to properly evaluate the constitutionality of s. 33.1, this Court will need to consider how that section operates in tandem with other legal doctrines governing criminal responsibility, such as the so-called *Cooper* exclusion, re-affirmed by this Court in *Bouchard-Lebrun*. Depending on the result of this analysis, a new trial for the Respondent may not be necessary or appropriate. The Respondent submits that on the uncontested findings below, an acquittal should be entered; or, in the alternative, a finding of NCR should be made. The Court should therefore grant leave to cross-appeal in order to have these remedial alternatives at its disposal.

36. This Court has jurisdiction to grant the relief sought by the Respondent pursuant to s. 695 of the *Code*, which allows it to “make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.” This jurisdiction was exercised, for example, in *R. v. J.F.*, a Crown appeal from a decision of the Ontario Court of Appeal overturning a conviction and ordering a new trial. The accused had sought an acquittal on appeal. This Court granted the accused leave to cross-appeal on the remedy and ultimately allowed the cross-appeal, entering an acquittal in place of the order for a new trial.<sup>51</sup> The Respondent in the case at bar seeks the same relief.

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<sup>47</sup> C. Chan, cross-examination, Vol. 3, p. 64, ll. 16-25 [A.R., Tab 3]

<sup>48</sup> [Reasons for Sentence](#), at para. 21

<sup>49</sup> [Reasons for Sentence](#), at para. 19

<sup>50</sup> [Reasons for Sentence](#), at paras. 23-24

<sup>51</sup> [R. v. J.F., 2008 SCC 60, \[2008\] 3 S.C.R. 215](#)

### PART III – STATEMENT OF ARGUMENT

***The organizing principle: only conduct that is physically and morally voluntary can justify criminal conviction***

37. The principle that only a guilty mind can justify criminal punishment and stigma has a venerable lineage at common law,<sup>52</sup> and was the first “principle of fundamental justice” identified by the Supreme Court under s. 7 of the *Charter*.<sup>53</sup> Later, in *Ruzic*, the Court elaborated a related – and perhaps even more fundamental – principle that only conduct that is *voluntary* in both a physical and moral sense can properly attract criminal liability.<sup>54</sup> As La Forest J. put it in *Parks*, “only those who act voluntarily with the requisite intent to commit an offence should be punished by criminal sanction.”<sup>55</sup>

38. “Automatism” is one form of involuntariness. It has been defined as:

...a term used to describe unconscious involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done.<sup>56</sup>

39. Sometimes automatism results from a mental disorder, in which case an NCR verdict is entered. Sometimes it results from a non-mental disorder cause like sleepwalking, in which case an acquittal is the proper result.<sup>57</sup>

***The interaction between insanity and automatism***

40. Mental disorder automatism represents only one of two avenues to an NCR verdict under s. 16, however. When a mental disorder renders someone incapable of appreciating the nature and quality of the act, the accused is effectively an automaton. He simply does not know what he is doing. By contrast, when a mental disorder has rendered the accused incapable of knowing that the act was wrong, he *does* appreciate the nature of the act – he just lacks the capacity to be morally

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<sup>52</sup> See, e.g., *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, per Dickson J.

<sup>53</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, per Lamer J.

<sup>54</sup> *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24, at para. 47, per LeBel J.

<sup>55</sup> *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 908, per La Forest J.

<sup>56</sup> *R. v. Rabey*, [1980] 2 S.C.R. 513, at p. 518, per Ritchie J., quoting *R. v. K.*, 3 C.C.C. (2d) 84 (Ont. H.C.J.)

<sup>57</sup> *R. v. Parks*, *supra*

accountable for it. Section 16 accounts for both of these possibilities and treats them in identical fashion.

41. Critically, *both* avenues to an NCR verdict are predicated on the bedrock principle that “only those who act voluntarily with the requisite intent to commit an offence should be punished by criminal sanction.”<sup>58</sup> It does not matter whether the conduct is *physically* involuntary, as with someone acting under the influence of an epileptic seizure or somnambulism; or whether it is *morally* involuntary, as with someone acting under the sway of psychotic delusions. As LeBel J. explained in *Bouchard-Lebrun*:

**For an act to be considered voluntary in the criminal law, it must be the product of the accused person’s free will. [...]**

An individual’s will is expressed through conscious control exerted by the individual over his or her body (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 249). The control may be physical, in which case voluntariness relates to the muscle movements of a person exerting **physical control** over his or her body. The exercise of a person’s will may also involve **moral control** over actions the person wants to take, in which case a voluntary act is a carefully thought out act that is performed freely by an individual with at least a minimum level of intelligence (see H. Parent, *Responsabilité pénale et troubles mentaux: Histoire de la folie en droit pénal français, anglais et canadien* (1999), at pp. 266-71). Will is also a product of reason.<sup>59</sup>

42. Regardless of whether the loss of control relates to physical or moral volition, an accused in that state does not possess the capacity for individual autonomy that criminal responsibility entails. Fundamental justice requires that *no one* whose conduct lacked this essential element of voluntariness be held criminally liable for it. The immateriality of the distinction between physical and moral involuntariness is reflected in *Daviault* itself, where Cory J. referred repeatedly to extreme intoxication “akin to automatism *or* insanity.”<sup>60</sup>

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<sup>58</sup> *R. v. Parks*, *supra*, at p. 908, *per* La Forest J.

<sup>59</sup> *R. v. Bouchard-Lebrun*, *supra*, at paras. 46-47

<sup>60</sup> *R. v. Daviault*, *supra*, at pp. 73, 99, 100, 101

*The impact of Bouchard-Lebrun on the availability of an NCR verdict*

43. This is where the Respondent's case reveals an unacceptable anomaly in the law as it stands.

44. On the trial judge's undisputed findings, supported by the opinions of both psychiatrists who testified, the Respondent was "experiencing an acute break with reality at the time the offences were committed."<sup>61</sup> Because of his psychotic delusions, he was "incapable of knowing that his actions were morally wrong."<sup>62</sup> He was not an "automaton" as he possessed conscious awareness of what was going on. But this conscious awareness was fundamentally skewed by his psychotically delusional perception of reality. Mr. Chan was not capable of morally "voluntary conduct."<sup>63</sup> He was not exercising a "free will."

45. This finding should have precluded a criminal conviction as a matter of fundamental justice. By operation of s. 33.1, however, the source of Mr. Chan's mental state (drug ingestion) rendered him ineligible for an acquittal. And because the mental incapacity arose principally from an external cause (again, the drugs), an NCR verdict was also unavailable.

46. The unavailability of an NCR verdict flowed from a straightforward application of this Court's decision in *Bouchard-Lebrun*. There, the accused committed a number of violent acts while experiencing toxic psychosis brought about by pills that were supposed to contain the drug "ecstasy." Although his extreme intoxication mandated an acquittal for break and enter (as he could not form the requisite specific intent), a conviction was entered for aggravated assault by operation of s. 33.1. Crucially, the constitutionality of s. 33.1 was challenged neither at trial nor on appeal. Rather, the accused submitted that his psychosis had rendered him NCR under s. 16. This Court assumed without deciding that s. 33.1 was constitutional, and considered whether an NCR finding was justified by the abnormal consequences of the accused's drug-taking.

47. Writing for a unanimous Court, LeBel J. answered that question in the negative. In so holding, he re-affirmed that "self-induced states caused by alcohol or drugs" are excluded from

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<sup>61</sup> [Reasons for Judgment](#), para. 84

<sup>62</sup> [Reasons for Judgment](#), para. 83

<sup>63</sup> *R. v. Bouchard-Lebrun*, *supra*, at para. 51

the legal definition of “disease of the mind” – the so-called “*Cooper* exclusion.”<sup>64</sup> This exclusion is not absolute and can be rebutted by evidence 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.”<sup>65</sup> Because Mr. Bouchard-Lebrun led no such evidence, the *Cooper* exclusion applied and s. 16 was unavailable.<sup>66</sup> The question then became whether s. 33.1 applied so as to bar an acquittal based on the accused’s self-induced intoxication. The Court had little difficulty finding that it did.<sup>67</sup> Again, the provision’s constitutionality was assumed.

***The conundrum posed by the Respondent’s case***

48. In the Respondent’s case, the Court of Appeal entertained the constitutional challenge that had not been brought in *Bouchard-Lebrun*. Quite properly, the Court of Appeal held s. 33.1 to be constitutionally infirm in a number of respects. If this Court grants leave, the Respondent will argue that foundational constitutional principles compelled this result and that the Crown’s attempts to justify the legislation are unpersuasive.

49. The Court of Appeal’s judgment striking down s. 33.1 fixed part of the problem, but only this Court can fix the other part. The Court of Appeal held that section 7 and 11(d) of the *Charter* entitled the Respondent to ask for an acquittal on the basis that he lacked the voluntariness or general intent to commit the offence. However, because the trial judge did not make a finding of *automatism* – rather, he found that the Respondent lacked the ability to distinguish right from wrong – a new trial rather than an acquittal was the proper result.<sup>68</sup> In essence, the Court of Appeal implicitly distinguished *moral* from *physical* involuntariness in the sense discussed above, and found that only the latter would necessarily justify an acquittal.

50. As already seen, for purposes of criminal responsibility, the law does not distinguish between these two forms of involuntariness – and with good reason. An accused who stabs his father believing him to be the devil is no more culpable in a moral sense than an accused who does

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<sup>64</sup> [R. v. Cooper](#), *supra*, at p. 1159, *per* Dickson J.

<sup>65</sup> [R. v. Bouchard-Lebrun](#), *supra*, at para. 69

<sup>66</sup> [R. v. Bouchard-Lebrun](#), *supra*, at para. 84

<sup>67</sup> [R. v. Bouchard-Lebrun](#), *supra*, at paras. 89-91

<sup>68</sup> [Reasons for Judgment of the Court of Appeal](#), at paras. 162-166

the same thing while sleepwalking. Yet, in the Respondent's case, the Court of Appeal's remedial decision appears to have hinged entirely on this distinction.

51. What will happen to the Respondent at a new trial? As the law currently stands, and assuming that the factual findings are the same, it is not clear that *any* legally tenable verdicts are available. Clearly, the Respondent cannot be criminally convicted if he lacked the ability to appreciate the moral wrongness of his act.<sup>69</sup> And according to the Court of Appeal's implicit holding, he cannot be *acquitted* if he acted under the sway of psychotic delusions but not as an "automaton." (Otherwise, why did the Court not enter an acquittal on the unchallenged facts?) Finally, under this Court's holdings in *Cooper* and *Bouchard-Lebrun*, he cannot be found NCR if his mentally disordered state arose from the voluntary compulsion of drugs. The result would be a legal absurdity: a trial with not a single legal verdict to choose from. That cannot be right.

52. Two solutions present themselves.

53. **First:** this Court should uphold the Court of Appeal's declaration of invalidity and further hold that someone who lacks the capacity for voluntary conduct by reason of extreme intoxication should be entitled to an acquittal. This would leave *Bouchard-Lebrun* and the *Cooper* exclusion intact, reserving an NCR verdict for those cases in which the intoxicating substance acted in combination with some pre-existing internal condition to produce the involuntary conduct. This Court can build practical safeguards into the defence (as the Court did in *Daviault*) to ensure that the defence is only available where the intoxication was extreme and its consequences unforeseeable.

54. **Second:** in the alternative, this Court could modify its holding in *Bouchard-Lebrun* to broaden the availability of an NCR verdict in cases of substance-induced psychosis. This Court may decide that the dichotomy between external and internal causes, which was never scientifically mandated, is ripe for retirement. Where the involuntariness of the conduct renders criminal liability unavailable, arguably the court's sole focus should be prospective and protective: does public safety require the accused to be under continuing supervision (in which case an NCR verdict should be entered) or is the future risk negligible? In the further alternative, the Respondent

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<sup>69</sup> [R. v. Warsing, \[1998\] 3 S.C.R. 579](#), at para. 59, *per* Major J.

will argue that the trial judge simply misapplied *Bouchard-Lebrun* to exclude a finding of NCR in this case.

55. Either way, fundamental justice demands that the Respondent not face the possibility of criminal conviction for conduct that he did not intend and could not have foreseen.

**PART IV – COSTS**


56. The Respondent makes no submissions as to costs.

**PART V – ORDER SOUGHT**

57. The Respondent respectfully requests that this Court grant leave to cross-appeal from the decision of the Court of Appeal for Ontario.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9th day of October, 2020

  
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Matthew Gourlay

  
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Danielle Robitaille



**PART VI – TABLE OF AUTHORITIES**

<b>Case name</b>	<b>Paragraph</b>
<a href="#">R. v. Bouchard-Lebrun, 2011 SCC 58, [2011] 3 SCR 575</a>	4, 7, 8, 35, 41, 46, 47, 48, 51, 53, 54
<a href="#">R. v. Cooper, [1980] 1 S.C.R. 1149</a>	7, 35, 47, 51, 53
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<a href="#">R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299</a>	37
<a href="#">R. v. Warsing, [1998] 3 S.C.R. 579</a>	51
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<b>Statutory provision</b>	<b>Paragraph</b>
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK), 1982</i> , c. 11 <a href="#">[English]</a> <a href="#">[French]</a>	5, 6, 37, 49
<i>Criminal Code</i> , R.S.C., 1985, c. C-46 <ul style="list-style-type: none"> <li>• Section 16 <a href="#">[English]</a> <a href="#">[French]</a></li> </ul>	40, 46, 47
<ul style="list-style-type: none"> <li>• Section 33.1 <a href="#">[English]</a> <a href="#">[French]</a></li> </ul>	1, 4, 8, 35, 45, 46, 47, 48, 49

<ul style="list-style-type: none"><li>• Section 695 <a href="#">[English]</a> <a href="#">[French]</a></li></ul>	36
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