The *Charter* and Civil Law:

If at First You Don't Succeed: Relitigating Charter Claims

Prepared For: Legal Education Society of Alberta
Constitutional Law Symposium

Presented by:
Professor Eric Adams
University of Alberta, Faculty of Law
Edmonton, Alberta

For Presentation In:
Edmonton – Sept. 28, 2012

If at First You Don't Succeed: Relitigating Charter Claims

Eric M. Adams*

Draft: Not to be cited or circulated without permission of the author

Stifling under the burden I raised my hands to Heaven
And called out with my last and expiring breath
"At least you cannot deny I have a new aspect?
I cite in my aid the fresh approach of Lord Simon!"
But all I could hear was the old sing-song,
This time in Latin, muttering stare decisis.

-Frank R. Scott, "Some Privy Council"[1]

Introduction

In the 1950s, debates about the power of precedent filled the pages of the *Canadian Bar Review*.[2] With the cessation of appeals to the Judicial Committee of the Privy Council in 1949, Canadian lawyers wondered whether the newly liberated Supreme Court of Canada would continue to be bound by the Privy Council's jurisprudence. And what, if anything, would become of the Supreme Court's attachment to its existing rule that, as an intermediate court of appeal subject to review and correction from above, it should be bound by its own previous decisions absent "exceptional circumstances"?[3] Seeking stability, the Canadian Bar Association cautiously urged the Supreme Court to continue to be bound by Privy Council precedent.[4] Bora Laskin, by contrast, especially anxious for a new direction in the Supreme Court's federalism jurisprudence, called for the Court to embrace "the spirit of its new status" and free itself from the Privy Council's doctrinal chains.[5] Although Justice Ivan Rand eagerly, if somewhat abstractly, took up the challenge,[6] the matter was

*Associate Professor, University of Alberta, Faculty of Law. I would like to thank Kelsey Robertson for her research assistance in the preparation of this material.

[1] (1950) 28 CBR 780 at 780.

[2] See Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 CBR 1038 at 1057, 1075; W. Fridmann, "*Stare Decisis* at Common Law and under the Civil Code of Quebec" (1953) 31 CBR 723 at 747; Gilbert D. Kennedy "Supreme Court of Canada – Stare Decisis – Role of Canada's Final Court – Unsatisfactory Nature of Reasons for Judgment" (1955) 33 CBR 340; and Andrew Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36 CBR 175.

[3] See *Stuart v. Bank of Montreal* (1909) 41 SCR 516 at 535. "What exceptional circumstances would justify a departure from the general rule," Justice Duff (as he then was) wrote, "we need not consider".

[4] See *House of Commons Debates* (20 September 1949) at 75; (23 September 1949) at 189-199.

[5] Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 CBR 1038 at 1057, 1075.

[6] *Reference re Farm Products Marketing Act*, [1957] SCR 198 at 212-3. "The powers of this Court in the exercise of its jurisdiction," Rand J. held,

> are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a

not dealt with directly until the late 1970s when Laskin himself, in his role as Chief Justice of Canada, remembered his old advice and confirmed that he had no hesitation in overturning "mistaken[]" precedents, Privy Council or otherwise.[7]

The arrival of the *Charter of Rights and Freedoms*[8] further emboldened the Supreme Court to revisit, revise, and overturn a number of its previous decisions.[9] Justice Dickson, dissenting in *Bernard v The Queen*, attempted to elaborate some of the "compelling circumstances" which might justify the Court departing from a prior decision,[10] but the factors have remained flexible and contextual. As the Court made clear in *R v Henry*,[11] the threshold for overturning a previous decision remains set rather ambiguously at "compelling reasons," and what is compelling may vary from case to case.

The doctrine of *stare decisis et non quieta movere* (abide by earlier decisions and do not disturb settled points) provides not merely that previous decisions are helpful or persuasive, but that they literally *bind* the court to follow them when they raise the same or similar legal issues. Complicating the apparent simplicity of the rule is that idea that not every word of a judgment is binding but only its *ratio decidendi* ("what was actually decided") as distinguished from a judgment's *obiter dicta* (what was "said in passing").[12] Accordingly, the application of *stare decisis* in any given case usually

---

> function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.

[7] *Reference re: Agricultural Products Marketing Act, 1970*, [1978] 2 SCR 1198. See generally Gordon Bale, "Casting Off the Mooring Ropes of Binding Precedent" (1980) 58 CBR 255. Earlier cases had seemingly ignored or overruled previous Privy Council decisions but did so indirectly, see, for e.g., *Drew v The Queen*, [1961] SCR 614

[8] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[9] See, for e.g., *R v Big M Drug Mart*, [1985] 1 SCR 295 at 333-4; *R v Therens*, [1985] 1 SCR 613 at 639-40; and *Re BC Motor Vehicle Act*, [1985] 2 SCR 486. In other cases, *Charter* values and changing human rights norms pushed the Court to overrule previous decisions. See, for e.g., *Brooks v Safeway*, [1989] 1 SCR 1219.

[10] *Bernard v The Queen*, [1988] 2 SCR 833 at para 28. Dickson CJs factors, however, appear driven by the specifics of this particular case. The four factors he considers in determining whether to overturn a prior decision are: 1) the decision does not reflect the values of the *Charter*; 2) the decision has been attenuated by subsequent case law; 3) the decision creates uncertainty in its application; and 4) the decision is unfavourable to the accused. As Lamer CJ held in *R v Chaulk*, [1990] 3 SCR 1303 at para 94, Dickson CJ's *Bernard* 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."

[11] [2005] 3 SCR 609 at paras. 44-46.

[12] See generally Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 MLJ 135. As explained in *Halsbury's Laws of Canada, Civil Procedure I*, 1st ed (Markham: LexisNexis, 2008) at 282:

> only the ratio decidendi of the prior court decision is binding on a subsequent court. The term ratio decidendi describes the process of judicial reasoning that was necessary in order for the court to reach a result on the issues that were presented to it for a decision. All other comments contained within the reasons of the prior court are termed *obiter dicta*, and in essence such incidental remarks are treated as asides. They may have persuasive value, but they are not binding.

But lawyers and judges have come to recognize that the starkness of the division between a *ratio* and *obiter* often breaks down in the messy realities of a long, complex judgment. In *R v Henry*, *supra* note 11, Justice Binnie proposed that the question should be "What does the case actually decide?" But as the Ontario Court of Appeal pointed out in *R v Prokofiew*, 2010 ONCA 423 at para 19, "Some cases decide only a narrow point in a specific factual context. Other cases – including