

7-26-2024

## The Highest Suggestion in the Land: Obiter Dicta and the Modern Supreme Court of Canada

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### Citation Information

Singh, Amitpal C.. "The Highest Suggestion in the Land: Obiter Dicta and the Modern Supreme Court of Canada." *Osgoode Hall Law Journal* 61.1 (2024) : 9-61.

DOI: <https://doi.org/10.60082/2817-5069.3977>

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# The Highest Suggestion in the Land: Obiter Dicta and the Modern Supreme Court of Canada

## Abstract

The Supreme Court of Canada is unlike any court of appeal in Canada. Many decades ago, the Court shed the traditional mould of an error-correcting appellate court. The modern Court is a “jurisprudential overseer” and its appeals are occasions for legal innovation. This essay explores whether the distinction between non-binding obiter dicta and binding ratio decidendi has any continued significance for the Court. In this essay, I argue that the modern orthodoxy about the Court’s institutional role obliterates any such distinction. This conclusion runs contrary to the Court’s own jurisprudence on this topic, which attempts to preserve the distinction by remaking it in a modern image. The Court has settled on a spectrum view about its obiter: the weight of obiter decreases as it moves away from dispositive ratio. I show that the obiter-ratio distinction is rooted in a model of adjudication—dispute-resolution—that the Court no longer adheres to, as is evinced by the muscular role of reference opinions and other doctrinal developments. This descriptive argument is also a normative argument against the modern orthodoxy about the Court’s role as jurisprudential overseer: the fact that the modern orthodoxy obliterates the obiter-ratio distinction is a reductio ad absurdum against that orthodoxy.

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# The Highest Suggestion in the Land: *Obiter Dicta* and the Modern Supreme Court of Canada

AMITPAL C. SINGH<sup>1</sup>

The Supreme Court of Canada is unlike any court of appeal in Canada. Many decades ago, the Court shed the traditional mould of an error-correcting appellate court. The modern Court is a “jurisprudential overseer” and its appeals are occasions for legal innovation. This essay explores whether the distinction between non-binding *obiter dicta* and binding *ratio decidendi* has any continued significance for the Court. In this essay, I argue that the modern orthodoxy about the Court’s institutional role obliterates any such distinction. This conclusion runs contrary to the Court’s own jurisprudence on this topic, which attempts to preserve the distinction by remaking it in a modern image. The Court has settled on a spectrum view about its *obiter*: the weight of *obiter* decreases as it moves away from dispositive *ratio*. I show that the *obiter-ratio* distinction is rooted in a model of adjudication—dispute-resolution—that the Court no longer adheres to, as is evinced by the muscular role of reference opinions and other doctrinal developments. This descriptive argument is also a normative argument against the modern orthodoxy about the Court’s role as jurisprudential overseer: the fact that the modern orthodoxy obliterates the *obiter-ratio* distinction is a *reductio ad absurdum* against that orthodoxy.

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1. LLM Candidate, Yale Law School. JD (2021), University of Toronto Faculty of Law. I wish to thank Jasman Gill, Manish Oza, Jim Phillips, Robert Sharpe, Kees Westland, and Andy Yu for their generous comments on prior drafts of this paper. I am also grateful to the editors of the Osgoode Hall Law Journal for their careful editorial work. All errors were made in *obiter*.

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EVERY FIRST-YEAR LAW STUDENT in the common law world is taught the distinction between *ratio decidendi* and *obiter dicta*. The *ratio* of the case—the portion that is binding as precedent—is the portion of the judgment containing the legal rule necessary to decide the parties’ dispute. Any other remarks that the court makes en passant are *obiter dicta*. The *obiter-ratio* distinction is a crucial element of *stare decisis* in the common law tradition.<sup>2</sup> Importantly, *obiter* is not binding on future courts. Despite this important classificatory consequence, the difference between *ratio* and *obiter* is not always easy to identify. Indeed, law students quickly realize that courts themselves are rarely explicit in demarcating their *ratio* from their *obiter*. But, in principle, the difference is discoverable, and the difference matters.

Law students also quickly learn that the Supreme Court of Canada is unlike other courts in Canada. In particular, the Court does not fit the mould of the classic common law court of appeal, which corrects legal errors in lower court judgments. According to the traditional orthodoxy about adjudication, appellate courts—and courts in general—do not make the law; they simply discern and apply it.<sup>3</sup> The Supreme Court of Canada, by contrast, does more than correct

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- For more on the traditional view of *obiter dicta* and its relation to common law precedent more generally, see Rupert Cross, *Precedent in English Law*, 3rd (Clarendon Press, 1977). There is now a voluminous literature discussing the difference between *obiter dicta* and *ratio decidendi* and offering new ways to draw the distinction. See e.g. Sebastien Lewis, “Precedent and the Rule of Law” (2021) 41 Oxford J Leg Stud 873, DOI: <<https://doi.org/10.1093/ojls/ggab007>>; Andrew C Michaels, “The Holding-Dictum Spectrum” (2017) 70 Ark L Rev 661; Judith M Stinson, “Why Dicta Becomes Holding and Why It Matters” (2010) 76 Brook L Rev 219; Michael Abramowicz & Maxwell Stearns, “Defining Dicta” (2005) 57 Stan L Rev 953; Frederick Schauer, “Precedent” (1987) 39 Stan L Rev 571, DOI: <<https://doi.org/10.2307/1228760>>.
  - R v Evans*, 2014 ABCA 339 at paras 16-24.

legal errors in the service of settling some forty or so legal disputes a year.<sup>4</sup> The Court has long since shed the carapace of error-correction and morphed into a jurisprudential shepherd. As our apex court, the Supreme Court of Canada is clearly a law-making court, one that renovates entire doctrinal areas and crafts novel legal frameworks. In doing so, the Court inevitably makes remarks that do not, strictly speaking, decide the case in front of it. As Justice Doherty put the point in *R v Prokofiew*:

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.<sup>5</sup>

In this essay, I examine the interaction between the Court’s “new” role as a jurisprudential innovator and the traditional distinction between *obiter dicta* and *ratio decidendi*. I consider whether the traditional distinction between binding *ratio* and non-binding *obiter* still has meaning for the modern Court. One possibility is that the *obiter-ratio* distinction is a casualty of the Court’s metamorphosis into a jurisprudential overseer. The other possibility is that the distinction has simply been remade. While the latter view is the orthodoxy amongst Canadian courts, I argue that in fact, the former is true. The primary thesis of this paper is that the Court’s modern role obliterates any meaningful distinction between its *obiter* and its *ratio*. The *obiter-ratio* distinction no longer has any principled or pragmatic significance for the modern Court. In other words, if the modern orthodoxy about its role is to be believed, the Court’s *obiter* should be regarded as equivalent, in *stare decisis* effect, to its *ratio*.<sup>6</sup>

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4. The number of cases the Court is deciding has trended downwards in recent years, with a historical low of just twenty-four leave applications granted in 2022. See Paul-Erik Veel, “Getting Leave to The Supreme Court of Canada: 2023 by the Numbers” (24 January 2024), online: <litigate.com/OnTheDocket#/getting-leave-to-the-supreme-court-of-canada-2023-by-the-numbers> [perma.cc/ME4M-2VM7]; Cristin Schmitz, “SCC’s Output Fell to 34 Judgments in 2023, renewing questions, concerns within the bar” Law360.com (13 February 2024), online: <www.law360.ca/ca/articles/1797145/scc-s-output-fell-to-34-judgments-in-2023-renewing-questions-concerns-within-the-bar> [perma.cc/L2GV-FY5Q].
  5. 2010 ONCA 423 at para 19 [*Prokofiew* ONCA].
  6. My focus in this paper is on vertical *stare decisis* rather than horizontal *stare decisis*. The Supreme Court distinguished these two types of *stare decisis* in *Canada (Attorney General) v Bedford*, as well as *R v Sullivan*. See 2013 SCC 72 [*Bedford*]; 2022 SCC 19 at para 65. One may say that the common law system makes litigants, rather than individual judges and courts, the focal point of the *obiter dicta* versus *ratio decidendi* debate. Put differently, perhaps the common law system does not explicitly delineate *obiter* from *ratio* because it leaves it to future litigants to ascertain the distinction. I do not think this is accurate. Even if parties may make arguments about whether a particular passage is *obiter* or *ratio*, the decision is ultimately a court’s to make (even if it is not the decision of the court whose reasons are subsequently being interpreted). In this way, the distinction between what is *obiter* and *ratio*

This startling conclusion calls for a reckoning with the modern Court. This brings me to the second part of my argument, which has the structure of a *reductio ad absurdum*. If I am right that the Court's outsized modern role obliterates the *obiter-ratio* distinction, then the Court's modern role is itself in need of further justification and must be rejected. To be clear, I do not deny that there is *some* legitimate law-making role for the Court (and courts generally). My point is only that one of the common law's long-standing, structural limits on judicial law-making—the *obiter-ratio* distinction—has been dispatched, and at too high a cost. Nor am I saying that obliterating the *obiter-ratio* distinction is normatively desirable. To the contrary, the first part of my argument is simply descriptive: I maintain that the orthodox view of the Court's institutional role *implies* the abolition of the *obiter-ratio* distinction. This is not a prescription to do away with the distinction. Rather, teasing out this implication is a way to see that the present orthodoxy about the Court, which characterizes it as a plenary, jurisprudential overseer, is normatively mistaken and unjustified.

*Obiter dicta* is usually translated to “that which is said in passing.”<sup>7</sup> This translation makes the puzzle I wish to explore in this paper readily apparent. Does the modern Supreme Court of Canada really say *anything* in passing? This question broaches a broader issue: Which characteristics of traditional common law adjudication have remained with the Court since it traversed the juridical boundary between error-correction and law-making?

The Court itself has recognized a tension between the traditional *obiter-ratio* distinction and its role as a jurisprudential overseer.<sup>8</sup> Nearly forty years ago, Justice Wilson wrote that one of the great tensions latent in Supreme Court of Canada adjudication is between “the ‘deciding only what is necessary for the case’ approach and the approach that views the Court in the role of overseer of

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is just like any other argument that a court must adjudicate. While litigants raise issues and make arguments, it is ultimately courts who decide them.

7. See Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (Thomson Reuters, 2019) sub verbo “*ratio decidendi*” and “*dictum*.”
8. See Bora Laskin, “The Role and Functions of Final Appellate Courts: The Supreme Court of Canada” (1975) 53 Can Bar Rev 469 at 475. Laskin observes that:

Now, even more in its supervisory role than in its heretofore more traditional appellate role, the Supreme Court's main function is to oversee the development of the law in the courts of Canada, to give guidance in articulate reasons... This is surely the paramount obligation of an ultimate appellate court with national authority. It is only under this umbrella that it can, in general, be expected to be sensitive to the correctness of the decisions in particular cases.

the development of the jurisprudence.”<sup>9</sup> In passing, she noted that adherents of the former, traditional view are likely to view the distinction between the Court’s *obiter* and its *ratio* as a bedrock parameter that must be preserved:

Clearly, [the idea of providing guidance via pronouncements that do not settle the particular dispute at hand] is heresy for those wedded to the incremental decision-making approach to the common law, with its devotion to *stare decisis* and its horror of *obiter dicta* and hypothetical situations. Leave essay writing to the academics, they say, and let us stick to our job of judging!<sup>10</sup>

While this tension has interested Justice Wilson and the Court, it has yet to be explored in a sustained fashion in the academic literature. I undertake that exploration here.

I proceed as follows. In Part I, I outline the intellectual-historical context in which the *obiter dicta* and *ratio decidendi* distinction was conceived, namely the legal formalism of the nineteenth-century textbook tradition. I trace the eventual disenchantment with formalism due to the rise of the realist conception of law and adjudication, according to which deciding cases is largely just an exercise in legal policy making.<sup>11</sup> This historical trajectory is important for understanding our present reality, wherein the Supreme Court is frequently innovative in its approach to the law, and does not really even pretend to “deduce” its innovations from past precedent. In Part II, I offer an overview of the modern Court’s institutional role as a jurisprudential overseer. The heart of the paper is Parts III-IV, where I turn to the case law about the *stare decisis* effect of the Court’s *obiter*. I will argue that present doctrine is a mismatch with the Court’s institutional role. In particular, the present doctrine is an unsatisfying middle ground between two poles that the Court has rejected: (1) the so-called *Sellars* principle, according to which all statements of the Court are binding, no matter how removed from the facts of a particular dispute; and (2) the traditional view of an appellate court, according to which only that which is necessary to decide the dispute in front of the court becomes binding law. Throughout, I will suggest that the *Sellars* principle is more authentic to the modern orthodoxy about the Court’s institutional role than *Sellars*’ critics may have realized. In Part V, I link my criticisms of the current doctrine about the *obiter-ratio* distinction to broader concerns about the Court’s adjudicative practices. I use three recent cases to

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9. Bertha Wilson, “Decision-Making in the Supreme Court” (1986) 36 UTLJ 227 at 228, DOI: <<https://doi.org/10.2307/825574>>.

10. *Ibid* at 234.

11. See Robert J Sharpe, “Do Judges Make Law” in *Good Judgment: Making Judicial Decisions* (University of Toronto Press, 2018) 77, DOI: <<https://doi.org/10.3138/9781487516994>>.

reveal inconsistencies in the Court's own understanding of the limits of its task in a particular appeal. I will argue that the transition away from the traditional, common law understanding of adjudication has meant that the boundaries of Supreme Court adjudication can no longer be specified doctrinally (or in any principled fashion at all). The Court sets the boundaries of its own powers, and it does not always do so consistently. This is the reality of the modern Court that we must frankly acknowledge and reckon with. Part VI concludes.

## I. *OBITER DICTA*, THE TEXTBOOK TRADITION, AND THE COMMON LAW

The *obiter dicta* versus *ratio decidendi* distinction is a venerable heirloom from a cabinet of concepts about the nature of law and adjudication. These concepts form part of what legal historians have called the “textbook tradition.”<sup>12</sup> According to the textbook tradition, law is a rational enterprise. Law is comprised of rules, some more general and others more particular, that stand in logical relationships to each other. These logical relationships are discernible from a study of the sources of law—primarily case law—by the practitioners of law, *i.e.*, lawyers and judges. In this way, the textbook tradition regarded law as a kind of science. The courts, inspired by Pollock, Goodhart, and others in this tradition, drew analogies between the chemical data studied in labs, patient charts in hospitals, and case law.<sup>13</sup> As one court put it, “the study of law is a science in the same sense as physics or chemistry are sciences, and the material with which it is concerned consists of individual cases which must be analyzed and measured as carefully as is the material in the other sciences.”<sup>14</sup>

This view has other philosophical commitments about the nature of law. First, law is determinate.<sup>15</sup> The answer to some as-yet unadjudicated legal dispute

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12. See David Sugarman, “Legal Theory, the Common Law Mind and the Making of the Textbook Tradition” in William Twining, ed, *Legal Theory and Common Law* (Blackwell, 1986) 26.

13. *Incorporated Council of Law Reporting for England and Wales v Attorney-General and Commissioners of Inland Revenue* [1972] Ch 73 at 92.

14. *Ibid* at 101.

15. There were, of course, important debates in the twentieth century (which continue today) about the determinacy of legal rules. See generally HLA Hart, *The Concept of Law* (Clarendon Press, 1961); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); Allan C Hutchinson & Patrick J Monahan, “Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 *Stan L Rev* 199, DOI: <<https://doi.org/10.2307/1228683>>.



is in principle contained in the system of rules. Answers to particular legal issues that arise in disputes between parties are deducible by reference to legal rules. When a court reaches a result, it does not *create* the law so much as *discover* it using the raw matter of the discipline—precedents.<sup>16</sup> If a multi-member court splits into a majority opinion and a dissenting opinion, this disagreement is not merely one of taste or political preference but presents a resolvable question: one of these opinions is *wrong*. The possibility of disagreement and error also explains the institutional structure of adjudication. Appellate courts exist to correct the errors of lower courts. They do not simply substitute their preferences for those of a lower court. They impose the correct answer.

A second philosophical commitment of the textbook tradition is methodological. Judges must look to the internal logic of the law, and not to their private preferences, political aims, economic efficiency, or even what they believe would be the best *outcome*, to decide cases. The law is a logical system unto itself. This is the formalist essence of the textbook tradition.<sup>17</sup> On this view, any considerations other than the applicable legal rules themselves are extraneous to the process of adjudication. On the strongest versions of this view, the law must be insulated from the unprincipled, unruly, and nebulous notion of “public policy.”<sup>18</sup> This vision of law sharply divides law from politics.<sup>19</sup>

This originating narrative still sustains legal education today—usefully so.<sup>20</sup> The idea that the law is a closed system unto itself is helpful for understanding why a law school is not just another philosophy, politics, or history department, even though these disciplines are regarded as law cognates. Law has a content and a grammar of its own. Hence the mantra that dominates law school promotional materials, which is ritualistically invoked in the early days of first-year law school: “we are going to teach you to think like a lawyer.”<sup>21</sup> So, while philosophers, political scientists, and historians can and surely do also think about law, they do so from the outside, as it were, with methods foreign to the law itself. Accordingly,

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16. William Blackstone, *Commentaries on the Laws of England*, vol 1 (Clarendon Press, 1765) at 69-71.
  17. Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 Yale LJ 949, DOI: <<https://doi.org/10.2307/796339>>.
  18. *Ibid* at 1006-1007. *Richardson v Mellish*, (1824) 2 Bing 229, [1824-34] All ER Rep 258 at 266. “Public policy is a very unruly horse, and when you get astride, you never know where it will carry you.”
  19. Chaim Saiman, “The Law Wants to Be Formal” (2021) 96 Notre Dame L Rev 1067.
  20. Sugarman, *supra* note 12 at 27.
  21. See *e.g.* Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009) and Stephen Waddams, *Introduction to the Study of Law*, 8th ed (Carswell, 2016).

law students must learn to behave as formalists, at least when preparing for most of their evaluations. They are expected to cite cases as authorities for propositions and discern an overall logic to the doctrinal area they are studying. A purely realist analysis of a fact pattern in a Torts exam is unlikely to win plaudits among law professors, even those who are not legal formalists in life outside of the classroom.<sup>22</sup> In this way, legal education is still indebted to AV Dicey, Frederick Pollock, and other luminaries of the textbook tradition, who authored expository student treatises based on case law.<sup>23</sup>

Another crucial feature of the textbook tradition's approach to common law adjudication—and the feature that will get us close to the *obiter-ratio* distinction in particular—is that courts resolve *disputes*. In doing so, courts apply legal rules which they have discerned from precedents to ever-evolving factual contexts. Therein lies the tension at the heart of the common law: static rules that are newly elaborated at every turn. The common law evolves incrementally—and horizontally—as its rules are applied to novel facts. Therefore, the common law's principles must always be understood in light of the factual contexts in which they are expressed. As Lord Halsbury has put the point:

[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.<sup>24</sup>

Lord Halsbury's point is not that the common law has no principles. Rather, it is just that the interaction of fact and law is what produces the principles of the common law. Thus, the way to discern a general common law principle is not to myopically read a single case to discover a pithily stated proposition. Rather, it is to observe a pattern emerging from the way a rule is applied to several disputes that the courts have resolved.

Another feature of the textbook tradition is a normative justification for the authority of the courts. The courts are not given a podium to announce binding legal rules as they see fit. They do so in the service of dispute resolution. Where a

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22. That is not to say that a student who conducts the relevant formal analysis but also adds a policy or critical analysis would do poorly. My point is simply that the formal analysis is still seen as essential and foundational. Critique without doctrine is empty, and doctrine without critique is blind.

23. David Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 Mod L Rev 102 at 107.

24. *Quinn v Leatham*, [1901] AC 495 at 506 [*Quinn*].

court is not resolving a dispute, it loses its authority to issue binding judgments.<sup>25</sup> Accordingly, where a court issues *obiter* (*i.e.*, commentary incidental to the resolution of the dispute), giving it binding effect would efface the separation of powers and the rule of law.<sup>26</sup> The institutional legitimacy of the courts to announce binding legal rules comes from the fact that they are discovering law and not inventing it, but also because their use of precedents (*i.e.*, previously resolved disputes) ensures stability and predictability. On this view, the courts are also passive. That is, they resolve disputes by “rely[ing] on the parties to frame the issues for decision and assign to [themselves] the role of neutral arbiter of matters the parties present.”<sup>27</sup> Courts settle the legal issues that parties bring to them.

This is where the importance of the *obiter-ratio* distinction begins to come into view. As Lord Halsbury explained, because the legitimacy of the courts’ legal pronouncements comes from dispute resolution, “a case is only an authority for what it decides.”<sup>28</sup> What a case decides, in turn, is just that portion of the judgment in which a legal rule interacts with the facts to produce an outcome that resolves the dispute between the parties. The portions of the judgment that do not contribute to a final resolution of the dispute between the parties therefore

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25. See The Hon Justice Steven Rares, “The Role of the Intermediate Appellate Court After *Farah Constructions*” (Speech delivered at the *Fourth Appellate Judges Conference of the Australasian Institute of Judicial Administration*, 7 November 2008) online (pdf): <aiaa.org.au/wp-content/uploads/2018/03/Rares.pdf> [perma.cc/9CQL-RJ3Q] at para 6.

More importantly, dicta are incidental to the exercise of the judicial power to quell a controversy. Dicta, themselves, do not quell the actual controversy before the Court. And, because they do not quell such a controversy, even if uttered by the High Court, they can never be binding.

See also Matthew Harding & Ian Malkin, “The High Court of Australia’s Obiter Dicta and Decision-Making in Lower Courts” (2012) 24 Sydney L Rev 239 at 257.

The authority of a court attaches only to reasons that it is necessary for the court to appeal to in the discharge of that court’s institutional function, and the institutional function of any court...is limited to the resolution of disputes in accordance with law.

See also Lionel Smith, “The Rationality of Tradition” in Timothy Endicott, Joshua Getzler & Edwin Peel, eds, *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) at 297, 306.

26. Rares, *supra* note 25 at para 8. “It would be a usurpation of the rule of law for dicta, whatever their source, to be elevated any higher than being of persuasive force.”
27. *Greenlaw v United States*, 554 US 327 (2008), at 243 (per Justice Ginsburg) [*Greenlaw*]. See also *R v Mian*, 2014 SCC 54 at paras 38-39, citing *Greenlaw*.
28. *Quinn*, *supra* note 24 at 506.

lack binding force.<sup>29</sup> Put differently, that “non-precedential” part of the judgment does not have *stare decisis* effect.<sup>30</sup> *Obiter* may be persuasive, but it is not binding.

As we will see in a moment, the modern Supreme Court of Canada is a square peg that cannot fit into the round hole of the error-correcting appellate courts envisioned by the textbook tradition. As a result, the *obiter-ratio* distinction cannot be translated to the Court while leaving the distinction intact in its traditional form. Sensing this, the Court has tried to remake the *obiter-ratio* distinction to match its new institutional role. I will argue that this modern reformulation of the distinction is a principled and practical failure. Before tracing that doctrinal shift, I turn to a few framing observations about the modern Court.

## II. THE SUPREME COURT OF CANADA TODAY

The Supreme Court of Canada is a court of appeal. But it is also unlike every other court of appeal in Canada. It is not just the next appellate court after the Court of Appeal for British Columbia, the Federal Court of Appeal, or the Court Martial Appeal Court of Canada. The transition between the appellate courts and the Supreme Court marks a transition across the juridical Rubicon to a new territory—one in which jurisprudential guidance, and not error correction, is the *modus operandi*.

This understanding of the Court is not new or controversial. It has constituted the received wisdom for some time. This was Chief Justice Laskin’s rendition of the Court’s role in his 1975 lecture, delivered seven years before the advent of the *Canadian Charter of Rights and Freedoms*.<sup>31</sup> Chief Justice Laskin distinguished the “supervisory” role of the Supreme Court of Canada from error correction, which he described as the mandate of an “appellate tribunal in the traditional sense.”<sup>32</sup> Chief Justice Laskin’s remarks will sound familiar, and perhaps even trite, to modern Canadian lawyers.

It is tempting to believe that the advent of the *Charter* “created” the modern Court, just as the modern Court has breathed life into the *Charter*. Yet Chief Justice Laskin’s nearly four-decade-old remarks suggest that the supervisory mandate of the Court was ushered in sometime before the *Charter* remade the

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29. See “Dictum Revisited,” (1952) 4 Stan L Rev 509 at 512, DOI: <<https://doi.org/10.2307/1226183>>; Marc McAllister, “Dicta Redefined” (2011) 47 Willamette L Rev 161 at 165-166.

30. McAllister, *supra* note 29 at 162, n 6.

31. Laskin, *supra* note 8 at 469.

32. *Ibid.*

Court in the mould of an American-style apex court, tasked with protecting a constitutional bill of rights via judicial review of legislation.<sup>33</sup> Chief Justice Laskin instead attributes that change to the 1974 amendments to the *Supreme Court Act*. These amendments produced the Court's docket as we know it today—a docket which is largely populated by cases granted leave to appeal, with some important exceptions.<sup>34</sup> Indeed, section 40 of the *Supreme Court Act* directs the Court to select its appeals based on their importance to the development of the law in Canada.<sup>35</sup> The language in the provision is expansive, clearly contemplating that the Court set its own agenda. The Court may grant leave where the Court itself is

of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.<sup>36</sup>

Unsurprisingly, appeals to the Supreme Court have taken on a more normative and abstract character than appeals to the courts below. The dispute between the parties and the bottom-line outcome for them after the judgment is rendered—whether that is penal liability, tax liability, tort liability, or even the status of a litigant's *Charter* rights—plays a secondary role in the Court's

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33. The touchstone is, of course, *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

34. *Supreme Court Act*, RSC, 1985, c S-26 [*Supreme Court Act*]. The most prominent of these exceptions is the right of appeal in criminal cases, where a court of appeal decision features a dissent on a point of law or where the court of appeal has set aside an acquittal. See also Supreme Court of Canada, "Role of the Court" (23 August 2017), online: <[www.scc-csc.ca/court-court/role-eng.aspx](http://www.scc-csc.ca/court-court/role-eng.aspx)> [perma.cc/M7YD-S4D5]. Tellingly, such decisions are often short and are increasingly issued from the bench. See Alex Bogach, Jeremy Opolsky, & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 SCLR (2d) 251.

35. *Supreme Court Act*, *supra* note 34, s 40.

36. *Ibid* [emphasis added]. For an empirical study on the success of applications for leave to appeal, see Paul-Erik Veel, "Getting Leave to Appeal to the Supreme Court: Empirical Insights from Tax Cases" (20 January 2021), online: <[litigate.com/OnTheDocket#/getting-leave-to-appeal-to-the-supreme-court-empirical-insights-from-tax-cases](http://litigate.com/OnTheDocket#/getting-leave-to-appeal-to-the-supreme-court-empirical-insights-from-tax-cases)> [perma.cc/Y54C-FKT3]; Paul Erik-Veel, "A Quantitative Look at the Supreme Court of Canada" (4 May 2020), online: <[litigate.com/#/a-quantitative-look-at-the-supreme-court-of-canada](http://litigate.com/#/a-quantitative-look-at-the-supreme-court-of-canada)> [perma.cc/2RYV-YCK6]. See also Benjamin RD Alarie & Andrew J Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 OHLJ 381, DOI: <<https://doi.org/10.60082/2817-5069.1086>>.

adjudication process.<sup>37</sup> As a causal matter, litigants' disputes are the reason for the Court's pronouncements. But resolving those disputes is not the Court's animating purpose in taking and resolving appeals. The Court's appeals are first and foremost occasions for jurisprudential innovation, with far-reaching effects beyond resolving the parties' dispute in a single appeal. This is entirely consistent with the phenomenology of studying the Court's judgments as a law student. The Court's cases are taught primarily (but not exclusively) by law professors for the rule of law the Court lays down, and only secondarily for the application to the facts before it. This is the mirror image of the traditional appellate court, which first and foremost resolves disputes, and only incidentally clarifies the law.

As we have seen, the notion that the Court is a jurisprudential overseer had some traction even before the advent of the *Charter* in 1982. However, it is true that the *Charter* formally anointed and accelerated this new mandate. The Court was thereafter tasked with filling in an entirely new, skeletal constitution. The constitution was written in the language of principles rather than rules. This broad and open-ended language required the Court to develop the scope and content of its provisions. The Court had to devise doctrine from whole cloth using first principles rather than precedents.

Indeed, it was widely understood that the Court could not and should not draw inspiration from its jurisprudence under the *Charter's* predecessor, the *Canadian Bill of Rights*. As W.J. Waluchow puts the point, the *Canadian Bill of Rights* jurisprudence had a "sorry history" that had "very little impact on the state of Canadian law."<sup>38</sup> In addition to the fact that this uninspiring jurisprudence was unlikely to be helpful, it was also seen as normatively undesirable for the Court to rely on it. Emmett Macfarlane has argued that the advent of the *Charter* was a conscious paradigm shift because it translated previously legislatively enacted rights into the register of a *constitutional* bill of rights, thereby removing

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37. There are, of course, exceptions to this. The Court also decides singular issues that are significant for the entire country, such as whether medically-assisted dying is a constitutional right, or whether the federal government has the authority to impose a nationwide carbon tax. See *Carter v Canada*, 2015 SCC 5 [*Carter*]; *Referencés re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Referencés re Greenhouse Gas*]. But such cases do not comprise the majority of the Court's docket. And importantly, even in deciding such cases, the Court's methodology is one of developing the law, not simply correcting errors or deducing the law "as it is."

38. *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press 2006) at 3, DOI: <<https://doi.org/10.1017/CBO9780511498893>>.

those rights from everyday politics and the vicissitudes of majority opinion.<sup>39</sup> In light of this, it is thus unsurprising that the Court quickly became comfortable with making law beyond the constitutional context. The innovation impulse, accelerated by the 1974 amendments to the *Supreme Court Act*<sup>40</sup> and the *Charter*, was difficult to cabin to constitutional law. It began to spill into the Court's docket as a whole.<sup>41</sup>

This institutional paradigm shift was also accompanied by several other consequential historical developments. Initially, the elimination of the Judicial Committee of the Privy Council as Canada's final court of appeal failed to usher in a massive shift in the Court's role because the Court suffered from what some scholars have described as a lack of talent.<sup>42</sup> The Court was far from the prominent, headline-winning institution that it is now.<sup>43</sup> It was only until Prime Minister

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39. *Ibid* at 117. See also *ibid* at 74-122; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press, 2013) at 2, DOI: <<https://doi.org/10.59962/9780774823524>>.
40. It is, of course, an oversimplification to describe the pre-1974 era of the Court as lacking in judicial innovation entirely. An important counterexample to this is the work of Chief Justice Duff, best known for his jurisprudence on the implied bill of rights. Its most authoritative statement is in *Reference re Alberta Statutes*, [1938] SCR 100. See further Gerald Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 OHLJ 261 at 319, DOI: <<https://doi.org/10.60082/2817-5069.2237>>. My point is simply that, as other commentators have observed, the impulse to develop the law in novel ways became the Court's modus operandi after 1975, even if there were occasional (and sometimes important) flashes of this before 1974. See also Laskin, *supra* note 8 at 474. Laskin attributes the innovative impulse of the modern Court to the 1974 amendments to the *Supreme Court Act*.
41. One might be tempted to think that this innovative instinct is limited to public law cases, whereas the Court functions much more like a traditional, error-correcting court of appeal in private law cases. This, I think, overstates the differences between the two types of cases. See e.g. *Bhasin v Hrynew*, 2014 SCC 71. In a string of contract law cases beginning with *Bhasin*, the Court has developed the law of good faith in contracts from first principles, just as it might in the public law context. See further *Matthews v Ocean Nutrition Canada*, 2020 SCC 26; *CM Callow Inc v Zollinger*, 2020 SCC 45; *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7. Similarly, the Court recently revamped the law of takings in *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36. I am grateful to an anonymous reviewer for pressing me to clarify this point.
42. Carissima Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (Hart, 2019) at 108.
43. Macfarlane, *supra* note 39 at 1; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (University of Toronto Press, 2008) at 3-8, DOI: <<https://doi.org/10.3138/9781442689473>> ("[F]or much of its history the Supreme Court of Canada toiled in obscurity, well out of the limelight of political controversy."). See also Patrick J Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80:1/2 Can Bar Rev 374 at 374-375.

Pierre Elliot Trudeau began the practice of seeking highly distinguished jurists for the nation's top court that a transformation occurred. The appointment of Bora Laskin and his eventual elevation to Chief Justice inaugurated a new era in which the Court's members were comfortable donning the mantle of jurisprudential overseers.<sup>44</sup> With this injection of a different breed of personnel, the Court was equipped to be the institution we know today: a bold innovator of the law.<sup>45</sup>

Broader ideological currents also cemented the Court's modern role. The textbook tradition, with its formalist emphasis on discerning the law with reasoning internal to the law itself, began to wane in influence. Today, new nominees to the Court openly acknowledge that they will be entrusted with making law as much as applying it.<sup>46</sup> There is a rich and complex history of the eventual disenchantment with legal formalism, a shift that is usually credited to the American legal academy in the 1920s and 1930s.<sup>47</sup> American legal realists in this era argued that the law's seemingly neutral, logical categories are products of a political calculus that privileges powerful interests<sup>48</sup> and that judges'

44. Macfarlane, *supra* note 39 at 42.

45. There are certainly judges on the Court today who are comfortable developing the law. However, there are also a number of judges who are more readily persuaded by some notion of judicial restraint. These fissures on the modern Court are apparent in recent cases. See *e.g.* *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

46. See *e.g.* Office of the Commissioner for Federal Judicial Affairs Canada, "The Honourable Malcolm Rowe's questionnaire" (4 July 2017), online: <[www.fja.gc.ca/scc-csc/2016-MalcolmRowe/nominee-candidat-eng.html](http://www.fja.gc.ca/scc-csc/2016-MalcolmRowe/nominee-candidat-eng.html)> [perma.cc/BUZ4-V2F4] ["Rowe Questionnaire"].

Rowe states:

The Supreme Court is not, primarily, a court of correction. Rather, the role of the Court is to make definitive statements of the law which are then applied by trial judges and courts of appeal. Through the leave to appeal process, the Court chooses areas of the law in which it wishes to make a definitive statement. Thus, the Supreme Court judges ordinarily make law, rather than simply applying it [emphasis added].

See also Office of the Commissioner for Federal Judicial Affairs Canada, "The Honourable Michelle O'Bonsawin's questionnaire" (19 August 2022), online: <[www.fja.gc.ca/scc-csc/2022/nominee-candidat-eng.html](http://www.fja.gc.ca/scc-csc/2022/nominee-candidat-eng.html)> [perma.cc/3CS4-77MS] ("[T]he Supreme Court of Canada's decisions must clarify legal questions, set precedents and, at times, shape public policy based on the laws of the country."); Office of the Commissioner for Federal Judicial Affairs Canada, "The Honourable Mary Moreau's questionnaire" (26 October 2023), online: <[fja-cmf.gc.ca/scc-csc/2023/nominee-candidate-eng.html](http://fja-cmf.gc.ca/scc-csc/2023/nominee-candidate-eng.html)> [perma.cc/ALT8-FRCF] ("[T]he Supreme Court guides the development of the law while at the same time respecting the need to render justice to the parties to the dispute.").

47. Michael S Green, "Legal Realism as Theory of Law" (2005) 46 *Wm & Mary L Rev* 1915 at 1917, 1921-1939.

48. For a version of this claim in the context of property rights, see Morris R Cohen, "Property and Sovereignty" (1927) 13 *Cornell L Rev* 8.



highly legalized, abstract language simply masks instrumental, outcome-based reasoning.<sup>49</sup> As the cliché goes, “we are all legal realists now.”<sup>50</sup>

Unsurprisingly, the Supreme Court of Canada was not immune to these developments. Chief Justice Laskin traced the demise of the formalist tradition and explicitly linked this to the changing character of the Court:

The Supreme Court of Canada began life at about the time Langdell and his case-law approach to the discovery of the ‘true legal rule’ revolutionized legal studies in the United States. On the English side, before the nineteenth century was out the House of Lords had sanctified its own position as the expositor of the one true rule which, once declared, was alterable only by legislation. A quarter of a century later Cardozo was to tell us that at its highest reaches the role of the judge lay in creation and not in mere discovery.<sup>51</sup>

Laskin thought that Cardozo’s spirit, not Langdell’s, animated the adjudicative process of the modern Supreme Court of Canada. It was no longer heresy for the Court to make law; in fact, that was its key function.<sup>52</sup> The same view is confirmed in more recent judgments. Justice Binnie helpfully encapsulates the modern institutional orthodoxy about the Court:

In Canada in the 1970s... this Court’s mandate became oriented less to error correction and more to development of the jurisprudence (or, as it is put in s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to deal with questions of “public importance”). The amendments to the *Supreme Court Act* had two effects... Firstly, the Court took fewer appeals, thus accepting fewer opportunities to discuss a particular area of the law, and some judges felt that “we should make the most of the opportunity by adopting a more expansive approach to our decision-making role”: B. Wilson, “Decision-making in the Supreme Court” (1986), 36 U.T.L.J. 227, at p. 234. Secondly, and more importantly, much of the Court’s work (particularly under the *Charter*) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. In those circumstances, the Court nevertheless intended that effect be given to the broader analysis.<sup>53</sup>

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49. See e.g. Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harv L Rev 457.

50. Dan Priel, “The Return of Legal Realism,” in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford University Press, 2018) 457 at 464. See also Brian Leiter, “Rethinking Legal Realism: Toward a Naturalized Jurisprudence” (1997) 76 Tex L Rev 267 at 267-268.

51. Laskin, *supra* note 8 at 477.

52. Brice Dickson, “Apex Courts and the Development of the Common Law” in Paul Daly, ed, *Apex Courts & the Common Law* (University of Toronto Press, 2019) at 36. “The myth that, in common law countries, judges do not create law, but merely discover it, has been well and truly debunked.”

53. *R v Henry*, 2005 SCC 76 at para 53 [*Henry*].

With the Court's new institutional role in mind, I turn to the arc of the doctrine about *obiter*. As we will see in a moment, the doctrine has evolved alongside the Court's institutional evolution—albeit in a surprising way.

### III. THE DOCTRINAL ARC OF *OBITER DICTA*

As the Supreme Court of Canada's role has evolved in the ways identified by Chief Justice Laskin, the traditional distinction between non-binding *obiter* and binding *ratio* has given way to a modern doctrine. This modern doctrine reimagines the content of the distinction while purporting to preserve it structurally. The arc of the doctrine has three significant points: *R v Sellars* (“*Sellars*”),<sup>54</sup> *R v Henry* (“*Henry*”),<sup>55</sup> and *R v Prokofiew* (“*Prokofiew*”).<sup>56</sup> The Court's initial foray in *Sellars* adopted the view that everything in its judgments, including *obiter*, is binding. Since then, in the more recent cases of *Henry* and *Prokofiew*, the Court has staked out a more cautious and more complicated view of its *obiter*. In broad terms, the present doctrine requires assessing the depth of *obiter* to ascertain its *stare decisis* effect.

*Sellars* was the first instalment in this evolution and also offered the most radical vision of the Court's *obiter*.<sup>57</sup> This vision has since been abandoned, as we will see. In *Sellars*, Justice Chouinard birthed the so-called “*Sellars* principle,” according to which all *obiter* of the Supreme Court is binding. The source of the principle is a single sentence from Justice Chouinard's judgment for the Court, where he wrote, “As it does from time to time, the Court has thus ruled on the point, although it was not absolutely necessary to do so in order to dispose of the appeal.”<sup>58</sup> Whether Justice Chouinard really intended to create

54. [1980] 1 SCR 527 [*Sellars*].

55. *Henry*, *supra* note 53.

56. 2012 SCC 49 [*Prokofiew* SCC].

57. *Sellars*, *supra* note 54.

58. *Ibid* at 529. English law contains echoes of a similar view. See *e.g.* *R v Barton and Booth*, 2020 EWCA Crim 575 at para 104; *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd*, [1967] 2 All ER 850 (QB) 857. See also *Hedley Byrne & Co Ltd v Heller and Partners Ltd*, [1964] AC 465 (HL).

Where five members of the House of Lords have all said, after close examination of the authorities, that a certain type of tort exists, I think that a judge of first instance should proceed on the basis that it does exist without pausing to embark on an examination of whether what was said was necessary to the ultimate decision.

Indeed, commentators have described the *Sellars* principle as equivalent to the English (and Australian) position. See *e.g.* JD Heydon, “How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law” (2009) 9 OJCLJ 1 at 32, DOI: < <https://doi.org/10.1080/14729342.2009.11421499>>. A useful summary of the US position, which is more controversial, is at 33-35.

what was subsequently called the “*Sellars* principle” has been the subject of some controversy.<sup>59</sup> What is clear, however, is that Canadian courts took the *Sellars* principle to be law in Canada for some time.<sup>60</sup> (Ironically, there is a meta issue as to whether Justice Chouinard’s apparent change of the law of *obiter* and *ratio* was itself *obiter*, but I set that aside here, for all of our sakes!).

The Court has since resiled from the *Sellars* principle. But before tracing that shift, I pause to note that the *Sellars* principle has strong prima facie credibility in light of the evolution the Court’s institutional role that I outlined in Part II. As we now know, the Supreme Court is not an error-correcting court that scientifically deduces the single “correct” legal principle necessary to decide the particular dispute before it. In fact, deciding the dispute at hand is often the least of the Court’s concerns. Finally, as we saw above, the *Supreme Court Act* itself directs the Court to select its appeals based on national significance.<sup>61</sup> All this to say that if the leading jurisprudential minds in the country have spoken to a legal issue—whether via *ratio* or via *obiter*—perhaps that guidance should be accepted by lower courts as binding. Put simply, the Court’s institutional role as a jurisprudential overseer seems to have a natural harmony with the *Sellars* principle. I will develop this argument further in Part IV, below. For now, I simply wish to plant the seed of the idea that the *Sellars* principle is not obviously mistaken, as more recent cases might make it tempting to believe. Indeed, it appears to have a prima facie compatibility with the modern orthodoxy about the Court.

I wish to re-emphasize an important point made at the beginning of this paper. As I hope is apparent, my claim is that the *Sellars* principle is the most authentic expression of the modern orthodoxy about the Court’s institutional role. My claim is *not* that the *Sellars* principle is, in some deep sense, normatively desirable. On the contrary, I ultimately argue that the modern orthodoxy should be rejected precisely because it implies and requires the adoption of the *Sellars* principle. At this stage in the argument, I simply seek to show that the *Sellars* principle is the most authentic doctrinal expression of the modern orthodoxy about the Court’s role as it concerns the *obiter-ratio* distinction.

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59. There has been some suggestion that this interpretation of the *Sellars* principle is the result of a mistranslation from the original French in which *Sellars* was authored. See Debra Parkes, “Precedent Unbound” (2006) 32 Man LJ 135 at 138-139.

60. See e.g. *R v Chartrand*, 1992 CarswellMan 16 (MB CA) at para 11; *Scarff v Wilson*, 1988 CarswellBC 449 (BC CA), rev’d [1989] 2 SCR 776, but without comment on the *obiter dicta* issue.

61. *Supreme Court Act*, *supra* note 34, s 40(1).

With all of this in mind, I turn to the present doctrine. In 2005, the Court in *Henry* revisited and rejected the *Sellars* principle.<sup>62</sup> The case concerned the *Charter's* section 13 guarantee against self-incrimination.<sup>63</sup> At his second murder trial, the accused gave testimony that was inconsistent with his testimony from his first trial on the same charge. When the Crown sought to use the testimony from his first trial at his second trial, the accused objected on the grounds that this offended the constitutional right against self-incrimination.

In making this argument, the accused relied on a prior Supreme Court case called *R v Noël* (“*Noël*”).<sup>64</sup> That judgment contained *obiter* to the effect that accused persons who testify voluntarily should be shielded from having that testimony used in a future trial. However, *Noël* itself concerned the first instance trial of an accused person whose prior testimony had been *compelled* at the trial of another accused person on charges related to the same murder. *Noël* did not concern a retrial on the same charge, as was the case in *Henry*. The remark was thus unnecessary, strictly speaking, to settle the issue before the Court in *Noël*. The remark proved controversial because it appeared to furnish a voluntarily testifying accused with the same right against self-incrimination enjoyed by a witness being compelled to testify.<sup>65</sup>

Three years later, in *Henry*, Justice Binnie declined to follow the *obiter* in *Noël*. In doing so, he explicitly confronted and rejected the *Sellars* principle, but also rejected the traditional view of the distinction between *obiter* and *ratio*.<sup>66</sup> Justice Binnie observed that *Sellars* had come to stand for the proposition that any guidance contained in a majority judgment of the Supreme Court of Canada, no matter how incidental to the main point of the case or how far removed it was from the dispositive facts or law, was binding on lower courts.<sup>67</sup>

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62. *Henry*, *supra* note 53.

63. *Canadian Charter of Rights and Freedoms*, s 13, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

64. *R v Noël*, 2002 SCC 67 [*Noël*].

65. *Henry*, *supra* note 53 at para 36.

66. Interestingly, Justice Binnie did not use another possible strategy to deal with *Noël* that has a long pedigree in the common law tradition: distinguishing the case. Justice Binnie could have decided that *Noël* was not binding because it was not analogous to the facts of the case in front of him. It is telling that he did not do so. The reluctance to distinguish a Supreme Court decision that speaks to a legal issue is itself a testament to the idea that the Court's pronouncements do not really decide disputes in narrow factual contexts. The Court's pronouncements have *prima facie* horizontal *stare decisis* effect even if a particular remark was not, strictly speaking, relevant to deciding the appeal in which it was made.

67. *Henry*, *supra* note 53 at para 55.

Justice Binnie argued that this principle was untenable.<sup>68</sup> He offered two reasons for rejecting it. First, he took note of a case decided after *Sellars*, where the Court held that its remarks in another case “were strictly *obiter dicta*, and thus did not bind the courts below.”<sup>69</sup> He took this as evidence of the continuing significance of the *obiter-ratio* distinction. Second, and more interestingly, Justice Binnie offered a principled reason for rejecting the *Sellars* principle:

The objective...is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.<sup>70</sup>

Intriguingly, Justice Binnie pays homage to the notion—familiar from the textbook tradition—that the common law develops iteratively and in the context of particular cases. Yet Justice Binnie clearly was not endorsing the full-fledged traditional view sketched in Part I, according to which a court quasi-scientifically deduces the relevant legal principle, duly applies it to the facts, and thereby settles the parties’ dispute. As Justice Binnie helpfully explained, the Court has long since departed from the role of a mere error-corrector:

In *R v Oakes*...for example, Dickson C.J. laid out a broad purposive analysis of s. 1 of the *Charter*, but the dispositive point was his conclusion that there was no rational connection between the basic fact of possession of narcotics and the legislated presumption that the possession was for the purpose of trafficking. Yet the entire approach to s. 1 was intended to be, and has been regarded as, binding on other Canadian courts. It would be a foolhardy advocate who dismissed Dickson C.J.’s classic formulation of proportionality in *Oakes* as mere *obiter*. Thus if we were to ask “what *Oakes* actually decides”, we would likely offer a more expansive definition in the post-*Charter* period than the Earl of Halsbury L.C. would have recognized a century ago.<sup>71</sup>

Justice Binnie is right that the analytical framework established in *R v Oakes* (“*Oakes*”) was clearly intended to be part of the binding portion of the case. By all accounts, the *Oakes* Test was novel. It was not mathematically deduced from grand principles standing behind constitutional law, nor was the *Oakes* Test somehow “latent” in Canadian law as a Platonic Form, waiting to be discovered. The Court in *Oakes* broke new ground.

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68. *Ibid* at para 57.

69. *Ibid* at para 56, citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 168.

70. *Ibid* at para 57.

71. *Ibid* at para 53.

Accordingly, Justice Binnie sought to show that the innovative new role of the Court was consistent with the notion that common law adjudication proceeds by experience. As a result, Justice Binnie rejected the *Sellars* principle and offered a new framework for lower courts confronted with *obiter* of the Supreme Court of Canada.

Justice Binnie distinguished between portions of a Supreme Court judgment that have *stare decisis* effect and others that do not. He explained that at least some of what the Supreme Court of Canada says is *not* binding, for it is not really even *obiter* at all—it therefore has no *stare decisis* effect whatsoever. Such irrelevant remarks, which are “not part of the analysis...should not be taken as imposing a rule or norm or even a statistical hurdle limiting other courts.”<sup>72</sup>

When it comes to *obiter*, however, sorting out its precise weight is a matter of determining the place of that *obiter* on a spectrum:

All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” in the sense the *Sellars* principle in its most exaggerated form would have it.<sup>73</sup>

This passage appears to offer the following taxonomy of the content of the *binding* portion of the Court’s judgments, from most to least weighty: (1) dispositive *ratio decidendi*; (2) a wider circle of analysis intended as guidance; and (3) examples or exposition that are intended as persuasive.

When this taxonomy is read alongside Justice Binnie’s remarks about the Oakes Test, something curious comes to the fore. It turns out that the Oakes Test was indeed *obiter*, though it was, of course, uncontroversially binding *obiter* of fundamental importance. That is, Justice Binnie makes clear that the Oakes Test is part of what *Oakes* decided. “What the Court decided,” and thus what is binding, cuts across the *obiter* and *ratio* distinction. “What the Court decided” is also a notion broader than what is necessary to settle the dispute as between the parties:

The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed

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72. *Ibid* at para 58.

73. *Ibid* at para 57. While not the entirety of what the court decides will be *ratio*, it remains the case that “what the Court decides” is binding. Accordingly, if part of what the Court decides includes *obiter*, it will thereby be binding. See *Prokofiew ONCA, supra* note 53 at paras 18-19.

out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test.<sup>74</sup>

In one sense, this taxonomical classification of the *Oakes* Test is surprising—initially perhaps even shocking. The *Oakes* Test, of all things, is *obiter*?<sup>75</sup> Yet, from the perspective of Justice Binnie’s decision in *Henry*, this is perfectly sensible—after all, both *ratio* and *obiter* can share in binding force because the notion of “what the Court decides” cuts across the distinction. Once we deflate the *obiter-ratio* distinction of the significance attached to it in the textbook tradition, on which *obiter* is strictly non-binding, this classification of the *Oakes* Test looks more palatable.

Put differently, as a jurisprudential innovator, the Supreme Court of Canada exists to do what it did in *Oakes*. Whether the *Oakes* Test is *obiter* or not is therefore somewhat beside the point. The Court had to devise a legal framework for section 1 of the *Charter* (largely) from scratch.<sup>76</sup> This is a core competency of the modern Court, and as such, it is clear to all Canadian lawyers that *Oakes* is a highly significant decision for our law, *obiter* or not.

However, all of this reveals a curious ambivalence in the spectrum established by Justice Binnie in *Henry*. The idea that “what the Court decides” is a category that cuts across the *obiter-ratio* distinction is also grounds to believe that the distinction is actually obsolete. That is, perhaps there should not be any difference between the *stare decisis* effect of the Court’s *obiter* and its *ratio*. The most authentic expression of that idea is the *Sellars* principle.

Despite this, the tripartite taxonomy established by Justice Binnie still gives pride of place to the *ratio* in the traditional sense. The starting point of the spectrum—the category with the most potent *stare decisis* effect—is the

74. *Henry*, *supra* note 53 at para 57 [emphasis added].

75. The *Oakes* Test has the distinctive honour of being annually celebrated by the Students Law Society at the University of Toronto Faculty of Law, via “*Oakes* Day.” Events include “A Pressing & Substantial Breakfast.”

76. This is only “largely” the case because there were existing precedents concerning the section 1 analysis, such as *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295. None has taken on the significance of *Oakes*. Moreover, despite the fact that the (clearly precedential) proportionality test in *Oakes* was technically *obiter*, it has been refined and tweaked in subsequent cases. See *e.g. R v Edwards Books and Art Ltd*, [1986] 2 SCR 713; *Egan v Canada*, [1995] 2 SCR 513. See also Sujit Choudhry, “So What is the Real Legacy of *Oakes*?: Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34 SCLR 501 at 505, DOI: <https://doi.org/10.60082/2563-8505.1107>.

In *Oakes*, Dickson C.J. set out the analytical framework governing section 1 interpretation, which, despite two decades of doctrinal elaboration, qualification and modification, still provides the basic framework within which limitations analysis is conducted.

“dispositive *ratio decidendi*” which is “generally rooted in the facts.”<sup>77</sup> However, if the Court’s modern institutional mandate primarily consists of pioneering novel analytical frameworks, it is not clear why the portions of a judgement that have a connection to the particular facts of the case at bar should have a higher status on the spectrum than the analytical frameworks of the ilk of *Oakes* (which, as we have seen, is *obiter*, albeit binding *obiter*). Why should the *Oakes* Test occupy a lower position on the rungs of *stare decisis* than the application of a well-worn and banal legal principle that decides a dispute as between the parties? This is a strange result, precisely because the modern orthodoxy counsels that the Court’s function, as our apex court, is to do what it did in *Oakes*. Put differently, the spectrum established by Justice Binnie appears more apt for “ordinary,” error-correcting appellate courts.

While it may not be implausible *per se* to relegate the *Oakes* Test to *obiter* if the *Oakes* Test is nonetheless binding *obiter*, it *is* implausible to assign the *Oakes* Test a lower place on the precedential hierarchy than, for example, a cookie-cutter, five-paragraph judgment in which the Court affirms the ruling of a court of appeal.<sup>78</sup> All of the institutional truths that Justice Binnie rehearses about the modern Supreme Court of Canada cut *against* regarding the *Oakes* Test as anything other than the weightiest type of contribution the Supreme Court of Canada can make to our law. Indeed, Justice Binnie seems to make this point himself, noting that “much of the Court’s work (particularly under the *Charter*) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. In those circumstances, the Court nevertheless intended that effect be given to the broader analysis.”<sup>79</sup>

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77. *Henry*, *supra* note 53 at para 57.

78. *Se e.g. R v Waterman*, 2021 SCC 5. Judgments like *Waterman* are instances in which the Supreme Court of Canada is functioning akin to an “ordinary” court of appeal rather than a jurisprudential overseer, albeit as the final court of appeal in the country. Accordingly, when the Court affirms a court of appeal judgment that itself contains a mix of *obiter* and *ratio*, it may well preserve that distinction even in its own judgment affirming the lower court. The lower courts in Australia, for example, take the view that the *obiter* of appellate courts do not share in the same special precedential authority as that of the High Court of Australia. See *e.g. DPP v Patrick Stevedores Holdings Pty Ltd*, [2012] VSCA 300 at para 127.

The decisions of intermediate appellate courts do not have the precedential weight of decisions of the High Court. Whatever may be the full implications of *Farab*, and its injunction that ‘seriously considered dicta uttered by a majority’ of the High Court should be regarded as binding, there is nothing to suggest that this principle applies to such dicta in the judgments of intermediate appellate courts. [citations omitted].

79. *Henry*, *supra* note 53 at para 53.



As a practical matter, this taxonomical classification is of little significance. *Oakes* will continue to be regarded as a decision of profound significance for Canadian law. My point is that Justice Binnie's astute observation that the question for lower courts faced with the Court's judgments is "what did the case decide?" itself militates for *ousting* the *obiter-ratio* distinction, rather than merely remaking it. That distinction is rooted in the dispute resolution paradigm. Justice Binnie's underlying rationale recommends a different model for precedent entirely, according to which every issue the Court turns its attention to in a sustained fashion is thereby definitively decided. The eventual doctrinal framework he crafted is a mismatch with that principled rationale. I take up this argument in more detail in Part V. But, for now, the broad lesson we should take from *Henry* is that the Court has attempted to reach a middle ground between the expansive *Sellars* principle and the traditional, narrow understanding of the *obiter-ratio* distinction—a middle ground that I will argue is ultimately unstable for principled and practical reasons.

That middle ground has been further developed in *Prokofiew*, the latest instalment in the *obiter* jurisprudence.<sup>80</sup> In *Prokofiew*, the Court further drained its *obiter* of its potency (a potency that reached its zenith in *Sellars*). In doing so, the Court has exacerbated the mismatch between the weight of its *obiter* and its self-avowed institutional role.

Once again, evidence law provided the doctrinal context for the Court to consider the weight of its *obiter*. The accused Prokofiew and his co-accused Solty were tried for fraud. Solty's defence consisted in pinning the blame on Prokofiew. Solty's lawyer painted his client as an unassuming dupe who had been exploited by the wily and seasoned Prokofiew.<sup>81</sup> In his closing argument, Solty's counsel contrasted the fact that his client had testified at the trial with the fact that Prokofiew had not. He suggested that Prokofiew's failure to testify was an indication that he had something to hide.

As it happens, inferring guilt from the accused's silence is an error of law. However, the trial judge did not issue any warning to the jury on this point. He declined to do so based on his strict interpretation of section 4(6) of the *Canada Evidence Act*, which prohibited a trial judge from making a "comment" on the failure of the accused to testify. The trial judge understood this provision to bar him from drawing any attention to the silence of the accused whatsoever,

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80. *Prokofiew* SCC, *supra* note 56, aff'g *Prokofiew* ONCA, *supra* note 5, aff'g 2005 CarswellOnt 3201 (ON SC).

81. See *Prokofiew* SCC, *supra* note 56 at para 49.

even in the form of a remedial instruction.<sup>82</sup> He was persuaded to reach this conclusion by the *obiter* of Justice Sopinka in *R v Noble* (“*Noble*”):

Section 4(6), whose validity is not in issue in the present case, prevents a trial judge from commenting on the silence of the accused. The trial judge is therefore prevented from instructing the jury on the impermissibility of using silence to take the case against the accused to one that proves guilt beyond a reasonable doubt.<sup>83</sup>

The substantive evidence law dilemma in *Prokofiew* is easy to see. The lack of a remedial instruction from the trial judge might itself be interpreted by the jury as a “comment” permitting the illicit inference. On the other hand, giving a remedial instruction might be seen as drawing attention to the accused’s silence, and therefore be precisely the type of judicial conduct that the provision contemplates and prohibits.

Justice Sopinka’s comment, which regarded the former tack as the lesser of two evils, was clearly *obiter* in the traditional sense. *Noble* involved a single accused tried by *judge alone*; *Prokofiew* was a jury trial. The legal issue in *Noble* was whether an accused’s failure to testify could be put on the scales in determining whether the Crown had discharged its burden of proof beyond a reasonable doubt. The majority of the Court answered that it could not.<sup>84</sup>

The trial judge’s decision in *Prokofiew*, which relied on the *Noble obiter*, was appealed to the Court of Appeal for Ontario. On appeal, Justice Doherty offered a comprehensive analysis of the weight of the Supreme Court’s *obiter*. He chose to depart from the *Noble obiter*, concluding that it was not binding upon him. Justice Doherty’s judgment is the most sustained attention any Canadian court has given to the question of the weight of the Court’s *obiter*. On appeal to the Supreme Court of Canada, his conclusion on the *obiter* issue was endorsed by the entire Court.<sup>85</sup> Accordingly, it merits close attention and analysis.

Justice Doherty noted that the single relevant question for lower courts confronted with Supreme Court *obiter* after *Henry* is how to distinguish the Court’s binding and non-binding *obiter*.<sup>86</sup> However, reflecting on Justice Binnie’s

82. *Ibid* at para 43.

83. *R v Noble*, [1997] 1 SCR 874 at para 16 [*Noble*, cited to SCR].

84. *Ibid* at para 53.

85. The dissent explicitly endorsed Justice Doherty’s view of *obiter* at paras 71-72. See *Prokofiew* SCC, *supra* note 56. The majority did not explicitly discuss the *obiter* issue, but arrived at the same conclusion on the legal question concerning section 4(6), and summarized its view in paragraph 1 as dismissing the appeal for the reasons of Justice Doherty. The disagreement between the majority and the dissent consisted in whether the legal error was significant enough to warrant a new trial, rather than the *obiter* issue.

86. *Prokofiew* ONCA, *supra* note 5 at para 19.

approach in *Henry*, Justice Doherty cautioned that “[l]ower courts should be slow to characterize *obiter* from the Supreme Court of Canada as non-binding.”<sup>87</sup> Indeed, “[i]t is best [for lower courts] to begin from the premise that all *obiter* from the Supreme Court of Canada should be followed, and to move away from that premise only where a reading of the relevant judgment provides a cogent reason for not applying that *obiter*.”<sup>88</sup>

Despite these warnings, Justice Doherty proceeded to depart from Justice Sopinka’s *obiter* in *Noble*. He did so for three reasons, all of which warrant examination. Read in tandem, Justice Doherty’s reasons for departing from *Noble* offer lower courts powerful ways to discard the Supreme Court’s *obiter*. My contention will be that the post-*Prokofew* doctrine allows lower courts to adopt an even less deferential posture with respect to the Court’s *obiter* than envisioned by Justice Binnie in *Henry*. As a result, the doctrine is now even further away from the *Sellars* principle—which demanded compliance with all of the Court’s *obiter*—than even under *Henry*.

With that in mind, let me turn to Justice Doherty’s three reasons for departing from the *obiter* in *Noble*. First, Justice Doherty noted that Justice Sopinka’s comments in *Noble* cited no prior Supreme Court jurisprudence. In fact, a review of prior Supreme Court authorities suggested that a trial judge can indeed comment on the silence of the accused to warn a jury about drawing an illicit inference. Justice Doherty emphasized that those prior authorities—*R v McConnell*,<sup>89</sup> *Avon v R*,<sup>90</sup> and *R v Potvin*<sup>91</sup>—affirmed this point as part of the *ratio decidendi* of their judgments. Moreover, these authorities had not been explicitly considered and overruled.<sup>92</sup> Thus, Justice Doherty reasoned that when a lower court is faced with a conflict between earlier Supreme Court *ratio* and later Supreme Court *obiter*, earlier *ratio* must prevail.<sup>93</sup>

Recall that the rationale underlying *Henry* emphasises that the Court is not primarily an error-corrector but a jurisprudential innovator. The first exception to the bindingness of *obiter* identified by Justice Doherty sits in some tension with this rationale. In *Henry*, Justice Binnie endorsed the extra-judicially delivered remarks of Justice Wilson, according to which the Court “should make the most of the opportunity [to pronounce on a particular area of law] by adopting

87. *Ibid* at para 21.

88. *Ibid*.

89. [1996] 1 SCR 1075.

90. [1971] SCR 650.

91. [1989] 1 SCR 525.

92. *Ibid* at para 27.

93. *Ibid* at para 28.

a more expansive approach to our decision-making role.”<sup>94</sup> The Court’s leave to appeal process demonstrates that *it* decides when to make a statement on a point of law.<sup>95</sup> Moreover, as Chief Justice Laskin once explained, “it is part of our philosophy of adjudication—and we are not unique in this—that each judge may put his own questions and supply his own answers.”<sup>96</sup> If so, then perhaps well-considered, novel *obiter* of the Court *should* be regarded as controlling, even if it conflicts with the *ratio* of older authorities. Indeed, it is only on the dispute-resolution paradigm of adjudication that older *ratio* should trump newer *obiter*. Put differently, the latest remarks of a jurisprudential overseer are its most relevant ones. Justice Doherty’s judgment does not canvass these propositions about the institutional role of the modern Court. Had he done so, the tension with his first proposed reason for departing from the Court’s prior *obiter* might have been more apparent.

Justice Doherty’s second reason for departing from the *obiter* in *Noble* was that the *obiter* played a “peripheral role” in that decision.<sup>97</sup> In particular, Justice Doherty held that Justice Sopinka’s observation about the scope of section 4(6) of the *Evidence Act* merely formed the “constitutional backdrop” of Justice Sopinka’s analysis of the considerations that compete with an accused’s right to silence.<sup>98</sup> Justice Sopinka gave the example of section 4(6) as one practical limit on the right to silence. Section 4(6) constituted a limit on that right because, in his view, this provision prevented a trial judge from warning a jury against inferring guilt from a failure to testify.

Justice Doherty’s judgment in *Prokofiew* seems to suggest that Justice Sopinka’s remark was incidental to the appeal, having little to do with the dispute at hand. While Justice Sopinka’s comment was clearly *obiter* in that traditional sense, it is not easy to determine why it was not also part of the “what the case decides” portion of the judgment in the post-*Henry* sense. Recall from our discussion above that *Henry* trains the analysis on one question: “The issue in each case, to return to the Halsbury question, is what did the case decide?”<sup>99</sup> And recall also, that “what the case decides” can cut across the *obiter* and *ratio* distinction. Indeed, one might cogently reason that the analytical route to the

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94. *Henry*, *supra* note 53 at para 53, citing *Wilson*, *supra* note 9 at 234.

95. See “Rowe Questionnaire,” *supra* note 46.

96. Laskin, *supra* note 8 at 469.

97. *Prokofiew ONCA*, *supra* note 5 at para 36.

98. *Ibid.*

99. *Henry*, *supra* note 53 at para 57.

Court's outcome is part of what the case decides.<sup>100</sup> And Justice Sopinka's remark appears to fit this description. On this interpretation—which seems perfectly credible—Justice Sopinka's *obiter* in *Noble* would properly be regarded as binding.

This is not to say that Justice Sopinka's comments in *Noble* should have been taken as gospel, never to be subsequently questioned. This, I take it, is the thrust of Justice Binnie's sensible warning in *Henry* that words in the judgments of the Court are not to be "treated as if enacted by a statute."<sup>101</sup> Crucially, however, my focus here is on vertical *stare decisis*, namely, when a lower court may disregard binding precedent of a higher court.<sup>102</sup> It may well have been appropriate for the Supreme Court of Canada itself to revisit Justice Sopinka's comments in a later case that squarely raised these issues. It is quite another matter to allow a *lower court* to depart from the *obiter* of a jurisprudential overseer. What is remarkable about Justice Doherty's judgment (and that of the trial judge before him) is that it permits just that. Justice Doherty held that it was permissible for a lower court to depart from Justice Sopinka's comments in *Noble*. Put differently, any vertical *stare decisis* effect of the Court's *obiter* could be ignored. On appeal, the Court itself affirmed the same view—*i.e.*, the Court affirmed that a *lower court* could ignore its clear and unequivocal *obiter* on the issue.<sup>103</sup> This second ground for departing from Supreme Court *obiter* also stands in tension with the Court's role as a jurisprudential overseer.

This brings me to Justice Doherty's third and final reason for declining to follow the *Noble obiter*. Justice Doherty held that the constitutional vision articulated by Justice Sopinka in *Noble* was better served by the view opposite to Justice Sopinka's *obiter*. That is, an accused's right to silence is better protected by *permitting* the trial judge to issue a remedial instruction against inferring guilt from silence. In effect, Justice Doherty reasoned that Justice Sopinka was simply substantively wrong in his *Noble obiter*. The constitutional right to silence does not require an artificial limit on a judge's ability to comment on the accused's decision not to testify. Section 4(6) should be interpreted purposively rather than

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100. This shows that the categories established by Justice Binnie in *Henry* are by no means the single obvious way to classify the nature of "what the court decides." Charles Tyler has suggested, using the example of *National Federation of Independent Business v Sebelius*, that a court's holding could include any proposition that was on the court's analytical route to its outcome. Charles W Tyler, "The Adjudicative Model of Precedent" (2020) 87 U Chicago L Rev 1551 at 1562-1563; 567 US 519 at 548-58 (per Roberts CJ).

101. *Henry*, *supra* note 53 at para 57.

102. See *Bedford*, *supra* note 6.

103. See *Prokofiew SCC*, *supra* note 56 at paras 1, 55, 71-2.

literally.<sup>104</sup> Recall that Justice Sopinka had reasoned that this was a regrettable but necessary limit on the accused's constitutional right to silence—a reality that had to be tolerated in operationalizing that constitutional right in our legal system. Justice Doherty argued that Justice Sopinka had failed to realize that the right to silence is in fact more robustly protected if a trial judge is allowed to ward off the possibility of the jury drawing a constitutionally illicit inference with explicit instruction.<sup>105</sup> The very principles that Justice Sopinka canvassed in *Noble* showed that his *obiter* was ill-advised.

This is a remarkable development. *Henry* did not explicitly contemplate the possibility of a lower court departing from Supreme Court *obiter* because it determined that the *obiter* was incorrect. No part of Justice Binnie's tripartite taxonomy includes this possibility. In addition to effacing the framework in *Henry*, this exception to vertical *stare decisis* is the most difficult to square, as a principled matter, with the Court's new institutional role. As we have seen, "what the Court decides" is now a category that cuts across the *ratio* and *obiter* distinction.<sup>106</sup> *Obiter* shares in *stare decisis* effect, whether correct or incorrect. *Prokofiew* thus creates another radical exception to vertical *stare decisis*.<sup>107</sup>

It is true, of course, that Justice Doherty offered *three* reasons for departing from Justice Sopinka's *obiter* in *Noble*. Justice Doherty's view that Justice Sopinka effectively misspoke was not Justice Doherty's sole reason for departing from his judgment. There were prior, un-cited decisions of the Court that stood in tension with his *obiter*, and the *obiter* comment was apparently made ancillary to the main thrust of the appeal. So perhaps the more plausible way to read the judgment is

104. See *Prokofiew* ONCA, *supra* note 5 at para 39.

105. *Ibid.*

106. *Ibid* at para 18 ("In *R. v. Henry*, [2005] 3 S.C.R. 609, Justice Binnie, writing for a unanimous court, recognized that *stare decisis* commands compliance not only with the *ratio decidendi*, but some of the *obiter* from the Supreme Court of Canada.").

107. A lower court presented with *obiter dicta* of the Supreme Court must engage in a two-step analysis. First, the court must characterize the *obiter* in question according to the *Henry-Prokofiew* spectrum. If the court settles on the view that the remark in question is not even binding at all, the *stare decisis* question does not even arise. If, however, the remark in question enjoys some *stare decisis* effect, then the court must apply the *Bedford* test to determine if this is one of the narrow circumstances in which a lower court may depart from binding precedent of a higher court. The Court has since clarified the *Bedford* test in *Carter* (*supra* note 37) and *R v Comeau*, 2018 SCC 15. In essence, the test requires a fundamental change in circumstances, significant developments in the law, or fresh *Charter* issues. This series of cases has been dubbed the "*Bedford* Trilogy." See Shannon Hale, "The *Bedford* Trilogy and the Shifting Foundations of Vertical *Stare Decisis*: Emancipation from Judicial Restraint?" (2020) Dal J Leg Stud 97.

that these three reasons, though perhaps individually inadequate to disregard Supreme Court of Canada *obiter*, were nonetheless jointly sufficient to do so.

This may indeed be true, but it also remains true that such considerations were not envisioned by the Court's *obiter* in *Henry*. Stepping back, it is clear that the Court's retreat from *Sellars* has been a long march indeed. The jurisprudential arc now bends back towards the textbook tradition's view of the *obiter-ratio* distinction, according to which *obiter* does not bind lower courts at all, even as the Court now unabashedly makes law. As I have implied throughout this Part, the *Sellars* principle is the most authentic expression of the vertical *stare decisis* effect of the Court's *obiter* vis-à-vis its role as a jurisprudential overseer. A departure from *Sellars* is thus an embrace of a more classical view.

Having traced the *Sellars–Henry–Prokofiew* shift, I now turn to directly developing my argument against the present state of the doctrine.

## IV. PRACTICAL AND PRINCIPLED PROBLEMS

### A. JURISPRUDENTIAL GUIDANCE

In Part III above, I argued that *Henry* and *Prokofiew* give lower courts a surprising leeway to disregard the Supreme Court's *obiter*. In this subsection, I point to key practical failings of the doctrine, before returning to principled problems in the next subsection. Despite their avowed aims, *Henry* and *Prokofiew* do not succeed in giving practical guidance to lower courts with respect to the Court's *obiter*. For one, each of the three categories established in *Henry* has a core and penumbral meaning.<sup>108</sup> The border between category two and category three in particular—"a wider circle of analysis intended as guidance" versus "examples or exposition intended as persuasive"—seems particularly difficult to locate. For example, we might wonder if anything populates category two other than a novel analytical framework, such as the Oakes Test.<sup>109</sup>

Canadian doctrine mirrors Australian law on this point, and the criticisms of the latter are instructive for us as well. In a widely-criticized decision in *Farah Constructions v Say-Dee* ("*Farah*"), the High Court of Australia held that

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108. See HLA Hart, *The Concept of Law* (Clarendon Press, 1961), at 121-144.

109. For an example of the Court crafting a new analytical framework, see *R v Bradshaw*, 2017 SCC 35. The Court in *Bradshaw* overhauled the test for corroborative evidence in the hearsay analysis.

lower courts are bound by “seriously considered dicta” of the High Court.<sup>110</sup> Unsurprisingly, commentators (and other judges) have derided the decision’s lack of guidance on what constitutes “serious consideration” and whether this is a workable term at all.<sup>111</sup> Canadian doctrine, which amounts to much the same position, is vulnerable to the same criticisms about the taxonomical exercise it demands of lower courts.

Even after that difficult classification exercise is completed, a lower court must ponder the additional considerations canvassed in *Prokofiew*. Does the *obiter* really cohere with the principles animating the decision? This kind of open-ended invitation to consider the structural integrity of a Supreme Court of Canada decision—the links between its principled vision and some particular doctrine it suggests in *obiter*—is likely to be uncomfortable for a lower court. Other difficult questions beckon. Did the Court make its *obiter* remark as part of reaching its analytical conclusion on the actual legal issue in the case at bar? Or was it merely ancillary, a background comment inessential to that conclusion, such that it has no *stare decisis* effect at all?<sup>112</sup> The *Henry-Prokofiew* doctrine’s use

110. [2007] HCA 22 at paras 134, 158 [*Farah*]; *Bofinger v Kingsway Group Ltd*, [2009] HCA 44 at 86 [*Bofinger*]. See also Justice Keith Mason, “President Mason’s Farewell Speech” (2008) Austl LJ 768 at 769 (arguing that *Farah* is “a profound shift in the rules of judicial engagement” and constitutes an “assertion of a High Court monopoly in the essential developmental aspect of the common law” in Australia). The High Court itself has subsequently been ambivalent about this pronouncement. See *The Queen v Keenan*, [2009] HCA 1 at para 35 [citations omitted]. Justice Kirby wrote:

In recent years, this Court has repeatedly reminded judges at trial and intermediate courts of their duty to conform to the rulings of this Court in matters submitted to it for its decision. It has instructed them to observe ‘seriously considered dicta uttered by a majority of this Court’. Although, respectfully, I question whether the legal duty of obedience extends beyond obedience to the *rationes decidendi* of earlier decisions, I certainly agree that, where such decisions exist, the legal principles for which they stand must be applied by judicial officers subject to this Court’s authority as an aspect of the rule of obedience to the doctrine of judicial precedent that applies throughout the Judicature of this country.

For a useful overview of the development of the law after *Farah*, see James Lee, “Precedent on High: The High Court of Australia and ‘Seriously Considered Dicta,’” *Opinions on High* (21 August 2013), online: <blogs.unimelb.edu.au/opinionsonhigh/2013/08/21/lee-precedent-on-high> [perma.cc/US85-X72K]. See also Heydon, *supra* note 58 at 30-39.

111. Harding & Malkin, *supra* note 25; Justice Rares, *supra* note 25 at para 3.

112. To be clear, the post-*Prokofiew* doctrine is not entirely idiosyncratic. After a bitter fight, the United States Court of Appeals for the Ninth Circuit has settled on a similar view, holding that “where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.” *United States v Johnson*, 256 F (3d) 895 at 914 (Cir, 2001), en banc. See also John Roemer, “9th Circuit Dukes it Out over Dicta,” *Daily Journal* (26 Feb 2010), online: <www.nonpublication.com/roemer2.26.10.htm> [perma.cc/QE2Y-28NK]; Ryan S Killian, “Dicta and the Rule of Law” [2013] Pepp L Rev 1; Tyler, *supra* note 100 at 1567-74.



of open-textured terms like “germane,” “ancillary,” and “reasoned consideration” make this a challenging exercise for lower courts.

One might respond that there is nothing troubling about the indeterminate and open-textured nature of these terms. After all, law as an enterprise is full of indeterminacy and open-textured rules. However, while it may be tolerable—and perhaps even healthy for the development of the common law—for substantive legal rules to be partly indeterminate, it is quite another thing for the *stare decisis* effect of a particular legal rule to itself be indeterminate. *This* kind of indeterminacy threatens the legitimacy of the courts in a deeper sense, precisely because it goes to the very structure of adjudication, which is intended to produce rules stable enough to inform citizens’ reasonable expectations.<sup>113</sup> Whereas indeterminacy in a single legal rule’s application to some factual scenario is a relatively confined, modular concern that can be resolved by a particular court, uncertainty with respect to the notion of precedent itself is an endemic concern.<sup>114</sup>

This uncertainty is exacerbated by the emphasis that the *Henry-Prokofew* spectrum places on the rhetorical force of the delivery of particular *obiter*. The origin of this issue is in *Henry* itself, which appears to make the “bindingness”

113. Malcolm Rowe & Leanna Katz, “A Practical Guide to *Stare Decisis*” (2020) 41 Windsor Rev Legal Soc Issues 1 at 4.

114. Indeed, one key rationale for *stare decisis* is that it promotes certainty in the law. See Sharpe, *supra* note 11 at 168. One might respond that the *Sellars* principle, too, suffers from an indeterminacy problem, albeit of a different kind. That is, if everything the SCC has said is equally binding, in the likely event that the SCC has said inconsistent things across cases, there is the problem of determining which is binding. This warrants two responses. First, recall that I am not recommending the ultimate endorsement of the *Sellars* principle but rather arguing that *Sellars* is the most accurate reflection of the modern understanding of the Court as a jurisprudential overseer. Second, and more directly, I think the *Sellars* principle does have a more straightforward way of resolving its indeterminacy problem: it is the latest pronouncement that is binding. This is part and parcel of the view that the Court is an innovator of the law, reshaping doctrine as is necessary and updating it in light of present-day demands. Again, I am not arguing that the Court has the institutional competence to do what the modern vision of the Court requires. Relatedly, chronic uncertainty about the content of a legal rule (*e.g.* with respect to section 15 of the *Charter*, which has been analyzed inconsistently in a series of cases) can also be threatening to the legitimacy of a court, especially one that styles itself as a jurisprudential shepherd. See *e.g.* *Fraser v Canada*, 2020 SCC 28 (in which three judgments were produced). Justices Brown and Rowe, dissenting, found that the challenge should fail at the second stage of the section 15(1) framework. Justice Côté, dissenting, found that the claim should fail at the first stage of the s 15(1) analysis. The majority opinion, authored by Justice Abella, held that there was an unjustifiable infringement of s 15(1). See also *R v Sharma*, 2022 SCC 39 [*Sharma*] (featuring a 5–4 split on the section 15 issue). While it is plausible that these recurring analytical disagreements and routine fracturing threaten the Court’s legitimacy, legal subjects are still capable of understanding that the majority rule governs their conduct. A legal subject that is confronted with a majority opinion without knowing if it is precedential at all faces a deeper problem in using that judgment to guide their behaviour.

of some portion of the Court's judgment proportional to how forcefully the authoring judge *intended* to make the point:

All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive.<sup>115</sup>

Practically speaking, a lower court confronted with a remark in Supreme Court of Canada judgment may find it difficult to determine whether the authoring judge really intended it, or whether it was merely a throwaway line. *Prokofew* was an easy case because the *obiter* in *Noble* was short.<sup>116</sup> If, however, Justice Sopinka had explained that he had reviewed the prior jurisprudence that allowed for an explicit jury instruction about the failure of the accused to testify and had concluded that the case law was a mistake, the logic of *Prokofew* would make determining the weight of such *obiter* a very difficult exercise for a lower court. A lower court would be faced with the fact that this comment appeared ancillary to the result in the case, yet was bolstered in its *stare decisis* effect by the fact that Justice Sopinka wrote the judgment in a way that appears to suggest that *he really meant it*.

More worryingly, from a principled perspective, this emphasis on the rhetorical force of the judgment effaces the notion of *stare decisis*. Judges should

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115. *Henry*, *supra* note 53 at para 57. See also *Henry*, *supra* note 53 at para 53 (“In Canada in the 1970s, the challenge became more acute when this Court’s mandate became oriented less to error correction and more to development of the jurisprudence.”). The Supreme Court of the United States has used similar language to describe the binding effect of its *obiter*. It has held that its constitutional rulings establish binding law even if unnecessary for the ultimate disposition of the case. See *Camreta v Greene* (2011), 563 US 692 at 704-705 [emphasis added].

The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or “statements in opinions.”...They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong...And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court’s permission, to promote clarity—and observance—of constitutional rules. [emphasis added]

116. Indeed, one may be of the view, as Justice Doherty appeared to be, that the *obiter* in *Noble* was so short that it was not intended to have *stare decisis* effect at all. In my view, this overstates how short the *obiter* was. It was certainly too long to be classified as a throwaway line. Indeed, it was long enough to justify the Court of Appeal for Ontario’s careful consideration of its *stare decisis* effect.

not be allowed to augment the *stare decisis* effect of their *obiter* by writing more forcefully. It is not the psychological attitudes of judges that *stare decisis* intends to preserve. (Otherwise, we could simply ask retired judges what they meant by particular phrases in their judgments and save lawyers the trouble of making interpretive arguments). Accordingly, it should not be the task of a lower court judge to determine if a particular Supreme Court judge *really* meant what they said in their *obiter*.<sup>117</sup> The point of disciplining judgments into written form is to allow the judgment to stand for itself. By inviting an inquiry into the intentions of the authoring judge as revealed by the rhetoric accompanying the delivery of *obiter*, existing doctrine makes the very error that Justice Binnie warned us about in *Henry*, *viz.*, turning the interpretation of past Supreme Court judgments into a matter of statutory interpretation. Lower courts are directed to pore over each word of a judgment to determine if the *obiter* was truly intended to be binding or just a throwaway line. Gleaning judicial intent from the language in a judgment is the precise analogue of gleaning legislative intent in statutory interpretation, which Justice Binnie warned against.

Perhaps a more charitable gloss on the *Henry* doctrine is to suggest that it is *jurisprudential* force, rather than rhetorical force, that determines the weightiness of particular *obiter*. Lengthy discussion of a legal issue is evidence of the judge's intentions, but more importantly, it is also evidence of sustained jurisprudential analysis that warrants deference. This is the gloss of *Henry* that Justice Rowe has offered in his extra-judicial writing:

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117. One might argue that the venerable practice of distinguishing cases shows that lower courts routinely dodge the *stare decisis* effects of higher court judgments. However, the process of distinguishing cases has a principled pedigree in the common law tradition that makes it different than a lower court disregarding higher court *obiter* as, say, inapplicable because it is misguided or simply wrong. For one, there is a clear rhetorical difference. A lower court that distinguishes the opinion of a higher court accepts that the authority is binding but says it is inapplicable. A lower court that uses *Prokofiew*-like reasons to disregard *obiter*, by contrast, challenges the inherent "bindingness" of the authority itself. In this vein, Scott Hershovitz has said that distinguishing cases is authentic to *stare decisis* rather than effacing it. See Scott Hershovitz, "Integrity and Stare Decisis" in Scott Hershovitz, ed, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2008) at 113, DOI: <<https://doi.org/10.1093/acprof:oso/9780199546145.003.0006>>. See also Sharpe, *supra* note 11 at 150; Rowe & Katz, *supra* note 113 at 10-11 (noting that overruling a case is a bolder step than distinguishing it). Of course, all of this stands in contrast to more skeptical views about the formalist gloss of *stare decisis* and precedent. For a useful overview of such views, see Brian Leiter, "Realism about Precedent" in Timothy Endicott, Hafsteinn Dan Kristjansson & Sebastien Lewis, eds, *Philosophical Foundations of Precedent* (Oxford University Press, 2023), DOI: <<https://doi.org/10.1093/oso/9780192857248.003.0024>>.

We offer the view, which we see in full accord with *Henry*, that to the extent a statement in a decision reflects the court's *considered* view of an area of law, it provides guidance that should be treated as binding. That is, where the Supreme Court turns its full attention to an issue and deals with it definitively, the concepts of *ratio* and *obiter* tend to lose significance. Similarly, where an issue is dealt with in passing, even where it is part of the *ratio*, we would see it as having weak precedential value. Often, when preparing reasons for decision, there is discussion not merely of what the court needs to decide in order to dispose of a given case, but of what further guidance can usefully be given with the case at hand as a vehicle for the purpose.<sup>118</sup>

Justice Rowe is correct to observe that the distinction between *obiter* and *ratio* fades in significance when the Court turns its sustained attention to an issue. However, Justice Rowe's contention that only "considered views" should enjoy strong binding effect is not authentic to the *Henry-Prokofiew* spectrum, contrary to his assurance that it is "in full accord with *Henry*."<sup>119</sup> The view that considered pronouncements enjoy strong precedential value (while passing remarks do not) scrambles the *Henry-Prokofiew* spectrum. On Justice Rowe's proposal, an issue that is dealt with in passing, "even where it is part of the ratio," may have weaker precedential value than an issue to which the Court turns its full attention but which, strictly speaking, is *obiter*. By contrast, recall that the *Henry-Prokofiew* spectrum still preserves the highest possible precedential value for the entirety of the *ratio*. Justice Rowe's approach expunges the *obiter-ratio* distinction and replaces it with the question of how much jurisprudential attention was paid to a particular issue. Though it purports to remake and yet preserve the traditional distinction, it simply replaces it with something else.<sup>120</sup>

Charles Tyler has advocated Justice Rowe's view of precedent in the United States.<sup>121</sup> Tyler dubs it the "adjudicative model" of precedent.<sup>122</sup> On Tyler's view, the binding portion of a judgment is just that which the Court explicitly claims to resolve, through an "application of the judicial mind."<sup>123</sup> Tellingly, Tyler and the American courts that have accepted this view of precedent regard this as *replacing* the *obiter* and *ratio* distinction, rather than remaking it. Similarly, Justice Rowe's "jurisprudential force" view, while more workable than the rhetorical force analysis

118. Rowe & Katz, *supra* note 113 at 10 [emphasis in original]. Notably, Justice Rowe's view appears to track Australian law quite closely. See *Farah*, *supra* note 110; *Bofinger*, *supra* note 110; *Harding & Malkin*, *supra* note 25; *Rares*, *supra* note 25.

119. Rowe & Katz, *supra* note 113 at 10.

120. *Ibid* at 9-10.

121. See Tyler, *supra* note 100.

122. *Ibid*.

123. *Ibid* at 1566, quoting *Schmidt v Prince George's Hospital* (2001), 784 A (2d) 1112 (Md Ct App) at 1121.

suggested by *Henry*, is not an interpretation of the *Henry-Prokofiew* spectrum or the traditional distinction at all. It stakes out an entirely new approach. As a result, it cannot be of practical guidance to lower courts confronted with the taxonomy created by the *Henry-Prokofiew* spectrum.<sup>124</sup>

## B. REFERENCE OPINIONS AND OBITER DICTA

The previous subsection canvassed practical concerns with the post-*Prokofiew* doctrine while only hinting at some principled problems. Here, I offer a more sustained, principled argument against the doctrine through a comparison with reference opinions. The Court's retreat from *Sellars* is particularly striking when juxtaposed with the Court's remarkable power to issue reference opinions as enshrined in section 53 of the *Supreme Court Act*.<sup>125</sup> Few apex courts possess this power. For example, the Supreme Court of the United States does not.<sup>126</sup> The Supreme Court of Canada has used its advisory power to pronounce on matters of extraordinary significance, such as whether a referendum on Québec secession could be binding.<sup>127</sup> Practically speaking, reference opinions are regarded as law,

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124. There remains, however, the question of whether this is a compelling view of *obiter* in its own right, even if it fails to comport with the *Henry-Prokofiew* spectrum. I do not believe that the Justice Rowe/Tyler view presents a credible alternative to the *Sellars* principle. Because the Justice Rowe/Tyler view scrambles the alignment of “binding versus non-binding” with “*obiter* versus *ratio*,” it effectively collapses into the *Sellars* principle. *Sellars*, remember, stands for the proposition that the Court's *obiter* is binding all the same, even if we determine that some remark is indeed *obiter*. *Sellars* thus counsels us to forget the classification exercise in the first place, and simply regard the entirety of the Court's judgments as binding. *Sellars* is consistent with the view that mere throwaway lines of the Court should be less significant than more considered reasoning, precisely because it evinces the Court speaking more directly to an issue it deems important, but that may not be squarely raised on the facts. For example, Justice Sopinka's *obiter* in *Noble* would be binding on the *Sellars* view, despite being *obiter*. A lower court would not be free to depart from it, contra Justice Doherty in *Prokofiew*. Put simply, if we accept that both *obiter* and *ratio* may share in *stare decisis* effect, as the Justice Rowe/Tyler view does, *Sellars* is a small step away.

125. See *Supreme Court Act*, *supra* note 34.

126. The Supreme Court of the United States has held that Article III of the US Constitution prohibits courts from deciding “abstract, hypothetical, or contingent questions.” *Alabama State Fed'n of Labor v McAdory* (1945), 325 US 450, 461. The Supreme Court of Canada is not entirely idiosyncratic in this regard, however. The Israeli and South African courts also issue reference opinions, but they are limited to constitutional questions.

127. See *Supreme Court Act*, *supra* note 34, s 53. See also *Reference Re Secession of Québec*, [1998] 2 SCR 217. Lower courts in Canada have the power to issue reference opinions, though this is less common. See, for example, the “Polygamy Reference.” *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

on par with judgments.<sup>128</sup> Yet, by definition, they have no connection to any “actual” legal dispute in the traditional sense, familiar to us from the textbook tradition. Reference opinions need not even involve someone who stands in an adversarial posture vis-à-vis the party initiating the reference.<sup>129</sup>

This robust role for reference opinions in our adjudicative topography is only growing and is undoubtedly here to stay. A reference opinion is a podium from which the Court, as a jurisprudential shepherd, speaks. The lower courts and the executive tend to listen. Indeed, the *country* tends to listen. My argument in the following Part will be that nothing of principle separates the Court’s considered judgment in a reference opinion from an “ordinary” case in which it grants leave to appeal and makes a comment in *obiter*. To make this point, allow me to make a few more framing observations about reference opinions.

The history of the Court’s reference power is instructive for our purposes here. Carissima Mathen has sketched this history in detail. Mathen traces a remarkable transformation, beginning with a widespread repugnance of reference opinions yielding to an acceptance—and perhaps even a preference—for reference opinions as a mode of adjudication.<sup>130</sup> Allowing courts to opine in the absence of a concrete legal dispute was once seen as constitutional heresy. Accordingly, reference opinions were regarded as having persuasive value only.<sup>131</sup> Courts themselves were reluctant to issue reference opinions because they might be seen as highly prejudicial in a future case where the same issue would come up in an “actual” case. And perhaps most significantly, the issuance of non-binding opinions about the law was seen as too far removed from the dispute resolution function of the courts, the source of their legitimacy. As one court put it, “the courts are neither a debating club nor an advisory bureau.”<sup>132</sup> The modern attitude about reference opinions has evolved to be considerably different from these historical views.

Mathen canvasses several reasons—historical and jurisprudential—for why reference opinions, which are formally speaking non-binding, have come to be regarded as binding law. First, in subsequent cases following a reference opinion, the Court itself makes no distinction between its judgments and its reference opinions.<sup>133</sup> Reference opinions are cited as authorities on par with regular cases.

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128. See Mathen, *supra* note 42 at 213-21.

129. *Ibid* at 201.

130. *Ibid* at 233.

131. *Ibid* at 46-47.

132. *Macnaughton v Macnaughton’s Trustees*, [1953] SC 387 at 392.

133. See Mathen, *supra* note 42 at 205.

The Court has been explicit that its reference opinions share in *stare decisis* effect for all intents and purposes.<sup>134</sup> As the Court has said, “Notwithstanding their advisory – and therefore in principle non-binding – nature, opinions given in references are in practice treated as judicial decisions and are followed by other courts.”<sup>135</sup> Oddly, the Court has also purported to “suspend the effects of its decision in the context of a reference, as it may do on an appeal,” effectively treating references on par with an appeal, even in remedial terms.<sup>136</sup>

Reference opinions are also largely indistinguishable from ordinary cases as a matter of procedure, the conduct of the hearings, and the adjudicative process and output. Whereas reference opinions were once answered briefly and after cursory oral argument<sup>137</sup>—sometimes with a mere “yes” or “no” to the reference question<sup>138</sup>—they now enjoy the same sense of occasion and attention as any case before the Court. For example, the recent carbon tax reference produced four judgments and ran 616 paragraphs.<sup>139</sup> Indeed, the *Supreme Court Act* requires that opinions and reasons be given in reference cases as they are in ordinary appeals.<sup>140</sup> Live facts are also important in reference opinions. As demonstrated by the carbon tax reference and other recent reference cases, the modern Court confronts highly developed factual records and extant controversies even in the context of reference opinions.<sup>141</sup>

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134. See *Bedford*, *supra* note 6 at para 40 (“[w]hile reference opinions may not be legally binding, in practice they have been followed”).

135. *Reference re Code of Civil Procedure (Que)*, art 35, 2021 SCC 27 at para 152 [*Reference re Code*].

136. *Ibid* at para 153. See also *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 292; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3; *Re Manitoba Language Rights*, [1985] 1 SCR 721. This strange proposition, *i.e.*, purporting to suspend a “declaration” in a reference opinion where no such declaration is made, is, in my view, conceptually confused. See further Amitpal C Singh, “Judicial Review and Declarations of Invalidity after *R v Sullivan*” (forthcoming, 2024), 1 SCLR (3d), s VI.1.ii.

137. See Mathen, *supra* note 42 at 209.

138. *Ibid* at 48.

139. *References re Greenhouse Gas*, *supra* note 37.

140. *Supreme Court Act*, *supra* note 34, s 53(4).

141. See *References re Greenhouse Gas*, *supra* note 37. There, the Court dedicated the first thirty-eight paragraphs of its judgment to the factual context of climate change and the legislative scheme in question. See also *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 (where the titular sections of the *Supreme Court Act* were interpreted in order to decide whether Justice Marc Nadon of the Federal Court of Appeal was eligible to fill one of the Supreme Court seats reserved for a Québec jurist). The judgment is replete with references to Justice Nadon’s specific circumstances.

In addition to these developments in the Court's own *modus operandi*, there are several principled reasons why other legal actors have come to regard reference opinions as binding. Two of these reasons are striking because they can be readily repurposed as arguments for treating the Court's *obiter* as binding. The first is that reference opinions provide doctrinal guidance, which puts them at the core of the modern Court's institutional competency and function.<sup>142</sup> True, reference opinions do not settle disputes; but settling disputes is at most an ancillary concern of the modern Court. The second is that reference opinions come with the Court's imprimatur. There is an added value to having the Supreme Court of Canada speak to a legal issue that justifies treating a reference as binding. Put differently, the institutional role of the Court compensates for a reference opinion's formal, *stare decisis* shortcomings. As Mathen puts it, "[t]he [Court's] status is sufficiently weighty to extend authority and bindingness to all of the pronouncements made by the Court in a proceeding where it has been asked to determine what the law is."<sup>143</sup> The Court enjoys a special role and widespread legitimacy that it can leverage to speak definitively about a legal issue, whether the issue arises in a dispute in a traditional appeal or via a reference opinion.

When juxtaposed with the trajectory of reference opinions, the post-*Sellars* developments to the *obiter-ratio* doctrine look strange indeed. Recall that the *Henry-Prokofiew* doctrine establishes a spectrum, according to which some portion of the Court's judgment is not binding at all, and *obiter*, too, varies in its potency. The closer *obiter* is to resolving the issue in the case, the weightier it is. However, I argue that the Court's avowed role as a jurisprudential shepherd is most authentically reflected by the view that all its pronouncements as binding, *i.e.*, the *Sellars* principle. The Court's institutional role can compensate for the formal *stare decisis* inadequacies of its *obiter*, just as it does for reference opinions. The traditional objections regarding treating advisory opinions as binding law have long since been waived away. If we accept the modern orthodoxy about the Court's institutional role, there is no principled reason, then, why analogous concerns in the context of *obiter* should detain us.

Early critics of reference opinions cautioned against allowing parties to make arguments about legal issues not strictly required to solve *their dispute*.<sup>144</sup> But as we have seen, such critics are on the losing side of history (for better or for worse). Reference opinions do not require adversely situated parties to make

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142. Mathen, *supra* note 42 at 182-83.

143. *Ibid* at 232.

144. See the various examples canvassed in Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960) 6 McGill LJ 168 at 180-185.



competing arguments to solve any concrete dispute, and yet such opinions come to enjoy *de facto* binding force.<sup>145</sup> In light of this, the *Sellars* principle seems to be the mirror image of the binding, law-like quality of the reference opinion. The *Henry-Prokofiew* shift is a mismatch with the muscular role of reference opinions today.

Consider another similarity between reference opinions and the *Sellars* principle. A key function of reference opinions is to pre-empt and *foreclose* future litigation. The executive can seek a reference opinion on a *proposed* statute or course of action, and thus avoid the waste of time and resources associated with taking the course of action only to later find out that it is unlawful. The modern Court has never expressed any concerns with this state of affairs. That is, the modern Court has never said, “we would prefer a flesh-and-blood litigant to challenge this proposed statute after it becomes law. Therefore, we will not answer this reference.”<sup>146</sup> Such a position would appear to misunderstand the avowed purpose and putative utility of the reference opinion.

*Obiter*, too, can have this pre-emptive function. Proponents of the *Sellars* principle might point out that *obiter* can resolve a thorny legal issue without the expense and trouble of a series of appeals, not to mention having to contend with the lottery of seeking leave to appeal to the Court in an era where many deserving cases must go unheard. Indeed, there might not be a litigant motivated to resolve a particular legal issue. Why leave the issue to these contingencies if the Court can settle it, here and now, in this particular case?

When compared with the reference opinion, it is remarkable that the post-*Prokofiew* doctrine establishes a spectrum, with several escape hatches for lower courts to disregard the Court’s *obiter*. For example, recall that the taxonomy established by Justice Binnie in *Henry* allows for a lower court to characterize some portions of a Supreme Court judgment as mere “examples or exposition intended to be helpful” in order to deflate its *stare decisis* effect. Indeed, a lower court that identifies some remark in a judgment as irrelevant to the dispute in the appeal can disregard it entirely.<sup>147</sup> Reference opinions, by contrast, enjoy blanket

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145. Critics objected to the legitimacy or appropriateness of reference opinions on precisely this basis.

146. The Court may refuse to provide reference opinions, and has done so, despite appearing to lack explicit statutory authority to do so. Kate Puddister, “A Question They Can’t Refuse? The Canadian Reference Power and Refusing to Answer Reference Questions” (2019) 13 *Can Political Science Rev* 34 at 36.

147. *Henry*, *supra* note 53 at paras 53, 57.

treatment as binding.<sup>148</sup> As we saw above, *Profokiew* itself offers a series of other avenues to depart from *obiter*.

One might respond that this asymmetry—treating reference opinions as binding but *obiter dicta* as not so—can be justified by some notion of judicial restraint. Reference opinions are initiated by legal actors other than the Court (*i.e.*, the executive branch), just as ordinary cases are. Thus, it seems appropriate for reference opinions to be binding. By contrast, *obiter* is the self-indulgent soliloquy of the Court itself, which means it should be afforded lesser *stare decisis* effect.

This rejoinder overstates the distinction between reference opinions and *obiter* in two ways. First, it should be noted that the Court has the discretion to decline to answer reference questions in certain circumstances—and it has done so in the past.<sup>149</sup> There is an important sense in which the Court gatekeeps which reference questions enter the realm of binding force, even if it does not put reference questions to itself. The Court exercising its discretion in this context is not unlike the discretion the Court would deploy were the *Sellars* principle to be adopted again. For example, the Court may decline to answer a reference question where this would be “inappropriate, either because the question lacks sufficient legal content...or because attempting to answer it would for other reasons be problematic.”<sup>150</sup> This flexible power suggests that the Court itself is to reflect on whether a particular matter is the right occasion to weigh in on an issue in light of the arguments presented by the parties. A *Sellars*-abiding Court would undertake much the same reflection in the context of *obiter*. The Court could wait for a dispute that squarely raises the issue on the facts in the traditional sense. Yet the Court could also use the occasion to opine on a legal issue that is broached by the facts in a looser sense.

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148. See also *Reference re Code*, *supra* note 135 at para 152. One might contend that a reference opinion, too, can contain elements of *obiter* and *ratio*. That is, reference opinions are meant to address specific questions submitted to the court. In line with the traditional *obiter-ratio* distinction, even though there is no dispute among parties, one might still think that discussion that answers the reference questions is akin to binding *ratio*, whereas discussion that does not do so is akin to non-binding *obiter*. Forceful as this objection is, I think it is a mistake to suppose that reference opinions can sustain the *obiter-ratio* distinction. After all, the distinction is rooted in the dispute resolution model, *i.e.*, a court presiding over a concrete dispute and resolving it by applying a legal rule to the particular facts in the case at bar. See generally Hershovitz, *supra* note 117; Sharpe, *supra* note 11; Rowe & Katz, *supra* note 113; Leiter, *supra* note 117.

149. See *e.g.* *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 7, 72.

150. *Ibid* at para 62.

The second way that the objection overstates the difference between *obiter* and reference opinions is that the Court does not hesitate to *invite* litigation on issues in the ordinary course, signalling its desire to weigh in. For example, in a recent appeal concerning the appropriate sentencing framework for persons convicted of child sexual assault, the Court declined to answer whether the use of “starting points”—a presumptive sentence length that is then adjusted up or down depending on the particularities of this offence and offender—was consistent with its sentencing jurisprudence.<sup>151</sup> However, the Court held that the arguments the parties made on this point “raise an issue of importance that should be resolved in an appropriate case,” clearly signalling a desire to pronounce on this issue.<sup>152</sup> Similarly, while commenting on the rules for imposing concurrent or consecutive sentences in the same case, the Court explained that “this issue warrants further discussion in another case.”<sup>153</sup> Indeed, a few months later, the Court got its wish: It granted leave to appeal to a case that raised precisely this issue.<sup>154</sup>

Many, if not most Canadian lawyers see this signalling process as innocuous. Indeed, they would see it as part of the Court’s core institutional mandate. The Court is entitled to broadcast its opinion on what it finds to be a perplexing issue that warrants its intervention. As Chief Justice Laskin once put it, the Court’s “paramount obligation” or “main function” is “to oversee the development of the law.”<sup>155</sup> But this practice is at some distance from the traditional, error-correcting appellate court that passively receives cases and resolves disputes. The modern Court is a participant in curating its docket even *before* litigants seek leave to appeal.

One might contend that the Court’s practice of waiting to weigh in until an appropriate case arises evinces a deeper desire to wait for cases where legal issues are specifically in dispute as between the parties. As we saw above, the Court does not always take an intervener or party’s invitation to opine on a matter not specifically in issue. This may seem to challenge my contention that the Court signals its interest in particular issues to invite appeals on those matters.

However, my point is that the Court’s consistent pattern of emphasizing the importance of an issue when it declines to answer it in a particular appeal demonstrates that it is an active, agenda-setting Court rather than a passive

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151. *R v Friesen*, 2020 SCC 9 [*Friesen*].

152. *Ibid* at para 41. It is unclear why the Court did not deem this case itself to be an appropriate occasion to resolve these issues. The Crown, accused, and a panoply of interveners made arguments on this point. In oral argument, the Crown directly asked the Court to re-affirm the utility of starting points.

153. *Ibid* at para 155.

154. *R v Parranto*, 2021 SCC 46.

155. Laskin, *supra* note 8 at 475.

resolver of disputes. After all, the Court could simply decline to pronounce on a matter not squarely raised in an appeal, without saying more. Instead, in cases like *R v Friesen*, the Court's language is active and inviting. The Court flags certain issues that it does not resolve in a particular appeal as important and worthy of resolution in a future case.<sup>156</sup> This practice signals not only a *willingness* to resolve the issue if litigants were to bring it before the Court, but also a *desire* to see it resolved. This tips the Court into the realm of curating its own docket. Not only does the Court decide what appeals to grant leave to, it plays an important role in influencing what appeals are filed in the first place.

More radically still, the Court has explicitly called for submissions on a particular point of law when granting leave to appeal.<sup>157</sup> The case of *Canada (Minister of Citizenship and Immigration) v Vavilov*<sup>158</sup> was highly anticipated because, in granting leave, the Court made the following, remarkable request of the parties:

The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-394-15, 2017 FCA 132, dated June 21, 2017, is granted with costs in the cause.

.....

The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases. To that end, the appellant and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review, and shall be allowed to file and serve a factum on appeal of at most 45 pages.<sup>159</sup>

The Court's directive—euphemistically described as an “invitation”—is remarkable. It is remarkable because it confirms the Court not only decides the issues parties bring to it but that it is also an active participant in deciding the very issues a case will present. Here, the Court was a key protagonist in framing the issue, having taken cues from academia and the lower courts that the law needed clarification.<sup>160</sup> The Court decided that *Vavilov* would be the occasion for

156. See *Friesen*, *supra* note 151 at para 41.

157. I am grateful to Kees Westland for this very helpful suggestion.

158. 2019 SCC 65 [*Vavilov*].

159. *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132, leave to appeal to SCC granted, 37896 (10 May 2018).

160. See, for example, David W Stratias, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 Queen's LJ 27, DOI: <<https://doi.org/10.2139/ssrn.2733751>>; *Vavilov*, *supra* note 158 at paras 4, 9, and 20.

revising the standard of review framework, and accordingly shaped the arguments that would be marshalled before it. This is the zenith of the Court acting as a jurisprudential shepherd: choosing when to update the law, how to update the law, and even directing the parties to devote their attention to particular issues.

In tandem, these observations suggest that we should be skeptical of the idea that some notion of judicial restraint can draw a sharp line between *obiter* and the modern reference opinion. As Mathen pithily puts the point, advisory opinions have come to be regarded as binding despite being unconnected to a legal dispute in the traditional sense, because “[w]hen a court issues an advisory opinion, it answers questions.”<sup>161</sup> “*Obiter dicta*” is easily substituted for “advisory opinion” in that sentence. However, as I have emphasized thus far, the *Henry-Prokofew* spectrum is out of touch with the modern institutional role of the Court. Mathen’s characterization of the Court’s modern adjudicative process is entirely apposite as a rationale for treating the Court’s *obiter* as binding, just as the *Sellars* principle counsels:

[T]he Canadian Supreme Court does not seem overly preoccupied with *who* participates in, or initiates [a] dispute. It is content to be asked for its advice by actors expected to act in (reasonably) good faith; and it rarely declines to provide it.<sup>162</sup>

The Court’s use of *obiter* to steer the law could, therefore, be seen as one legitimate tool to discharge its new, quasi-advisory role.

Writing about litigation at modern apex courts, Jeremy Waldron observes that “almost all traces of the original flesh-and-blood rights holders have vanished,” and that “argument such as it is revolves around the abstract issue of the right in dispute.”<sup>163</sup> The Court’s steady pull away from the *facts* of a dispute, the *parties* in a dispute, and the *resolution* of a dispute is evinced by the muscular use of reference opinions, but also by a slew of other developments including the broadening basis for public interest standing, the robust role of interveners, and the use of declaratory judgments.<sup>164</sup> These are all (now) relatively uncontroversial adjudicative practices. But they operate on the margins of the idea that courts are

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161. Mathen, *supra* note 42 at 226.

162. *Ibid* at 235.

163. Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) at 220.

164. *Ibid* at 223-24. See generally Lazar Sarna, *The Law of Declaratory Judgments*, 4th (Thomson Reuters, 2016) 12:5. Declaratory judgment is now a popular constitutional remedy. See *R v Starz*, 2015 ONCA 318; *Canada (Prime Minister) v Khadr*, 2010 SCC 3; and Kent Roach, *Constitutional Remedies in Canada*, 2nd, (Canada Law Book loose-leaf, 2014), s 12:5.

to decide concrete disputes by hearing from adversely situated parties. Clinging to the traditional paradigm with respect to *obiter* alone is, therefore, inconsistent with the modern orthodoxy about the Court's role.

Comparing *obiter dicta* with advisory opinions broaches broader questions about the limits of the Court's law-making abilities. In the error-correcting days of yore, the idea that a court must apply the extant law to resolve a dispute provided for limits on the powers of courts. "Binding *ratio decidendi*" versus "non-binding *obiter dicta*" was one way to police these limits. Now that the Court is in new institutional and jurisprudential territory, that protection is no longer available to us. If the modern Court is legitimate, we need a new theory—a new account of judicial restraint—that justifies its modern institutional role. This is the cost of the transition from error correction to jurisprudential guidance, where the parameters of the Court's decision-making powers are more indeterminate than ever. One symptom of this broader issue is uncertainty concerning what constitutes *obiter* and when it should be treated as binding.

In the next section, I bring this issue sharply into focus. I will argue that the Court today has no principled, consistent doctrine on the scope of its powers to make the law in its appeals. This state of affairs calls for a frank reckoning with the Court's modern institutional role.

## V. THE SCOPE AND LIMITS OF THE MODERN COURT

To develop the argument I just gestured at, I use three recent Supreme Court of Canada judgments as case studies. The overarching lesson of this Part is that the Court has applied its own doctrine of *obiter dicta* inconsistently, and sometimes ignored it entirely. In effect, the Court casts aside the *obiter-ratio* distinction when it wishes to establish a rule or result that it deems important. In that sense, the nuanced remaking of the distinction in *Henry* and *Prokofiew* has served as a red herring. In effect, the *Sellars* principle—which obliterates the *obiter-ratio* distinction—is the Court's *modus operandi* when it forms the belief that a particular rule or approach is important to enshrine in Canadian law. Where the distinction is rhetorically useful in a dissent, it is trotted out as a weapon to challenge the majority decision as incorrect. Put simply, as a matter of practice, the modern Court routinely runs roughshod over the *obiter-ratio* distinction, even if, as a matter of formal legal doctrine, the distinction has apparent continuing significance.

The first case example is *Ontario (Attorney General) v G* (“*Ontario v G*”).<sup>165</sup> The Court considered the constitutionality of Ontario’s *Christopher’s Law*. The Court rendered three judgments, each of which took a different view on the scope and parameters of the issue on appeal.

The statute required those found not criminally responsible (NCR) for sexual offences on account of mental disorder to register on a sexual offender registry. G had been found NCR after he sexually assaulted his then-wife during a manic episode.<sup>166</sup> *Christopher’s Law* required both guilty and NCR accused to register on the sexual offender registry. However, NCR persons like G had no way to be de-listed from the register, unlike their counterparts who were found guilty of sexual offences. “Ordinary” offenders were able to receive a discharge, pardon, or criminal record suspension that would scrub their names from the register. G brought a section 15 *Charter* challenge to *Christopher’s Law* on this basis, alleging that the distinction was discriminatory.<sup>167</sup>

The Court delivered three judgments, though the section 15 issue was swiftly disposed of. All three judgments had little difficulty concluding that *Christopher’s Law* promoted prejudicial and stereotypical views about persons with mental illnesses, including, specifically, that NCR individuals were dangerous and incapable of rehabilitation. The distinction had the effect of putting NCR persons in a worse position than those found guilty for entirely arbitrary reasons.<sup>168</sup> Finally, the law was not justified under section 1 of the *Charter*.<sup>169</sup>

The three judgments instead focussed their attention on an issue presented by one of the interveners, the Asper Centre for Constitutional Rights, which asked the Court to clarify its framework for determining whether an unconstitutional law should be accompanied by a suspended declaration of invalidity. The Court accepted the invitation to reform this area of the law after years of academic commentary which contended that its jurisprudence in this regard was inconsistent and ad hoc.<sup>170</sup> There had been no discernible logic as to when the Court had offered a suspended declaration and when it had not. The Court had, at times, made suspended declarations and at other times failed to do so. Sometimes, the Court issued such a suspension at the request of a party. In other instances, it did so of its own accord.

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165. 2020 SCC 38.

166. *Ibid* at paras 7-8.

167. *Ibid* at para 10.

168. *Ibid* at para 67.

169. *Ibid* at para 76.

170. *Ibid* at para 106.

Justice Karakatsanis’s majority judgment crafted a new “principled approach,” according to which a court issuing a declaration of invalidity should reflect on four factors to determine whether it should also be temporarily suspended.<sup>171</sup> These considerations include the public’s interest in the compliance of legislation with the constitution and the special institutional competence of Parliament and the provincial legislatures to enact legislation.<sup>172</sup> Justice Karakatsanis also suggested that individualized exemptions for the litigant bringing the *Charter* challenge would “often” be appropriate because keeping an unconstitutional law on the books works an injustice on the victorious litigant.<sup>173</sup>

Justice Rowe’s separate concurrence took issue with this new framework, arguing that it was too abstract to provide effective guidance.<sup>174</sup> Justice Rowe would instead have re-affirmed the framework from *Schachter v Canada* (“*Schachter*”), a prior precedent which had been effectively ignored for many years.<sup>175</sup>

Justices Brown and Côté penned yet another concurrence, arguing that suspended declarations should only be granted in the event of an emergency or threat to the rule of law, and that *Schachter* offered too expansive a framework for meaningful guidance.<sup>176</sup> *Schachter* had thus been rightfully ignored.<sup>177</sup> The majority’s new principled approach, they argued, was even more indeterminate than *Schachter*.<sup>178</sup>

What is remarkable about the case is not the substance of these three positions. Rather, it is that each judgment took itself to answer—and to be entitled to answer—a different set of questions than its counterparts. Justice Brown, for example, took issue with Justice Karakatsanis’s section 15 analysis, while agreeing with her conclusion. In particular, he argued that Justice Karakatsanis’s comments on adverse effects discrimination—comprising nearly twenty paragraphs of her judgment—were inapposite, because this was a case of *direct* discrimination as NCR persons were *explicitly* treated differently by the statute than guilty persons:

[Justice Karakatsanis], however, goes further, and in extensive *obiter dicta* discusses adverse effects discrimination and “substantive equality” (paras. 41-69). Her doctrinal statements are not remotely relevant to the issues raised by this appeal, especially considering this is not an adverse effects case.... Thus, our silence on

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171. *Ibid* at paras 94, 126.

172. *Ibid*.

173. *Ibid* at para 142.

174. *Ibid* at para 186.

175. *Ibid*.

176. *Ibid* at para 248.

177. *Ibid*.

178. *Ibid*.



paragraphs 41-69 of our colleague's reasons should not be taken as tacit approval of their content. We simply do not see them as offering *actual reasons* for her judgment, but "commentary ... or exposition" instead (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57).<sup>179</sup>

Justice Brown's description of Justice Karakatsanis's comments as "not remotely relevant," appears to suggest that they would have no binding force were they to be germane in a subsequent case. Yet Justice Brown also cites *Henry* for the proposition that they are "*obiter dicta*" comments, albeit of the lowest rung on the hierarchy, namely "commentary or exposition intended as helpful." However, recall that *Henry* and *Prokofiew* say that *all obiter dicta* is presumptively binding on lower courts, albeit in a spectrum. So it is unclear exactly how Justice Brown diagnoses the *stare decisis* effect of Justice Karakatsanis's remarks. What is clear is that Justice Brown thought that they were mistaken and should not have been made because they were not at all relevant to the disposition of the case.

Remarkably, Justice Rowe's concurring opinion offered a *tu quoque* argument levelled at Justice Brown. Justice Brown's own judgment engaged in an extensive discussion on the issue of the individual exemptions to suspended declarations for a victorious *Charter* plaintiff, arguing, contra Justice Karakatsanis, that such exemptions should be very rarely given. (Recall that Justice Karakatsanis held that such exemptions would often be warranted.) However, Justice Brown reasoned that G ultimately merited an exemption due to his spotless record after the manic episode and the need to reward him with the "benefit of his success on the constitutional merits."<sup>180</sup> Justice Rowe, for his part, observed that Justice Brown's analysis of the individual exemption was outside the scope of the appeal:

In this case, neither party focused their submissions on the suspension. In addition, this Court refused to stay the 12-month suspension (*Ontario (Attorney General) v. G*, 2019 SCC 36), which thus expired on April 4, 2020, rendering the issue moot. In the circumstances, there is no cause to decide whether the declaration was properly suspended.

The issue of the exemption order is also moot. The respondent does not need to be exempted from legislation that is already of no force or effect. As a result, although I am in substantial agreement with the approach to individual exemptions set out by Justices Côté and Brown, there is no cause to decide whether the individual exemption was rightly ordered.<sup>181</sup>

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179. *Ibid* at paras 223-24 [emphasis added].

180. *Ibid* at para 182.

181. *Ibid* at paras 214-15 [emphasis added].

Though Justice Rowe's point is made with less rhetorical bite than Justice Brown's diatribe against Justice Karakatsanis, it is essentially the same point. The impugned legislation had long since lapsed. The Court had refused to stay a suspension issued by the Court of Appeal for Ontario more than seven months before the Court's judgment on the merits. Thus, G no longer had to contend with the constitutionally defective law that he successfully impugned.

It is remarkable that the parameters of an appeal could be so disparately and inconsistently understood by the Court. The three judgments are inconsistent not just on the merits of the constitutional remedies issues, but also on their basic framing of the appeal. This is troubling. It suggests that the parameters of an appeal are not defined by any principle, but according to how important an individual member of the Court deems an issue to be. If an issue is "adjacent enough" to the arguments and issues raised by the litigant, and an individual judge deems it a sufficiently important point to make, then there is no groundswell of principle that permits, prohibits, or recommends that the issue be decided in the appeal. Put concretely in terms of the issue in *Ontario v G*, it is difficult to see why Justice Karakatsanis's comments on adverse effects discrimination were any less relevant than Justice Brown's comments on suspended declarations and individual exemptions.

Ordinarily, this issue escapes notice because the Court is unanimous in its framing of an appeal. In cases like *Ontario v G*, however, when the Court splinters, these institutional defects are laid bare. A court that produces three irreconcilable views on the parameters of an appeal fails in its mandate to be a jurisprudential guide.

This is a broader, chronic trend that is not limited to *Ontario v G*. The distinction between *obiter* and *ratio* is now primarily trotted out for instrumental reasons alone. In another recent case, *Québec (Attorney General) v 9147-0732 Québec inc.* ("9147-0732 Québec inc."), the Court fissured on the issue of the sources and method of constitutional interpretation.<sup>182</sup> The appeal concerned the Québec Court of Appeal's finding that a corporation could be subject to cruel and unusual punishment within the meaning of section 12 of the *Charter*. The defendant corporation was found guilty of doing construction work without a license and was fined \$30,000 as a result. While the entire Court rejected the corporation's argument that section 7 of the *Charter* applied to corporations, the Court split on the appropriate way to reach that result.

In a lengthy concurring judgment, Justice Abella made extensive reference to eclectic international legal instruments, some of which had not been ratified

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182. 2020 SCC 32.

by Canada.<sup>183</sup> A majority judgment authored by Justice Brown forcefully resisted this.<sup>184</sup> Justice Brown held that only those international instruments that Canada had ratified should inform constitutional interpretation—and in doing so, should only serve to support or confirm an interpretation rather than drive the analysis.<sup>185</sup> Justice Kasirer wrote a separate, third opinion, also concurring in the result. Justice Kasirer declined to partake in the controversy about the use of international law in constitutional interpretation, writing:

In this case, all the relevant factors are to the same effect, indicating that the protection offered by s. 12 does not extend to corporations. I therefore find it unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further. In my view, Chamberland J.A.'s reasons permit us to conclude, without saying more, that the appeal must be allowed.<sup>186</sup>

In Justice Kasirer's view, this appeal did not turn on the proper role of international law. The ultimate relevance of international law to the section 12 issue was thus analogous to the relevance of adverse effects discrimination to the appeal in *Ontario v G*. Close attention to domestic law alone would resolve the case. Thus, the Court need not say more about this issue.

But these considerations did not stop Justice Brown in this case. Remarkably, Justice Brown seemed to acknowledge that his remarks on the place of international law were ancillary to the disposition of the appeal in the penultimate paragraph of his majority judgment:

[Constitutional] analysis must be dominated by [international and comparative law] only as appropriate, accompanied by an explanation of why a nonbinding source is being considered and how it is being used, including the persuasive weight being assigned to it. In our respectful view, our colleague Abella J.'s reasons do not conform to this approach. The result is that foreign and international instruments and jurisprudence dominate her analysis, contrary to this Court's teachings on constitutional interpretation. While this change in approach is not determinative in the case at bar, it could very well be in a different one. We therefore find it crucial to reiterate the proper approach to *Charter* interpretation.<sup>187</sup>

These remarks are difficult to reconcile with Justice Brown's criticisms of Justice Karakatsanis in *Ontario v G*, decided just fifteen days later. Clearly, Justice Brown wrote his judgment in *9147-0732 Québec inc.* with the intention to settle the issue

183. *Ibid* at paras 108-117.

184. *Ibid* at para 3.

185. *Ibid* at paras 20 and 31.

186. *Ibid* at para 141.

187. *Ibid* at para 47 [emphasis added].

definitively. That, at least, is the most plausible interpretation of his explanation that the approach laid out here “could very well be [determinative] in a different [case].”<sup>188</sup> In other words, Justice Brown *really wanted to make this point*, and saw this as the case to do it.

This engages the same concerns I canvassed in the preceding Part, namely that, after *Henry* and *Prokofiew*, the rhetorical force with which an *obiter* comment is made appears to augment its *stare decisis* effect. Again, it is difficult to resist the cynic’s interpretation here: The distinction between what constitutes *obiter* as opposed to the core issue in an appeal is inconsistently applied by the Court itself. The distinction has simply become one weapon in the arsenal of a dissenting judge to fire at a majority opinion with which they substantively disagree. When that same judge joins a majority opinion on a point of law they find important and persuasive, the legitimate parameters of the appeal become an afterthought.

Another symptom of the Court’s underlying inability to specify the parameters of its appeals emerged in the recent case of *R v McGregor* (“*McGregor*”).<sup>189</sup> The competing judgments about the proper role of interveners are rooted in two radically different visions of the Court’s adjudicative function. *McGregor* concerned the extraterritorial application of the *Charter* to a search conducted in the United States by Canadian military police—an issue governed by the Court’s precedent in *R v Hape* (“*Hape*”).<sup>190</sup> In *McGregor*, the parties themselves disagreed about the application of *Hape* to the facts of the case at bar. The interveners, however, went further. Armed with academic commentary critical of *Hape*, they called for the Court to overturn and revise the *Hape* framework. The Court’s split response is the latest symptom of the continued indeterminacy surrounding the legitimate scope of its appeals. Five judges, led by Justice Côté, declined the interveners’ invitation to overrule *Hape* as follows:

I do not believe that this is an appropriate case in which to reconsider the extraterritorial application of the *Charter*. The parties do not contend that the *Hape* framework should be revisited; they simply debate its application to the facts at hand. As a rule, which the Court should depart from only in rare and exceptional circumstances, we should not overrule a precedent without having been asked to do so by a party. In this instance, only some interveners ask us to overturn *Hape*; in doing so, they go beyond their proper role. Doing what they are asking would mean deciding an issue that is not properly before us.<sup>191</sup>

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188. *Ibid* at para 47.

189. 2023 SCC 4 [*McGregor*]. See also *Sharma*, *supra* note 114 at para 75.

190. 2007 SCC 26.

191. *McGregor*, *supra* note 189 at para 23.

Justice Rowe, who wrote a separate concurrence to further emphasize the limited role of interveners, agreed with Justice Côté on this point.<sup>192</sup> In sum, six of the eight sitting judges held that interveners alone cannot instigate the overruling of a Supreme Court precedent, on the grounds that it “invites the Court to reason in the abstract without the benefit of lower court decisions, a full evidentiary record, or submissions from parties,” thereby increasing the potential for inaccuracy.<sup>193</sup>

Justices Karakatsanis and Martin disagreed. They reasoned that while interveners must not introduce entirely novel issues, they must offer “broader perspectives” to the Court than those offered by the parties. In asking the Court to revisit *Hape*, “[s]everal interveners in this case did precisely that”; “they proposed a different view of the core legal issue of whether the *Charter* applied [extraterritorially].”<sup>194</sup>

This split is telling. Justices Karakatsanis and Martin’s view of “the core legal issue” in the case is capacious enough to escape the confines of the dispute as *defined by the parties*. Indeed, they explicitly link their conclusion on the permissible role of interveners and what is properly before the Court to their underlying view of the Court’s adjudicative function:

[The restriction proposed by the majority] also runs counter to the role of this Court, which is not merely one of error correction. Rather, the role of the Court, as an apex court, is oriented to the “development of the jurisprudence” by “deal[ing] with questions of ‘public importance’”, and much of the Court’s work “necessarily [goes] beyond what [is] essential for the disposition of the particular case” (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 53; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 86). By “bringing broader perspectives before the Court than those advanced by appellants and respondents”, and by advancing their own views on legal issues before the Court, interveners help the Court fulfill this institutional role (*Notice to the Profession*).<sup>195</sup>

The spirited clash in *McGregor*, then, is yet another instance of two competing visions of the Court’s adjudicative function. The majority’s view of interveners is authentic to the dispute resolution paradigm, one that the Court has left behind. By contrast, the minority champions the logical conclusion of the new orthodoxy (duly citing *Henry* in the process). If the Court is a jurisprudential overseer, responsible for more than mere dispute resolution, there is no reason

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192. *Ibid* at paras 96-115.

193. *Ibid* at paras 111, 114. It is worth noting that some of the judges that formed the majority in *McGregor* have not shied away, in the past, from accepting the invitation of an intervener to revise a legal framework. See especially *Ontario v G*, *supra* note 165.

194. *McGregor*, *supra* note 189 at para 81.

195. *Ibid* at para 82.

why it should be constrained by the arguments of the parties in changing the law. As Justices Karakatsanis and Martin explained, “*Hape* itself demonstrates that this Court can overturn precedent without any invitation from the parties or interveners.”<sup>196</sup> The Court in *Hape* did precisely that.

In sum, Justices Karakatsanis and Martin’s judgment has the virtue of being authentic to the modern orthodoxy about the Court. However, that is also its deeper vice. Their conclusion, true to the modern orthodoxy, serves as a further *reductio ad absurdum* on the institution role of the Court that produces it.

## VI. CONCLUSION

I have argued that the jurisprudential arc of *obiter* is out of sync with the modern role of the Supreme Court of Canada. More specifically, I have argued that the *Sellars* principle is the most authentic expression of the jurisprudential and institutional position of the Court today. If I am right about this, one important corollary is that concerns with the *Sellars* principle are rooted in deeper (and as-yet unexamined) anxieties about the expansive role of the Court in Canadian law today. If we are willing to accept this outsized role, there are no principled reasons to regard the *obiter* of our jurisprudential overseer as any less significant than its *ratio*.

For many years, the modern orthodoxy has taught us that this outsized role is unsurprising and innocuous.<sup>197</sup> I have sought to show just how far we have slid down that slippery slope. Where we have ended up, I think, is nothing short of startling. By accepting that the Court may change the goalposts of an appeal at will, we must accept that a particular opinion cannot be criticized for going too far afield. The modern Court is largely unbounded and expected to police the legitimate scope of its own powers. As we have seen, it has struggled to do so in a principled way. This is the cost of living in a world where traditional

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196. *Ibid.*

197. Commentators have noted a tension between the Court’s modern, innovative role (especially in the *Charter* context) and the confines of *stare decisis*. See e.g. Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997) at 3, DOI: <<https://doi.org/10.3138/9781442676466>> (“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.”); Joseph J Arvay, Sheila M Tucker & Alison M Latimer, “*Stare Decisis* and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?” (2012) 58 SCLR 61 at 62, DOI: <<https://doi.org/10.60082/2563-8505.1248>>.

distinctions, including *ratio decidendi* versus *obiter dicta*, are obliterated. The *obiter-ratio* distinction once functioned as a constraint on the courts. Leaving the world of error correction, dispute resolution, and common law incrementalism means leaving behind these checks and balances. It is this understanding of the Court, as a self-regulating, plenary jurisprudential innovator, that we must reckon with today.

