In Sullivan, the SCC clarifies role of stare decisis in constitutional litigation

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The Supreme Court of Canada's decisions in the companion appeals in *R v. Brown*[1] (*Brown)* and *R v. Sullivan*[2] (*Sullivan*) were released on May 13, 2022. In *Brown*, the Court invalidated on constitutional grounds s. 33.1 of the Criminal Code – a provision that prohibits an accused from asserting an automatism defence against "general intent" crimes. In *Sullivan*, the Court also held that a superior court's declaration of unconstitutionality under s. 52(1) of the *Constitution Act* would only be binding on judges within a province according to the rules of horizontal *stare decisis*. The criminal law bar is abuzz regarding the Court's ruling in *Brown* on section 33.1 and its implications on the prosecution of violent crimes against women. This article focuses on the Court's decision in the companion appeal in *Sullivan*, which holds significant consequences for constitutional litigation across the country.

What you need to know

- A superior court's declaration of unconstitutionality under section 52(1) of the *Constitution Act* will be binding on other superior court judges within the same province according to the ordinary rules of horizontal *stare decisis* and judicial comity. This can only be displaced in narrow prescribed circumstances.
- Due to the operation of the constitutional principle of federalism, a section 52(1) declaration of unconstitutionality by a superior court judge will not be binding on superior court judges in other provinces, although the reasons may be persuasive.

Facts and trial decisions

The decision in *Sullivan* involved appeals of two accused heard together – David Sullivan and Thomas Chan – who each argued that their violent actions were involuntary due to extreme intoxication akin to automatism.[3] Chan's case revealed inconsistent conclusions in the lower courts about how *stare decisis* can and should be applied to declarations of unconstitutionality.

David Sullivan

Sullivan ingested 30 to 80 tablets of Wellbutrin in a suicide attempt, a drug known to have psychosis as a side effect. Believing his mother was an alien, he stabbed her several times and injured her. Sullivan was charged with aggravated assault and assault with a weapon, among other offences.

The trial judge found as a fact that Sullivan experienced a state of non-mental disorder automatism due to his ingestion of Wellbutrin. This resulted in his actions being involuntary. However, section 33.1 of the *Criminal Code* (section 33.1)[4] prohibited Sullivan from relying on his self-induced automatism as a defence to the charges. This section prohibits an accused charged with (threatening) the interference of another person's bodily integrity from defending against the charge by arguing that the act was involuntary or unintentional because it was committed in a state of self-induced extreme intoxication akin to automatism. Sullivan was found guilty of several charges at trial.

Thomas Chan

Chan consumed magic mushrooms with his friends. Unlike past uses of magic mushrooms, he became scared and spoke gibberish. Chan broke into his father's house, stabbed his father to death, and seriously injured his father's partner. He was charged with manslaughter and aggravated assault. Chan challenged the constitutionality of s. 33.1, arguing the trial judge was bound by other decisions of the same court declaring s. 33.1 unconstitutional. The trial judge concluded he was not bound by the other decisions and upheld s. 33.1. Like Sullivan, Chan was not permitted to rely on the defence of automatism at trial, and he was convicted of manslaughter and aggravated assault.

Court of Appeal for Ontario

The Court of Appeal for Ontario heard Sullivan's and Chan's appeals together and allowed both appeals. Section 33.1 was declared unconstitutional, and Sullivan and Chan were permitted to raise the defence of automatism. Because the trial judge had found as a fact that Sullivan had been in a state of non-mental disorder automatism, the Court entered an acquittal. The trial judge had made no such finding for Mr. Chan, so the *Court* ordered a new trial.

With respect to the issue of *stare decisis*, the court found that declarations of unconstitutionality are binding on courts of the same level, subject to limited exceptions. The Crown appealed the Court's decision.

Supreme Court of Canada

Conflicting lower court jurisprudence on the constitutionality of s. 33.1 led to questions in the courts below as to the extent these superior court decisions were binding on other courts at the same level. The *Sullivan* appeal provided the Supreme Court of Canada an occasion to consider the principle of horizontal *stare decisis* with the primary question being the extent to which a superior court decision is binding on a judge of the same court.

The Supreme Court of Canada dismissed the Crown's appeal. In the companion case, *R v. Brown*,[5] the Court found that section 33.1 was unconstitutional and should be struck

down as having no force and effect. This finding was applied to Chan and Sullivan, allowing both to rely on the defence of automatism.

In *R v. Sullivan*, the Court addressed the remaining issue regarding the operation of *stare decisis*: to what extent is a superior court's declaration under section 52(1) of the *Constitution Act* – that a legislative provision has no force and effect because it is unconstitutional – binding on courts of coordinate jurisdiction?[6]

The Court clarified that the ordinary rules of horizontal *stare decisis* and judicial comity apply to declarations of unconstitutionality by superior courts within the same province.

First, Justice Kasirer explained for a unanimous court that *stare decisis* applies to a judicial determination under section 52(1) because this type of determination is a question of law. It assesses whether an impugned law is inconsistent with the Constitution and if so, to what extent the law is of no force and effect. This exercise is no different from questions of law outside of the constitutional context. Since all questions of law are constrained by *stare decisis*, the same applies to a section 52(1) declaration. Additionally, *stare decisis* balances stability and predictability against correctness and the orderly development of law in constitutional litigation.

Second, Justice Kasirer explained that the application of *stare decisis* to section 52(1) declarations only applies within a province. The legal effect of section 52(1) is constrained by federalism, which dictates that a superior court only has powers within its province of operation. It follows that horizontal *stare decisis* will apply to courts of coordinate jurisdiction and vertical *stare decisis* will bind lower courts – within the same province. Although not binding in other provinces, a decision from an extra-provincial court of coordinate jurisdiction may still be persuasive. Practically, the Court's decision underscores the importance for private litigants to consider retaining counsel with multi-jurisdictional expertise to consider nationwide precedents to advance the strongest case possible.

Applying the foregoing principles, Justice Kasirer clarified the following framework for determining whether a court is bound by an earlier section 52(1) declaration:

1. If a decision is distinguishable on its facts or the court had no practical way of knowing a decision existed[7], then the decision may not be binding.
2. If the court is faced with conflicting authority on the constitutionality of a legislative provision, the most recent authority will be binding.
3. If a decision is found to be binding, a trial court may only depart from applying the decision if one or more of the narrow exceptions set out in *Re Hansard Spruce Mills*[8] applies:
    a. The rationale of the earlier decision has been undermined by subsequent appellate decisions;
    b. Some binding authority in case law or some relevant statute was not considered; or,
    c. The earlier decision was not fully considered (for example, it was taken in exigent circumstances).

Applying the foregoing principles to Chan, the Supreme Court of Canada held that the pre-trial judge was bound by an earlier decision which found section 33.1 to be contrary to sections 7 and 11(d) but saved by section 1, because it considered appropriate

statutes and authorities, and there was no indication that one of the narrow exceptions in *Spruce Mills* applied. On appeal, the Court of Appeal for Ontario was not bound to follow any first instance superior court decision, and had appropriately reconsidered and determined that section 33(1) is unconstitutional.

Looking ahead – key takeaways

The *Sullivan* decision has broad implications for constitutional litigation across the country, but leaves some unanswered questions. The following are key issues to consider for future litigants and their counsel:

1. It remains to be seen to what extent the Court's ratio on horizontal *stare decisis* will be applied to superior court decisions other than section 52(1) declarations of invalidity. Although the Court's decision is focused on section 52(1), the Court's ratio – that prior decisions not distinguishable on their facts should be followed unless the strict *Spruce Mills* criteria are met – could be applied more broadly.
2. Superior court declarations of invalidity will generally be binding on other superior courts, but only in the same province. Public interest litigants seeking to challenge the constitutionality of legislation will need to carefully consider their strategy in terms of the province or provinces in which they bring their challenge.
3. Although not binding, constitutional declarations in other provinces may still be persuasive. It will be critical for counsel to have an eye on constitutional litigation and decisions from across the country when seeking relief under s. 52(1).

Footnotes

[1] *R v. Brown*, 2022 SCC 18.

[2] *R v. Sullivan*, 2022 SCC 19.

[3] Automatism is a state of unconsciousness that renders a person incapable of consciously controlling their behaviour while in that state (that is, so intoxicated or impaired that the individual has completely lost control of themselves).

[4] In 1995, Parliament enacted s. 33.1 in response to the Supreme Court of Canada's decision in *R v. Daviault*, [1994] 3 SCR 63 where the Court held that automatism may be asserted as a defence against "general intent" criminal offences.

[5] *R v. Brown*, 2022 SCC 18.

[6] The court also dealt with the issue of whether the Supreme Court of Canada had the jurisdiction to hear an accused's cross-appeal of an order of a new trial. This issue is beyond the scope of this bulletin.

[7] This is less relevant for civil litigation, in which court decisions are almost always accompanied by written reasons that other courts can readily access.

[8] *Re Hansard Spruce Mills Limited*,[1954] 4 DLR 590 (BC SC) [*Spruce Mills*].

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