S.C.C. File No. 37701
(CMAC-567/CMAC-574/CMAC-577/CMAC-578/
CMAC-579/CMAC-581/CMAC-583/CMAC-584)

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA)

B E T W E E N :

MASTER CORPORAL C.J. STILLMAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

[*Style of cause continued on next page.*]

FACTUM OF THE INTERVENER, ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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[*Style of cause continued.*]

A N D B E T W E E N :

EX-PETTY OFFICER 2ND CLASS J.K. WILKS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

WARRANT OFFICER J.G.A. GAGNON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

LIEUTENANT (NAVY) G.M. KLEIN

Appellant

- and -

CANADA (MINISTER OF NATIONAL DEFENSE)

Respondent

A N D B E T W E E N :

CORPORAL CHARLES NADEAU-DION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

CORPORAL F.P. PFAHL

Appellant

- and -

CANADA (MINISTER OF NATIONAL DEFENSE)

Respondent

[*Style of cause continued on next page.*]

[*Style of cause continued.*]

A N D B E T W E E N :

CORPORAL A.J.R. THIBAULT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

SECOND LIEUTENANT SOUDRI

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

A N D B E T W E E N :

K39 842 031 PETTY OFFICER 2ND CLASS R.K. BLACKMAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ADVOCATES FOR THE RULE OF LAW

Intervener

S.C.C. File No. 38308

A N D B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

CORPORAL R.P. BEAUDRY

Respondent

- and -

ADVOCATES FOR THE RULE OF LAW

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PART I—OVERVIEW

1. This Court has never provided guidance on when intermediate appellate courts may decline to follow their own binding precedent. These appeals illustrate why such guidance is needed. Advocates for the Rule of Law ("**ARL**") intervenes to propose what it should be.

2. In the Court Martial Appeal Court, horizontal *stare decisis* was dispositive of one of these appeals, and could have been of the other.[1] This reflects broader jurisprudential discord across the country. The Court should clarify this area of the law, which is of daily significance to Canada's appellate courts and to the litigants who appear before them.

3. ARL makes two interrelated submissions. ***First***, horizontal *stare decisis* reflects constitutional constraints on appellate judicial decision making. These constraints are fundamental to the rule of law. They are: (i) like cases must be treated alike, so that everyone is treated equally under the law; and (ii) the law must be ascertainable so that those subject to it can order their affairs accordingly. Inconsistent approaches to precedent in the intermediate appellate courts undermine these imperatives, and thus the rule of law.

4. ***Second***, except where horizontal *stare decisis* does not apply, intermediate appellate courts may only depart from their own precedents in rare circumstances. They have limited discretion to do so. That discretion should only be exercised, in ARL's submission, when the appellate court has convened an expanded or otherwise special panel for the express purpose of reconsidering a binding precedent. Because intermediate appellate courts all operate under the same Constitution — and because horizontal *stare decisis* everywhere in Canada reflects our Constitution's demands — the circumstances in which a specially convened panel may reverse a prior decision of an intermediate appellate court should be consistent across jurisdictions. This Court should say what these circumstances are.

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[1] *R. v. Déry*, 2017 CMAC 2, ¶3, per Bell C.J. (concurring), and ¶¶95-99, per Cournoyer and Gleason JJ.A. ["***Stillman***"]; *Beaudry v. R.*, 2018 CMAC 4, ¶25, per Ouellette J.A., and ¶¶75 and 88, per Bell C.J. (dissenting).

PART II—STATEMENT OF QUESTION IN ISSUE

5. ARL takes no position on the constitutionality of s. 130(1)(a) of the *National Defence Act*. It intervenes only on the issue of horizontal *stare decisis*, and in relation to the following question: When may an intermediate appellate court depart from its own binding precedent?

PART III—STATEMENT OF ARGUMENT

1. Horizontal *Stare Decisis* Reflects Constitutional Constraints on Appellate Judging

6. Like vertical *stare decisis*, horizontal *stare decisis* is "fundamental to our legal system".[2] In particular, horizontal *stare decisis* indispensably preserves and promotes Canada's constitutional order, specifically the rule of law.[3] By safeguarding certainty and consistency, adherence to precedent "allows for an orderly administration of justice predicated on the rule of law".[4] The rule of law, in turn, is "a fundamental postulate of our constitutional structure"[5] — the "foundational constitutional principle" that "vouchsafes to the citizens and residents of the country a stable, predictable, and ordered society in which to conduct their affairs" on the basis of "known legal rules".[6]

7. Inconsistent approaches to horizontal *stare decisis* undermine these important constitutional guarantees. They make legal rules more stable in some jurisdictions than others, muddy the limits of the judicial law-making function, and invite incursions on the constitutional separation of powers.[7] This is why it is a problem when intermediate courts of appeal apply precedent differently. It is also why this Court's intervention is warranted. In the absence of authoritative guidance,[8] courts are left without even a scholarly[9] or judicial[10] consensus as to

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[2] *Carter v. Canada (Attorney General)*, 2015 SCC 5, ¶44.

[3] See *Sriskandarajah v. United States of America*, 2012 SCC 70, ¶18.

[4] *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, ¶140, per Côté and Rowe JJ. (dissenting).

[5] *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 142.

[6] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶¶40 and 49.

[7] See *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, ¶117, per Wakeling J.A., citing C. J. Peters, "Foolish Consistency: On Equality, Integrity, and Justice in *Stare Decisis*" (1996) 105 Yale L.J. 2031, at 2039.

[8] See *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), ¶126 ["***Polowin***"].

whether *stare decisis* is properly characterized as a "doctrine" at all — or whether, instead, it is merely a "judicial practice" or policy choice.

8. For example, the Federal Court of Appeal has distinguished vertical *stare decisis*, which it has held is binding as a matter of law, from horizontal *stare decisis* (or "comity"), which is "not binding in the same way", although "departures should be rare".[11] A different panel of the same intermediate appellate court has more recently stated that "appellate courts ***must*** follow decisions of other panels, even though … they would decide the matter differently"; this is because horizontal *stare decisis* is linked "to the rule of law, which requires that the law be normative[;] … it must be capable of being discerned in order that individuals can conduct themselves in accordance with it".[12]

9. In the Court of Appeal of Alberta, Berger J.A. recently observed that "there is quite a history in Alberta and elsewhere in Canada of appellate judges following their legal conscience and refusing to follow their court's previous decisions, particularly so in criminal cases".[13] Yet, even in making this assertion, Berger J.A. relied on decades-old judgments of the Ontario Court of Appeal that affirmed "the utmost social importance [of] certainty in the criminal law", such that "in matters of criminal law *stare decisis* is to be strictly adhered to unless a benefit to the liberty of the subject is involved".[14]

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[9] See, e.g., A. Geary et al., *Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Abingdon: Routledge–Cavendish, 2009), at 75–76, Intervener's Book of Authorities ("**IBOA**"), Tab 8; D. Newman, "Judicial Method and Three Gaps in the Supreme Court of Canada's Assisted Suicide Judgment in *Carter*" (2015), 78:2 Sask. L. Rev. 217, IBOA, Tab 10.

[10] See, e.g., *R. v. Youngpine*, 2009 ABCA 89, ¶18 and *Delta Acceptance Corp. v. Redman*, [1966] 2 O.R. 37 (C.A.), ¶8, IBOA, Tab 1; cf. *Bates v. Bates* (2000), 49 O.R. (3d) 1 (C.A.), ¶31.

[11] *Apotex Inc. v. Allergan Inc.*, 2012 FCA 308, ¶¶43-48, per Noël J.A.; see also *Apotex Inc. v. Pfizer Canada Inc.*, 2014 FCA 250, ¶115, per Noël C.J.

[12] *Tan v. Canada (Attorney General)*, 2018 FCA 186, ¶¶25-26 (emphasis added).

[13] *R. v. Gashikanyi*, 2017 ABCA 194, ¶10, per Berger J.A., and ¶79, per O'Ferrall J.A.; see also *R. v. Santeramo* (1976), 32 CCC (2d) 35 (Ont. C.A.) at 45-46.

[14] *R. v. Govedarov* (1974), 3 O.R. (2d) 23 (C.A.), ¶33 (WL) (emphasis added), per Jessup J.A., IBOA, Tab 4; *R. v. McInnis* (1973), 1 O.R. (2d) 1 (C.A.), ¶38 (WL), IBOA, Tab 5.

10. Today, ordinary three-judge panels of the Court of Appeal for Ontario do not consider themselves empowered to depart from precedent, in criminal or civil cases.[15] Neither do three-judge divisions of the Court of Appeal for British Columbia.[16] Still, as discussed below, five-judge panels of both of these intermediate appellate courts have asserted broad discretion to reverse prior decisions.[17] On their jurisprudence, their discretion to depart from binding precedent is at least as broad, or broader, than this Court's.[18]

11. These divergent approaches represent the unmooring of horizontal *stare decisis* from its constitutional foundations. They also reflect a shift in the way intermediate appellate courts discharge their functions; the jurisprudential trend has been towards "a greater, more explicit emphasis on correctness over certainty".[19] This Court should use these appeals to recalibrate the balance between these values, by holding that intermediate appellate courts must follow their own precedents, except in rare circumstances. As Brown J.A. (as he then was) put it in *Caswell*:

> [A]ccessibility of the law — which is a core principle of the rule of law … — requires that the law be intelligible, clear *and predictable*, and subject to orderly development in incremental steps …. Constitutional legal order itself presupposes the creation *and maintenance* of positive laws….
>
> In short, *stare decisis*, being fundamental to our legal system, remains the presumptive analytical starting point, for both trial courts and intermediate appellate courts, in identifying the law to be applied.[20]

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[15] See, e.g., *R. v. Labrecque*, 2011 ONCA 360, ¶5; *R. v. Young*, 2009 ONCA 549, ¶¶11-12; *Wellman v. TELUS Communications Company*, 2017 ONCA 433, ¶¶19-20; *Nanne v. 2011650 Nova Scotia Limited (Michipicoten Forest Resources)*, 2015 ONCA 391, ¶¶22-23.

[16] See, e.g., *R. v. Wilcox*, 2012 BCCA 413, ¶9 fn. 1; *Andreychuk v. RBC Life Insurance Company*, 2008 BCCA 492, ¶¶2-3; *British Columbia (Milk Board) v. Grisnich* (1993), 36 B.C.A.C. 12 (C.A.), ¶¶4-5.

[17] See *David Polowin* (Ont. C.A.), *supra* note 8, ¶¶124-44; *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385, ¶62.

[18] See *Tan* (F.C.A.), *supra* note 12, ¶36; A. J. W. Toth, "Clarifying the Role of Precedent and the Doctrine of *Stare Decisis* in Trial and Intermediate Appellate Level *Charter* Analysis" (2013), 22 Dalhousie J. Legal Stud. 34, at 43, IBOA, Tab 9.

[19] D. Parkes, "Precedent Revisited: Carter v. Canada (AG) and the Contemporary Practice of Precedent" (2016) 10:1 McGill J. L. & Health 123, at 149.

[20] *R. v. Caswell*, 2015 ABCA 97, ¶¶38-39 (emphasis in original; quotation marks and citations omitted).

12. The constitutional constraints underlying horizontal *stare decisis* call for a presumption — at the intermediate appellate level, at least — that "the reasons in favour of following a precedent … outweigh the need to overturn" it.[21] Otherwise, a court risks undermining what Professor Waldron has described as the rule of law imperative: that they "be seen as … an institution that decides cases on a general basis, rather than just as an institutional environment in which individuals make particularized case-by-case determinations".[22]

2. Except Where *Stare Decisis* Does Not Apply, an Intermediate Appellate Court May Only Depart from Its Own Precedent in Rare Circumstances

13. Intermediate appellate courts are courts of correction. They play a crucial part in the evolution of the common law, yet their primary responsibility is to serve as the guardians of legal stability, predictability, consistency, and certainty within their jurisdiction.[23] For this reason, Canada's intermediate appellate courts have consistently recognized the importance of following their own prior decisions.[24] Adherence is (and should be) the rule, but — since "*stare decisis* is not a straitjacket that condemns the law to stasis"[25] — there are circumstances in which an intermediate appellate court may escape binding precedent.

14. Yet, Canada's intermediate appellate courts disagree on what those circumstances are. The Court of Appeal for Ontario, for example, has articulated an extensive, non-exhaustive list of factors, including the relative recency of the prior decision and the amount of money at stake.[26] The Court of Appeal of Manitoba has endorsed this framework.[27] The Nova Scotia Court

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[21] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, ¶139, per Rothstein J. (concurring).

[22] J. Waldron, "*Stare Decisis* and the Rule of Law: A Layered Approach" (2012) 111 Mich. L. Rev. 1, at 23.

[23] See N. Finkelstein & R. Podolny, "*Canada v. Craig* – The Common Law as the Servant of Society" (2012), 91 Can. Bar Rev. 455, at 459-60, IBOA, Tab 12; see also *Myers v. Director of Public Prosecution*, [1965] A.C. 1001 at 1047 (H.L.), per Lord Donovan, IBOA, Tab 3; *Jones v. Tsige*, 2012 ONCA 32, ¶¶65 and 68.

[24] See e.g., *Black v. Owen*, 2017 ONCA 397, ¶46, per Cronk J.A.; *David Polowin* (Ont. C.A.), *supra* note 8, ¶¶119-20; *Miller v. Canada (Attorney General)*, 2002 FCA 370, ¶9, per Rothstein J.A.

[25] *Carter* (S.C.C.), *supra* note 2, ¶44.

[26] *David Polowin* (Ont. C.A.), *supra* note 8, ¶¶140 and 142.

[27] *R. v. Neves*, 2005 MBCA 112, ¶¶91-108, per Steel and Freedman JJ.A ["***Neves***"].

of Appeal has adopted a more limited set of factors.[28] Here, the Court Martial Appeal Court held it could not depart from precedent, except where horizontal *stare decisis* does not apply.[29]

15. This divergence between Canada's intermediate appellate courts on the application of horizontal *stare decisis* is a rule of law problem. The constitutional constraints that underlie *stare decisis* do not vary by jurisdiction. Consensus has proved elusive, yet a common approach is necessary. Only this Court can provide one.

16. That approach should reflect the different positions that intermediate appellate courts and the Supreme Court of Canada respectively occupy in the judicial hierarchy. If, as McLachlin C.J. and LeBel J. explained in *Fraser*, "overturning a precedent of this Court is a step not to be lightly undertaken",[30] then the bar should be even higher, not lower, for intermediate appellate courts; the latter lack this Court's pronounced law-making role under the constitutionally entrenched *Supreme Court Act*.[31] This is so even though intermediate appellate courts "are in reality the *de facto* courts of last resort for the vast majority of cases coming before them".[32] That fact justifies allowing intermediate appellate courts to depart from precedent in the first place, not to be less constrained than this Court in doing so. By endorsing the following framework, the Court can ensure that Canada's courts of correction apply horizontal *stare decisis* consistently and conservatively, as the Constitution demands.

i. Step One: Does *Stare Decisis* Apply?

17. In their joint reasons in *Stillman*, Cournoyer and Gleason JJ.A. recognized "three narrow exceptions to the binding nature of a prior decision of an intermediate appellate court". These are: (i) where there are conflicting decisions of the same court; (ii) where there is inconsistency

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[28] *Thomson v. Nova Scotia (Workers' Compensation Board)*, 2003 NSCA 14, ¶34.

[29] *Stillman* (C.M.A.C.), *supra* note 1, ¶87, per Cournoyer and Gleason JJ.A.; *Beaudry* (C.M.A.C.), *supra* note 1, ¶22, per Ouellette J.A.

[30] *Fraser* (S.C.C.), *supra* note 21, ¶56.

[31] See *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, ¶¶86-87 and 94; *R. v. Henry*, 2005 SCC 76, ¶53; P. W. Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis" (2001), 80 Can. Bar Rev. 171, at 175, IBOA, Tab 14; P. J. Monahan, "The Supreme Court of Canada in the 21st Century" (2001), 80 Can. Bar Rev. 374, at 377-78, IBOA, Tab 13.

[32] *Gashikanyi* (Alta. C.A.), *supra* note 13, ¶13, per Berger J.A.; see also *David Polowin* (Ont. C.A.), *supra* note 8, ¶143.

between the prior decision and a decision of a higher court; and (iii) where the prior decision was given *per incuriam*.[33]

18. Each of these is properly conceptualized as an ***exclusion*** from horizontal *stare decisis*, rather than as an ***exception*** to it.[34] In the circumstances of each exclusion, horizontal *stare decisis* simply does not apply. When the prior decision comes within one of them, the precedent is not binding on the court. It need not be followed.[35]

ii. Step Two: Does the Panel Have the Discretion to Depart From Precedent?

19. If none of the exclusions applies, then the precedent is binding on the panel. The court then turns to the second question: Does the panel hearing the appeal have the discretion to depart from the binding precedent? This determination should turn on whether the panel has been convened specifically to revisit a prior decision of the same court.

a. Ordinary Panels of Intermediate Appellate Courts Do Not Have the Discretion To Depart from Binding Precedent

20. Unlike a specifically convened panel, discussed below, an ordinary panel of an intermediate appellate court should not ever depart from a prior decision of the same court. This is consistent with the approach taken by at least six provincial courts of appeal.[36] It is also the rule of *Stillman*. All three judges on that panel agreed that, since the Court Martial Appeal Court's prior judgment in *Royes* was binding, they did not have the discretion to depart from it.[37] This approach respects horizontal *stare decisis* and the constitutional constraints it reflects.

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[33] *Stillman* (C.M.A.C.), *supra* note 1, ¶¶89-90; see also *Young v. Bristol Aeroplane Co. Ltd*., [1944] 2 All E.R. 293 (C.A.), at 300, per Lord Greene M.R., IBOA, Tab 6; *Young v. Bristol Aeroplane Co. Ltd*., [1946] A.C. 163 (H.L.), at 169, per Viscount Simon, IBOA, Tab 7.

[34] See, e.g., *R. v. McClure*, 2001 SCC 14, ¶¶17-37, per Major J.; *R. v. Handy*, 2002 SCC 56, ¶¶31-55, per Binnie J.

[35] See *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590 (B.C. S.C.), at 592, IBOA, Tab 2; *Canada v. Craig*, 2012 SCC 43, ¶21, per Rothstein J ["***Craig***"].

[36] *R. v. Lee*, 2012 ABCA 17; *Bell v. Cessna Aircraft Company* (1983), 149 D.L.R. (3d) 509 (B.C.C.A.); *British Columbia v. Worthington (Canada) Inc.*, [1989] 1 W.W.R. 1 (B.C. C.A.), at 2; *R. v. Grumbo* (1998), 159 D.L.R. (4th) 577 (Sask. C.A.); *Neves* (Man. C.A.), *supra* note 27, ¶60; *Wellman* (Ont. C.A.), *supra* note 15, ¶¶19-20; *Thomson v. Nova Scotia (Workers' Compensation Board)*, 2003 NSCA 14, ¶¶2 and 11.

[37] *Stillman* (C.M.A.C.), *supra* note 1, ¶95.

b. Specifically Convened Panels Have Limited Discretion to Depart from Binding Precedent

21. Unlike ordinary panels of intermediate appellate courts, specifically convened panels of those courts may depart from binding precedent.[38] A few courts of appeal have issued practice directives stating when and how they will strike an expanded panel to reconsider a previously decided decision.[39] Other intermediate appellate courts should be encouraged to do the same.

22. The striking of expanded panels puts the parties — and the broader public — on notice. It allows parties and interveners to focus their submissions on why the court should or should not overturn itself. The striking of expanded panels also signals the court's intention to draw on its collective judgment to resolve the case. Writing on the use of *en banc* panels in the American appellate context, one commentator has described the effects of expanded panels this way: "[*E*]*n banc* rehearings allow more complete consideration (since more judges are present) and provides perspective not available to the [three-judge] panel".[40] Similar logic applies here.

23. Still, the discretion to depart from binding precedent is not unbounded; it should only be exercised according to clear and defined "guidelines",[41] only rarely, and in a manner that respects the constitutional constraints that underlie horizontal *stare decisis*. A specifically convened panel of an intermediate appellate court may only depart from precedent when the need to do so trumps the constitutional imperative of maintaining stability, predictability, consistency, and certainty in the law.[42] As this Court has emphasized, this is a high threshold.[43] The standard for an intermediate appellate court cannot be less demanding.

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[38] See, e.g., *Rex v. Hartfeil* (1920), 55 D.L.R. 524 (Alta. CA.), at 530; J.W. Mead, "*Stare Decisis* in the Inferior Courts of the United States" (2012), 12 Nev. L. J. 787, at 798, IBOA, Tab 11.

[39] See British Columbia Court of Appeal Practice Directive (Civil and Criminal), "Five Justice Divisions" (February 3, 2012); Practice Notes for the Court of Appeal of Newfoundland and Labrador (January 5, 2018), PN 4; and Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario (March 1, 2017), s. 13.

[40] Alexandra Sadinsky, "Redefining en Banc Review in the Federal Courts of Appeal" (2014) 82 Fordham L. Rev. 2001, at 2030.

[41] *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1353.

[42] See, e.g., *Craig* (S.C.C.), *supra* note 35, ¶27; *Fraser* (S.C.C.), *supra* note 21, ¶139, per Rothstein J. (concurring); *Teva* (S.C.C.), *supra* note 4, ¶140, per Côté and Rowe JJ. (dissenting).

[43] See, e.g., *Craig* (S.C.C.), *supra* note 35, ¶25; *Teva* (S.C.C.), *supra* note 4, ¶139, per Côté and Rowe JJ. (dissenting).

24. This high threshold should apply in all circumstances. The factors that inform whether it is met will differ, however, depending on the question. Separate considerations will apply when the prior decision is on a question of statutory or constitutional interpretation, rather than on a question of common law doctrine. This distinction reflects an important feature of appellate courts' law-making powers over time — namely, that they are more expansive in stewarding the evolution of the common law than in interpreting constitutional and statutory provisions.[44]

25. Where the impugned precedent relates to an intermediate appellate court's prior interpretation of a legislative or constitutional provision, the court must first determine whether there are "compelling reasons" to doubt the precedent's correctness.[45] If there are, then the court may go on to consider whether the precedent should be revisited. This will be the case if: (i) the precedent undermines certainty or has proved unworkable, in a manner inconsistent with the legislature's intent; and/or, in cases of statutory interpretation, (ii) the precedent is inconsistent with the *Charter*.[46] This narrow discretion reflects the limits of the judicial role in interpretation, which is to discern and effectuate intent. Revising interpretations of legislative or constitutional provisions shifts law-making power away from legislatures and towards courts. Intermediate appellate courts should exercise this authority only in the rarest and clearest of cases.

26. By contrast, where the impugned precedent relates to the intermediate appellate court's previous articulation of a common law doctrine — *i.e.*, a matter of judge-made law, rather than the interpretation of a statute or a constitutional provision — a specifically convened panel's discretion to depart from precedent will be broader.

27. The need to depart from the prior decision in these circumstances will outweigh the need to maintain stability, predictability, consistency, and certainty in the law if: (i) following the prior decision would undermine, rather than promote, certainty;[47] (ii) subsequent jurisprudence

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[44] See R. J. Sharpe, *Good Judgment* (Toronto: University of Toronto Press, 2018), at 198, IBOA, Tab 15.

[45] See *Teva* (S.C.C.), *supra* note 4, ¶139, per Côté and Rowe JJ. (dissenting).

[46] See *R. v. Salituro*, [1991] 3 S.C.R. 654, at 673-74; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at 777-778; *David Polowin* (Ont. C.A.), *supra* note 8; and *Neves* (Man. C.A.), *supra* note 27.

[47] See *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at 528; *R. v. Bernard*, [1988] 2 S.C.R. 833, at 858, per Dickson C.J. (dissenting); *Chaulk* (S.C.C.), *supra* note 41 at 1352-53.

has rendered the prior decision fundamentally inconsistent with the broader common law;[48] (iii) the prior decision predates, and is not consistent with, the *Charter*, a constitutional amendment or an enacted or amended legislative provision;[49] and/or (iv) fundamental social, political or economic assumptions underlying the prior decision have been undermined, such that its application effects unfairness, creates hardship or is simply unworkable.[50] Other considerations, such as academic criticism (in and of itself) and the relative recentness of the prior decision, do not belong in the balance.[51]

28. The foregoing is not intended to be exhaustive.[52] Still, it is difficult to imagine a case in which an intermediate appellate court could properly exercise its power not to follow binding precedent where ***none*** of these considerations pulled strongly in favour of doing so.

29. The rule of law cannot abide uncertainty here. To order our affairs according to law, Canadians must not only know what the law is, but also when it might change. These appeals present a rare opportunity to provide guidance on this issue. The Court should do so.

PART IV—SUBMISSIONS CONCERNING COSTS

30. ARL requests that no costs be awarded either for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of March, 2019.

Adam Goldenberg / Peter Grbac / Asher Honickman

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[48] See *Bernard* (S.C.C.), *supra* note 47, at 855-56, per Dickson C.J. (dissenting); *Miller* (F.C.A.), *supra* note 24, ¶20.

[49] See *Salituro* (S.C.C.), *supra* note 46, at 673-74; *B. (K.G.)* (S.C.C.), *supra* note 46, at 777-778.

[50] See *Fraser* (S.C.C.), *supra* note 21, ¶135, per Rothstein J. (concurring); *David Polowin* (Ont. C.A.), *supra* note 8, ¶124.

[51] See *Craig* (S.C.C.), *supra* note 35, ¶29; *R. v. Robinson*, [1996] 1 S.C.R. 683, ¶39; *David Polowin* (Ont. C.A.), *supra* note 8, ¶140.

[52] See *Fraser* (S.C.C.), *supra* note 21, ¶139, per Rothstein J. (concurring); *Chaulk* (S.C.C.), *supra* note 41, at 1353; *David Polowin* (Ont. C.A.), *supra* note 8, ¶125.

PART V—TABLE OF AUTHORITIES

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