

1-1-2013

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### Recommended Citation

Adrian JW Toth, "Clarifying the Role of Precedent and the Doctrine of Stare Decisis in Trial and Intermediate Appellate Level Charter Analysis" (2013) 22 Dal J Leg Stud 34.

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## CLARIFYING THE ROLE OF PRECEDENT AND THE DOCTRINE OF STARE DECISIS IN TRIAL AND INTERMEDIATE APPELLATE LEVEL CHARTER ANALYSIS

Adryan J.W. Toth\*

### I. Introduction

With the *Canadian Charter of Rights and Freedoms*<sup>1</sup> (“Charter”) turning 30 years old, a new phenomenon is emerging within constitutional jurisprudence. As our society evolves, so too does our constitutional law. What happens, however, when both evolve to the point where the validity of prior precedent—including from our highest court—is called into question in fact and law? Two recent cases have brought this issue to the forefront of both the media and legal theory: *Bedford v Attorney (General Canada)*<sup>2</sup> and *Carter v Canada (Attorney General)*.<sup>3</sup> The subject matter of these cases renders them, from their outset, controversial in society,<sup>4</sup> as they speak to some fundamental moral principles in competing ways. The latter is a more recent case from the British Columbia Superior Court, whereby Smith J. struck down subsection 241(b) of the *Criminal Code*,<sup>5</sup> the provision that prohibits

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982*, c 11 [*Charter*].

<sup>2</sup> 2010 ONSC 4264, 327 DLR (4th) 52 aff’d in part 2012 ONCA 186, 346 DLR (4th) 385 [*Bedford*]. Note that the majority opinion of the Ontario Court of Appeal held that the application judge did not err in engaging a constitutional analysis, despite there being Supreme Court of Canada authority on the topic, because the issues in the two cases were distinct (at paras 61-70). In other words, the ONCA was of the view that *Bedford* was distinguishable from any prior binding authority.

<sup>3</sup> 2012 BCSC 886, [2012] BCJ No 1196 [*Carter*].

<sup>4</sup> See e.g. Tracey Tyler, “Prostitution laws struck down,” *thestar.com* (28 September 2010) online: <<http://www.thestar.com/news/canada/article/867332--prostitution-laws-struck-down>>; Shannon Kari, “Ontario judge strikes down prostitution laws,” *National Post* (28 September 2010) online: <<http://news.nationalpost.com/2010/09/28/ontario-judge-strikes-down-prostitution-laws>>; and Sunny Dhillon, “B.C. Supreme Court strikes down ban on physician-assisted suicide” *The Globe and Mail* (15 June 2012) online: <<http://www.theglobeandmail.com/news/british-columbia/bc-supreme-court-strikes-down-ban-on-physician-assisted-suicide/article4267631>>.

<sup>5</sup> RSC 1985, c C-46 [*Criminal Code*].

the counselling or aiding of suicide.<sup>6</sup> The former, and the case that forms the underlying subject matter of this paper, was a decision by Himel J. of the Ontario Superior Court of Justice (“ONSC”), whereby she struck down numerous provisions of the *Criminal Code* related to prostitution.<sup>7</sup> In both cases, the application judges wrote lengthy and comprehensive decisions, presenting strong reasons in support of striking down the impugned provisions, and did so despite there being precedent from the Supreme Court of Canada (“SCC”) that upheld the constitutionality of those same provisions.<sup>8</sup>

*Bedford*, having now been heard and decided by the Ontario Court of Appeal (“ONCA”), is on its natural and inevitable progression towards the SCC. Indeed, the Court has just recently granted leave to hear a final appeal in the case,<sup>9</sup> and as its journey continues, its controversy remains. While this controversy is partly due to the case’s subject matter (i.e. prostitution), it is also due in part to the fact that the case’s topics, arguments, and holdings relate to a wide variety of legal subject matter, including constitutional law,<sup>10</sup> criminal law,<sup>11</sup> evidence,<sup>12</sup> and constitutional remedies.<sup>13</sup> It is thus not all that surprising that ever since the trial decision was handed down on September 28, 2010, students, professors, lawyers, and similarly interested parties across the country have been considering and debating both the merits of its reasoning as well as its overall implications.

Of particular importance to the topic of this paper, however, is that *Bedford* also discusses a doctrinal matter that is fundamental to Canadian law in general: the doctrine of *stare decisis*. The case tests the doctrine’s continued relevance in an ever-evolving constitutional and societal context. As somewhat expected then, within the *Bedford* decision itself, there is a section devoted entirely to the doctrine of *stare decisis*.<sup>14</sup> This paper will specifically focus on the implications arising from this section, placing particular emphasis on the roles of vertical and horizontal precedent in trial and intermediate appellate level *Charter* analysis. This discussion of precedent will lead into a deeper analysis of precedent in the constitutional con-

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<sup>6</sup> *Carter*, *supra* note 3.

<sup>7</sup> *Bedford*, *supra* note 2.

<sup>8</sup> With respect to *ibid*, the SCC considered the constitutionality of, and ultimately upheld as constitutional, certain prostitution related provisions, now ss 210, 212(1)(j), and 213(1)(c) of the *Criminal Code*, in *Reference re ss 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123, [1990] 4 WWR 481 [*Prostitution Reference*]. With respect to *Carter*, *supra* note 3, the constitutionality of now s 241(b) was previously considered and upheld by a majority of the SCC in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*]. The application judge, after citing the ONCA’s reasoning in *Bedford*, distinguished *Rodriguez* by reasoning that the majority decision “[d]id not decide whether the right to life under s 7 was engaged by s 241(b) of the *Criminal Code*” at para 924. She then went on to find that the jurisprudence with respect to the principles of fundamental justice, especially regarding gross disproportionality and overbreadth, had materially evolved since *Rodriguez*, such that constitutionality should be revisited: at paras 973-85. The application judge then went on to find that there were new legislative and social facts such that a new s 1 analysis was required: at paras 942-48.

<sup>9</sup> *Canada (Attorney General) v Bedford*, [2012] SCCA No. 159.

<sup>10</sup> See generally *Bedford*, *supra* note 2 at paras 214-306, 369-507.

<sup>11</sup> See generally *ibid* at paras 229-278.

<sup>12</sup> See generally *ibid* at paras 84-213, 307-366.

<sup>13</sup> See generally *ibid* at paras 508-539.

<sup>14</sup> See generally *ibid* at paras 63-83.

text, culminating with the identification and explanation of a concept I call “precedent expiration.”

Before moving forward, however, it will prove useful at this point to provide some additional details with respect to the *Bedford* decision. In *Bedford*, Himel J. ruled that three *Criminal Code* provisions dealing with certain facets of prostitution (namely keeping a common bawdy house – section 210; living off of the avails of prostitution – 212(1)(j); and communicating for the purposes of prostitution – 213(1)(c)) were unconstitutional and should therefore be struck down.<sup>15</sup> This decision was ultimately based on the finding that all three *Criminal Code* provisions violated section 7 of the *Charter* and that section 213(1)(c) further violated subsection 2(b) of the *Charter*.<sup>16</sup> Himel J. reached this decision notwithstanding the fact that, approximately 20 years prior, the SCC pronounced in the *Prostitution Reference*, that sections 210 (then section 193) and 213(1)(c) (then 195.1(1)(c)) were indeed constitutional.<sup>17</sup> Himel J. was certainly not blind to this issue; in fact, she clearly acknowledged that the *Prostitution Reference* was “*prima facie* binding” upon her court.<sup>18</sup> So it is here that lay the roots of two of several controversies found within *Bedford*: (1) the binding effect of a potentially ‘outdated’ SCC constitutional precedent: the *Prostitution Reference*; and (2) the role of *stare decisis* in trial level *Charter* analysis. Overall, it will be my intent throughout this paper to begin to untangle these two controversies.

In this paper, I will argue that Himel J. was mistaken in her interpretation and use of the various authorities cited throughout the *stare decisis* section of her judgment, and that these errors call into question her justification for revisiting the constitutionality of certain *Criminal Code* provisions relating to prostitution. In this regard, my criticisms of her judgment will be mostly restricted to the section dealing with *stare decisis*.<sup>19</sup> I will ultimately argue that although the authorities cited by Himel J. do not provide support for a departure from *stare decisis* in the manner that she reasoned, there nevertheless are certain situations when a trial level judge would be permitted to revisit issues regarding a law’s constitutionality and/or permitted in rendering new constitutional determinations.

The framework for this paper is as follows. In section II, I begin by describing the historical background and legal significance of both the *Prostitution Reference* and *Bedford*. I then, in section III, provide a brief overview of the doctrine of *stare decisis*, including a discussion of the unique and important differences between horizontal and vertical precedent. In section IV, I turn to provide a critique of Himel J.’s discussion of *stare decisis* in the *Bedford* case, including her use of authorities from the SCC, the Ontario Court of Appeal (“ONCA”), and the Saskatchewan Court of Queen’s Bench (“SKQB”). This critique will naturally leave one wondering when it would be permissible for a trial judge to reconsider a law’s constitutionality, and I therefore move to discuss the SCC’s recent comments on retroactive versus prospective constitutional remedies in section V. The implica-

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<sup>15</sup> See *Bedford*, *supra* note 2 at paras 3, 506-507.

<sup>16</sup> *Ibid* at paras 3, 506-507.

<sup>17</sup> See *Prostitution Reference*, *supra* note 8.

<sup>18</sup> *Bedford*, *supra* note 2 at para 66.

<sup>19</sup> See *ibid* at paras 63-83. These paragraphs consist of the section of the judgment that deals with *stare decisis*.

tions arising out of this discussion will provide the basis for my arguments in section VI. In this section, I argue that there is one type of situation where a trial or intermediate appellate level judge may identify that a binding precedent has ‘expired,’ and two situations where the same may revisit issues regarding a law’s constitutionality. Throughout this section, I propose a series of tests to be used as an analytical framework for trial and intermediate appellate level judges engaging in a *Charter* analysis involving a “re-impugned”<sup>20</sup> law.

## II. Factual Background

At this time, it will prove instructive to explain the legal and factual context by which *Bedford* was brought to trial. It is also helpful to generally summarize the historical background and legal significance of the *Prostitution Reference* with respect to *Bedford*. I begin with the latter because not only was it decided prior to *Bedford*, but it is also the legal precedent of the SCC which states that certain *Criminal Code* provisions dealing with facets of prostitution are indeed constitutional.

### (i) *Prostitution Reference*

In Canada, Parliament has not expressly outlawed prostitution. Parliament has instead chosen to outlaw certain things that are associated with prostitution and this essentially has the effect of making prostitution illegal. For example, section 210 of the *Criminal Code* makes it a criminal offence to keep a common bawdy house, and paragraph 213(1)(c) makes it a criminal offence to communicate with another person for the purposes of engaging in prostitution or procuring sexual services.<sup>21</sup> It was the constitutionality of these provisions that the SCC was tasked with deciding in the *Prostitution Reference*.

The *Prostitution Reference* began when Manitoba’s Lieutenant-Governor in Council chose to refer to the Manitoba Court of Appeal (“MBCA”) questions concerning the constitutionality of then sections 193 (now section 210) and 195.1(1)(c) (now section 213(1)(c)) of the *Criminal Code*.<sup>22</sup> The Lieutenant Governor in Council made this decision after a Manitoba trial judge in *R v Cunningham*<sup>23</sup> held that paragraph 195.1(1)(c) was unconstitutional and therefore of no force or effect.<sup>24</sup> After hearing arguments with respect to the impugned *Criminal Code* provisions’ constitutionality, all five justices of the MBCA agreed that the provisions were indeed constitutional.<sup>25</sup> This decision was then appealed to the SCC, and on May 31, 1990, the Court released its own opinion on the matter.

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<sup>20</sup> I use the term “re-impugned” to signify that the constitutionality of a law has already been properly considered and settled. In *Bedford*, the re-impugned laws are the specific *Criminal Code* provisions in question that relate to prostitution, i.e. ss 210 and 213(1)(c).

<sup>21</sup> See generally *Criminal Code*, *supra* note 5, ss 210-213; see also *Prostitution Reference*, *supra* note 8 and *Bedford*, *supra* note 2 at paras 1-7.

<sup>22</sup> See generally *Reference re ss 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1987] 6 WWR 289, 60 CR (3d) 216 [*Manitoba Prostitution Reference*]; see also *supra* note 8 at para 22.

<sup>23</sup> (1986), 31 CCC (3d) 223 (Man Prov Ct).

<sup>24</sup> See *Prostitution Reference*, *supra* note 8 at para 22.

<sup>25</sup> See generally *Manitoba Prostitution Reference*, *supra* note 22; see also *ibid* at paras 24-30 (Lamer J. helpfully discusses the history of the *Manitoba Prostitution Reference*).

The *Prostitution Reference* was heard by seven justices of the SCC,<sup>26</sup> with the final decision given by six<sup>27</sup> of those justices—Dickson C.J.C. with La Forest and Sopinka JJ. concurring; Lamer J. offering a separate opinion; and Wilson J. with L’Heureux-Dubé in dissent. Dickson C.J.C. agreed with Wilson J. that paragraph 213(1)(c) of the *Criminal Code* represented a *prima facie* infringement of subsection 2(b) of the *Charter*. Unlike Wilson J., however, Dickson C.J.C. believed that the infringement was reasonably justified under section 1.<sup>28</sup> Dickson C.J.C. further held that sections 210 and 213(1)(c) did not, either separately or in combination, infringe section 7 of the *Charter*.<sup>29</sup> Lamer J. found an infringement of subsection 2(b) of the *Charter*, but, like Dickson C.J.C., ultimately held that such an infringement was reasonably justified under section 1.<sup>30</sup> Lamer J. further held that the impugned provisions did not infringe section 7 and were therefore constitutional.<sup>31</sup>

Notwithstanding Wilson J.’s dissent, Dickson C.J.C. and Lamer J.’s judgments together formed the final holding of the case, namely that sections 210 and 213(1)(c) were constitutional. It is this holding that became the *prima facie* binding precedent to be followed by future courts, including the ONSC in *Bedford*.<sup>32</sup>

(ii) *Bedford v Attorney General (Canada)*

Approximately 20 years after the SCC rendered its decision in the *Prostitution Reference*, three individuals—Terri Jean Bedford, Amy Lebovitch, and Valerie Scott (together referred to as the “applicants”)—brought an application seeking an order declaring that sections 210, 212(1)(j), and 213(1)(c) of the *Criminal Code* were un-

<sup>26</sup> The seven justices were Dickson C.J.C. (as he then was), and McIntyre, Lamer, La Forest, L’Heureux Dubé, and Sopinka JJ.

<sup>27</sup> McIntyre J. took no part in the decision.

<sup>28</sup> *Prostitution Reference*, *supra* note 8 at para 1.

<sup>29</sup> *Ibid* at paras 14-19. Dickson C.J.C. found that there was an infringement of the liberty component of s 7, but ultimately determined that such an infringement was in accordance with the principles of fundamental justice and therefore not unconstitutional.

<sup>30</sup> *Ibid* at para 107.

<sup>31</sup> *Ibid*.

<sup>32</sup> For the purposes of this paper, I have chosen to treat the *Prostitution Reference*, *supra* note 8 as a vertically binding precedent (for a discussion of vertically binding precedent, see *infra* section III(i) Vertical Precedent); however, I do note that reference decisions are not technically binding. That said, most references are treated as binding precedent upon lower courts and are usually followed as such when appropriate. As Rinfrét C.J.C. stated in *Reference re Wartime Leasehold Regulations*, [1950] SCR 124, [1950] 2 DLR 1 at para 3:

“[r]eferences...merely call for the opinion of the Court on the questions of law or fact submitted...and the answers given by the Court are only opinions. It has invariably been declared that they are not judgments either binding on the government, on parliament, on individuals, and even on the Court itself, although, of course, this should be qualified by saying that, in a contested case where the same questions would arise, they would no doubt be followed.”

In fact, as noted above, Himel J. in *Bedford* recognized and stated that the *Prostitution Reference* was a *prima facie* binding precedent upon her court: *Bedford*, *supra* note 2 at para 66. I also note that the *ratio decidendi* of the *Prostitution Reference* may be broader or more narrow than the holding which I have stated: see *Bedford v Canada (Attorney General)*, 2012 ONCA 186, 346 DLR (4th) 385, where the majority decision states that the issues decided in *Bedford* can be distinguished from the issues decided in the *Prostitution Reference*. That said, determining the exact *ratio decidendi* of the reference is beyond the scope of this commentary. For this commentary’s purposes, it is sufficient to note that the impugned provisions in the *Prostitution Reference* were ultimately found to be constitutional, and that Himel J. was *prima facie* bound by such a determination.

constitutional.<sup>33</sup> As noted above, the constitutionality of two of these provisions, namely sections 210 and 213(1)(c), were previously constitutionally considered and upheld by the SCC in the *Prostitution Reference*.<sup>34</sup> The applicants challenged all three provisions by arguing that such provisions violated sections 7 and 2(b) of the *Charter*, and that these violations could not be saved under section 1.<sup>35</sup>

Himel J. noted that although prostitution is not illegal *per se* in Canada, many prostitution related activities are illegal.<sup>36</sup> Himel J. further noted that it was Parliament's act of legislating such activities illegal, and not the actual act of prostitution, which provided the basis for the applicants' assertion that the government prevents prostitutes from being able to conduct "[t]heir lawful business in a safe environment."<sup>37</sup> Being guaranteed a safe environment to conduct lawful business, the applicants asserted, was a right protected by the *Charter*.<sup>38</sup> Each one of the applicants was at one time a prostitute. All asserted, based on experience, that prostitution was significantly safer when conducted indoors and through appropriate screening processes.<sup>39</sup>

With regards to the binding effect of the *Prostitution Reference*, the applicants argued that the reference was either "[d]istinguishable and/or no longer binding..." due to the fact that there was new evidence available that had not been before the SCC, and that there were also new developments in *Charter* jurisprudence that called the SCC's decision into question.<sup>40</sup> The Attorney General of Canada, however, argued the opposite, asserting that there was no basis for Himel J. to revisit the issue of constitutionality.<sup>41</sup> It is this issue—the applicability and effect of *stare decisis* in *Bedford* and, more generally, trial level *Charter* analysis—which is of upmost importance to this paper. Therefore, in order to achieve a better understanding of the doctrine of *stare decisis*, I will now briefly outline and discuss the various rules that inform the concept of precedent and the doctrine of *stare decisis*.

### III. The Doctrine of *Stare Decisis* and Rules of Precedent

*Stare decisis* is the Latin term that signifies the common law convention of judicial devotion to binding precedent. Literally translated, *stare decisis* means "[t]o stand by decided matters."<sup>42</sup> The complete Latin phrase which explains the doctrine in its entirety—i.e. "*stare decisis et non quieta movere*"—means "[t]o stand by deci-

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<sup>33</sup> See generally *Bedford*, *supra* note 2.

<sup>34</sup> *Supra* note 8.

<sup>35</sup> See *Bedford*, *supra* note 2 at paras 8-13.

<sup>36</sup> *Ibid* at para 8.

<sup>37</sup> *Ibid* at para 8.

<sup>38</sup> *Ibid*.

<sup>39</sup> See *ibid* at paras 26-43.

<sup>40</sup> *Ibid* at para 9.

<sup>41</sup> *Ibid* at para 15. The Attorney General of Canada made further alternative arguments for if Himel J. determined that she was able to revisit the issue of constitutionality, but it is beyond the scope of this paper to consider such arguments.

<sup>42</sup> Gerald L Gall, *The Canadian Legal System*, 5th ed (Toronto, ON: Thomson Canada Limited, 2004) at 431; see generally *the Dictionary of Canadian Law*, 3d ed, *sub verbo* "*stare decisis*" [*Canadian Dictionary*].

sions and not to disturb settled matters.”<sup>43</sup> These concepts together represent the common law precept that judges are to follow the decisions of applicable prior cases and are not to revisit issues of law that have already been settled.<sup>44</sup>

The doctrine of *stare decisis* and rules concerning precedent exist in common law jurisdictions to help ensure that judges reach the same legal conclusions that were reached in previous cases if and when they are faced with similar legal issues in future cases.<sup>45</sup> When judges do reach the same legal conclusions in such instances, they create a sense of clarity, predictability, and legitimacy within the law.<sup>46</sup> Consistent decision-making through adherence to precedent also creates legal and judicial certainty for all members of society.<sup>47</sup> Laskin J.A. of the ONCA articulated the inherent values and importance of the doctrine aptly in *David Polowin Real Estate Ltd. v The Dominion of Canada General Insurance Co.* (“*David Polowin*”), when he stated:

[t]he values underlying...*stare decisis* are well known: consistency, certainty, predictability, and sound judicial administration. Adherence to precedent promotes these values...Adherence to precedent also enhances the legitimacy and acceptability of judge-made law and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case.<sup>48</sup>

In essence, Laskin J.A. is stating that laws need to be reasonably certain so that society and its members can suitably function in accordance with those laws and, in the constitutional context, so that legislatures can function in accordance with constitutional expectations.<sup>49</sup> To achieve these ends, adherence to precedent is considered preferable to—and is required as opposed to—unrestrained *ad hoc* judicial determinations.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*; *Canadian Dictionary*, *supra* note 41; see generally Debra Parkes, “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2007) 32 *Man LJ* 135 and David J Murphy & Robert Reuter, *Stare decisis in commonwealth appellate courts* (Toronto, ON: Butterworths, 1981); see also *Re Canada Temperance Act*, [1939] OR 570, 72 CCC 145 at para 70 [*Canada Temperance*].

<sup>45</sup> See Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009) at 37.

<sup>46</sup> See e.g. *Minister of Indian Affairs and Northern Development v Ranville*, [1982] 2 SCR 518, 139 DLR (3d) 1 at 15 [*Ranville*]; see *David Polowin Real Estate Ltd. v The Dominion of Canada General Insurance Co.*, (2005), 76 O.R. (3d) 161, 199 OAC 266, leave to appeal to the SCC denied: [2005] SCCA No 388 at para 119 [*David Polowin*]; see also Gall, *supra* note 42.

<sup>47</sup> *David Polowin*, *supra* note 46 at paras 119-120.

<sup>48</sup> *Ibid* at paras 119-120; see also *Stuart v Bank of Montreal*, 41 SCR 516, aff'd [1911] AC 120 at para 93; *Barnett v Henderson*, [1976] 2 SCR 531, 57 DLR (3d) 225 at para 43; *Woods Manufacturing Co v R*, [1951] SCR 504, [1951] 2 DLR 465 at para 24; *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609 at paras 52-59 [*Henry*]; *R v Yeh*, 2009 SKCA 112, [2009] WWR 193 at para 112; *R v Prokofiew*, 2010 ONCA 423, 256 CCC (3d) 355 at para 35; *R v Y (LS)*, 2009 ABCA 89, 242 CCC (3d) 441 at para 18 [*Y (LS)*]; *R v Crazybull*, 141 AR 69, [1993] AWLD 605 at paras 20-21 [*Crazybull*]; *New Brunswick (Minister of Natural Resources) v McCoy*, 277 NBR (2d) 27, 50 CPC (5th) 298 at paras 5-6; *Honesty Property Co v Lemaigre*. 2004 SKCA 28, 241 Sask R 313 at para 4; *Canada (Minister of Citizenship & Immigration) v Fast*, 2001 FCA 373, [2002] 3 FC 400 at para 2 [*Fast*].

<sup>49</sup> See *David Polowin*, *supra* note 46 at para 119.

To guard against these *ad hoc* determinations, two types of precedents exist: vertical precedent and horizontal precedent. In combination, these types of precedent form the critical content of the doctrine of *stare decisis*.<sup>50</sup> Historically, some common law jurisdictions, including the United Kingdom, considered both horizontal and vertical precedents to be absolutely binding.<sup>51</sup> The situation in Canada, however, is somewhat different. Generally, although Canadian courts do not actively seek to depart from their horizontal precedents, only vertical precedents remain strictly binding in the Canadian context.<sup>52</sup> It is this distinction between the binding effects of vertical versus horizontal precedents that is vital to explaining why Himel J., in *Bedford*, was mistaken in her reasons with respect to *stare decisis*.

(i) *Vertical Precedent*

Canada's judicial system is hierarchical. In simple terms, it is made up of separate jurisdictions of lower trial level courts and higher intermediate level appellate courts. There is also one final court of appeal, the SCC, which exercises the highest form of judicial authority. SCC authority is binding upon every Canadian jurisdiction and thus every Canadian court of law. It is because of this hierarchical structure that vertical precedent exists. When a higher level court makes a pronouncement of law, that pronouncement becomes binding upon all lower level courts within the same jurisdiction.<sup>53</sup> In other words, such pronouncements create vertical precedents that bind all applicable lower level courts.<sup>54</sup> As Professor Schauer—a legal reasoning and philosophy of law professor at the University of Virginia, School of Law—fittingly puts it,

[l]ower courts are normally expected to obey the previous decisions of higher courts within their jurisdiction, and this relationship...is usefully understood as vertical...Indeed, we refer to courts as higher and lower precisely because higher courts exercise authority over lower ones, an authority manifested principally in the obligation of lower courts to treat the decisions of higher courts as binding upon them.<sup>55</sup>

It follows that since *Bedford* was a decision of the ONSC, Himel J. was bound by decisions of the ONCA and of the SCC; this is because those courts would be considered higher courts within her court's jurisdiction. It also follows that because the *Prostitution Reference* was a decision of the SCC, it too was vertically binding upon her court. Other decisions of the ONSC, however, would not be considered verti-

<sup>50</sup> See JD Heydon, "How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?" (Summer 2009) 9 OUCIJ 1 at 3-4.

<sup>51</sup> See *The London Tramways Company Limited v The London County Council*, [1898] AC 375, [1898] UKHL 1. Note that this is no longer the position of the House of Lords: See *Practice Statement (Judicial Precedent)*, [1966] 1 WLR 1234 (HL).

<sup>52</sup> See Parkes, *supra* note 44 at para 5; see also Henry, *supra* note 48 at paras 52-59; Fast, *supra* note 48 at para 2; Y (LS), *supra* note 48 at para 18; Crazybull, *supra* note 48 at paras 20-21.

<sup>53</sup> See Gall, *supra* note 42 at 431; see Schauer, *supra* note 45 at 36; see Peter W Hogg, *Constitutional Law in Canada*, 3d ed (Toronto, ON: Carswell, 1992) at 219; see *Canadian Dictionary*, *supra* note 41 *sub verbo* "stare decisis"; see e.g. *Canada Temperance*, *supra* note 44 at para 70.

<sup>54</sup> Schauer, *supra* note 45 at 36.

<sup>55</sup> *Ibid* at 36-37. I note that here Professor Schauer is discussing how precedent functions in the United States. Nonetheless, his statement applies as well and in full to the Canadian context.

cally binding. Instead, those decisions would form horizontal precedents, the binding effects of which, as I will now explain, are functionally different.

### (ii) *Horizontal Precedent*

Strictly speaking, the term horizontal precedent<sup>56</sup> means that courts are bound to follow *their own* prior decisions.<sup>57</sup> That said, Canadian courts apply a more flexible approach to the binding effect of horizontal precedent as compared to the more strict vertical precedent.<sup>58</sup> Although Canadian courts tend to exercise caution and restraint when presented with an opportunity to overrule a horizontal precedent, they nevertheless do not consider themselves *absolutely* bound by their past decisions.<sup>59</sup> I will now discuss further the ways in which the SCC, ONCA, and ONSC each take a more flexible approach to the binding effect of horizontal precedent.

#### *The Supreme Court of Canada*

Speaking in relation to horizontal precedent at the SCC level, Cartwright J. (as he then was) stated in *Binus v The Queen*,<sup>60</sup> “[I] do not doubt the power of this Court to depart from a previous judgment of its own but...I think that such a departure should be made *only for compelling reasons*.”<sup>61</sup> In stating this, Cartwright J. was setting the foundation for how the SCC would approach situations involving the potential overruling of its own decisions. This foundation has been built upon by Cartwright J.’s successors; however, no justice of the SCC has set out a formal test aimed at determining when the Court will or will not overrule one of its own horizontal precedents. The Court has, however, on a number of occasions, reiterated the general notion that it would need compelling reasons in order to overrule one of its own horizontal precedents.<sup>62</sup> All things considered, while it is clear that the SCC will overrule one of its previous decisions when it is compelled to do so, such a determination will only be made after a careful consideration of the implications involved.

#### *The Ontario Court of Appeal*

The SCC’s approach to horizontal precedent is not binding on the ONCA. In other words, simply because the SCC approaches horizontal precedent in a certain

<sup>56</sup> I will restrict my comments on horizontal precedent to the relevant courts in *Bedford*, *supra* note 2, namely the SCC, the ONCA, and the ONSC. Although Himel J. in *Bedford* also cites the Saskatchewan Court of Queen’s Bench, this decision is not a horizontal precedent as it is a decision from a separate jurisdiction. Such a decision would technically be considered a persuasive authority.

<sup>57</sup> Schauer, *supra* note 45 at 37.

<sup>58</sup> See generally Parkes, *supra* note 44 at paras 25-53.

<sup>59</sup> See generally *ibid*; see *R v Bernard*, [1988] 2 SCR 833, 45 CCC (3d) 1 at para 28 [*Bernard*] (per Dickson C.J.C.: “There must be compelling circumstances to justify a departure from a prior decision.”); see *R v Chaulk*, [1990] 3 SCR 1303, 62 CCC (3d) 193 at para 103 [*Chaulk*]; see *David Polowin*, *supra* note 46 at para 126; see also Heydon, *supra* note 50 at 4. Heydon discusses the role of horizontal precedent in the United Kingdom. Its role is similar to that of the Canadian context.

<sup>60</sup> [1967] SCR 594, [1968] 1 CCC 227.

<sup>61</sup> *Ibid* at 601 [emphasis added].

<sup>62</sup> See *ibid*; see *Bernard*, *supra* note 59; see *Chaulk*, *supra* note 59; see *Henry*, *supra* note 48 at paras 44-46; see *R v Salituro*, [1991] 3 SCR 654, 68 CCC (3d) 289 at 29 [*Salituro*]; see *R v B (KG)*, [1993] 1 SCR 740, 79 CCC (3d) 257 at para 63; see *R v Robinson*, [1996] 1 SCR 683, [1966] 4 WWR 609 at para 16.

way, it does not follow that the ONCA must follow this same approach. This is because the SCC has never imposed the approach on lower courts.<sup>63</sup> Instead, it remains a policy of sorts for the SCC. Nevertheless, the ONCA has adopted *similar* guidelines to those of the SCC with respect to horizontal precedent and, furthermore, it has chosen to build upon them.<sup>64</sup>

Much like the SCC, the ONCA holds the belief that departing from its prior decisions should be the exception—i.e. reserved for special circumstances—rather than the norm.<sup>65</sup> In contrast to the SCC, however, the ONCA appears to have a somewhat stricter view of the binding effect of horizontal precedent. For example, even if the ONCA determines that a prior decision of its court is erroneous, that determination will not necessarily lead the ONCA to overrule its prior decision.<sup>66</sup> As Laskin J.A. stated in *David Polowin*, “[a]lthough I have concluded that [a previous decision of this court is in error], it does not automatically follow that [it] should be overruled. The principle of *stare decisis*—‘stand by things decided’—comes into play.”<sup>67</sup> Instead, the ONCA will only overrule a prior erroneous decision if there are sufficient reasons to do so.<sup>68</sup> Making such a determination will involve “weigh[ing] the advantages and disadvantages of correcting the error...”<sup>69</sup> Therefore, although the ONCA is potentially willing to overrule its own precedent, it would only do so following a meticulous balancing process and a careful consideration of the implications that would flow from taking such an action.

### *The Ontario Superior Court of Justice*

The ONSC adheres to the conformity approach with respect to trial level horizontal precedent.<sup>70</sup> This approach was first articulated by Wilson J. in *Re Hansard Spruce Mills Ltd.*,<sup>71</sup> a British Columbia trial level decision. That approach was stated by Wilson J. as follows:

[I] have no power to override a brother judge. I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law...

Therefore...I say this: I will only go against a judgment of another judge of this Court if:

- a) Subsequent decisions have affected the validity of the impugned judgment;

<sup>63</sup> *David Polowin*, *supra* note 46 at para 126.

<sup>64</sup> See *ibid* at paras 124-143.

<sup>65</sup> See *ibid* at para 126.

<sup>66</sup> *Ibid* at para 107.

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

<sup>68</sup> See *Ibid* at para 108.

<sup>69</sup> *Ibid* at para 127; see also *R v Neves*, 2005 MBCA 112, 202 CCC (3d) 375 at paras 74-94 (this is a decision of the Manitoba Court of Appeal adopting the views of Laskin J.A. in *David Polowin*).

<sup>70</sup> See generally *Holmes v Jarrett*, [1993] ILR 1-2949, 68 OR (3d) 667 at paras 13-27 [*Holmes*]; see also *PricewaterhouseCoopers LLP v Phelps*, 2010 ONSC 1061, 2010 CarswellOnt 1061 at paras 37-39 [*Phelps*] and *Re Hansard Spruce Mills Ltd.*, [1954] 4 DLR 590, 13 WWR (NS) 285 (BCSC) at paras 4-8 [*Re Hansard*].

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

- b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
- c) The judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exists I think a trial judge should follow the decisions of his brother judges.<sup>72</sup>

The ONSC formally adopted this approach in *Holmes v Jarrett*, and recently confirmed the adoption in *PricewaterhouseCoopers LLP v Phelps*.<sup>73</sup> The trial judges in those cases particularly noted that the conformity approach allows for certainty to be brought to the law up until the point where an appropriate appellate level court is able to finally settle the legal issue(s) in question.<sup>74</sup> As I have already canvassed above, it is this certainty which is of fundamental importance to our conception of law, and which the doctrine of *stare decisis* assists in achieving.

(iii) *Authority to Revisit versus Authority to Overrule*

Before moving on to discuss the specific authorities cited in *Bedford*, it will prove advantageous to first clarify the distinction between having the authority to revisit a precedent, and having the authority to overrule a precedent. Throughout *Bedford* and the numerous authorities cited therein in reference to *stare decisis*, there is discussion about when courts may revisit and/or reconsider past decisions.<sup>75</sup> There is an important distinction between having the authority to revisit decisions and having the authority to overrule them—though Himel J. does not make note of it in her reasoning—and this distinction is vital to a trial and/or an intermediate appellate level court’s *Charter* analysis. Himel J. seems to suggest that the authorities she relies upon stand for the proposition that having the authority to revisit necessarily equates to having the authority to overrule. While this suggestion may hold true at the SCC level, it does not hold true for intermediate appellate and trial level courts. It therefore follows that such a presumption is to be rejected.

The authority to revisit a decision must be distinguished from the authority to overrule because the two types of authority do not necessarily co-exist. For example, a trial level judge may have the authority to revisit a settled issue of law, but due to the binding effect of a vertical precedent, that trial level judge may not have the authority to overrule the previous decision which settled that issue of law. If the trial level judge disagrees with the precedent, then that trial judge is free to criticize the precedent’s remaining validity. He or she would not, however, have the authority to overrule it.<sup>76</sup> This authority would be reserved for the appellate level court that settled the issue of law and created the binding precedent.

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<sup>72</sup> *Ibid.*

<sup>73</sup> See *Holmes*, *supra* note 70 at paras 12-27; see *Phelps*, *supra* note 70 at paras 37-39.

<sup>74</sup> *Ibid* at para 39.

<sup>75</sup> See *Bedford*, *supra* note 2 at paras 69-83.

<sup>76</sup> See Heydon, *supra* note 50 at 14.

With regard to an intermediate appellate level court, such a court would certainly have the authority to revisit and overrule one of its own decisions—this is consistent with the notion of horizontal precedent. It would also have the authority to revisit a precedent of the SCC and offer its views regarding that precedent’s remaining validity.<sup>77</sup> It would not, however, have the authority to overrule that SCC precedent. The authority to overrule would be reserved for the SCC due to the rules regarding vertical and horizontal precedent. An intermediate appellate level court would be bound by the SCC decision because such a decision would be a vertically binding precedent upon that intermediate appellate level court. Conversely, the SCC would not be strictly bound by the same decision because such a decision, to the SCC, would be a horizontal precedent.

With the distinction between vertical and horizontal precedent in mind, I now turn to discuss the authorities from the various levels of court cited by Himel J. in *Bedford* to support her decision to depart from the binding effect of the *Prostitution Reference*.

#### **IV. *Stare Decisis* in *Bedford*: Clarifying the Meaning of the Authorities Cited**

Himel J. relied on authorities from the SCC, ONCA, ONSC, and SKQB in the *stare decisis* section of her decision in *Bedford*. Given that she specifically designated a section to *stare decisis*,<sup>78</sup> it can be reasonably inferred that Himel J. understood that the doctrine had particular importance to the case. This inference gains particular support from the fact that Himel J. acknowledged that the *Prostitution Reference* was “*prima facie* binding” upon her court.<sup>79</sup> Unfortunately, however, it appears that Himel J. consistently confused and conflated the concepts of horizontal and vertical precedent throughout her reasons with respect to *stare decisis*. Himel J.’s overarching argument, namely that she was not bound by *stare decisis*, incorrectly equated the more flexible approach of horizontal precedent with the strict concept of vertical precedent. I will now demonstrate why the authorities relied upon by Himel J. do not support such an equivalency.

##### *(i) The Supreme Court of Canada*

Himel J. noted that the SCC has the power to revisit its own decisions,<sup>80</sup> with the implication being drawn from this that the SCC also has the authority to overrule its own decisions. While the above discussion clearly demonstrates that both these notions are true, the ability of a court to revisit and overrule *its own* prior decisions is quite different from a lower court being able to revisit and overrule *a higher court’s* previous decisions. Again, the reason the SCC has the ability to overrule its prior decisions is because it does not consider itself strictly bound by horizontal precedent. This limited flexibility with regards to the binding effect of

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Bedford*, *supra* note 2 at paras 63-83.

<sup>79</sup> *Ibid* at para 66.

<sup>80</sup> *Ibid* at para 78 citing *Ranville*, *supra* note 46, *Bernard*, *supra* note 59, *Chaulk*, *supra* note 59, and *Salituro*, *supra* note 62.

horizontal precedent, however, is simply not available with respect to vertically binding precedent.

After noting that the SCC has the authority to revisit its past decisions, Himel J. also asserted, in the sentence immediately following, that trial judges may also revisit past decisions, but only “[i]n very limited circumstances.”<sup>81</sup> This assertion, however, would only be correct if it stood for the proposition that trial level judges may revisit past decisions *of their own court*.<sup>82</sup> As outlined above, trial judges in Ontario may revisit and depart from decisions of other Ontario trial judges if and when certain limited circumstances exist.<sup>83</sup> The *Prostitution Reference* however, is not a decision of the ONSC, but instead a decision of the SCC. It is vertically binding in relation to the ONSC, not horizontally binding. Therefore, Himel J.’s suggestion that lower courts may revisit previous decisions of higher courts due to the fact that SCC precedents state that the SCC may revisit its own decisions is mistaken. No SCC authority cited by Himel J. stands for the proposition that lower courts may revisit and/or overrule vertically binding precedent. This is not surprising seeing as the SCC has never made such a pronouncement of law.

(ii) *The Ontario Court of Appeal*

While Himel J. does make reference to the SCC’s practices regarding horizontal precedent, she relies more heavily on the ONCA’s decision in *David Polowin*. Although relying on this decision may seem intuitively logical—because the ONCA is a higher level court within her jurisdiction—it is important to fully understand Laskin J.A.’s reasoning in *David Polowin* in order to determine whether Himel J. was properly relying on that decision. One should note that Laskin J.A. discusses the overall applicability of *stare decisis*, but only does so in relation to the binding effect of horizontal precedent at the ONCA and the SCC.

Himel J. noted that Laskin J.A. suggests a more flexible approach to *stare decisis* is preferable.<sup>84</sup> What Himel J. seems to confuse, however, is the fact that Laskin J.A. was only making those comments with respect to whether the ONCA should choose to depart from its own prior decisions.<sup>85</sup> Further, the SCC authorities cited by Laskin J.A. in *David Polowin* were all discussing *stare decisis* in terms of departure from horizontally binding precedents. From these authorities, Laskin J.A. gleaned a non-exhaustive list of five factors that the SCC considers when determining whether there are compelling reasons for it to overrule one of its horizontal precedents.<sup>86</sup> Laskin J.A. went on to propose a further seven factors that the ONCA could consider in overruling one of its horizontal precedents.<sup>87</sup> The key point here is that Laskin J.A. was developing the law with respect to horizontal precedent at the ONCA only, and that such developments provide no direct support for Himel

<sup>81</sup> *Bedford*, *supra* note 2 at para 78.

<sup>82</sup> I will discuss these authorities cited by Himel J. with regards to trial level judges being able to revisit issues of law below at Section IV(3)The Ontario Superior Court of Justice and Section IV(4) The Saskatchewan Court of Queen’s Bench.

<sup>83</sup> See section III(ii) Ontario Superior Court of Justice above; see *Holmes*, *supra* note 70 at paras 12-27; see *Phelps*, *supra* note 70 at paras 37-39; see also *Re Hansard*, *supra* note 70 at paras 4-8.

<sup>84</sup> See *Bedford* note 2 at para 68 citing *David Polowin*, *supra* note 46 at paras 127.

<sup>85</sup> See *David Polowin*, *supra* note 46 at paras 107-145.

<sup>86</sup> *Ibid* at paras 124-125.

<sup>87</sup> *Ibid* at paras 130-145.

J.'s arguments regarding the (in)applicability of *stare decisis* in *Bedford*. Again, the result is that Himel J. mistakenly conflated horizontal and vertical precedent in supporting her suggestion that she was able to depart from the binding effect of the *Prostitution Reference*.

In addition, it is important to note that the precedent Laskin J.A. considered overruling in *David Polowin* was one that he considered to be decided erroneously.<sup>88</sup> Himel J. does not make a similar assertion in *Bedford*. More importantly—and somewhat ironic for Himel J.'s reasoning—Laskin J.A. in *David Polowin* made specific mention of whether trial level judges have authority to overrule decisions of higher level courts. When presented with the argument that trial level judges should have such authority, Laskin J.A. definitively stated,

[t]he insurers go as far as to argue that the motions judge had authority to depart from [our precedent] and that he ought to have done so. I do not find any of these arguments persuasive...

...the insurers' [argument]...has no merit. The motions judge's ruling was entirely appropriate. A fair reading of his reasons suggests that he would have decided the motions differently had he been free to do so. But he properly considered himself bound to follow [our precedent]. *If the error...is to be corrected, it falls to this court, not to the motions judge, to do so.*<sup>89</sup>

In light of this, the position of the ONCA, and of the law generally, is actually quite clear: trial level judges are to adhere to vertically binding precedent even if they believe that the precedent is incorrect. It follows from this that since the *Prostitution Reference* was a vertically binding precedent, Himel J. was bound to follow it, regardless of whether or not she believed it to be decided erroneously.

### (iii) *The Ontario Superior Court of Justice*

After citing authority—albeit mistakenly—from the SCC and ONCA, Himel J. then turned to support her reasoning on the issue of *stare decisis* through a reliance on horizontal precedent from the ONSC.<sup>90</sup> Although citing to and relying on horizontal precedent is not incorrect *per se*, it is important to understand what the cited authority stands for as a proposition of law in order to determine whether Himel J.'s use of the precedent was appropriate.

The horizontal precedent which Himel J. relied on was *Wakeford v Canada (Attorney General)* [*Wakeford*].<sup>91</sup> In this case, Swinton J. of the ONSC stated,

<sup>88</sup> *Ibid* at para 107.

<sup>89</sup> *Ibid* at para 117 [emphasis added].

<sup>90</sup> See *Bedford*, *supra* note 2 at paras 79–80.

<sup>91</sup> 81 CRR (2d) 342; 2001 CarswellOnt 352 aff'd (2001), 156 OAC 385, leave to appeal to SCC refused, [2002] SCCA No. 72 [*Wakeford*]. Note: while this case was affirmed by the Ontario Court of Appeal, the affirmation made no comment on Swinton J.'s suggestions of anticipatory overruling being available to trial judges. In fact, the paragraph-long affirmation went as follows: "We appreciate that this appeal raises a serious issue. However, we agree with Swinton J. that the issue has been fully settled by the [SCC]...Therefore, the appeal is dismissed without costs." Ultimately, Swinton J.'s suggestions are *obiter dicta* because they had no significant bearing on the outcome of the case, and should be rejected as conflicting with the doctrine of *stare decisis*.

It is true that the [SCC] has the power to overrule its past decisions. However, a lower Court should not be quick to assume that it will do so, given the importance of the principle of *stare decisis* in our legal system...[W]here there is a decision of the [SCC] squarely on point, there must be some indication—either in the facts pleaded or in the decisions of the [SCC]—that the prior decision may be open for reconsideration...<sup>92</sup>

In essence, Swinton J. is referring to the concept of anticipatory overruling.<sup>93</sup> Anticipatory overruling is a concept whereby lower level courts may overrule vertically binding precedent if and when they are almost entirely able to anticipate that the applicable higher level court will overrule that precedent when given the opportunity to do so.<sup>94</sup> Although it has been argued that anticipatory overruling should be available to intermediate appellate level courts<sup>95</sup> (for example the ONCA), this argument has not been accepted into Canadian law.<sup>96</sup> One of the main reasons for the non-acceptance is that being able to predict an overruling with sufficient certainty is an extremely difficult, if not impossible, task. As Professor Parkes states in her article on the role of precedent, “[t]he reality is that there are very few cases where it can truly be said that an overruling by the [SCC] is very likely or inevitable...”<sup>97</sup> After reviewing how the notion of anticipatory overruling is viewed in the jurisprudence of both Canada and the United States, Professor Parkes correctly concludes that the notion of anticipatory overruling has ultimately been rejected.<sup>98</sup> As such, the suggestion by both Swinton J. in *Wakeford* and Himel J. in *Bedford* that a trial level judge could have the authority to anticipatorily overrule vertically binding precedent as a proposed exception to the doctrine of *stare decisis* is without any sound legal foundation.

#### (iv) *The Saskatchewan Court of Queen’s Bench*

Although not technically a horizontal precedent—but instead a persuasive precedent—Himel J. also reaches for support from a decision by Laing C.J. (as he then was) of the SKQB, namely *Leeson v University of Regina [Leeson]*,<sup>99</sup> to assert her ability to reconsider the legal issues previously settled in the *Prostitution Reference*.<sup>100</sup> However, much like Himel J.’s reasoning in *Bedford*, Laing C.J. in *Leeson* mistakenly conflates the rules of horizontal and vertical precedent and he thus rendered a decision erroneous in law. Like Himel J., Laing C.J. cites Laskin J.A.’s reasoning in *David Polowin* regarding when an appellate court may potentially revisit one of its own past decisions.<sup>101</sup> It has already been shown, however, that

<sup>92</sup> *Ibid* at para 14.

<sup>93</sup> See generally Parkes, *supra* note 44 at paras 17-24.

<sup>94</sup> *Ibid*.

<sup>95</sup> See generally Dale Gibson, “Stare Decisis and the Action Per Quod Servitium Amisit – Refusing to Follow the Leader: R v Buchinsky” (1980) 13 CCLT 309.

<sup>96</sup> See Parkes, *supra* note 44 at paras 21-24.

<sup>97</sup> *Ibid* at para 22.

<sup>98</sup> *Ibid* at paras 21-24.

<sup>99</sup> 2007 SKQB 252, 301 Sask R 316 [*Leeson*].

<sup>100</sup> See *Bedford*, *supra* note 2 at para 82.

<sup>101</sup> *Leeson*, *supra* note 99 at para 9 citing *David Polowin*, *supra* note 46 at para 124 citing *Bernard*, *supra* note 59, *Chaulk*, *supra* note 59, and *Salituro*, *supra* note 62.

*David Polowin* does not support the proposition that any court, including lower level courts, may revisit settled issues of law by higher level courts.<sup>102</sup>

In essence, Laing C.J. in *Leeson* and Himel J. in *Bedford* suggest that there is an exception to the binding effect of vertical precedent and that this exception specifically arises if, over a length of time, new facts expose that “[c]ertain social, political, or economic assumptions underlying the [precedent] are no longer valid.”<sup>103</sup> Himel J. relies on what she determines to be a wealth of new evidence and new developments in sections 7 and 2(b) *Charter* jurisprudence to justify her departure from the *Prostitution Reference*. While I candidly acknowledge that there may have been new evidence and new developments in the *Charter* jurisprudence applicable to *Leeson*, discussing the merits of these claims is beyond the scope of this paper. It is instead important for this paper’s purposes to note that Laing C.J. made the same error as Himel J. did in *Bedford*; namely that he relied on an authority which discusses the revisitation and overruling of horizontal precedent, and then confused and conflated this with the notion of vertical precedent.

Now, while *Leeson* suffers from the same shortcomings as *Bedford*, Laing C.J.’s *obiter dicta* in *Leeson* seems to hint upon a key procedural inevitability in *Charter* analysis more generally: in order for the SCC to have the opportunity to revisit and (potentially) overrule its own settled issues (i.e. its horizontal precedent), the revisitation process must necessarily “[c]ommence at the trial court level.”<sup>104</sup> It is this necessity that raises two fundamental questions in trial level *Charter* analysis: (1) when, if ever, may a trial level judge revisit an already settled issue of constitutional law; and (2) is such revisitation reconcilable with the doctrine of *stare decisis*? With these two questions in mind, I turn to proffer a solution to each.

## V. Retroactive and Prospective Remedies: Inferring the Possibility of Precedent Expiration in *Charter* Analysis

This paper’s discussion thus far has led to the conclusion that once Himel J. acknowledged that the *Prostitution Reference* was *prima facie* binding upon her court, she had no choice but to adhere to it because it was a vertically binding precedent. This conclusion seems somewhat paradoxical, however, given the fundamental principle that the Canadian constitution is meant to be “[a] living tree capable of growth and expansion within its natural limits...”<sup>105</sup> and that this growth and expansion is to develop alongside Canadian society over time.<sup>106</sup> After all, how is *Charter* jurisprudence to grow and expand if trial level judges are precluded from revisiting and making new determinations regarding previously settled issues in light of new evidence, new changes in Canadian society, and new developments in Canadian law? I propose that the answer to this question partly lies in a notion that may be called “precedent expiration.”

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<sup>102</sup> See section IV(ii) The Ontario Court of Appeal above.

<sup>103</sup> *Bedford*, *supra* note 2 at para 82-83 citing *Leeson*, *supra* note 99 at para 9.

<sup>104</sup> *Leeson*, *supra* note 99 at para 9.

<sup>105</sup> See *Edwards v Attorney-General for Canada*, [1930] AC 124 (PC), [1929] WWR 479 at para 54.

<sup>106</sup> See *Bedford*, *supra* note 2 at para 78 citing *ibid*; see also *Re Same-Sex Marriage*, 2004 SCC 79, 3 SCR 698.

Some support for the notion of precedent expiration may be found in the remedies section of *R v Hislop* (“*Hislop*”),<sup>107</sup> where the SCC discussed the availability, use, and applicability of retroactive and prospective remedies in relation to section 52 of the *Charter*. This section gives a court the power to strike down unconstitutional laws.<sup>108</sup> *Hislop* centred upon a section 15 *Charter* challenge that claimed subsection 72(1) of the *Canada Pension Plan Act*<sup>109</sup> was discriminatory to same-sex couples. It also involved an analysis of whether a successful challenge would give rise to either a retroactive or prospective remedy.<sup>110</sup> LeBel and Rothstein JJ., speaking for a strong majority, noted that the remedy of striking down a law pursuant to subsection 52(1) of the *Constitution Act, 1982* can be retroactive, prospective, or a combination of both.<sup>111</sup>

A retroactive remedy is one where a law is declared invalid and of no force and effect *from the moment it was made*, or at any point in time prior to the present day.<sup>112</sup> A prospective remedy, on the other hand, is one where a law is declared invalid and of no force and effect *from the present day onward*, or from a certain future point in time onward.<sup>113</sup> The SCC gave various reasons as to why one type of remedy might be chosen as opposed to the other in any one case, but none of these reasons are important within the context of this paper.<sup>114</sup> Instead, what is important is that the SCC, through the lens of remedy, suggested that courts may identify points in time where a law is to be considered constitutional and/or unconstitutional. And, in suggesting that there may exist a certain temporal element of constitutionality within any one law, one may query whether a more general implication can be drawn from this apart from remedy. In my view, such a general implication may be so drawn. I suggest that *Hislop* potentially lends support for a novel idea that the constitutionality of a law exists upon a time-based spectrum, and that therefore the constitutionality of a law has the potential to change over time. In other words, considering that the SCC, albeit again through the lens of remedy, has recognized that a law may be unconstitutional prior to or after it is actually found to be unconstitutional, it may be suggested that even though a law is to be considered constitutional at one point in time, this does not necessarily mean that the law will continue its constitutionality in perpetuity. Indeed, this appears to be the situation in *Bedford*, where Himel J. struck down the re-impugned *Criminal Code* provisions because she determined, in light of new legislative and/or social facts and new changes in *Charter* jurisprudence since the *Prostitution Reference*, that the provisions could *no longer* be considered constitutional.<sup>115</sup> Himel J. did not argue or rule that the *Prostitution Reference* was invalid when it was decided in 1990, but instead reconsidered the overarching issues in the *Prostitution*

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<sup>107</sup> 2007 SCC 10, [2007] 1 SCR 429 at paras 78-134 [*Hislop*].

<sup>108</sup> *Ibid*; see *Charter*, *supra* note 1, s 52.

<sup>109</sup> RSC 1985, c C-8.

<sup>110</sup> See generally *Hislop*, *supra* note 107; *c.f.* Richard HS Tur, “Time and Law” (2002) 22:3 Oxford J Leg Stud 463 [Tur]. Tur discusses retroactive and prospective overruling in the context of UK common law, instead of with respect to constitutional remedies as is the case in *Hislop*.

<sup>111</sup> *Ibid* at para 82.

<sup>112</sup> *Ibid* at para 93.

<sup>113</sup> See *ibid* at paras 93-95.

<sup>114</sup> See generally *ibid* at 93-103.

<sup>115</sup> See *Bedford*, *supra* note 2 at paras 3, 70-76, 506-507.

*Reference*—namely the constitutionality of the re-impugned *Criminal Code* provisions—in light of new findings of fact and developments in *Charter* jurisprudence between 1990 and 2010.

I would be remiss, however, if I did not concede that *Hislop* may be distinguished from *Bedford* in several ways. First, *Hislop* was dealing with constitutional remedies and not, as was the case in *Bedford*, the idea of analyzing a re-impugned law's constitutionality. Second, *Hislop* was not a decision made by a lower court that was bound by a higher court's precedent. The *Bedford* decision was the decision of a lower court being vertically bound by a higher court's precedent, namely the *Prostitution Reference*. Third—and as a consequence of the first two distinctions—the SCC in *Hislop* was simply tasked with determining whether a statutory provision was invalid, and if so, what the proper remedy would be. (Again, it did not have to first deal with issues involving the doctrine of *stare decisis* and vertically binding precedent.) Ultimately then, the SCC in *Hislop* was concerned with remedy and was not constrained by precedent in the way that Himel J. happened to be in *Bedford*. As such, *Bedford* contains an extra layer of complexity due to the existence of a vertically binding precedent.<sup>116</sup> Fortunately, in my view, the concept of precedent expiration will assist in untangling some of this complexity.

In gripping upon the suggestion above that the constitutionality of a law has potential to change over time, it may follow that upon such a change, a precedent once considered vertically binding in the constitutional context might actually become 'irrelevant'. In other words, when the constitutionality of a law changes at a later point in time, a precedent's applicability after the change might cease to exist (i.e. might be expired), thus leaving the state of the law again unsettled. Now, although precedent expiration may at first seem similar to lower level overruling and/or anticipatory overruling, this paper suggests that precedent expiration is a concept both analytically and foundationally distinct from these concepts, each one of which is barred by the doctrine of *stare decisis* while precedent expiration is not.<sup>117</sup> Indeed, precedent expiration may be conceptualized as a necessary corollary of the "living tree" doctrine of the constitution and the inevitability of society's development over time.

Precedent expiration is a specific doctrine born from the nature of constitutional law itself, and therefore limited to the sphere of constitutional analysis. Functionally, it preserves the flexibility required to allow *Charter* jurisprudence to appropriately evolve, while also maintaining fidelity to the doctrine of *stare decisis*. It does not challenge the notion that vertical precedent is binding, nor does it violate the notion of precedent more generally; it simply acknowledges that in the constitutional context, the length of time that a vertical precedent is binding may be limited.

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<sup>116</sup> I reiterate that for the purposes of this paper I have chosen to treat the *Prostitution Reference* as a vertically binding precedent: see note 32 above.

<sup>117</sup> *C.f.* Tur, *supra* note 110. Tur makes an interesting and somewhat similar claim with respect to the common law and precedent. Tur argues that there is a distinction between 'authoritatively overruling' and the weaker claim of 'not following', and although not dealing necessarily with the concept of precedent in the same way as I do, the idea of there being a subtle distinction in precedential concepts is similar to the claim I make here where in my view there is a subtle yet crucial distinction between anticipatory overruling and precedent expiration.

In addition, one should take note that, unlike lower level overruling and anticipatory overruling, precedent expiration occurs naturally and independent of action by the judiciary at any level. Lower level overruling and anticipatory overruling require some sort of direct or indirect judicial action in order to exist. While it is conceded that the law will only take notice of a precedent's expiration upon a judge making that very finding—a finding to take place through the specific tests which I will propose below—this 'discovery' is conceptually different from an overt or, as arguably Himel J. has done in *Bedford*, an obscure overruling. The discovery is an acknowledgement that a perfectly valid vertical precedent existed, but due to developments which have already occurred beyond a specific judge's control, the precedent simply no longer exists and the law, therefore, is no longer settled. In addition, it is a discovery brought about by and through a specific doctrinal analysis. If sufficiently new factual evidence is brought forward, and evidence that the law has shifted is likewise brought forward, it will become incumbent upon the trial judge to fill the void left by the expired precedent. The only way to do this will be to consider the constitutional issues *de novo* (i.e. free from the constraints of a now inapplicable vertically binding precedent).

## VI. Precedent Expiration or Permissible Revisitation?

Before proceeding, I must reiterate that I will not be commenting on the more substantive constitutional issues arising out of *Bedford*. Whether or not the jurisprudence surrounding sections 7 and 2(b) of the *Charter* has evolved sufficiently enough since the *Prostitution Reference* to warrant a finding of precedent expiration and/or permissible revisitation, and whether or not there were sufficiently new findings of fact to warrant a new section 1 analysis, are both questions better debated elsewhere. Instead, I turn now to focus on explaining, through a proposed test, the one situation where a trial level judge or intermediate appellate level court may identify that a precedent has expired, and the two situations where each may revisit issues of a law's constitutionality.

### (i) *Precedent Expiration – The First Situation – A Sufficient Shift in the Law and Sufficiently New Findings of Fact*

There is a difference between having the authority to overrule and having the authority to revisit.<sup>118</sup> There is also a difference between overruling and identifying that a precedent has expired. In *Charter* analysis, and in Canadian law generally, lower courts do not have the authority to overrule higher courts due to the doctrine of *stare decisis*.<sup>119</sup> At times, however, a lower court will have the authority to revisit and/or will be able to identify an expired precedent. In *Charter* analysis, the latter will occur if *both* questions from the following test can be answered in the affirmative:

1. Has the jurisprudence surrounding the *Charter* right developed—since the constitutionality of the re-impugned provision was originally set-

<sup>118</sup> See above section III(iii) Authority to Revisit versus Authority to Overrule.

<sup>119</sup> See above section III(i) Vertical Precedent.

- tled—to such an extent as to create a situation of a relatively *de novo* analysis of the re-impugned provision? and
2. Do new social and/or legislative facts exist now that were not under consideration when the constitutionality of the re-impugned provision was previously settled which oblige the trial judge to revisit the section 1 *Charter* analysis with respect to the re-impugned provision?

When answered in the affirmative, the first prong of the test gives a trial level judge sufficient reason to reconsider a provision's constitutionality with respect to a specific *Charter* right, while the second prong, when answered in the affirmative, gives a trial judge sufficient reason to reconsider the section 1 analysis with respect to that provision.<sup>120</sup> The first prong emphasizes a sufficient shift in the law, while the second prong emphasizes a sufficient shift in the assumptions underlying Canadian society. But only when both prongs are answered in the affirmative will a trial judge be able to identify that a *prima facie* vertically binding precedent has expired due to there being a significant and sufficient shift in both the law and in Canadian society in general. The trial judge would be able to engage in a full constitutional analysis and would be free to determine whether the re-impugned provision is constitutional or unconstitutional, and, if the latter, would be free to grant whatever constitutional remedy is appropriate in the circumstances. This is because the previously considered binding precedent would lose its binding effect due to the above test's effect of recognizing that both the law and the facts now in consideration have sufficiently shifted from those previously considered.

The above test provides sufficient restraint on trial judges while also adhering to the doctrine of *stare decisis*. If both prongs are affirmed, the actual legal and factual issues under consideration will be significantly—and therefore also sufficiently—shifted from those of the *prima facie* binding precedent. Particular emphasis must be placed on the fact that *both* these questions need to be answered in the affirmative. An affirmative answer to both questions brings into focus the fact that the state of the law and the state of society overall have shifted to such an extent that the law, in effect and in reality, is no longer settled. The precedent's expiration leaves the trial level judge with a clean slate from which she or he is able to make new constitutional determinations.

If either one of the questions in the test cannot be answered in the affirmative, this will be an indication that the overall state of the law and/or of society has not sufficiently shifted to allow the trial level judge to identify that the *prima facie* vertically binding precedent has expired. The vertically binding precedent would still exist and its existence would result in the doctrine of *stare decisis* precluding the trial judge from reaching a final determination different from that of the *prima facie* binding (now wholly binding) precedent. Now, as will be outlined more fully below, the trial judge may at this point provide reasons as to why she or he would not wish to follow the binding precedent, but she or he will nevertheless still have

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<sup>120</sup> A s 1 analysis is used to determine whether the infringement of a *Charter* right is reasonably justified in a free and democratic society: see e.g. *R v Oakes*, [1986] 1 SCR 103, 24 CCC (3d) 321; see also *Charter*, *supra* note 1, s 1.

to adhere to the vertically binding precedent because of the doctrine of *stare decisis*.<sup>121</sup>

As a useful thought experiment, I note that Himel J.'s reasons seem to provide support for an affirmative answer to both questions in the above test. Himel J. notes that there have been developments in both sections 7 and 2(b) *Charter* jurisprudence.<sup>122</sup> She also notes that there is a wealth of evidence that was not before the SCC in the *Prostitution Reference* that she had the benefit of considering in her section 1 analysis.<sup>123</sup> The shift in *Charter* jurisprudence and the availability of new facts seems to support an affirmative answer to each of the test's prongs and, therefore, seems to support identifying that the *Prostitution Reference*'s authority as a precedent had expired.

It is, I think, also useful to briefly consider the above test within the context of another recent decision dealing with the analysis of a re-impugned law. As noted at the beginning of this paper, in *Carter Smith J.* of the BCSC struck down certain laws in the face of what appeared to be binding vertical precedent. In her decision, Smith J. notes that *Charter* jurisprudence with respect to the principles of fundamental justice, especially with respect to gross disproportionality and overbreadth, significantly evolved since the SCC had previously considered the constitutionality of subsection 241(b) of the *Criminal Code* in *Rodriguez*.<sup>124</sup> She also notes that the legislative and social fact evidence available to her was significantly different as compared to that which was available in *Rodriguez*.<sup>125</sup> Therefore, this reasoning, like Himel J.'s reasoning in *Bedford*, seems to satisfy both prongs of the precedent expiration test such that *Rodriguez*, as a precedent, could be considered expired.

### (ii) *Permissible Revisitation – The Second and Third Situations*

If one of the prongs in the precedent expiration test cannot be answered in the affirmative, this does not necessarily mean that a trial level judge is precluded from revisiting issues of constitutionality. It only means that the trial level judge is precluded from identifying the precedent as expired, and is therefore unable to escape the binding effect of the vertical precedent. The following two situations allow for a trial level judge to revisit the constitutionality of a provision, but still require that judge to rule in conformity with the vertically binding precedent that is still in existence and binding upon his or her court.

#### *The Second Situation: Sufficiently New Findings of Fact Only*

The assumption underlying this situation is that although there may be sufficiently new findings of fact, the jurisprudence surrounding the *Charter* right has not evolved to a degree considered significant, and that therefore the issue is lim-

<sup>121</sup> See Heydon, *supra* note 50 at 14.

<sup>122</sup> See *Bedford*, *supra* note 2 at paras 70, 83.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Carter*, *supra* note 3 at paras 973-85.

<sup>125</sup> *Ibid* at paras 942-48. Having said this, I note that Smith J. is of the view that a change in legislative and/or social facts may not always be sufficient to revisit a s 1 analysis. Indeed, she seems to suggest that it is only when such a change is coupled with an evolution in s 1 jurisprudence, as she suggests there was in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, will it be appropriate to reconsider s 1: see at paras 989-98.

ited to a new section 1 analysis. The second situation will occur when both questions in the following test are answered in the affirmative:

1. Did the prior decision regarding the constitutionality of the re-impugned provision determine that the provision infringed a *Charter* right? and
2. Do new social and or legislative facts exist now that were not under consideration when the law was previously settled which sufficiently oblige the trial judge to revisit the section 1 *Charter* analysis regarding the re-impugned provision?

If the first prong is answered in the negative, the lower level court will have no reason to engage in a section 1 analysis because the judge will be bound by the vertical precedent which held that there was no *Charter* violation. However, if both questions are answered in the affirmative, a trial judge may revisit the section 1 analysis and provide reasons as to why she or he would still uphold the provision under section 1, or conversely, provide reasons as to why she or he would now find the law unconstitutional.<sup>126</sup> That said, it must be emphasized that after this analysis is complete, the trial judge would still be forced to recognize the binding effect of the vertical precedent due to the doctrine of *stare decisis*.<sup>127</sup> The reasons of the trial level judge would simply serve to persuade the appropriate appellate level court to overrule its prior precedent when and if it has the opportunity to do so. Notwithstanding that the trial judge may wish to rule differently from a previous decision of an appellate court, that trial judge would still be forced to acknowledge that because of the doctrine of *stare decisis*, the applicable vertically binding precedent precludes him or her from ruling that the law is now unconstitutional.

I note that this test would also be applicable at intermediate appellate level courts when the vertically binding precedent is that of the SCC. The test allows the intermediate appellate court to revisit the section 1 analysis and provide its own reasons for why the lower court's reasons were valid or invalid, or why the SCC should depart or adhere to its previous decision. The test appropriately leaves the redetermination of a provision's constitutionality to the appropriate level of appellate court, while also appropriately leaving findings of newly introduced facts to the appropriate lower level court. Ultimately, the test allows for the revisitation of a section 1 analysis due to newly found facts, while also ensuring fidelity to the doctrine of *stare decisis*.

As Laing C.J. rightly noted in *Leeson*, “[t]here are reasons why earlier decisions can and should be revisited, and necessarily such revisitations must *commence* at the trial court level.”<sup>128</sup> Commencing revisitation at the trial court level, however, does not necessarily mean that identifying a precedent's expiration at this level is available or even doctrinally sound. Commencing revisitation is merely the appropriate means for bringing an impugned precedent to the court that has the authority to overrule that precedent. Ultimately, the proposed test identifies and

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<sup>126</sup> See Heydon, *supra* note 50 at 14.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Leeson*, *supra* note 99 at para 9 [emphasis added].

provides for the proper commencement process, while also abiding by the doctrine of *stare decisis*.

I note that it appears, at the very least, that Himel J. had the authority to revisit the re-impugned *Criminal Code* provisions' constitutionality in light of the new facts which were placed before her. In *Bedford*, Himel J. was presented with “[o]ver 25,000 pages of evidence in 88 volumes, amassed over two and half years...”<sup>129</sup> Although, again, determining the merit of such evidence is beyond in the scope of this paper, such a mass of evidence, if indeed new and relevant, would likely oblige a trial level judge to answer the second prong of the above test in the affirmative. If the first prong is able to be answered in the affirmative—which in *Bedford* it is due to the fact that the *Prostitution Reference* found subsection 2(b) to be infringed—it would be permissible for that judge to engage in a new section 1 analysis, with the necessary understanding that she or he would still, in the end, be bound by the doctrine of *stare decisis*.

### *The Third Situation – A Sufficient Shift in the Law Only*

Under this third situation, there are no new facts in existence. Moreover, it is important to remember that in this situation there is still a vertically binding precedent in existence. And, further, there is an assumption underlying this situation that the re-impugned provision is being challenged under the same right that it was challenged under prior. This is an important assumption because the shift in law that this situation refers to is a shift in law within the right itself. The ultimate determination of constitutionality, therefore, would have to be determined by the same court which settled the issue of the re-impugned provision's constitutionality. This is because such a determination would involve potential overruling. Thus, for example, if the SCC held that a provision was constitutional under section 7 of the *Charter*, the overruling of that decision, regardless of developments in section 7 jurisprudence since the original SCC decision was decided, would have to be an overruling by the SCC. This, again, is due to the doctrine of *stare decisis* and the rules governing vertical and horizontal precedent.<sup>130</sup>

The third situation permitting revisitation occurs when the question in the following test is answered in the affirmative:

1. Has the jurisprudence surrounding the *Charter* right developed—since the constitutionality of the re-impugned provision was originally settled—to such an extent as to create a situation of a relatively *de novo* analysis of the re-impugned provision?

If this question cannot be answered in the affirmative, the vertically binding precedent would preclude the trial level judge from revisiting the issue of constitutionality. If this question can be answered in the affirmative, however, a trial judge would be free to provide reasons as to why she or he believes the re-impugned provision still does not infringe the applicable *Charter* right, or conversely, provide reasons as to why she or he believes that the re-impugned law now

<sup>129</sup> *Bedford*, *supra* note 2 at para 84.

<sup>130</sup> See above section III The Doctrine of *Stare Decisis* and Rules of Precedent.

indeed infringes the applicable *Charter* right.<sup>131</sup> Much like the second situation, however, the determination reached at the end of the *Charter* analysis would not be the final determination unless that determination was to be in conformity with the vertically binding precedent. The trial judge would still be precluded from reaching a determination that is different from the vertically binding precedent due to the doctrine of *stare decisis*.

The trial judge may commence revisitation in this instance due to an acknowledgement that the once settled law may have developed to cast a penumbra of doubt around the precedent's continued applicability. Nonetheless, this would not be enough to allow the trial judge to depart from the precedent because the doctrine of *stare decisis* would encompass that penumbra. The acknowledgement will only provide an opportunity for the trial judge to call into question the remaining viability and validity of the binding precedent.

The ultimate determination of the precedent's remaining viability and validity is to be reserved for the appellate court that last settled the issue, or for the SCC as the final court of appellate jurisdiction. This is doctrinally sound according to the doctrine of *stare decisis* because: (1) it adheres to the exception within the doctrine in which horizontal precedent may be overruled by the same level court that created the precedent; and (2) it adheres to the notion of vertical precedent by recognizing that the SCC reserves ultimate authority to settle and resettle issues of law. A trial judge's reasoning as to how the law developed may carry enough weight to compel a higher level court to overrule its previous decision or it may not. Again, while authority to revisit does not necessarily equate to authority to overrule, revisitation must commence at the trial court level.<sup>132</sup> Ultimately, when the above test is answered in the affirmative, it acknowledges the appropriate opportunity for a trial level judge to commence revisitation when she or he is presented with the situation of a shift in *Charter* right jurisprudence.

Whether or not the law applicable to sections 7 and 2(b) of the *Charter* sufficiently developed to allow Himel J. to revisit the constitutionality of the *Criminal Code* provisions is, again, beyond the scope of this paper. That said, Himel J. did note that there were developments in these areas of the law.<sup>133</sup> Therefore, if the developments in each area can be viewed as sufficient to create a situation of a relatively *de novo* analysis of sections 7 and 2(b) generally, one would be forced to acknowledge that it would have been permissible for Himel J. to revisit the constitutionality of the *Criminal Code* provisions with respect to these two rights. The same reasoning, of course, would apply to the *Carter* decision.

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<sup>131</sup> See Heydon, *supra* note 50 at 14. Although JD Heydon is not speaking in regard to *Charter* rights, he is speaking in regard to a lower court's right and ability to criticize a precedent which is binding upon it.

<sup>132</sup> See *Leeson*, *supra* note 99 at para 9.

<sup>133</sup> See *Bedford*, *supra* note 2 at paras 70, 83. A similar argument could be made regarding *Carter*, *supra* note 3, especially with respect to whether the principles of fundamental justice have evolved since the SCC decision of *Rodriguez*, *supra* note 8.

## VII. Conclusion

While *Bedford* is a controversial decision due to its inherently divisive subject matter, it need not be controversial doctrinally. Unfortunately, the *stare decisis* section of Himel J.'s decision in *Bedford* is doctrinally unsound as presented. Himel J.'s seemingly consistent confusion and conflation of the rules governing vertical and horizontal precedent simply does not accord with the doctrine of *stare decisis*. *Stare decisis* and the rules regarding precedent are bedrocks of the Canadian judiciary and of Canadian law generally and are to be adhered to at all times. Fortunately, this required adherence can be reconciled with the inevitable evolution of society and *Charter* rights jurisprudence through proper *Charter* analysis at trial and intermediate appellate court levels.

*Bedford* is an important case because it presents a relatively unique scenario: a trial level court faced with reconsidering constitutional issues in light of new evidence and new *Charter* developments that have taken place over an approximately 20 year period. The *Charter* analysis in *Bedford* is complex, with regular constitutional issues being compounded by the doctrine of *stare decisis*, which includes the rules governing vertical and horizontal precedent. That said—and as has been argued throughout this paper—this complexity is navigable upon a closer inspection of the nature of constitutional law and the role of *stare decisis* in a trial level court's *Charter* analysis. And, in particular, this complexity is most easily navigable with the aid of the “three situations” framework outlined above.<sup>134</sup> Ultimately then, although the *Bedford* decision is quite complicated due to the doctrine of *stare decisis* and the rules of precedent, the concepts of precedent expiration and permissible revisitation provide an appropriate conceptual and analytical framework to be used by trial and intermediate appellate level courts in a *Charter* analysis involving instances of re-impugned legislative provisions.

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<sup>134</sup> See above section VI Precedent Expiration or Permissible Revisitation.