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# Precedent Revisited: Carter v Canada (AG) and the Contemporary Practice of Precedent

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## PRECEDENT REVISITED: *CARTER V CANADA (AG)* AND THE CONTEMPORARY PRACTICE OF PRECEDENT

*Debra Parkes\**

In addition to the important substantive changes to Canadian law brought about by *Carter v Canada (AG)*, the decision is significant for its consideration of the doctrine of *stare decisis*. This article examines the circumstances under which Canadian courts, including courts lower in the relevant hierarchy, might be entitled to revisit otherwise binding, higher court precedents and to depart from them. At least in constitutional cases, the *Carter* trial decision affirms that trial judges may reconsider rulings of higher courts where a new legal issue is raised or where there is a change in circumstances or evidence that “fundamentally shifts the parameters of the debate.” Following a review of the recent Supreme Court of Canada case law on *stare decisis*, including *Carter*, the article turns to some critiques of the Court’s

En plus des modifications importantes à la loi canadienne suscitées par l’arrêt *Carter c Canada (PG)*, ce jugement est important en raison de son examen du principe du *stare decisis*. Le présent article analyse les circonstances en vertu desquelles les tribunaux canadiens, y compris les tribunaux moins élevés dans la hiérarchie pertinente, pourraient réexaminer et s’écarter de précédents autrement obligatoires rendus par les tribunaux supérieurs. Dans *Carter*, la cour d’instance affirme que les juges de première instance peuvent reconsidérer les décisions provenant de tribunaux supérieurs lorsqu’une nouvelle question de droit est soulevée ou lorsqu’une modification de la situation ou de la preuve « change radicalement la donne », du moins dans les affaires constitutionnelles. À la suite de l’examen de

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newly articulated approach to revisiting precedents in lower courts, and responds to those critiques. The article also looks to the recent case law in which courts largely reject attempts to reconsider precedents from higher courts, revealing that the pull to follow precedent remains strong in Canadian law.

décisions récentes de la Cour suprême du Canada concernant le principe du *stare decisis*, y compris l'arrêt *Carter*, cet article traite de certaines critiques quant à l'approche de la Cour en ce qui concerne la révision de précédents par les tribunaux inférieurs, puis répond à ces critiques. Cet article examine également la jurisprudence récente dans laquelle les tribunaux rejettent largement les tentatives de réexamens de précédents provenant de tribunaux supérieurs, révélant de ce fait que l'attrait de la règle du précédent demeure élevé en droit canadien.

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## INTRODUCTION

*Carter v Canada (AG) (Carter SCC)*,<sup>1</sup> is a case about life and death. The stakes for litigants do not get higher. The claim was filed in April 2011 on behalf of Lee Carter and Hollis Johnson, a couple who had accompanied Lee's 89-year-old mother, Kay Carter, to Switzerland to have a physician-assisted death. Gloria Taylor, who was living with Amyotrophic Lateral Sclerosis (ALS), was added as a plaintiff shortly thereafter.<sup>2</sup> The plaintiffs argued that the criminal offence of assisting suicide<sup>3</sup> violated their rights under Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms (Charter)*.<sup>4</sup> The decision of the Supreme Court of Canada, rendered in March 2015 in the plaintiffs' favour and declaring the offence invalid insofar as it prohibited assistance to competent, consenting adults facing grievous, irremediable and intolerable medical conditions,<sup>5</sup> has been called "historic and far-reaching"<sup>6</sup> in its impact. Other contributions to this special volume examine that impact and the many meanings of *Carter SCC* across law and society. This paper focuses its attention on the trial stage of the litigation, examining the lawyerly question of whether the trial judge was entitled to decide the case as she did, declaring the impugned law invalid, when confronted with a precedent of the Supreme Court of Canada upholding that

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<sup>1</sup> 2015 SCC 5, [2015] 1 SCR 331 [*Carter SCC*].

<sup>2</sup> The Supreme Court of Canada also heard from 25 intervenors who took various approaches to the issue (some strongly in favour of physician assisted death; some strongly opposed), including disability rights groups, religious groups, medical organizations, and many others.

<sup>3</sup> *Criminal Code*, RSC 1985, c C-46, s 241 provides: "[e]very one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>5</sup> *Carter SCC*, *supra* note 1 at para 4: "[w]e conclude that the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."

<sup>6</sup> Tonda MacCharles, "Supreme Court Strikes Down Assisted Suicide Ban", *The Toronto Star* (6 February 2015).

very same law in a *Charter* challenge twenty years earlier in *Rodriguez v British Columbia (AG) (Rodriguez)*.<sup>7</sup>

I intend two meanings for the term “revisiting” in the title of this paper. First, the paper examines the circumstances under which Canadian courts, particularly courts lower in the relevant hierarchy, might be entitled to revisit otherwise binding, higher court precedents and to depart from them. In another sense, the paper revisits, in the light of the recent developments in the case law, what I said about *stare decisis*, and particularly the vertical convention of precedent, in my previous published work.<sup>8</sup>

As any first year law student can tell you, the doctrine of *stare decisis* means, at least, that courts lower in the relevant hierarchy are bound to apply the law as expounded by higher courts.<sup>9</sup> Precedent was against Taylor and Carter, but they prevailed at trial. Justice Smith held that she was not bound by the decision in *Rodriguez* because the law and the legal analysis, particularly with respect to Section 7 of the *Charter*,<sup>10</sup> had changed significantly from *Rodriguez*. The social and legislative facts were also sufficiently different, as exemplified by a substantial body of evidence from a number of jurisdictions that had decriminalized physician-assisted death and had subsequently studied the effectiveness of various safeguards in these jurisdictions to protect vulnerable community members from coercion or pressure to end their lives.

While all of this was enough to convince Justice Smith to depart from *Rodriguez*, a majority of the British Columbia Court of Appeal did not share

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<sup>7</sup> [1993] 3 SCR 519 at 615, 82 BCLR (2d) 273.

<sup>8</sup> Debra Parkes, “Precedent Unbound: Contemporary Approaches to Precedent in Canada” (2007) 32 Man LJ 135. That article has been cited in a number of cases, but it is, in some respects, dated because it was written before the recent flurry of case law on the relationship between *stare decisis* and constitutional supremacy discussed below.

<sup>9</sup> See generally, *ibid* at 136. This is the vertical convention of precedent (that courts lower in the hierarchy are bound by decisions of higher courts) whereas the horizontal convention relates to the treatment by appellate courts of their own decisions.

<sup>10</sup> Section 7 of the *Charter*, *supra* note 4, provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

her view of the doctrine of *stare decisis*<sup>11</sup> or its application to the case at bar.<sup>12</sup> They overturned her decision, citing recent decisions of the Saskatchewan Court of Appeal<sup>13</sup> and Federal Court of Appeal,<sup>14</sup> as well as my 2007 article,<sup>15</sup> for the proposition that “anticipatory overruling” of this kind is inappropriate in Canadian law.<sup>16</sup> They held that the “the trial judge was bound to find that the plaintiffs’ case had been authoritatively decided by *Rodriguez*.”<sup>17</sup> In

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<sup>11</sup> *Carter v Canada (AG)*, 2013 BCCA 435 at paras 54, 58–59, 365 DLR (4th) 351 [*Carter BCCA*].

<sup>12</sup> *Ibid* at para 107

<sup>13</sup> *Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43 at paras 48–50, 361 DLR (4th) 132 [*Saskatchewan Federation of Labour SKCA*]. This decision was later overturned by the Supreme Court of Canada: *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*Saskatchewan Federation of Labour SCC*].

<sup>14</sup> *Air Canada Pilots’ Association v Kelly et al*, 2012 FCA 209 at paras 47–48, [2013] 1 FCR 308, leave to appeal to SCC refused, 10711 (28 March 2013) [*Kelly*].

<sup>15</sup> *Carter BCCA*, *supra* note 11 at para 316. It appears that I may have introduced the language of “anticipatory overruling” into the Canadian case law, since a search of all Canadian cases on both CanLII and Quicklaw/LexisNexis reveals only two that contain the phrase: *Saskatchewan Federation of Labour SKCA*, *supra* note 13 and *Carter BCCA*, *supra* note 11, both of which cited it in conjunction with my article. In the piece, I described anticipatory overruling as occurring when a lower court is bound by a higher court precedent but refuses to follow it when the lower court “is firmly of the view that the higher court will overrule its own precedent when given the chance”: Parkes, *supra* note 8 at para 17. My discussion relied heavily on a case comment by Dale Gibson in which he acknowledged the heretical nature of anticipatory overruling but argued that it could be applied in clear cases. See Dale Gibson, “*Stare Decisis* and the Action *Per Quod Servitium Amisit* – Refusing to Follow the Leader: *R. v Buchinsky*” (1980) 13 CCLT 309. I stated that, given the relatively relaxed approach to the horizontal convention of precedent evident in recent Canadian appellate case law, “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 SCC is very likely or inevitable (as opposed to the CA simply disagreeing with the precedent of the SCC)”: Parkes, *supra* note 8 at para 22.

<sup>16</sup> *Carter BCCA*, *supra* note 11 at para 316.

<sup>17</sup> *Ibid* at para 324.

such a situation, they maintained, the trial judge's role is to "allow the parties to gather and present the evidence and to make the necessary findings of fact and of credibility, so as to establish the evidentiary record upon which the Supreme Court can decide whether to reconsider its earlier decision."<sup>18</sup> Justice of Appeals Finch dissented for reasons similar to those of Justice Smith.

The Supreme Court of Canada upheld the trial decision, confirming the approach to the vertical convention of precedent that the Court had articulated in the intervening case of *Canada (AG) v Bedford (Bedford)*.<sup>19</sup> The unanimous Court in *Carter SCC* said:

The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."<sup>20</sup>

The Court went on to apply this standard to Justice Smith's decision, holding that "both conditions were met."<sup>21</sup> The Section 7 law was sufficiently different from *Rodriguez*, presenting a "new legal issue" for the trial judge. In addition, the evidence established new social and legislative facts that fundamentally altered the parameters of the debate, undermining key foundations of *Rodriguez*, such as the premise that "a blanket prohibition" on assisted suicide "is necessary to protect against the slippery slope" toward vulnerable people being involuntarily euthanized.<sup>22</sup>

In a recent case comment on *Carter SCC*, Dwight Newman argues that the Supreme Court of Canada has abandoned an established rule against an-

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<sup>18</sup> *Ibid* at para 316, citing *Kelly*, *supra* note 14 at para 48.

<sup>19</sup> 2013 SCC 72 at para 42, [2013] 3 SCR 1101 [*Bedford*].

<sup>20</sup> *Carter SCC*, *supra* note 1 at para 44 [footnotes omitted].

<sup>21</sup> *Ibid* at para 45.

<sup>22</sup> *Ibid* at para 47.

ticipatory overruling without adequate explanation.<sup>23</sup> He sees the *Bedford/Carter* line of cases as displaying a “shockingly standardless approach to precedent.”<sup>24</sup> He also argues that the Supreme Court has essentially collapsed the two approaches to precedent (horizontal and vertical) into the same analysis.

To examine the cogency of Newman’s critique and to gauge the scope and impact of the *Bedford/Carter* SCC approach to the vertical convention, it is necessary to look more closely at the way that the judicial role and process of judging is articulated in these decisions and to understand the contours of the contemporary Canadian doctrine of *stare decisis* within that context. Following a review of the recent Supreme Court of Canada case law on *stare decisis*, attention will be turned to some critiques of the approach to the vertical convention of precedent articulated in *Bedford* and *Carter* SCC, and responses to those critiques. The final Part of the paper looks to the future of the vertical convention, briefly examining a handful of post-*Bedford/Carter* SCC lower court decisions to get a sense of how the doctrine is being conceived of and applied. In short, the floodgates have not opened; the vertical convention of precedent remains quite strict. The paper concludes with some brief thoughts on the theory versus practice of precedent.

## I. THE PRACTICE OF PRECEDENT: RECENT SUPREME COURT OF CANADA CASE LAW

Recent cases before the Supreme Court of Canada have prompted the Court to explicitly address *stare decisis* and both the vertical and horizontal conventions of precedent. Throughout its recent case law, the Court has cited familiar rhetoric about the pursuit of “certainty” in the common law, but has been more explicit about the extent to which it will abandon precedents (even relatively recent ones) in favour of correcting decisions now thought to be wrong in the light of new evidence or doctrine.

What has been most significant in the last five years is the extent to which the Court has revised the vertical convention of precedent, allowing some limited room for lower courts to revisit otherwise binding precedents,

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<sup>23</sup> Dwight Newman, “Judicial Method and Three Gaps in the Supreme Court of Canada’s Assisted Suicide Judgment in *Carter*” (2015) 78:2 Sask L Rev at 218.

<sup>24</sup> *Ibid* at 219.



at least in constitutional cases. To understand this trend, it is necessary to read *Bedford* and *Carter* SCC together with the other key Supreme Court of Canada decisions explicitly addressing *stare decisis* in the last decade or so. This Part canvasses the decisions in roughly chronological order, drawing attention to the, at times, differing accounts of *stare decisis* and the way that the subject matter of the case may influence the practice of precedent. The opinions of Justice Rothstein are an interesting study in this regard.

A word on terminology: my use of the term “practice of precedent” arises from my view that precedent is best understood as a judicial practice shaped by legal culture and a host of other factors rather than as a doctrine or rule.<sup>25</sup>

#### A. *R v Henry (2005)*

I have previously traced the development of the functional and pragmatic approach of the Supreme Court of Canada and intermediate appellate courts to the horizontal convention of precedent (their decisions to overrule their own precedents) in the early *Charter* era.<sup>26</sup> *R v Henry (Henry)*,<sup>27</sup> decided in 2005, ten years before *Carter* SCC, is regularly cited in recent cases for its articulation of the contemporary approach to *stare decisis*, particularly the horizontal convention.<sup>28</sup> In *Henry*, the Court revisited two post-

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<sup>25</sup> See Adam Gearey, Wayne Morrison & Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Abingdon: Routledge–Cavendish, 2009) at 75–76:

[P]recedent is not to be understood as a rule or doctrine but as judicial practice. That practice is shaped by, among other things, the rules on court hierarchy, ideas as to the nature of case law and the ‘law-making’ nature of judicial determination of disputes. Such ideas reflect general jurisprudential beliefs, even if not so clearly articulated by the judge.

<sup>26</sup> Parkes, *supra* note 8 at 149–58.

<sup>27</sup> 2005 SCC 76, [2005] 3 SCR 609 [*Henry*].

<sup>28</sup> I am grateful to Julia Hughes for reminding me of *United States of America v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*], a decision in which the Supreme Court of Canada reconsidered the constitutionality of extraditing Canadians to face the death penalty in another country just 10 years after it had upheld that practice under *Charter* review in *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, [1991] SCJ No 63. In *Burns*, a differently consti-

*Charter* precedents, *R v Kuldip (Kuldip)*<sup>29</sup> and *R v Mannion (Mannion)*,<sup>30</sup> interpreting the right against self-incrimination in Section 13 of the *Charter*, which together created confusion and a lack of clarity in this area of the law of evidence.<sup>31</sup> In overruling aspects of those two precedents, the Court articulated a clear rule that Section 13 protects against any *compelled* statements being used against a person in a subsequent proceeding,<sup>32</sup> returning to the stated purpose of Section 13 articulated 20 years earlier in *Dubois*.<sup>33</sup> Any statements that were voluntarily given by the accused are not protected by Section 13 (such as, in *Henry*, the accused's testimony at his first trial).

The Court in *Henry* stated that it “should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection.”<sup>34</sup> In the result, it overruled one aspect of the case law that has been beneficial to the accused (the rule from *Mannion* that an accused could not ordinarily be cross-examined on prior voluntary testimony) and one aspect that had been favourable to the Crown (the rule from *Kuldip* permitting cross-examination on all prior testimony, provided it was used to impeach credibility, rather than to incriminate the accused).

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tuted Court unanimously held that Section 7 of the *Charter* requires that the Minister of Justice seek assurances that the death penalty will not be sought before signing an extradition order, citing changes in the social science evidence about the practice of the death penalty, particularly in the United States. Significantly, the Supreme Court in *Burns* did not overrule *Kindler*, opting instead to distinguish it. In fact, the words *stare decisis* and precedent do not appear in the *Burns* opinion, yet the Court focuses on changes in the social and legislative facts surrounding the death penalty. See Richard Haigh, “A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the Need for a Principled Approach to Overruling” (2001) 14 SCLR (2d) 139 at 157 (arguing that the Supreme Court lacks “a specialized theory to guide the overturning of previous constitutional decisions”).

<sup>29</sup> [1990] 3 SCR 618, 1 CR (4th) 285.

<sup>30</sup> [1986] 2 SCR 272, 31 DLR (4th) 712.

<sup>31</sup> See e.g. Gary Trotter, “*R. v. Henry*: Self-Incrimination and Self-Reflection in the Supreme Court” (2006) 34 SCLR (2d) at 420, commenting on the pre-*Henry* state of the law: “Twenty years of experience with section 13 of the *Charter* has given rise to inconsistency and dubious distinctions.”

<sup>32</sup> *Henry*, *supra* note 27 at para 59.

<sup>33</sup> *Dubois v R*, [1985] 2 SCR 350, 23 DLR (4th) 503.

<sup>34</sup> *Henry*, *supra* note 27 at para 44.

The relatively transparent, pragmatic approach taken by the *Henry* Court to overruling its own precedents – admitting error or unworkability – is preferable to an approach that distinguishes cases on technical grounds, reinterprets them substantially without admitting a change, or continues to apply a law thought to be unjust.<sup>35</sup> The Court offered three “compelling reasons” for overruling its own precedents (the unworkability of former rules, unfairness to the accused, and inconsistency with the purpose of the *Charter* section), but generally seemed quite comfortable with its power to do so.

### **B. R v Nedelcu (2012)**

Skipping ahead a few years, the precedent set in *Henry*, overruling key aspects of the Court’s recent decisions in *Mannion* and *Kuldip*, was itself revisited in the 2012 decision in *R v Nedelcu*.<sup>36</sup> The Court’s willingness to revisit *Henry* illustrates the diminished role that horizontal *stare decisis* plays in the *Charter* era. The Supreme Court, and lower courts across the country, are clearly wrestling with the many ways that the right against self-incrimination can be interpreted and applied, and the implications of those different approaches for accused persons and the trial process. In *Nedelcu*, the driver of a motorcycle was charged with impaired driving and dangerous driving causing death after his co-worker died while riding as his passenger. When the deceased’s family also brought a civil action, Nedelcu testified on examination for discovery that he had no memory of the crash. At his subsequent criminal trial, Nedelcu provided a detailed account of the events.<sup>37</sup> The legal issue for the Supreme Court was whether Nedelcu’s Section 13 *Charter* right prevented him from being cross-examined on his testimony at the examination for discovery. Criminal lawyers saw *Henry* as offering clarity and a workable rule (compelled evidence was protected and inadmissible; voluntary evidence was not protected and therefore, admissible), as unpalatable as that may be in some cases.<sup>38</sup> However, in *Nedelcu*, a majority of the Supreme Court resurrected the approach from the earlier case law

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<sup>35</sup> Parkes, *supra* note 8 at 152.

<sup>36</sup> 2012 SCC 59, [2012] 3 SCR 311.

<sup>37</sup> *Ibid* at paras 50–54.

<sup>38</sup> See e.g. Megan Savard, “One Step Forward, Two Steps Back: The Supreme Court’s Decision in *Nedelcu*” Addario Law Group (4 January 2013), online: <[www.addario.ca/one-step-forward-two-steps-back-the-supreme-courts-decision-in-nedelcu/](http://www.addario.ca/one-step-forward-two-steps-back-the-supreme-courts-decision-in-nedelcu/)>.

that had attempted, with great difficulty, to distinguish between incriminating and non-incriminating evidence. *Nedelcu* arguably returns us to lack of clarity, since a renewed focus on incriminating versus non-incriminating evidence as the threshold question creates considerable room for argument about the use to which a prior statement of the accused can be put.<sup>39</sup>

In *Nedelcu*, the majority opinion framed the issue as an interpretation question (what does “incriminating” mean in Section 13?) and purported not to be overruling *Henry*. The dissenting judges were unconvinced, seeing the new interpretation of incriminating versus non-incriminating evidence as incompatible with the ruling in *Henry*. As such, *Nedelcu* is an example of the Court overruling a precedent in an indirect way. It is preferable for courts to be clear about their treatment of a precedent, reconsidering and overruling (if necessary) in a transparent way. No doubt the facts in *Nedelcu* – particularly the spectre of an undoubted liar being acquitted of a serious crime through the exclusion of his earlier evidence – loomed large in the decision to effectively overrule (or at least, substantially modify) *Henry*.

### C. Ontario (AG) v Fraser (2011)

Just a few months before *Nedelcu*, in *Ontario (AG) v Fraser (Fraser)*,<sup>40</sup> the Court was similarly divided on this very issue of the approach it should take to overruling (or not) its recent *Charter* precedents. *Fraser* is one in a series of *Charter* cases dealing with the Court’s evolving interpretation of Section 2(d) freedom of association in the context of labour law. It is an area in which differing ideological approaches and views of the appropriate role of government in regulating labour-management relations loom large. It is also an area in which the courts have had to wrestle with the precedential value of early *Charter* decisions.

In *Fraser*, the Court rejected a claim by agricultural workers that the freedom of association protected in Section 2(d) of the *Charter* included a right to form a union which, if recognized, would render unconstitutional Ontario legislation setting out a regime for the legal protection of “agricul-

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<sup>39</sup> See Sara Hanson, “*R v Nedelcu*: The Right Against Self-Incrimination and the Return to the Unworkable Distinction” (24 November 2012), theCourt.ca (blog), online: <[www.thecourt.ca/2012/11/24/r-v-nedelcu-the-right-against-self-incrimination-and-the-return-to-the-unworkable-distinction/](http://www.thecourt.ca/2012/11/24/r-v-nedelcu-the-right-against-self-incrimination-and-the-return-to-the-unworkable-distinction/)>

<sup>40</sup> 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

tural workers' associations"<sup>41</sup> that did not include protection for collective bargaining by these associations. The Court was faced with its own decision three years earlier in *Health Services and Support – Facilities Sub-sector Bargaining Association v British Columbia (British Columbia Health Services)*<sup>42</sup> which had recognized a right to bargain collectively in Section 2(d), a decision which itself had revisited and overruled an earlier decision to the contrary from 1990.<sup>43</sup> As it would also do in *Nedelcu*, the majority opinion chose to reinterpret (and indeed, limit) the scope of its recent ruling in *British Columbia Health Services*. In so doing, the majority rejected the agricultural workers' claim that the workers said flowed directly from the *British Columbia Health Services* ruling. While the separate legislative regime for agricultural workers' associations was less favourable to workers than the *Labour Relations Act, 1995*<sup>44</sup> in many respects, including for example, imposing no duty on employers to bargain with the workers' associations, the majority held that the Section 2(d) right was not infringed.<sup>45</sup>

Justice Rothstein wrote a lengthy opinion, concurring in the result but holding that it was necessary to overrule *British Columbia Health Services* which, in his view, had wrongly expanded the scope of Section 2(d), tipping the balance in favour of unions and workers. He framed his departure from the majority as a disagreement about *stare decisis*, making various arguments in favour of overturning this very recent precedent, despite the fact that none of the parties had asked the Court to do so. Reading Justice Rothstein's dissent, it is difficult to escape the conclusion that his fundamental difference with the majority was with respect to the correct interpretation of the right itself, more particularly, how strongly labour rights should be protected under the *Charter* and how much state regulation of the labour market the *Charter* should require, not about principles of *stare decisis*. The majority opinion upheld the three-year-old precedent of *British Columbia Health Services*, which declared the right to bargain collectively to be pro-

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<sup>41</sup> *Agricultural Employees Protection Act*, SO 2002, c 16.

<sup>42</sup> 2007 SCC 27, [2007] 2 SCR 391 [*British Columbia Health Services*].

<sup>43</sup> *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1.

<sup>44</sup> SO 1995, c 1, Schedule A.

<sup>45</sup> *Fraser*, *supra* note 40 at paras 106–07. For extensive analysis and critique of *Fraser*, and discussion of its impact on labour and constitutional law, see Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012).

tected by Section 2(d) of the *Charter*, whereas Justice Rothstein urged the court to overturn this recent precedent in favour of the previous approach (in the 1989 Labour Trilogy) which had denied such protection. As we will see, a few years later, in another group of labour cases, Justice Rothstein takes the same substantive position – that the Labour Trilogy carved out the appropriate, limited role for Section 2(d) rights in the labour context – while again differing from the majority on whether to overrule a precedent.

#### D. *Canada v Craig (2012)*

In *Canada v Craig (Craig)*,<sup>46</sup> decided just before *Bedford*, Justice Rothstein wrote an opinion for the Court which overruled its 35 year-old precedent-setting decision, *Moldowan v Canada (Moldowan)*,<sup>47</sup> on the interpretation of a section of the *Income Tax Act* limiting deductible losses from farm income where farming was not the taxpayer's primary source of income.<sup>48</sup> *Moldowan* had been criticized in a 2006 decision of the Federal Court of Appeal, *Gunn v Canada (Gunn)*,<sup>49</sup> and the trial judge in *Craig* had refused to apply *Moldowan* for the reasons articulated in *Gunn*. Tax law scholars Neil Brooks and Kim Brooks have extensively critiqued the decision in *Craig*, and the Court's willingness to overrule an established precedent that was consistent with the government's stated tax policy approach and that had been applied regularly by the Canada Revenue Agency for decades.<sup>50</sup> On behalf of the Court, Justice Rothstein adopted what Brooks and Brooks describe as a "plain meaning" approach to the *Income Tax Act*, which they argue is strikingly different from the Court's contextual and purposive approach in other areas of statutory interpretation.<sup>51</sup> Brooks and Brooks point

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<sup>46</sup> 2012 SCC 43, [2012] 2 SCR 489 [*Craig*].

<sup>47</sup> [1978] 1 SCR 480, 77 DLR (3d) 112.

<sup>48</sup> RSC 1985, c 1 (5th Supp), s 31(1) as it appeared on 1 August 2012. At the time of *Craig*, *supra* note 46, the section provided that the loss a taxpayer could claim from farming would be restricted "where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income."

<sup>49</sup> 2006 FCA 281, [2007] 3 FCR 57.

<sup>50</sup> "The Supreme Court's 2012 Tax Cases: Formalism Trumps Pragmatism and Good Sense" (2014) 64 SCLR (2d) 267.

<sup>51</sup> *Ibid* at 269–70.

to *Craig* as an example of “the staggering failure of the Court’s formalism” in tax cases.<sup>52</sup> The horizontal *stare decisis* analysis in *Craig* consists of a loose balancing test, citing the familiar language of balancing certainty and correctness.<sup>53</sup> At the same time, the Court’s analysis on this point arguably tilts significantly in the direction of “correcting” what the Court sees as an erroneous interpretation in *Moldowan*.

In overruling *Moldowan*, Justice Rothstein made clear his view that the vertical convention of precedent was strict here: the trial judge should have followed *Moldowan*, despite disagreeing with it and favouring the analysis in *Gunn*. He said:

It may be that *Gunn* departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the section was “an awkwardly worded and intractable section and the source of much debate” (p. 482). Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided.

But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.<sup>54</sup>

In an interesting postscript, Parliament reacted swiftly to *Craig* by amending the *Income Tax Act* to return the law to the *Moldowan* interpretation limiting farm loss deductions.<sup>55</sup>

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<sup>52</sup> *Ibid* at 273.

<sup>53</sup> *Craig*, *supra* note 46 at para 27. The same language is used by Justice Rothstein in *Fraser*, *supra* note 40 at para 133.

<sup>54</sup> *Ibid* at paras 20–21.

<sup>55</sup> *Income Tax Act*, *supra* note 48, s 31(1) as it appeared on 12 December 2013. The provision has since read that farming loss would be restricted “[if] a taxpayer’s chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income that is a subordinate source of income for the taxpayer.” See Canada Revenue Agency, Federal Budget Announcement, “Budget 2013 – Restricted Farm Losses” (15 July 2015), online: CRA <[www.cra-arc.gc.ca/gncy/bdgt/2013/qa09-eng.html](http://www.cra-arc.gc.ca/gncy/bdgt/2013/qa09-eng.html)>; *Economic Action Plan 2013 Act, No 2*, SC 2013, c 40, s 14.

Brooks and Brooks argue that Justice Rothstein's tax decisions continued a trend toward formalism found in the Court's tax cases in the years before his appointment. During his decade-long term, Justice Rothstein was the top Court's go-to judge in tax cases, writing a majority of the Court's decisions in that field. The stated commitment to finding the "plain meaning" of the tax statute, without an attempt to discern the policy purposes of particular tax provisions, "allows the Court to escape responsibility for the outcomes of its decisions. The results are thought to be preordained by the words the drafters chose."<sup>56</sup> There are parallels between this approach and appeals for a strict adherence to the doctrine of *stare decisis* in the sense that both can justify formalism over attention to the social context and impact of a decision. In *Bedford*, a changing social context loomed large, bringing with it a somewhat revised approach to the vertical convention of precedent.

### E. Canada (AG) v Bedford (2013)

*Bedford* is the watershed case, decided just a few months after *Craig*, that explicitly reassessed the contours of the vertical convention of precedent in constitutional cases. All members of the Court, including Justice Rothstein, signed on to this ground-breaking opinion striking down Canada's prostitution laws. In *Bedford*, the precedent was the 1990 decision of the Supreme Court in the *Prostitution Reference*,<sup>57</sup> which had upheld the prostitution-related offences in the *Criminal Code* in the face of arguments that they violated Sections 2(b) and 7 of the *Charter*. The 1990 reference opinion was framed around an economic liberty argument, as well as a commercial expression claim.<sup>58</sup> More than twenty years later, in *Bedford*, the legal arguments were substantially different. They focused on security of the person interests and recently developed principles of fundamental justice (arbitrariness, gross disproportionality, and overbreadth) as opposed to

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<sup>56</sup> Brooks & Brooks, *supra* note 50 at 271.

<sup>57</sup> *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 49 Man R (2d) 1 [*Prostitution Reference*]. As Adam Dodek has noted, references are, in practice, treated as binding authority in the same way as conventional cases, despite their formal status as advisory opinions: Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117 at 129–30, citing Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2014 supplement) vol 1 at § 8.6(d).

<sup>58</sup> *Prostitution Reference*, *supra* note 57, Part VI, paras 89, 112.



vagueness and indirect criminalization which were argued in the *Prostitution Reference*. Also new in *Bedford* was a body of social science evidence, from which Justice Himel found new social and legislative facts, which were materially different from those on which the *Prostitution Reference* was decided.

Joseph Arvay, co-counsel to the plaintiffs in *Carter*, was also co-counsel to the intervenor, the David Asper Centre for Constitutional Rights (Asper Centre), in *Bedford*. *Stare decisis* was the only issue on which the Asper Centre intervened in *Bedford* and their submissions figured prominently in the Court's decision on this issue. The essence of the argument made – and accepted by the court – was articulated in a 2012 law journal article penned by Arvay and his *Carter* co-counsel, Sheila Tucker and Alison Latimer.<sup>59</sup> They argued that “section 52 of the Constitution Act, 1982 effectively imposes a constitutional duty on a trial court to distinguish, where appropriate, a prior *Charter* decision on the basis of a change in legislative and social fact.”<sup>60</sup> This approach to the vertical convention of precedent is rooted in the doctrine of constitutional supremacy. Here are the key paragraphs from Chief Justice McLachlin's unanimous opinion in *Bedford*, approving of these arguments and articulating a limited exception to the vertical convention:

In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

The intervenor, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as “mere scribe[s]”, creating a record and findings without conducting a legal analysis

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<sup>59</sup> 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 SCLR (2d) 61.

<sup>60</sup> *Ibid* at 74.

I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.<sup>61</sup>

The Court in *Bedford* went on to apply this new standard to the trial decision, holding that the judge was entitled to revisit the Section 7 issue given the significant changes in the law and the very different basis of the Section 7 argument in the *Prostitution Reference*.<sup>62</sup> These legal issues “were not raised in the earlier case.”<sup>63</sup> There was also a substantially different record before the trial judge in *Bedford*, including significant evidence indicating that the criminal prohibitions contributed to making sex work more dangerous, both with respect to the bawdy house and communicating offences.<sup>64</sup> In affirming the trial judge’s jurisdiction to consider the Section 7 issue anew, the Supreme Court added that “the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”<sup>65</sup> The Court went on to rule that the Section 2(b) analysis had not changed substantially and therefore it was binding authority.

To be clear, the first way in which a lower court may revisit an earlier precedent – where “new legal issues are raised as a consequence of significant developments in the law” – is not actually new; it is a grounded in

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<sup>61</sup> *Bedford*, *supra* note 19 at paras 42–44, per McLachlin CJC for the court [footnotes omitted].

<sup>62</sup> *Ibid* at para 45.

<sup>63</sup> *Ibid* at para 42.

<sup>64</sup> *Bedford v Canada (AG)*, 2010 ONSC 4264 at para 365, 327 DLR (4th) 52. Justice Himel stated, “[a]s a result of the voluminous evidentiary record put before me in this case, I have found on a balance of probabilities that the impugned provisions materially contribute to the decreased personal security of the applicants.”

<sup>65</sup> *Bedford*, *supra* note 19 at para 42.

the longstanding notion that an earlier precedent is only binding for what it actually decides. Of course, determining exactly what an earlier case stands for is a significant and somewhat indeterminate part of the analysis that leaves room for principled argument. The Supreme Court in *Bedford* held that the Section 7 issue before the trial judge had not been decided in the *Prostitution Reference*, whereas the Section 2(b) issue had.

What is truly new in *Bedford* is the statement by the Court that it is open to a trial judge to reconsider otherwise binding precedents when they are presented with a new body of evidence, particularly with respect to social and legislative facts, that “fundamentally shifts the parameters of the debate.”<sup>66</sup> In this respect, the ten pages of the Asper Centre’s intervener factum loomed large. They argued for a threshold requirement of a “significant and material change” in the social and legislative facts for the revisiting of a precedent on constitutional grounds.<sup>67</sup> They argued that this threshold will not open the floodgates: “[r]evisiting the few cases that meet [this threshold] will not throw the system into disorder or disrepute, will not threaten the rule of law and indeed will invigorate it by ensuring that citizens of ordinary means can hold governments to the highest law at the earliest opportunity.”<sup>68</sup> The unanimous Court agreed.

### ***E. Carter v Canada (AG) (2015)***

The new approach to the vertical convention of precedent was set out in *Bedford*, applied (with only the briefest of mention) in *Saskatchewan Federation of Labour v Saskatchewan*,<sup>69</sup> and then explicitly affirmed in *Carter* SCC. By the time *Carter* reached the Supreme Court of Canada, most parties and interveners proceeded on that basis that the *Bedford* approach, permitting a limited revisiting of precedent by a trial judge, was now the law. As for the horizontal convention, it seems to have been widely accepted among the parties and interveners that it was time for the Court to revisit

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<sup>66</sup> There is no mention in *Bedford* about the potential difference between a reference and a conventional case in the sense of the more fulsome evidentiary record that might be available in the latter.

<sup>67</sup> *Bedford*, *supra* note 19, Factum of the Intervener, David Asper Centre for Constitutional Rights at para 30.

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

<sup>69</sup> Discussed below.

*Rodriguez* in light of the new evidence and new *Charter* doctrine. That did not mean that *Rodriguez* would necessarily be overruled, but few doubted that the Supreme Court would take a good, hard look at it. The precedential force of *Rodriguez*, an early *Charter* case, had been called into question.

Only the Attorney General of Ontario addressed the vertical *stare decisis* issue head-on, devoting its entire factum to this question and urging the Court to affirm a very strict approach to the vertical convention. The factum argues, “whether or not this Court now departs from its own prior decision in *Rodriguez*, the British Columbia courts had no power to do so. None of the factual or legal bases advanced by the trial judge justified the decision not to follow *Rodriguez*.”<sup>70</sup> Ultimately, the unanimous Court in *Carter* SCC disagreed, affirming the *Bedford* approach to the vertical convention, at least in constitutional cases.

In an interesting move, the Ontario Attorney General attempted to flip the argument underlying the *Bedford* approach to vertical *stare decisis* in constitutional cases on its head, arguing that the doctrine of *stare decisis* is itself an unwritten constitutional principle.<sup>71</sup> The Ontario Attorney General drew on the recent *Reference Re Senate Reform*<sup>72</sup> in which the Court relied on the constitution’s “internal architecture” and “basic constitutional structure” to effectively constitutionalize certain aspects of the composition of the Supreme Court of Canada.<sup>73</sup> The factum argued that “[v]ertical *stare decisis* is reflected, albeit implicitly, in the provision in section 101 of the *Constitution Act, 1867* for ‘a General Court of Appeal for Canada’, the reference in the preamble to the *Constitution Act, 1867* to ‘a Constitution similar in Principle to that of the United Kingdom,’ and the preamble to the *Charter*, which acknowledges that Canada is founded upon principles that recognize the ‘rule of law.’”<sup>74</sup>

These submissions, elevating the goal of certainty and predictability in the law to dizzying constitutional heights, received a very cool reception at the Supreme Court of Canada. In its unanimous opinion, the Court rejected

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<sup>70</sup> *Carter* SCC, *supra* note 1, Factum of the Intervener, Attorney General of Ontario at para 4 [Ontario AG factum in *Carter* SCC].

<sup>71</sup> *Ibid* at para 7.

<sup>72</sup> 2014 SCC 32, [2014] 1 SCR 704.

<sup>73</sup> *Ibid* at para 26.

<sup>74</sup> Ontario AG factum in *Carter* SCC, *supra* note 70 at para 7.

the argument outright. They note that “Ontario goes so far as to argue that ‘vertical *stare decisis*’ is a constitutional principle that requires all lower courts to rigidly follow this Court’s *Charter* precedents unless and until this Court sets them aside.”<sup>75</sup> In the next paragraph, the Court made it clear that *stare decisis* is not a “judicial straightjacket” and went on to approve of, and apply, the *Bedford* test for a lower court revisiting a precedent.

The Supreme Court of Canada does not engage the language of “anticipatory overruling” in *Bedford* or *Carter* SCC. It is clear that they do not see this practice of revisiting precedent as overruling. The focus is not on the likelihood of a higher court changing its mind but, rather, what exactly is binding on the lower court due to changes in the law and/or evidence in the intervening years. The newly articulated *Bedford/Carter* SCC approach to the vertical convention is located in those decisions in proximity to the established practice of distinguishing a precedent as not binding on a new set of facts (here, new legislative and social facts) or as deciding a different point of law. Constitutional supremacy is the “hook” on which the Court’s approach to the vertical convention hangs. However, it is not clear in the Court’s reasoning (or, indeed, in the subsequent cases) that the revised approach to the vertical convention should apply only in constitutional cases. A substantial and material change in social and legislative facts may also fundamentally change the parameters of an issue in, for example, family law or tort law.

Beyond applying the new test to the facts of *Carter* and concluding that it was clearly met by the changes in Section 7 doctrine and the very substantial changes in the social and legislative facts, the Court in *Carter* SCC provided limited guidance to lower courts in deciding whether a change in the law or evidence fundamentally changed the parameters of the debate. It did not, for example, suggest factors to consider in deciding whether the threshold for revisiting was met. In *Bedford*, the Asper Centre had suggested the following non-exhaustive list to assist in determining whether a change in social and legislative facts is significant and material: (1) the length of time that has passed since the earlier decision; (2) the breadth of the new evidence that was not available to the court in the earlier decision; (3) evidence that the social, political, or economic assumptions underlying the earlier decision are no longer valid; (4) evidence of a shift internationally in approaching the problem; (5) any difference in adjudicative facts between

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<sup>75</sup> *Carter* SCC, *supra* note 1 at para 43.

the two cases; and (6) and difference in the perspective of the claimants in the two cases.<sup>76</sup>

In *Carter* SCC, the Court clearly affirmed the *Bedford* approach to lower courts revisiting (constitutional) precedents of higher courts. It is significant for its pointed rejection of the Ontario Attorney General's attempts to shore up the vertical convention as strictly binding. Outside the constitutional context, *Craig* suggests that the vertical convention remains strict. However, it is not entirely clear that the reasoning in *Bedford* (and later *Carter* SCC) does or should only apply to constitutional cases.

**G. *The new labour trilogy: United Food and Commercial Workers, Local 503 v Wal-Mart (2014), Mounted Police Association of Canada v Canada (AG) (2015), and Saskatchewan Federation of Labour v Saskatchewan (2015)***

During the approximately year and a half between *Bedford* and *Carter* SCC the Supreme Court decided three contentious cases about labour rights, all of which involved the Court revisiting its earlier precedents and addressing issues of *stare decisis*: *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp (Wal-Mart)* (allowing unionized Wal-Mart workers to use a particular provision of the Québec *Labour Code* to challenge the store closure following certification);<sup>77</sup> *Mounted Police Association of Canada v Canada (AG) (Mounted Police)* (holding that the right to bargain collectively requires that workplace associations be structurally independent from the employer);<sup>78</sup> and *Saskatchewan Federation of Labour* (holding that Section 2(d) protects a right to strike).<sup>79</sup> The latter case involved both the vertical and the horizontal convention; whereas the other two cases were solely about the horizontal convention.

In finding a constitutionally protected right to strike in Section 2(d), thereby overruling the Court's decision in the 1987 *Alberta Reference*,<sup>80</sup> the

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<sup>76</sup> *Ibid* at para 34.

<sup>77</sup> 2014 SCC 45, [2014] 2 SCR 323 [*Wal-Mart*].

<sup>78</sup> 2015 SCC 1, [2015] 1 SCR 3 [*Mounted Police*].

<sup>79</sup> *Saskatchewan Federation of Labour* SCC, *supra* note 13.

<sup>80</sup> *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.

majority opinion in *Saskatchewan Federation of Labour*, penned by Justice Abella, dealt with the *stare decisis* issue in one sentence:

Given the fundamental shift in the scope of s. 2(d) since the *Alberta Reference* was decided, the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s. 2(d): *Canada (Attorney General) v. Bedford*.<sup>81</sup>

However, the dissenting justices addressed it at length, asserting that the majority was running roughshod over principles of *stare decisis*. Justice Rothstein co-wrote the dissent which echoed and expanded upon his dissenting opinions in *Wal-Mart* and *Mounted Police*.

In *Wal-Mart*, the majority opinion held that section 59 of the Québec *Labour Code*, which bars the employer from changing conditions of employment during the period of negotiating a collective agreement, applied to the situation at bar, in which Wal-Mart had dismissed all employees and closed the business before a first contract could be negotiated. In their dissent, Justices Rothstein and Wagner said that the majority's "approach undermines the principle of *stare decisis*, whose importance this Court so recently emphasized in *Canada v. Craig*."<sup>82</sup> They took the view that an earlier case, *Plourde v Wal-Mart Canada Corp (Plourde)*,<sup>83</sup> dealing with this very store closure but relying on a different section of the *Labour Code*, foreclosed the approach taken by the majority.<sup>84</sup> However, section 59 was not before the Court in *Plourde* and the majority held that it was open to the arbitrator to apply that section as she had in this case.<sup>85</sup> Justice Rothstein's approach to *stare decisis* in *Wal-Mart* is a decidedly strict one.

In *Mounted Police*, a majority of the Court held that Section 2(d), guaranteeing freedom of association, which since *British Columbia Health Services* has included a right to bargain collectively, entails a level of independence, and choice of bargaining unit and representative to be effective. In so holding, the majority overruled its 1999 decision in *Delisle v Canada*

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<sup>81</sup> *Saskatchewan Federation of Labour* SCC, *supra* note 13 [footnotes omitted].

<sup>82</sup> *Wal-Mart*, *supra* note 77 at para 122.

<sup>83</sup> 2009 SCC 54 at para 1, [2009] 3 SCR 465.

<sup>84</sup> *Ibid* at paras 121–22.

<sup>85</sup> *Wal-Mart*, *supra* note 77 at para 84.

(*Deputy AG*),<sup>86</sup> which had found no right to bargain collectively for Royal Canadian Mounted Police officers. Justice Rothstein, in a lone dissent in *Mounted Police*, framed his substantive disagreement with the majority in the language of *stare decisis* and certainty. He disagreed that the “structural independence” of workplace associations (unions) was a requirement of the right to bargain collectively, arguing that the majority approach “constitutionalizes an adversarial model of labour relations and effectively excludes collaborative models.”<sup>87</sup>

Justice Rothstein sees this as an expansion of associational rights and as effectively reversing a key holding of *British Columbia Health Services* and *Fraser*, namely that Section 2(d) does not guarantee a particular model of collective bargaining nor a particular outcome of that process. He goes on to cite *Bedford* for the importance of certainty in the law. He says:

It is open to this Court to depart from its previous jurisprudence in some circumstances, but the importance and value of certainty demand that such departures be made infrequently and only where they have been carefully and explicitly considered to ensure that the departure is justified and that the implications of such a deviation from the normal rule of *stare decisis* have been fully and carefully analyzed. The majority has failed to do so and its departure from authoritative precedents does not satisfy this high standard.<sup>88</sup>

In the Supreme Court’s most recent decision to address *stare decisis*, *Saskatchewan Federation of Labour*, a majority of the Court considered *Bedford* and *Carter* to have clearly established that it was open to the trial judge to revisit the 1989 *Alberta Reference* which had held that there was no right to strike protected by Section 2(d) of the *Charter*. The interpretation of Section 2(d) on which that decision was based – namely an “individual analogy” approach to Section 2(d) which had limited its application to activities done in a group that could be lawfully done individually – had been rejected in a series of decisions beginning with *Dunmore* in 2002, through *British Columbia Health Services* in 2007, *Fraser* in 2011, and *Mounted Police* in 2014. Arguably, there is no other *Charter* right that has gone through such

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<sup>86</sup> [1999] 2 SCR 989, 176 DLR (4th) 513.

<sup>87</sup> *Mounted Police*, *supra* note 78 at para 211.

<sup>88</sup> *Ibid* at para 212.



a profound transformation as has the freedom of association.<sup>89</sup> As Justice Abella notes for the majority in *Saskatchewan Federation of Labour*, there has been a “fundamental shift” in the interpretation of Section 2(d). The majority opinion in *Mounted Police*, penned by Chief Justice McLachlin and Justice LeBel had already described the shift as follows:

The jurisprudence on freedom of association under s. 2 (d) of the *Charter*. . . falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.<sup>90</sup>

They go on to say that this “generous and purposive approach”<sup>91</sup> seeks to protect “employee autonomy against the superior power of management”<sup>92</sup> to facilitate a meaningful process of collective bargaining. Justices Rothstein and Wagner dissent, disagreeing fundamentally with this shift and again framing their disagreement in relation to principles of *stare decisis*.

Recall that previously, in *Fraser*,<sup>93</sup> Justice Rothstein wrote a separate opinion from the majority, urging the Court to overturn its very recent precedent, *British Columbia Health Services*,<sup>94</sup> which had established that Section 2(d) of the *Charter* protects a right of workers to bargain collectively.<sup>95</sup> Justice Rothstein also signed onto the unanimous majority opinions

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<sup>89</sup> See generally Judy Fudge, “Freedom of Association” in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham, Ontario: LexisNexis, 2013) 527 (chronicling, as the author puts it at 528, “[t]he deep jurisprudential divisions amongst members of the Supreme Court of Canada over the interpretation of freedom of association in the labour relations context.”). For a thoughtful discussion of Justice LeBel’s contribution to these significant jurisprudential changes, see Julia Hughes, “Like Oil on Troubled Water: A Labour Perspective on the Charter Labour Jurisprudence of Justice Louis LeBel” (2015) 70 SCLR (2d) 221.

<sup>90</sup> *Mounted Police*, *supra* note 78 at para 30.

<sup>91</sup> *Ibid* at paras 46–47, 77.

<sup>92</sup> *Ibid* at para 82, cited with approval in *Saskatchewan Federation of Labour* SCC, *supra* note 13 at para 31, Abella J.

<sup>93</sup> *Fraser*, *supra* note 40.

<sup>94</sup> See *Fraser*, *supra* note 40 at paras 129–51, Rothstein J.

<sup>95</sup> *British Columbia Health Services*, *supra* note 42.

in *Bedford* and *Carter* SCC, which explicitly take a more flexible approach to the vertical and horizontal conventions of *stare decisis*. His lengthy dissenting opinion in *Saskatchewan Federation of Labour* takes issue with the majority's reasons for overruling the *Alberta Reference*, articulating again his deferential approach to judicial review in the labour relations context. If anything, there had been more judicial activity directly undermining the authority of the precedent at issue in *Saskatchewan Federation of Labour* than there was in either *Bedford* or *Carter* SCC. It is clear from Justice Rothstein's opinions in the intervening cases (*Mounted Police* and *Wal-Mart*) that he disagreed in substance with the majority opinion expanding workers' rights. This is fundamentally a substantive, ideological disagreement, not a methodological one, particularly given Justice Rothstein's agreement with the *stare decisis* analysis in *Bedford* and *Carter* SCC, but not with the majority in *Saskatchewan Federation of Labour*.

Tracing the Supreme Court of Canada's contemporary approach to *stare decisis* doctrine through Justice Rothstein's recent opinions tells us something about the malleability of the doctrine and the extent to which disputes about its operation are often fundamentally disputes about the merits of the substantive issues before the court. I do not point out these various appeals to, or descriptions of, *stare decisis* in Justice Rothstein's rulings to single him out for criticism. Rather, I suggest that they illustrate the reality that *stare decisis* – and its alleged capacity to achieve certainty in the law – is simply one of the “working ingredients” of judicial decision-making.<sup>96</sup> In all the cases, it was Justice Rothstein's sense of justice, his view of the “correct” legal answer, that animated his decisions, rather than a particular approach to the doctrine of precedent. The extent to which he was prepared to depart from precedent or defend it depended on the substance of the precedent and, with respect, whether he agreed with it or not. Substantively, his labour opinions are all linked. Justice Rothstein's position with respect to a restrained role for the state in regulating the labour market is consistent across all of these cases.

A basic insight of legal realism is that judicial decisions are influenced by extra-legal considerations, including the experiences and beliefs of judges.<sup>97</sup> As I read the cases, Justice Rothstein's approach to *stare decisis* is

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<sup>96</sup> Parkes, *supra* note 8 at 161, citing Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed (Toronto: Carswell, 2001) at 12.

<sup>97</sup> Brian Leiter, “Rethinking Legal Realism: Toward a Naturalized Jurisprudence” (1997) 76 *Texas L Rev* 267 at 278.

not fundamentally different or more (or less) principled than that of other members of the Court. His substantive disagreement with Justice Abella's majority opinion in *Saskatchewan Federation of Labour* is about the government's role in regulating labour relations. However, it is framed as a different approach to *stare decisis*.

## II. EVALUATING THE CONTEMPORARY JUDICIAL PRACTICE OF PRECEDENT

Critics of the Supreme Court's contemporary approach to precedent, and particularly the new *Bedford/Carter* SCC approach to the vertical convention, cite both principled and practical concerns. The principled concern is that voiced by Newman that the approach to precedent is "shockingly standardless" and the practical concern can be seen in the Attorney General of Ontario's factum in *Carter* SCC, citing the need for a strict vertical convention to prevent a deluge of claims seeking to revisit settled law. Similarly, the Ontario Court of Appeal in *Bedford* raised the spectre of the "living tree" doctrine of progressive constitutionalism being replaced with a "garden of annuals to be regularly uprooted."<sup>98</sup>

With respect to the objection based on a lack of standards and consistent judicial method, I have discussed above the extent to which particular justices' stated doctrinal approach to *stare decisis*, and its application in a particular case, is very much influenced by the subject matter of the case and the judges' own views about the correctness of the precedent. The stated goal of achieving certainty in the law through *stare decisis* thus promises too much.

Justices Rothstein and Wagner open their dissent in *Saskatchewan Federation of Labour* with these words: "In our legal system, certainty in the law is achieved through the application of precedents"<sup>99</sup> and that the judge's task is one of "balanc[ing] certainty against correctness."<sup>100</sup> In fact, throughout the case law and commentary on *stare decisis*, it is repeatedly stated that the doctrine balances the core principles of certainty and correctness. While this is an appealing formulation, the language of certainty promises

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<sup>98</sup> *Canada (AG) v Bedford*, 2012 ONCA 186, 109 OR (3d) 1 at para 84 [*Bedford* ONCA].

<sup>99</sup> *Saskatchewan Federation of Labour* SCC, *supra* note 13 at para 137.

<sup>100</sup> *Ibid* at para 138.

too much and is at odds with what judges actually do. Edmund Thomas,<sup>101</sup> a former justice of the New Zealand High Court, has argued that calls for strict adherence to precedent can actually undermine the elusive goal of certainty, noting that the doctrine can be manipulated politically<sup>102</sup> and can compel courts “to distinguish on inadequate grounds decisions of which they disapprove.” He suggests a more pragmatic approach to judicial decision-making that sees certainty as a relevant consideration, rather than as a primary goal of adjudication. He says this of certainty:

Those who pursue certainty as if it were a general, abstract goal of judicial adjudication do the law a disservice. Assume for a moment that complete certainty was achieved, individual justice would be sacrificed and, because it would be static, the law would cease to serve the needs and expectations of the community. The law would forfeit the concept of justice and abandon its social utility. Certainty is not therefore an ideal, as justice is an ideal. Nor is it a justification, as social utility is a justification. Rather, it is a concept designed to serve these ends. Its rationale lies in its ability to promote justice and to serve the needs and expectations of the community.<sup>103</sup>

It is clear that we have seen a difference in the articulated approach to *stare decisis* in recent years, a new orthodoxy. There is arguably a greater, more explicit emphasis on correctness over certainty. This is welcome, particularly in the *Charter* era. An openness to revisiting early decisions is consistent with the rate of social change in the *Charter* era (think of changing attitudes toward same-sex relationships and marriage, for example). The fact that appellate judges may be more explicit about their interest in getting it “right” is commendable. Our appellate process contemplates, and indeed relies on, multiple minds being turned to challenging interpretive questions.<sup>104</sup>

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<sup>101</sup> EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge: Cambridge University Press, 2005).

<sup>102</sup> *Ibid* at 133.

<sup>103</sup> Thomas, *supra* note 101 at 136.

<sup>104</sup> Occasionally appellate review does not occur in important cases, such as the recent, unusual *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 28 BCLR (5th) 96, leading to the undesirable situation of a single judge’s views carrying the day on a controversial matter.

Similarly, the practical floodgates objection is not warranted.<sup>105</sup> As further discussed below, since *Bedford*, parties in a handful of cases have attempted to revisit *Charter* precedents with little success. The spectre of lower courts refusing to follow precedents “every time a litigant came upon new evidence or a fresh perspective from which to view the problem”<sup>106</sup> has not materialized. This is not surprising. The practice of following precedent is deeply entrenched in Canadian common law culture and courts are fundamentally conservative institutions. The barriers to bringing *Charter* claims are many, as evidenced by the recent treatment of a *Charter* challenge, *Tanudjaja v Canada (AG) (Tanudjaja)*,<sup>107</sup> to provincial and federal action (and inaction) that the claimants argued exacerbated homelessness and inadequate housing in violation of Sections 7 and 15. The claim in *Tanudjaja* was struck out at the pleadings stage and that decision was upheld by a majority of the Ontario Court of Appeal, with the Supreme Court of Canada recently denying leave to appeal.<sup>108</sup>

While the approach to the vertical convention in *Bedford* and *Carter* SCC is a positive move for access to justice,<sup>109</sup> the difficulties litigants face in seeking constitutional justice in the courts remain immense. The Supreme Court has demonstrated some awareness of this problem as, for example, access to justice issues figured prominently in the 2014 decision of the Supreme Court in *Canada (AG) v Confédération des syndicats nationaux (Confédération 2014)*.<sup>110</sup> In that case, Justices LeBel and Wagner wrote for the Court that the jurisdiction to strike an action on the basis of *stare decisis* should be exercised sparingly so as not to defeat access to justice:

Although the proper administration of justice requires that courts’ resources not be expended on actions that are bound to

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<sup>105</sup> Arvay, Tucker & Latimer, *supra* note 59 at 80.

<sup>106</sup> *Bedford* ONCA, *supra* note 98 at para 84.

<sup>107</sup> 2014 ONCA 852, 123 OR (3d) 161, leave to appeal to SCC refused, 57714 (December 1 2014).

<sup>108</sup> *Ibid.*

<sup>109</sup> Some other recent decisions can also be seen as promoting access to justice. See *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 (expanding the scope of public interest standing); *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 (on administrative tribunals granting *Charter* remedies).

<sup>110</sup> 2014 SCC 49, [2014] 2 SCR 477.

fail, the cardinal principle of access to justice requires that the power be used sparingly, where it is clear that an action has no reasonable chance of success.<sup>111</sup>

In *Confédération* 2014, the unanimous Supreme Court held that the unions' claim was bound to fail; it had no reasonable chance of success given the decision of the Court involving the same parties, decided four years earlier.<sup>112</sup>

Recently, the Newfoundland Court of Appeal had occasion to consider *Confédération* 2014 at length. In *Andrews v Canada (AG)*,<sup>113</sup> a majority of the Court allowed a claim to proceed in the face of a challenge that *stare decisis* and an earlier decision of that Court had rendered it "bound to fail" as in *Confédération* 2014: "the policy of husbanding scarce resources for true matters of dispute may have to give way in some cases to the importance of providing access to justice to enable advocacy of change in and refinement of the law."<sup>114</sup> The majority applied the *Bedford* test for revisiting a legal issue to modify the test for striking out a claim, holding that "a litigant may have a 'reasonable chance of success' within the test if based on reasonable argument there is a reasonable possibility that the law might change."<sup>115</sup>

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<sup>111</sup> *Ibid* at para 1.

<sup>112</sup> *Confédération des syndicats nationaux v Canada (AG)*, 2008 SCC 68, [2008] 3 SCR 511. Both the 2008 and 2014 decisions involved the union challenging provisions of the federal employment insurance regime as constitutionally invalid. For critical commentary on the decisions, see Mary Thibodeau, "Balancing the Budget with EI Premiums? *Stare Decisis* and *Canada v Confédération des syndicats nationaux*" (19 December 2014), theCourt.ca (blog), online: <<http://www.thecourt.ca/2014/12/balancing-the-budget-with-ei-premiums-stare-decisis-and-canada-v-confederation-des-syndicats-nationaux/>>.

<sup>113</sup> 2014 NLCA 32, 376 DLR (4th) 719.

<sup>114</sup> *Ibid* at para 18.

<sup>115</sup> *Ibid* at para 19. Justice Welsh dissented, stating that "[a]pplying *stare decisis* as discussed in *Confédération des syndicats nationaux*, the conclusion follows that the decision in *Bert Andrews* resolves the entire dispute and provides a complete, certain and final answer to the fishers' claim in this case" (*ibid* at para 81).

### III. THE FUTURE OF THE VERTICAL CONVENTION?

A number of cases have addressed the vertical convention of precedent explicitly in the year and a half that has passed since the Supreme Court of Canada released its decision in *Carter*, setting out the parameters for revisiting a higher court precedent in the light of changed law or evidence. Have the floodgates opened to regularly revisiting settled precedents in the lower courts? In a word, no. Courts have continued to apply precedents every day and, even when faced with an opportunity to revisit, they have often rebuffed that approach. The appeal of *stare decisis* remains strong in the Canadian common law world.

How are courts interpreting and applying the *Bedford/Carter* SCC test? That test provides that “[t]rial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that ‘fundamentally shifts the parameters of the debate.’”<sup>116</sup> A common refrain in decisions where the application to revisit a higher court precedent has been rejected, is the statement from the Court in *Bedford* that “a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach.”<sup>117</sup>

One such case is *R v Hersi*,<sup>118</sup> in which a trial judge rejected the accused’s challenge of the constitutionality of section 577 of the *Criminal Code*, which authorizes direct indictment. The constitutionality of this provision had previously been upheld by the Ontario Court of Appeal in *R v Arviv*<sup>119</sup> and *R v Ertel*,<sup>120</sup> as well as by the Supreme Court of Canada in *R v SJJ*.<sup>121</sup> The trial judge acknowledged the new approach articulated in *Bedford*, suggesting it was “akin to the pronouncement of Professor Roscoe Pound more than ninety years ago” that “law must be stable and yet it can-

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<sup>116</sup> *Carter* SCC, *supra* note 1 at para 44.

<sup>117</sup> *Bedford*, *supra* note 19 at para 44.

<sup>118</sup> 2014 ONSC 1211, [2014] OJ No 3581 [*Hersi*].

<sup>119</sup> 51 OR (2d) 551, [1985] OJ No 2602.

<sup>120</sup> 20 OAC 257, [1987] OJ No 516.

<sup>121</sup> 2009 SCC 14, [2009] 1 SCR 426.

not stand still.”<sup>122</sup> However, the judge found no new legal issues or evidence, easily rejecting the argument for revisiting the earlier cases.

Similarly, in *United States of America v Fraser (USA v Fraser)*,<sup>123</sup> a judge of the British Columbia Supreme Court presiding in an extradition matter saw no basis for reconsidering the twenty-year-old Supreme Court of Canada precedent in *United States of America v Lépine*<sup>124</sup> which had been codified in the form of section 5 of the *Extradition Act* to authorize extradition “whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction; and whether or not Canada could exercise jurisdiction in similar circumstances.”<sup>125</sup> *Lépine* held that the extradition judge should not consider the question of the requesting state’s jurisdiction to prosecute the offence in question since that matter was within the exclusive domain of the Minister.<sup>126</sup> The judge in *USA v Fraser* was not persuaded by the applicants’ argument that an intervening case, *United States of America v Ferras*,<sup>127</sup> had introduced a new legal issue that met the *Bedford* standard for reconsideration.<sup>128</sup> In *USA v Fraser*, the judge rejected the characterization of the new issue as “the articulation that meaningful judicial process [in extradition matters] is a principle of fundamental justice under section 7 of the *Charter*,”<sup>129</sup> saying that the only new aspect raised in *Ferras* was the approach to admissibility and sufficiency of evidence by extradition judges, a very different issue from the one being challenged by the applicants. *Ferras* was “not a broad overhaul of the law of extradition,”<sup>130</sup> and, as such, *Bedford* did not authorize a revisiting. To hold that *Ferras* reopened the question decided by *Lépine* would, according to the court in *USA v Fraser*, potentially call into question all of

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<sup>122</sup> *Hersi*, *supra* note 118 at para 13, citing Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan, 1923) at 1.

<sup>123</sup> *United States of America v Fraser*, 2014 BCSC 1641, 116 WCB (2d) 277 [*USA v Fraser*].

<sup>124</sup> [1994] 1 SCR 286, 111 DLR (4th) 31 [*Lépine* cited to SCR].

<sup>125</sup> SC 1999, c 18, s 5.

<sup>126</sup> *Lépine*, *supra* note 124 at 301.

<sup>127</sup> 2006 SCC 33, [2006] 2 SCR 77 [*Ferras*].

<sup>128</sup> *USA v Fraser*, *supra* note 123 at paras 64–75.

<sup>129</sup> *Ibid* at para 60.

<sup>130</sup> *Ibid* at para 64.



the Supreme Court's many decisions bearing on the limited jurisdiction of extradition judges. "The values of certainty and stability that underlie the principle of *stare decisis* strongly militate against that result."<sup>131</sup>

In *R v Junek*,<sup>132</sup> a judge of the Alberta Provincial Court rejected Junek's claim that his Section 10(b) *Charter* right to counsel was violated when he was not told that if he had a cellular phone with access to the internet he had the right to use the phone to access the internet as part of his exercise of those rights. The same judge had made such a finding in a previous decision, *R v Welty*.<sup>133</sup> However, the very next day, a justice of the Queen's Bench ruled in *R v McKay*<sup>134</sup> that there is no implementational duty on the police to provide internet access to detainees who may wish to exercise their Section 10(b) rights to contact legal counsel (although he suggested that police practice would likely change in the future in this regard) and therefore the informational duty was not expanded to require the police to tell detainees about their rights to access the internet to contact legal counsel. The judge in *Junek* concluded that the *Bedford* standard was not met. There was no new legal issue or new facts or evidence that significantly altered the parameters of the debate. He was bound to follow *McKay*.

In another reported case, *R v Wagner*,<sup>135</sup> an individual charged with breach of probation and mischief to property in relation to her actions in protesting at an abortion clinic. She attempted to raise a number of defences – defence of the person, necessity, etc. – which had been rejected in earlier case law. The question of whether a foetus was a human being was also settled law. The Ontario Superior Court found no basis for invoking the *Bedford* rule concerning the vertical convention of precedent. The judge held that "the proposed evidence filed on Ms. Wagner's part falls far, far short of, 'fundamentally [shifting] the parameters of the debate,' and there was no demonstration of any new legal issue."<sup>136</sup>

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<sup>131</sup> *Ibid* at para 75.

<sup>132</sup> 2014 ABPC 199, 596 AR 397.

<sup>133</sup> 2014 ABPC 26, 582 AR 103.

<sup>134</sup> 2014 ABQB 70 at para 64, 100 Alta LR (5th) 1.

<sup>135</sup> 2015 ONCJ 66, 119 WCB (2d) 605.

<sup>136</sup> *Ibid* at para 76.

In *R v Caron*,<sup>137</sup> the Alberta Court of Appeal unanimously dismissed a claim that there was a constitutional obligation for all Alberta legislation to be published in both French and English. Members of the francophone community in Alberta had successfully argued in provincial court that the provisions of the *Traffic Safety Act*<sup>138</sup> under which they were charged were invalid because Alberta was constitutionally required to publish its legislation in both English and French. They were successful in the Provincial Court but lost in the Queen's Bench and Court of Appeal. A majority of the Court of Appeal considered the claim on its merits while one member of the Court wrote lengthy concurring reasons holding that a 1988 decision of the Supreme Court of Canada in *R v Mercure*,<sup>139</sup> was binding authority for the proposition that there was no constitutional requirement for English and French publication that came with Saskatchewan and Alberta's joining confederation. Concurring in the result, Justice Slatter delved deeply into the *stare decisis* issue, opining that "stability and predictability are particularly important" in the context of the "controversial and divisive" matter of constitutional language rights.<sup>140</sup> He held that the *Bedford* standard of "new legal issues raised as a consequence of significant developments in the law" was not met<sup>141</sup> and therefore, the trial judge should not have revisited it.<sup>142</sup> Similarly, he was unconvinced that the more substantial historical record constituted new "evidence that fundamentally shifts that parameters of the debate."<sup>143</sup> Interestingly, in the Court of Appeal the Crown did not rely on the *stare decisis* argument, focusing instead on the substance of the constitutional arguments.<sup>144</sup> The *stare decisis* opinion was a minority one in *Mercure* but it taps into a more traditional, formalist view of *stare decisis*, stating that the *Bedford* approach "embraces to some degree the controversial doctrine of lower courts 'underruling' decisions of higher courts."<sup>145</sup>

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<sup>137</sup> 2014 ABCA 71, 92 Alta LR (5th) 306 [*Caron*].

<sup>138</sup> RSA 2000, c T-6.

<sup>139</sup> [1998] 1 SCR 234, 48 DLR (4th) 1.

<sup>140</sup> *Caron*, *supra* note 137 at para 91.

<sup>141</sup> *Ibid* at para 79.

<sup>142</sup> *Ibid* at para 79.

<sup>143</sup> *Ibid* at paras 77–88.

<sup>144</sup> *Ibid* at para 68.

<sup>145</sup> *Ibid* at para 70.

Again in *R v Caswell*,<sup>146</sup> the Alberta Court of Appeal is the site of a significant debate about *stare decisis*. Justice Veldhuis, in dissent, held that Court of Appeal should reconsider its 20-year-old precedent, *R v Mitchell*,<sup>147</sup> which had upheld under Section 1 the suspension of Section 10(b) rights at the roadside for sobriety tests and the use of an approved screening device. Since *Mitchell* followed the approach taken by the Supreme Court of Canada in *R v Thomsen*,<sup>148</sup> the vertical convention of precedent was also implicated in this decision. In concluding that it was appropriate to reconsider *Mitchell*, Justice Veldhuis cited the *Bedford* language of changes in the law and circumstance that “fundamentally shif[t] the paramaters of the debate,” noting changes in technology (particularly cell phone technology) and in the legislative scheme (including immediate roadside suspensions).<sup>149</sup> However, the majority did not agree and their opinion expresses concern about the approach to the vertical convention taken in *Bedford*. Justice Brown states, “[t]here is little doubt that ... *Bedford* represents a significant new exception to *stare decisis*”<sup>150</sup> and describes the *Bedford* threshold as “highly abstract – particularly when compared to the test for invoking the per incuriam exception.”<sup>151</sup> Justice Brown, who has subsequently been appointed to the Supreme Court of Canada, articulates the view in *Caswell* that *Bedford* has not provided a “coherent and consistent normative account” of when a precedent can be revisited and that, therefore, “the best lower courts can do is take *Bedford*’s stated threshold seriously by applying it strictly.”<sup>152</sup> He goes on to do so, finding that changes in technology and the legislative scheme did not meet that high standard. It will be interesting to see how Justice Brown approaches *stare decisis* questions at the Supreme Court, given his criticism of the *Bedford* standard in *Caswell*.

In *R v Fitts*,<sup>153</sup> Justice David Pacciocco of the Ontario Court of Justice ruled on a defence application for disclosure of certain information about

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<sup>146</sup> 2015 ABCA 97, 28 Alta LR (6th) 86 [*Caswell*].

<sup>147</sup> 1994 ABCA 369, 162 AR 109.

<sup>148</sup> [1988] 1 SCR 640, 40 CCC (3d) 411.

<sup>149</sup> *Caswell*, *supra* note 146 at para 15.

<sup>150</sup> *Ibid* at para 36.

<sup>151</sup> *Ibid* at para 40.

<sup>152</sup> *Ibid* at para 40, citing Slatter JA in *Caron*, *supra* note 137 at para 70.

<sup>153</sup> 2015 ONCJ 262, [2015] OJ No 2431 [*Fitts*].

the breathalyzer instrument used to obtain an alcohol breath sample relied on by the Crown. Justice Pacciocco was faced with evidence that cast doubt on the assumption inherent in a Supreme Court of Canada precedent, *R v St-Onge Lamoureux*,<sup>154</sup> in which it was held that improper maintenance and historical difficulties with a breathalyzer machine can raise a reasonable doubt about the validity of individual test results. However, he held that he was nevertheless bound to follow *St-Onge Lamoureux*. Citing *Bedford, Carter* and other cases, Justice Pacciocco stated,

I am uncertain whether there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate.” I can have no confidence that the Supreme Court of Canada did not have evidence before it similar to that which has been presented before me, and that it did not reject the arguments before it that I accept here. Nor can I be confident that the evidence that I heard is complete.<sup>155</sup>

In none of these cases did the judge find the *Bedford/Carter* SCC threshold for revisiting a precedent to be met. At least one expressed concern about a lack of guidance provided to the lower courts in applying this new approach to precedent.<sup>156</sup> Obviously, these are early days and it may be that we will see more judges applying the *Bedford/Carter* SCC standard to revisit precedents in the future. However, it is unsurprising that the “garden of uprooted annuals” has not materialized.

#### CONCLUSION: *STARE DECISIS* – NOT QUITE WHAT IT CLAIMS TO BE

In a recent review of Neil Duxbury’s book, *The Nature and Authority of Precedent*,<sup>157</sup> Stephen Waddams cites Duxbury’s view that “the doctrine of precedent has been an essential and beneficial part of the common law – but paradoxically, that it has served the common law best by not being in practice quite what it claims to be in theory.”<sup>158</sup> According to Duxbury,

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<sup>154</sup> 2012 SCC 57, [2012] 3 SCR 187.

<sup>155</sup> *Fitts*, *supra* note 153 at para 71.

<sup>156</sup> *Caswell*, *supra* note 146.

<sup>157</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008).

<sup>158</sup> Stephen Waddams, “Authority, Precedent, and Principle” (2009) 59 UTLJ 127

[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 simultaneously to create constraint and allow a degree of discretion. A theory capable of demonstrating that judges can never justifiably refuse to follow precedent would support a doctrine of *stare decisis* ill-suited to the common law. For the common law requires not an unassailable but a strong rebuttable presumption that earlier decisions be followed.<sup>159</sup>

Most commentators would agree that Canadian appellate courts have treated the horizontal convention in this way for some time. Some would argue that the presumption is not even that strong with respect to the horizontal convention in the Supreme Court of Canada. Certainly the vertical convention remains stronger, even in the wake of the *Bedford/Carter* SCC approach authorizing lower courts to revisit precedents in limited circumstances. It is true that the judicial practice of *stare decisis* is not quite what the doctrine claims to be. However, this awareness should not be cause for alarm or pining for a strict convention that invites formalism. The contemporary Canadian judicial practice of precedent is characterized by considerable constraint while allowing a degree of discretion to respond to changing legal norms or social context. In a case such as *Carter* SCC, that discretion can (and did) make all the difference.

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at 132.

<sup>159</sup> Duxbury, *supra* note 157 at 183.