The Doctrine of

Res Judicata in Canada

Second Edition

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ABOUT THE AUTHOR

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3. THE DOCTRINE OF *STARE DECISIS*

The doctrine of *stare decisis*[84] is the guardian of the development of stable general principles of law. It is different from the doctrines of issue estoppel and cause of action estoppel. The estoppel doctrines operate as a bar between the same parties with respect to the factual and legal issues determined between them. *Stare decisis* is a declaration of the law, and like judgments *in rem*, the doctrine is binding and conclusive against all persons, not merely against the parties to the proceeding.

The doctrine is a cornerstone of the Canadian hierarchical system of justice. In *R. v. Beaudry*,[85] Berger J.A. stated:

> ¶ 15 The Canadian hierarchal system requires that trial courts must follow their own court of appeal and all courts must follow the Supreme Court of Canada. The hierarchal rule was clearly stated by Rinfret, C.J. in Woods Manufacturing Co. Ltd. v. The King, [1951] S.C.R. 504 at p. 515:
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> > "It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. . . . even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of the relationship between the courts."

The doctrine is foremostly binding upon judges of subordinate jurisdiction, and it is also not to be departed from by judges of co-ordinate jurisdiction unless some compelling exception can be made out. There are four levels of jurisdiction to consider: (1) courts of subordinate jurisdiction, (2) courts of co-ordinate jurisdiction,[86] (3) courts of appeal of the provinces and the Federal Court of Appeal, and (4) the Supreme Court of Canada.

> ¶ 37 To this principle [res inter alios acta alteri nocere non debet] there is, in my opinion, a partial exception when the action is upon a contract of indemnity for liability imposed by law.

Hollinrake and Hinds JJ.A. concurred in the result on other grounds without reference to this principle.

84 The phrase *stare decisis* is an abbreviation of the Latin phrase *stare decisis et non quieta movere* and may be translated as "to stand by decisions and not to disturb settled matters." See *Dumont Vins & Spiriteux Inc. v. Canadian Wine Institute*, [2001] F.C.J. No. 1030 (T.D.) at par. 25; *Holmes v. Jarrett*, [1993] O.J. No. 679 (Gen. Div.).

85 *R. v. Beaudry*, [2000] A.J. No. 1086 (C.A.) at par. 15, *per* Berger J.A., Russell J.A. and Chrumka J. concurring in the result.

86 This is sometimes described as courts of equal jurisdiction. However, they do not have to be courts of equal level. For example, a provincial superior court and a provincial county court, while not courts of equal level, may share co-ordinate jurisdiction.

The duties of a subordinate court, such as a provincial superior court, in the application of the doctrine of *stare decisis* are expressed in *Fisken v. Meehan*.[87] Harrison C.J. stated:

> It is not for a subordinate Court to disregard the decisions of a Court of Appeal; but, on the contrary, it is the duty of the subordinate Court to give full effect to such decisions, whatever its views may be as to their intrinsic wisdom. See *Costello v. The Syracuse, Binghampton, and New York R.W. Co.*, 65 Barb. 92, 100.
>
> But when the Appellate Court departs from its own decisions, and leaves it uncertain what its views are upon a question of law, it is the duty of the subordinate Court to give effect to the latest expression of the views of the Appellate Court, leaving to that Court to determine which is the sounder, the earlier or the later decisions: *Ib.*

For the purpose of the doctrine of *stare decisis*, a subordinate court must follow only the decisions of those courts that can reverse its judgments, either immediately or ultimately by appeal.[88] Where there is no appeal from a provincial superior court, being a subordinate court, to the Federal Court of Canada, the doctrine of *stare decisis* does not apply to bind the provincial superior court but the decisions of the Federal Court of Canada are entitled to persuasive weight as would be given by the provincial superior court to the decisions of other courts of appeal in other provinces.[89] A subordinate court is not bound to follow a decision of an appellate court of another province interpreting a federal statute.[90] A subordinate court is wholly right in following the opinion of one judge of a court of appeal where the other judges express no contrary opinion.[91]

Stare decisis is normally applicable in courts of co-ordinate jurisdiction although it has been stated that "[t]here can be no *stare decisis* between judges of the same court. There may be a question of collegiality in a case where the facts are identical, or at least are similar to the extent that a decision cannot be ignored."[92]

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87 *Fisken v. Meehan* (1877), 40 U.C.Q.B. 146 at 159, *per* Harrison C.J., Morrison J. concurring. Wilson J. did not address the duties. See also *Bank of Montreal v. Bailey*, [1943] O.R. 406 (H.C.) at 410, citing *Fisken*.

88 *Masse v. Dietrich*, [1971] 3 O.R. 359 (Co. Ct.) at 361.

89 *Bedard v. Isaac*, [1972] 2 O.R. 391 (H.C.) at 395–96. The case is arguably authority for the obvious *stare decisis* doctrine that a subordinate court is not bound to follow decisions of extra-provincial courts of appeal. See also *Withler v. Canada (Attorney General)*, [2002] B.C.J. No. 1395 (S.C.) at par. 61.

90 *R. v. Beaney*, [1969] 2 O.R. 71 (Co. Ct.) at 78.

91 *Bellamy v. Timbers* (1914), 31 O.L.R. 613 (C.A.) at 628, *per* Riddell J.A. Mulock C.J. Ex. and Leitch J. concurred. Hodgins J.A. did not address the issue.

92 *R. v. Phoenix Assurance Co.*, [1976] 2 F.C. 649 (T.D.) at 655, *per* Decary J. In *R. v. Beaney*, [1969] 2 O.R. 71 (Co. Ct.) at 77–78, the court referred to academic literature for the proposition that there can be no true doctrine of *stare decisis* unless its source comes from outside the judicial system. It is simply a question of judicial attitudes and convenience. In *Marconi Wireless Telegraph Co. v. Canadian Car & Foundry Co.* (1918), 44 D.L.R. 378 (Ex. Ct.) at 379–80, Audette J. described "comity" as "a useful ultra-legal adjunct to the judicial doctrine of *stare decisis*." See also *Farm World Equipment Ltd. v. Minister of National Revenue*, [1997] 4 W.W.R. 73 (Sask. Q.B.) at 76.

In *Burroughsford v. Lynch*,[93] Goodfellow J. set out situations where *stare decisis* would not be binding on a court of co-ordinate jurisdiction. Goodfellow J. stated:

> Generally one is bound by the decision of another Justice of the Court when the subject-matter is substantially indistinguishable. I am not bound by any statute or provision in the *Judicature Act*, R.S.N.S. 1989, c. 240; however, in the interests of predictability and certainty, one should usually follow the decision of another Justice unless one is convinced that the judgment is wrong or there exists strong reason to the contrary. Strong reason to the contrary might be something that indicates the prior decision was given without consideration of a statute or some authority that ought to have been followed, and not simply a strongly held contrary view by the second Justice. One obvious consideration for not being bound by a fellow Justice's decision is subsequent direction, comment or overruling of that decision by appellate courts.

Goodfellow J. was affirmed by a unanimous Nova Scotia Court of Appeal both as to "the result reached and, in general, for the reasons he gave."[94] Similar wording for the test of "strong reason to the contrary" is stated in *R. v. Northern Electric Co.*,[95] a decision favoured by the courts, but not referred to in *Burroughsford*. By inference, it may be taken to be approved by the Nova Scotia Court of Appeal because of the similar wording. McRuer C.J.H.C. stated:

> I think that "strong reason to the contrary" does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular judge.[96]

[93] *Burroughsford v. Lynch* (1996), 139 D.L.R. (4th) 350 (N.S.S.C.) at 355; affd (1997), 143 D.L.R. (4th) 535 (N.S.C.A.). See also *Bell v. Klein* (1954), 12 W.W.R. (N.S.) 272 (B.C.C.A.) at 280, *per* Robertson J.A.; revd on other grounds [1955] S.C.R. 309.

[94] *Burroughsford v. Lynch* (1997), 143 D.L.R. (4th) 535 (N.S.C.A.) at 536, *per* Clarke C.J.N.S.

[95] *R. v. Northern Electric Co.*, [1955] O.R. 431 (H.C.) at 448. See also *Horne v. Evans* (1986), 54 O.R. (2d) 510 (H.C.) at 511; affd on another ground (1987), 60 O.R. (2d) 1 (C.A.); *May, Executor of Koziej Estate v. M.N.R.* (1985), 85 D.T.C. 690 (T.C.C.) at 694.

[96] In *Re The Canada Temperance Act*, [1939] O.R. 570 (C.A.) at 581, Riddell J.A. stated:

> We must always bear in mind that we sit in Court, not as individual lawyers with the right to give judgment according to what our individual opinion may be as to what ought to be the law, but we are to give judgment according to what we find stated by authorities, whose opinions are binding on us; and *stare decisis* is still as always a guiding principle.

McTague J.A., Gillanders J.A. concurring, also addressed the doctrine. Affirmed [1946] A.C. 193 (Ont. P.C.) applying the doctrine.

Another statement of the proper practice to follow for judges of co-ordinate jurisdiction is found in *Re Hansard Spruce Mills Ltd. (in Bankruptcy)*.[97] Wilson J. stated:

> Therefore, to epitomize what I have already written in the *Cairney* case,[98] I say this: I will only go against a judgment of another judge of this court if:
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> (a) Subsequent decisions have affected the validity of the impugned judgment;
> (b) It is demonstrated that some binding authority in case law[99] 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.[100]

The foregoing statements from *Burroughsford*, *Northern Electric*, and *Hansard Spruce Mills*, in essence, express exceptions to the application of the doctrine of *stare decisis*[101] similar to the exception of special circumstances for the doctrines of issue estoppel and cause of action estoppel. The reason for making such an exception ought to be clearly stated.[102] The fact that the decision giving rise to *stare decisis* was not properly argued is not an exception.[103]

The obvious rationale for respecting decisions of courts of co-ordinate jurisdiction is that "[i]t is undesirable that a judge sit on appeal from a decision of a judge of co-ordinate authority. To permit such a practice would foster inconsistency and uncertainty respecting decisions made by the same court."[104] In *Wolverine v. R.*,[105] Wimmer J. stated:

> It is true that the doctrine of *stare decisis* does not absolutely bind a judge of first instance to follow a prior decision of another judge of the same court, but a failure

[97] *Re Hansard Spruce Mills Ltd. (in Bankruptcy)* (1954), 13 W.W.R. (N.S.) 285 (B.C.S.C.) at 286.

[98] *Cairney v. Queen Charlotte Airlines Ltd. (No. 2)* (1954), 12 W.W.R. (N.S.) 459 (B.C.S.C.) at 460.

[99] See *Hamilton v. Hamilton* (1920), 47 O.L.R. 359 (H.C.) at 361.

[100] These principles were approved in *R. v. Silbernagel*, [2000] B.C.J. No. 734 (C.A.) at par. 4, *per* Southin J.A., Newbury J.A. concurring. Prowse J.A. declined to decide the effect of the decision in *Hansard* on constitutional questions, since no argument was made on that issue on the appeal.

[101] In *Bank of Montreal v. Bailey*, [1943] O.R. 406 (H.C.) at 409, Hope J. used the term "very exceptional circumstances" in the application of *stare decisis*.

[102] *Re Fairview Industries Ltd. (No. 1)* (1991), 109 N.S.R. (2d) 8 (S.C.) at 12.

[103] *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2003] O.J. No. 2914 (S.C.J.) at par. 147.

[104] *Farm World Equipment Ltd. v. Minister of National Revenue*, [1997] 4 W.W.R. 73 (Sask. Q.B.) at 76, *per* Baynton J.

[105] *Wolverine v. R.*, [1987] 3 W.W.R. 475 (Sask. Q.B.) at 477–78 citing other Canadian cases; affd on another ground [1989] 4 W.W.R. 467 (Sask. C.A.). See also *Northland Bank v. Flin Flon Mines Ltd.* (1987), 38 D.L.R. (4th) 49 (Sask. Q.B.) at 58–60; affd on another ground (1987), 46 D.L.R. (4th) 766 (Sask. C.A.).

to do so is a disservice to litigants, lawyers and inferior courts who are entitled to see the law as reasonably settled and certain. It is for courts of appeal, not individual judges of equal jurisdiction, to correct judicial errors.

In regard to a judge's failure to apply *stare decisis* in a court of co-ordinate jurisdiction, Hughes J., in *R. v. Kartna*,[106] stated:

> I pause here to say, with deference but emphatically, that in my view it is unfortunate that such a disagreement with a Judge of coordinate jurisdiction was indulged in by Forget D.C.J. in the case of *Vaughan*. I will go further and say that the proper procedure, and one without the recognition of which the administration of justice would fall into disrepute and disarray, is for a Judge in his position to consider himself bound by what has been decided before in his own Court. Such is the rule of stare decisis. He may, of course, express his disagreement as trenchantly as he likes, but should leave the question which vexes him to the Court of Appeal for such decision as may be appropriate.

A helpful review of the role of *stare decisis* in courts of co-ordinate jurisdiction is found in *Holmes v. Jarrett*.[107] Granger J. canvassed some of the previously discussed decisions on the subject, as well as other decisions, and categorized three views of, or approaches to, the doctrine of *stare decisis* applied by courts of co-ordinate jurisdiction. These views may be summarized as follows:

(1) The authoritative view is that a court of co-ordinate jurisdiction is obligated to follow all previous decisions of that court, leaving it to an appellate court to correct any error in these decisions. This view is the strict, traditional view of the doctrine of *stare decisis*.
(2) The persuasive view is that a decision of a judge of a court of co-ordinate jurisdiction is to be followed, as a matter of judicial comity, unless the judge is convinced that the earlier decision is wrong. This view is premised on the notion that *stare decisis* is not a rule in courts of co-ordinate jurisdiction because there can be no obligation to follow a previous decision unless the obligation arises from a source outside the court of co-ordinate jurisdiction, namely, a decision of a court higher in the hierarchical judicial structure.
(3) The conformity view is that a judge ought to follow a previous decision of a court of co-ordinate jurisdiction unless circumstances exist, such as those that are set out in the preceding quotations from *Hansard Spruce Mills* and *Northern Electric*.[108] If such circumstances do not exist, the authoritative view is to be followed because the persuasive view fails to provide any objective criteria to determine when a judge may be convinced that the earlier decision is wrong. It may simply lead to a difference of opinion approach, which was the concern expressed by Hughes J. in the preceeding quotation from *Kartna*.

[106] *R. v. Kartna* (1979), 2 M.V.R. 259 (Ont. H.C.) at 267.
[107] *Holmes v. Jarrett*, [1993] O.J. No. 679 (Gen. Div.). The *Holmes* analysis was also quoted by Granger J. in *R. v. Koziolek*, [1999] O.J. No. 657 (Gen. Div.).
[108] Decisions relying on the conformity view are: *Canada v. Hollinger Inc.*, [1999] F.C.J. No. 1164 (C.A.) at par. 30, Letourneau J.A., Rothstein J.A. concurring; Isaac C.J. concurred in the result on the ground of judicial comity and other grounds at par. 2; *Eli Lilly & Co. v. Novopharm Ltd.* (1996), 67 C.P.R. (3d) 377 (F.C.A.); revd on other grounds [1998] 2 S.C.R. 129; *Janssen Pharmaceutical Inc. v. Apotex Inc.* (1997), 72 C.P.R. (3d) 179 (F.C.A.); *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)* (1996), 64 C.P.R. (3d) 65 (F.C.T.D.).

The conformity view, espoused in *Holmes*, however, is relevant when there is no possibility of an appeal to resolve the uncertainty created by conflicting decisions in courts of co-ordinate jurisdiction.[109]

At the appellate level of courts of co-ordinate jurisdiction, two early views are found in the Ontario Court of Appeal decision in *Delta Acceptance Corp. v. Redman*.[110] The *stare decisis* issue involved following a previous majority judgment of the same court where Schroeder J.A. had dissented. In *Delta Acceptance*, Schroeder J.A. stated:

> Holding these views I would be prepared to accord my ready concurrence to the judgment of my brother Laskin if I did not hold the opinion that we are bound by the doctrine of *stare decisis* to bow to the majority judgment in the *Park Motors* case, *supra*. That is a decision of a Court which, though differently constituted, is a Court of co-ordinate authority and this Court would not be justified in declining to follow it if[111] it should be of opinion that it was wrong. *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516 [affd [1911] A.C. 120], is authority for the proposition that this Court is bound by its own decisions provided that they enunciate a substantive rule of law. Judicial decisions are a source of law in cases involving questions of fact which admit of being answered on principle, thereby establishing a rule which can be adopted for the future as a rule of law.

Of the inapplicability of *stare decisis*, Laskin J.A., dissenting, stated:

> Even if *stare decisis* does not apply, this Court should not lightly depart from a previous decision: *cf. Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516 at 535 [affd [1911] A.C. 120]. Moreover, it may be imprudent to refuse to follow an earlier decision (which cannot be distinguished or otherwise explained away) where that decision has either stood for many years on the same bottom or circumstances, or has been reaffirmed by the Court in intermediate cases.

The sentiment enunciated by Laskin J.A. in *Delta Acceptance Corp.* would apply to commercial cases, for example, where the earlier appellate decision

[109] *Ziyadah v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. No. 894 (T.D.) at par. 12; affd [2000] F.C.J. No. 1073 (C.A.).
[110] *Delta Acceptance Corp. v. Redman* (1966), 55 D.L.R. (2d) 481 (Ont. C.A.) at 483, *per* Schroeder J.A., McGillivray J.A. concurring as to *stare decisis*, at 495, *per* Laskin J.A. dissenting.
[111] The word "if" should be read to mean "unless."

created or settled expectations. This thinking was applied in *Barrett v. Krebs*,[112] where the Alberta Court of Appeal held that an exception to the application of the doctrine of *stare decisis* is a continuing injustice. Kerans J.A., for the court, stated:

> In these circumstances, it seems to me that our system of justice would fall into disrepute if we undermine the 125 cases settled to date by reversing ourselves. As said before, if we switch once, we may, with a different panel, switch again. Nothing would ever be decided. The only basis upon which I could be persuaded to undermine the idea of [*stare decisis*][113] in that way is if I became convinced that the original rule worked such an unjust result that it could no longer be countenanced.

Notwithstanding these early statements, it is now commonly accepted that an appellate court of the provinces or the Federal Court of Appeal[114] may overturn its own previous decision where there are compelling reasons for doing so. A striking example is from the Ontario Court of Appeal. At issue was the retroactive application of title search legislation enacted in 1981 which, if retroactive, would have widespread repercussions on real estate practice in Ontario. In the 1990 trial decision of *Camrich Developments Inc v. Ontario Hydro*,[115] the court held that the amending legislation was retroactive, and it sternly observed that, if negligence claims flowed from this finding, such a result was of no concern, since the legislation continuously affected real estate practice in Ontario since 1929. On appeal, the majority of the Ontario Court of Appeal held that the legislation was not retroactive, while the dissenting justice wholly adopted the reasoning of the trial judge.[116]

A brief seven months later, the Ontario Court of Appeal in its decision in *Fire v. Longtin*[117] reversed the majority in *Camrich* and wholly adopted the reasons both of the dissenting justice and of the trial judge. The panel in *Fire* was differently constituted than the panel in *Camrich*. It made no reference to the doctrine

[112] *Barrett v. Krebs* (1995), 174 A.R. 59 (C.A.) at 63.

[113] The term "*res judicata*" was used, clearly inadvertently, when *stare decisis* was meant.

[114] In regard to decisions of the Federal Court of Canada, see the statement in *Porto Seguro Companhia de Seguros Gerais v. Belcan S.A.*, [1996] F.C.J. No. 422 (C.A.) at par. 40, *per* MacGuigan J.A. dissenting, where Supreme Court of Canada authority was cited for the statement. In *R. v. Pollock*, [1984] C.T.C. 353 (F.C.A.) at 353, the Federal Court of Canada stated that an appellate court should refuse to follow its previous decision only when it is convinced that the earlier decision is wrong, but in *Widmont v. Canada (Minister of Employment & Immigration)* (1984), 56 N.R. 198 (Fed. C.A.), there was considerable disagreement. See the list of examples of overturning previous decisions in *R. v. Beaudry*, [2000] A.J. No. 1086 (C.A.) at par. 17, *per* Berger J.A., and at par. 95 ff. (regarding Alberta), *per* Russell J.A. dissenting in part on the scope of the exceptions, concurring in the result. Chrumka J.A., concurring in the result, did not address *stare decisis*.

[115] *Camrich Developments Inc. v. Ontario Hydro*, [1990] O.J. No. 437 (H.C.).

[116] *Camrich Developments Inc. v. Ontario Hydro*, [1993] O.J. No. 1798 (C.A.), *per* Finlayson J.A., Labrosse J.A. concurring, Osborne J.A. dissenting. The decision was released August 12, 1993.

[117] *Fire v. Longtin*, [1994] O.J. No. 542 (C.A.), *per* McKinlay J.A., Dubin C.J.O. and Carthy J.A. concurring. The decsion was released March 21, 1994.

of *stare decisis*. However, it must be inferred that the panel in *Fire* was convinced that the earlier decision was clearly wrong. The Supreme Court of Canada[118] later affirmed the *Fire* decision, and it did so in unrestrained terms. The Supreme Court, *per curiam*, stated: "[w]e adopt in their entirety the reasons for judgment delivered by McKinlay J.A. . . ."

It has been observed that the English exceptions to the doctrine of *stare decisis* govern Canadian appellate courts. In *R. Beaudry*,[119] Berger J.A. stated:

> ¶ 32A My colleague [Russell J.A. at par. 97] acknowledges that "Canadian appellate courts have adopted the English exceptions to stare decisis articulated in Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718 (C.A.) in which the court held that it was bound by its own decisions except in the following circumstances.
>
> (i) the court is entitled and bound to decide which of two conflicting decisions of its own it will follow;
> (ii) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion, stand with a decision of the House of Lords [Supreme Court of Canada];
> (iii) the court is not bound to follow a decision of its own if it is satisfied that the decision was given in inadvertence to some authority."

The Supreme Court of Canada has exclusive appellate civil and criminal jurisdiction in Canada, and its judgments, in all cases, are final and conclusive.[120] Although it has stated that the traditional ground for the doctrine of *stare decisis* is certainty in the law, it is willing to overturn a prior decision of its own for compelling reasons,[121] and it has exercised its discretion on a number of occasions.[122] However, there are guidelines involved in the exercise of this discretion. In *R. v. B. (K.G.)*,[123] Lamer C.J. stated:

[118] *Fire v. Longtin*, [1995] S.C.J. No. 83.

[119] *R. v. Beaudry*, [2000] A.J. No. 1086 (C.A.) at par. 32A, *per* Berger J.A. Russell J.A., dissenting in part on additional exceptions proposed by Berger J.A., concurred in the result. Chrumka J.A., concurring in the result, did not address *stare decisis*. See also *Bell v. Cessna Aircraft*, [1983] B.C.J. No. 2130 (C.A.), *per* Craig J.A., Taggart J.A. concurring, Lambert J.A. dissenting on an issue of procedure.

[120] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 52.

[121] *Canada (Minister of Indian Affairs & Nothern Development) v. Ranville*, [1982] 2 S.C.R. 518 at 527, *per* Dickson J.A., at 528, *per* Ritchie J. All panel members concurred. See the cases cited therein. *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516 at 535, *per* Duff J.; affd on other grounds [1911] A.C. 120, has often been cited as the standard authority for the principle that the Supreme Court of Canada is bound by its own decisions.

[122] *R. v. Bernard*, [1988] S.C.J. No. 96 at par. 28–29 citing several examples, *per* Dickson C.J. dissenting, Lamer J. concurring. See also *R. v. Robinson*, [1996] S.C.J. No. 32 at par. 76, *per* L'Heureux-Dubé J. dissenting on other grounds.

[123] *R. v. B. (K.G.)*, [1993] S.C.J. No. 22 at par. 62, *per* Lamer C.J. for the majority, at par. 125, *per* Cory J. for the minority concurring in the result.

In Salituro,[124] at p. 665, Iacobucci J. stated that "[t]his Court is now willing, where there are compelling reasons for doing so, to overturn its own previous decisions." However, there are guidelines which direct our exercise of this jurisdiction to overrule previous decisions. In R. v. Chaulk, [1990] 3 S.C.R. 1303 at p. 1353, I adopted the considerations listed by Dickson C.J. (in dissent)[125] in R. v. Bernard, [1988] 2 S.C.R. 833. Those guidelines were:

(1) whether the rule or principle under consideration must be varied in order to avoid a Charter breach;[126]
(2) whether the rule or principle under consideration has been attenuated or undermined by other decisions of this or other appellate courts;
(3) whether the rule or principle under consideration has created uncertainty or has become "unduly and unnecessarily complex and technical;" and
(4) whether the proposed change in the rule or principle is one which broadens the scope of criminal liability, or is otherwise unfavourable to the position of the accused.

In *R. v. Chaulk*,[127] Lamer C.J. went on to state:

> Dickson C.J. described in Bernard four separate factors that would support a decision by this Court to overrule an earlier judgment. These factors were not held to be a comprehensive list nor was it claimed that they must all be present in a particular case to justify overruling a prior decision. They are instead guidelines to assist this Court in exercising its discretion.

These guidelines may be of assistance to provincial appellate courts in considering whether to overrule an earlier decision despite the doctrine of *stare decisis*,[128] since these courts are, in effect, the courts of last resort for most legal decisions for the purpose of the doctrine of *stare decisis*.[129]

A principle asserted to be the law by the Supreme Court of Canada becomes the authority for the principle asserted notwithstanding the fact that no case law is cited.[130] *Obiter dicta* of the Supreme Court of Canada is considered binding

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124 *R. v. Salituro*, [1991] S.C.J. No. 97.

125 In *R. v. Chaulk*, [1990] S.C.J. No. 139 at par. 93, Lamer C.J. noted that "Dickson C.J. was in dissent, although the Justices who disagreed with his conclusions did not disagree with him on this point." In *R. v. Tutton*, [1989] S.C.J. No. 60 at par. 18, Wilson J., Dickson C.J. and La Forest J. concurring, stated: "On the standard required to justify a departure from the practice of stare decisis, I find the comments of the Chief Justice in his dissent in R. v. Bernard, [1988] 2 S.C.R. 833, at pp. 849-861, instructive."

126 See also *R. v. Robinson*, [1996] S.C.J. No. 32 at par. 40–46, *per* Lamer J. for the majority, at par. 76, *per* L'Heureux-Dubé J. dissenting on other grounds.

127 *R. v. Chaulk*, [1990] S.C.J. No. 139 at par. 94.

128 These guidelines have been considered in *Public Service Alliance of Canada v. Nav Canada*, [2002] O.J. No. 2030 (C.A.); supp. reasons at [2002] O.J. No. 1435 (C.A.) at par. 26.

129 *Bank of Montreal v. Butler*, [1990] B.C.J. No. 635 (C.A.), *per* Wood J.A., Seaton and Macdonald JJ.A. concurring in the result in separate reasons.

130 *R. v. Depagie* (1976), 1 Alta. L.R. (2d) 30 (C.A.) at 35, *per* McDermid J.A., Clement J.A. concurring, Morin J.A. dissenting. Leave to appeal to S.C.C. refused (1976), 32 C.C.C. (2d) 89n (S.C.C.). In regard to lower courts and sketchy reasons of an unreported decision, see *R. v. Jack* (1981), 17 M.V.R. 77 (Ont. Prov. Ct.) at 82–85.

upon lower courts.[131] If the Supreme Court of Canada expresses doubt about the correctness of one of its previous decisions, this may provide a legal basis upon which to depart from the earlier decision without offending the doctrine of *stare decisis*.[132] The courts of Canada must follow the latest decision of the Supreme Court of Canada and not question whether its decision is in accordance with its previous decisions.[133]

The doctrine of *stare decisis* and the doctrines of issue estoppel and cause of action estoppel have been applied interchangeably.[134] Applying the reasons for decision of one proceeding to another may be accomplished through *stare decisis* rather than through issue estoppel.[135] Failing to follow a decision of a court of appeal given in the very matter with which a judge is seized is not only a breach of the doctrine of *stare decisis* but a breach of the doctrine of issue estoppel.[136] Courts must decide cases according to the law and are bound by *stare decisis*, but tribunals are not so constrained.[137] Since a labour relations board is not bound by the doctrine, a court cannot find that the board made a patently unreasonable error in failing to apply *stare decisis*.[138]

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131 *Sellars v. R.*, [1980] 1 S.C.R. 527 at 530. See also *Moses v. Shore Boat Builders Ltd.*, [1993] B.C.J. No. 1910 (C.A.) at par. 16–17; *Ottawa (City) v. Nepean (Township)*, [1943] O.W.N. 352 (C.A.) at 353; *Scarff v. Wilson*, [1988] B.C.J. No. 2283 (C.A.). In *R. v. McKibbon* (1981), 34 O.R. (2d) 185 (H.C.) at 186, the court, following *Sellars*, also considered *obiter dicta* of a provincial court of appeal binding on lower courts. Affirmed on another ground (1981), 35 O.R. (2d) 124 (C.A.) without addressing the principle; affd on other grounds [1984] 1 S.C.R. 131. Contra *Dumont Vins & Spiritueux Inc. v. Canadian Wine Institute*, [2001] F.C.J. No. 1030 (T.D.) at par. 26; *Bank of Montreal v. Bailey*, [1943] O.R. 406 (H.C.) at 410–11; *Landreville v. Gouin* (1884), 6 O.R. 455 (C.P.) at 464, where *obiter dictum* was defined.

132 *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1994] 3 F.C. 188 (C.A.) at par. 95, *per* Roberston J.A. dissenting. This proposition may also apply to any appellate court expressing doubt about the correctness of a previous decision.

133 *Slater v. Laboree* (1905), 10 O.L.R. 648 (C.A.) at 650.

134 *Baird v. Lawson* (1996), 22 C.C.E.L. (2d) 101 (Sask. Q.B.) at 105; *Redick v. Wyoming (Village)* (1992), 35 A.C.W.S. (3d) 1117 (Ont. Gen. Div.) at 4–5.

135 *Robb Estate v. St. Joseph's Health Care Centre* (1999), 30 C.P.C. (4th) 78 (Ont. Gen. Div.) at 84.

136 *Tetzlaff v. Canada (Minister of the Environment)*, [1992] 2 F.C. 215 (C.A.) at 226. In *Landes v. Royal Bank* (1997), 50 Alta. L.R. (3d) 128 (C.A.) at 130, one appeal judge followed a previous appellate panel's decision on the basis of practice and procedure, declining to rely upon issue estoppel. In *Tetzlaff* and *Landes*, the term "*res judicata*" was used but they are likely cases of issue estoppel.

137 *Weber v. Ontario Hydro*, [1995] S.C.J. No. 59 at par. 14, *per* Iacobucci J. for the minority, dissenting on the cross-appeal. See also *Canadian Paperworkers' Union v. Eurocan Pulp and Paper Co.*, [1991] B.C.J. No. 2208 (C.A.).

138 *S.E.A. Contracting Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 579*, [2002] N.J. No. 171 (C.A.) at par. 3. This paragraph was paraphrased, in part, in *Withler v. Canada (Attorney General)*, [2002] B.C.J. No. 1395 (S.C.) at par. 49.