



SUPREME COURT OF CANADA

CITATION: R. v. Sullivan, 2022
SCC 19

APPEAL HEARD: October 12,
2021

JUDGMENT RENDERED: May
13, 2022

DOCKET: 39270

BETWEEN:

Her Majesty The Queen
Appellant

and

David Sullivan
Respondent

AND BETWEEN:

Her Majesty The Queen
Appellant / Respondent on application for leave to cross-appeal

and

Thomas Chan
Respondent / Applicant on application for leave to cross-appeal

- and -

Attorney General of Canada, Attorney General of Quebec, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, British Columbia Civil Liberties Association, Empowerment Council, Systemic Advocates in Addictions and Mental Health, Criminal Lawyers' Association (Ontario), Canadian Civil

**Liberties Association, Women's Legal Education and Action Fund Inc. and
Advocates for the Rule of Law**
Intervenors

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

REASONS FOR Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Côté,
JUDGMENT: Brown, Rowe, Martin and Jamal JJ. concurring)
(paras. 1 to 99)

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Her Majesty The Queen

Appellant

v.

David Sullivan

Respondent

- and -

Her Majesty The Queen

*Appellant /
Respondent on application for leave to cross-appeal*

v.

Thomas Chan

*Respondent /
Applicant on application for leave to cross-appeal*

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**Attorney General of Canada,
Attorney General of Quebec,
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Interveners

Indexed as: R. v. Sullivan

2022 SCC 19

File No.: 39270.

2021: October 12; 2022: May 13.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Fundamental justice — Presumption of innocence — Reasonable limits — Section 33.1 of Criminal Code preventing accused from raising common law defence of self-induced intoxication akin to automatism — Whether s. 33.1 violates principles of fundamental justice or presumption of innocence — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) — Criminal Code, R.S.C. 1985, c. C-46, s. 33.1.

Constitutional law — Remedy — Declaration of invalidity — Whether declaration of unconstitutionality issued by superior court pursuant to s. 52(1) of Constitution Act, 1982, can be considered binding on courts of coordinate jurisdiction.

Criminal law — Appeals — Appeals to Supreme Court of Canada — Jurisdiction — Accused convicted of indictable offence at trial — Court of Appeal setting aside conviction and ordering new trial — Crown bringing appeal to Supreme Court of Canada — Accused applying for leave to cross-appeal order of new trial and requesting stay — Whether Court has jurisdiction to hear accused's appeal — Criminal Code, R.S.C. 1985, c. C-46, s. 691.

After having voluntarily taken an overdose of a prescription drug and falling into an impaired state, S attacked his mother with a knife and injured her gravely. He was charged with several offences, including aggravated assault and assault with a weapon. In unrelated circumstances, C fell into an impaired state after he voluntarily ingested magic mushrooms containing a drug called psilocybin. He attacked his father with a knife and killed him, and seriously injured his father's partner. C was tried for manslaughter and aggravated assault. Both S and C argued at their respective trials that their state of intoxication was so extreme that their actions were involuntary and could not be the basis of a guilty verdict for the violent offences of general intent brought against them. C also argued that an underlying brain injury was the significant contributing cause of his psychosis, rather than his intoxication alone, such that he was not criminally responsible.

In the case of S, the trial judge accepted that S was acting involuntarily but decided that the defence of extreme intoxication akin to automatism was not available by virtue of s. 33.1 of the *Criminal Code*. S was convicted of the two assault charges.

The trial judge in C's case dismissed C's constitutional challenge to s. 33.1, during which C had argued that previous decisions of the same court that declared s. 33.1 unconstitutional were binding on the trial judge. C's brain trauma was held to be a mental disorder but not the cause of C's incapacity, which was the result of the voluntary ingestion of magic mushrooms. C was convicted of manslaughter and aggravated assault.

The Court of Appeal heard appeals by S and C together and held that s. 33.1 violates ss. 7 and 11(d) of the *Charter* and is not saved by s. 1. S and C were therefore entitled to raise the defence of automatism. The Court of Appeal also addressed the issue of whether the trial judge in C's case was bound by precedent of a court of coordinate jurisdiction in the province to accept the unconstitutionality of s. 33.1. It held that the ordinary rules of *stare decisis* apply when superior courts in first instance consider whether to follow previous declarations of unconstitutionality. The trial judge was correct to decide that he was not bound by previous decisions and entitled to consider the issue afresh. In the result, S's convictions were set aside and acquittals entered. The Court of Appeal ordered a new trial for C because no finding of fact had been made in respect of non-mental disorder automatism. The Crown appeals to the Court from the Court of Appeal's decision in respect of both S and C, and C applies for leave to cross-appeal the order of a new trial, seeking an acquittal or, in the alternative, a stay of proceedings.

Held: The appeals should be dismissed. C's application for leave to cross-appeal should be quashed for want of jurisdiction.

In the companion appeal of *R. v. Brown*, 2022 SCC 18, the Court concludes that s. 33.1 violates the *Charter* and is of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. That conclusion is applicable to the Crown's appeals in the present cases. In the result, given that s. 33.1 is of no force or effect, S is entitled to acquittals. He established that he was intoxicated to the point of automatism and the trial judge found that he was acting involuntarily. As for C, the Court of Appeal's order for a new trial should be upheld. C may avail himself of the defence of non-mental disorder automatism at a new trial, should it be applicable on the facts.

The ordinary rules of horizontal *stare decisis* and judicial comity apply to declarations of unconstitutionality issued by superior courts within the same province. A decision may not be binding if it is distinguishable on its facts or the court had no practical way of knowing it existed. If it is binding, a trial court may only depart if one or more of the exceptions set out in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), apply.

Accordingly, a trial judge is not strictly bound by a prior declaration by a court of coordinate jurisdiction by virtue of s. 52(1) of the *Constitution Act, 1982*. A s. 52(1) declaration of unconstitutionality reflects an ordinary judicial task of determining a question of law. Determining whether an impugned law is inconsistent with the provisions of the Constitution and, if so, whether and to what extent the law is

of no force or effect is no different than other questions of law decided outside the constitutional context. Judges cannot in a literal sense strike down legislation when they review the consistency of the law with the Constitution under s. 52(1). A declaration of unconstitutionality simply refutes the presumption of constitutionality; it does not alter the terms of the statute. Questions of law are governed by the normal rules and conventions that constrain courts in the performance of their judicial tasks, including applying the ordinary principles of *stare decisis*. A judicial declaration made under s. 52(1) by a superior court is therefore binding on other courts within the confines of the law relating to precedent.

The principle of constitutional supremacy cannot dominate the analysis of s. 52(1) to the exclusion of other constitutional principles. The legal effect of a s. 52(1) declaration by a superior court must be defined with reference to constitutional supremacy, the rule of law, and federalism. Pursuant to s. 96 of the *Constitution Act, 1867*, superior courts operating within a province only have powers within the province. Federalism prevents a s. 52(1) declaration issued within one province from binding courts throughout the country. Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province and a constitutional ruling will bind lower courts through vertical *stare decisis*. *Stare decisis* is the appropriate framework to apply to litigation of constitutional issues, because it balances stability and predictability against correctness and the orderly development of the law. The Crown may consider an appeal when faced with conflicting trial decisions relating to a law on which the prosecution continues to rely, but is not bound to appeal declarations of

unconstitutionality in criminal matters. However desirable uniform treatment of the substantive criminal law might be within or even across provinces, a decision to appeal remains within the discretion of the relevant attorney general, to be decided in keeping with its authority to pursue the public interest and the constitutional and practical constraints relating to its office.

Varying standards have been invoked to define when departure from prior precedent is appropriate, for example if it is plainly wrong, when there is good reason for doing so or in extraordinary circumstances. These qualitative tags are susceptible of extending to almost any circumstance and do not provide precise guidance. These terms should no longer be used. Judicial comity as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances: the rationale of the earlier decision has been undermined by subsequent appellate decisions; some binding authority in case law or some relevant statute was not considered; or the earlier decision was not fully considered, for example if it was taken in exigent circumstances. Where a judge is faced with conflicting authority on the constitutionality of legislation, the judge must follow the most recent authority unless one or more of these three criteria are met. These criteria do not detract from the narrow circumstances in which a lower court may depart from binding vertical precedent.

An application of the doctrine of horizontal *stare decisis* to C's case illustrates how these criteria should work in practice. *R. v. Dunn* (1999), 28 C.R. (5th) 295, did not engage with an earlier Ontario decision that upheld the constitutionality of s. 33.1 and *Dunn* did not apply the criteria to determine whether it was permissible to depart from that precedent; therefore it was a decision *per incuriam* and did not need to be followed. The earlier decision considered the appropriate statutes and authorities in reaching the conclusion that s. 33.1 infringed ss. 7 and 11(d) of the *Charter* but was upheld under s. 1 and there is no indication that it was rendered in exigent circumstances. Therefore, that decision should have been followed by the trial judge in the constitutional ruling in C's case. On appeal, however, the Court of Appeal was not bound to follow any first instance superior court decision.

There is no statutory route for C to appeal the Court of Appeal's order of a new trial. Section 695 of the *Criminal Code* does not provide the Court with the jurisdiction to hear a cross-appeal by C. Sections 691 and 692 of the *Criminal Code* set out the jurisdiction of the Court to hear criminal appeals brought by criminal accused and represent the whole of an accused's express statutory right to appeal when their conviction has been affirmed or their acquittal set aside by the Court of Appeal. In cases like C's, where an accused, having been convicted of an indictable offence at trial, is granted a new trial, s. 691 does not provide a route of appeal to the Court. As for a stay of proceedings, it may only be granted in the clearest of cases, where prejudice to an accused's rights or to the judicial system is irreparable and cannot be

remedied. The record before the Court is insufficient to conclude that C's right to a fair trial is prejudiced.

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By Kasirer J.

Applied: *R. v. Brown*, 2022 SCC 18; *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590; **distinguished:** *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Warsing*, [1998] 3 S.C.R. 579; **explained:** *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; **considered:** *R. v. Dunn* (1999), 28 C.R. (5th) 295; *R. v. Fleming*, 2010 ONSC 8022; *R. v. McCaw*, 2018 ONSC 3464, 48 C.R. (7th) 359; *R. v. Decaire*, [1998] O.J. No. 6339; **referred to:** *R. v. Scarlett*, 2013 ONSC 562; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. P. (J.)* (2003), 67 O.R. (3d) 321; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; *Coquitlam (City) v. Construction Aggregates Ltd.* (1998), 65 B.C.L.R. (3d) 275, aff'd 2000 BCCA 301, 75 B.C.L.R. (3d) 350, leave to appeal refused, [2001] 1 S.C.R. ix; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Mouvement laïque*

québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Ontario (Attorney General) v. G.*, 2020 SCC 38; *R. v. Albashir*, 2021 SCC 48; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Wolf v. The Queen*, [1975] 2 S.C.R. 107; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Parent v. Guimond*, 2016 QCCA 159; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. McCann*, 2015 ONCA 451; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Dunn*, 156 O.A.C. 27; *R. v. Jensen* (2005), 74 O.R. (3d) 561; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Green*, 2021 ONSC 2826; *R. v. Kehler*, 2009 MBPC 29, 242 Man. R. (2d) 4; *R. v. Wolverine and Bernard* (1987), 59 Sask. R. 22; *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, 4 B.C.L.R. (6th) 370; *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Shea*, 2010 SCC 26, [2010] 2 S.C.R. 17; *Saumur v. Recorder's Court (Quebec)*, [1947] S.C.R. 492; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. O'Connor*, [1995] 4 S.C.R. 411.

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APPEAL and APPLICATION FOR LEAVE TO CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Watt, Lauwers and Paciocco JJ.A.), 2020 ONCA 333, 151 O.R. (3d) 353, 387 C.C.C. (3d) 304, 63 C.R. (7th) 77, 462 C.R.R. (2d) 231, [2020] O.J. No. 2452 (QL), 2020 CarswellOnt 7645 (WL Can.), setting aside the convictions for manslaughter and aggravated assault entered by Boswell J., 2018 ONSC 7158, [2018] O.J. No. 6459 (QL), 2018 CarswellOnt 20662 (WL Can.), and ordering a new trial. Appeal dismissed and application for leave to cross-appeal quashed.

Joan Barrett, Michael Perlin and Jeffrey Wyngaarden, for the appellant/respondent on application for leave to cross-appeal.

Stephanie DiGiuseppe and Karen Heath, for the respondent David Sullivan.

Matthew R. Gourlay and Danielle Robitaille, for the respondent/applicant on application for leave to cross-appeal Thomas Chan.

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Lindsay Daviau and Deepa Negandhi, for the intervener the Criminal Lawyers' Association (Ontario).

Eric S. Neubauer, for the intervener the Canadian Civil Liberties Association.

Megan Stephens and Lara Kinkartz, for the intervener the Women's Legal Education and Action Fund Inc.

Connor Bildfell and Asher Honickman, for the intervener the Advocates
for the Rule of Law.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] After having voluntarily taken an overdose of a prescription drug and falling into an impaired state, David Sullivan attacked his mother with a knife and injured her gravely. He was charged with several offences, including aggravated assault and assault with a weapon. In unrelated circumstances, Thomas Chan also fell into an impaired state after he voluntarily ingested “magic mushrooms” containing a drug called psilocybin. Mr. Chan attacked his father with a knife and killed him and seriously injured his father’s partner. He was tried for manslaughter and aggravated assault.

[2] In their different circumstances, both Mr. Sullivan and Mr. Chan argued at their respective trials that their state of intoxication was so extreme that their actions were involuntary and could not be the basis of a guilty verdict for the violent offences of general intent brought against them. Mr. Chan argued in particular that an underlying brain injury was the significant contributing cause of his psychosis, rather than his

intoxication alone, such that he was not criminally responsible pursuant to s. 16 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] In the case of Mr. Sullivan, the trial judge accepted the accused was acting involuntarily but decided that the defence of extreme intoxication akin to automatism was not available by virtue of s. 33.1 of the *Criminal Code*. Mr. Sullivan was convicted of the two assault charges. In the case of Mr. Chan, the trial judge dismissed a constitutional challenge to s. 33.1. Mr. Chan's brain trauma was held to be a mental disorder, but not the cause of the incapacity, which was the result of the voluntary ingestion of magic mushrooms. The trial judge in his case rejected his argument under s. 16. He was convicted of manslaughter and aggravated assault.

[4] Their appeals were heard together. The Court of Appeal for Ontario held that s. 33.1 violated ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and was not saved by s. 1. As a result, both Mr. Sullivan and Mr. Chan were entitled to raise the defence of automatism. Based on the findings at his trial, Mr. Sullivan's convictions were set aside and acquittals entered. The Court of Appeal ordered a new trial for Mr. Chan because no finding of fact had been made in respect of non-mental disorder automatism in his case. The Crown has appealed both the decisions for Mr. Sullivan and Mr. Chan to this Court.

[5] In *R. v. Brown*, 2022 SCC 18, released concurrently with the reasons for judgment in these appeals, I conclude that s. 33.1 violates the *Charter* and is of no force

or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. That conclusion is equally applicable to the Crown's appeals in the cases at bar.

[6] As respondent, Mr. Sullivan has raised an issue relating to the character and force of a s. 52(1) declaration of unconstitutionality issued by a superior court. He argued before us that the trial judge had been bound by a previous declaration by a superior court judge in the province that held s. 33.1 to be of no force and effect. The issue raised by Mr. Sullivan provides an opportunity to clarify whether a declaration made under s. 52(1) binds the courts of coordinate jurisdiction in future cases due to the principle of constitutional supremacy, or whether the ordinary rules of horizontal *stare decisis* apply. As I shall endeavour to explain, *stare decisis* does apply and the trial judge was only bound to that limited extent on the question of the constitutionality of s. 33.1. The right approach can be stated plainly. Superior courts at first instance may not be bound if the prior decision is distinguishable on its facts or if the court had no practical way of knowing that the earlier decision existed. Otherwise, the decision is binding and the judge may only depart from it if one or more of the exceptions helpfully explained in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), apply.

[7] In the result, I would dismiss the Crown's appeal in the case of Mr. Sullivan and confirm the acquittals entered by the Court of Appeal.

[8] As respondent in his appeal before this Court, Mr. Chan seeks leave to cross-appeal and, if granted, he asks that we substitute an acquittal for the order of a

new trial. I would reject Mr. Chan's arguments on this point. In my view, Mr. Chan's application for leave to cross-appeal must be quashed for want of jurisdiction. I would reject his alternative argument that this Court order a stay of proceedings in respect of the very serious violent charges brought against Mr. Chan because the requirements for a stay have not been made out. In the result, I would confirm the Court of Appeal's order of a new trial.

II. Background

A. *David Sullivan*

[9] All parties agree that Mr. Sullivan attacked his mother during an episode of drug-induced psychosis during which he had no voluntary control over his actions. Mr. Sullivan, then 43 years old, lived with his mother in a condominium unit. He has a history of mental illness and substance abuse. Evidence adduced at trial indicated that in the three months before the attack, he was convinced that the planet would be invaded by aliens that were already present in their condominium.

[10] Mr. Sullivan had been prescribed bupropion (under the name Wellbutrin) to help him quit smoking. Psychosis is a side effect of the drug. He had experienced psychosis from Wellbutrin at least once before, shortly before the events in this case. The evening prior to the attack, he ingested 30 to 80 Wellbutrin tablets in a suicide attempt. The drugs prompted a psychotic episode during which time, in the early hours of the morning, he woke his mother and told her an alien was in the living room. She

followed him into the area and, while she was there, Mr. Sullivan went into the kitchen, took two knives, and stabbed his mother six times. She suffered serious injuries, including residual nerve damage that was slow to heal. She died before trial of unrelated causes.

[11] Several neighbours saw Mr. Sullivan acting erratically outside of the building after the attack. Agitated when the police arrived, Mr. Sullivan was talking about Jesus, the devil, and aliens. He was taken to the hospital, where he had multiple seizures. The psychotic episode resolved itself within a few days. At trial, a forensic psychiatrist gave evidence that Mr. Sullivan was likely experiencing a bupropion-induced psychosis at the time of the attack on his mother.

B. *Thomas Chan*

[12] Thomas Chan violently attacked his father and his father's partner with a knife. Mr. Chan's father later died from his injuries. The father's partner was gravely and permanently injured.

[13] After returning home from a bar where they had consumed several alcoholic drinks earlier that evening, Mr. Chan and his friends decided to take magic mushrooms. Mr. Chan had consumed mushrooms before and enjoyed the experience. He ingested an initial dose and when he failed to feel the same effects as his friends, he took a second dose. Towards the end of the night, he began acting erratically. Frightened, he went upstairs where he woke up his mother, mother's boyfriend, and

sister. Mr. Chan then left the home wearing only a pair of pants. His family and friends pursued him as he ran towards his father's home a short distance away. Mr. Chan broke into his father's house through a window even though he normally gained entry through finger-print recognition on a home security system.

[14] Once inside, he confronted his father in the kitchen and did not appear to recognize him. He shouted that he was God and that his father was Satan. He proceeded to stab his father repeatedly. He then stabbed his father's partner. When police arrived, he complied with their demands, although at one point he struggled with what a police officer described as "super-strength".

III. Proceedings Below

A. *David Sullivan*

Ontario Superior Court of Justice, [2016] O.J. No. 6847 (QL), 2016 CarswellOnt 21197 (WL Can.) (Salmers J.)

[15] At trial, the parties agreed, and the trial judge accepted, that Mr. Sullivan was acting involuntarily when he stabbed his mother. The trial judge found that Mr. Sullivan experienced a state of non-mental disorder automatism, attributable to his ingestion of Wellbutrin. His state was caused by a drug for which psychosis is a known side-effect.

[16] The Crown said s. 33.1 applied because Mr. Sullivan's psychosis was self-induced and therefore could not be the basis for a defence that he lacked the general intent or voluntariness for the crimes of assault. There was disagreement about whether Mr. Sullivan's consumption of Wellbutrin was voluntary. Section 33.1 would only preclude the automatism defence if intoxication was "self-induced". The trial judge found that Mr. Sullivan's intoxication was voluntary and that he knew or ought to have known that Wellbutrin would cause him to be impaired. Section 33.1 was applied. He was found guilty of aggravated assault, assault with a weapon, and four counts of breach of a non-communication order. It bears noting that Mr. Sullivan did not contest the constitutionality of s. 33.1 at trial. He received a global sentence of five years.

B. *Thomas Chan*

(1) Constitutional Ruling, 2018 ONSC 3849, 365 C.C.C. (3d) 376 (Boswell J.)

[17] Mr. Chan challenged the constitutionality of s. 33.1 in a pre-trial application, arguing in particular that the trial judge was bound by previous decisions of the same court, notably *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. C.J. (Gen. Div.)), and *R. v. Fleming*, 2010 ONSC 8022, which found s. 33.1 to be unconstitutional.

[18] Boswell J. considered whether, by reason of the doctrine of horizontal *stare decisis*, he was bound by a constitutional declaration by another judge of the superior court in the province that s. 33.1 was of no force or effect because it was inconsistent with the *Charter*. Relying on *R. v. Scarlett*, 2013 ONSC 562, the trial judge held that

he was not so bound. Decisions from courts of coordinate jurisdiction should be followed in the absence of cogent reasons to depart therefrom. A court is bound unless the previous decision is “plainly wrong” (paras. 55-56). The trial judge reasoned that the case law on the constitutionality of s. 33.1 was “considerably unsettled” (para. 58). Although all courts had agreed that s. 33.1 violated ss. 7 and 11(d) of the *Charter*, courts were divided on whether it could be saved under s. 1. As a result, Boswell J. did not “feel constrained to follow one school of thought more than the other” (*ibid.*). In addition, none of the earlier constitutional decisions had had the benefit of the judgment of the Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, on the relationship between ss. 7 and 1 (para. 58). He concluded that he was free to reconsider the question afresh.

[19] The trial judge then went on to decide that s. 33.1 violated ss. 7 and 11(d) of the *Charter* but was saved under s. 1.

(2) Judgment on the Merits, 2018 ONSC 7158 (Boswell J.)

[20] With the defence of automatism precluded by operation of s. 33.1, Mr. Chan argued that he was not criminally responsible by reason of brain trauma which, alone or in connection with the effect of the intoxicant, amounted to mental disorder under s. 16. The parties disagreed about whether Mr. Chan was suffering from a brain injury and, if so, whether it played a part in his violent conduct. Mr. Chan argued that but for the brain injury, he would not have been psychotic from consuming the mushrooms. The Crown argued that the primary cause of Mr. Chan’s psychosis was

his voluntary consumption of the mushrooms. The trial judge was required to consider, first, whether Mr. Chan was suffering from a mental disorder at the time of the offence and, second, if that mental disorder rendered him incapable of appreciating the nature and quality of his actions, or incapable of knowing they were wrong.

[21] Mr. Chan did not satisfy the applicable requirements under s. 16. The evidence disclosed a mild traumatic brain injury. The trial judge could not conclusively say that the brain injury rendered Mr. Chan incapable of appreciating the nature and quality of his actions or of knowing they were wrong. The progression of his psychosis suggested that the ingestion of psilocybin was the primary cause of Mr. Chan's impaired state. The judge found that "Mr. Chan experienced a sudden onset of psychosis that coincided directly with the ingestion and absorption of magic mushrooms". While the trial judge found that Mr. Chan "was incapacitated by the effects of the drugs he consumed", I note that he made no specific finding that Mr. Chan was in a state of self-induced intoxication akin to non-mental disorder automatism.

[22] Mr. Chan was convicted of manslaughter and aggravated assault. He was later sentenced to a global sentence of five years, reduced to three and a half years after credit reductions (2019 ONSC 1400).

(3) Application to Re-open Constitutional Challenge, 2019 ONSC 783, 428 C.R.R. (2d) 81 (Boswell J.)

[23] After sentencing, Mr. Chan applied to re-open the case to re-argue the constitutional issue. He said that *R. v. McCaw*, 2018 ONSC 3464, 48 C.R. (7th) 359, which had been rendered subsequently, declared s. 33.1 unconstitutional and therefore presented a renewed opportunity to consider the question. In *McCaw*, Spies J. said she was bound by *Dunn*. Spies J. held that once a provision is declared unconstitutional, it is invalid and “off the books” (para. 76) for all future cases by operation of s. 52(1) and as directed in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96. In other words, judges of concurrent jurisdiction are bound by a declaration of unconstitutionality. On that basis, argued Mr. Chan, the trial judge had been bound by the prior declaration of unconstitutionality in *Dunn* when he considered the application of s. 33.1 here.

[24] Boswell J. dismissed Mr. Chan’s application to re-open the case. *McCaw* was not an accurate statement of the law. Relying on *Spruce Mills*, a proper understanding of the rule of horizontal *stare decisis* is that relevant decisions of the same level of court should be followed as a matter of judicial comity, unless there are compelling reasons that justify departing therefrom. *Spruce Mills* set out three criteria for departure, which were summarized correctly, in his view, by Strathy J. in *Scarlett* as “plainly wrong” (para. 41).

[25] For Boswell J., *McCaw* misinterpreted the statements by McLachlin C.J. in *Ferguson* that an unconstitutional law is “effectively removed from the statute books” (para. 65). McLachlin C.J. did not express the view that judges of coordinate jurisdiction could not review or reconsider an order striking down a provision under

s. 52. *Ferguson* was not about horizontal *stare decisis*. Boswell J. preferred Strathy J.'s reading of *Ferguson*, which acknowledged the *erga omnes* (“against all” or, as is sometimes said, “against the world”) character of a declaration of unconstitutionality but did not extend that effect to courts of coordinate jurisdiction. The question remained as to whether the prior ruling is plainly wrong and there are salient reasons for correcting the error. With respect to *Dunn*, there were good reasons to depart from precedent. The s. 1 analysis was plainly wrong; *Bedford* had changed the relationship between ss. 7 and 1. Moreover there were inconsistent rulings on the matter of the constitutionality of s. 33.1 across the country.

C. *Court of Appeal for Ontario, 2020 ONCA 333, 151 O.R. (3d) 353 (Paciocco J.A., Watt J.A. concurring; Lauwers J.A. concurring in the result)*

[26] The Court of Appeal allowed the appeals and held that s. 33.1 is unconstitutional and of no force or effect. The Court of Appeal’s judgment on this point is reviewed in *Brown* and need not be recounted here in detail. For the purposes of this case, I need only note that Paciocco J.A.’s careful reasoning on ss. 7 and 11(d) has been affirmed in *Brown*. In addition, although my own justification analysis differs from that of Paciocco and Lauwers J.A., I agree with their ultimate conclusion: s. 33.1 cannot be saved by s. 1. Their conclusion that s. 33.1 is inconsistent with the *Charter* and of no force or effect is equally applicable in these two appeals.

[27] Speaking for the Court on this point, Paciocco J.A. addressed the issue of whether the trial judge in Mr. Chan's case was bound by precedent of a court of coordinate jurisdiction in the province to accept the unconstitutionality of s. 33.1.

[28] In his view, the ordinary rules of *stare decisis* apply when superior courts in first instance consider whether to follow previous declarations of unconstitutionality made by the same court. He distinguished several cases that purported to stand for the proposition that a declaration is binding on other superior court judges unless successfully appealed by the Crown (paras. 34-35, referring to *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; and *Ferguson*). These cases made statements to the effect that a provision inconsistent with the Constitution "is invalid from the moment it is enacted" in all future cases and is "effectively removed from the statute books" (*Martin*, at paras. 28 and 31; see *Ferguson*, at para. 65; *Hislop*, at para. 82). Paciocco J.A. read these cases as describing the effect of s. 52(1) declarations rendered by the Supreme Court because it is the apex court in Canada. They did not oust the principles of *stare decisis* generally nor did they pertain to declarations made by lower courts.

[29] If all s. 52(1) declarations were binding, wrote Paciocco J.A., accuracy would be compromised. For example, if three superior court judges in succession upheld a provision, but a fourth judge's ruling declared it to be of no force and effect, only the fourth judge's ruling would take hold within a province absent an appeal by

the Crown. The development of the law would be “driven by coincidence” rather than by the “quality of the judicial ruling” (para. 37).

[30] The principles in *Spruce Mills* and *Scarlett* were affirmed. Applied to the context of s. 52(1) declarations of unconstitutionality, a superior court judge faced with a prior judgment of a court of coordinate jurisdiction should apply that precedent and treat the provision as having no force or effect unless, by exception to the principle of horizontal *stare decisis*, the earlier decision is plainly wrong. The trial judge was correct to decide that he was not bound by *Dunn* and entitled to consider the issue afresh.

[31] Having declared s. 33.1 unconstitutional and of no force or effect, Paciocco J.A. entered acquittals for Mr. Sullivan on his assault charges. Mr. Chan was entitled to a new trial, but not acquittals. The trial judge made no finding that Mr. Chan was acting involuntarily. Instead, the trial judge rejected Mr. Chan’s claim that he should be found not criminally responsible, a claim that does not require the establishment of automatism. Mr. Chan should have the opportunity to invoke the defence of non-mental automatism and lead evidence in that regard at a new trial.

IV. Issues

[32] As noted, the Crown appeals on the constitutionality of s. 33.1 cannot succeed for the reasons stated in *Brown*. The Court of Appeal correctly concluded that s. 33.1 infringes ss. 7 and 11(d) and cannot be saved under s. 1.

[33] There are two remaining issues in these appeals:

1. On what basis can a declaration issued by a superior court pursuant to s. 52(1) of the *Constitution Act, 1982* be considered binding on courts of coordinate jurisdiction?
2. Does the Court have jurisdiction to hear Mr. Chan's cross-appeal? If so, is he entitled to an acquittal? If not, is he nevertheless entitled to a stay of proceedings?

[34] For the reasons that follow, I conclude on the first issue that the ordinary rules of *stare decisis* and judicial comity apply to declarations of unconstitutionality issued by superior courts within the same province. On the second issue, I conclude the Court lacks jurisdiction to hear the cross-appeal. I would not order a stay. The Court of Appeal's order for a new trial for Mr. Chan should be upheld, as should the acquittals it entered for Mr. Sullivan.

V. Analysis

A. *Section 52(1) Declarations of Unconstitutionality and Horizontal Stare Decisis*

[35] Presented in the General Part of the *Constitution Act, 1982* under the heading "Primacy of Constitution of Canada", s. 52(1) provides:

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[36] The parties disagree on the rules that apply after a superior court declares a law inconsistent with the *Charter* and thus of no force or effect pursuant to s. 52(1).

[37] Mr. Sullivan observes that at the time he was convicted at trial, s. 33.1 had already been declared of no force and effect by other judges of the superior court in the province of Ontario. He recalls that starting in *Dunn*, in 1999, four separate superior court judgments were rendered “striking [s. 33.1] down” (R.F., at para. 85). Mr. Sullivan says that a declaration issued by a court of coordinate jurisdiction under s. 52(1) of the *Constitution Act, 1982* invalidates the law for all future cases. In deciding the contrary, the trial judge in Mr. Chan’s case and the Court of Appeal failed to recognize the effect on the law of the declaration issued under s. 52(1). Paciocco J.A., writing for a unanimous court on this point in appeal, erred in deciding that the matter is governed by the ordinary principles of *stare decisis* and by adopting the test of judicial comity explained in *Scarlett* and *Spruce Mills*.

[38] Mr. Sullivan, along with a number of interveners, submit that a superior court only “discovers” that a law is unconstitutional when it issues a declaration pursuant to s. 52(1) — the law becomes of no force or effect through the operation of s. 52(1). He relies on statements from this Court which characterize a s. 52(1) declaration as rendering the law “null and void”, a finding which applies “for all future cases” and that the law is unenforceable because it is “effectively removed from the

statute books” (*Martin*, at para. 31; *Ferguson*, at para. 65, *Hislop*, at para. 82). Consistent with those statements, says Mr. Sullivan, when a superior court issues a s. 52(1) declaration of unconstitutionality, the impugned provision is nullified both prospectively and retrospectively. The intervener British Columbia Civil Liberties Association argues further that, by its nature, a s. 52(1) declaration by a superior court has universal effect beyond the parties “for all Canadians” and thus must bind courts across the country. The intervener Advocates for the Rule of Law adds that a s. 52(1) declaration derives its force from the Constitution and that permitting the government to relitigate a law’s constitutionality after it has been declared of no force or effect would be inconsistent with the Constitution’s remedial scheme. Finally, the Canadian Civil Liberties Association intervenes to warn of the potential undermining of the rule of law and consequential unpredictability if the ordinary rules of *stare decisis* apply.

[39] Although it argues that the Court of Appeal made no mistake in holding that the ordinary rules of *stare decisis* apply here, the Crown recalls that the matter is technically moot. Even if the trial judges were obliged to follow *Dunn*, this Court is not so bound and the lower courts’ failure to do so has no practical impact on the outcome of these appeals. But, says the Crown, the question raised by Mr. Sullivan should still be decided.

[40] I agree that the matter can and should be decided here (*Rules of the Supreme Court of Canada*, SOR/2002-156, r. 29(3); *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at paras. 18-26). The question is one of public importance to the conduct

of constitutional litigation in courts of first instance in Canada. Moreover the question was carefully considered by the courts below and, in this Court, has been addressed by the parties with additional submissions on either side of the question by interveners.

[41] On the substance of the matter, the Crown argues that while s. 52(1) declarations are *erga omnes* in nature, they do not necessarily stand as authority for all future cases to be decided of coordinate jurisdiction or bind across the country. Mr. Sullivan's approach compromises the rule of law by allowing for erroneous findings of unconstitutionality to stand. The rules of *stare decisis* provide the flexibility needed to balance finality with correctness.

[42] The Attorneys General of British Columbia, Quebec and Canada intervene in support of the Crown's position. British Columbia submits that a s. 52(1) declaration should be reconsidered only where there is palpable and overriding error or where the threshold in *Bedford* is met. Quebec argues the "plainly wrong" standard should be qualified; a previous decision should only be set aside where there is a new question of law or a change in the situation or evidence that leads to materially different circumstances. Canada observes that disagreement between lower courts helpfully generates considered opinions upon which appellate courts can rely for their own reasoning.

[43] For the reasons that follow, I agree with the Crown that the trial judge was not strictly bound by the prior declaration by a court of coordinate jurisdiction by virtue of s. 52(1). In my respectful view, Mr. Sullivan's understanding of the effect of a

declaration under s. 52(1) is mistaken. A s. 52(1) declaration of unconstitutionality reflects an ordinary judicial task of determining a question of law, in this case with respect to the consistency of a law with the requirements of the *Charter*. Questions of law are governed by the normal rules and conventions that constrain courts in the performance of their judicial tasks.

[44] In the result, I agree with the conclusion reached by Paciocco J.A. that the ordinary principles of *stare decisis* govern the manner in which a declaration issued by a court under s. 52(1) affects how courts of coordinate jurisdiction in the province should decide future cases raising the same issue. I would however clarify the situations when a superior court may depart from a prior judgment of a court of coordinate jurisdiction. The standard is not that the prior decision was “plainly wrong”. A superior court judge in first instance should follow prior decisions made by their own court on all questions of law, including questions of constitutional law, unless one or more of the exceptions in *Spruce Mills* are met.

(1) Section 52(1) Declarations of Unconstitutionality Reflect the Exercise of Judicial Power to Decide Questions of Law

[45] I start with a simple point: in issuing a declaration that a law is inconsistent with the Constitution and thus of no force or effect, a judge is exercising an ordinary judicial power to determine a question of law. Given the nature of the power they exercise, judges cannot in a literal sense “strike down legislation” when they review the consistency of the law with the Constitution under s. 52(1). Mr. Sullivan

misconstrues the power of judges when he says that the effect of a declaration of unconstitutionality is that the impugned law is removed from the statute books going forward. In our law, legislatures have the power to remove laws from the statute books, or to modify those statutes, not judges (see D. Pinard, “De l’inhabilité des juges à modifier le texte des lois déclarées inconstitutionnelles”, in P. Taillon, E. Brouillet and A. Binette, eds., *Un regard québécois sur le droit constitutionnel: Mélanges en l’honneur d’Henri Brun et de Guy Tremblay* (2016), 329, at p. 342). Professor Pinard convincingly frames this judicial power as one grounded in legal interpretation and recalls the distinction, that she rightly says is sometimes neglected, between legal rules and the textual expression of those rules. Judges, in their interpretative task as it bears on statutory law under s. 52(1), have no power to [TRANSLATION] “alter the text of rules of written law” (p. 329, fn. 2 (emphasis deleted)). She writes:

[TRANSLATION] Judicial review for constitutionality concerns the impugned rule, not the text of written law that expresses the rule. The necessary legislative reworking, if any, will only be done after the judgment of unconstitutionality, by the relevant legislature. [p. 347]

[46] Contrary to what Mr. Sullivan suggests, while s. 33.1 was declared to be inconsistent with the Constitution and of no force or effect in *Dunn*, it was not, by the effect of that judgment, “struck from the books”. As I seek to explain below, when this Court in *Ferguson* stated that a law is effectively removed from the statute books, it was not speaking in literal terms. The effect of the judicial declaration in this case, where s. 33.1 is considered to be inconsistent with the Constitution, is not to annul the law but, as the French text of s. 52(1) makes especially plain, to declare that it is

“*inopérante*” (see M.-A. Gervais, “Les impasses théoriques et pratiques du contrôle de constitutionnalité canadien” (2021), 66 *McGill L.J.* 509, at p. 521, at fn. 45, citing P.-A. Côté, “La préséance de la Charte canadienne des droits et libertés” (1984), 18 *R.J.T.* 105, at pp. 108-10; see also F. Gélinas, “La primauté du droit et les effets d’une loi inconstitutionnelle” (1988), 67 *Can. Bar Rev.* 455, at pp. 463-64).

[47] A second equally simple point flows from the first and also appears to have been neglected by Mr. Sullivan. In authorizing a competent judge to issue a declaration under s. 52(1), the *Constitution Act, 1982* also invites the court to decide an ordinary question of law, albeit one with constitutional implications. Specifically, s. 52(1) asks the court to determine whether the impugned law is “inconsistent with the provisions of the Constitution” and, if so, to measure “the extent of this inconsistency” to decide whether and to what extent the law is of no force or effect. To do so, the court interprets the impugned law and interprets the Constitution. In Mr. Chan’s case, the trial judge was called upon to determine whether there was an inconsistency between the *Charter* and s. 33.1. To decide that, he had to resolve the legal question relating to the meaning of ss. 7, 11(d) and 1 of the *Charter* and the meaning of s. 33.1.

[48] Notwithstanding the heady constitutional context, these are ordinary judicial tasks raising questions of law. Under s. 52(1) of the *Constitution Act, 1982*, courts are called upon to resolve conflicts between the Constitution and ordinary statutes (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 746). Properly understood, the supremacy clause refers to the hierarchy of laws in the

constitutional order. Superior courts are empowered to determine whether a provision is inconsistent with the Constitution in accordance with this hierarchy. These questions of law are no different than other questions of law decided outside the constitutional context (A. Marcotte, “A Question of Law: (Formal) Declarations of Invalidity and the Doctrine of Stare Decisis” (2021), 42 *N.J.C.L.* 1, at p. 9). Judicial review of legislation on federalism or *Charter* grounds has been described as a “normal judicial task” similar to the “interpretation of a statute” (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at §5-21; R. Leckey, *Bills of Rights in the Common Law* (2015), at p. 55). As judicial review of legislation is an ordinary judicial task consisting of the determination of a question of law, the legal effects of the declaration of unconstitutionality that results should be governed by the ordinary rules of *stare decisis* (Marcotte, at p. 21). In its effect, a declaration of unconstitutionality simply refutes the presumption of constitutionality by deciding that the impugned provisions are inconsistent with the Constitution and therefore of no force or effect. It does not alter the terms of the statute (see, e.g., *R. v. P. (J.)* (2003), 67 O.R. (3d) 321 (C.A.), at para. 31; Gervais, at pp. 535-38).

[49] Having indicated my view that a s. 52(1) declaration of unconstitutionality is an ordinary judicial task that involves resolving a question of law rather than an expression of the authority of a superior court to alter the statute book, I now turn to the legal nature and effect of a s. 52(1) declaration beyond the parties to litigation.

(2) *Stare Decisis* Governs Declarations of Unconstitutionality

[50] Mr. Sullivan argues that an unconstitutional law is invalid from the moment it was first enacted, due to the operation of s. 52(1) and the principle of constitutional supremacy. In effect, s. 52(1) renders a law invalid or “null and void” retrospectively and prospectively. As a result, when a superior court “discovers” that legislation is unconstitutional, absent an appeal, the legislation is null and void for all future cases. In support of this argument, he points specifically to the judgment of Spies J. in *McCaw* who decided she was bound by a previous judgment of her court in *Dunn* declaring that s. 33.1 was unconstitutional where the Crown had chosen not to appeal. Spies J. relied specifically on *Ferguson* for this conclusion: “To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books” (*Ferguson*, at para. 65, cited by Spies J. in *McCaw*, at para. 60).

[51] I respectfully disagree.

[52] Understanding the comments of this Court in *Ferguson* requires the reader to recall the context in which that case was rendered. The Court rejected the argument, in connection with the application of mandatory minimum sentences, that individual exemptions be granted by judges from otherwise unconstitutional laws. McLachlin C.J. sought to underscore, in understandably strong language, that a s. 52(1) declaration did not operate on a case-by-case remedial basis as would a constitutional remedy available under s. 24(1) of the *Charter*, but instead that the issuing court’s declaration that the law was of no force or effect was applicable *erga omnes*. The impugned legislation was

not to be applied, as a matter of course, to some litigants and not others according to judicial discretion (see *Ferguson*, at para. 35).

[53] That said, *Ferguson* does not change the fact that the declaration remains an exercise of judicial power by which a judge determines a question of law. As such, the determination of that question of law is binding *erga omnes* as a matter precedent, according to the ordinary rules of *stare decisis*, and not because that law has been truly removed from the statute books (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. I.54). Judges, of course, do not have that latter power. To suggest that, by its use of a figure of speech, this Court lost sight of this is, in my view, a mistaken reading of the case. I note that some scholars have similarly commented upon the formulation of the observations in *Ferguson* and like observations made by this Court as to the effect of a s. 52(1) declaration (see, e.g., Marcotte, at pp. 13-14 and 16-17; Pinard, at p. 349). Indeed *Ferguson* points to a plain understanding that the declaration issued under s. 52(1) is the exercise of judicial power that has an *erga omnes* vocation. I read the occasional references to s. 52(1) as judgments *in rem* in the cases (see, e.g., *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, at para. 27), in the same way. A judgment *in rem* applies beyond the immediate parties but, ultimately, even in the context of a s. 52(1) declaration, it remains a judgment: an exercise of judicial power that determines a question of law (*Coquitlam (City) v. Construction Aggregates Ltd.* (1998), 65 B.C.L.R. (3d) 275 (S.C.), at paras. 11-17, aff'd 2000 BCCA 301, 75 B.C.L.R. (3d) 350, leave to appeal dismissed, [2001] 1 S.C.R. ix, cited in Marcotte, at p. 14, fn. 64; see also L. Sarna, *The Law of*

Declaratory Judgments (4th ed. 2016), at p. 158). It is binding precedent, to be sure, but within the proper limits of the doctrine of *stare decisis*.

[54] I am thus content to read *Ferguson* as a useful figure of speech rather than take what the Court said in literal terms. McLachlin C.J. sought to show, in connection with the dispute as to remedy before the Court in that case, that under s. 52(1), as opposed to s. 24(1) of the *Charter*, the law was unconstitutional *erga omnes* and not on a case-by-case basis. At a technical level, it is true that the explanation for that is rooted in s. 52(1), as other cases have suggested. But ultimately, that effect requires the exercise of judicial power to declare the law to be unconstitutional. And the exercise of that power requires the judge to make a determination of an ordinary question of law: by interpreting the impugned law and the relevant provisions of the Constitution, whether the impugned law is inconsistent with Canada's supreme law. If so, then the law is, of course, of no force or effect for all future cases, insofar as that judicial declaration made under s. 52(1) by a superior court is binding on other courts and within the right confines of the law relating to precedent. Other decisions of this Court that use the language of "striking out" or "striking down" or "severing" statutory text should be understood in a similarly figurative manner, rendering the text merely inoperative pursuant to s. 52(1) as opposed to altering or repealing the text in the literal sense (see *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 94, and *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, at para. 67, cited in Pinard, at pp. 331-34; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 695; Gervais, at p. 530; see also *Windsor (City) v. Canadian Transit*

Co., 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 70; *R. v. Lloyd*, 2016 SCC 130, [2016] 1 S.C.R. 13, at para. 15; P. W. Hogg and A. A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997), 35 *Osgoode Hall L.J.* 75, at p. 100).

[55] Similarly, the principle from *Martin* that the “invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1)” must be understood in its entire context (para. 28). *Martin* concerned the ability of administrative tribunals to consider the constitutionality of provisions of their enabling statutes (para. 27). Gonthier J. determined that an administrative tribunal empowered to consider and decide questions of law through its enabling statute must also have the power to determine a provision’s consistency with the *Charter* because its constitutionality is a question of law (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 6:3). Such a determination is not binding on future decision-makers (paras. 28 and 31). Importantly, Gonthier J. added that only through “obtaining a formal declaration of invalidity by a [superior] court can a litigant establish the general invalidity of a legislative provision for all future cases” (para. 31), a point taken up in later cases of this Court (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 153; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, at paras. 43-44; *Ontario (Attorney General) v. G*, 2020 SCC 38, at para. 88). In other words, it is the constitutional determination of a superior court judge that binds future decision makers (*R. v. Albashir*, 2021 SCC 48, at paras. 64-65). The inconsistency spoken to in s. 52(1) is revealed through litigation,

specifically the judgment that declares the inoperability of the impugned law. The doctrine of *stare decisis* extends the effect of that judgment beyond the parties to the case, *erga omnes* within the province at least — subject to the limits of the doctrine itself. The issue in these appeals concerns the binding nature of such a judgment, and, in my view, consonant with our jurisprudence, a s. 52(1) declaration establishes unconstitutionality “for all future cases” through the authority of the judgment that makes that declaration. I agree with Paciocco J.A., at para. 34 of the judgment in appeal, that Gonthier J. was not seeking to alter the principles of *stare decisis* in *Martin*.

[56] I add that this explanation does not reduce the declaration to an individual remedy, as some interveners suggest. While it is true that *stare decisis* pertains to the reasons given by a court and a s. 52(1) declaration is a remedy, the reasons explain the status of the impugned law in terms of its consistency with the Constitution. The constitutional status of the law is, as I say, a question of law. The scope of the legal reasoning extends beyond the individual claimant, with effect beyond the parties flowing from the binding character of the judgment as a matter of precedent (*Albashir*, at para. 65). The granting of a personal remedy under s. 24(1), in contrast, is a highly factual exercise, involving the application of law to a specific context — that someone has obtained a s. 24(1) remedy in a case says very little about whether a subsequent claimant is entitled to the same relief (*Ferguson*, at paras. 59-61; *Albashir*, at para. 65).

[57] In other words, in *McCaw*, Spies J. was right to conclude she was not free to ignore prior decisions but, with respect, she arrived at that conclusion for what

appears to be the wrong reason (para. 76). It was right to say that, in considering whether to follow *Dunn*, the court was obliged to consider s. 33.1 as having been declared, by a judge of her court, as unconstitutional. But the result of that declaration was not that s. 33.1 was “off the books” (it remains of course on the books until Parliament chooses to remove it) (para. 76). Spies J. was bound to follow precedent because as a matter of horizontal *stare decisis*, *Dunn* was binding on courts of coordinate jurisdiction in the province as a matter of judicial comity, unless an exception to horizontal *stare decisis* was established. It was true that s. 33.1 was of no force and effect. It was true that the declaration in *Dunn* applied not just to the parties in that case but to all future cases. But, with respect, it was wrong to say that “judicial comity has no relevance to the issue before me” (*McCaw*, at para. 76). If she had concluded that *Dunn* had been rendered *per incuriam* (“through carelessness” or “by inadvertence”), for example, it would not have been binding on the court in *McCaw* based on the ordinary rules of *stare decisis* as interpreted in *Spruce Mills*. Indeed, as suggested by this Court in *Martin*, Spies J. could not apply an invalid law. It is certainly true, as suggested in *Ferguson*, that she had “no discretion” to do so (para. 35). Yet Spies J. was bound, as a matter of precedent, by the prior judgment of a court of coordinate jurisdiction to consider s. 33.1 to be unconstitutional, insofar as the doctrine of horizontal *stare decisis* so required.

[58] By contrast, in Mr. Chan’s case, Boswell J. decided, as a matter of discerning applicable and binding precedent, that *Dunn* did not bind him. While he may have erred in respect of his explanation as to why *Dunn* was not binding, he was right

to consider the matter from the point of view of binding precedent and the doctrine of horizontal *stare decisis*.

[59] I would add — and here I likely part company with the Court of Appeal in the present case — that the same principles apply to judicial declarations made by this Court under s. 52(1). I respectfully disagree with the view that, as the apex court in the Canadian judicial system, the Supreme Court of Canada is invested with a special mandate to strike laws from the books. The judges of this Court are judges, not legislators. If it is true that the declarations of this Court under s. 52(1) have a qualitatively different effect than declarations made by judges of other courts, it is on the basis of vertical *stare decisis* — the idea that other courts are bound to follow precedent set by higher judicial authority — and not because the Constitution has invested the judges of this Court with a power that is in some way non-judicial (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, for a related expression of this same idea).

(3) The Role of Federalism and the Rule of Law

[60] The principle of constitutional supremacy cannot dominate the analysis of s. 52(1) to the exclusion of other constitutional principles. Mr. Sullivan points to the idea that an unconstitutional law is invalid from the moment it is enacted. But the strict enforcement of such a principle “cannot easily be reconciled with modern constitutional law” (*Albashir*, at para. 40). Instead, it is subject to a number of exceptions and s. 52(1) must be read “in light of all constitutional principles” (*Albashir*, at paras. 40 and 42; *G*, at para. 88). In *Albashir*, my colleague Karakatsanis J. explained

that declarations of unconstitutionality are generally retrospective, consistent with the notion that a law is unconstitutional from its enactment. However, other constitutional principles may require a purely prospective declaration of unconstitutionality or a suspended declaration. Similarly, the legal effect of a s. 52(1) declaration by a superior court must be defined with reference to constitutional supremacy, the rule of law, and federalism.

[61] It is often said there are four fundamental organizing precepts of the Constitution: federalism, democracy, constitutionalism and the rule of law and respect for minorities (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 32, 43 and 49). Of particular importance in the context of s. 52(1), the principle of constitutional supremacy must be balanced against federalism and the rule of law (see *Albashir*, at paras. 30 and 34). This point has been neglected by Mr. Sullivan and some of the interveners who argue that a declaration of unconstitutionality has the effect of rendering a law null and void as “against the world” without regard for the territorial limits of the administration of justice within a province. Yet even in *McCaw*, Spies J. understood that effect to be limited to the province (para. 77). Author Mark Mancini acknowledges that this is linked to a proper understanding of s. 96 of the *Constitution Act, 1867*, which explains that because superior courts operating “within the province” only have powers within the province, courts of one province are not bound by decisions of courts of another province (“Declarations of Invalidity in Superior Courts” (2019), 28:3 *Const. Forum* 31, at p. 35, relying on *Wolf v. The Queen*, [1975] 2 S.C.R. 107; see also Gervais, at p. 561; Brun, Tremblay and Brouillet, at para. I.106). I agree.

[62] Federalism prevents a s. 52(1) declaration issued within one province from binding courts throughout the country: indeed, to allow a declaration of unconstitutionality issued by a superior court in British Columbia to bind a superior court, much less an appellate court, in Quebec or Alberta would be wholly inconsistent with our constitutional structure (see, e.g., *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 70). It cannot be the case that the supremacy clause compels this outcome, through the simple operation of s. 52(1) (see C.A. reasons, at para. 35). I understand this to be a major obstacle to Mr. Sullivan’s argument, not just as a matter of the territorial scope of the effect of s. 52(1) declarations, but in respect of the theoretical basis for arguing why and how they would operate outside the confines of the ordinary rules of *stare decisis*. If the provision of s. 33.1 was truly “off the books” because a s. 52(1) declaration resulted in it being considered null and void, it is hard to explain why — not least from the perspective of the accused in another province — it would be null and void in one part of the country and not another.

[63] The better view is that s. 33.1 is not null and void, but inoperative by reason of a determination of law made by a judge. That determination is binding, within the province, unless there is valid reason to depart from it. The accused is free to make that argument and a court of coordinate jurisdiction is not irretrievably bound by the prior decision within the province. Needless to say, the declaration of unconstitutionality made by a superior court in one province may be followed in another province because it is persuasive (see, e.g., *Parent v. Guimond*, 2016 QCCA 159, at paras. 11 et seq. (CanLII); Brun, Tremblay and Brouillet, at para. I.105). Thus, I reject the arguments

from Mr. Sullivan and the interveners that a s. 52(1) declaration is of such a unique legal character that, once a declaration is issued anywhere in the country, its effect is that the impugned legislation is “no longer in the system” from coast to coast. Instead, a s. 52(1) declaration is the end-result of a judge’s ability to resolve questions of law and should be observed by courts of coordinate jurisdiction within the province as a matter of *stare decisis*: nothing more or less.

[64] It follows there is no supplementary power held by courts when issuing a declaration of unconstitutionality beyond the strictures imposed by the rules of *stare decisis*. Precedent requires judges to examine prior judicial decisions, examine the *ratio decidendi* in order to determine whether the *ratio* is binding or distinguishable and, if binding, whether the precedent must be followed or departed from (see M. Rowe and L. Katz, “A Practical Guide to *Stare Decisis*” (2020), 41 *Windsor Rev. Legal Soc. Issues* 1, at pp. 8-12; D. Parkes, “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2006), 32 *Man. L.J.* 135, at p. 141; see also *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 71). Adherence to precedent furthers basic rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 137; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), at paras. 118-21). It helps ensure judges decide cases based on shared and general norms, rather than personal predilection or intuition (J. Waldron, “Stare Decisis and the Rule of Law: A Layered Approach” (2012), 111 *Mich. L. Rev.* 1, at pp. 22-23). The rule of law itself

has constitutional status, recognized in the preamble of the *Charter*. It “lie[s] at the root of [Canada’s] system of government” (*Reference re Secession of Quebec*, at paras. 32 and 70).

[65] Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province, and applies to a ruling on the constitutionality of legislation as it does to any other legal issue decided by a court, if the ruling is binding. While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally (Parkes, at p. 158). A constitutional ruling by any court will, of course, bind lower courts through vertical *stare decisis*.

[66] *Stare decisis* brings important benefits to constitutional adjudication that balance predictability and consistency with changing social circumstances and the need for correctness. As Robert J. Sharpe has observed, an incorrect constitutional decision by a court is more difficult to repair and may require legislative intervention (*Good Judgment: Making Judicial Decisions* (2018)). It would be unwise for a single trial judge in a province to bind all other trial judges. It is better to revisit precedent than to allow it to perpetuate an injustice (Sharpe, at pp. 165-68). Were s. 52(1) declarations strictly binding for all future cases, none of these benefits would be realized and our constitutional law would ossify. It is for these reasons that McLachlin C.J. asserted that “*stare decisis* is not a straitjacket that condemns the law to stasis” (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44). Horizontal *stare*

decisis attempts to balance stability and predictability against correctness and the orderly development of the law.

[67] In the absence of the supporting theory of *stare decisis*, *res judicata* on its own is not a helpful lens through which to analyse s. 52(1) declarations. *Res judicata* estops relitigation of disputed facts and disputed mixed questions of fact and law (B. Garner et al., *The Law of Judicial Precedent* (2016), at p. 374). The formal requirements of the two main branches of *res judicata*, cause of action and issue estoppel, will not be met in cases relitigating the constitutionality of a provision, for the simple reason that the parties will not be the same and neither will the facts. I acknowledge that courts also have inherent ability to prevent an abuse of process, which prevents relitigation of an issue where the strict test for *res judicata* is not met, in order to “[preserve] the integrity of the court’s process” (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 42).

[68] *Stare decisis* is the better framework to apply to litigation of constitutional issues, as it better guards against the relitigation of law, whereas *res judicata* guards against the relitigation of facts. First, abuse of process is not confined within a province and applying it to relitigation of the constitutionality of legislation would require a court to consider whether the parties are estopped from arguing the issue because a court in another jurisdiction has already decided on it. Even more remarkably, applying abuse of process to these types of cases would require a court of appeal to consider whether it should hear an appeal where a trial court in another province has already ruled on the

constitutionality of an issue. Second, *stare decisis* and the test from *Spruce Mills* serve as a better guide for trial judges to determine whether to depart from horizontal precedent. At its core, this question relates to the rule of law and judicial comity. Applying abuse of process would unnecessarily confuse this analysis. Finally, courts must adjudicate constitutional issues — applying abuse of process or *res judicata* would prevent a court from even considering new constitutional arguments or issues. This would be unwise and would undermine constitutional supremacy. It would also prevent the courts from adapting to changing social circumstances, a fundamental feature of our constitutional order.

[69] Lastly, I note that some have been critical of the fact that the constitutional status of s. 33.1 has remained unsettled before trial courts across the country more than twenty years after its enactment by reason, in part, of a lack of appeals by the prosecution. Section 33.1 was declared unconstitutional by several trial courts in different provinces and upheld in others over this period. Notwithstanding declarations of unconstitutionality by trial courts, the Crown continued to rely on the provision in subsequent cases. One intervener before us suggested that the Crown must appeal declarations of unconstitutionality at the first opportunity or accept the lower court's conclusion for all future cases. In the legal literature, some have said that it is unacceptable, in respect of federal legislation, for a provision to be unconstitutional in one province and not in another, or for a law to be applied inconsistently within a province because its constitutionality remains unsettled.

[70] While one might well expect the authorities to consider an appeal when faced with conflicting trial decisions relating to a law on which the prosecution continues to rely, I respectfully disagree with the view that the relevant attorney general is bound to appeal declarations of unconstitutionality in criminal matters such as these. It is true that when put on notice that the constitutionality of a provision has been challenged, the attorney general has the “opportunity” to defend the impugned law and appeal a declaration of unconstitutionality where an appeal does lie (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 19; see also *R. v. McCann*, 2015 ONCA 451, at para. 6 (CanLII)). Yet however desirable uniform treatment of the substantive criminal law might be within or even across provinces, the decision to appeal remains within the discretion of the attorney general, who acts independently in deciding the question, in keeping with its authority to pursue the public interest (see, e.g., M. Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813, at pp. 819 and 825; K. Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006), 31 *Queen’s L.J.* 598, at pp. 608-10, citing J. Ll. J. Edwards, *The Law Officers of the Crown* (1964), at p. 228).

[71] Barring an abuse of that authority, the attorney general is not answerable for the exercise of its discretion in such matters before the courts (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 44 and 46). The attorney general might well choose not to appeal a declaration of unconstitutionality, for example, if it felt that the matter is insufficiently developed in the decided cases for proper consideration by an

appeal court or that a conviction would best be left alone. For example, there was no appeal from the constitutional ruling in *Dunn* notwithstanding an appeal from sentence (see, e.g., *R. v. Dunn* (2002), 156 O.A.C. 27 (C.A.); see also *R. v. Jensen* (2005), 74 O.R. (3d) 561 (C.A.)). That said, unsettled constitutional law, “and the uncertainty and unpredictability that [can] result”, may of course be a matter of serious consequence (*Ferguson*, at para. 72, cited in *Nur*, at para. 91).

[72] Before us, it was argued that the peculiar circumstances of this case highlight that the constitutional status of s. 33.1 remained unsettled for a significant period of time. It is not, of course, the role of this Court to instruct the Attorney General of Canada in the exercise of its prosecutorial discretion or the other tools it has at its disposal in the exercise of its charge. I do note that the Attorney General of Canada itself has written that “the Attorney General may conclude that it is in the public interest to appeal a *Charter* decision to the Supreme Court of Canada in order to allow for a pan-Canadian determination of the legislation’s constitutionality, as well as a pan-Canadian interpretation of the relevant *Charter* right” (Department of Justice Canada, *Principles Guiding the Attorney General of Canada in Charter Litigation* (2017), at p. 10). In making these comments, I acknowledge the constitutional and practical constraints on the office of the attorney general in the pursuit of its role as the “protector of the public interest” in the proper functioning of the criminal justice system (see, e.g., *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 27-28; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616).

(4) Proper Approach to Horizontal *Stare Decisis*

[73] Horizontal *stare decisis* applies to decisions of the same level of court. The framework that guides the application of horizontal *stare decisis* for superior courts at first instance is found in *Spruce Mills*, described by Wilson J. as follows (at p. 592):

- . . . I will only go against a judgment of another Judge of this Court if:
- (a) Subsequent decisions have affected the validity of the impugned judgment;
 - (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
 - (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[74] The *Spruce Mills* criteria have been followed in numerous cases across Canada. However, the analytical framework has, at times, been blurred and the criteria have occasionally been of difficult application. Varying standards have been invoked to define when departure from prior precedent is appropriate. For example, some have held that a prior decision can be ignored if it is “plainly wrong” (*R. v. Green*, 2021 ONSC 2826, at paras. 9 and 24 (CanLII)), when there is “good reason” for doing so (*R. v. Kehler*, 2009 MBPC 29, 242 Man. R. (2d) 4, at para. 42), or in “extraordinary circumstances” (*R. v. Wolverine and Bernard* (1987), 59 Sask. R. 22 (Q.B.), at para. 6). The standards of “plainly wrong”, “good reason”, and “extraordinary circumstances” are qualitative tags susceptible of extending to almost any circumstance and do not provide the same precise guidance that *Spruce Mills* does (see S. Kerwin, “*Stare Decisis* in the B.C. Supreme Court: Revisiting *Hansard Spruce Mills*” (2004), 62

Advocate 541, at p. 543, fn. 33). These terms should no longer be used. In particular, the phrase “plainly wrong” is a subjective term and suggests that a judge may depart from binding precedent if they disagree with it — mere personal disagreement between two judges is not a sufficient basis to depart from binding precedent. The institutional consistency and predictability rationales of *stare decisis* are undermined by standards that enable difference in a single judge’s opinion to determine whether precedent should be followed. It is also not the case that a court can decide a question of law afresh where there are conflicting decisions.

[75] The principle of judicial comity — that judges treat fellow judges’ decisions with courtesy and consideration — as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam (“through carelessness” or “by inadvertence”); or

3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[76] First, a judge need not follow a prior decision where the authority of the prior decision has been undermined by subsequent decisions. This may arise in a situation where a decision has been overruled by, or is necessarily inconsistent with, a decision by a higher court (see Rowe and Katz, at p. 18, citing Kerwin, at p. 542).

[77] Second, a judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a circumstance generally understood to be “rare” (see, e.g., *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, 4 B.C.L.R. (6th) 370, at para. 132). The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment (Rowe and Katz, at p. 19).

[78] Third and finally, a judge may depart where the exigencies of the trial required an immediate decision without the opportunity to consult authority fully and thus the decision was not fully considered. An unconsidered judgment is not binding on other judges (Rowe and Katz, at p. 18, citing *Spruce Mills*, at p. 592).

[79] These criteria define when a superior court at first instance may depart from binding judgment issued by a court of coordinate jurisdiction and apply equally to a prior ruling on the constitutionality of legislation. Where, as here, a judge is faced with conflicting authority on the constitutionality of legislation, the judge must follow the most recent authority unless the criteria above are met. In such a situation, the judge must, in determining whether the prior decision was taken *per incuriam*, consider whether the analysis failed to consider a binding authority or statute relevant to the legal question.

[80] To be plain: these criteria do not detract from the narrow circumstances outlined in *Bedford*, at paras. 42-45, describing when a lower court may depart from binding vertical precedent.

[81] I will now turn to whether it was appropriate for the trial judge in Mr. Chan's case to depart from *Dunn* and decide the constitutionality of s. 33.1 afresh.

[82] Application of the doctrine of horizontal *stare decisis* in Mr. Chan's case illustrates how the *Spruce Mills* criteria should work in practice. At the time of Boswell J.'s constitutional ruling, there were four known decisions from the Ontario Superior Court, three of which held that s. 33.1 was unconstitutional. The most recent of these was *Fleming*. *Fleming* relied wholly on *Dunn* and, as a result, it is most appropriate to apply the *Spruce Mills* criteria to *Dunn*.

[83] Boswell J. cited the correct principles from *Spruce Mills* but, respectfully, erred in applying them. First, he concluded that he “[did] not feel constrained to follow one school of thought more than the other” because trial courts across the country had expressed different views on the constitutionality of s. 33.1 (para. 58). The conventions of horizontal *stare decisis* apply within the province and so the trial judge was required to consider the *Spruce Mills* criteria with specific reference to previous rulings within Ontario. The presence of conflicting decisions is not a reason to sidestep the *Spruce Mills* analysis. Second, in the Application to Re-open the Constitutional Challenge, he concluded that *McCaw* — which held that it was bound by *Dunn* — was “plainly wrong” (paras. 14 and 34). The “plainly wrong” standard no longer adequately summarizes the whole of the applicable *Spruce Mills* criteria.

[84] Instead, Boswell J. should have looked to the substance of *Dunn* to determine whether it had been overruled by a higher court, had been decided *per incuriam*, or had been taken in exigent circumstances. That would have revealed that *Dunn* did not engage whatsoever with the earlier Ontario decision in *R. v. Decaire*, [1998] O.J. No. 6339 (QL) (C.J. (Gen. Div.)), that upheld the constitutionality of s. 33.1. Since *Dunn* did not apply the *Spruce Mills* criteria to determine whether it was permissible to depart from *Decaire*, *Dunn* was a decision *per incuriam* and did not need to be followed. The trial judge should have then reviewed the substance of *Decaire* to determine whether that decision should be followed based on the *Spruce Mills* criteria. That would have revealed that *Decaire* considered the appropriate statutes and authorities in reaching the conclusion that s. 33.1 infringed ss. 7 and 11(d) of the

Charter but was upheld under s. 1. There is also no indication that *Decaire* was rendered in exigent circumstances. The trial judge therefore should have followed *Decaire* in the constitutional ruling. Of course, on appeal, the Court of Appeal was not bound to follow *Decaire* or any other first instance superior court decision.

[85] Finally, it bears recalling that *McCaw* was decided shortly after the constitutional ruling in Mr. Chan's case. The court in *McCaw* did not have the benefit of Boswell J.'s reasons in Mr. Chan's case for upholding s. 33.1, as the pre-trial constitutional decision had not yet been published while awaiting possible jury deliberations (Application to Re-Open Constitutional Challenge, at para. 9). In circumstances such as this, where a court had no practical way of knowing that the earlier decision existed, the judgment will not bind a subsequent court, unless it has been brought to the court's attention or the court is otherwise aware of it (see Kerwin, at p. 551).

[86] To summarize, a court is required by the principles of judicial comity and horizontal *stare decisis* to follow a binding prior decision of the same court in the province. A decision may not be binding if it is distinguishable on its facts or the court has no practical way of knowing it existed. If it is binding, a trial court may only depart if one or more of the *Spruce Mills* exceptions apply.

[87] I will now turn to Mr. Chan's cross-appeal.

B. *Is There Jurisdiction to Hear Mr. Chan's Cross-Appeal?*

[88] Mr. Chan argued in his application for leave to cross-appeal that s. 695 of the *Criminal Code* provides this Court with the jurisdiction to hear his cross-appeal, which allows it to make any order that a court of appeal “might have made”. He points to *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, where this Court granted leave to an accused’s cross-appeal and entered an acquittal in place of a new trial. I disagree. In my view, his application for leave to cross-appeal should be quashed for want of jurisdiction.

[89] Sections 691 and 692 of the *Criminal Code* set out the jurisdiction of this Court to hear criminal appeals brought by criminal accused. An accused may appeal where their conviction for an indictable offence has been confirmed by the Court of Appeal (s. 691(1)) or where acquittal at trial has been set aside by the Court of Appeal (s. 691(2)). Sections 691(1) and (2), along with s. 692 (which has no bearing on this case), represent the whole of an accused’s express statutory right to appeal when their conviction has been affirmed or their acquittal set aside by a Court of Appeal. In circumstances like those of Mr. Chan, where an accused, having been convicted of an indictable offence at trial, is granted a new trial, s. 691 does not provide a route of appeal to this Court.

[90] There is no other statutory route for Mr. Chan to appeal the Court of Appeal’s order of a new trial. Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, which does give this Court jurisdiction to hear an appeal of a final order of a

Court of Appeal, cannot ground jurisdiction for a cross-appeal by Mr. Chan because s. 40(3) precludes it:

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or *setting aside* or affirming *a conviction* or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

In other words, where a person is convicted of an indictable offence but subsequently has that conviction set aside, there is no right of appeal to this Court under s. 40 (see *R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 18). The combined effect of s. 40(3) and ss. 691 and 692 “excludes many criminal appeals from the ambit of s. 40(1)” (*R. v. Shea*, 2010 SCC 26, [2010] 2 S.C.R. 17, at para. 3, per Cromwell J.).

[91] Respectfully, *J.F.* does not assist Mr. Chan. The parties in *J.F.* did not make submissions on whether the accused in that case had jurisdiction to cross-appeal. Where a case is heard but jurisdiction is not discussed, the case is not an authority that the Court has jurisdiction (*Saumur v. Recorder’s Court (Quebec)*, [1947] S.C.R. 492, at pp. 497-98). It is well understood that this Court’s jurisdiction is statutory — a prior decision of this Court which did not address jurisdiction cannot displace clear statutory language (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53).

[92] During oral argument, counsel for Mr. Chan also referred the Court to *R. v. Warsing*, [1998] 3 S.C.R. 579. In that case, the Court held that the British Columbia Court of Appeal did not have jurisdiction to order a limited new trial on the issue of not

criminally responsible on account of mental disorder because it would have restricted the accused's right to control his defence. This Court ordered a full new trial instead. *Warsing* is distinguishable here because it did not substitute an order for a new trial for an acquittal — it maintained the same order but varied the scope of the new trial. On the specific question of whether this Court has jurisdiction to hear a cross-appeal, *Warsing* is also distinguishable on the basis that no cross-appeal was filed. It was appropriate for the Court to rely on s. 695(1) in that case because it had jurisdiction to hear the appeal and it was merely varying the order which the Court of Appeal ought to have made. As s. 695(1) provides, this Court “may, on an appeal under this Part, 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”.

C. *Disposition of the Appeals*

(1) Mr. Chan

[93] Given the lack of jurisdiction to substitute an acquittal, it would be unwise to comment further on the substance of Mr. Chan's application to cross-appeal. Since this Court has held that s. 33.1 is unconstitutional and of no force or effect in *Brown*, Mr. Chan may avail himself of the defence of non-mental disorder automatism, should it be applicable on the facts. He will have the opportunity to lead evidence in that regard.

[94] Counsel for Mr. Chan submitted in oral argument that a stay of proceedings is warranted if there is no jurisdiction to hear the cross-appeal (transcript, at p. 154). If a retrial occurs, Mr. Chan argued, the Crown will very likely take the position that Mr. Chan is not criminally responsible by reason of a mental disorder — a position the prosecution forcefully opposed at his first trial. The evidence he led at his first trial to support the finding that he was not criminally responsible under s. 16, including highly personal evidence of his concussions, learning disabilities, and depression, would be used against him in his retrial. He argues that it is fundamentally unfair.

[95] Assuming without deciding that a stay could be ordered in such circumstances, I would decline to do so here. There is an insufficient record before the Court to order a stay of proceedings. I am unable to conclude, based on the nature of the proceedings below, that a stay is warranted. I hasten to add that a future trial judge may find otherwise if the evidence put forward and the nature of the proceedings warrant. A stay of proceedings may only be granted in the “clearest of cases”, where prejudice to an accused’s rights or to the judicial system is irreparable and cannot be remedied (*R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 52; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31, both quoting *R. v. O’Connor*, [1995] 4 S.C.R. 411, at paras. 68 and 82). The test for a stay has three components: 1) there must be prejudice to an accused’s fair trial right or to the integrity of the justice system that will be perpetuated or aggravated through a trial or its outcome; 2) there must be no alternative remedy capable of remedying the prejudice; 3) where it is unclear whether a stay is warranted after the first two steps, the court must balance the interests in favour of a

stay against the interest that society has in having a final decision on the merits (*Babos*, at para. 32).

[96] Mr. Chan's arguments with respect to the prejudice he might suffer relate to a future trial, not the proceedings below. I am unable to conclude, on the record before the Court, that Mr. Chan's right to a fair trial has been prejudiced. A trial judge is best positioned to determine whether such prejudice arises in the future and, if it does, what the appropriate remedy may be (*O'Connor*, at paras. 68 and 82). For example, a trial judge would be capable of excluding evidence if the Crown sought to marshal it in a prejudicial manner.

[97] I add that it remains an open question whether it would be in the public interest to proceed with Mr. Chan's prosecution again, or whether there is a reasonable prospect of conviction. This case is, to use the words of the trial judge, a tragic case with a tragic result. It is also true that Mr. Chan has been charged with serious violent crimes. The final decision on how to proceed rests with the Crown and in my view, this Court is not best placed to consider the matter further.

(2) Mr. Sullivan

[98] The trial judge found that Mr. Sullivan was acting involuntarily when he attacked his mother. The common law compels an acquittal in such an instance. He was nevertheless found guilty, due to the operation of s. 33.1. The Court of Appeal declared that s. 33.1 is of no force or effect, set aside the conviction, and substituted an acquittal.

As I concluded in *Brown*, the Court of Appeal was correct that s. 33.1 is unconstitutional. Mr. Sullivan established at trial that he was intoxicated to the point of automatism owing to his Wellbutrin overdose. Given that s. 33.1 is of no force or effect, I would confirm the conclusion of the Court of Appeal that Mr. Sullivan is entitled to acquittals.

VI. Conclusion

[99] I would dismiss the appeals. The application for leave to cross-appeal by Mr. Chan should be quashed for want of jurisdiction. In the result, I would confirm Mr. Sullivan's acquittals and the order of a new trial for Mr. Chan.

Appeals dismissed and application for leave to cross-appeal quashed.

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