A PRACTICAL GUIDE TO *STARE DECISIS*

The Honourable Justice Malcolm Rowe and Leanna Katz*

I. *STARE DECISIS*: AN INTRODUCTION

The doctrine of *stare decisis* asks judges to look back to cases that have been decided as a guide to judging the case before them. The term comes from the Latin phrase *stare decisis et non quieta movere*, which means "to stand by decisions, and not to disturb settled points."[1] *Stare decisis* is often described as incorporating a tension between certainty—on the one hand—and achieving a just result on the other. The idea of certainty and the correction of error (to achieve a just result) as competing forces was captured by the Supreme Court of Canada in 2012 in *Canada v Craig*: "The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct

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[1] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed, (St. Paul, Minn: Thomson Reuters, 2019) sub verbo "*stare decisis et non quieta movere*".

the error."[2] Legal scholar Wolfgang Friedmann characterized the "basic problem of any civilized legal system":

> All laws oscillate between the demands of certainty−which require firm and reliable guidance by authority−and the demands of justice, which require that the solution of an individual case should be equitable and conform to current social ideals and conceptions of justice. Every legal system must compromise between these two pulls; it must balance rigidity with flexibility.[3]

In what follows, we offer a guide to the Canadian approach to *stare decisis*.[4] We first explain its elements and then provide practical guidance on its application. We suggest that the competing demands of certainty and correctness yield a productive tension that helps to answer the questions: When does a precedent decide the case before a judge? And when should a judge distinguish or overturn precedent? The principles of *stare decisis* direct when to stay the course and when to set out, at least in part, in a new direction.

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[2] *Canada v Craig*, 2012 SCC 43 at para 27 [*Craig*].

[3] Wolfgang Friedmann, "*Stare Decisis* at Common Law and under the *Civil Code of Quebec*" (1953) 31:7 Can Bar Rev 723 at 723.

[4] This article focuses on the common law approach to *stare decisis* rather than the civil law approach; See Claire L'Heureux-Dubé, "By Reason of Authority or by Authority of Reason" (1993) 27:1 UBC L Rev 1 ("the civilian tradition favours the spirit and content of civil legislation as well as doctrine over strict adherence to judicial precedents" at 1); Albert Mayrand, "L'autorité du précédent au Québec" (1992) 28:2 RJT 771 ("Dans les pays de droit civil, le précédent est moins autoritaire. II ne commande pas, il recommande qu'on le suive. … En common law le précédent s'impose comme une règle, en droit civil il se présente comme un module proposé" at 773). Other scholars suggest that, in practice, the difference in the treatment of precedent in Canadian common law compared to civil jurisdictions is less significant; see D Neil MacCormick & Robert S Summers, eds, *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997), cited in Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) ("In theory, the attitude of the common law provinces [of Canada] regarding the authority of precedent remains different from that of Quebec. But in fact, these attitudes are now very similar, owing to the relaxation of the doctrine of stare decisis and, even in civil law countries, the considerable growth of the role of case-law" at 13, n 33).

We observe, reflecting on the principles of *stare decisis*, that the destination of the law is not an immutably fixed point. Over time—sometimes a very long time—the law evolves, not so much in its foundational concepts, but in the edifice erected, repaired, and, from time to time, rebuilt upon its enduring foundations. The doctrine of *stare decisis* is a guide to charting the appropriate path, based on the line of reasoning laid down in the law and the relevant circumstances. Properly understood and applied, the doctrine of *stare decisis* serves both aims of certainty and achieving a just result. As Justice Sharpe so aptly states:

> Precedent is a foundational principle of the common law. But the weight attached to precedent cannot be reduced to a set of mechanical rules. It is the starting point to legal analysis. For most disputes, precedent will be decisive. But the capacity of the common law to evolve is inconsistent with rigid, unbending adherence to past decisions. We must keep in mind that the ultimate purpose of precedent is to foster certainty, predictability, and coherence in the law. Blind adherence to *stare decisis* may not only perpetuate an unjust rule but may also conflict with the very purpose of the doctrine itself.[5]

We begin by providing some background on the doctrine of *stare decisis,* in particular, its rationales and history.

a. Rationales for stare decisis

The oft-cited rationales for *stare decisis* concern "consistency, certainty, predictability and sound judicial administration."[6] As Justice Laskin stated, "[a]dherence to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty ... People should be able to know the law so that they can conduct themselves in accordance with it."[7]

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[5] Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 168.
[6] *David Polowin Real Estate Ltd v The Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161 at 191–92, 255 DLR (4th) 633 (CA) [*Polowin*].
[7] *Ibid* at 192.

The justification for *stare decisis* often sounds in the theme of keeping the law settled. In other words, by adhering to precedent, judges keep the law certain and predictable.[8] Yet certainty as to the law and predictability as to the outcome—while related—are conceptually distinct. Each case raises a new factual scenario, which makes it difficult to predict the outcome—no matter how certain the law may be. Furthermore, it is not necessarily desirable to apply precedent rigidly in the name of certainty and predictability. As Lord Atkin stated: "Finality is a good thing but justice is a better."[9]

Other rationales for *stare decisis* include: administrative efficiency (limiting what goes on the judicial agenda and improving efficiency by applying cases where the legal question has been decided in the past);[10] judicial humility (knowing "we are no wiser than our ancestors" and perhaps made wiser by learning from how they have decided past cases); [11] and judicial comity (judges treating fellow judges' decisions with courtesy and consideration).[12] The importance of each rationale varies by level of court.

The means by which judges maintain the law as settled is by treating like cases alike. This allows individuals to plan their affairs, lawyers to advise clients, and citizens to interact with the legal system based on a set of reasonable expectations.[13] Aristotle considered it to be a basic element of justice to treat like cases alike.[14] Philosopher Jeremy Waldron frames the concern with keeping the law settled in terms of coherently articulating and applying norms: "[it] is not just about consistency. Instead, it is a principle that commands judges to

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[8] Duxbury, *supra* note 4 at 159.

[9] *Ras Behari Lal v King Emperor*, [1933] UKPC 60, [1933] All ER Rep 723 at 726 (PC), cited in Joseph J Arvay, Sheila M Tucker & Alison M Latimer, "Stare Decisis and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?" (2012) 58:2 SCLR (2d) 61 at 68, online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/sclr/vol58/iss1/2/>.

[10] Jeremy Waldron, "*Stare Decisis* and the Rule of Law: A Layered Approach" (2012) 111:1 Mich L Rev 1 at 4, citing Henry Paul Monaghan, "Stare Decisis and Constitutional Adjudication" (1988) 88:4 Colum L Rev 723 at 744–52; Frederick Schauer, "Precedent" (1987) 39:3 Stan L Rev 571 at 572–73.

[11] Waldron, *supra* note 10 at 4.

[12] *Re Hansard Spruce Mills Ltd*, [1954] 4 DLR 590 at 592, [1954] BCJ No 136 (QL) (SC) [*Re Hansard*].

[13] Duxbury, *supra* note 4 at 162.

[14] *Ibid* at 36, citing Aristotle, *Nicomachean Ethics*, V 2 1131^{a}–1131^{b}.

work together to articulate, establish and follow general legal norms."[15] This framing recalls the historical view of *stare decisis.*

b. Historical view of stare decisis

Before turning to the how-to guide, a brief historical account of *stare decisis* can help illuminate our discussion. The doctrine of *stare decisis* began to take shape in England in the 18th century and crystallized as a rule in the late 19th century.[16]

Before that, common law judges were guided more generally by past experience. The 17th century view considered whether a decision fit coherently in the common law. Sir Matthew Hale said that the reason and certainty of the law depended on judges "keep[ing] a constancy and consistency of the law itself." Professor Neil Duxbury added, not in the sense of like cases being treated alike, but in judgments being consistent with the law as a whole.[17] Hale said of 17th century common law thought: although judicial decisions bind "as a Law between the Parties thereto . . . they do not make a Law properly so called, (for that only the King and Parliament can do)." While Hale did not think that individual rulings had the authority of law, "they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is."[18]

Before the recognition of the formal doctrine of *stare decisis*, the main constraint on legal decision-making was the view that "precedents and usages do not rule the law, but the law rules them" and its companion *non exemplis sed rationibus adjudicandum est*—judging follows reason not examples.[19] In other

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[15] Waldron, *supra* note 10 at 4.
[16] Duxbury, *supra* note 4 at 25.
[17] *Ibid* at 48–49, quoting Gerald J Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2:2 OUCLJ 155 at 178.
[18] *Ibid* at 50, citing Sir Matthew Hale, *The History of the Common Law of England* (Chicago: Chicago University Press, 1971 [1713]) at 45.
[19] *Ibid* at 51; see *Rust v Cooper*, (1777) 98 ER 1277 at 1279, (1777) 2 Cowp 629 (KB) [*Rust*].

words, judicial decisions were the best *evidence* of the law, rather than being the law itself.[20]

In the 18th and 19th centuries, precedent became the dominant form of authority in legal argument. Past decisions offered reasons for particular rules and doctrines.[21] The growth of the doctrine of *stare decisis* was related to the increase of law reports, which made prior cases more accessible and, thereby, more reliable sources of authority for courts to consider.[22]

While judges today consider themselves bound by precedent, *stare decisis* is not a constitutional or statutory requirement. Rather, precedents bind because judges "consider themselves to be bound by them, or at least bound to take account of them."[23] As Professor Carleton Kemp Allen said: "We say that [the judge] is bound by the decisions of higher Courts; and so he undoubtedly is. But … he places the fetters in his own hands…"[24] Thus, *stare decisis* is as important as it is today in part because judges have made it so.

II. THE ELEMENTS OF *STARE DECISIS*

Turning now to its elements, *stare decisis* consists of two conventions—the vertical and the horizontal. There is also the related matter of distinguishing between the *ratio decidendi* and *obiter dicta*.

a. The vertical and horizontal conventions

According to the vertical convention, lower courts must follow decisions of higher courts. This rule gives practical effect to the hierarchical court structure. In Canada, only the vertical convention of *stare decisis* is strictly binding. The horizontal convention, in contrast, provides that decisions from the same level

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[20] *Ibid*; see *Jones v Randall*, (1774) 98 ER 706, (1774) Lofft 383 (per Lord Mansfield, "precedent, though be evidence of law, is not law itself, much less the whole of the law" at 707).
[21] Duxbury, *supra* note 4 at 55–57.
[22] *Ibid* at 53–54.
[23] *Ibid* at 15.
[24] *Ibid* at 15, n 44, citing Carleton Kemp Allen, *Law in the Making*, 3rd ed (Oxford: Clarendon Press, 1939) at 247–48.

of court should be followed unless there is compelling reason not to do so.[25] As a related matter, decisions from courts outside the direct hierarchy of the decision-making court are persuasive rather than binding authority. For example, the British Columbia Court of Appeal and the Supreme Court of British Columbia are not bound to follow the Court of Appeal for Ontario, but those decisions may well assist the court in reaching a decision.[26]

b. What the case stands for: ratio decidendi versus obiter dicta

For all decisions, it is essential to identify the *ratio decidendi* and *obiter dicta* to understand whether and how the precedent applies. The Latin term *ratio decidendi* means "the reason for deciding" and *obiter dicta* means "something said in passing."[27] Courts are bound only to follow what was actually decided in earlier cases—that is, the *ratio decidendi*. Courts are not bound to follow *obiter dicta*, what was merely said in passing—as it is by definition not part of the reasoning by which the result was determined. Drawing the line between *ratio* and *obiter dicta* is a key, and at times challenging, aspect of working with the doctrine of *stare decisis*.

III. A GUIDE TO WORKING WITH THE DOCTRINE OF *STARE DECISIS*

Getting oriented: Determining which court made the decision

The initial step when working with the doctrine of *stare decisis* is to identify which court made the earlier decision. If it is a decision of a higher court, then the vertical convention applies, and if it is a decision of the same court, the horizontal convention applies. In either situation, the precedent is generally followed, unless it can be distinguished or should be overturned (of which more below). Working under the vertical or the horizontal convention, the first step

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[25] Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2006) 32:1 Man LJ 135 at 137.
[26] *Ibid* at 137–38.
[27] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed, (St. Paul, Minn: Thomson Reuters, 2019) sub verbo "*ratio decidendi*", "*dictum*".

is to ascertain what part of the decision is the binding *ratio decidendi* and what parts are *obiter dicta.*

Step 1: What does the case decide? Ratio versus obiter dicta

Having first considered what court made the decision, a lawyer, judge or law student looking to rely on the decision asks: what did the case decide? It is easy to state the rule that only the *ratio decidendi* is binding and all else is *obiter dicta*. However, drawing the line between the two is not always straightforward.

The Supreme Court of Canada addressed the difference between *ratio* and *obiter dicta* in *R v Henry*, describing the *ratio* as "generally rooted in the facts of the case" bearing in mind that "the legal point decided … may be … narrow … or … broad."[28] *Obiter dicta*, meanwhile, refers to statements in the reasons that are not necessary to dispose of the case. The key distinction is whether the relevant principle of law is the reason for the decision, or extraneous to the matter decided.[29]

Drawing the line between the *ratio* and *obiter dicta* is "a matter of argument and judgment."[30] Determining the *ratio* will often be straightforward. However, it may not be clear how to identify the *ratio* if a judge provides several lines of reasoning (sometimes in the alternative) for the result. Judges may also read a case differently and disagree about what principle the case establishes. Notwithstanding the difficulty on occasion of identifying the *ratio*, it is a necessary first step in working with precedent. The exercise of distinguishing between the *ratio* and *obiter dicta* allows navigating between when to keep the law settled and when to develop the law.[31]

What is considered to be binding tends to vary with the level of court. Lower courts are generally most involved with the facts of the case. Therefore, their decisions are read as deciding a matter based on the facts, often without

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[28] 2005 SCC 76 at para 57 [*Henry*].
[29] Duxbury, *supra* note 4 at 67, citing William Fulbeck, *Direction, or Preparative to the Study of Law* (London: Clarke, 1829 [1600]) at 237–38 (in 1600, William Fulbeck distinguished between 'the principal points' and the 'bye-matters' in a case, and 75 years later, Vaughan CJ argued that 'bye-matters' are of little or no consequence).
[30] Sharpe, *supra* note 5 at 149–50.
[31] *Ibid* at 150.

speaking to the law more broadly. A judge looking to a lower court decision must determine how to apply the *ratio* from that decision to the case before them.[32]

Intermediate appellate courts hear appeals on questions of law, but more generally on the proper application of the law to the facts of the case under appeal. The *ratio* may speak to a broader legal point, but often relates to the proper application of settled law, rather than to the making of new law (e.g. the creation of a precedent). That said, considered *obiter* from an intermediate appellate court should be respected, particularly when the court has surveyed the law with a view to clarifying it.[33]

Finally, Supreme Court of Canada decisions tend to address an area of law in greater depth. This is because of the leave process: in order for the Supreme Court to grant leave, the case must raise a matter of public importance. As such, Supreme Court decisions often reflect a consideration of broader legal questions and speak to the formulation of the law beyond what is required by the facts of the case. In this way, the Supreme Court plays more of a law-making role compared to other Canadian courts—not in the sense that legislatures make law, but rather by making definitive statements as to the meaning and operation of the law, statements which constitute precedents binding on all courts in the relevant jurisdiction, often the whole country.

To the question of how to read a court decision, a higher court decision that reflects a considered view of the law and is intended to provide guidance is seen as binding. This is based on the idea that the common law develops by experience. Lower courts apply the law to new facts and the common law accumulates wisdom to articulate legal principles, which develop over time. As Justice Sharpe states: "[i]t is through the crucible of the common law fact-specific method that we determine the precedential value of a prior decision."[34]

Justice Binnie in *R v Henry* addressed how to treat considered *obiter dicta* from the Supreme Court of Canada:

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[32] *Ibid* at 149.
[33] *Ibid* at 154.
[34] *Ibid* at 152.

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity.[35]

We offer the view, which we see in full accord with *Henry*, that to the extent a statement in a decision reflects the court's *considered* view of an area of law, it provides guidance that should be treated as binding. That is, where the Supreme Court turns its full attention to an issue and deals with it definitively, the concepts of *ratio* and *obiter* tend to lose significance. Similarly, where an issue is dealt with in passing, even where it is part of the *ratio*, we would see it as having weak precedential value. Often, when preparing reasons for decision, there is discussion not merely of what the court needs to decide in order to dispose of a given case, but of what further guidance can usefully be given with the case at hand as a vehicle for the purpose.

Drawing the line between *ratio* and *obiter* is a key step in deciding whether an earlier decision applies to, and governs, the case at bar. From the foregoing, one can see that this requires careful attention to a series of considerations.

Step 2: When to distinguish or overrule precedent?

If a court determines that it cannot or ought not follow a prior decision, it may either distinguish or overrule it. Distinguishing a prior decision means interpreting its *ratio* to show that it does not apply in the case before the judge.[36] Overruling, by comparison, is a far bolder step amounting to repealing an earlier

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[35] *Henry*, *supra* note 28 at para 57 (this statement was in response to perceived confusion following *Sellars v R*, [1980] 1 SCR 527 at 529–30, 110 DLR (3d) 629, where Justice Chouinard wrote that when the SCC had ruled on a question of law, though not necessary to dispose of the appeal, that ruling was binding on lower courts).

[36] Duxbury, *supra* note 4 at 27.

decision. Judges are expected to give reasons explaining why they departed from precedent.[37] Courts confine overruling to specific circumstances, discussed below.

a. Distinguishing precedent

Courts show that there is good reason not to follow a precedent by drawing a distinction and then explaining why the distinction is material.

Facts are important to determine whether to distinguish a prior decision or how far to follow it. That said, the same facts are unlikely to occur twice. As Friedmann states, "it does not often happen that a sash cord of a window breaks in identical circumstances and causes comparable injuries."[38] A precedent may not apply analogously if the factual scenario is sufficiently different. Justice Dickson said in a 1980 speech: "By the genius of distinguishing facts the courts escaped the folly of perpetuating to eternity, principles unsuited to modern circumstances."[39] So, one must ask, are the facts of the earlier case appropriate to analogize to the present case, or are they distinguishable?

Neil Duxbury describes there being two ways to distinguish precedent. First, distinguishing *between* cases—showing that factual differences between the prior case and the instant case make the *ratio* of the prior case inapplicable to the present case (as we are discussing in this section).[40] Second, distinguishing *within* a case, which involves differentiating the *ratio decidendi* from *obiter dicta* (as discussed above). To distinguish within a case, a court may take a different view of how to separate the material facts from the facts that are not material to a decision, or the court may make a particular ruling depend on the presence of a more extensive range of material facts (and in doing so, the

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[37] *Ibid* at 112, citing Schauer, *supra* note 10 at 580–81 (Schauer describes precedent as placing an "argumentative burden" on judges to explain how the precedent ought to be treated. Duxbury says the fact that a judge explicitly departs from a precedent might be considered evidence that the precedent has authority; precedents would be devoid of authority if judges felt no need to offer reasons for not following them).

[38] Friedmann, *supra* note 3 at 732.

[39] Sharpe, *supra* note 5 at 150, citing Brian Dickson, "The Role and Function of Judges" (1980) 14 L Soc'y Gaz 138 at 182.

[40] Duxbury, *supra* note 4 at 113.

precedent is less often applicable).[41] This is sometimes called "restrictive distinguishing." [42] A judge distinguishing a precedent in this manner has developed the law.[43]

Note the emphasis on *material* facts. In order to distinguish a case, a lawyer or judge must address, in a specific and structured way, why the facts are material to the decision. Often, this is not done. Failing to do so is a failure of effective advocacy, as this is an important way by which to persuade a court to find a prior decision either applicable or inapplicable.

Distinguishing a case generally does not disturb the authority of the precedent. Rather, it conveys that the case is "good but inapplicable law."[44] Overruling a case, by contrast, is a direct refutation of a precedent. Courts have limited overruling to specific circumstances; the rules differ for each level of court.

b. Vertical convention: Overruling precedent from a higher court

Under the vertical convention, lower courts are required to follow precedents from higher courts. This means that all appellate, superior, federal and provincial courts should follow decisions of the Supreme Court of Canada (as well as pre-1949 decisions of the Judicial Committee of the Privy Council that

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[41] *Ibid* at 115.

[42] Parkes, *supra* note 25 at 141–42, citing Paul Perell, "Stare Decisis and Techniques of Legal Reasoning and Legal Argument" (1987) 2:2–3 Leg Research Update 11, online: *CanLII* <commentary.canlii.org/w/canlii/2018CanLIIDocs161> (both authors point to the illustration of restrictive distinguishing in *Anns Merton v London Burough*, [1977] UKHL 4, which is cited as authority for the proposition that a municipality may be liable in negligence where it fails to properly inspect building plans. The case *Peabody Fund v Sir Lindsay Parkinson Ltd*, [1983] UKHL 5, added the requirement of a possible injury to safety and health—thus narrowing the scope of the municipality's liability, as defined in the *Anns* case).

[43] Duxbury, *supra* note 4 at 115 (this is not to say that judges distinguish a case because they seek to develop the law; rather they tend to distinguish in order to reach what they see as the right outcome).

[44] *Ibid* at 114–15 (although distinguishing may lead lawyers and judges to consider the authority of a case to be weakened; a precedent may come to lack authority because it is "very distinguished"); see also Patrick Devlin, *The Judge* (Oxford: Oxford University Press, 1981) at 92–3.

have not been overruled by the Supreme Court).[45] It is generally accepted that courts that are not final should follow precedent more strictly than final courts of appeal. Courts are bound by the decisions of courts higher in the judicial hierarchy, as well as their own prior decisions, aside from exceptional cases.

The vertical convention of *stare decisis* provides that judges should follow prior decisions even if they disagree with them. Lord Reid, following a common law decision from which he dissented, stated: "I still think the decision was wrong … But I think that however wrong or anomalous the decision may be it must stand … unless and until it is altered by Parliament."[46] In our view, this is preferable to repeating one's dissent each time the issue arises.[47] The practice of "anticipatory overruling", that is, where a lower court is of the view that the higher court will overrule its own precedent when given the opportunity, is inconsistent with vertical *stare decisis.* In effect, a court that pre-emptively "overrules" the higher court decision is refusing to follow precedent (a lower court could not overrule a decision of a higher court). While following an apparently incorrect decision may create a sense that a litigant will suffer an unjust result, it is a feature of our hierarchal system that the issue can make its way to the highest court at which point the law will develop.[48]

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[45] Parkes, *supra* note 25 at 138 (for the SCC, pre-1949 JCPC decisions operate based on a horizontal convention because the SCC is now the final court of appeal with the power to overrule its own decisions and those of the JCPC. See *Reference re Agricultural Products Marketing Act*, [1978] 2 SCR 1198, 84 DLR (3d) 257. Until 1966, the House of Lords held itself to be bound by its own prior decisions, but in 1966 assumed the power to refuse to follow its prior decisions (the House of Lords was replaced by the Supreme Court of the United Kingdom in 2005). The Privy Council never regarded itself as bound by its own prior decisions); see also Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2017) (supplement 2019) vol 1, ch 8.2.

[46] Sharpe, *supra* note 5 at 152, citing *Knuller (Publishing, Printing and Promotions) Ltd v DPP*, [1972] 2 All ER 898 at 903, [1972] 3 WLR 143, Lord Reid.

[47] *Ibid* (Justice Sharpe shares this view at 152).

[48] Parkes, *supra* note 25 at 144; Sharpe, *supra* note 5 at 167 (in *Canada v Craig*, 2011 FCA 22, the Federal Court of Appeal dealt with a case, *Moldowan v Canada*, [1978] 1 SCR 480, 77 DLR (3d) 112, where the interpretation of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) had been the object of criticism. The FCA had considered *Moldowan* in 2006 and decided not to follow it (in *Gunn v Canada*, 2006 FCA 281). The FCA 2011 panel decided that it was bound to follow its 2006 decision and not the SCC decision. The SCC in *Craig*, *supra* note 2, held the FCA was wrong in 2006 and 2011. It was for the SCC to overrule itself, and it did so. At paragraph 21, Justice Rothstein stated: "what the court in this case ought to have done was to

In recent years, the Supreme Court of Canada has provided guidance about when trial courts may depart from decisions of higher courts. Some scholars and judges have commented that the Court appears to be taking a more flexible approach to *stare decisis*.[49] In *Carter*, *Bedford*, and *Comeau*, the Supreme Court commented on vertical *stare decisis*. It is worth recounting what happened in each case in order to describe the state of the law.

In *Canada (Attorney General) v Bedford*,[50] the Court considered the constitutionality of *Criminal Code* prohibitions relating to prostitution (the prohibition on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution). The trial judge held that the earlier SCC advisory opinion in the 1990 *Prostitution Reference*,[51] which upheld the bawdy-house and communication laws, did not preclude her from reconsidering the constitutionality of these provisions.[52] The Supreme Court upheld her decision. It reasoned that certainty in the law is not disturbed when a trial judge considers a new legal issue—here, the trial judge was faced with the question of whether the laws violated the section 7 security of the person interest, whereas only the liberty interest was at issue in the earlier *Prostitution Reference.*[53] In *Bedford*, the Court stated that the trial judge was entitled to revisit a matter decided by the Supreme Court where (1) "new legal issues are raised as a consequence of significant developments in the law," or (2) "there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[54]

In *Carter v Canada (Attorney General)*,[55] the Court considered the constitutionality of the *Criminal Code* prohibition on physician-assisted

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have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it").

[49] Debra Parkes, "Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent" (2016) 10:1 McGill JL & Health 123 at 123, 146–47; Sharpe, *supra* note 5 at 161–66.

[50] *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*].

[51] *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, [1990] SCJ No 52 (QL).

[52] *Bedford*, *supra* note 50 at para 17.

[53] *Ibid* at para 45.

[54] *Ibid* at para 42.

[55] *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

suicide. The trial judge found the prohibition unconstitutional under section 7 of the *Charter*, although the Supreme Court had (ten years earlier) found the prohibition constitutional in *Rodriguez v British Columbia (Attorney General)*.[56] The Supreme Court, applying the holding from *Bedford*, held the trial court was entitled to reconsider a settled ruling of a higher court as both conditions from *Bedford* were satisfied.[57] Here, the Court described the doctrine of *stare decisis*: "[t]he doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis."[58]

Finally, in *R v Comeau*,[59] the issue was the constitutionality of a provision restricting access to liquor from other provinces. The trial judge held that "new evidence" from a historian about the intentions of the drafters of the prohibition provided a basis to depart from the Supreme Court's prior decision in *Gold Seal v Alberta*,[60] under the "evidence-based exception to vertical *stare decisis* approved in *Bedford*."[61] The Supreme Court disagreed. The historical evidence was "not evidence of changing legislative and social facts or some other fundamental change" that would "justify departing from vertical *stare decisis*."[62] The Court clarified that a fundamental change in circumstances that justifies departing from vertical *stare decisis* is a "high threshold"[63] and that "new evidence must 'fundamentally shif[t]' how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question."[64]

These three cases address the approach to vertical *stare decisis* in constitutional cases. Although the threshold is high, it is not unattainable if

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[56] *Rodriquez v British Columbia (AG)*, [1993] 3 SCR 519 at para 4, 107 DLR (4th) 342.
[57] *Carter*, *supra* note 55 at para 44.
[58] *Ibid.*
[59] *R v Comeau*, 2018 SCC 15 [*Comeau*].
[60] *Gold Seal Ltd v Dominion Express Co*, [1921] 62 SCR 424, 62 DLR 62.
[61] *Comeau*, *supra* note 59 at para 17.
[62] *Ibid* at para 37.
[63] *Ibid* at para 35.
[64] *Ibid* at para 34.

evidence rises to the level of showing a fundamental change in circumstances. Courts must be attuned to context and circumstances to assess whether the change rises to the requisite level.

Vertical stare decisis and the Charter

As a further point, we note that the Supreme Court has generally not set out a distinct approach to *stare decisis* for constitutional decisions.[65] However, there are different considerations at play for *stare decisis* under the *Charter* as compared to the interpretation of legislation or the common law.

Peter Hogg writes: "it is arguable that in constitutional cases the Court should be more willing to overrule prior decisions than in other kinds of cases."[66] One argument is that for non-constitutional cases, legislators can change the law if they reject the judicial solution, whereas in constitutional cases, a court decision can be changed only by constitutional amendment.[67] A further argument is that the principle of constitutional supremacy, enshrined in section 52 of the *Constitution Act*, *1867* (UK),[68] suggests that a court's constitutional interpretation should supersede answers provided in precedent decisions. A third argument is that *stare decisis* should apply more flexibly in constitutional cases because section 1 of the *Charter* asks courts to inquire into legislative and social facts to determine the purpose and background of the legislation. Because of the centrality of legislative and social facts to a section 1 analysis, such analysis remains binding only to the extent that a similar factual matrix continues to exist.[69] Some thus argue that *stare decisis* should operate in a manner akin to the horizontal rather than vertical convention in *Charter* cases,

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[65] Hogg, *supra* note 45, ch 8.7, nn 135–36a-b (until *Bedford*, the SCC had not expressly recognized that constitutional precedents are different from other precedents. However, the SCC had changed constitutional doctrine and "explicitly overruled a disproportionate number of constitutional precedents." Hogg refers to section 15 of the *Charter* as the most dramatic example of frequent changes in doctrine).
[66] *Ibid*, ch 8.7, n 133.
[67] *Ibid*, ch 8.7.
[68] *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s 52.
[69] Arvay, Tucker & Latimer, *supra* note 9 at 82 (this is relevant only where it is the section 1 analysis that is the matter at issue).

that is, an earlier decision would not be treated as strictly binding, but would be followed unless there is a compelling reason to overrule.[70]

The argument on the other side is that stability in the law is just as important in the constitutional realm. Legislative and executive action often relies on prior constitutional decisions and the other branches of government look to court decisions to guide government policy. [71] Moreover, "frequent departures from past decisions would be inconsistent with the image of a permanence implicit in a constitution."[72]

While recently, the Supreme Court has taken a somewhat more flexible approach to vertical *stare decisis* in *Charter* cases, in Canada, there is not a different doctrine of *stare decisis* in constitutional cases.[73] We turn now to the horizontal convention.

c. Horizontal convention: Overruling precedent from the same court

In Canada, the concept of *stare decisis* applies to previous decisions of the same court under the horizontal convention, even though binding precedent is limited to the vertical convention. The general rule of horizontal *stare decisis* is that decisions of the same court should be followed unless there is compelling reason not to; if there is a compelling reason, the precedent can be distinguished or departed from. However, the general rule varies in its application, and the rationale for the rule differs somewhat depending on the level of court. We first look to trial courts, then appellate courts, and finally the apex court, the Supreme Court of Canada, to explain how the horizontal convention applies at each level of court.

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[70] *Ibid* at 75.
[71] Richard Haigh, "A Kindler, Gentler Supreme Court? The Case of *Burns* and the Need for a Principled Approach to Overruling" (2001) 14:1 SCLR (2d) 139 at 143, online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/sclr/vol14/iss1/9>.
[72] Sharpe, *supra* note 5 at 165.
[73] Hogg, *supra* note 45, ch 8.7, nn 135–36 (in contrast, the Supreme Court of the United States takes a more relaxed approach to *stare decisis* in constitutional law than with most non-constitutional matters. The High Court of Australia has also occasionally refused to follow its own precedent); see also Duxbury, *supra* note 4 at 150.

i. Trial courts

Trial court judges ordinarily follow decisions of other judges from the same court, absent compelling reasons to the contrary. The law accepts that in certain circumstances a decision from a judge of the same court need not be followed.[74]

In what has become a classic statement, Justice Wilson of the Supreme Court of British Columbia stated in *Re Hansard Spruce Mills Ltd*:[75]

> I have no power to override a brother judge. I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.[76]

The rationale for *stare decisis* in trial courts stated in *Re Hansard Spruce Mills* is "judicial comity" as well as concern about certainty and protecting parties' reliance interest.[77]

Generally, there are three exceptions as to when a judge need not follow a decision of a judge in the same court. First, the authority of the prior decision has been undermined by subsequent decisions. This may arise in the relatively straightforward case of a decision that has been overruled by, or is necessarily inconsistent with, a decision by a higher court.[78]

Second, where the decision was reached without considering a relevant

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[74] Sharpe, *supra* note 5 at 152.
[75] *Re Hansard*, *supra* note 12.
[76] *Ibid* at 592.
[77] Scott Kerwin, "Stare Decisis in the BC Supreme Court: Revisiting Hansard Spruce Mills" (2004) 62:4 Advocate 541 at 542.
[78] *Ibid* at 547 (the desirability of consistent interpretations of a federal statute across provinces suggests that a decision from a court in another province can also influence interpretation); see e.g. *R v Mason*, [1971] 3 WWR 112, 3 CCC (2d) 76 at 79 (BC SC) (Justice McIntyre found that he was not bound by a prior BC Supreme Court decision regarding the federal *Juvenile Delinquents Act*, RSC 1952, c 160, based on a contrary decision by a Manitoba Court); see also *Re Yewdale* (1995), 121 DLR (4th) 521, [1995] 4 WWR 458 at paras 28–31 (BC SC) (Justice Tysoe found that a subsequent decision of the Saskatchewan Court of Appeal meant that he was not bound by a previous BC Supreme Court decision, as the statute ought to be applied consistently across provinces).

statute or binding authority. In other words, the decision was made *per incuriam*, Latin for through carelessness or inadvertence.[79] The standard to find a decision *per incuriam* is that the court failed to consider some binding authority or relevant statute, and—had the court considered the authority or statute—it would have come to a different decision. It cannot merely be the case that an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment.[80]

Third, "where the exigencies of the trial require an immediate decision without opportunity to fully consult authority" and thus the decision was not fully considered.[81] An unconsidered judgment is not binding on other judges. It is said that trial judges know such a decision when they see one.

There is good reason why a trial judge may depart from a prior decision by a judge of the same court: a trial judges' primary task is to decide the case on the facts before them. Following the principle of *stare decisis*, a trial judge has room to distinguish the facts or find an appropriate reason not to follow the prior decision.[82]

ii. Intermediate appellate courts

Like trial courts, intermediate appellate courts will not ordinarily depart from their own decisions. They have a duty to provide general guidance on the law, and so must be concerned with the integrity of the legal system.[83] The rationales for *stare decisis* at the intermediate appellate court level stated by Justice Laskin in *David Polowin Real Estate Ltd. v The Dominion of Canada General Insurance Co.*[84] are "consistency, certainty, predictability and sound judicial administration. … Adherence to precedent … enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of

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[79] James Arthur Ballentine, ed, *Ballentine's Law Dictionary*, 3rd ed, (Rochester, NY: Lawyers Co-operative Pub Co) sub verbo "*per incuriam*".
[80] Kerwin, *supra* note 77 at 551.
[81] *Re Hansard*, *supra* note 12 at 592.
[82] Kerwin, *supra* note 77 at 553.
[83] Sharpe, *supra* note 5 at 155–56.
[84] *Polowin*, *supra* note 6.

justice."[85] While the apex court plays a larger role in the development of the law, intermediate courts of appeal administer more decisions, and so it is important that they follow *stare decisis* to maintain the stability of the legal system.

The traditional rule is that there are narrow exceptions to *stare decisis* for intermediate appellate courts. In *Young v Bristol Aeroplane Co Ltd*,[86] Lord Greene of the English Court of Appeal identified three. First, where a court is faced with conflicting decisions from the same court it can decide which decision to follow. Second, a court is not bound to follow a prior decision that is inconsistent with a decision of the House of Lords. Finally, a court is not bound to follow a prior decision that is *per incuriam* or made in disregard of a binding statute, rule, or other legal authority. This latter category *could* be construed broadly—it can always be argued that a decision did not consider every statute, rule, or earlier binding decision—but were this exception interpreted widely, it would swallow the rule.[87] It has also been argued that an appellate court is not bound to follow a prior decision that was based on a "manifest slip or error".[88] However, this exception is not often relied on, perhaps because such obvious errors are rare.

For many litigants, the intermediate appellate court is "effectively the court of last resort."[89] Different appellate courts have their own formulations as to when to depart from horizontal *stare decisis*. For example, the Manitoba Court of Appeal in *R v Neves*[90] stated that a court will be more prepared to overrule a purely conclusory decision than a fully reasoned one: "The court's freedom to depart from a prior, incorrect decision should logically increase in direct proportion to the extent that the prior decision lacks a fully reasoned, analytically sound foundation."[91] Another example is the Court of Appeal for Ontario's list of seven factors that justified departing from precedent in *David*

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[85] *Ibid* at paras 119–20.
[86] *Young v Bristol Aeroplane Co Ltd*, [1944] KB 718 at 725, [1944] 2 All ER 293 (CA).
[87] Sharpe, *supra* note 5 at 156.
[88] *Ibid* at 157, citing *Morelle Ltd v Wakeling*, [1955] EWCA Civ 1, [1955] 1 All ER 708 (CA); see also *R v Neves*, 2005 MBCA 112 at para 106 [*Neves*].
[89] *R v Beaudry*, 2000 ABCA 243 at para 20 [*Beaudry*].
[90] *Neves*, *supra* note 88.
[91] *Ibid* at para 106; see also *Beaudry*, *supra* note 89 at paras 29–30.

Polowin Real Estate Ltd. v Dominion of Canada General Insurance Co.,[92]: i) whether the decision was attenuated by later decisions of the court; ii) whether the decision raises a recurring question; iii) whether parties are relying on the decision; iv) whether the decision is relatively recent (it is preferable to "correct an error early on than to let it settle in"); v) whether the factual record now provides better context for the decision, vi) the amount of money at stake in the litigation, and vii) whether the SCC is likely to correct the error.[93] In *Polowin*, the Court of Appeal, sitting as a five-judge panel, faced the question of whether to overrule an earlier decision.

The practice for overruling: five-judge panels

The practice in many Canadian appellate courts is to strike a panel of five judges or more, rather than the usual three, when the court is considering overruling its previous decision. In such cases, the court can depart from *stare decisis* when none of the exceptions apply. In Ontario, for example, a court of appeal sitting as five may revisit its own precedent, resolve inconsistencies between decisions by different panels, and address a reference by a provincial Cabinet.[94] Most intermediate appellate courts can sit as five, but there are at least two exceptions—the Prince Edward Island Court of Appeal, which has only three judges, and the Court Martial Appeal Court of Canada, which explained that because it cannot sit as five, it adopts a strict approach to *stare decisis*.[95]

iii. Supreme Court of Canada

Finally, the Supreme Court of Canada, as an apex court, takes a different approach to horizontal *stare decisis.*

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[92] *Polowin*, *supra* note 6.
[93] *Ibid* at paras 137–43.
[94] "Practice Direction Concerning Civil Appeals and the Court of Appeal for Ontario" (1 March 2017), online: *Court of Appeal for Ontario* <www.ontariocourts.ca/coa/en/notices/pd/civil.htm>.
[95] See *R v Déry*, 2017 CMAC 2 at para 95. The *National Defence Act,* RSC, 1985, c N-5, s 235(2), provides that "[e]very appeal shall be heard by three judges of the Court Martial Appeal Court sitting together…".

The Supreme Court's role has changed over time. At its inception, the Supreme Court was not a court of last resort; that was the Judicial Committee of the Privy Council ("JCPC"). In 1949, appeals to the JCPC were abolished, and thereafter, the Supreme Court developed a distinct body of jurisprudence.[96] Since the 1950s, the Supreme Court has accepted the possibility of overruling its own decisions.[97] The principle of *stare decisis* was first expressly formulated by the Supreme Court in *Stuart v Bank of Montreal*.[98] While the Court remained answerable to the Privy Council, the Supreme Court stated that it should not disregard its previous decisions apart from "very exceptional cases."[99] Beginning in the late 1970s and early 1980s, the Supreme Court demonstrated a willingness to overturn precedents of its own as well as JCPC precedents where there were "compelling reasons."[100]

Today, the Supreme Court exercises a law-making function, which influences its approach to *stare decisis.* The Court hears cases for which it grants leave, save for two exceptions. Those exceptions are: (1) "as of right" cases for which leave is not required, and (2) advisory opinions on questions referred to the Court by the Governor in Council. Otherwise, the Court controls its own docket.[101] The Court gained control over its docket in 1975, and the Court's main function became, as then Chief Justice Bora Laskin wrote in the

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[96] John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002); L'Heureux-Dubé, *supra* note 4 at 4; see also *R v Bernard*, [1988] 2 SCR 833, [1988] SCJ No 96 (QL) [*Bernard*] and *R v Salituro*, [1991] 3 SCR 654 at 655–56, [1991] SCJ No 9 (QL) [*Salituro*].

[97] *Reference Re Farm Products Marketing Act*, [1957] SCR 198 at 212, 208 DLR (4th) 494; *Minister of Indian Affairs and Northern Development v Ranville*, [1982] 2 SCR 518 at 527, 139 DLR (3d) 1 [*Ranville*]; see also *Salituro*, *supra* note 96 at 655–56.

[98] (1909) 41 SCR 516, 1909 CanLII 3 [*Stuart* cited to SCR].

[99] *Ibid* at 549; see Andrew Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36:2 Can Bar Rev 175 at 180–81; *Capital Cities Communications Inc v Canadian Radio-Television & Telecommunications Commission* (1977), [1978] 2 SCR 141, 81 DLR (3d) 609 (the rule set forth in *Stuart*, *supra* note 98, was qualified in this case, stating "this Court is not bound by judgments of the Privy Council any more than it is bound by its own judgments" at 161).

[100] *Binus v R*, [1967] SCR 594 at 601, [1968] 1 CCC 227; *Ranville*, *supra* note 97 at 527.

[101] As of right cases include certain criminal cases and appeals from opinions pronounced by courts of appeal on matters referred to them by a provincial government, see *Supreme Court Act*, RSC, 1985, c S-26 ss 43, 53.

Canadian Bar Review, "to oversee the development of the law" and "to give guidance in articulate reasons … on issues of national concern."[102] Control over its docket, combined with the introduction of the *Charter*, gave courts a greater law-making function and required the Supreme Court to re-examine earlier decisions in light of the rights and freedoms enshrined in the *Charter*.[103]

The Supreme Court has addressed when it will overturn its own precedents. Justice Dickson set out a non-exhaustive list of instances in which the court was willing to overturn its own precedent, dissenting in *R v Bernard*,[104] later adopted by the full Court.[105]

First on the list is where the decision is inconsistent with or fails to reflect the values of the *Charter*. This was of particular concern as cases were being heard upon the enactment of the *Charter*. The *Charter* fundamentally changed the legal landscape, and decisions by courts had to reflect this change. This accords with the view of courts as guardians of the constitution, charged with ensuring, under section 52 of the *Constitution Act, 1982*, that any laws inconsistent with the Constitution are declared to be of no force and effect to the extent of the inconsistency.[106] As the Supreme Court of Canada stated in *Bedford*, "the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional."[107]

The next three instances where the Supreme Court will overturn its own decision are based on rationales relating to certainty and changing circumstances. One, where a decision has been subsequently "attenuated."[108] As Justice Sharpe writes, "[a] court should confront a decision that has not stood up to the test of time."[109] Another is where the social, political or economic

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[102] Sharpe, *supra* note 5 at 164, citing Bora Laskin, "The Role and Function of Final Appellate Courts: The Supreme Court of Canada" (1975) 53:3 Can Bar Rev 469 at 475.
[103] *Ibid* at 164.
[104] *Bernard*, *supra* note 96.
[105] Sharpe, *supra* note 5 at 161, citing *R v Chaulk*, [1990] 3 SCR 1303, [1990] SCJ No 139 (QL); *R v B (KG)*, [1993] 1 SCR 740, [1993] SCJ No 22 (QL).
[106] s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[107] *Bedford*, *supra* note 50 at paras 43–44.
[108] *Polowin*, *supra* note 6 at paras 124, 128, 131.
[109] Sharpe, *supra* note 5 at 161.

assumptions underlying a decision are no longer valid in contemporary society. Justice Sharpe comments that "[t]his has become a significant factor in *Charter* litigation where parties are able to present a comprehensive factual record to demonstrate that the actual operation and effect of a law is other than what was found or assumed by the court when it made a prior determination of constitutional validity."[110] The next is where a decision fails to articulate a workable rule or standard having content sufficient to guide behavior. This is similar to the second instance, as it is concerned with providing certainty. Where adhering to a decision produces uncertainty, "it is better, in the name of predictability, to overrule it."[111] A similar point was made by the dissent in *Teva v Canada*[112]: "Generally, adhering to precedent enshrines certainty. However, in some instances continued recognition of prior decisions has the effect of *creating* uncertainty … and therefore following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law."[113]

Finally, the fifth instance is particular to criminal law: a court will not ordinarily overrule a prior decision where the effect would be to expand the reach of criminal liability or restrict the liberty of the subject. In *R v Henry*, the Supreme Court overruled a 19-year-old precedent on the right against self-incrimination, noting the need to be "particularly careful before reversing a precedent where the effect is to diminish *Charter* protection."[114] Heightened attention is needed where overturning precedent would adversely impact the accused. There is a problem where a court finds conduct previously thought lawful to be criminal. In contrast, the court will feel less constrained in overturning a prior decision that restricted the liberty of the accused.[115]

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[110] *Ibid* at 161–62.
[111] *Ibid* at 162.
[112] *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51 at para 141.
[113] *Ibid*, Côté & Rowe JJ, dissenting (McLachlin CJC & Wagner J concurring) (while this statement was contained in dissenting reasons, it was in the application of the statement where the majority and minority differed).
[114] *Henry*, *supra* note 28 at para 44.
[115] Sharpe, *supra* note 5 at 162, citing *R v Santeramo* (1976), 32 CCC (2d) 35, [1976] OJ No 987 (QL) (CA), Brooke JA ("I do not feel bound by a judgment of this Court where the liberty of the subject is in issue if I am convinced that the judgment is wrong" at 46. This statement was cited with approval in *Bernard*, *supra* note 96 at para 55).

The decision by former Chief Justice Dickson in the early days of the *Charter*, in 1988, reflects his view of how the Supreme Court would apply the doctrine of *stare decisis* given the introduction of the *Charter.* Chief Justice Dickson acknowledged that the Court would have a greater role to play in assessing the constitutionality of laws, and located the central concern of *stare decisis* in certainty and maintaining a principled line of decisions. Speaking at the turn of the 21st century, Chief Justice McLachlin reflected on the more flexible approach to *stare decisis* and the expanded role of the Court:

> Resolving disputes is still the primary and most fundamental task of the judiciary. But for some time now, it has been recognized that the matter is not so simple. In the course of resolving disputes, common law judges interpreted and inevitably, incrementally, with the aid of the doctrine of precedent or *stare decisis*, changed the law. The common law thus came to recognize that while dispute resolution was the primary task of the judge, the judge played a secondary role of lawmaker, or at least, law-developer. In the latter part of the twentieth century, the lawmaking role of the judge has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, once perceived as the exclusive right of Parliament and the legislatures.[116]

Both perspectives from these former Chief Justices reflect concern with maintaining stability in the law, while acknowledging that the court may have to depart from prior decisions to ensure the law remains principled and relevant. Sitting on the Supreme Court of Canada provides a distinct institutional vantage point on the legal system. While the role of courts, and certainly the Supreme Court of Canada, has evolved since 1949, courts generally keep to the sort of "incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[117] It is this balancing that judges undertake based on the doctrine of *stare decisis*.

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[116] Rt Hon Beverley McLachlin, "The Role of Judges in Modern Society" (Speech delivered at The Fourth Worldwide Common Law Judiciary Conference, Vancouver, BC, 5 May 2001).
[117] *Salituro*, *supra* note 96 at 670.

Step 3: What does it means to follow precedent?

What does it mean to apply a precedent? A sound judicial decision will do more than trace a line of cases and replicate the reasoning. Judicial decision-making calls for a judge to look to a number of prior decisions to understand how a principle applies. [118] A judge must often look to more than one line of cases and think across a range of decisions. [119] A judge should be guided by precedent, even when faced with what looks like an entirely new situation, rather than "striking out unpredictability with a new approach of their own."[120]

A thoughtful application of the doctrine of *stare decisis* calls for a judge to reflect on the reasoning in relevant precedent and identify the *ratio*. A judge must consider *how* to apply the *ratio* to the factual matrix before them. Judges will then attempt to articulate a clear line of reasoning, consistent with precedent, in deciding the case. Such concern for consistency in the law reflects, as Lord Mansfield put it, that the law exists not only in a "particular case; but in general principles, which run through the cases, and govern the decisions of them."[121]

IV. CONCLUSION

Roscoe Pound characterizes *stare decisis* as a tool well suited to the common law. *Stare decisis* is "based on a conception of law as experience developed by reason and reason tested and developed by experience."[122] The principles of *stare decisis* inform judicial decision-making by creating a productive tension between maintaining certainty and achieving a just result. Professor Neil Duxbury stated it well: "[t]he value of the doctrine of precedent rests not in its capacity to commit decision-makers to a course of action but in its capacity

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[118] Roscoe Pound, "What of Stare Decisis?" (1941) 10:1 Fordham L Rev 1 at 7.
[119] Duxbury, *supra* note 4 at 61, n 14, citing Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press, 2006) at 79, 123–24 ("coherence, not simply with particular doctrines here and there, but, as best as it can be achieved, principled coherence with the whole structure of the law" at 250).
[120] Waldron, *supra* note 10 at 9.
[121] Duxbury, *supra* note 4 at 51, citing *Rust*, *supra* note 19, Lord Mansfield.
[122] Pound, *supra* note 118 at 5.

simultaneously to create constraint and allow a degree of discretion."[123] As a practical matter, it may not always be clear when *stare decisis* principles call for following a precedent or allowing judicial development of the law to reach a new result. But it is in navigating this productive tension with good judgment that one strives to reach a just result within a coherent and (relatively) certain system of laws.

[123] Duxbury, *supra* note 4 at 183.