

# Precedent Unbound?

## Contemporary Approaches to Precedent in Canada

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D E B R A P A R K E S \*

*Stare decisis* is an abbreviation of the Latin phrase *stare decisis et non quieta movere*, and may be translated as “to stand by decisions and not to disturb settled matters.”<sup>1</sup> In *Gulliver’s Travels*, the English satirist Johnathan Swift had Gulliver say:

It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly.<sup>2</sup>

While the notion that Canadian appellate judges slavishly adhere to outdated precedent in a manner contrary to “common justice and the general reason of mankind” does not accurately describe the current reality, there remains a lively and important debate about the functions, values and limits of “abiding by things decided” in common law systems.<sup>3</sup> In this vein, Justices Steel and Freedman in the recent *R. v. Neves*<sup>4</sup> decision stated:

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I am greatly indebted to my colleague Alvin Esau, for sharing his excellent Legal Systems course materials which proved invaluable in orienting me to this topic and pointing me to a number of key issues and controversies. My thanks are also owed to Sharon Scharfe, for her research assistance, and to the Manitoba Legal Research Institute for funding that research.

<sup>1</sup> Gerald Gall, *The Canadian Legal System* (Toronto: Carswell, 2004) at 431.

<sup>2</sup> Johnathan Swift, *Gulliver’s Travels* (Oxford: Oxford University Press, 1977) at 249, cited in Don Stuart, *Canadian Criminal Law: A Treatise*, 4<sup>th</sup> ed (Toronto: Carswell, 2001) at 11.

<sup>3</sup> Judicial decision-making in civil law systems is deductive, rather than inductive, and as such, is not bound by principles of *stare decisis*. Judges in Quebec preside over a hybrid system, with public law being based on the common law and private law being based on civil law. See generally, Justice Claire L’Heureux-Dubé, “By Reason of Authority or by Authority of Reason” (1993), 27 *U.B.C.L.R.* 1. It has been suggested that, at least in Canada, the style of reasoning in criminal law cases interpreting the *Criminal Code* does not differ starkly between

The principle of *stare decisis* is a bedrock of our judicial system. There is great value in certainty in law, but there is also, of course, an expectation that the law as expounded by judges will be correct, and certainly not knowingly incorrect, which would result when a decision felt to be wrong is not overruled. The tension when these basic principles are in conflict can be profound.<sup>5</sup>

This paper examines some key aspects of the contemporary treatment of precedent in Canada, including consideration of the *vertical* convention of precedent (lower courts being bound by decisions of higher courts) and the *horizontal* convention of precedent (courts being willing and/or able to overrule or depart from decisions of the same court). On the latter topic of horizontal precedent, particular attention will be paid to three recent decisions of the Supreme Court of Canada, Ontario Court of Appeal, and Manitoba Court of Appeal respectively, which take a more functional and pragmatic approach to the issue and demonstrate a greater willingness to overrule decisions now thought to be wrong. Additional issues and controversies, such as the precedential weight of *obiter dicta* (particularly *dicta* of the Supreme Court of Canada) will be examined along the way.

## I. PRINCIPLES UNDERLYING STARE DECISIS AND THE CONVENTIONS OF PRECEDENT

In the recent Ontario Court of Appeal decision, *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.*,<sup>6</sup> Justice John Laskin aptly summarized the key tension in this debate by citing two eminent jurists:

Lord Denning once wrote, “The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff,” to which Justice Brandeis might have replied: “It is usually more important that a rule of law be settled, than that it be settled right.”<sup>7</sup>

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civily-trained judges in Quebec and common law-trained judges in the rest of Canada. Stuart, *ibid.* at 13.

<sup>4</sup> [2005] M.J. No. 381 (C.A.) [*Neves*].

<sup>5</sup> *Ibid.* at para. 90.

<sup>6</sup> (2005), 199 O.A.C. 266, leave to appeal to the S.C.C. denied: [2005] S.C.C.A. No. 388 [*David Polowin*].

<sup>7</sup> *Ibid.* at para. 118, citing Lord Denning in *Ostime v. Australian Mutual Provident Society*, [1960] A.C. 459 at 489 and Justice Brandeis in *Di Santo v. Pennsylvania* (1927) 273 U.S. 34 at 270.

Justice Laskin went on to say:

The values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. Adherence 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.<sup>8</sup>

However, rigid adherence to precedent, particularly in the face of changing values and social realities—not to mention new information that may cast doubt on the correctness or workability of an earlier decision—does little to foster confidence in the judicial process, as the quote from *Gulliver's Travels* demonstrates. Judges are not mere technicians, mechanically applying established rules to a given case without consideration of whether the rule remains apt or consistent with changing values or knowledge. It seems likely that confidence in the administration of justice is increased when courts are willing to candidly admit error or to address unforeseen implications of an earlier decision.

The entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 has arguably strengthened the case for overruling earlier decisions that are inconsistent with the evolving interpretation of various *Charter* rights. In the 2005 *R. v. Henry*<sup>9</sup> decision, Binnie J. said for a unanimous Supreme Court:

The Court's practice, of course, is against departing from its precedents unless there are compelling reasons to do so.... Nevertheless, while rare, departures do occur. In *Clark v. Canadian National Railway Co.*, it was said that "[t]his Court has made it clear that constitutional decisions are not immutable, even in the absence of constitutional amendment" and in the *Charter* context the Court in *United States v. Burns* effectively overturned the result (if not the reasoning) in *Kindler v. Canada* (Minister of Justice) and *Reference re Ng Extradition (Can.)*. ... The Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection.<sup>10</sup>

As things have developed in Canada, the concept of "binding precedent" is limited to the vertical convention. Courts lower in the applicable hierarchy are bound to follow decisions of a higher court. The concept of *stare decisis* is used more broadly to apply to decisions of higher courts (the vertical convention) and to previous decisions of the same court, albeit often differently constituted (the horizontal convention). In the latter case decisions are not strictly binding, but should be followed unless there are compelling reasons to overrule them. Finally, the concept of "persuasive authority" refers to all decisions of courts outside the direct hierarchy of the instant court. For example, neither the Manitoba Court of Appeal nor the Manitoba Court of Queen's Bench is bound to follow a decision

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<sup>8</sup> *Ibid.* at para. 119.

<sup>9</sup> [2005] 3 S.C.R. 609 [*Henry*].

<sup>10</sup> *Ibid.* at para. 44.

of the British Columbia Court of Appeal.<sup>11</sup> In either case, the decision may be persuasive and may assist the court in coming to a decision, but *stare decisis* will not apply.

## II. VERTICAL CONVENTION OF PRECEDENT

The vertical convention of precedent, *i.e.*, that lower courts must abide by decisions of courts above them in the hierarchy, is a key aspect of the common law system. By virtue of the vertical convention, all appellate courts, superior courts, federal courts, and provincial courts must follow decisions of the Supreme Court of Canada. They must also follow pre-1949 decisions of the Judicial Committee of the Privy Council (J.C.P.C.) that have not been subsequently overruled by the Supreme Court of Canada. Since the J.C.P.C. was the final court of appeal for Canada until 1949, its decisions from that era are still vertically binding on all Canadian courts other than the Supreme Court of Canada. For the Supreme Court, pre-1949 J.C.P.C. decisions operate on the horizontal convention of precedent because the S.C.C. is now the final court of appeal, with the power to overrule its own decisions and those of the J.C.P.C.<sup>12</sup>

### 1. Binding Obiter Dicta?

A significant limitation on the vertical convention of precedent is the reality that courts are only bound to follow “what was actually decided” in the earlier case.<sup>13</sup> To use lawyer’s Latin, this means that courts must follow the *ratio decidendi*, but not the *obiter dicta*, of the applicable case. As such, trial courts may refuse to follow certain aspects of a Supreme Court or provincial appellate court decision on the basis that the relevant part of the decision was *obiter dicta*. The line between *ratio* and *obiter*, however, is not always easy to draw.

To make matters worse, significant confusion resulted from the so-called “*Sellars* principle” attributed to Chouinard J. that *obiter* of the S.C.C. is binding.<sup>14</sup>

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<sup>11</sup> Alvin Esau has noted the “persistent error” made by some trial judges who state that they are bound to follow an appellate decision from another province. Alvin Esau, “Note on Precedent at the Trial Court Level,” *Legal Systems Course Materials* (2006) [unpublished, archived with the author at the University of Manitoba Faculty of Law], also online: <[http://www.umanitoba.ca/faculties/law/Courses/esau/legal\\_systems/CM-4.htm](http://www.umanitoba.ca/faculties/law/Courses/esau/legal_systems/CM-4.htm)> [Esau]. Also see *Wolf v. The Queen*, [1975] 2 S.C.R. 107.

<sup>12</sup> *Reference re Agricultural Products Marketing Act, (Canada)*, [1978] 2 S.C.R. 1198.

<sup>13</sup> *Quinn v. Leathem*, [1901] A.C. 495 (H.L.), Halsbury L.J. [Quinn].

<sup>14</sup> *R. v. Sellars*, [1980] 1 S.C.R. 527 [Sellars]. See, for example, *R. v. Chartrand* (1992), 81 Man. R. (2<sup>nd</sup>) 81 (C.A.), in which Philp J.A. for the majority and Lyon J.A. in dissent disagreed sharply over the meaning, implications and efficacy of the purported rule in *Sellars* that all *obiter* of the S.C.C. is binding. Philp J.A. stated,

Revisiting this issue in the recent *Henry* decision, Binnie J. for the unanimous Supreme Court suggested that Chouinard J. never said such a thing.<sup>15</sup> In citing an earlier decision of the S.C.C. on the issue of jury instructions, the English translation of the Chouinard opinion states “this is the interpretation that must prevail. As it does from time to time, the Court has thus ruled on the point, although it was not absolutely necessary to do so in order to dispose of the appeal.”<sup>16</sup> Writing extra-judicially, Justice Douglas Lambert of the British Columbia Court of Appeal has suggested that much of the confusion surrounding *Sellars* arose from an error in translating the opinion from French to English (i.e., “should prevail” became “must prevail”), which was compounded by the English headnote writer overstating the point made by Chouinard J.;<sup>17</sup> a cautionary tale concerning the reliance on headnotes, if ever there was one!

In *Henry*, the Supreme Court unanimously rejected the notion that the “*Sellars* principle” had ripened into a rule of law to the effect that “whatever was said in a majority judgment of the Supreme Court of Canada was binding, no matter how incidental to the main point of the case or how far it was removed from the dispositive facts and principles of law.”<sup>18</sup> Having said that, and to put it colloquially, all *obiter* is not created equal. Or, to return to a point made earlier, the line between *ratio* and *obiter* is not always clear. It may be said that the narrow *ratio* of a case (i.e., that which is strictly necessary to the disposition of the particular case) is all that is binding. However, as Binnie J. points out in *Henry*, “[i]t would be a foolhardy advocate who dismissed Dickson C.J.’s classic formulation of proportionality in *Oakes* as mere *obiter*.”<sup>19</sup> Amendments to the *Supreme Court Act* essentially limiting leave to appeal to matters of “public importance,”<sup>20</sup> combined with

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“In *Sellars*, Chouinard, J., writing for the full court, altered the traditional view of *obiter dictum*. He declared that where the Supreme Court has ruled on a question of law, although it was not necessary to do so in order to dispose of the appeal, that ruling is binding on lower courts.” Conversely, Lyon J.A. said, “I do not feel circumscribed in distinguishing the general dicta found in *Evans*, supra, from the real ratio of that case as I have indicated heretofore. Nor do I have any hesitation in saying that while the considered dicta of the Supreme Court of Canada should be respected as thoughtful expressions of the law, they cannot be treated as automatically and absolutely binding or immune to being distinguished.”

<sup>15</sup> *Henry*, supra note 9 at paras. 54-55.

<sup>16</sup> *Sellars*, supra note 14 at 529.

<sup>17</sup> Douglas Lambert, “Ratio Decidendi and Obiter Dicta” (1993), 51 *Advocate (B.C.)* 689 at 693-94.

<sup>18</sup> *Henry*, supra note 9 at para. 55.

<sup>19</sup> *Ibid.* at para. 53.

<sup>20</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1) provides as follows:

the demands of *Charter* interpretation, have signaled a shift in the work of the Supreme Court from error correction toward the greater development of general analytical frameworks to be applied by lower courts.<sup>21</sup> Therefore, while it is true, as Lord Halsbury L.C. said, “a case is only authority for what it actually decides,”<sup>22</sup> determining what a case actually decided is an interpretive task in itself, and one that must be guided by first principles. Binnie J. attempted to give some guidance in *Henry*:

Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. 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. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.<sup>23</sup> [emphasis added]

Therefore, the dispositive *ratio* of the case is clearly binding and the “wider circle of analysis...should be accepted as authoritative.” With respect, it is this sentence that muddies the waters somewhat. How, if at all, is “authoritative” different from “binding”? “Highly persuasive” might be a more apt description based on the metaphor of a core *ratio* and a penumbra of analysis that decreases in its precedential value with its distance from the core.

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40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court [emphasis added].

<sup>21</sup> *Henry*, *supra* note 9 at para. 53.

<sup>22</sup> *Quinn*, *supra* note 13 at 506.

<sup>23</sup> *Henry*, *supra* note 9 at para. 57.

On the facts of *Henry*, the language that some parties suggested might be interpreted as binding *obiter* from the Supreme Court's decision in *R. v. Noël*<sup>24</sup> included Justice Arbour's comment that circumstances enabling a *Kuldip*-type cross-examination of the accused might be "rare".<sup>25</sup> This comment was, as noted by Binnie J. in *Henry*, "neither part of the legal analysis nor a direction to trial courts. It was simply an observation by an experienced trial judge."<sup>26</sup> While such comments probably cannot fairly be considered the "wider circle of analysis" on which the decision was based, lawyers and lower court judges may still be wondering where this boundary lies.

## 2. Distinguishing a Precedent

The most common "way around" the strict vertical convention is the process of distinguishing a precedent, a practice that is well-known to judges and lawyers. When faced with an apparent precedent from the same or a higher court, any good advocate will examine the material facts of the earlier case to determine how closely (or not) they align with those in the instant case. A case that is said to be "on all fours" with the case at bar is a precedent that cannot be distinguished.

A variant of distinguishing is the practice of a subsequent court restating a precedent at a higher or lower level of generality so as to essentially render it inapplicable to the current case.<sup>27</sup> This practice is sometimes called "restrictive distinguishing," meaning that the subsequent decision limits the *ratio* of the precedent by treating as material to the earlier decision some fact which may not have been considered material in that case.<sup>28</sup> Paul Perell cites the treatment of *Anns Merton v. London Borough*<sup>29</sup> by the House of Lords in *Peabody Fund v. Sir Lindsay Parkinson Ltd.*<sup>30</sup> as an example of restrictive distinguishing:

The *Anns* case is cited as authority for the proposition that a municipality may be liable in negligence where it fails to properly inspect building plans. In the *Peabody Fund* case, by defining the duty of the municipality as being owed to owners and occupiers threatened with the possibility of injury to safety or health, the House of Lords specified and made less general, the scope of the municipality's responsibility as it had been defined in

<sup>24</sup> *R. v. Noël*, [2002] 3 S.C.R. 433.

<sup>25</sup> *Ibid.* at para. 60, cited in *Henry*, *supra* note 9 at para. 52.

<sup>26</sup> *Henry*, *supra* note 9 at para. 52.

<sup>27</sup> See Julius Stone, "The Ratio of the Ratio Decidendi" (1959), 22 *Mod. L. Rev.* 597.

<sup>28</sup> Paul Perrell, "Stare Decisis and Techniques of Legal Reasoning and Legal Argument" (1987) 2 *Legal Research Update* 11, online: <<http://legalresearch.org/docs/perell.html>>, citing Glanville Williams, *Learning the Law*, 9<sup>th</sup> ed. (London: Sweet & Maxwell, 1973) [Perrell].

<sup>29</sup> [1978] A.C. 728 (H.L.).

<sup>30</sup> [1984] 3 W.L.R. 953 (H.L.).

the *Anns* case. In the result, the Court did not allow a claim by the developer of a housing project who suffered damages when the municipality's drainage inspector failed to point out that the drainage system was not being installed in accordance with the approved design. Thus, in *Peabody Fund* the element of restrictive distinguishing is the introduction of the requirement of the possibility of injury to safety or health.<sup>31</sup>

### 3. “Per incuriam” Decisions of a Higher Court?

While on the English Court of Appeal, Lord Denning famously attempted to get around the vertical convention of precedent by declaring that the relevant House of Lords decision was *per incuriam* (i.e., a decision “given in ignorance or forgetfulness of some inconsistent authority binding on the court concerned”<sup>32</sup>). However, Lord Denning was strongly criticized by the House of Lords for doing so. In *Davis v. Johnson*, Lord Diplock described Lord Denning as having conducted “what may be described, I hope without offence, as a one-man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of *stare decisis* imposed upon its liberty of decision”<sup>33</sup> and affirmed that the Court of Appeal was bound by decisions of the House of Lords, even ones that the C.A. considers to have been rendered *per incuriam*.<sup>34</sup> The principle that a lower court cannot refuse to follow a higher court’s decision on the basis that it was rendered *per incuriam* has been adopted by a number of Canadian appellate courts.<sup>35</sup> However the strength of this principle seems to be eroding<sup>36</sup> in cases where the *per incuriam* rule is confined to its narrow bounds and not used as a means to refuse to follow a precedent with which the lower court simply disagrees or believes to be wrong.

### 4. Examples of Non-Precedent

Sometimes it is implied by counsel that certain decisions have precedential value, when in fact, they do not. For example, denial of leave to appeal to the Supreme Court of Canada in a particular case does not accord any greater precedential

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<sup>31</sup> *Perrell*, *supra* note 28 [citations omitted].

<sup>32</sup> *Morelle v. Wakeling*, [1955] 2 Q.B. 379 at 406 (C.A.).

<sup>33</sup> [1979] A.C. 264 at 325.

<sup>34</sup> See also *Broome v. Cassell & Co. Ltd.*, [1972] 1 All. E.R. 801 (H.L.).

<sup>35</sup> See, e.g., *Leroux v. Cooperators General Insurance Co*, [1991] O.J. No. 1554 (C.A.), *Scarff v. Wilson* (1988), 55 D.L.R. (4<sup>th</sup>) 247 (B.C.C.A.), and *Newfoundland Assn. of Provincial Court Judges v. Newfoundland*, [2000] N.J. No. 258 (C.A.).

<sup>36</sup> Michael Zander, *The Law-Making Process*, 5<sup>th</sup> ed. (London: Butterworths, 1999) at 223, citing *Hughes v. Kingston Upon Hull City Council*, [1999] 2 All E.R. 49 (Div. Ct.) in which the court declared an otherwise binding precedent of the Court of Appeal to be *per incuriam* on the basis that the binding House of Lords decision had not been considered by the C.A.

weight to the Court of Appeal decision at issue.<sup>37</sup> The same holds true for a trial decision where leave to appeal to the Court of Appeal has been denied. It is also sometimes erroneously asserted that courts should consider consent judgments as precedents. As noted by the Federal Court of Appeal in a tax case, “a consent judgment represents an agreement of the parties and although it is entered upon the record with the approval of a court and is therefore binding as between the parties it does not create a precedent by which an inferior court is bound.”<sup>38</sup>

An evenly divided decision (*i.e.*, a tie) in the Supreme Court of Canada will mean that the appeal will be dismissed and the appellate court decision will stand as a precedent that has not been overruled.<sup>39</sup> In the case of divided decisions or those where there is no clear majority, the Supreme Court has indicated that, while not standing as binding precedents, the reasons of the members of the court supporting the result (*i.e.*, upholding the court of appeal decision) are entitled to “great respect.”<sup>40</sup> Of course, since the court sits in odd numbers,<sup>41</sup> a tie only happens when a judge is ill, retires, or dies. An example is *Tutton v. Tutton*,<sup>42</sup> a 3-3 decision of the S.C.C. on whether fault for criminal negligence is assessed on a subjective or objective standard. Since the court was evenly divided on this issue, the Ontario Court of Appeal continued to apply the objective test as it had before.<sup>43</sup> The S.C.C. has not clarified this issue explicitly when it has

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<sup>37</sup> See, *e.g.*, *R. v. Meston* (1975), 34 C.R.(N.S.) 323 (Ont. C.A.) and *R. v. Bachman* (1987), 78 A.R. 282 (Alta. C.A.).

<sup>38</sup> *Armstrong v. Canada*, [1996] F.C.J. No. 599 at para.13 (Sask.C.A.). See also *3325806 Manitoba Ltd. v. Winnipeg (City) Assessor*, [2005] M.J. No. 186 (Q.B.).

<sup>39</sup> See J.T. Irvine, “The Case of the Evenly Divided Court” (2001), 64 *Sask. L. Rev.* 219 at paras. 14-24 [Irvine]. Irvine surveys other high courts, such as the House of Lords and the United States Supreme Court and determines that they treat evenly divided decisions very differently. The House of Lords considers the opinion of the judge dismissing the appeal to be binding, whereas the U.S. Supreme Court considers an evenly divided decision to have no precedential value. Perhaps predictably, the S.C.C. has taken a middle ground approach. See also Alvin Esau, “Note on Precedent in Canadian Provincial Courts of Appeal,” *Legal Systems Course Materials* (2006) [unpublished, archived with the author at the University of Manitoba Faculty of Law], also online: <[http://www.umanitoba.ca/Law/Courses/esau/legal\\_systems/CM-3.htm](http://www.umanitoba.ca/Law/Courses/esau/legal_systems/CM-3.htm)>.

<sup>40</sup> Irvine, *ibid.* at paras. 15 and 23, citing *Canada (Minister of National Revenue – M.N.R.) v. Jackson*, [1931] S.C.R. 485, Anglin C.J.C.

<sup>41</sup> While this is true now, see Irvine, *supra* note 39 at paras. 11-13 for a discussion of the early Supreme Court of Canada which often sat as a panel of six until 1926.

<sup>42</sup> [1989] 1 S.C.R. 1392. Only six justices took part in the decision. Beetz and Le Dain JJ. were ill and Estey J. resigned before a decision was rendered.

<sup>43</sup> See, *e.g.*, *R. v. Nelson*, (1990), 54 C.C.C. (3d) 285 at 289 (Ont. C.A.) where the Court unanimously stated, “the decisions of the Supreme Court of Canada in *Waite* and *Tutton* do not stand for the proposition that the objective test as enunciated by this court in *Waite*, and

had occasion to do so,<sup>44</sup> but some other provincial courts of appeal have proceeded on the assumption that the matter was resolved by the Supreme Court in favour of an objective standard.<sup>45</sup>

## 5. Anticipatory Overruling

Keeping in mind the relatively strict vertical convention of precedent, is there any place for “anticipatory overruling” whereby a lower court bound by precedent is firmly of the view that the higher court will overrule its own precedent when given the chance?<sup>46</sup> Should a litigant have to bear the personal cost of pursuing an appeal to the higher court to “correct” the law by overruling a precedent that is out-of-step with more recent rulings not directly on point, but indicative of the court’s changing approach? Strictly speaking, it is inaccurate to speak of this practice as anticipatory overruling, as it is simply impossible in our common law system for a lower court to “overrule” a higher court. It would be more accurate to describe the lower court’s act as refusing to follow a precedent.

An example cited by Esau of the problematic nature of the strict vertical convention is the Ontario High Court and Court of Appeal decisions in *Marvco Color Research v. Harris*<sup>47</sup> dealing with the “*non est factum*” rule in contract law. In *Marvco*, the applicable Supreme Court of Canada precedent had been based on a House of Lords decision that had since been overruled by the House itself. Both lower courts were of the view that the Canadian precedent was bad law and was inconsistent with the law in other similar jurisdictions, yet they applied the law. Eventually, the case made its way to the Supreme Court and the law was changed as predicted.

Dale Gibson argued in a case comment in 1980<sup>48</sup> that intermediate courts of appeal should have the power to “initiate the process of overruling” a higher

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*Sharp* is incorrect. Until the Supreme Court of Canada holds that to be the case, this court ought not to depart from the objective standard.”

<sup>44</sup> See *R. v. Anderson*, [1990] 1 S.C.R. 265.

<sup>45</sup> See, e.g., *R. v. Ubhi* (1994), 27 C.R. (4<sup>th</sup>) 332 (B.C.C.A.).

<sup>46</sup> Anticipatory overruling is to be distinguished from implied overruling, the latter being the case where a higher court has ruled on a matter without explicitly stating that a decision (usually of a lower court) is overruled. However, a key aspect of the earlier decision simply cannot be reconciled with the higher court’s ruling. For example, the Supreme Court’s decision in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 impliedly overruled a number of decisions dealing with negligence actions against municipalities. The Supreme Court has also spoken of implied overruling of a J.C.P.C. precedent where the Supreme Court’s own decisions had ignored it: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at para. 39.

<sup>47</sup> (1980), 27 O.R. (2d) 686 (H.C.J.) and (1980), 30 O.R. (2d) 162 (C.A.).

<sup>48</sup> Dale Gibson, “*Stare Decisis* and the Action *Per Quod Servitium Amisit* -- Refusing to Follow the Leader: *R. v. Buchinsky*” (1980) 13 C.C.L.T. 309 [Gibson].

court precedent that is believed to be wrong, at least in certain circumstances. He was referring to a decision of the Manitoba C.A. in *R. v. Buchinsky*,<sup>49</sup> wherein the court refused to follow precedents of the Supreme Court of Canada on the question of whether the Crown was entitled to bring a tort action “*per quot servitium amisit*” for damages suffered by a member of the armed forces. O’Sullivan J.A. maintained in the majority opinion that the issue had not been settled by the Supreme Court, yet later in the judgment he indicated that he was prepared to depart from the S.C.C. precedent, in any event, stating:

The problem that arises in this case is not what was the law in respect of *per quot* thought to be in 1948 or in 1962 [the years of the S.C.C. precedents], but what is the law of Manitoba today?...We are...bound to apply the common law. But, as I understand it, the common law is not simply to be determined by strict adherence to precedents...the common law is susceptible of development in light of changing circumstances, reconsideration of the reasons for a law, and the new light which is shed on old authorities by modern research.<sup>50</sup> [emphasis added]

Acknowledging the heretical nature of advocating any form of anticipatory overruling, Gibson quipped, “[t]oday’s heresy is tomorrow’s orthodoxy,” and went on to discuss the benefits and disadvantages of such a practice. He noted that while the strict vertical convention of precedent serves the interests of consistency and predictability of the law, “consistency is not the only component of justice”<sup>51</sup> and argued that the “public is much more likely to respect a Court that is willing to be corrected where its decisions can be shown to operate unfairly, than one which insists on blind subservience to its rulings, right or wrong.”<sup>52</sup> Gibson emphasized that this power should be used sparingly, in fact only where there is a “strong likelihood” that the higher court will overrule its own precedent.

On the facts of *Buchinsky*, Gibson doubted that the Manitoba C.A. would be vindicated in the end, and he was correct in that prediction. The Supreme Court overturned the decision of the C.A. and restored the trial judgment, noting that the trial judge had correctly interpreted “the decisions of this Court ... which are binding on the courts of Manitoba.”<sup>53</sup> While Gibson approved of the general, albeit heretical, principle behind anticipatory overruling, he correctly pointed out that it should be employed only in the clearest of cases.

As discussed below, the Supreme Court of Canada seems increasingly willing to reconsider and overrule even recent decisions in the *Charter* era. In this con-

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<sup>49</sup> (1980) 4 Man. R. (2d) 141 (C.A.).

<sup>50</sup> *Ibid.* at para. 9.

<sup>51</sup> Gibson, *supra* note 48 at 312.

<sup>52</sup> *Ibid.* at 313.

<sup>53</sup> *R. v. Buchinsky*, [1983] 1 S.C.R. 481 at 485, Ritchie J.

text, it might be argued that the case for anticipatory overruling by intermediate courts is stronger than it might have been at the time Gibson wrote his case comment in 1980. However, the reality is that there are very few cases where it can truly be said that an overruling by the S.C.C. is very likely or inevitable (as opposed to the C.A. simply disagreeing with the precedent of the S.C.C.).

While this issue has been rarely debated in Canada, in the United States there exists a long history of intermediate appellate courts disregarding applicable U.S. Supreme Court precedents, predicting that the higher court will eventually overrule itself. Until 1989, the U.S. Supreme Court had not expressly disapproved of this practice, despite having a number of occasions on which it could have done so.<sup>54</sup> However, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>55</sup> the Court overruled an earlier precedent (as anticipated by various appellate courts), but all members of the court expressly decried the concept of anticipatory overruling. Justice Kennedy wrote:

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.<sup>56</sup>

Therefore, for now, even in the U.S., anticipatory overruling has been rejected.

### III. HORIZONTAL CONVENTION OF PRECEDENT

The subject of when and how a court will overrule one of its own decisions has received considerable attention in appellate courts across Canada, including the Supreme Court, in recent years. A classic case of a court overruling itself is the U.S. Supreme Court decision in *Brown v. Board of Education*,<sup>57</sup> which overruled the separate but equal doctrine from *Plessy v. Ferguson*<sup>58</sup> and held that racially segregated schools violated the Equal Protection guarantee in the U.S. Constitution. The U.S. Supreme Court has generally been more willing to overrule itself than have some other high courts in the English common law tradition. In particular, the House of Lords strictly maintained the horizontal convention of precedent

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<sup>54</sup> Steven Bradford, "Following Dead Precedent: The Supreme Court's Ill-advised Rejection of Anticipatory Overruling" (1990) 59 *Fordham L. Rev.* 39 at 48.

<sup>55</sup> 109 S.Ct. 1917 (1989).

<sup>56</sup> *Ibid.* at 1921-1922.

<sup>57</sup> 347 U.S. 483 (1954).

<sup>58</sup> 163 U.S. 537 (1896).

until 1966,<sup>59</sup> refusing to recognize its own power to overrule its decisions and leaving it to Parliament to correct any decisions believed to be unjust or unworkable. However, it was in that year that the Lord Gardiner L.C. delivered the following statement on behalf of himself and the entire House:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for the orderly development of legal rules.

Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict proper development of the law. They propose therefore to modify their practice and, while treating former decisions of this House as normally binding, to depart from previous decisions when it appears right to do so.

In this connection they bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty in the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.<sup>60</sup>

This well-known statement captures the key tensions that arise when considering whether it is appropriate to overrule a precedent. On the one hand, there is the quest for certainty and predictability, which is seen as particularly important in private law matters where parties have relied on a particular statement of the law in ordering their affairs. Underlying the House of Lords previous position against overruling was the notion that once a matter has been determined, it should be left to the democratically elected legislature to change it. However, on the other side of the equation, Lord Gardiner L.C. acknowledges that strict adherence to precedent can lead to injustice (particularly where Parliament does not step in to redress a known problem or defect in the law). In addition, there is an allusion to the fact that without recognizing the power to overrule, our highest courts' law-making role would be "limited to 'filling in gaps' rather than moulding and updating the common law to keep abreast of social needs or abstract demands for better justice in the law."<sup>61</sup>

A recent decision of the Judicial Committee of the Privy Council in *Lewis v. Attorney General of Jamaica*<sup>62</sup> reveals that there are still those who maintain the view that a final court of appeal's own precedent should be followed, even when

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<sup>59</sup> See, e.g., *Beamish v. Beamish* (1861) 9 H.L.C. 274.

<sup>60</sup> Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234 (H.L.).

<sup>61</sup> Alvin Esau, "The Formal Conventions of Precedent in the House of Lords," *University of Manitoba Legal Systems Course Materials* (2006) [unpublished, archived with the author at the University of Manitoba Faculty of Law], also online: <[http://www.umanitoba.ca/Law/Courses/esau/legal\\_systems/CM-1.htm](http://www.umanitoba.ca/Law/Courses/esau/legal_systems/CM-1.htm)>.

<sup>62</sup> [2001] 2 A.C. 50 (J.C.P.C.).

that court believes the precedent to be wrongly decided.<sup>63</sup> In *Lewis*, a majority of the J.C.P.C. overruled its own precedents on a variety of issues relating to judicial review of the exercise of the royal prerogative of mercy in death penalty cases. In dissent, Lord Hoffman stated that he believed the precedents limiting the availability of judicial review in such cases were correctly decided. However, he went on to state that even if he believed them to be wrongly decided, the precedents should nevertheless be followed. In a case literally concerned with whether people lived or died, and given the trend in final courts of appeal in recent years,<sup>64</sup> this is an anomalous view.<sup>65</sup> As discussed below, such a strict approach to the horizontal precedent has been rejected in Canada, both at the Supreme Court and provincial appellate court level.

Even those who maintain a strict view of the horizontal convention in final courts of appeal generally recognize the power to distinguish or refuse to follow a precedent where factual circumstances or legal principles have changed since it was decided, where it was held to be *per incuriam*, or where it has been found to be unworkable in practical application.<sup>66</sup> The difficulty arises where none of these criteria are met, yet the later court simply considers the precedent to be wrong. As described by Bruce Harris, “[w]here the precedent is considered to be merely wrong, the later final appellate court believes that the earlier decision should have been reasoned in an alternative way to produce a more just result.”<sup>67</sup> The idea that, in such cases, a subsequent court should not substitute its own view of the matter for that of the earlier court has been described as the “no new reasons” justification for maintaining *stare decisis*,<sup>68</sup> and may, in some courts, be relied on as a presumption against overruling a “merely wrong” precedent. For example, in the U.S. Supreme Court decision in *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, Governor of Pennsylvania, et al.*, O’Connor, Kennedy and Souter JJ. said, in referring to the precedent of *Roe v. Wade* on abortion,

the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in

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<sup>63</sup> See also *Kneller (Publishing, Printing and Promotions) Ltd. v. D.P.P.*, [1973] A.C. 435 (H.L.) where the precedent creating a common law crime of “conspiracy to corrupt public morals” was not overruled even though a majority of the court thought it was wrong.

<sup>64</sup> See generally, Bruce Harris, “Final Appellate Courts Overruling Their Own ‘Wrong’ Precedents: The Ongoing Search for Principle” (2002) 118 *L.Q.R.* 408 [Harris].

<sup>65</sup> The House of Lords had recognized since at least 1983 that the fact a case dealt with an individual’s “loss of liberty” was a factor in favour of overruling: *Ex parte Khawaja*, [1983] 2 W.L.R. 321 (H.L.).

<sup>66</sup> *Harris*, *supra* note 64 at 411-412.

<sup>67</sup> *Ibid.* at 412.

<sup>68</sup> *Ibid.* at 416.

our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.<sup>69</sup>

Harris has reviewed the trend in final common law courts of appeal toward a greater willingness to overrule their own precedents.<sup>70</sup> He argues forcefully for the reversal of the presumption against overruling “merely wrong” precedents in favour of a presumption that wrong precedents should be overruled “unless their retention can be justified in the circumstances by overriding *stare decisis* values.”<sup>71</sup> Ultimately, he argues for a transparent exercise of discretion to depart from precedent after balancing the competing interests at stake. The court should weigh the consequences of perpetuating a wrong precedent against the values, when examined in context, of observing *stare decisis*. Harris has added to the traditional justifications for overruling a precedent and put forward the following eight considerations relevant to a decision to overrule or defer:

- (i) whether the precedent can be distinguished based on changing facts or law;
- (ii) whether the precedent was reached *per incuriam*;
- (iii) whether precedent has proved unworkable;
- (iv) whether any reasons have been advanced on appeal which were not considered in the earlier case (going beyond the standard for *per incuriam*);
- (v) whether the later court now views the precedent to be wrong ( *i.e.*, the court now gives different weight or priority to the considerations weighed in the earlier case);
- (vi) whether the values underlying error correction or “doing justice” as it is now perceived outweigh the values advanced to by adherence to *stare decisis* (here is where the presumption would now be in favour of correction);
- (vii) whether the perceived error or injustice is likely to be swiftly corrected by the legislature (note that where interpretation of a written constitution is involved, simple amendment is not possible); and
- (viii) whether fundamental principles of human and civil rights are involved.

As we shall see, the latter consideration has contributed to a greater willingness on the part of the Supreme Court of Canada to overrule precedents in the *Charter* era. In addition, Canadian appellate courts have adopted a pragmatic

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<sup>69</sup> 505 U.S. 833 (1992) at 864.

<sup>70</sup> *Harris, supra* note 64.

<sup>71</sup> *Ibid.* at 427.

balancing approach of the benefits and disadvantages of overruling a precedent (Harris' sixth consideration) and seem to be moving toward a presumption that "merely wrong" precedents should be overruled, absent compelling considerations to the contrary.

### 1. Supreme Court of Canada

From the time appeals from the S.C.C. to the J.C.P.C. were abolished in 1949, the incremental process of the S.C.C. developing a uniquely Canadian body of law was underway,<sup>72</sup> and this process included the court becoming more comfortable with the practice of distinguishing and, eventually, overruling precedents.<sup>73</sup> Beginning in the late 1970s and early 1980's, the Supreme Court of Canada demonstrated a willingness to overturn its own (or pre-1949 J.C.P.C.) precedents where, in the words of Dickson J. (as he then was), "compelling reasons" existed.<sup>74</sup> Such a move was not surprising, given that the Court was led at the time by Chief Justice Bora Laskin who had long been critical of the strict approach to *stare decisis* practiced in the Supreme Court of Canada and the Ontario Court of Appeal, as well as of the fidelity that had been shown to English law over the creation of uniquely Canadian precedents. By the time Brian Dickson became Chief Justice, presiding over the formative years of *Charter* jurisprudence in Canada, it became clear that the S.C.C. would not be bound by any strict formula in deciding whether to overrule its own decisions, particularly pre-*Charter* ones. Beginning with his dissent in *Bernard v. The Queen*,<sup>75</sup> Dickson C.J. recognized at least four factors that tended to favour overruling, including (1) whether the precedent is consistent with the *Charter*, (2) whether it has been attenuated by subsequent cases, (3) whether it creates uncertainty, and (4) in a criminal case, whether it operates to the detriment of accused persons.<sup>76</sup> In *R. v. Chaulk*,<sup>77</sup> a majority of the court relied on these factors to overrule *Schwartz v. The Queen*<sup>78</sup> on the meaning of the word "wrong" in the insanity (now mental disorder) defence.

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<sup>72</sup> See generally, John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002).

<sup>73</sup> See Justice Rosalie Silberman Abella, "Advocacy in Jurisprudential Appeals" (2003) 21 *Advocates' Soc. J.* 19 [Abella].

<sup>74</sup> See *Canada (Minister of Indian Affairs and Northern Development) v. Ranville*, [1982] 2 S.C.R. 518 and *Marvco Color v. Harris*, [1982] 2 S.C.R. 774.

<sup>75</sup> [1988] 2 S.C.R. 833.

<sup>76</sup> *Ibid.* at paras. 30-55.

<sup>77</sup> [1990] 3 S.C.R. 1303.

<sup>78</sup> [1977] 1 S.C.R. 673.

Two years ago, in *R. v. Henry*,<sup>79</sup> the Supreme Court was called upon to reconsider a line of cases interpreting s. 13 of the *Charter*, the right against self-incrimination. The cases, *Dubois v. The Queen*,<sup>80</sup> *R. v. Mannion*,<sup>81</sup> *R. v. Kuldip*,<sup>82</sup> and *R. v. Noël*,<sup>83</sup> all dealt with various aspects of whether and how an accused's prior statement or testimony could be used in a subsequent trial. In *Henry*, the two accused were convicted of first degree murder in a re-trial in which they were cross-examined on prior inconsistent testimony they had given at their first trial. Defence counsel asserted on appeal that the accused were entitled to protection by virtue of s. 13 from exposure to contradictory testimony they had given voluntarily in the earlier trial.

In rejecting this interpretation of s. 13, a unanimous Supreme Court in *Henry* overruled *Mannion*, a 19 year-old precedent, which had held that an accused could not be cross-examined on prior inconsistent testimony given at an earlier trial where the accused had testified voluntarily. The court also overruled in part *Kuldip*, a post-*Mannion* decision, in which it was held that an accused could only be cross-examined on such prior testimony where the purpose was to impeach credibility, rather than to incriminate the accused. The court in *Henry* took the view that the decisions in *Mannion* and *Kuldip* had strayed from the purpose of s. 13 which was first recognized in *Dubois*, namely to "protect individuals from being indirectly compelled to incriminate themselves."<sup>84</sup> Those decisions had not drawn any distinction between being confronted in cross-examination by prior compelled evidence (where the accused is entitled to protection by s. 13) and being confronted with prior testimony given by the accused voluntarily at his or her own trial (where the accused is not entitled to protection from "self-incrimination" by s. 13). They had erred in treating both compelled and voluntary testimony as equally deserving of protection, and drawing an unworkable distinction in *Kuldip* between cross-examination to impeach and cross-examination to incriminate.

The court in *Henry* acknowledged that it "should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection."<sup>85</sup> In the result, it overruled one aspect of the case law that has been beneficial to the accused (the *Mannion* rule that an accused could not ordinarily be cross-

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<sup>79</sup> *Supra* note 9.

<sup>80</sup> [1985] 2 S.C.R. 350 [*Dubois*].

<sup>81</sup> [1986] 2 S.C.R. 272.

<sup>82</sup> [1990] 3 S.C.R. 618.

<sup>83</sup> [2002] 3 S.C.R. 433.

<sup>84</sup> *Dubois*, *supra*, note 80 at 358.

<sup>85</sup> *Henry*, *supra* note 9 at para. 44.

examined on prior voluntary testimony) and one aspect that had been favourable to the Crown (the *Kuldip* rule permitting cross-examination on all prior testimony provided it was used to impeach credibility, rather than to incriminate the accused). According to Binnie J., “[t]he result of a purposeful interpretation of s. 13 is that an accused will lose the *Mannion* advantage in relation to prior *volunteered* testimony but his or her protection against the use of prior *compelled* testimony will be strengthened.”<sup>86</sup> [emphasis added].

In a manner consistent with other S.C.C. decisions in the last decade of the *Charter* era, the court in *Henry* did not spend much time explaining its ability to overrule its own precedents, beyond noting that there were three “compelling reasons” to overrule in this case.<sup>87</sup> The first compelling reason was the court’s view that *Mannion* had adopted an interpretation of s. 13 that was inconsistent with that provision’s purpose. A second compelling reason was said to be the unworkability of the *Kuldip* distinction between cross-examination to incriminate and cross-examination to impeach, a conclusion that was only reached after experience trying to implement it. In fact, both the Crown and defence in *Henry* acknowledged the problematic nature of this distinction, although they disagreed about the solution to that problem<sup>88</sup> (the Crown wanted more freedom to cross-examine the accused, while the defence wanted virtually none). Finally, the third compelling reason was said to be the unfair dilution of s. 13 protection against subsequent use of compelled testimony by the decision in earlier cases to lump it in together with testimony given by the accused voluntarily, and therefore permitting some cross-examination on it with the real potential for incrimination.

While the Supreme Court stated in *Henry* that its practice is “against departing from precedents unless there are compelling reasons to do so” and that such departures are “rare”,<sup>89</sup> the reality is that compelling reasons have been found quite regularly in the post-*Charter* era.<sup>90</sup> This is not to suggest that overruling previous decisions now thought to be incorrect is inappropriate. The reality is that it is sometimes difficult to predict in advance that a newly articulated approach or principle will be unworkable or lead to unintended consequences or inequities. It is preferable that the court squarely face up to these challenges and admit error or unworkability where it is evident, rather than to distinguish cases on spurious or technical grounds or continue to apply a law thought to be unjust.

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<sup>86</sup> *Ibid.* at para. 60.

<sup>87</sup> *Ibid.* at para. 45-46.

<sup>88</sup> *Ibid.* at para. 8.

<sup>89</sup> *Ibid.* at para. 44.

<sup>90</sup> At least eight are mentioned in *Henry* and that list is by no means exhaustive.

## 2. Provincial appellate courts

The ability of intermediate courts of appeal (such as the Federal Court of Appeal and the various provincial appellate courts in Canada) to overrule their own precedents has been treated differently than that for final courts of appeal. A factor in favour of limiting the power to overrule is found in the fact that, unlike final courts of appeal, intermediate appellate courts generally do not sit *en banc* (with all members of the court), but rather in panels of three members of a much larger court. If one panel of three members of the court was not bound to follow a decision of a different panel of three, the state of the law would be quite uncertain.<sup>91</sup>

The strictest approach to this power is that set out by the English Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.*<sup>92</sup> In *Young*, Lord Greene M.R., on behalf of the Court, held that, subject to three exceptions, the Court of Appeal was bound by its own previous decisions. Those exceptions were (1) when faced with a previous conflicting decision of the Court of Appeal it could choose which to follow, (2) when a previous decision had been impliedly overruled by a subsequent decision of the House of Lords, and (3) when a decision of the Court of Appeal was given *per incuriam*, it need not be followed. Over the years, a few other exceptions have been added, such as that the strict approach to *stare decisis* does not apply where the liberty of the subject is at issue, such as in criminal cases,<sup>93</sup> but the ability to overrule itself remains quite limited.

Until quite recently, most provincial appellate courts in Canada did not consider themselves bound by horizontal *stare decisis* in a manner similar to the English Court of Appeal. The Ontario Court of Appeal was the exception, having taken the view, at least in civil matters, that it ought not to overrule its own decisions, even those thought to be wrong.<sup>94</sup> Writing in 1978, George Curtis attributed the intermediate appellate courts' relative level of comfort with overruling their own precedents to such factors as the enormous geographic scope of Canada and the reality that these courts were the *de facto* courts of last resort for the vast majority of cases coming before them.<sup>95</sup> For example, in a 1975 decision,<sup>96</sup> Freedman C.J.M. made clear his willingness to overturn precedent in appropriate cases:

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<sup>91</sup> *Rickards v. Rickards*, [1989] 3 All E.R. 193 (C.A.).

<sup>92</sup> [1944] K.B. 718 (C.A.).

<sup>93</sup> *R. v. Spencer*, [1985] 1 All E.R. 673 (C.A.).

<sup>94</sup> See e.g., *Delta Acceptance Corp. v. Redman* (1966), 55 D.L.R. (2d) 481 (Ont. C.A.).

<sup>95</sup> George Curtis, "Stare Decisis at Common Law in Canada" (1978) 12 *U.B.C.L.Rev.* 1.

<sup>96</sup> *General Brake & Clutch Services Ltd. v. W.A. Scott & Sons Ltd.* (1975), 59 D.L.R. (3d) 741 (Man. C.A.).

Let me at once express my belief that we do not lack the power to depart from an earlier decision of this Court. It is a power that will of course be exercised only in rare circumstances. But if the circumstances are deemed appropriate and we are convinced that the earlier decision was incorrect we should be guided by the principle that it is no part of the function of any Court to make error perpetual.<sup>97</sup>

However, in *John Deere v. Firdale Farms Ltd.*,<sup>98</sup> both the majority and dissenting opinions in the Manitoba Court of Appeal seemed to take a more restrictive view, citing *Young v. Bristol Aeroplane*. The court sat a five-person panel and a majority of three justices overruled the court's earlier decision in *Royal Bank of Canada v. J.I. Case Canada Inc.*<sup>99</sup> However, in doing so, Twaddle J.A. seemed to approve of the *Young* approach, while relying on the "rare" exception from post-*Young* cases to the effect that a decision of an intermediate court of appeal could be considered *per incuriam* and need not be followed where it was "demonstrably wrong" or made in "manifest error."<sup>100</sup> Apparently gone is the more relaxed approach of Freedman C.J.M. that an earlier decision could be overruled if considered simply incorrect. (unclear here, for is not Twaddle using the mistake doctrine?) The two dissenting justices, O'Sullivan and Huband JJ., both of whom had decided *Royal Bank of Canada*, took a similarly restrictive view of the power to overrule, while also taking exception to the characterization of their earlier decision as "manifestly wrong." Huband J.A. stated, "[i]f *Royal Bank v. Case* was not a decision *per incuriam*, then it should be followed no matter what the individual views of the judges on this panel might be."<sup>101</sup> O'Sullivan J.A. took the view that the 3-2 decision in *John Deere* to depart from *Royal Bank of Canada* represented only a "conflicting decision of this court" and noted that "future courts would have to choose between" the two conflicting authorities.<sup>102</sup>

In *Mellway v. Mellway*,<sup>103</sup> Monnin J.A. stated that a precedent of the Manitoba Court of Appeal can only be overruled by the Supreme Court of Canada or by a five-person panel of the court. This "panel of five" convention appears to have originated in British Columbia,<sup>104</sup> but has since been adopted in other provinces,<sup>105</sup> on the basis that a three-person panel is simply disagreeing with,

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<sup>97</sup> *Ibid.* at para. 2.

<sup>98</sup> (1987) 45 D.L.R. (4<sup>th</sup>) 641 (Man. C.A.) [*John Deere*].

<sup>99</sup> [1984] 1 W.W.R. 669 (C.A.).

<sup>100</sup> See, e.g., *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708 (C.A.).

<sup>101</sup> *John Deere*, *supra* note 98 at 652.

<sup>102</sup> *Ibid.* at 648.

<sup>103</sup> (2004), 187 Man. R. (2d) 247 (C.A.).

<sup>104</sup> See *Bell v. Cessna Aircraft Co.*, [1983] 6 W.W.R. 178 (B.C.C.A.).

<sup>105</sup> See, e.g., *David Polowin*, *supra* note 7 (Ont. C.A.).

rather than overruling, a previous decision.<sup>106</sup> However, there remains some dispute about whether a three-person panel is empowered to overrule a precedent on the limited *Young v. Bristol Aeroplane* grounds (*per incuriam*, etc.), leaving the five-person panel for overruling on substantive grounds for incorrectness. For example, in *United Brotherhood of Carpenters v. British Columbia (Labour Relations Board)*,<sup>107</sup> a three-person panel of the British Columbia Court of Appeal held that “a three-judge panel may decline to follow a previous decision of the Court in certain circumstances,” which includes, at least, where the *per incuriam* rule applies.<sup>108</sup>

It should be noted that the Federal Court of Appeal has adopted a similar approach to overruling its own precedents, as exemplified in the following passage from a 1997 decision:

although a decision of one panel of this court is not binding on another, it is incorrect to speak of a recent decision overruling an earlier one. The accepted rules of stare decisis dictate that both decisions are of equal weight. It is true that with the passage of time an earlier decision may fall into disfavour and, thus, lose its persuasiveness through application of various well-known judicial techniques. It is equally true that on occasion one panel expressly disapproves of an earlier decision where the principal author of that decision or the majority of that panel is now sitting on the subsequent case. More often than not the earlier decision was rendered from the bench or was decided *per incuriam*. Aside from these circumstances, the formal means for overruling an earlier decision is to have the Court strike an enlarged panel, as may be done where there are two conflicting decisions of the Court, or conflicting lines of authority, and the issue involved is deemed to be of fundamental significance to the jurisprudence in a particular area of federal law.<sup>109</sup>

This brings us to *R. v. Neves*,<sup>110</sup> the 2005 decision of a five-person panel of the Manitoba Court of Appeal, in which a 3-2 majority overruled *R. v. Garoufalis*.<sup>111</sup> *Garoufalis* had held that ability to pay was irrelevant to the court’s consideration of whether to impose a fine in lieu of forfeiture under s. 462.37(3) of the *Criminal Code*. Steel and Freedman J.J.A. for the majority<sup>112</sup> cited with approval the view of Monnin J.A. in *Mellway* that a five-member panel is required for a “direct

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<sup>106</sup> In the U.S. Federal Court system, precedents of the various circuits may only be overruled by the court *en banc* (i.e., all members of the circuit sitting together) or by the U.S. Supreme Court.

<sup>107</sup> [2006] B.C.J. No. 1757 (B.C.C.A.).

<sup>108</sup> *Ibid.* at paras 25-27.

<sup>109</sup> *Mastri v. Canada (Attorney General)*, [1997] FCJ No. 880 at para. 6 (C.A.).

<sup>110</sup> *Supra* note 4.

<sup>111</sup> (1998), 131 Man. R. (2d) 231 (C.A.).

<sup>112</sup> Scott C.J.M. concurred.

rejection” of a previous decision of the court.<sup>113</sup> They also cited Freedman C.J.M. in *General Brake & Clutch* for the proposition quoted above, namely that the court should not perpetuate its own errors.<sup>114</sup> The majority in *Neves* went on to adopt the approach of the Ontario Court of Appeal in *David Polowin Real Estate v. Dominion of Canada General Insurance Co.*<sup>115</sup> for situations where neither the *per incuriam* nor the “manifest slip or error” exceptions to *stare decisis* applies. In such cases where the appellate court nevertheless believes the precedent to be wrong, it should

weigh the advantages and disadvantages of correcting the error...focus[ing] on the nature of the error, and the effect and future impact of either correcting it or maintaining it. In doing so, this approach not only takes into account the effect and impact on the parties and future litigants but also on the integrity and administration of our justice system.<sup>116</sup>

Having unanimously overruled a four year-old precedent in *David Polowin*, it is now clear that the Ontario Court of Appeal has abandoned its earlier adherence to the limited *Young* approach to overruling.

The real benefit of such the more principled, functional approach can be found in the fact that it does not require judges who believe a precedent to be wrong to shoehorn their decision to overrule into one of the limited exceptions such as those enumerated in *Young* and its progeny.<sup>117</sup> Laskin J.A. refused to decide *David Polowin* on the basis of a number of limited and technical exceptions to *stare decisis* put forward by the insurers. Those exceptions included the *per incuriam* rule, the proposition that *stare decisis* does not apply to the interpretation of contracts, the argument that the instant appeal involved a different question than the precedent, and a purported “special circumstances” exception.<sup>118</sup> Instead, the Ontario Court of Appeal in *David Polowin* and the majority of the Manitoba Court of Appeal in *Neves* undertook a more transparent, pragmatic

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<sup>113</sup> *Neves*, *supra* note 4 at para. 60.

<sup>114</sup> *Ibid.* at para 87.

<sup>115</sup> *Supra* note 6.

<sup>116</sup> *Ibid.* at para. 127, cited in *Neves*, *supra* note 5 at para. 92.

<sup>117</sup> *David Polowin*, *ibid.* at para. 127.

<sup>118</sup> *Ibid.* at paras. 110-117. In rejecting these arguments, the court rejected the submission that the motions judge of the Superior Court could have refused to apply the precedent, *McNaughton*, on one or more of these bases, stating:

The motions judge’s ruling was entirely appropriate. A fair reading of his reasons suggests he would have decided the motions differently had he been free to do so. But he properly considered himself bound to follow *McNaughton*. If the error in *McNaughton* is to be corrected, it falls to this court, not the motions judge, to do so (at para. 117).

attempt to consider how the values promoted by adherence to precedent on the one hand, and by error correction on the other, actually play out on the facts of the case. Both decisions cited the criteria from *Chaulk* and other S.C.C. decisions favouring overruling a precedent (including consistency with *Charter* values, attenuation by later decisions of the court, uncertainty caused by the precedent, and whether the overruling would be favourable to the accused). However, the nature of the cost-benefit analysis opened up other factors for consideration, such as whether decisions of other courts of appeal across the country contradict the precedent, whether the broader issues at stake are likely to recur in the future, whether there has been significant reliance on the precedent, whether the precedent is of recent vintage (“better then to correct an error early than to let it settle in”<sup>119</sup>), and whether the panel has the benefit of legislative history that the earlier court did not.

Unlike the decision in *David Polowin*, *Neves* was not unanimous. The two dissenting justices (Huband and Monnin J.J.A.) were strongly of the view that “to maintain the principle of *stare decisis* in the circumstances of this case is the paramount consideration. If that principle can be side-stepped in this case, then the principle is eroded beyond recognition.”<sup>120</sup> Significantly, they did not disapprove of the approach in *David Polowin*. However, they argued that any factors favouring reconsideration of *Garoufalis* were trumped by the fact that the five-person court in the instant appeal could not agree that the precedent was wrongly decided<sup>121</sup> and that it is unprecedented for a divided court to overrule a unanimous decision simply on the basis that it was wrong.<sup>122</sup>

Ideally, every decision to overrule a precedent would be unanimous. However, Canadian courts do not require unanimity for a decision to be considered binding. In the end, the substantive issue in *Neves* was resolved by the Supreme Court of Canada in its decision on a related appeal, *R. v. Lavigne*,<sup>123</sup> in a manner that overruled the majority decision from Manitoba. The high court interpreted the relevant provision of the *Code* differently from both the majority and dissenting opinions in *Neves*, although in result closer to the dissent than to the majority.<sup>124</sup> This does not necessarily mean that the majority in *Neves* should not have

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<sup>119</sup> *Ibid.* at para. 140.

<sup>120</sup> *Neves*, *supra* note 5 at para. 206.

<sup>121</sup> *Ibid.* at para. 205.

<sup>122</sup> *Ibid.* at para. 199.

<sup>123</sup> *R. v. Lavigne*, [2006] S.C.J. No. 10.

<sup>124</sup> Section 462.37(3) of the *Code* was interpreted to confer a very limited discretion on sentencing judges, which discretion only applies to the decision of whether to impose no fine and a determination of the value of the property (*Garoufalis* and the dissent in *Neves* had said no

ruled as it did. However, since it was already known that the Supreme Court of Canada would be pronouncing on the issue in *Lavigne*, the argument for overruling the precedent to clarify the law in the province for future cases (a key factor in *David Polowin*) could not be relied on in *Neves*.<sup>125</sup> On this point, the Ontario Court of Appeal had said the following:

I do not think that this court should be less willing to depart from its own decisions because the Supreme Court of Canada, our country's final court, can correct errors made by a provincial appellate court. For people in Ontario, the Court of Appeal for Ontario is the final court in the vast majority of cases. The Supreme Court grants leave rarely and does not ordinarily do so simply because it considers a provincial appellate court decision to be wrong. More is required to obtain leave—the case must raise an issue of public or national importance...If we dismiss these appeals because of stare decisis, it is not obvious that the appellants will obtain leave to appeal to our highest court.<sup>126</sup>

Therefore, it seems that we have come full circle to an approach remarkably similar to that described by George Curtis and Justice Freedman in the 1970s, where the likelihood (or not) that the Supreme Court of Canada will correct errors is a factor in favour of permitting greater latitude for provincial courts of appeal to overrule their own decisions. It seems that the liberal, functional approach to overruling in provincial courts of appeal is gaining momentum at a pace similar to the Supreme Court's increasing comfort level with overruling its own precedents now thought to be wrong or unworkable. However, there are still strong voices in favour of a more restrained approach.

### 3. Trial courts

With respect to the horizontal convention of precedent at the trial level, the dominant approach is that, while not strictly binding, applicable decisions of the same court should be followed as a matter of judicial comity, unless certain circumstances exist.<sup>127</sup> A leading decision is *Re Hansard Spruce Mills*,<sup>128</sup> in which Wilson J. of the B.C. Supreme Court expressed the matter in these terms:

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

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discretion), but does not include consideration of ability to pay (the majority in *Neves* had included some consideration of ability to pay).

<sup>125</sup> *Neves*, *supra* note 4 at para. 202, Huband J.A., dissenting.

<sup>126</sup> *David Polowin*, *supra* note 6 at para. 143.

<sup>127</sup> See, e.g., *Re Hansard Spruce Mills Ltd.*, [1954] 13 W.W.R. (N.S.) 285 (B.C.S.C.) [*Hansard*] and *Holmes v. Jarrett* (1993), 68 O.R. (3d) 667 (Gen. Div.).

<sup>128</sup> *Hansard*, *ibid.*

difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.<sup>129</sup>

Wilson J. went on to say that a judge should only decline to follow a decision of the same court if (1) subsequent decisions have affected the validity of the previous decision, (2) it is demonstrated that some binding precedent or relevant statute was not considered (*i.e.*, the decision was *per incuriam*), or (3) the judgment was not considered (*i.e.*, it was given as an immediate decision without opportunity to consult authority).<sup>130</sup>

Having said that, Manitoba judges have on occasion treated previous decisions of their colleagues as binding.<sup>131</sup> A relatively recent example is the decision of Morse J. in *Paul v. Manitoba (Chief Electoral Officer)*<sup>132</sup> involving a *Charter* challenge to the prohibition on prisoner voting in provincial elections.<sup>133</sup> The case arose in somewhat unusual circumstances. Prisoners at Stony Mountain Penitentiary had successfully challenged the prisoner voting ban in provincial legislation in a decision before Scollin J. in 1986.<sup>134</sup> However, with only a short time before the provincial election, the court declined to order the Chief Electoral Officer to actually make prisoner voting a reality. The prisoners' appeal of that remedial decision was denied by the Court of Appeal (it was 17 hours before the polls opened). The Attorney General then filed an appeal but did nothing to prosecute it for two years. In the mean time, the same prisoners (Arnold Badger and others) brought an action challenging the constitutionality of the federal prisoner voting ban. In that case, Hirschfield J. declared the federal law unconstitutional,<sup>135</sup> but an appeal to the Manitoba Court of Appeal was allowed, upholding the federal voting ban as valid.<sup>136</sup> In a separate proceeding, the Court of Appeal refused to exercise its discretion to revive the appeal of the Scollin J. decision concerning the validity of the provincial voting ban.<sup>137</sup> It was with this background that *Paul* was heard and the first *Badger* decision followed (*i.e.*, the provincial voting ban was declared invalid), notwithstanding the C.A. decision in

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<sup>129</sup> *Ibid.* at 286.

<sup>130</sup> *Ibid.*

<sup>131</sup> See, *e.g.*, *Sedziak v. Polish Worker's Association*, [1937] 4 D.L.R. 672 (Man. K.B.).

<sup>132</sup> (1990), 72 D.L.R. (4<sup>th</sup>) 396 (Q.B.) [*Paul*].

<sup>133</sup> Prisoner voting bans at the federal and provincial level have since been declared unconstitutional. See *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66 and *Driskell v. Manitoba (Attorney General)*, [1999] M.J. No. 352 (Q.B.).

<sup>134</sup> *Badger v. Manitoba (Attorney-General)* (1986), 30 D.L.R. (4<sup>th</sup>) 108 (Q.B.).

<sup>135</sup> *Badger v. Canada (Attorney General)* (1988), 55 Man. R. (2d) 211 (Q.B.).

<sup>136</sup> *Badger v. Canada (Attorney General)*, [1989] 1 W.W.R. 216 (Man. C.A.).

<sup>137</sup> *Badger v. Manitoba (Attorney General)* (1990), 66 Man. R. (2d) 291 (C.A.).

the second *Badger* case which had upheld the federal voting ban and had arguably cast doubt on the first *Badger* decision. In response to the argument that he should consider “*Badger No. 1*” impliedly overruled by the Court of Appeal decision in “*Badger No. 2*,” Morse J. said the following:

In my judgment, however, I do not have the right or authority to declare valid legislation which another judge of this court has declared to be of no force or effect or invalid by reason of inconsistency with the Charter. If this is to be done, it must, in my opinion, ...be done by the Court of Appeal.<sup>138</sup>

Such an approach to following trial level decisions seems anomalous, and may have been adopted by the court due to the nature of the issue, namely upholding a *Charter* right that had been vindicated in the earlier case. On the other hand, there are examples of trial judges (at the provincial court and superior court level) taking the view that they are free to depart from a decision of the same court,<sup>139</sup> often citing the words of Lord Goddard C.J. in *Police Authority for Huddersfield v. Watson*.<sup>140</sup>

I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court.<sup>141</sup>

With the high number of trial judges at work in a given jurisdiction (for example, the Ontario Superior Court has over 250 members), a plethora of conflicting decisions is undesirable. However, it is also well-known that trial judges often do not have the benefit of full argument and case law on the legal matters they must decide. As such, the dominant approach is that articulated in *Re Hansard Spruce Mills*, and is generally understood to be based on the idea of non-binding comity (*i.e.*, respect for opinions of the same court) with freedom to depart for good reason. However, some judges seem to treat the notion of comity as essentially binding them to follow the previous decision,<sup>142</sup> while others consider

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<sup>138</sup> *Paul*, *supra* note 132 at 403.

<sup>139</sup> See, *e.g.*, *Xerox Canada Inc. v. Neary* (1984) 47 O.R. (2d) 776 (Prov. Ct.), *R. v. Groves* (1977), 17 O.R. (2d) 65 (H.C.J.), and *R. v. Ostridge* (1979) 22 N. & P.E.I. R. 123 (P.E.I.S.C.). See also Esau, *supra* note 12.

<sup>140</sup> [1947] 1 K.B. 842 (H.L.).

<sup>141</sup> *Ibid.* at 847.

<sup>142</sup> See, *e.g.*, the recent Saskatchewan Queen’s Bench decision in *R. v. Butchko*, [2004] S.J. No. 441 in which Klebuc J. followed another Q.B. decision which he believed to be wrongly de-

themselves free to disagree with a previous decision (for they cannot be understood to “overrule” it) if they think it incorrect.<sup>143</sup> As suggested by Esau, the uncertainty in regard to the horizontal precedent at the trial court level is unsatisfactory.<sup>144</sup> Borrowing a page from the appellate decisions in *David Polowin in Neves*, we may start to see an effort made by trial judges to weigh the benefits and disadvantages of following previous decisions of the same court.

#### IV. CONCLUSION

In a recent article entitled “Advocacy in Jurisprudential Appeals,”<sup>145</sup> Justice Rosalie Abella cited Iacobucci J. for the proposition that “laws get changed when the court thinks the law needs incremental changes to ‘bring legal rules into step with a changing society.’ In other words, judges make law reluctantly and infrequently, legislatures do it for a living. This I think, is how most judges feel.”<sup>146</sup> Don Stuart has suggested that precedent is only one of the “working ingredients” of judicial decision-making, particularly at the Supreme Court of Canada level, “achiev[ing] a compromise between a goal of certainty and predictability and one of flexibility.”<sup>147</sup> The recent treatment of precedent in Canada, particularly the horizontal convention, seems to confirm this view. On the other hand, we have seen the Supreme Court of Canada take a stricter view than some would like to the vertical convention of precedent, particularly the precedential value of “authoritative *obiter*” from that court.

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cided and which was inconsistent with an Ontario C.A. decision which he thought was correct. He stated:

I find myself in substantially the same position as the trial judge to the extent that I considered the better law is as stated by the Ontario Court of Appeal in *R. v. Lindsay*, *supra*. Notwithstanding my conclusions, I feel bound, as a matter of practice and courtesy and not as a matter of law, to observe the secondary arm of stare decisis by applying *R. v. Arcand* and granting the appeal based on its ratio decidendi. The non-legal meaning of comity also applies to the extent that I wish to be civil and polite by respecting the prior decision of a judge of this court (at para. 27).

His decision was reversed by the Sask. C.A.: [2004] S.J. No. 735.

<sup>143</sup> See, e.g., *dela Fuente v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1219 at para. 29 (T.D.) where Harrington J. states “it is preferable that a judge of the same court follow what has been previously decided by another judge of the same court. Nevertheless, one is not bound by such a decision if one cannot agree with the reasoning.”

<sup>144</sup> Esau, *supra* note 11.

<sup>145</sup> Abella, *supra* note 73.

<sup>146</sup> *Ibid.* at 22, citing *R. v. Salituro*, [1991] 3 S.C.R. 654.

<sup>147</sup> Don Stuart, *Canadian Criminal Law; A Treatise*, 4<sup>th</sup> ed. (Toronto: Carswell, 2001) at 12.

A more flexible, functional approach to precedent arguably discourages a kind of formalistic reasoning that may result if judges are not permitted to consider the merits of a particular rule, as well as a tendency to “find another way around” a problematic precedent, rather than to address it forthrightly. After all, judging requires *judgment*, which means considering the admittedly slippery concept of whether justice is done by maintaining or changing a legal rule.<sup>148</sup> Huband J.A. in *Neves* has correctly observed that the doctrine of *stare decisis* is being eroded not, I would suggest, “beyond recognition,” but eroded nonetheless. Some of the trends discussed here represent a challenge to the traditional view that a later panel of a given court should not be free to substitute its doctrinal preferences or views for that of the first panel to decide the matter. As Bruce Harris has noted, in arguing for a principled approach to horizontal overruling, “there would appear to be no reason why the doctrinal disposition of the earlier court should automatically prevail over that of the later court.”<sup>149</sup> Stability, consistency, and protection of reliance interests are all important institutional values promoted by the doctrine of *stare decisis*. Recent appellate decisions signal a shift toward a greater focus on exactly how those values play out on the facts before the court, rather than in an abstract sense. Such a principled and functional approach is welcome.

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<sup>148</sup> Heather Leonoff, who was defence counsel in *R. v. Chaulk*, *supra*, note 77, has suggested that a key consideration for the S.C.C. in overruling *R. v. Schwartz* was her submission that it would simply be unjust to deny Robert Chaulk the benefit of the insanity defence in that case. Personal conversation with Heather Leonoff, October 4, 2006.

<sup>149</sup> Harris, *supra*, note 65 at 418.