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Stare Decisis and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?

Joseph J. Arvay, Q.C., Sheila M. Tucker and Alison M. Latimer*

I. INTRODUCTION

Thirty years ago, the enactment of the *Constitution Act, 1982*, Part I of which was the *Canadian Charter of Rights and Freedoms*,[1] was a transformative moment in Canada's development as a constitutional democracy. It guaranteed a set of civil rights and freedoms (which had hitherto not been constitutionally entrenched and which many viewed as ill-protected under the *Canadian Bill of Rights*[2]) and, by the addition of section 52 to the *Constitution Act*, gave expression to the principle of constitutional supremacy in providing that "any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect".[3]

In the early days of Charter jurisprudence, the Supreme Court of Canada made clear that the Charter represented a departure from the timorous approach to rights protection that prevailed under the *Canadian Bill of Rights*. So, for example, in *R. v. Big M Drug Mart Ltd.*, in the context of freedom of religion, the Supreme Court of Canada held that unlike the *Canadian Bill of Rights*, the Charter "does not simply 'recog-

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. See, *e.g.*, Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 1998), at c. 35.5 and 36.1.

3 *R. v. Conway*, [2010] S.C.J. No. 22, [2010] 1 S.C.R. 765, at para. 65 (S.C.C.) [hereinafter "*Conway*"].

nize and declare' existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative."[4] However, 30 years on, many legal observers have questioned the courts' success in giving full force to the imperatives of the Charter. Joel Bakan describes the conundrum as follows:

> The Charter's potentially radical and liberatory principles of equality, freedom, and democracy are administered by a fundamentally conservative institution — the legal system — and operate in social conditions that routinely undermine their realization.[5]

That said, there really cannot be any doubt that the Supreme Court of Canada (and indeed, the many lower courts throughout the country) has made any number of decisions under the Charter that have had very significant emancipatory impacts in Canada. The Court has matured into an authoritative institution of constitutional review; but once old enough to have a past, a body is defined, in part, by its relationship to that past.

We have been asked to provide a paper dealing with the broad topic of transformative Charter moments. Transformative means "a thorough or dramatic change".[6] This paper considers *stare decisis* — an inherently conservative doctrine that champions the goals of consistency, certainty and predictability in the law. Admittedly, *stare decisis* appears to operate in direct contradiction to the spirit of our assigned topic. Indeed, an examination of the role of *stare decisis* in Charter litigation reveals some transformative Charter moments *lost*. The core concern of this paper is to point out that very fact, and to consider some means for minimizing that effect.

Although we examine both the "horizontal" and the "vertical" conventions of *stare decisis*, we focus on the latter and thus the extent to which lower courts may depart from prior decisions of the Supreme Court of Canada addressing similar legal issues in the wake of a sea change in legislative and social facts.[7] Our purpose is to offer an approach to this doctrine that allows for the goals of *stare decisis* to be met while giving effect to the constitutionally entrenched principle of constitutional supremacy which, of necessity, must leave room for the

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[4] [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 115 (S.C.C.) [hereinafter "*Big M*"].

[5] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), at 3.

[6] *Oxford Concise English Dictionary*, 9th ed., 1996, at 1481.

[7] That *stare decisis* applies at all in Charter litigation is assumed for the purpose of this paper. However, we note that the more radical proposition that *stare decisis* has no application at all in light of the imperative of constitutional supremacy is worthy of some debate.

Charter's liberatory principles to be interpreted and applied in the face of changing social and other conditions. We will argue that this approach enhances sound judicial administration and the legitimacy and acceptability of the common law — other principles at the core of *stare decisis*.[8] It also ensures that there will continue to be transformative Charter moments as evolving contexts require.

The force of *stare decisis* in these circumstances was an issue of central importance in the recent Ontario Court of Appeal decision in *Bedford*.[9] We hope to persuade the reader that the Court of Appeal wrongly concluded that *stare decisis* applies to prevent lower courts from making a new decision under the Charter when faced with a fundamental change in the social and legislative facts underpinning the prior Supreme Court of Canada decision. As a result of this error, the Ontario Court of Appeal lost an important opportunity to participate in a transformative moment in Charter history. This issue is of great practical and immediate importance. It has already become an issue in determining whether the trial judge presently seized of a case challenging the absolute prohibition against physician-assisted dying (*Carter v. Canada (Attorney General)*[10] can differ from the decision of the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)*.[11] From a broader perspective, it is also an issue of enormous pragmatic significance for litigants

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[8] *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186, at para. 56 (Ont. C.A.) [hereinafter "*Bedford*"], citing *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, [2005] O.J. No. 2436, 76 O.R. (3d) 161, at paras. 119-120 (Ont. C.A.).

[9] At issue in *Bedford*, *id.*, was the constitutional validity of ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46. The Attorneys General of Canada and Ontario took the position that the Supreme Court of Canada's decision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Prostitution Reference*"], coupled with the principle of *stare decisis*, prevented the application judge from considering or reconsidering the constitutional validity of ss. 210 and 213(1)(c). The Ontario Court of Appeal concluded in *Bedford*, at para. 52, that "the application judge did not err in considering whether or not the bawdy house [s. 210] and communicating provisions [s. 213(1)(c)] violate s. 7 of the *Charter*" because both the legal issues raised and the legal framework to be applied were different than they were at the time of the *Prostitution Reference*. However, the Ontario Court of Appeal found that "the application judge erred in reconsidering whether or not the communicating provision [s. 213(1)(c)] is an unjustified infringement of s. 2(b) of the *Charter*. The Supreme Court definitively decided this issue in the *Prostitution Reference*, and only that court may revisit it."

[10] [2012] B.C.J. No. 886, 2012 BCSC 886 (B.C.S.C.) [hereinafter "*Carter*"]. The authors of this paper, along with Grace Pastine, act as counsel for the plaintiffs in *Carter*.

[11] [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) [hereinafter "*Rodriguez*"]. There are many reasons why *Rodriguez* is not an impediment to the trial judge seized of *Carter* reaching a different conclusion on the constitutional questions asked. These reasons include that different legal arguments have been advanced and that there have been changes in the law since the judgment in *Rodriguez* was rendered. However, a full discussion of these issues is beyond the scope of this paper.

deciding whether to undertake a Charter case at all in the face of an ostensibly binding Supreme Court of Canada decision.

II. THE ROLE OF *STARE DECISIS*

The Honorable Edward D. Re, Chief Judge, United States Customs Court, explained *stare decisis* as follows:

> The doctrine, from *stare decisis et non quieta movere*, "stand by the decision and do not disturb what is settled," is rooted in the common law policy that a principle of law deduced from a judicial decision will be considered and applied in the determination of a future similar case. In essence, this policy refers to the likelihood that a similar or like case arising in the future will be decided in the same way.[12]

The doctrine has a horizontal axis and a vertical axis, both of which will be described briefly below. In "Precedent Unbound?", Debra Parkes explains:

> As things have developed in Canada, the concept of "binding precedent" is limited to the vertical convention. Courts lower in the applicable hierarchy are bound to follow decisions of a higher court. The concept of *stare decisis* is used more broadly to apply to decisions of higher courts (the vertical convention) and to previous decisions of the same court, albeit often differently constituted (the horizontal convention). In the latter case decisions are not strictly binding, but should be followed unless there are compelling reasons to overrule them.[13]

Next we discuss how Canadian courts have treated these conventions.

1. Horizontal Convention of *Stare Decisis*

The horizontal convention of *stare decisis* refers to the extent to which a court will overrule one of its own earlier judgments.[14] This issue has arisen a number of times at the Supreme Court of Canada, most recently

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[12] Honorable Edward D. Re, Chief Judge, United States Customs Court, "*Stare Decisis*" (paper presented at a seminar for Federal Appellate Judges sponsored by the Federal Judicial Center, May 13-16, 1975), at 1-2.

[13] Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2006-2008) 32 Man. L.J. 135, at 137 [hereinafter "Precedent Unbound?"].

[14] "Precedent Unbound?", *id.*, at 146.

in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[15] and *Ontario (Attorney General) v. Fraser*.[16]

Health Services was itself a significant transformative "moment" in Supreme Court of Canada history, in that the Court reversed a trilogy of decisions holding that section 2(d) of the Charter (freedom of association) did not extend to collective bargaining.[17] In *Health Services*, the Court overruled the 20-year-old labour trilogy, concluding that the reasons given therein for not extending the protection simply could not withstand "principled scrutiny"[18] and that a failure to protect collective bargaining was inconsistent with both Canada's "historic recognition of the importance of collective bargaining to freedom of association" and international law.[19] In light of these considerations, the Court held that, on a correct interpretation, section 2(d) of the Charter did protect the right to bargain collectively.

Four short years later, in *Fraser*,[20] Rothstein J. (dissenting on this point though concurring in the result), would have overturned *Health Services* and reverted to the law established in the labour trilogy — that is, that section 2(d) of the Charter does not protect collective bargaining. Justice Rothstein affirmed the right of the Supreme Court of Canada to reverse itself and noted that "the courts have set down, and academics have suggested, a plethora of criteria for courts to consider in deciding between upholding precedent and correcting error".[21] Justice Rothstein considered this "non-exhaustive" list of criteria and concluded that:

> Fundamentally, the question in every case involves a balancing: Do the reasons in favour of following a precedent — such as certainty, consistency, predictability and institutional legitimacy — outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld and perpetuated?[22]

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15 [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"].

16 [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Fraser*"].

17 That trilogy of cases included: *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); and *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.) [hereinafter collectively "the labour trilogy"].

18 *Health Services*, *supra*, note 15, at para. 22.

19 *Health Services*, *id.*, at para. 20.

20 *Supra*, note 16.

21 *Id.*, at para. 133.

22 *Id.*, at para. 139; see also paras. 133-138.

A consideration of this fundamental question led Rothstein J. to conclude that the Court should overrule *Health Services*. His reasons were that *Health Services* addressed an issue of constitutional law and was thus "not susceptible to being corrected in a lasting way by the legislative branch";[23] *Health Services* "strayed significantly from earlier sound precedents with respect to the purpose of Charter protection for freedom of association;"[24] the constitutionalization of collective bargaining was, in his view, "unworkable";[25] there had been "intense academic criticism" of *Health Services*;[26] and, finally, *Health Services* was wrongly decided.[27] The plurality responded to Rothstein J.'s judgment at length.[28]

The contrast in the approaches is best reflected in these two passages. The first is from the judgment of Rothstein J.:

> First, the error in *Health Services* concerns a question of constitutional law. Thus, not only does it go to one of the foundational principles of our legal system, but it is not susceptible to being corrected in a lasting way by the legislative branch. While s. 33 of the *Charter* may allow Parliament or the legislatures to suspend, temporarily, the force of this Court's ruling, history over the last two decades demonstrates that resort to s. 33 by legislatures has been exceedingly rare. *Health Services* will, if left to stand, set out abiding principles of constitutional law. Only the Court may correct this error in fundamental principle. As noted in *Planned Parenthood*, it is "common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case" (p. 854). The jurisprudence of this Court contains similar observations. Because the *Charter* involves the most fundamental principles underlying our law, it is particularly important that its provisions be correctly interpreted.
>
> [McLachlin C.J.C.] and LeBel J. say that the constitutional nature of *Health Services* should only be a final consideration with respect to overruling difficult cases (para. 58). In my respectful view, and as my reasons will endeavour to demonstrate, there are no shortage of reasons to believe that *Health Services* is problematic on other grounds.

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[23] *Id.*, at para. 141.
[24] *Id.*, at paras. 144, 152-171.
[25] *Id.*, at paras. 145, 256-269.
[26] *Id.*, at para. 146.
[27] *Id.*, at paras. 151-296.
[28] *Id.*, at paras. 52-96.

> Relying on *Henry*, my colleagues also warn that this Court should be wary of overruling *Health Services* because doing so might have the potential to diminish *Charter* protection (para. 58, citing *Henry*, at para. 44). They say that this consideration "militate[s] in favour of upholding" *Health Services* (para. 58). However, the Court cannot be oblivious to errors in prior decisions. When considering overruling, the Court must balance correctness and certainty. If there is a potential diminishment arising from correcting prior error, that is a reason to be cautious, not a reason to forego correcting prior error altogether. Arguably, as *Health Services* itself strayed from prior precedent, returning to those prior precedents would promote certainty. However, even if certainty would favour retaining *Health Services*, in this case the need for a constitutionally correct answer is paramount.[29]

The response of the plurality decision written by the Chief Justice and LeBel J. is as follows:

> Our colleague correctly recognizes at the outset of his reasons that overturning a precedent of this Court is a step not to be lightly undertaken. We would note that as we understand the law (see above), rejection of *Health Services* implies rejection of *Dunmore* as well, since the two cases rest on the same fundamental logic.
>
> The seriousness of overturning two recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage. *Health Services* was issued only four years ago, and, when this appeal was argued, only two years had passed.
>
> Rothstein J. suggests that since *Health Services* deals with constitutional law, the Court should be more willing to overturn it (paras. 141-43). In our respectful view, this argument is not persuasive. The constitutional nature of a decision is not a primary consideration when deciding whether or not to overrule, but at best a final consideration in difficult cases. Indeed, the fact that *Health Services* relates to a constitutional *Charter* right may militate in favour of upholding this past decision. As Binnie J. stated on behalf of a unanimous Court in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, "[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection" (para. 44). Justice

[29] *Id.*, at paras. 141-143.

> Rothstein's proposed interpretation of s. 2(*d*) of the *Charter* would diminish the scope of the s. 2(*d*) right.[30]

There are some interesting lessons to be learned from this "dialogue" between the two factions of the Court in *Fraser*. (These points are relevant here, and will also bear on our discussion under the topic of vertical *stare decisis*.)

The first is Rothstein J.'s very, and arguably ironic, "activist" stance insofar as he was so ready to overturn a decision of the Court on which the ink had barely dried. It seemed to be his view that the balance always favours "correctness" over "certainty". He seemed to share the view, expressed most pithily by Lord Atkin in 1933, that: "Finality is a good thing but justice is a better."[31] We agree with that. However, the *Health Services* decision was, itself, made on the same basis. That is, the majority in *Health Services* overturned the labour trilogy because it considered the labour trilogy incorrect for various reasons. So this dialogue does not reflect a difference in opinion as to the paramount importance of being correct in constitutional matters, but rather a difference in opinion as to which interpretation of section 2(d) was "the" correct one.

Second, it is important to read what the plurality said about *stare decisis* in *Fraser* keeping three points in mind: first, the plurality is speaking about the implications of overturning two very recent majority decisions of the Court; second, it is speaking as a court that need only ever concern itself with horizontal *stare decisis*; and, third, it is speaking as the very court that just overturned the labour trilogy on the basis that it was simply incorrect. Thus, when the plurality speaks about the seriousness of overturning precedent, it is speaking about the particular folly of revisiting the issue *every two years*. That is an observation about there being a threshold need for a modicum of functional stability within the judicial system for it to operate at all. When the plurality goes on to state that the fact that the issue is a constitutional one does not make revisitation in the circumstances any more appropriate, it must be kept in mind that it is saying that even a desire for correctness in constitutional matters might not justify a pace of revisitation that threatens the system itself. Further, the plurality is speaking as a court of ultimate authority — as a court that has an absolute right to overrule itself if and when it has a genuine realization of error. To such a court, the additional fact that any

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30 *Id.*, at paras. 56-58.

31 *Ras Behari Lal v. King Emperor*, [1933] All E.R. Rep. 723, at 726 (P.C.).

given case is constitutional might indeed be largely irrelevant, given that it has the right to depart from its own decisions at will in any event to correct errors. Taking the facts and context into consideration, nothing the plurality says in *Fraser* detracts from the fundamental point established in *Health Services*: *i.e.*, 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.

It is acknowledged that the plurality also said that "the fact that *Health Services* relates to a constitutional *Charter* right may militate in favour of upholding this past decision".[32] However, that statement must not be taken out of its specific context — that is, that revisiting *Health Services* and reverting to the labour trilogy would *diminish* constitutional rights currently protected under the *Health Services* decision. The plurality was not expressing a view that the Court should, in general, hesitate to revisit Charter decisions. To take a broader interpretation of what the plurality said in *Fraser*, and to assert that they held that the constitutional nature of the decision is a reason for following precedent in general, would fail to account for the Court's fundamentally motivating concern in *Health Services*, where the primary reason for reversing the labour trilogy was not merely the fact that these decisions were wrong, but that they were wrong in a manner contrary to the rights and freedoms protected by the Charter. Likewise Dickson C.J.C. in *R. v. Bernard*, while acknowledging the importance of *stare decisis*, nonetheless held that the Charter was one of four factors that would allow the Court to depart from a previous decision: "The special mandate of the *Charter* has been found by the Court to require reconsideration of its own past decisions, and, where necessary, to overrule those decisions which fail to reflect *Charter* values."[33]

As noted, the factions in *Fraser* disagreed on the "correct" interpretation of the Charter. However, what we wish to emphasize is that both sides were, in fact, agreed that absent a set of circumstances that would undermine the legitimacy and workability of the judicial process (a threshold that in our submission must be an incredibly hard one to crest), precedent should not be an obstacle to ensuring constitutional behaviour by government.

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[32] *Fraser*, *supra*, note 16, at para. 58.

[33] [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833, at para. 34 (S.C.C.).

However, the real concern of this paper lies with how the doctrine of *stare decisis* should apply in its vertical convention in the Charter context, with particular regard to giving due consideration to section 52 of the Charter, and it is to that topic that we now turn our attention.

2. Vertical Convention of *Stare Decisis*

The vertical convention of *stare decisis* holds that lower courts are bound by the decisions of higher courts in their hierarchy. Thus the superior court of a given province is bound by the decisions of the courts of appeal of that province, and both are bound by decisions of the Supreme Court of Canada and "pre-1949 decisions of the Judicial Committee of the Privy Council (J.C.P.C.) that have not been subsequently overruled by the Supreme Court of Canada".[34]

The vertical convention of *stare decisis* took on central importance in *Bedford*.[35] That case concerned the constitutional validity of three provisions of the *Criminal Code*:[36] section 210, which prohibits the operation of common bawdy houses, section 212(1)(j), which prohibits living on the avails of prostitution, and section 213(1)(c), which prohibits communicating in public for the purpose of prostitution. These provisions were challenged on the basis of section 7 of the Charter. The communication provision was also challenged on the basis of section 2(b) of the Charter.

Twenty years ago, in the *Prostitution Reference*,[37] the Supreme Court of Canada found that the communication provision constituted a violation of the section 2(b) protection for freedom of expression, and further found that violation to be justified under section 1 of the Charter. Both the communication provision and the bawdy house provision were found to infringe the section 7 right to liberty, and both infringements were held to be in accordance with the principles of fundamental justice. Canada argued that the plaintiffs in *Bedford ONSC*[38] were precluded from challenging the bawdy house and communication provisions by the *Prostitution Reference* and the doctrine of *stare decisis*. At the hearing before the Ontario Superior Court of Justice, Himel J. did not consider

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34 "Precedent Unbound?", *supra*, note 13, at 138.

35 *Supra*, note 8.

36 *Criminal Code*, R.S.C. 1985, c. C-46.

37 *Prostitution Reference*, *supra*, note 9.

38 *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057, 327 D.L.R. (4th) 52 (Ont. S.C.J.) [hereinafter "*Bedford ONSC*"].

herself bound by the Supreme Court of Canada's decision in the *Prostitution Reference* with respect to either section 7 or section 2(b). She held:

> The *Prostitution Reference* is *prima facie* binding on this court.
>
> ...
>
> However, Justice Laskin suggested a flexible approach to the application of the principle of *stare decisis*, as a rigid adherence might lead to "injustices in individual cases, continued application of legal principles long since outdated as society has changed, and uncertainty bred by judges who draw overly fine distinctions to avoid *stare decisis*."
>
> ...
>
> I am persuaded that I am not foreclosed from hearing the challenge based on s. 7 of the *Charter* as the issues argued in this case are different than those argued in the *Prostitution Reference*. Although "the principles of fundamental justice are to be found in the basic tenets of our legal system" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J. at p. 503), the principles at issue in this case were not clearly articulated as such when the reference was heard. The jurisprudence on s. 7 of the *Charter* has evolved considerably in the last two decades.
>
> I am also persuaded that I may reconsider whether s. 213(1)(*c*) of the *Criminal Code* is in violation of s. 2(*b*) of the *Charter*.[39]

The reasons she gave for this latter point were that there was a need to reconsider constitutional interpretation because the Constitution is a "living tree" and the constitutional amendment process was difficult;[40] she noted that the Supreme Court of Canada had the authority to revisit its previous decisions;[41] relying on the Ontario Superior Court of Justice decision in *Wakeford v. Canada (Attorney General)*,[42] she considered whether there was an indication that the Supreme Court of Canada's decision was open to reconsideration either because of a shift in the jurisprudence or developments in public policy or new facts.[43] She concluded:

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39 *Bedford ONSC*, *id.*, at paras. 66, 68, 75-76.
40 *Bedford ONSC*, *id.*, at para. 77.
41 *Id.*, at para. 78.
42 [2001] O.J. No. 390, 81 C.R.R. (2d) 342 (Ont. C.A.).
43 *Bedford ONSC*, *supra*, note 38, at paras. 79-80.

> In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today. Indeed, several western democracies have made legal reforms decriminalizing prostitution to varying degrees. As well, the type of expression at issue in this case is different from that considered in the *Prostitution Reference*. Here, the expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me. As will become evident following a review of the evidence filed by the parties, there is a substantial amount of research that was not before the Supreme Court in 1990.[44]

The Court of Appeal unanimously agreed that Himel J. was not foreclosed from considering the section 7 issues;[45] however, they held that she erred with respect to whether or not she was bound on the freedom of expression issue. The Court explained that while *stare decisis* was traditionally only applied to the *ratio decidendi* of a decision, the scope of the doctrine had been expanded to encompass some *obiter dicta*:

> However, the traditional division between *ratio* and *obiter* has become more nuanced. It is now recognized that there is a spectrum of authoritativeness on which the statements of an appellate court may be placed. Justice Binnie, writing for a unanimous Supreme Court, stated in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57:
>
> > The issue in each case, to return to the Halsbury question, is *what did the case decide*? Beyond the *ratio decidendi* which... is generally rooted in the facts, the legal point decided by this

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[44] *Id.*, at paras. 66-68, 75-83.

[45] The Court of Appeal was careful to note that the *Prostitution Reference*, *supra*, note 9 considered a physical (as opposed to economic) liberty interest and that there was no binding decision with respect to security of the person. In *Bedford*, the parties agreed that the liberty interest was engaged and the respondents argued that their security of the person interest was engaged. Further, in the *Prostitution Reference* the only principle of fundamental justice considered was vagueness and the perceived inconsistency in Parliament's response to prostitution. In *Bedford* the respondents relied on the principles of arbitrariness, overbreadth and gross disproportionality. In light of all this, the Court concluded: "It cannot be said that the *Prostitution Reference* decided the substantive s. 7 issues before the application judge in this case. Therefore, *stare decisis* did not apply, and the application judge did not err by conducting her own analysis and coming to her own conclusion.": *Bedford*, *supra*, note 8, at paras. 65-70.

> Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. [Emphasis added.]

Justice Doherty, writing for a unanimous five-judge panel of this court, discussed *Henry* in the recent decision of *R. v. Prokofiew*, 2010 ONCA 423, (2010), 100 O.R. (3d) 401, leave to appeal to S.C.C. granted, [2010] S.C.C.A. No. 298, heard and reserved November 8, 2011, at para. 19:

> The question then becomes the following: how does one distinguish between binding *obiter* in a Supreme Court of Canada judgment and non-binding *obiter*? In *Henry*, at para. 53, Binnie J. explains that one must ask, *"What does the case actually decide?*" Some cases decide only a narrow point in a specific factual context. Other cases — including the vast majority of Supreme Court of Canada decisions — decide broader legal propositions and, in the course of doing so, *set out legal analyses that have application beyond the facts of the particular case*. [Emphasis added.]

These authorities delineate the boundary between binding and non-binding statements of the Supreme Court, and they do so based on an inquiry into the Court's substantive reasoning process. Applying *Henry* and *Prokofiew*, the question becomes: what did the *Prostitution Reference* decide?[46]

With respect to the trial judge's decision, the Court held:

> First, the application judge misconceived the principle of *stare decisis* when she described the *Prostitution Reference* as only "*prima facie* binding on this court." With respect, it was much more than that. The Supreme Court's decision that s. 213(1)(c) of the *Criminal Code* is a justified limit on freedom of expression was fully binding on the application judge, as there was no suggestion that it had been expressly or by implication overruled by a subsequent decision of the Supreme Court. In short, it is for the Supreme Court, and only that court, to overrule one of its own decisions.[47]

The Court of Appeal held that Himel J. also erred in equating her position, "when asked to reconsider a binding decision of the Supreme Court, with the position of a court that is asked to reconsider one of its

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[46] *Bedford*, *id.*, at paras. 58-60. See also the discussion in "Precedent Unbound?", *supra*, note 13, at 138-41.

[47] *Bedford*, *id.*, at para. 75.

own prior decisions",[48] and "by holding that the binding authority of the *Prostitution Reference* could be displaced by recasting the nature of the expression at issue as promoting safety, and not merely commercial expression".[49] The Court of Appeal specifically held that it was an error for Himel J. to conclude that a change in evidence and legislative facts was sufficient to trigger a reconsideration of a section 1 analysis by a lower court.[50]

It is never an easy or comfortable position to take to say that a five-member division of the Ontario Court of Appeal was wrong, especially one comprised of individual jurists of the calibre of Doherty, Rosenberg, MacPherson, Cronk and Feldman JJ.A. Nevertheless, with the greatest respect, we are of the view that the Court did err in overturning Himel J. and in so erring it missed an opportunity to participate in a transformative moment in Charter litigation. The error stemmed from assuming the common law approach to *stare decisis* can be transported directly and without alteration into the Charter context. In other words, the error consisted of the failure to consider whether the traditional approach to *stare decisis* is unduly broad in the Charter context, given the nature of Charter litigation and the imperative of constitutional supremacy.

In our opinion, 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.[51] To fail to distinguish a prior Charter decision where such distinguishing is warranted amounts to a refusal by a trial court to subject a law to Charter scrutiny. Further, the trial court's constitutional duty coincides with an institutional logic which also augurs in favour of decision-makers of first instance conducting the initial Charter analysis.[52]

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[48] *Id.*, at para. 81.

[49] *Id.*, at para. 82.

[50] *Id.*, at para. 83. It must be noted that the Supreme Court of Canada can *itself* reconsider Charter issues in light of changed circumstances: see for example, in the context of s. 7, *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 144 (S.C.C.). However, the Ontario Court of Appeal held that notwithstanding that the Supreme Court of Canada had this power, the application judge erroneously equated her role, as a court of first instance, with that of the Supreme Court of Canada (at paras. 75-80).

[51] Section 52(1) provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[52] See, for example, *Conway*, *supra*, note 3; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] S.C.J. No. 124, [1990] 3 S.C.R. 570 (S.C.C.); *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] S.C.J. No. 42, [1991] 2 S.C.R. 5 (S.C.C.); *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22 (S.C.C.); see also *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation*

We turn to a consideration of how these principles may be reconciled with the doctrine of *stare decisis*.

III. RECONCILING *STARE DECISIS* WITH CONSTITUTIONAL SUPREMACY

At first blush, a stark tension may appear between the emphasis placed by the common law doctrine of *stare decisis* on consistency, certainty and predictability in the law, and the assertion that adjudicators of first instance may be under a constitutional imperative to apply the highest law (the Constitution) to the specific set of legislative and social facts before them. This was the tension at the heart of the *Bedford* case and it is the same tension now in play in the *Carter* case.

Having regard to this constitutional imperative may not necessitate abandonment of *stare decisis* in Charter matters, although one might be tempted to go that far. Indeed it strikes us as being very plausible to argue that in Charter cases *stare decisis* should be more akin to the horizontal variety than the vertical such that prior decisions "are not strictly binding, but should be followed unless there are compelling reasons to overrule them".[53] At a minimum, however, the application of *stare decisis* in the Charter context must be tempered, both because it is a common law doctrine and thus should be subordinate to the dictates of the Constitution, and because constitutional cases are, in some respects, materially different from non-constitutional cases.

That the common law needs to be adapted — or perhaps "side-stepped" — to meet the demands of the Constitution is far from a novel proposition. A relatively recent example of the Supreme Court of Canada rejecting a common law rule in favour of the principle of constitutionality is *Kingstreet Investments Ltd. v. New Brunswick (Finance)*.[54] At issue in *Kingstreet* was the appropriate remedy in circumstances where the government attempts to retain unconstitutionally collected taxes. The

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Board) v. Laseur, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.); *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585 (S.C.C.); *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] S.C.J. No. 35, [2004] 2 S.C.R. 223 (S.C.C.); *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, [2005] S.C.J. No. 16, [2005] 1 S.C.R. 257 (S.C.C.).

[53] "Precedent Unbound?", *supra*, note 13, at 137.

[54] [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Kingstreet*"].

Court held that: "The Court's central concern must be to guarantee respect for constitutional principles."[55] The Court also held:

> When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle. As a result, a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution: P. Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in P. D. Finn, ed., *Essays on Restitution* (1990), c. 6, at p. 168.[56]

The Court held that the government must repay unconstitutionally collected taxes. In doing so, it rejected the *obiter* statements of La Forest J. on behalf of three members of the Court in *Air Canada v. British Columbia*[57] who proposed an immunity rule for such situations. As well, the Court declined to base the remedy on the doctrine of unjust enrichment. The Court explained that although unjust enrichment claims may be appropriate against the government in some cases:

> ... The taxpayers in this case [have] recourse to a remedy as a matter of constitutional right. This remedy is in fact the only appropriate remedy because it raises important constitutional principles which would be ignored by treating the claim under another category of restitution....[58]

Thus, the Court accepted that neither the common law nor equitable doctrines should operate to shield unconstitutional government action from review.[59]

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[55] *Id.*, at para. 14.

[56] *Id.*, at para. 15.

[57] [1989] S.C.J. No. 44, [1989] 1 S.C.R. 1161 (S.C.C.) [hereinafter "*Air Canada*"].

[58] *Kingstreet*, *supra*, note 54, at para. 34.

[59] The common law of standing is but another example of a doctrine which had to be adapted to meet the demands of the Constitution: *Thorson v. Canada (Attorney General)*, [1975] S.C.J. No. 45, [1975] 1 S.C.R. 138 (S.C.C.). Of course, the same-sex marriage litigation is an even more recent and outstanding example of the common law having to be amended to comply with the Charter: see, *e.g.*, *EGALE Canada Inc. v. Canada (Attorney General)* (*sub nom. Barbeau v. British Columbia (Attorney General)*), [2003] B.C.J. No. 994, 225 D.L.R. (4th) 472 (B.C.C.A.); *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 225 D.L.R. (4th) 529 (Ont. C.A.); *Hendricks v. Québec (Procureur général)*, [2002] J.Q. No. 3816, [2002] R.J.Q. 2506 (Que. S.C.), vard [2004] J.Q. no 2593, [2004] R.J.Q. 851 (Que. C.A.); *Dunbar v. Yukon*, [2004] Y.J. No. 61, 122 C.R.R. (2d) 149 (Y.T.S.C.); *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (Man. Q.B.); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (N.S.S.C.); and *W. (N.) v. Canada (Attorney General)*, [2004] S.J. No. 669, 246 D.L.R. (4th) 345 (Sask. Q.B.). In part as a result of these prior decisions, the Supreme Court of Canada exercised its discretion not to answer the question of whether the opposite-sex requirement for marriage for civil purposes as established by the common law and set out for Quebec in s. 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, S.C.

We say that respect for constitutional principles must be the governing consideration when the issue is whether or to what extent lower courts are bound by the decisions of higher courts.

Yet we do not rest on that point alone. As noted above, the point at which constitutional cases most differ from non-constitutional cases is in the Charter context and, within that context, in the section 1 justification analysis. This is reflected in the fact that the Court articulated the "contextual approach"[60] to the Charter and in its later description of context as "the indispensable handmaiden" to a proper application of section 1.[61] It is in Charter cases, and especially under section 1, that judicial reasoning is deeply intertwined with the social and legislative facts "that establish the purpose and background of legislation, including its social, economic and cultural context".[62] The Supreme Court of Canada's repeated warnings about the importance of determining Charter cases in a full factual matrix recognize that these facts are a driving consideration in Charter decisions. The central importance of legislative and social facts in section 1 Charter decisions is, in turn, the reason why a prior section 1 analysis is only binding to the extent that a fundamentally similar factual matrix continues to exist.[63]

It is a trial court's duty to apply the Charter; in order to fulfil that duty, a trial court must ensure that it does not foreclose itself, by overbroad application of precedent, from considering as cases of first instance matters that should be adjudicated under the Charter on their own, contemporary, social and legislative facts. That is, the duty to apply the Charter as the highest law of the land gives rise to a correlative *duty to distinguish* precedents that are, in reality, based on a social or legislative factual matrix that no longer exists. In short, a Charter analysis regarding section 1 inherently has potential for obsolescence, and a trial court must be particularly alive to that possibility.

2001, c. 4, was consistent with the Charter: *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, at paras. 61-72 (S.C.C.).

[60] *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at paras. 43-52 (S.C.C.).

[61] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 87 (S.C.C.).

[62] *Danson v. Ontario (Attorney General)*, [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086, at para. 27 (S.C.C.).

[63] See, *e.g.*, *MacKay v. Manitoba*, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357, at paras. 9-11 (S.C.C.); *British Columbia (Attorney General) v. Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873, at para. 28 (S.C.C.); *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222, at paras. 193-194 (S.C.C.); *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at paras. 17-19, 47 (S.C.C.).

In circumstances where an infringement of a Charter right has been previously found and justified under section 1, and a trial court is satisfied that the relevant legislative and social facts underpinning the case before it are materially and significantly different from those that were relied upon by an earlier but higher court to justify the law, the trial court has a constitutional obligation to determine whether the law is still constitutionally valid. In making this determination, the trial court is not overruling decisions of the Supreme Court of Canada; rather, it is determining an issue never before decided, and is therefore not bound by *stare decisis* especially as we believe it ought to be applied in constitutional cases (assuming it applies at all). This is not a radical departure from the doctrine of *stare decisis*, but rather an application of the doctrine that takes into account the special role that legislative and social facts play in Charter cases. *Stare decisis* in its traditional form recognizes that the process of judicial reasoning can be fundamentally different because of different jurisprudential developments.[64] Given the fact that judicial reasoning in a Charter section 1 analysis is "rooted in the facts",[65] how can it not be the case that the process of judicial reasoning in this context is fundamentally different when there are fundamentally different legislative and social facts?

The Ontario Court of Appeal appears to flatly disagree. However, we respectfully take the position that the Court of Appeal effectively turned constitutional supremacy on its head in *Bedford* when it held that "the need for a robust application of *stare decisis* is particularly important in the context of Charter litigation".[66] With respect, this would allow the "tail" of *stare decisis* to "wag the dog" of section 52.

We fully agree with the approach taken by the trial judge in *Bedford ONSC*. A trial judge should regard a prior higher court decision on the same Charter point as *prima facie* binding. However, if there is sufficient factual difference pleaded to merit proceeding to an evidentiary hearing, a trial should be permitted. If, following that trial, the trial judge is persuaded that there has been a significant and material change in facts, the trial judge should make a finding to that effect. Where the trial judge makes such a finding, we argue that the trial judge is then constitutionally *obliged* to carry out a full Charter analysis based on the record before him or her and to make all of the requisite findings of fact, mixed

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64 *Bedford*, *supra*, note 8, at para. 57.
65 *Id.*, at para. 58.
66 *Id.*, at para. 83.

fact and law, and law that he or she would make in the normal course. An appellate court will then be in a position to carry out appellate review, including review of whether the trial judge correctly concluded that there had been a significant and material change in the facts. If the trial judge's finding in the latter respect was wrong, the decision of the appeal court may be that the trial judge ought to have held the matter foreclosed by *stare decisis*. However, if the trial judge's finding in the latter respect was correct, the appeal court will be situated to carry out an appeal in the normal course.

In *Bedford*, the Ontario Court of Appeal appears to contemplate that the trial judge should agree to hold the hearing, but simply perform the role of finder of fact, setting out bare evidentiary conclusions and then pushing the matter up towards the Supreme Court of Canada.[67] As already discussed, it is our position that a trial court that takes this approach fails in its duty to determine whether the purported precedent is, in actuality, an authoritative precedent in the Charter context. Further, such a trial court also risks failing in its duty under section 52 of the Constitution.

We add to this a further institutional concern, which is that we do not believe it is realistic to expect a trial court, which would be limited on the approach articulated by the Court of Appeal in *Bedford* to making only findings of fact, to make sufficient findings to ever truly enable an appellate court to carry out a section 1 analysis as if it stood in the shoes of the trial court. The findings and analysis that go into determining whether laws are rationally connected, minimally impairing or disproportionate — questions of mixed law and fact — are the unique province of the adjudicator of first instance — the person most intimately familiar with the entirety of the evidence and the person who has had the benefit of full argument from the parties regarding that evidence and its import. Taking *Bedford* and *Carter* as examples, these cases involved vast evidence, lay and expert, regarding the operation and impact of the law on individuals, institutions and society, as well as the alternatives in place in other jurisdictions. In our opinion, the trial judge is far and away the person best situated to, for example, find and weigh the salutary and deleterious effects of the legislation. This is the very point that the Supreme Court of Canada has been making for years in asserting that there must be a proper record and findings at the trial level in order for a Charter matter to proceed. The approach endorsed by the Ontario Court

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[67] *Id.*, at para. 76.

of Appeal in *Bedford* puts the appellate courts at an extreme disadvantage by depriving them of findings at first instance.

The Ontario Court of Appeal did not address the concerns raised above in its decision in *Bedford*. Instead, its reasoning focuses on what are mainly floodgates concerns. With respect, under scrutiny, none of those floodgates concerns is particularly valid, let alone compelling. The Court held:

> In our view ... Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger a reconsideration in the lower courts.
>
> If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally. It would be particularly problematic in the criminal law, where citizens and law enforcement have the right to expect that they may plan their conduct in accordance with the law as laid down by the Supreme Court. Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.[68]

We agree that a lower court should not be entitled to ignore "authoritative holdings from the Supreme Court on the very points in issue", but that raises the question of when and in what circumstances a Supreme Court decision can be regarded as authoritative. It is our position that where a trial court is satisfied that the factual matrix before it is significantly and materially different than that underlying a prior section 1 analysis, it should not regard the prior decision as authoritative. If the facts are materially different, it makes no juridical sense to bar the trial court from proceeding to a decision based on the new facts.

We also agree that a lower court cannot refuse to follow a Supreme Court precedent "every time a litigant came upon new evidence or a fresh perspective from which to view the problem". We are not proposing such an approach. We are talking here of cases in which a plaintiff has succeeded in persuading a court that an evidentiary trial is worthwhile and then, in the context of that trial, has succeeded in putting evidence

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[68] *Id.*, at paras. 83-84.

before the court that is not merely "fresh", but rather that demonstrably establishes that the prior factual matrix has materially changed. We are not contemplating cases where a subsequent litigant has merely discovered evidence that a previous litigant was not aware of or failed to adduce. The evidentiary hurdle we are positing is not a slight one, and there is no reason to suspect that many cases would successfully clear it.

We appreciate that constitutional litigation should not "yield a garden of annuals to be regularly uprooted and replaced", but submit that that is not an appropriate metaphor given the evidentiary process and threshold described above. We would say that the Ontario Court of Appeal, in its effort to avoid gardening annuals, is preventing trial courts from discharging their duty to prune and tend the living tree that is the Constitution.[69] Trial courts should not be expected to ignore dead branches. Further, citizens invoking their fundamental rights should not be asked to stand by patiently while trial courts wilfully do so. It must not be forgotten that constitutional law affects people — the people of Canada, not merely the parties to the litigation — in a fundamental manner. There can be no better illustration than the *Carter* case: the Charter can touch upon matters of life and death. The practical reality is that in many, if not all, Charter cases "[t]he denial of early access to remedies is a denial of an appropriate and just remedy."[70] Thus a litigant who must wait until his or her case winds its way through the various levels of court and up to the Supreme Court of Canada may well be deprived of any meaningful vindication of his or her rights.

So while we understand the Ontario Court of Appeal's concern, noted above, that it may be "particularly problematic in the criminal law, where *citizens* ... have the right to expect that they may plan their conduct in accordance with the law as laid down by the Supreme Court"[71] for a lower court to find conduct long held to be lawful to suddenly be criminal, it does not seem problematic at all for a court to conclude that laws long thought to be constitutional (and conduct contrary to those laws to be criminal) to be unconstitutional (and thus the conduct perfectly lawful). As for changing the expectation of those

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[69] Yet another analogy is that suggested by Smith J. in *Carter*, *supra*, note 10, where she suggested to counsel that this argument was akin to saying that Charter decisions were like perennials — that is, they last for a few seasons but have a stale date. We decline to adopt the analogy because it suggests that factual obsolescence is inevitable, when, notwithstanding that it is always a possibility, it may be relatively rare in occurrence. (Also, the Constitution is obviously, in a metaphorical sense, a tree.)

[70] *Conway*, *supra*, note 3, at para. 79.

[71] *Bedford*, *supra*, note 8, at para. 84 (emphasis added).

involved in *law enforcement*, that, with respect, does not seem to warrant the same consideration. The Charter was not designed to protect government rights.

Finally, the Ontario Court of Appeal in *Bedford* expressed concern that allowing a trial court to depart from a higher court's decision simply because of a change in legislative and social facts could "undermine the legitimacy of *Charter* decisions and the rule of law generally".[72] We fail to see how that would be the result. We note that section 33 of the Charter obliges a government that invokes the override provision to justify an infringement to revisit the matter every five years. In the face of that entrenched understanding of obsolescence, it is difficult to see how or why the citizen or government should regard a section 1 revisitation triggered by a finding of significant and material change in facts as a threat to the rule of law. Further, contrary to the Court of Appeal's suggestion, revisitation in such circumstances does not throw the *status quo* into disorder any more than would be the case under a Charter challenge of first instance.

Thus from a doctrinal, institutional and remedial perspective, it makes sense that trial courts faced with constitutional issues, even constitutional issues that have arisen before but on substantially different facts, should and must determine the constitutional questions at stake in the case on the facts before them. This is especially the case when section 1 of the Charter is the pivotal provision in play and the changed facts in question are legislative and social. Appellate courts can weigh in in the usual course. This is the only approach that can reconcile section 52 with the doctrine of *stare decisis*.

IV. CONCLUSION

We return to the question of why the writers considered this topic appropriate for inclusion in a series addressing "transformative" moments in Charter litigation. As indicated in the introduction, the Supreme Court of Canada has built up three decades of Charter jurisprudence. However, the Charter is not the only thing that is 30 years older. Canadian society has itself changed substantially, in many respects dramatically, in that same time frame. The question that we have sought to address is the proper role of the trial courts in 2012 (and beyond) when

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[72] *Id.*, at para. 84.

faced with a claim that a prior Supreme Court of Canada decision no longer speaks to the reality of Canadian society.

As exemplified by *Health Services*, the Supreme Court of Canada is quite prepared to recognize its own youthful folly. However, we have not analyzed the question of whether it is for that Court alone to correct its own *mistakes*. Instead, we have asked what should happen where it is alleged not that a prior decision is wrong, but rather that it no longer "fits" the social and legislative facts. As we have attempted to outline above, in Charter litigation, social and legislative facts are especially key under section 1 of the Charter. Cases that seek to revisit these issues in the face of a prior Supreme Court of Canada decision — cases like *Bedford* and *Carter* — do so because the earlier decision held the challenged law to be constitutional notwithstanding the infringement of Charter rights. The issue raised before the second trial court in such cases is whether the infringement in question is still justifiable.

Treating precedents like the *Prostitution Reference* and *Rodriguez* as absolutely binding not only makes it difficult, expensive and in some cases ultimately futile for the committed to obtain a constitutional remedy, it also operates as a significant disincentive, preventing the less committed from making the attempt at all. That is a state of affairs that ultimately operates to relieve the government of the obligation to justify continuing infringements on Charter rights. It also deprives the radical and liberatory principles enunciated in the Charter of their progressive promise.

This is an issue of our time. The *Carter* and *Bedford* cases signal that a threshold has been reached based on a combination of 30 years of social change and the now considerable volume of past jurisprudence. We have identified this is as a "transformative moment" *in the potential sense.* Now is the time when it will be decided to what degree our Charter past will be allowed to be an obstacle to our Charter future.

V. AFTERWORD

This paper was presented at the Osgoode Hall Conference on Constitutional Cases in May 2012. The judgment in *Carter* was rendered just one month later in June 2012. In *Carter*, Smith J. concluded that *Rodriguez* had decided that Ms. Rodriguez was deprived of her section 7 Charter rights to liberty and security of the person, but that these deprivations were in accordance with the principle of fundamental justice that

laws not be arbitrary. However, Smith J. accepted the *Carter* plaintiffs' arguments that the Supreme Court of Canada in *Rodriguez* had not considered whether the prohibition also engaged the right to life, and had not considered whether the section 7 deprivations were in accordance with principles of fundamental justice that laws not be overbroad or grossly disproportionate.

Justice Smith also concluded that the decision in *Rodriguez* did not decide whether section 241(b) of the *Criminal Code* infringes section 15 of the Charter; rather, the Court had simply assumed that section 15 was infringed and moved directly to a section 1 analysis. In *Carter*, the plaintiffs argued that that the final step in the section 1 analysis, balancing the salutary and deleterious effects of the legislation, had been changed as a result of the intervening Supreme Court of Canada decision in *Alberta v. Hutterian Brethren of Wilson Colony*.[73] Justice Smith accepted this argument. The *Carter* plaintiffs also argued that because of the existence of changed legislative and social facts, the section 1 analysis in *Rodriguez* was, in any event, obsolete and not binding on that basis. For the purposes of this paper, and in light of the decision in *Bedford* discussed above, these are the *stare decisis* issues from *Carter* that bear most directly upon the topic of this paper. With respect to these points, Smith J. held:

> It is true, as the defendants submit, that the Supreme Court did not enunciate a new test. However, in my view *Hutterian Brethren* marks a substantive change, rather than the addition of a nuance. The Court made clear that the final step in the proportionality analysis is neither redundant nor a mere summary of the first two steps, although, as Professor Hogg observed, it had come to be viewed that way. Courts are to widen their perspective at the final stage to take full account of the deleterious effects of the infringement on individuals or groups, and determine whether the benefits of the legislation are worth that cost. That is a different question than whether the legislation is rationally connected to the government's objective or impairs the rights as little as possible.
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> I agree with the plaintiffs that the Supreme Court of Canada, in *Hutterian Brethren*, put life into the final balancing step in the analysis of proffered justifications for infringements of *Charter* rights.

[73] [2009] S.C.J. No. 3, [2009] 2 S.C.R. 567 (S.C.C.).

> In *Bedford*, it was not argued that the law with respect to s. 1 analysis had evolved; only that the legislative and social facts had changed.
>
> *I note as well that, while in principle a trial judge could find facts without conducting a legal analysis in order to create a record for appellate courts to decide section 1 issues, it would be an unusual exercise. Facts are not normally found in a legal vacuum — they are found in a context, for a reason and with a purpose. Indeed, without a legal framework, how is the primordial task of determining the relevance of evidence possible? Charter analysis is always to be contextual. Assessing justification under s. 1 is a particularly fact-intensive process. Similarly, it might be said that finding facts for a s. 1 inquiry is law-intensive, making reference to the governing legal principles essential.*
>
> *The existence of a different set of legislative and social facts on its own may not warrant a fresh s. 1 inquiry. However, it is unnecessary for me to say more about that point because I think that significantly and materially different legislative facts, along with a change in the legal principles to be applied, can.* Because those conditions exist in this case, I will address the s. 1 arguments of the parties, particularly at the final two stages where minimal impairment and proportionality of effects are assessed.[74]

Thus, it seems that Smith J. agreed with the *Carter* plaintiffs that the approach articulated by the Ontario Court of Appeal was at least problematic. However, she ultimately declined to squarely address the issue of whether section 1's built-in obsolescence could alone justify or require a court of first instance's departure from Supreme Court of Canada precedent. It remains to be seen whether and on what grounds the decision in *Carter* will be appealed. It is entirely possible that the issue of *stare decisis* will remain central as the *Bedford* and *Carter* cases move forward.

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[74] *Carter*, *supra*, note 10, at paras. 994-998 (emphasis added).