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# Escaping the “Straitjacket”: *Canada (Attorney General) v. Bedford* and the Doctrine of *Stare Decisis*

Michael Adams\*

## I. INTRODUCTION

On December 20, 2013, the Supreme Court of Canada (“SCC”) released its decision in *Canada (Attorney General) v. Bedford*.<sup>1</sup> In a few brief paragraphs the SCC made sweeping changes to the longstanding and fundamental principle of *stare decisis*. The Court enunciated two exceptions which would allow lower courts to make a ruling in the face of otherwise binding precedent. Despite the gravity of these changes, the Court provided little guidance as to the scope of the exceptions. Since *Bedford* was released the SCC has applied the *Bedford* exceptions in *Carter v. Canada (Attorney General)*<sup>2</sup> and *Saskatchewan Federation of Labour v. Saskatchewan*.<sup>3</sup> While the focus of this paper is on the developments in *Bedford*, references to *Carter* and *SFL* will be made where appropriate.

At issue in *Bedford* was whether the impugned sections of the *Criminal Code*<sup>4</sup> that regulated prostitution in Canada were inconsistent with the *Canadian Charter of Rights and Freedoms*.<sup>5</sup> This case takes on even greater significance when one considers that the SCC had already ruled in the *Prostitution Reference*<sup>6</sup> that the impugned sections were constitutional. Specifically, in the *Prostitution Reference*, the Court held

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1 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

2 2015 SCC 5, 384 DLR (4th) 14 [*Carter*].

3 2015 SCC 4, 380 DLR (4th) 577 [*SFL*].

4 RSC 1985, c C-46.

5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 [*Prostitution Reference*].

that s. 193 (now s. 210), separately or in combination with s. 195.1(1)(c) (now s. 213(1)(c)), is not inconsistent with s. 7 of the *Charter* and further, that s. 195.1(1)(c) violates s. 2(b) of the *Charter* but is saved under s. 1.<sup>7</sup> Yet when the issue was raised again at trial in *Bedford*, Himel J. did not consider herself bound by the *Prostitution Reference* and concluded that ss. 210 and 212(1)(j) of the *Criminal Code* offended s. 7 of the *Charter* and s. 213(1)(c) offended both s. 7 and s. 2(b), and that none of the provisions could be saved under s. 1.<sup>8</sup> When *Bedford* finally reached the SCC, the Court found that a reversal of its previous holding in the *Prostitution Reference* was justified and agreed that ss. 210, 212(1)(j) and 213(1) violated s. 7 of the *Charter* and declared the provisions to be invalid.<sup>9</sup> However, it is notable that the Court held that the trial judge was not able to revisit the s. 2(b) challenge and was bound by their decision in the *Prostitution Reference*.<sup>10</sup>

*Bedford* is the first in a line of three recent *Charter* cases that have gone to the SCC in which trial judges had made rulings that conflicted with SCC precedent.<sup>11</sup> In *Saskatchewan v. Saskatchewan Federation of Labour*<sup>12</sup> the trial judge held that strike activity was protected by s. 2(d) of the *Charter* despite an explicit finding to the contrary in *Reference Re Public Service Employee Relations Act (Alta.)*<sup>13</sup> Similarly, in *Carter v. Canada (Attorney General)*,<sup>14</sup> Smith J. felt that it was time to move beyond the SCC holding in *Rodriguez v. British Columbia (Attorney General)*<sup>15</sup> and found that the assisted suicide provisions in the *Criminal Code* violated ss. 7 and 15 of the *Charter*, and that neither violation could be saved under s. 1. On appeal, each of the three Courts of Appeal respectively, including the Ontario Court of Appeal in *Bedford v. Canada (Attorney General)*,<sup>16</sup> held that the trial judges were wrong to depart from precedent as it violated the common law principle of *stare decisis*.<sup>17</sup> Another important feature of these decisions is that, evoking *stare decisis*, the Courts of Appeal ruled, at least in part,

<sup>7</sup> *Ibid*, 1223-24. The Court did not deal with the section that prohibits living on the avails of prostitution (s 212(1)(j)).

<sup>8</sup> *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at paras 506-507, 327 DLR (4th) 152 [*Bedford ONSC*].

<sup>9</sup> *Bedford*, *supra* note 1 at para 164.

<sup>10</sup> *Ibid* at paras 46-47.

<sup>11</sup> *R v Saskatchewan Federation of Labour*, 2013 SKCA 43, 361 DLR (4th) 132 [*SFL SKCA*]; *Carter v Canada (Attorney General)*, 2013 BCCA 435, 365 DLR (4th) 351 [*Carter BCCA*].

<sup>12</sup> 2012 SKQB 62, [2012] 390 Sask R 196 [*SFL SKQB*].

<sup>13</sup> [1987] 1 SCR 313 at 409-410.

<sup>14</sup> 2012 BCSC 886, 287 CCC (3d) 1 [*Carter BCSC*].

<sup>15</sup> [1993] 3 SCR 519 [*Rodriguez*].

<sup>16</sup> 2012 ONCA 186 at para 52, 346 DLR (4th) 385 [*Bedford ONCA*].

<sup>17</sup> See *SFL SKCA*, *supra* note 11 at para 46; *Carter BCCA*, *supra* note 11 at para 316.

against each of the *Charter* applicants.<sup>18</sup> These decisions make it clear that the scope of *stare decisis* could have important implications for future *Charter* cases and the scope of *Charter* rights themselves.

The SCC was forced to revisit *stare decisis* in *Bedford*.<sup>19</sup> McLachlin C.J.C., writing for a unanimous court, made unprecedented additions to the principle, and significantly loosened the grip of *stare decisis* by articulating two exceptions. Indeed, as the SCC has since commented, “*stare decisis* is not a straitjacket that condemns the law to stasis.”<sup>20</sup> To help understand the extent of these changes, a review of the principle will be provided in Part II. Part III will analyze the Court’s new approach to *stare decisis* which will then be compared to the traditional treatment of the principle.

## II. THE TRADITIONAL APPROACH TO *STARE DECISIS*

*Stare decisis* has been described as a common law principle, a doctrine and a convention.<sup>21</sup> The principle takes its name from the Latin phrase *stare decisis et non quieta movere* which, when translated means “to stand by decisions and not to disturb settled matters.”<sup>22</sup> Underlying *stare decisis* is the assumption “that the most conclusive logic is the analogy of antecedent cases, especially if they have been decided by Courts of higher jurisdiction.”<sup>23</sup> Thus, judges ought to, and are in fact bound<sup>24</sup> to, follow and rule in-line with past decisions.

*Stare decisis* is often described as being foundational to our entire system of justice. As Richards J.A. (as he then was) stated in *SFL SKCA*, “[t]he concept of binding precedent occupies a central place in judicial decision making...It promotes several important values including

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<sup>18</sup> See generally *ibid*; *Bedford ONCA*, *supra* note 16.

<sup>19</sup> *Supra* note 1.

<sup>20</sup> *Carter*, *supra* note 2 at para 44.

<sup>21</sup> I describe it as a “principle” as this appears to be the term endorsed by the Supreme Court.

<sup>22</sup> Gerald Gall, *The Canadian Legal System* (Toronto: Carswell, 2004) at 431, cited in Debra Parkes, “Precedent Unbound?: Contemporary Approaches to Precedent in Canada” (2007) 32:1 *Man LJ* 135 at 135.

<sup>23</sup> Carleton Kemp Allen, “Precedent and Logic” (1925) 41 *Law Q Rev* 329 at 333.

<sup>24</sup> Allen provides a helpful explanation on how a judge is actually “bound” by precedent:

But he is only bound intellectually, by the established logic which it is his profession to exercise, not in any automatic or mechanical manner. He can, if he likes, utterly flout precedent, and declare all the great doctors of the law to be so many ignoramuses. Save when a Serjeant Arabin finds his way to the Bench—and that is rarely—this does not happen in practice, because it is highly improbable that a person of such mentality will hold judicial office, or, at all events, that he will hold it for long.

*Ibid.*

consistency, certainty and predictability in the law.”<sup>25</sup> Carleton Kemp Allen has called it “a very essential principle in our judicial system.”<sup>26</sup> Echoing these comments, the Supreme Court in *Bedford* found that it is a principle “upon which the common law relies.”<sup>27</sup>

Although *stare decisis* operates throughout our legal system, it has two distinct dimensions that apply differently to each case. The principle applies “to decisions of higher courts [(vertical *stare decisis*)]...and to previous decisions of the same court [(horizontal *stare decisis*)]...In the latter case decisions are not binding, but should be followed unless there are compelling reasons to overrule them.”<sup>28</sup>

### A. VERTICAL STARE DECISIS

Traditionally, vertical *stare decisis* prevented a trial judge full-stop from revisiting *Charter* issues. The principle has been stated strictly from the earliest cases: a lower court is bound to follow the *ratio decidendi*<sup>29</sup> of a higher court’s decisions.<sup>30</sup> The latest and most authoritative articulation of binding precedent in Canada comes from the Supreme Court in *R. v. Henry*.<sup>31</sup> Binne J. described how, contrary to some beliefs at the time, not every phrase in SCC decisions was binding, however, binding precedent was not limited specifically to the phrases that decided the cases. Instead, what should be accepted as being authoritative is the “dispositive *ratio decidendi*”<sup>32</sup> and the “analysis which is obviously intended for guidance.”<sup>33</sup> As stated succinctly in *Canada (Attorney General) v. Confédération des syndicats nationaux*, vertical *stare decisis* arises where “the issue is the same and that the questions [the case] raises have already been answered by a higher

<sup>25</sup> *Supra* note 11 at paras 29-30.

<sup>26</sup> *Supra* note 23 at 336.

<sup>27</sup> *Supra* note 1 at para 38.

<sup>28</sup> Parkes, *supra* note 22 at 137. See also *Bedford*, *ibid* at para 39. An important component of the vertical dimension is the concept of “binding precedent.” This refers to a rule dictating that the courts lower in the applicable hierarchy are bound to follow decisions of the higher court.

<sup>29</sup> The *ratio decidendi* of a case can be defined as the rule (or rules) upon which the court acted, “which a later court (appropriately placed in the hierarchy) cannot generally question” (AWB Simpson, “The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent” in AG Guest, ed, *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961) 148 at 160, 163). This is contrasted by the *obiter dicta*, which is discussion that is not relevant to the disposition of the case (*ibid* at 161).

<sup>30</sup> *Quinn v Leatham*, [1901] AC 495 (HL) at 506.

<sup>31</sup> 2005 SCC 76, [2005] 3 SCR 609 [*Henry*].

<sup>32</sup> Though not discussed in *Henry*, it remains true that the *ratio* of a case is only binding if it does not directly conflict with statute or the *ratio* of another decision by a different court of greater authority (Simpson, *supra* note 29 at 167).

<sup>33</sup> *Henry*, *supra* note 31 at para 57.

court.”<sup>34</sup> *Henry* and *Confédération* instructs that if an issue has been addressed by the Supreme Court in a *ratio*<sup>35</sup> or in statements clearly intended to provide guidance, then it cannot be revisited by a lower court.

Previously, trial judges had no tools to challenge archaic SCC decisions. Where the SCC had delivered a *ratio decidendi*, even if subsequent cases have shifted the approach to those *Charter* provisions, “on the face of things, the controlling Supreme Court precedents are still [in] effect.”<sup>36</sup> Indeed, this is the view that the Courts of Appeal in *Bedford*, *Carter* and *SFL* subscribed to in each of their respective decisions.<sup>37</sup> The consensus of the Courts of Appeal on the power of lower courts under *stare decisis* are summarized by Finch C.J.B.C.’s dissenting opinion in *Carter BCCA*:<sup>38</sup>

Where lower courts are of the view that a decision of a higher court was wrongly decided, the appropriate approach is to apply the precedent and provide comment, or even find additional facts, to facilitate a reconsideration of the point by a higher court, if an appeal to that court should be pursued.<sup>39</sup>

Traditionally, a trial judge was always bound to follow the applicable *ratio* or guidance of a higher court and could only aid *Charter* applicants by providing them with a favourable factual record. While the approach taken to *stare decisis* by the Courts of Appeal was ultimately rejected by the Supreme Court in each case, there can be no doubt that this was the law of the land before *Bedford*.

The only way for a trial judge not to be bound by the vertical component was to distinguish the case at bar from previous decisions. It can be said that *stare decisis* requires a trial judge to either “follow or distinguish earlier binding decisions.”<sup>40</sup> Generally, a trial judge

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<sup>34</sup> 2014 SCC 49 at para 25, [2014] 2 SCR 477 [*Confédération*]. While this recent decision cites *Bedford*, it does not elaborate on the new exceptions to *stare decisis* established by that case.

<sup>35</sup> For further reading on *ratio* identification in Canada see Michelle Biddulph & Dwight Newman, “Equality Rights, *Ratio* Identification, and the Un/Predictable Judicial Path Not Taken: *Quebec (Attorney General) v A* and *R v Ibanescu*” (2015) 48:1 UBC L Rev 1.

<sup>36</sup> *SFL SKCA*, *supra* note 11 at para 46.

<sup>37</sup> Each Court of Appeal relies on *Henry*, *supra* note 31; *SFL SKCA*, *supra* note 11 at para 31; *Carter BCCA*, *supra* note 11 at para 265; *Bedford ONCA*, *supra* note 16 at paras 58-60.

<sup>38</sup> The majority took no objection to Finch CJBC’s formulation of *stare decisis*.

<sup>39</sup> *Supra* note 11 at 57.

<sup>40</sup> Simpson, *supra* note 29 at 173.

can do this in two ways. First, the trial judge can find that the facts of the case are materially different from those found in the earlier precedent-setting case.<sup>41</sup> However, pointing out a factual distinction is not enough. The trial judge must use this factual distinction as a justification for refusal to follow the earlier case (i.e. the difference must be shown to be material).<sup>42</sup> Second, a case can be distinguished if a party raises different legal issues than those that had been raised previously;<sup>43</sup> statements that do not speak to the issues raised in the latter case are not binding on those decisions.<sup>44</sup> In either situation the trial judge is not bound by the precedent. In the realm of *Charter* challenges, applicants may try and argue that a different aspect of a right or a different right altogether had been infringed in order to avoid running afoul of jurisprudence.<sup>45</sup>

There have been a few challenges to the strict approach to *stare decisis* prior to *Bedford*. The first major challenge was the idea of “anticipatory overruling.” The idea that a lower court is no longer bound by precedent if it is confident that the “higher court [would] overrule its own precedent when given the chance.”<sup>46</sup> In her 2007 review of precedent, Professor Debra Parkes noted that the idea of anticipatory overruling had garnered some academic support.<sup>47</sup> However, this approach, as an exception to the binding nature of *stare decisis*, was rejected in both *Carter BCCA*<sup>48</sup> and *SFL SKCA*.<sup>49</sup> In his judgment, Richards J.A. (as he then was) pointed out that this “novel view...is a largely heretical notion which has no apparent basis in Canadian case law.”<sup>50</sup>

Another challenge to the strict approach to *stare decisis* was the idea that a shift in the jurisprudence or circumstances underlying a decision allows the issues decided to be revisited. Himel J. subscribed to this view in *Bedford ONSC* and produced case law to support the proposition that she had the authority to depart from the precedent set out in the *Prostitution Reference*.<sup>51</sup> In *Wakeford v. Canada (Attorney*

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41 *Ibid* at 175.

42 *Ibid*.

43 It may be argued this is not “distinguishing” in the traditional sense. By raising different legal issues one escapes *stare decisis* entirely. Alternatively, raising different legal issues automatically creates materially different facts. If either are true, it would not change my analysis in this article.

44 *Henry*, *supra* note 31 at para 57. See also the definition of *obiter dicta* in Parkes, *supra* note 22.

45 As was done at trial in *Carter BCSC* (see *supra* note 14 at para 1322).

46 Parkes, *supra* note 22 at 143.

47 *Ibid* at 144-45.

48 *Carter BCCA*, *supra* note 11 at para 316.

49 *SFL SKCA*, *supra* note 11 at paras 48-49.

50 *Ibid*.

51 *Supra* note 6 at paras 79-83.

*General*), a trial level decision affirmed by the Ontario Court of Appeal, the trial judge stated that “there must be some indication—either in the facts pleaded or in the decisions of the Supreme Court—that the prior decision may be open for reconsideration.”<sup>52</sup> Further, in *Leeson v. University of Regina*, Laing C.J. considered that a decided matter could proceed at trial when evidence is presented to show that “the social, political or economic assumptions underlying the [previous] decision are no longer valid.”<sup>53</sup>

Yet these decisions failed to erode the strict foundations of *stare decisis*, as evidenced by the decision in *Bedford ONCA*.<sup>54</sup> Indeed, the Ontario Court of Appeal was quick to dismiss the strength of these cases. The Ontario Court of Appeal claimed that the trial judge in *Wakeford* did not truly contemplate that she could have reconsidered the governing decision of the Supreme Court.<sup>55</sup> To the contrary, the trial judge actually concluded that “had the plaintiff made out the case for reconsideration, that reconsideration would have occurred in the Supreme Court and not in the trial court.”<sup>56</sup> The Court interpreted *Leeson* to mean that in any given factual situation, the trial judge could only do what was already in her power, that is, to “allow the plaintiff to build the necessary record.”<sup>57</sup> Thus, trial judges were seen as “‘mere scribe[s]’, creating a record and findings without conducting a legal analysis.”<sup>58</sup>

Due to the restrictive nature of vertical *stare decisis*, judges at the trial level were effectively barred from revisiting issues decided by the Supreme Court. It would take the SCC themselves to help loosen *stare decisis*' grip on trial judges.

## **B. HORIZONTAL STARE DECISIS**

In *Ontario (Attorney General) v. Fraser*, Rothstein J., in a concurring opinion, summarized the Supreme Court's prior treatment of the horizontal component of *stare decisis* and set out where, in principle, courts may overrule their earlier precedent.<sup>59</sup> The most important aspect of *Fraser* is that it has been interpreted to stand for the principle that the Supreme Court is “a court of absolute authority...a court that has an absolute right to overrule itself if and when it has a genuine

<sup>52</sup> *Wakeford v Canada (Attorney General)* (2001), 81 CRR (2d) 342 (Ont Sup Ct) at 348, aff'd 156 OAC 385, leave to appeal to SCC refused, [2002] SCCA No 72 [*Wakeford*].

<sup>53</sup> 2007 SKQB 252 at para 9, 301 Sask R 316 [*Leeson*].

<sup>54</sup> *Supra* note 16.

<sup>55</sup> *Ibid* at paras 78-79.

<sup>56</sup> *Ibid* at para 78.

<sup>57</sup> *Ibid* at para 80.

<sup>58</sup> *Bedford*, *supra* note 1 at para 43, citing Factum of Intervener David Asper Centre for Constitutional Rights at 25.

<sup>59</sup> 2011 SCC 20 at paras 134-39, [2011] 2 SCR 3 [*Fraser*].



realization of error.”<sup>60</sup> The decision also recognized that “it is the role and duty of the Court to provide what it believes to be a correct interpretation of the *Charter*, even if that involves admitting long-standing and oft-repeated past judicial error.”<sup>61</sup>

Yet there may not even be any one “correct” *Charter* interpretation *per se*. The Supreme Court has said that a “frozen concepts” interpretation “runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”<sup>62</sup> Judicial understanding of the Constitution develops over time, simply as a consequence of the application of principles of constitutional interpretation. Therefore, the fact that the “correct” interpretation can shift over time means that when it comes to *Charter* cases, the courts only need to point to the “living tree” approach before overruling its previous holding.

Further, in *Bedford*, the Court does not set any objective standards in its statement about the horizontal aspect of *stare decisis*. Rather, the Court simply states that it must “weigh correctness against certainty,”<sup>63</sup> which reinforces the point that the Court had complete discretion to overrule itself. For these reasons, practically speaking, the horizontal aspect of *stare decisis* will never be an obstacle when courts consider revisiting an issue under the *Charter*.<sup>64</sup>

### III. THE DEVELOPMENT OF VERTICAL *STARE DECISIS* IN *BEDFORD*

The common law principle of *stare decisis* arose in *Bedford* because many of the same issues had previously been decided in the *Prostitution Reference*.<sup>65</sup> However, in *Bedford* ONSC, Himel J. claimed that since a new legal issue was being raised in the form of an argument under a different s. 7 right, and that since the jurisprudence on the section had “evolved considerably,” she was entitled to revisit the s. 7 issue.<sup>66</sup> The SCC unanimously endorsed this position and held that the impugned provisions violated s. 7 and resolved the case on those

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<sup>60</sup> Joseph J Arvay, QC, Sheila M Tucker & Alison M Latimer, “*Stare Decisis* and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?” (2012) 58 Sup Ct L Rev (2d) 61 at 68.

<sup>61</sup> *Ibid* at 69.

<sup>62</sup> *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698.

<sup>63</sup> *Supra* note 1 at para 47.

<sup>64</sup> Admittedly, it will be an extremely rare case where a trial court will be forced to reconsider its own *Charter* interpretation and not that of a higher court. Though in such cases, the horizontal precedent will not be an obstacle.

<sup>65</sup> *Supra* note 6.

<sup>66</sup> *Supra* note 8 at para 75.

grounds.<sup>67</sup> However, the *Prostitution Reference's* conclusion regarding s. 2(b) was found to still be binding.

The Court described *stare decisis* as a common law principle, which requires courts to follow and apply authoritative precedents in order to promote certainty, a “foundational principle upon which the common law relies.”<sup>68</sup> While seemingly fundamental, the Court agreed that the principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold unconstitutional laws.<sup>69</sup> The proposition that important common law principles cannot be followed in the face of a breach of the Constitution is far from inventive, as can be seen from the Supreme Court’s ruling in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*.<sup>70</sup> Yet it is significant when related to the principle of *stare decisis* because it provides a legitimate avenue through which a trial judge can detach their decision from otherwise binding precedent. Theoretically, the common law principle of *stare decisis* is subordinate to all constitutional provisions. This presumptively includes the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982*.

Following the Court’s logic, a trial judge can make a ruling that is contrary to the holding of a Supreme Court decision, as long as they are finding a previously held constitutional law to be unconstitutional as a result of the application of modern standards.<sup>71</sup> Though not explicitly stated by the Court, one could reason that unless the trial judge is facing a constitutional issue, they will always be bound by the precedent of higher courts. Once the Supreme Court has ruled on common law or ordinary statutory issues, it would remain true that they alone can revisit the issue.

Indeed, I would argue that even the common law or a statute interpreted in light of “*Charter* values” cannot be revisited by lower courts. The difference between *Charter* values and *Charter* rights is that “*Charter* values bind all Canadians, but are not enforceable in law. *Charter* rights, on the other hand, bind only the actions of Canadian governments, but are fully enforceable in law.”<sup>72</sup> Indeed, “[p]rivate parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right.”<sup>73</sup> *Charter* values are simply interpretive principles.<sup>74</sup> In terms of the common law, *Charter*

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<sup>67</sup> *Bedford*, *supra* note 1 at para 47.

<sup>68</sup> *Ibid* at para 38.

<sup>69</sup> *Ibid* at paras 43-44.

<sup>70</sup> 2007 SCC 1, [2007] 1 SCR 3.

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

<sup>72</sup> Timothy Macklem, “*Vriend v Alberta*: Making the Private Public”, Case Comment (1999) 44 McGill LJ 197 at 219.

<sup>73</sup> *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 95 [*Hill*].

<sup>74</sup> *Ibid*; *R v Clarke*, 2014 SCC 28 at para 12, [2014] 1 SCR 612 [*Clarke*].

values “provide the guidelines for any modification to the common law which the court feels is necessary.”<sup>75</sup> *Charter* values have only a very limited application to statutory interpretation and can only be used if the statute is ambiguous.<sup>76</sup> Being merely an interpretive principle, *Charter* values do not give constitutional protection to the common law or statute.

The Supreme Court’s approach to vertical *stare decisis* regarding constitutional issues should be viewed as being predicated upon Lord Sankey’s oft-quoted passage that the constitution is a “living tree capable of growth and expansion within its natural limits.”<sup>77</sup> As described above, the SCC has made clear that no concepts found within the Constitution shall be frozen in time. Himel J.’s approach in *Bedford ONSC*, which was endorsed by the Supreme Court, was predicated on the view that the Constitution should be subject to changing judicial interpretations over time.<sup>78</sup> Based on this understanding of Canada’s Constitution, it was appropriate for the SCC to craft exceptions to *stare decisis* so that a “significant change”<sup>79</sup> will justify a new interpretation. Therefore, a trial judge can revisit a constitutional issue, not because the SCC previously came to an erroneous conclusion as to constitutionality, but rather because it is the Constitution itself (or at least its accepted interpretation) that has developed over time.<sup>80</sup>

Although a lower court cannot ignore binding precedent, it has a constitutional obligation to revisit a matter once a certain threshold is reached.<sup>81</sup> The threshold—set out by the SCC in *Bedford*—“is not an easy one to reach.”<sup>82</sup> The Court claims that allowing a trial judge to revisit an issue, but only upon reaching a high threshold, “balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, the lower court must be able to perform its full role.”<sup>83</sup> The threshold is described succinctly by the Court:

[A] trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case;

<sup>75</sup> *Hill, ibid* at para 97.

<sup>76</sup> *Clarke, supra* note 74 at para 12.

<sup>77</sup> *Edwards v Attorney-General for Canada*, [1930] AC 124 (PC) at 136.

<sup>78</sup> *Supra* note 8 at para 77.

<sup>79</sup> *Bedford, supra* note 1 at para 44.

<sup>80</sup> While outside the scope of this paper, there does not seem to be any judicial mechanism that a trial judge can use to correct a truly incorrect SCC holding where the circumstances or interpretation of the *Charter* do not change (e.g. that executions by the state can never violate an individual’s right to life).

<sup>81</sup> *Bedford, supra* note 1 at paras 43-44.

<sup>82</sup> *Ibid* at para 44.

<sup>83</sup> *Ibid.*

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.<sup>84</sup>

#### **A. CHARTER PROVISIONS NOT RAISED IN A PREVIOUS CASE**

According to the Supreme Court, the requisite threshold for revisiting precedent is met when a new legal issue is raised. In turn, parties can raise new legal issue in one of three ways. However, only in the second and third situations (fundamental change in circumstances or evidence and significant developments in the law) are trial judges unbound from precedent so as to constitute exceptions to *stare decisis*.

A new legal issue is raised when a seemingly new argument based on a different “provision” of the *Charter* is argued. Indeed, where a violation of a new provision is argued, a new legal issue has been raised that has yet to be answered by the SCC. For example, in *Bedford*, the Supreme Court ruled that the trial judge was entitled to rule on the new s. 7 arguments raised by the claimants. The Court stated that the trial judge could address “whether the laws in question violated the security of the person interests under s. 7...[because in] the *Prostitution Reference*, the majority decision was based on the s. 7 physical liberty interest alone.”<sup>85</sup> Accordingly, at least *prima facie*, the trial judge would have been bound by the *Prostitution Reference* if the Court had also addressed security of the person. Therefore, arguments based on new *Charter* provisions raise a new legal issue just as they did under the traditional approach to *stare decisis*.

In order to understand arguments based on *Charter* provisions that were not previously raised, the parameters of “*Charter* provisions” must be determined. While it is not contentious to state that each section or subsection of the *Charter* would constitute a separate *Charter* provision,<sup>86</sup> s. 7 requires further examination.<sup>87</sup>

The SCC has clearly determined that s. 7 of the *Charter* contains “independent interests, each of which must be given independent significance.”<sup>88</sup> Beginning with *Singh v. Minister of Employment and*

<sup>84</sup> *Ibid* at para 42.

<sup>85</sup> *Ibid* at para 45.

<sup>86</sup> See e.g. the Court’s usage of the term “*Charter* provisions” in *R v Keegstra*, [1990] 3 SCR 697 at 715, 717.

<sup>87</sup> Section 7 reads: “Everyone 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.”

<sup>88</sup> *R v Morgentaler*, [1988] 1 SCR 30 at 52 [*Morgentaler*], quoted in *Bedford*, *supra* note 1 at para 45.

*Immigration*<sup>89</sup> the Court has consistently emphasized that the three s. 7 interests are distinct elements, so as to allow for an inquiry as to whether just one interest has been infringed in accordance with the principles of fundamental justice.<sup>90</sup> Since the fact that each interest can be considered independently allowed Himel J. to again consider s. 7, it is only logical that each s. 7 interest, namely life, liberty and security of the person, is a separate *Charter* provision.

However, the Court's inconsistent treatment of different characterizations of the same s. 7 interest in *Bedford* deserves some attention. The Court, in its reasons, made reference to an economic interest in the context of liberty. Therein may lie an argument that a court's holding may refer to specific aspects within a particular s. 7 interest, instead of the entire interest itself. The inconsistency arises in McLachlin C.J.C.'s discussion of the *Prostitution Reference*. In the *Prostitution Reference*, the majority decision was based on the s. 7 liberty interest alone, however, McLachlin C.J.C. went on to note that Lamer J., writing only for himself, touched on security of the person "and then, only in the context of economic interest."<sup>91</sup> It is not clear why this addition was necessary. The fact that Lamer J.'s s. 7 analysis did not carry the majority seems to be the only relevant point.

Not only is McLachlin C.J.C.'s point regarding economic interest and security of the person irrelevant, it also conflicts with her analysis under s. 2(b) in *Bedford*. In the s. 2(b) analysis, the Court held that Himel J. had no authority to revisit the s. 2(b) issue and was bound by the conclusion in the *Prostitution Reference*.<sup>92</sup> In the *Prostitution Reference* the Court concluded that the *Criminal Code* provision at issue prohibited "the communication of, or the attempt to communicate, a commercial message to any member of the public."<sup>93</sup> Himel J. appears to have attempted to re-characterize the relevant speech as "speech meant to safeguard the physical and psychological integrity of individuals."<sup>94</sup> Instead of a commercial interest, the trial judge characterizes the right to free expression as a safety interest. The SCC in *Bedford* concluded, however, that "[r]e-characteriz[ation of] the type of expression alleged to be infringed did not convert [the] argument into a new legal issue."<sup>95</sup> It can be gleaned from this statement that different characterizations of a particular interest do not constitute

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<sup>89</sup> [1985] 1 SCR 177.

<sup>90</sup> *Morgentaler*, *supra* note 88 at 52.

<sup>91</sup> *Bedford*, *supra* note 1 at para 45.

<sup>92</sup> *Ibid* at para 46.

<sup>93</sup> *Supra* note 6 at 1188.

<sup>94</sup> *Bedford ONSC*, *supra* note 8 at para 462.

<sup>95</sup> *Bedford*, *supra* note 1 at para 46.

new legal issues. Nor can a claimant attempt to argue that a new legal issue is raised when a narrow aspect of an interest is threatened by government action.<sup>96</sup>

Therefore, the s. 2(b) analysis and McLachlin C.J.C.'s comment regarding "economic interests" appears to be conflicting and could support a narrower interpretation of "interest." However, the economic interest statement is *obiter*, and is superfluous to the issues in *Bedford*. The s. 2(b) argument was a separate issue in *Bedford* and although the case was resolved by the s. 7 analysis, the discussion of s. 2(b) should be given more weight. Thus, the only interests in s. 7 that can be considered separate "Charter provisions" are life, liberty, and security of the person.

It is important to note that in the case of s. 7, a previous SCC analysis under the principles of fundamental justice may continue to bind trial judges even if an infringement of a different interest is alleged.<sup>97</sup> A s. 7 analysis has two stages: first, it must be determined whether there has been a deprivation of a s. 7 interest and second, if so, whether the deprivation was in accordance with the principles of fundamental justice.<sup>98</sup> A law that violates s. 7 will deprive a claimant of either life, liberty, or security of the person in a way that is not in accordance with the principles of fundamental justice.<sup>99</sup> According to the *Prostitution Reference*, the impugned laws deprived the complainant of liberty but it was done so in accordance with the principles of fundamental justice.<sup>100</sup> Even if the same legislation was argued to have violated another s. 7 interest, arguably it would still do so in accordance with the principles of fundamental justice. Indeed, the majority in *Carter ONCA* found that regardless of what s. 7 interest was violated, that the SCC in *Rodriguez* had decided that the impugned law had met the tests under the principles of fundamental justice.<sup>101</sup> In other words, if the SCC held that an impugned provision deprived a claimant of a s. 7 interest but in accordance with the principles of fundamental justice, a trial judge must rule as if the Supreme Court was holding that the impugned sections constitutionally deprived the claimants of *all* s. 7 interests.

Yet specifically in *Bedford*, the Court held that since the principles of fundamental justice have developed significantly since the

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<sup>96</sup> For example, the claimants attempted to do this with their s 2(b) argument (*Bedford ONSC*, *supra* note 8).

<sup>97</sup> It was this fact that stopped the Court of Appeal in *Carter BCCA*, *supra* note 11, from considering the claimants s 7 deprivation of life arguments.

<sup>98</sup> *Bedford*, *supra* note 1 at paras 58, 93.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Supra* note 6 at 1201-1202.

<sup>101</sup> *Supra* note 11 at 282. This issue was not discussed by the SCC decision in *Carter*, *supra* note 2.

*Prostitution Reference* the trial judge was not bound by the holding in that case.<sup>102</sup> However, going forward, if a higher court holds that a law deprives a person of a s. 7 interest, but does so in accordance with the principles of fundamental justice, trial judges may continue to be bound by that ruling, unless the trial judge is unbound by one of the two exceptions laid out in *Bedford*.

In summary, an argument under a different *Charter* provision raises a “new legal issue,” but is not an exception to the binding effect of *stare decisis*. It is simply a case where a new legal issue is raised in the traditional sense. Despite some confusion arising from the SCC’s usage of the phrase “economic interest,” a *Charter* provision can be a section or subsection of the *Charter*, but with regard to s. 7, only refers to the interests listed: life, liberty, and security of the person. One also has to be careful as to whether a previous decision held that a deprivation of a s. 7 interest was done in accordance with the principles of fundamental justice because this can determine the ultimate result in later cases irrespective of which interest is argued to have been infringed. While arguing under a different *Charter* provision does not unbind a trial judge, the next two situations that raise a new legal issue are two truly new exceptions to the *stare decisis* principle.

#### **B. FUNDAMENTAL SHIFT IN EVIDENCE OR CIRCUMSTANCES**

The first exception, but second situation that raises a “new legal issue” in the eyes of the Court, is where “there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”<sup>103</sup> The Court provided very little guidance on this point and only concluded that there was no change that would have allowed the trial judge to revisit s. 2(b). Specifically, the Court concluded that “the more current evidentiary record or the shift in attitudes and perspectives [do not] amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate.”<sup>104</sup>

To fully flesh out the meaning of the passage it may be prudent to examine when courts have said that a change in circumstances or evidence made it necessary to revisit an issue. In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*,<sup>105</sup> Laskin J.A. set out a list of factors that the Supreme Court considered in deciding whether it should depart from a previous ruling. One factor discussed in *Polowin* seems to mirror the “fundamental shift” exception that

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<sup>102</sup> *Supra* note 1 at para 45.

<sup>103</sup> *Ibid* at para 42.

<sup>104</sup> *Ibid* at para 46.

<sup>105</sup> (2005), 76 OR (3d) 161 (CA) [*Polowin*].

has been set out in *Bedford*, that is: “where the social, political, or economic assumptions underlying a previous decision are no longer valid in contemporary society.”<sup>106</sup> This also seems to match the exception that was considered by Laing C.J. in *Leeson*.<sup>107</sup> While the social, political and economic assumptions factor described by Laskin J.A. and Laing C.J. seems to speak only to a change in the “circumstances,” it would be logical to assume that the previous evidence being similarly invalidated would involve a fundamental shift in the evidence as well.

Following *Polowin*, the Supreme Court overturned an earlier decision because of new evidence in *United States v. Burns*.<sup>108</sup> The case dealt with whether a decision by the Citizenship and Immigration Minister to extradite the applicants back to the United States, even though they might face the death penalty, violated their rights under s. 7 of the *Charter*. In holding that such a decision violated s. 7 and could not be saved under s. 1, the Court reversed their holding from a pair of 1991 cases.<sup>109</sup> The Court specifically cited changes in circumstances and evidence as their reason for doing so: “*Kindler* and *Ng* [should be]...revisited on the weight to be given to the ‘factor’ of capital punishment because of the changed circumstances in the ten years since those cases were decided.”<sup>110</sup> It seems that in 1991 there was an assumption that, due to the judicial safeguards in place to protect the innocent, it was nearly impossible for an innocent accused to face execution.<sup>111</sup> However in *Burns*, the Court pointed to an abundance of new evidence from Canada, the United States, and the United Kingdom<sup>112</sup> that demonstrated the potential for wrongful convictions, even in cases where the death penalty was available.<sup>113</sup> In light of

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<sup>106</sup> *Ibid* at 192. See also *R v Salituro*, [1991] 3 SCR 654 at 670.

<sup>107</sup> *Supra* note 53.

<sup>108</sup> 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

<sup>109</sup> *Ibid* at para 63: “[T]he result of those cases [*Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779; *Reference re Ng Extradition (Can)*, [1991] 2 SCR 858] should not determine the outcome here.”

<sup>110</sup> *Burns*, *ibid*.

<sup>111</sup> *Ibid* at paras 95, 117.

<sup>112</sup> A simple summary of the new evidence provides an example of what qualifies as a change in the circumstances or evidence that fundamentally shifts the parameters of the debate: Five Canadian cases of wrongful convictions are discussed, *ibid* at paras 96-104, as well as two notable cases from Britain where the accused had been executed but had the conviction quashed afterwards (*ibid* at paras 114-16). From the United States, the Court highlights studies from Columbia University and the United States Department of Justice, and concerns of the “American Bar Association, the Washington State Bar Association and other bodies [i.e. the Innocence Project] who possess ‘hands-on’ knowledge...[of] the possibility of wrongful convictions” (*ibid* at paras 108-110).

<sup>113</sup> See *ibid* at paras 95-117.



this evidence, the Court described the knowledge of the scope of the problem as growing to “unanticipated and unprecedented proportions in the years since *Kindler* and *Ng*.”<sup>114</sup> To borrow from *Leeson* and *Polowin*, the fundamental “underlying assumption” in *Kindler* and *Ng* was clearly invalidated by the new evidence.

In *Bedford ONSC*, Himel J.’s reasons regarding s. 2(b) that may fall into the “fundamental shift” exception appear to revolve around two pieces of evidence she claims were not before the SCC in 1990. The first is that prostitutes are “marginalized people who are at a high risk of being victims of violent crime.”<sup>115</sup> Second, compared to developments the Netherlands, Germany, New Zealand and Australia since 1990, Canada “is no longer in step...[and does not] minimize [the] risk of harm [associated with prostitution].”<sup>116</sup> However, in the *Prostitution Reference* the Supreme Court actually did take notice of the fact that prostitutes are at a much higher risk of being subjected to violent crime.<sup>117</sup> It seems that in the twenty years since the *Prostitution Reference* there has not been a “change” in the evidence or circumstances, rather, this evidence has only been strengthened. Unlike the evidence regarding wrongful convictions in *Burns*, it does not appear that in 1990, prostitutes being at an especially high risk for violence was a relatively unknown phenomenon. Further, the Court briefly noted that Canada did not appear “out of step with international responses,” pointing specifically to the “draconian” regimes set up in the United States.<sup>118</sup> Given this, it is understandable why the Supreme Court in *Bedford* would not view a change in international laws to be a shift of fundamental proportions.

Clearly there are no assumptions underlying the decision in the *Prostitution Reference* that have been subsequently challenged, much less invalidated. The main point of contention between Himel J. and the Court in the *Prostitution Reference*, it appears, is not with the evidence or circumstances but rather what s. 2(b) protects and its treatment under a s. 1 analysis.<sup>119</sup> Based on SCC jurisprudence, it is clear Himel J.’s *stare decisis* arguments fail to reach the standard set by the Court’s jurisprudence.

In *Carter*, using similar language to that outlined above, the Supreme Court found that there had been a fundamental shift in the circumstances or evidence. The Court found that the “matrix of legislative and social facts in this case...differed from the evidence

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<sup>114</sup> *Ibid* at para 95.

<sup>115</sup> *Bedford ONSC*, *supra* note 8 at para 458.

<sup>116</sup> *Ibid* at para 481.

<sup>117</sup> *Supra* note 6 at 1134-35.

<sup>118</sup> *Ibid* at 1200.

<sup>119</sup> Himel J’s argument under s 2(b) about being at a greater risk for violence seems more applicable to the security of the person interest in s 7.

before the Court in *Rodriguez*.<sup>120</sup> Therefore, Smith J. was able to revisit *Rodriguez* because the evidence “was capable of undermining...[the] conclusions” made in that case.<sup>121</sup> The SCC appears to be adopting the previously invalidated fundamental “underlying assumption” approach applied in *Leeson* and *Polowin*.

The Court outlined an exception to *stare decisis* where there is a change in circumstances or evidence that fundamentally shifts the parameters of the debate, but did not provide any further guidance. However, examining jurisprudence that speaks to when a court ought to overrule itself provides such guidance. *Polowin* and *Leeson* indicate where the circumstances or evidence underlying a previous decision have shifted or been subsequently invalidated, a trial judge may revisit that decision. In *Burns*, the SCC found that when the understanding of the circumstances and breadth of the evidence had grown by unanticipated and unprecedented proportions since the earlier decision, the issue decided in that case needed to be revisited. *Carter* confirms that a fundamental shift occurs where conclusions made in a decision are undermined by evidence produced in a subsequent case.

### C. SIGNIFICANT DEVELOPMENTS IN THE LAW

Finally, the second new exception to vertical *stare decisis*, and the last situation which justifies a trial judge revisiting an issue, is a significant development in the law. Again, the Court does not provide direct guidance as to what constitutes such a development. Examining previous instances where the SCC believed that it was necessary to overrule their previous decisions in such situations may again inform the modern exception.

Dickson C.J.C. and Lamer J.’s dissenting opinion<sup>122</sup> in *R. v. Bernard* provides the best guidance for when a court should overrule themselves in response to “developments in the jurisprudence.”<sup>123</sup> The most relevant situation for the purpose of this paper is where “the holding of a case has been ‘attenuated’” or “seriously undermine[d]” by subsequent decisions.<sup>124</sup> A good example of such a scenario is provided in *Bernard*:

The *Leary* rule fits most awkwardly with that enunciated in *Pappajohn*. Lower courts have held that in the light of

<sup>120</sup> *Carter*, *supra* note 2 at para 47. For a further discussion on legislative and social facts see *R v Spence*, 2005 SCC 71 at paras 56-59, [2005] 3 SCR 458.

<sup>121</sup> *Carter*, *ibid*.

<sup>122</sup> Later endorsed in: *Henry*, *supra* note 31 at paras 45-46; *R v Chaulk*, [1990] 3 SCR 1303 at 1353; and *Canada v Craig*, 2012 SCC 43 at para 27, [2012] 2 SCR 489.

<sup>123</sup> [1988] 2 SCR 833 at 855 [*Bernard*].

<sup>124</sup> *Ibid*.

*Leary*, where intoxication is a factor in inducing a mistaken belief in consent, the jury must be instructed that while an honest but unreasonable belief will negate *mens rea* (*Pappajohn*) they are to disregard the affect that intoxication might have had in inducing that mistake (*Leary*).<sup>125</sup>

Linked to this idea is that if a subsequent SCC decision creates “doubt as to which procedure a party should follow,” then one of the decisions should be overruled to provide a clear and certain answer to what is the correct procedure.<sup>126</sup> Therefore, if developments in the case law undermine the logic behind the holding of a previous SCC decision or create confusion as to procedures, a trial judge may be able to revisit the previous SCC decision to provide clarity, certainty, and coherence in the law.

The Court’s application of the significant development in law exception in *SFL*, parallels the approach set out in *Bernard*. While the Court does not explicitly set out the correct way to apply the exception, its own application reveals how it should be approached. In *SFL*, the Court concludes that the “fundamental shift in the scope of s. 2(d)...entitled [the trial judge] to depart from precedent.”<sup>127</sup> The SCC points to the fact that “the majority’s reasons [and rationale] in the *Alberta Reference*...[had] been overtaken by *Dunmore*” to support this conclusion.<sup>128</sup> Therefore, it follows that a significant development in the law occurs when the “rationale” underlying the reasons of a previous decision have been “overtaken” by those found in subsequent jurisprudence. There is an obvious parallel to *Bernard* where the Court found that a case needs to be revisited if its holding had been seriously undermined by the holdings of later cases.

In further support of its conclusion, the Court in *SFL* found that the s. 2(d) jurisprudence fell into two broad periods. It characterized the first as a period marked by a “restrictive approach to freedom of association,”<sup>129</sup> whereas the second period featured a “generous and purposive approach to the guarantee.”<sup>130</sup> Therefore, the “significant developments in the law” exception could be triggered when there has been a “fundamental shift” in the approach to interpretation of the *Charter* provision in question.

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<sup>125</sup> *Ibid* at 856.

<sup>126</sup> *Ibid* at 858.

<sup>127</sup> *Supra* note 3 at para 32.

<sup>128</sup> *Ibid* at para 28.

<sup>129</sup> *Ibid* at para 30, citing *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 30, 380 DLR (4th) 1.

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

The Court's treatment of the principles of fundamental justice in *Bedford* is also captured by the significant development in the law exception. The Court states that:

[f]urthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case—arbitrariness, overbreadth, and gross disproportionality—have, to a large extent, developed only in the last 20 years.<sup>131</sup>

This statement not only provides an example of a significant development in the law, but also speaks to a debate occurring in some courts of appeal.

In *Bedford ONCA*, the Court felt that the change in the principles of fundamental justice from vagueness and the permissibility of indirect criminalization, to arbitrariness, overbreadth, and gross disproportionality, was significant enough to release the trial judge from the *Prostitution Reference*.<sup>132</sup> The majority in *Carter BCCA*, however, held that “regardless of whether s. 241(b) was analyzed under life, liberty or security of the person, *Rodriguez* decided that the law met the tests of arbitrariness...and what are now referred to as overbreadth and proportionality.”<sup>133</sup> The Ontario Court of Appeal felt that dealing with all new principles when compared to a previous decision was a significant change in the law. Yet the British Columbia Court of Appeal examined the issue in a different light, focusing, instead, on if the current tests for the principles of fundamental justice had in effect been performed during the course of the initial decision, albeit using different terminology.

In *Bedford*, the SCC affirmed the Ontario Court of Appeal's view that dealing with all new principles constitutes a significant change.<sup>134</sup> However, it remains to be seen exactly what else will constitute a significant change.<sup>135</sup> Does this determination revolve around when the principles were formally enunciated<sup>136</sup> or whether the substance of the analysis matches that of the current principles, even if performed using the language of older principles? Interestingly,

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<sup>131</sup> *Bedford*, *supra* note 1 at para 45.

<sup>132</sup> *Supra* note 6 at paras 68, 70.

<sup>133</sup> *Supra* note 11 at para 282.

<sup>134</sup> *Bedford*, *supra* note 1 at para 45.

<sup>135</sup> In *Carter*, the Court found that “material advance[s]” in the law relating to two of the three current principles of fundamental justice, i.e. the emergence of overbreadth and gross disproportionality, were fundamental changes to s 7 (*supra* note 2 at para 46).

<sup>136</sup> Which the ONCA and the SCC seem to treat as a determinative factor.

while the SCC only discusses cases where the given principles are specifically enunciated,<sup>137</sup> they also note that the current concepts “evolved organically as the courts were faced with novel *Charter* claims.”<sup>138</sup> Scholars who have studied s. 7 tend to treat the different principles as simply being “established” or “recognized” by the SCC in a particular decision, instead of being developed over time and labelled as such in those decisions.<sup>139</sup> It is not clear, given these different approaches, what will determine when a significant change occurs where principles of fundamental justice are at issue.<sup>140</sup>

Arguably the SCC was distinguishing a precedent rather than saying that there was “significant legal development” in the principles of fundamental justice jurisprudence. In context, it could be argued that the Court may be elaborating on their point that the holding of the *Prostitution Reference* did not bind the trial judge with regards to the s. 7 arguments.<sup>141</sup> The Court could have been implicitly finding the holding from that decision to be especially narrow: that the section deprived the applicants of their s. 7 right to liberty but it was done according to the principles of fundamental justice, specifically, vagueness and the permissibility of indirect criminalization. This interpretation does not seem appropriate because while the other terms are taken directly from the *Charter*, descriptions of the principles of fundamental justice are not actually found within s. 7, and their contents have proven especially fluid. Allowing for such specific holdings also gives rise to the question of whether any s. 7 decision that did not consider all three now enunciated principles in their current and specific form continues to be valid. Indeed, such an argument may call almost every s. 7 decision into question.<sup>142</sup> For

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<sup>137</sup> See *Bedford*, *supra* note 1 at paras 96-103.

<sup>138</sup> *Ibid* at para 97.

<sup>139</sup> See Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 133-39; Peter W Hogg, “The Brilliant Career of Section 7 of the *Charter*” (2012) 58 Sup Ct Law Rev (2d) 195 at 201-204.

<sup>140</sup> The question remains unanswered after *Carter*. The Court found that the principles must be applied as “currently understood,” but then found that while “over-inclusiveness” was acknowledged in *Rodriguez*, the Court “instead asked whether the prohibition was ‘arbitrary or unfair’” (*Carter*, *supra* note 2 at para 46). However, as described above, the BCCA found that the tests had been applied as currently understood, *supra* note 11, only without using the modern terminology. The SCC does not address this claim in *Carter*, and instead, I believe, mischaracterizes the holding of the BCCA: “The majority...acknowledg[es] that the reasons in *Rodriguez* did not follow the analytical methodology that now applies under s. 7...” (*Carter*, *supra* note 2 at para 35).

<sup>141</sup> *Bedford*, *supra* note 1 at para 45.

<sup>142</sup> However, based on the discussion of the principles of fundamental justice in *Bedford*, it appears that only s 7 cases that were decided on vagueness and permissibility of indirect criminalization are open for review.

these reasons, it is more appropriate to view changes to the principles as a significant development in the law.

While the *Bedford* decision did not provide direct guidance on what constitutes a significant development in the law, *Bernard* informatively holds that if the *ratio* or holding of an earlier decision is seriously undermined by subsequent decisions, the initial decision ought to be revisited. This approach appears to be the same approach used by the SCC in *SFL*. Further, a fundamentally different approach to the interpretation of a particular *Charter* provision is also treated as a significant change. In *Bedford* and *Carter* the Court seems to signal that the emergence of at least two new principles of fundamental justice since an earlier decision is a significant change. Citing these points, an argument could be made that if the contents of the right, or possibly the processes underlying its operation shift dramatically, a trial judge may again rule on that right despite SCC precedent. Especially if there is an essentially different test applied under the section, as is the case with the principles of fundamental justice, then the section may be revisited.

#### IV. CONCLUSION

Traditionally, while horizontal *stare decisis* did not seem to present an obstacle to revisiting *Charter* issues, the vertical *stare decisis* was a full bar: a trial judge was bound by the precedent of higher courts. There were no exceptions, and the only way to avoid being bound was to differentiate the case from the previous one. *Bedford* has changed the status quo. The Court outlined two exceptions to *stare decisis* where *Charter* issues could be revisited. The first is where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. The second, where there is a significant development in the law. If either of these situations applies, a trial judge can revisit what would otherwise be binding decisions by higher courts. Examining when courts have decided it was necessary to overrule a previous decision, specifically in *Leeson*, *Polowin*, *Burns*, and *Bernard*, is helpful in determining the scope of the exceptions. Shortly after *Bedford*, the SCC applied these exceptions in the landmark decisions in *SFL* and *Carter* to reverse its previous rulings. Its approach to the new exceptions essentially parallels those found in the earlier case law highlighted above.

Although the SCC has since applied the exceptions outlined in *Bedford*, its full impact will not be evident until they are applied by lower courts. On appeal, a court can easily rectify mistakes it made in the past. Nonetheless, the concept of vertical *stare decisis* still holds great importance. Indeed, there may be cases where a claimant does not have the resources to further appeal a case. Furthermore, *Charter* infringements may occur or continue in the time it takes for a claim

to reach the relevant court. Therefore, if a trial judge is bound by precedent in a *Charter* case, their decision can have the effect of perpetuating an infringement of *Charter* rights. Yet it is said that “[t]he *Charter* belongs to the people.”<sup>143</sup> Surely it is better to give the trial judge the ability to provide an analysis of *Charter* issues at least where there has been a change in the circumstances or law. Even a case at the trial level can bring to light an all but forgotten *Charter* infringement. In addition, orders for costs against the Crown may force governments to bear the cost of continued litigation, which in turn, provides the appellate court the chance to revisit legislation that may now be held to be unconstitutional. Through such an approach to the principle of *stare decisis*, Canada can give the fullest meaning to the *Charter* and to its commitments to protect human rights.

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<sup>143</sup> *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at 899.