

# THE CANADIAN BAR REVIEW

## LA REVUE DU BARREAU CANADIEN

Vol. LVIII

JUNE 1980 JUIN

No. 2

### CASTING OFF THE MOORING ROPES OF BINDING PRECEDENT

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#### *Introduction*

The year 1978 was an interesting year from the perspective of precedent. The developments in Canada, Australia and England will be considered by looking at one case decided by the highest appellate tribunal in each of these jurisdictions. The Canadian decision will be considered under the heading of "opportunity" even though the Supreme Court of Canada does not appear to have grasped the significance of its freedom from binding precedent. The Australian case will be examined under the heading of "dilemma" because of the difficulties to the doctrine of binding precedent arising from the existence of two final appellate tribunals with a substantially coterminus jurisdiction. The English case will be considered under the heading of "confusion" because it is apparent that the House of Lords still does not appreciate that, in the absence of statute, whether a court is bound by its own prior decisions is a matter of practice to be determined by that court and not by a higher appellate tribunal. By way of introduction, the casting off of the final mooring ropes of binding precedent will be considered in Canada and Australia and then an analysis of the significance of this act will be assessed.

#### *I. Canada and Australia.*

In 1978, both the Supreme Court of Canada and the High Court of Australia announced that Privy Council decisions would no longer be regarded as binding authority. This was done in each case by the full court of nine and seven members respectively. The Supreme Court of Canada in *Reference re Agricultural Products Marketing Act*<sup>1</sup> laid to

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<sup>1</sup> [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

rest the Privy Council decision in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*<sup>2</sup> Pigeon J., with whom Martland, Ritchie, Beetz and de Grandpré JJ. concurred, stated: "I find it quite proper for us to overrule what may be left of the judgment in [the *Crystal Dairy* case] . . . ."<sup>3</sup> The Chief Justice, with whom Judson, Spence and Dickson JJ. concurred, after indicating that within the past few years, the court, for compelling reasons, had "departed" from its previous decisions in three cases, stated: "There are equally compelling reasons here to set aside the *Crystal Dairy* doctrine and I would unhesitatingly do so."<sup>4</sup> The Supreme Court of Canada reaffirmed this position in *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*,<sup>5</sup> a unanimous decision of a five member panel rendered near the close of 1978. Laskin C.J.C., after noting that *Bain v. Fothergill*,<sup>6</sup> a decision of the House of Lords, had been applied by the Supreme Court of Canada in *Ontario Asphalt Block Co. v. Montreuil*<sup>7</sup> "at a time when this court was still subject to the Privy Council and through it to the House of Lords in matters of common law",<sup>8</sup> stated: "That situation no longer obtains, and this Court has asserted its freedom not only to depart from its own decisions but from Canadian decisions of the Privy Council as well . . . ."<sup>9</sup>

In Australia, appeals from the High Court to the Privy Council were abolished by statute in 1975.<sup>10</sup> In *Virgo v. The Queen*<sup>11</sup> one of the questions which was referred to the full bench of seven judges was whether the High Court in view of the abolition of appeals continued to be bound by decisions of the Privy Council. All seven members of the court concluded that the statute which abolished appeals meant that the High Court was no longer bound by Privy Council decisions no matter when they were given. All members of the court rendered separate reasons but the basic reason is set out by Barwick C. J. who stated:<sup>12</sup>

The essential basis for the observance of a decision of a tribunal by way of binding precedent is that that tribunal can correct the decisions of the court

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<sup>2</sup> [1933] A.C. 168, [1933] 1 D.L.R. 82 (P.C.).

<sup>3</sup> *Supra*, footnote 1, at pp. 1290 (S.C.R.), 322 (D.L.R.).

<sup>4</sup> *Ibid.*, at pp. 1257 (S.C.R.), 299 (D.L.R.).

<sup>5</sup> [1979] 2 S.C.R. 43, 92 D.L.R. (3d) 289, [1979] 1 W.W.R. 330.

<sup>6</sup> (1874), L.R. 7 H.L. 158.

<sup>7</sup> (1916), 52 S.C.R. 541, 27 D.L.R. 514.

<sup>8</sup> *Supra*, footnote 5, at pp. 57 (S.C.R.), 298 (D.L.R.), 340 (W.W.R.).

<sup>9</sup> *Ibid.*

<sup>10</sup> Privy Council (Appeals from the High Court) Act 1975, No. 33.

<sup>11</sup> (1978), 52 A.L.J.R. 418.

<sup>12</sup> *Ibid.*, at p. 419.

which is said so to be bound. This condition can no longer be satisfied in the case of this Court in relation to the Privy Council.

After the abolition of appeals from any Canadian court to the Privy Council almost thirty years elapsed before the Supreme Court of Canada was prepared to announce that it was no longer bound by Privy Council decisions rendered on appeal from Canada. The High Court of Australia came to this conclusion within three years of the abolition of appeals from the High Court in spite of the fact that appeals may still be taken directly from the State Supreme Courts to the Privy Council in "State" matters. One factor which perhaps accounts for the more rapid response to the abolition of appeals is the House of Lords' Practice Statement of 1966. The House of Lords by declaring that it would "depart from a previous decision when it appears right to do so"<sup>13</sup> helped to prepare a favourable climate for such a declaration in Commonwealth legal circles. In addition, the High Court of Australia had never considered itself to be bound by its own former decisions. After 1949, the Supreme Court of Canada had to unshackle the chains which it had imposed upon itself in *Stuart v. Bank of Montreal*<sup>14</sup> forty years earlier. In that case Mr. Justice Duff, after noting that the English Court of Appeal would only in very exceptional circumstances depart from one of its own previous decisions, stated:<sup>15</sup>

Quite apart from this, there are, I think, considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the decisions of this court. What exceptional circumstances would justify a departure from the general rule, we need not consider . . . .

The practice of a court regarding itself to be bound by its own prior decision is often regarded as making itself subservient to the law. For instance, Lord Campbell in *Beamish v. Beamish* said: "The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the King's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority."<sup>16</sup> Such a situation appeals to the judicial mind because if it were possible it would mean that one would be truly governed by law and not by men. However, the practice should also be regarded as an attempt to bind later courts. Looked at from this perspective, it is arrogant and presumptuous. A court deciding that it is bound by its own former decisions is attempting to fetter a future court which will be differently

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<sup>13</sup> [1966] 3 All E.R. 66, [1966] 1 W.L.R. 1234.

<sup>14</sup> (1909), 41 S.C.R. 516.

<sup>15</sup> *Ibid.*, at p. 535.

<sup>16</sup> (1861), 9 H.L.C. 274, at p. 339, 11 E.R. 735, at p. 761.

constituted and is thus trying to determine what the common law is for all time. It is tantamount to a claim of omniscience. Professor Dawson, in describing Lord Halsbury's pronouncement in *London Street Tramways Co. v. London County Council* that "a decision of this House on a question of law is conclusive",<sup>17</sup> has stated:<sup>18</sup>

This self-declaration of infallibility by the House of Lords followed by only twenty-eight years the declaration of papal infallibility by the Vatican Council of 1870. There is no reason to suspect a connection. The argument of Lord Halsbury in 1898 was entirely secular.

The 1909 announcement of the Supreme Court of Canada that it would regard itself as bound by its own decisions could not be described as a self-declaration of infallibility for its decisions were subject to review by the Privy Council. Thus it could hardly be inferred that the Supreme Court of Canada thought it was determining the rules of the common law in perpetuity. Even if it had such thoughts, they would have been dashed immediately for the Supreme Court of Canada in the very same case was effectively overruled by the Privy Council.<sup>19</sup>

When the *Stuart* case is cited it is often stated that it was affirmed by the Privy Council. However, only the result of the case was affirmed. The proposition applied by the Supreme Court of Canada was overruled. In the *Stuart* case, the court applied its former decision in *Cox v. Adams*<sup>20</sup> which stood for the proposition that a married woman who entered into a contract of surety for loans made to her husband was not bound by the contract, even though she understood its nature and voluntarily entered into it, unless she had received independent legal advice. The four judges of the Supreme Court forming the majority all thought they were simply applying *Cox v. Adams*. Duff J., with whom Sir Charles Fitzpatrick C.J.C. concurred, stated: "In the determination of this appeal we are, I think, concluded by *Cox v. Adams*."<sup>21</sup> In the Privy Council Lord Macnaughten made very short shrift of *Cox v. Adams* stating: "Their Lordships do not think that the doctrine supposed to be laid down in *Cox v. Adams* can be supported . . ."<sup>22</sup> The decision of the Supreme Court allowing the wife's appeal was affirmed solely on the basis that the wife was entirely under the husband's influence and had not received independent legal advice. This was directly opposed to the inference drawn by the trial judge and by the Supreme

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<sup>17</sup> [1898] A.C. 375 (H.L.), at p. 381.

<sup>18</sup> J.P. Dawson, *The Oracles of the Law* (1968), pp. 91-92.

<sup>19</sup> *Bank of Montreal v. Stuart*, [1911] A.C. 120 (P.C.).

<sup>20</sup> (1904), 35 S.C.R. 393.

<sup>21</sup> *Supra*, footnote 14, at p. 534.

<sup>22</sup> *Supra*, footnote 19, at p. 126.

Court of Canada that: "Mr. Stuart exerted no undue influence over his wife."<sup>23</sup> Thus the Supreme Court of Canada in 1909 could only have been claiming for themselves the power to determine the common law until the Privy Council decided otherwise.

## II. *The Significance of Casting off. Binding Precedent by a Final Appellate Tribunal.*

It is undoubtedly legitimate to question whether any importance should be attached to the fact that the Supreme Court of Canada now regards all precedent as merely persuasive. The Supreme Court will only occasionally overrule either a Canadian Privy Council decision or a decision of its own. We now appreciate that there are few impregnable precedents. Does it really matter that the Supreme Court will now permit a frontal assault on all precedents whereas formerly a covert operation was necessary to manoeuvre around the out-moded precedent? The outflanking of a precedent through a skilful process of distinguishing it from the case at bar is slower but if continued, the out-moded precedent will eventually be sapped of all its vitality and remain but an empty shell.

Law-making is certainly not restricted to the overruling of a precedent. Law-making occurs when a precedent is distinguished and also when a precedent is followed. Some of the most significant law-making has occurred by courts purporting simply to follow *Donoghue v. Stevenson*<sup>24</sup> but in fact extending and expanding tort law in the most profound way. This illustrates Professor Montrose's rhetorical question: "Is not 'following' an old rule in new circumstances the making of a new rule?"<sup>25</sup> Law-making can and does occur whether or not a court considers itself to be bound by its own prior decisions. A.W.B. Simpson states that the only power that the House of Lords relinquished in 1898 by holding itself bound by its own former decisions was the power to decline to follow its own decisions without distinguishing them.<sup>26</sup> With regard to overruling he states that: "Such a power was very rarely exercised before 1898; its loss was not therefore very momentous, for the development of new Common Law only rarely took place through the exercise of such a power."<sup>27</sup> Similarly the House of Lords' decisions following

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<sup>23</sup> *Ibid.*, p. 125.

<sup>24</sup> [1932] A.C. 562 (H.L.).

<sup>25</sup> J.L. Montrose, *Precedent in English Law and other Essays* (ed. by H.G. Hanbury, 1968), p. 14.

<sup>26</sup> A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in *Oxford Essays in Jurisprudence* (ed. by A.G. Guest, 1961), p. 155.

<sup>27</sup> *Ibid.*

its 1966 declaration that it would "depart from a previous decision when it appears right to do so" do not represent a significant breach in the development of the English common law.

The Supreme Court of Canada's assertion of freedom to depart from its own prior decisions and also those decisions of the Privy Council on appeal from Canada is important because a failure to recognize law-making power may result in atrophy of that power. This point is made by Professor Jaffe and causes him to ask: "Has the English common law suffered a menopause?"<sup>28</sup> He states that the great judge was great because he dared to make new law and because he appreciated that the law was a living organism whose vitality is dependent upon renewal.<sup>29</sup> Professor Jaffe also maintains that:<sup>30</sup>

The judge should have a sense of moral freedom, a sense of independence in the service of justice. We cannot look to him to resist abuse of power if he is made to feel impotent.

He believes that the House of Lords by considering itself bound by its prior decisions during the period from 1898 to 1966, impaired its capacity to adapt the common law to changing demands and dampened its earlier ardour in protecting the citizen from executive excess.<sup>31</sup>

It is thus important that the Supreme Court of Canada has plucked up its courage and has admitted that there are no binding precedents but only persuasive precedents. The Supreme Court can no longer be content to say that the case is governed by an earlier decision either of its own or of the Privy Council unless the decision provides the proper reconciliation of the competing interests which are involved. The court can no longer regard itself as a pawn controlled by the power of precedent. This is important as even a jurist as vigilant as Mr. Justice Rand occasionally noted. In *Brewer v. McCauley*,<sup>32</sup> he adopted one of the most aridly technical rules<sup>33</sup> which the House of Lords has ever formulated with no discussion and simply stated: "the authorities in England have pronounced on both of them. . . . The appeal must therefore, be dismissed. . . ."<sup>34</sup> Professor Gilbert Kennedy soundly chastised Mr. Justice Rand when he wrote: "Baldwin and Lafontaine would hardly have been content

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<sup>28</sup> L.L. Jaffe, *English and American Judges as Lawmakers* (1969), p. 2.

<sup>29</sup> *Ibid.*, p. 1.

<sup>30</sup> *Ibid.*, p. 21.

<sup>31</sup> *Ibid.*, p. 22.

<sup>32</sup> [1954] S.C.R. 645, [1955] 1 D.L.R. 415.

<sup>33</sup> This is the rule that "charitable or benevolent" is too uncertain but "charitable and benevolent" is very acceptable. *Chichester Diocesan Fund and Bd. of Finance v. Simpson*, [1944] A.C. 341, [1944] 2 All E.R. 60 (H.L.).

<sup>34</sup> *Supra*, footnote 32, at pp. 647 (S.C.R.), 416 (D.L.R.).

with 'the authorities in England have pronounced'.<sup>35</sup> Professor Kennedy was not merely complaining of the "Made in England" aspect of the decision but the failure of the court to deal adequately with the issues. An ultimate appellate court which has abandoned the convenient crutch of binding precedent is much more likely to analyze with care all the issues involved in a case than is an ultimate appeal court which permits itself to take refuge in the delusion of the binding precedent.

### III. Opportunity.

A 1978 decision of the Supreme Court of Canada which will be considered is *Cherneskey v. Armadale Publishers Ltd.*<sup>36</sup> The decision is only indirectly relevant to precedent. The issue was whether the trial judge was correct in withdrawing the defence of fair comment from a newspaper publisher in a defamation action. The facts of the case are that the plaintiff, a lawyer and an alderman of the City of Saskatoon, brought a defamation action against the owner and publisher of *The Star-Phoenix* and Sterling King, editor of the paper, for publishing a letter to the editor written by two law students. The letter related to a controversy concerning the location of an Indian and Metis rehabilitation centre for alcoholics in a predominantly residential section of Saskatoon. The plaintiff, Mr. Cherneskey, was consulted by residents of the area opposed to the centre and he had advised them to present a petition to the city council which he subsequently brought to the attention of the council at a meeting. The letter to the editor set out the facts of this matter of public interest and ended with the hope that the "racist resistance exhibited will be replaced by the support and encouragement which the project deserves".<sup>37</sup>

The jury found that a reasonably minded person would infer that the words "racist resistance" referred to the plaintiff and that the words were defamatory. The trial judge took the defence of fair comment from the jury on the basis that the editor did not honestly believe the comment. The trial judge was reversed by a majority of the Saskatchewan Court of Appeal which ordered a new trial but the decision of the trial judge was restored by a majority of the Supreme Court of Canada.

Freedom of speech would be seriously curtailed were it not for the defences of privilege, justification and fair comment on a matter

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<sup>35</sup> G.D. Kennedy, Comment (1955), 33 Can. Bar Rev. 340, at p. 345. I wish to express my appreciation to Professor W.F. Bowker for drawing Professor Kennedy's comment to my attention.

<sup>36</sup> [1979] 1 S.C.R. 1067, 90 D.L.R. (3d) 321, [1978] 6 W.W.R. 618.

<sup>37</sup> *Ibid.*, at pp. 1076 (S.C.R.), 328 (D.L.R.), 621 (W.W.R.).

of public interest. This follows because the publication of a statement which tends to lower a person in the estimation of right-thinking persons constitutes defamation. The defence of fair comment on a matter of public interest is thus an important bulwark to freedom of speech because of the low threshold above which a statement will be regarded as defamatory. The Supreme Court of Canada in considering whether the trial judge was correct in withdrawing the defence of fair comment from the jury was faced with determining the delicate balance between the protection of free speech and the protection of an individual's reputation. This is an issue vital to the health of a free society.

It is regrettable to find the Supreme Court of Canada rendering a mechanical precedent-applying approach which was practically devoid of any consideration of the basic issues, particularly at a time that it has proclaimed its freedom from binding precedent. The majority judgments of Ritchie J., with whom Laskin C.J.C., Pigeon and Pratte JJ. concurred, and of Martland J., with whom Laskin C.J.C. and Beetz J. concurred, could both be described as "the authorities in England have pronounced" and therefore the appeal is allowed. In the majority decision of Ritchie J. ten cases are cited which include three Privy Council decisions, one House of Lords decision, five English Court of Appeal decisions and only one Supreme Court of Canada decision. However, two other Supreme Court of Canada decisions receive indirect mention through Ritchie J. quoting a passage from the dissenting judgment in the Saskatchewan Court of Appeal which in turn cites two other Supreme Court of Canada decisions. In the other majority judgment, that of Mr. Justice Martland, only one decision is cited and it is a trial level decision of the English Queen's Bench by Diplock J., as he then was.

The "Made in England" aspect of the majority decisions could be excused if the majority had evolved a rule which would balance the vitally important interests which clashed in this case. It will take some time to develop a Canadian common law but the process should be commenced sometime. The only redeeming feature of the case is the minority decision of Dickson J., with whom Spence and Estey JJ. concurred. The reasons for judgment of Mr. Justice Dickson contain an excellent discussion of the policy considerations involved in the law of defamation. In addition, utilizing basically the same precedents, he was able to fashion a rule which permitted a balancing of the interest of freedom of speech and the interest of providing protection to a person's reputation.

The majority held that a newspaper which prints a defamatory letter to the editor is not entitled to the defence of fair comment unless it agrees with the comment contained in the letter. It must be remembered that defamation is any publication which tends to lower



a person in the esteem of right-thinking members of society. The result of the case appears to be that a newspaper will have the defence of fair comment available to it when its own published opinion reflects discredit on someone but the defence of fair comment will not be available to it when it publishes the opinion of another with which it disagrees. This appears to be a very inappropriate balancing of the interest in protecting freedom of speech and in protecting an individual's reputation. Mr. Justice Dickson stresses that a letter to the editor page is one of the few ways in which an individual may gain access to the press and may disseminate his opinions to the community. The exceedingly unfortunate result which flows from the majority decision is set out by Mr. Justice Dickson when he states:<sup>38</sup>

Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology or being without defence if sued for defamation, democratic dialogue will be stifled.

Mr. Justice Dickson acknowledges that a publisher of a newspaper has no special immunity. The rule which he derives from the precedents for the defence of fair comment is twofold. The first is the objective test: "is the comment one that an honest albeit prejudiced person might make in the circumstances?"<sup>39</sup> The second is the subjective test: "whether the publisher himself was actuated by malice?"<sup>40</sup> which if he is, nullifies the defence. Since the first test is an objective one, the defence of fair comment is made available to the publisher even though he does not agree with the comment. He will lose the defence under the second test if he published it with malice.

This particular case was not directly concerned with whether the interest in the protection of freedom of speech should prevail over the protection of an individual's reputation. If the minority had prevailed, it would have meant only that the newspaper publisher was entitled to raise the defence. Whether the defence would succeed would be dependent upon the newspaper establishing that the facts upon which the comment was based were true and that it was fair comment on a matter of public interest. There was a great need for the court to enunciate a rule about defamation which could be utilized both in this case and more importantly in subsequent cases to achieve a proper balance between these important competing interests. Mr. Justice Dickson has evolved such a rule. However, the majority decision does not permit this balancing of interests in any

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<sup>38</sup> *Ibid.*, at pp. 1097 (S.C.R.), 344 (D.L.R.), 642 (W.W.R.).

<sup>39</sup> *Ibid.*, at pp. 1098 (S.C.R.), 345 (D.L.R.), 643 (W.W.R.).

<sup>40</sup> *Ibid.*

case in which the publisher is not the original author and does not agree with the comment.

The basic problem appears to be that the majority judges fail to appreciate that the defence of fair comment must distinguish between the situation in which the writer and publisher are one and the same person and the situation in which the publisher is not the writer. Mr. Justice Ritchie quotes Scott L. J. in *Lyon and Lyon v. Daily Telegraph Ltd.*<sup>41</sup> who stated that: "There is no question but that the comment contained in the letter represented the honest opinion of the 'Daily Telegraph'; and at trial no doubt was cast upon the complete belief of the newspaper that they were publishing a letter in which the writer was making a fair comment on a matter of public interest."<sup>42</sup> Ritchie J. then distinguishes the *Cherneskey* case on the basis that "the letter complained of here did not express the honest opinion of The Star-Phoenix . . .".<sup>43</sup> The Law Reform Commission of New South Wales in its *Report on Defamation* quotes precisely the same passage and then states:<sup>44</sup>

In their context, these words seem to mean that it was clear beyond argument that the comment represented the honest opinion of the Daily Telegraph. These words in the report (and they appear also in the collateral reports) must we think be a mistake: there is no suggestion anywhere of any admission, concession or evidence to that effect, and we do not see how the fact, if it was a fact, was relevant. However this may be, we think that there should not be any foothold for the notion that a newspaper proprietor is safe in publishing the comment of a stranger only if the newspaper proprietor agrees with the opinion expressed in the comments.

Mr. Justice Ritchie also enlists the support of Lord Denning in *Slim v. Daily Telegraph Ltd.*<sup>45</sup> and quotes him when he observes that:<sup>46</sup>

. . . the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper"; and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions.

However, Ritchie J. then proceeds to seize upon two sentences from Lord Denning's decision and does precisely what the Master of the

<sup>41</sup> [1943] 1 K.B. 746, [1943] 2 All E.R. 316 (C.A.).

<sup>42</sup> *Supra*, footnote 36, at pp. 1084 (S.C.R.), 334 (D.L.R.), 628 (W.W.R.).

<sup>43</sup> *Ibid.*, at pp. 1085 (S.C.R.), 334 (D.L.R.), 628 (W.W.R.).

<sup>44</sup> Report of the Law Reform Commission (N.S.W.) on Defamation, L.R.C. 11 (1971), p. 134.

<sup>45</sup> [1968] 2 Q.B. 157, [1968] 1 All E.R. 497 (C.A.).

<sup>46</sup> *Supra*, footnote 36, at pp. 1086 (S.C.R.), 336 (D.L.R.), 630 (W.W.R.).

Rolls warned against, that is, whittling down the defence of fair comment by legal refinements. Ritchie J. quotes Lord Denning in the penultimate paragraph of the same judgment when he stated:<sup>47</sup>

On the face of these letters, I think that the comments made by Mr. Herbert and the Daily Telegraph were fair comments on a matter of public interest. *They* honestly said what *they* thought.

By treating the passage above as though it were a Saskatchewan statute, Ritchie J. comes to the conclusion that it is necessary for both the writer and the newspaper to believe in the honesty of the comment. It is submitted that this is an undesirable technique and an unfortunate conclusion which is directly contrary to the general tenor of the judgment of Lord Denning.

It would appear that legislation about the defence of fair comment is now necessary to redress the balance in favour of the protection of freedom of speech in so far as its expression takes the form of letters to the editor. This seems unfortunate in that there may be many different responses by the provincial legislatures. It would surely have been preferable because of the fundamental nature of freedom of speech in a democracy for there to have been a common law for Canada. Since Mr. Justice Dickson was able to mould a workable rule out of the same persuasive precedents, it may even be charitable to describe the majority decisions as stating "the authorities in England have decided". It is to be hoped that the newly enunciated declaration of freedom from all precedent will be much more effectively used in the future.

#### IV. Dilemma.

*Virgo v. The Queen*,<sup>48</sup> a 1978 decision of the High Court of Australia, will now be considered. One question referred to the full court was whether a trial judge had correctly instructed the jury in regard to a person accused of murder who according to his account was "high" on heroin. Attention will be given to the question of whether, as a result of The Privy Council (Appeals from the High Court) Act 1975, the High Court was bound by Privy Council decisions. The High Court unanimously held that it was no longer bound by such decisions because of the abolition of the right to appeal to the Privy Council. The case merits consideration because of the anomalous situation in which the State courts now find themselves. It is still possible to appeal from a State court directly to the Privy Council in any matter not involving federal jurisdiction. There are thus two final courts of appeal, neither of which is subordinate to the other, from the Supreme Courts of the Australian

<sup>47</sup> *Ibid.* Italics added by Ritchie J.

<sup>48</sup> *Supra*, footnote 11.

States when they are not exercising federal jurisdiction. Mr. Justice Gibbs describes the result as "extraordinary and perhaps unprecedented".<sup>49</sup>

In order to appreciate the consequences of this situation, it will be assumed that the High Court and the Privy Council have enunciated diametrically opposite precedents on a particular issue and that the issue arises in a State Supreme Court between A and B. If the issue is resolved by the State court applying the High Court precedent favouring litigant A, litigant B will lose and B will appeal to the Privy Council, and if the Privy Council adheres to its former decision, it will hold for B. If the issue is resolved by the State court applying the Privy Council precedent favouring litigant B, litigant A will lose and A will appeal to the High Court and if the High Court adheres to its former decision, it will hold for A. In a situation such as this it is important for a party to lose in the State Supreme Court because by having the choice of appellate courts he will prevail in the end, provided he has the financial resources for an appeal. This is a strange new variety of forum shopping. However, as the shopping is done between two final appellate courts, one only has the opportunity to forum shop provided that one was fortunate enough to lose at the State Supreme Court level. A judicial system in which an advantage is obtained by losing is very unsatisfactory.

Mr. Justice Aickin considers the difficult position in which a State Supreme Court will find itself when confronted with a High Court and a Privy Council decision which are directly in conflict and states:<sup>50</sup>

[W]hichever decision the Supreme Court follows, the unsuccessful litigant will seek to appeal to the tribunal which took the other view. . . . The choice of the tribunal to which the appeal may go from the Supreme Court is in the hands of the unsuccessful litigant who will naturally tend to appeal to the tribunal in which he thinks he will fare better and what sounder ground for preference can there be than an existing decision in his favour by that tribunal.

Mr. Justice Stephen comes to the conclusion that the doctrine of binding precedent has become a "casualty of events"<sup>51</sup> whenever there is a conflict between a High Court and a Privy Council decision. The doctrine of binding precedent depends upon a hierarchy of courts. It can accommodate itself to two or more final appellate courts provided that their jurisdictional subject matter is exclusive. For instance from 1933 until 1949, the Supreme Court of Canada was the ultimate appeal court in criminal cases, with the Privy Council the ultimate appeal court in all other matters. This had no repercussion on precedent as the areas in which each was the final

<sup>49</sup> *Ibid.*, at p. 430.

<sup>50</sup> *Ibid.*, at p. 451.

<sup>51</sup> *Ibid.*, at p. 434.

appellate court were mutually exclusive. The doctrine of binding precedent is, however, impaired to the extent to which their jurisdiction is coterminous. In Australia the overlap of the jurisdiction of the two appellate courts is very extensive, comprising all the jurisdiction of the State courts with the exception of their federal jurisdiction.

The judges of the High Court were not able to offer any consistent advice to the State courts which would help them solve the dilemma of conflicting decisions of the High Court and the Privy Council. In considering the advice offered to the State courts, an attempt will be made to rank the judges according to the importance which they attach to following the decisions of the High Court. The advice of Barwick C.J. and Jacobs J. was that the State courts should always follow High Court decisions in preference to a conflicting decision of the Privy Council no matter when the decisions were rendered. Barwick C.J. believes that a State court cannot be permitted to decide whether it will follow a High Court or a Privy Council decision, it must follow the High Court. The Chief Justice states:<sup>52</sup>

It is for this Court alone to decide whether its decision is correct. Thus the passage of the federal statute abolishing appeals from this Court to the Privy Council was both intended to effect and has effected a very radical change in the relationship of the State court to the decisions of the Privy Council.

It would appear that the Chief Justice espouses a concept of an Australian common law to be moulded by the High Court but the problem is that his advice to the State courts will tend to divert appeals to the Privy Council in cases of conflict.

Mr. Justice Mason states that: "State courts are bound both by the decisions of the Privy Council and of this Court."<sup>53</sup> However, he then indicates that State courts should, as a general rule, follow High Court decisions in preference to Privy Council decisions. The only exception which he makes to the general rule is a case in which the Privy Council has considered a High Court decision and has decided not to follow it. However, even in this case the State courts should only follow the Privy Council if the decision is based on considerations that are relevant to Australian circumstances and conditions.

Mr. Justice Murphy clearly states that if a Privy Council decision and a later High Court decision are in conflict, the State courts should follow the High Court. He also states that the High Court decision should be followed in preference to an earlier or later Privy Council decision on appeal from outside Australia even if the

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<sup>52</sup> *Ibid.*, at p. 420.

<sup>53</sup> *Ibid.*, at p. 436.

Privy Council has taken into account a High Court decision. He does not indicate explicitly what the State courts should do when faced with a conflict between a Privy Council decision on appeal from Australia and an earlier High Court decision. However, he does say that: "An orderly approach to precedent suggests that previous decisions of the Privy Council, given on appeal from the High Court, should be treated for the present as equivalent to a High Court decision."<sup>54</sup> This suggests that a Privy Council decision on appeal from Australia should prevail in State courts over an earlier conflicting High Court decision.

Mr. Justice Gibbs states that: "There is no doubt that decisions of the Privy Council remain binding on the courts of the States."<sup>55</sup> Although stating that it is unnecessary in this case to lay down a set of rules to guide the State courts when there is a conflict between a High Court and Privy Council decision, he says: "If this Court has considered a decision of the Privy Council, and has deliberately decided not to follow it, the State courts will be bound to act in accordance with the law as declared by this Court unless they are directed by a later decision of the Privy Council to take a different course."<sup>56</sup> From this it might be inferred that the State courts should follow the later decision. However, he then cites an example of another situation in which he thinks it might be proper for a State court to follow the Privy Council rather than the High Court and that is: "if the decision of this court was an old one and obviously out of line with principles more recently established".<sup>57</sup> Thus it would seem that the conflict is not to be resolved generally by preferring the later decision but rather by following the High Court, except perhaps when a Privy Council decision has specifically disapproved of a High Court decision, or when the High Court decision is "an old one".

Mr. Justice Stephen and Mr. Justice Aickin decline to offer any advice to the State courts to assist them to resolve a conflict between a High Court and Privy Council decision because they believe that the doctrine of binding precedent has been impaired and no unilateral declaration of either of the two final appellate courts can resolve the dilemma. The doctrine of binding precedent has been impaired because of the decisive power possessed by the unsuccessful litigant at the State Supreme Court level to select the appellate forum of his choice. Both these judges indicate the problem involved with the rule, formulated by Barwick C.J. and Jacobs J., that in case of

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<sup>54</sup> *Ibid.*, at p. 447.

<sup>55</sup> *Ibid.*, at p. 430.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

conflict the State courts are to follow the High Court. The problem is that the litigant who loses at the State Supreme Court level will, in all such cases, appeal to the Privy Council and if the Privy Council is not prepared to defer to the High Court, it will allow the appeal by applying its own precedent. The Privy Council will thus obtain a monopoly of appeals where a High Court and a Privy Council decision are in direct conflict. Mr. Justice Stephen indicates that one virtue of a rule that requires State courts to apply the more recent decision would be to insure that the High Court received its share of appeals in this contentious area. If the more recent decision was that of the Privy Council, the losing litigant would appeal to the High Court. He also points out that, if the High Court were to direct the State courts to apply Privy Council decisions in preference to High Court decisions in cases of conflict, the High Court would secure the monopoly of appeals in this area. He then states that: "Such a sacrifice of principle for expediency cannot, of course, be countenanced . . . ."<sup>58</sup>

The dilemma in which Australian State courts have been placed by the High Court concluding that Privy Council decisions are no longer binding precedent in the High Court is intriguing but its significance can be exaggerated. The discussion has proceeded on the basis that a High Court decision is in direct conflict with a Privy Council decision. It is of course taught law that it is the *ratio decidendi* of the two cases which must be ascertained and only if they are in direct conflict will the Australian State courts be faced with a dilemma. When this is recognized, one is also compelled to acknowledge that there is little agreement about the way in which the *ratio decidendi* of a case is determined. Professor A.L. Goodhart contends that the *ratio* of a case is determined by taking "account (a) of the facts treated by the judge as material, and (b) his decision based upon them".<sup>59</sup> This approach is valuable for the insights which it provides and is very compatible with the study of law by a case-law method. However, this method seems to suffer by portraying the process as a very mechanical operation.<sup>60</sup> Perhaps the classical or orthodox theory of the *ratio decidendi* which Professor Morgan defines as "the rules of law applied by the court, the application of which is required for the determination of the issue

<sup>58</sup> *Ibid.*, at p. 434.

<sup>59</sup> A.L. Goodhart, Determining the Ratio Decidendi of a Case (1930), 40 Yale L.J. 161, at p. 182.

<sup>60</sup> Julius Stone in The Ratio of The Ratio Decidendi (1959), 22 Mod. L. Rev. 597 has indicated that Professor Goodhart's mode of determining the *ratio decidendi* of a case is not really as mechanical as it appears as material facts can be determined at various levels of generality.

presented . . .<sup>61</sup> is to be preferred. The determination of the *ratio decidendi* of a case is not an exact science but rather an art form—an art form guided by sound legal knowledge. Thus, there will usually be some doubt as to whether a decision is in direct conflict with another decision.

There will probably be only a relatively few number of instances in which a High Court decision and a Privy Council decision are in direct conflict. The dilemma may occur infrequently and it may be solved by the Privy Council deferring to the High Court as Barwick C.J. suggests when he states: "Now that there is no such appeal from the decisions of this Court, it seems to me that in the ascertainment of Australian law, the decisions of this Court might well be regarded by their Lordships as compelling."<sup>62</sup> Mr. Justice Gibbs considers that the fear of conflict will prove to be unfounded because the High Court "will not differ from a decision of the Privy Council anymore readily than we will depart from one of our own decisions"<sup>63</sup> and because "the Privy Council will give the same careful consideration to decisions of this Court as we shall give to decisions of the Board".<sup>64</sup> However, mutual deference does not appeal to Mr. Justice Murphy who makes no attempt to conceal his antipathy toward the Privy Council. He considers that it would be "mischievous" for the Privy Council to determine an appeal otherwise than in accordance with the decisions of the High Court. Mr. Justice Murphy also anticipates difficulties and states:<sup>65</sup>

If the appeal to the Privy Council (by right or by leave) continues, the absurdities and mischief which we face are obvious. The tension between the Privy Council and the High Court which occurred over inter se questions . . . will be repeated, but the area of conflict will be criminal and civil law generally.

It would appear that unless the Privy Council is prepared to play second fiddle to the High Court there are going to be some very discordant notes sounded by the High Court and directed at the Privy Council.<sup>66</sup> It seems likely that the situation will become intolerable for both the High Court and the Privy Council. Also it must be a very

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<sup>61</sup> E.M. Morgan, *Introduction to the Study of Law* (2nd ed., 1948), pp. 155-156.

<sup>62</sup> *Supra*, footnote 11, at p. 420.

<sup>63</sup> *Ibid.*, at p. 430.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, at p. 447.

<sup>66</sup> In *Uren v. Consolidated Press Ltd.*, [1969] 1 A.C. 590, [1967] 3 All E.R. 525, the Privy Council deferred to the High Court and did not apply the House of Lords' decision in *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367, concerning punitive or exemplary damages of which the High Court disapproved. It seems doubtful that the Privy Council would consistently be content to defer.



basic flaw in a judicial system for there to be an advantage in losing a case at any level of the proceedings. The appellate forum shopping<sup>67</sup> that can be engaged in by the losing litigant will add considerably to the uncertainty of the law. It must also be recognized that appellate forum shopping is expensive and as poor litigants will not be able to shop in London for a different legal rule this option will accrue to the benefit of the wealthy litigant. The manifest injustice of this situation is unlikely to be remedied by the provision of legal aid. It would therefore seem inevitable that appeals to the Privy Council from the State Supreme Courts will be abolished. Appeals to the Privy Council would appear to be not only an anachronism but an anachronism possessed with divisive and unfortunate consequences.<sup>68</sup>

### V. Confusion.

By focusing attention on England one further development in regard to precedent which seems to warrant discussion arises out of the rebellious attitude which the English Court of Appeal has adopted towards the House of Lords. In at least four cases within the last few years, the ire of the Law Lords has been aroused by the Court of Appeal refusing to hold itself bound by a decision of the House of

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<sup>67</sup> Forum shopping is a well-known concept in the conflict of laws. It is also interesting to note that the dilemma facing the State courts bears some similarities to the problem of "renvoi" in the conflict of laws. A "renvoi" situation arises where jurisdiction A makes a broad reference to all of the law of jurisdiction B, including its conflict of law rules, to solve a particular issue and jurisdiction B has a conflict of laws rule about the same issue which makes a broad reference to jurisdiction A, including its conflict of law rule. It is analogous in the sense that the precedent dilemma and the renvoi dilemma can only be solved by a self-denying ordinance by one court. The adoption of the "foreign court" or "total renvoi" solution to the dilemma of "renvoi" and the decision of one court to defer to the other in case of a precedent dilemma are both self-denying ordinances. It is also analogous to the "foreign court" or "total renvoi" solution in the sense that it is no solution at all if the other court has adopted the same solution. If each of the final appellate courts defer to the other, the State courts will have no guidance in determining between the application of a High Court decision or a Privy Council decision in cases of conflict. See J.-G. Castel, *Canadian Conflict of Laws*, Vol. 1 (1975), pp. 45-53.

<sup>68</sup> I wish to draw attention to a very perceptive article by Edward St. John entitled *The High Court and the Privy Council*; the *New Epoch* in (1976), 50 *Australian L.J.* 389. He foresaw and discussed in considerable detail the problems which *Virgo v. The Queen* later revealed. I read his article after I had nearly completed this article but I should acknowledge that the title comes from his article. At p. 398 he states: "It can be rather exciting and uplifting, as well as rather dangerous, to cast off mooring ropes after so long a stay in safe harbour, but the voyage must of course be undertaken, now at last." These words were in turn adopted from a speech by Mr. T.E.F. Hughes in the Commonwealth Parliament in 1968 and were used with reference to the development of an Australian common law.

Lords.<sup>69</sup> On this matter the House of Lords will certainly prevail because of the power which is inherent in its position at the apex of the English judicial hierarchy. As Lord Simon in *Miliangos v. Frank (Textiles) Ltd.* stated: "If a subordinate court fails to abide loyally by the judgment of its superior court, the decision of the subordinate court is likely to be appealed to the superior court, which is in turn likely to vindicate its previous decision."<sup>70</sup> However, the more interesting issue is whether the English Court of Appeal is bound by its own prior decisions. This became a contentious issue in 1978 in *Davis v. Johnson*<sup>71</sup> which was concerned with the scope of the protection to be accorded to "battered wives" or to persons in a relationship akin to marriage by the Domestic Violence and Matrimonial Proceedings Act 1976.<sup>72</sup>

In *Davis v. Johnson* an annoyed House of Lords moved resolutely and decisively to stamp out what it regarded as heresy. The Court of Appeal had decided that it was not bound by its own former decision where the court was satisfied that the decision was wrong and could not stand in face of a clear statute passed to remedy a serious abuse. Lord Denning went further and held that the so-called rule in *Young v. Bristol Aeroplane Co. Ltd.*,<sup>73</sup> in which the full Court of Appeal held that it was itself bound by its prior decisions with three exceptions, was "simply a practice or usage laid down by the court for its own guidance; and, as such, the successors of that court can alter that practice or amend it or set up other guidelines, just as the House of Lords did in 1966".<sup>74</sup> The three exceptions which were set out in the *Bristol Aeroplane* case were 1) where there are two conflicting decisions, 2) where a previous decision cannot stand with a decision of the House of Lords, and 3) where the previous decision was given *per incuriam*.<sup>75</sup>

<sup>69</sup> The cases are: *Broome v. Cassel & Co.*, [1971] 2 Q.B. 354, [1971] 2 All E.R. 187 in which the Court of Appeal declined to follow *Rooges v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367; *In re Harper v. National Coal Board*, [1974] 1 Q.B. 614, [1974] 2 All E.R. 441 in which the Court of Appeal declined to follow *Central Asbestos Co. Ltd. v. Dodd*, [1973] A.C. 518, [1972] 2 All E.R. 1135; *Schorsch Meier G.m.d.H. v. Hennin*, [1975] Q.B. 416, [1975] 1 All E.R. 152 and also *Miliangos v. George Frank (Textiles) Ltd.*, [1975] Q.B. 487, [1975] 1 All E.R. 1076 in which the Court of Appeal declined to follow *In re United Railways of Havana and Regla Warehouse Ltd.*, [1961] A.C. 1007, [1960] 2 All E.R. 1076. In the *Miliangos* case the position adopted by the Court of Appeal was adopted by the House of Lords, [1976] A.C. 443, [1975] 3 All E.R. 801.

<sup>70</sup> *Ibid.*, at pp. 478 (A.C.), 822 (All E.R.) in which Lord Simon was specifically referring to *Broome v. Cassel & Co. Ltd.*

<sup>71</sup> [1978] 1 All E.R. 1132 (H.L.).

<sup>72</sup> Domestic Violence and Matrimonial Proceeding Act, 1976, c. 50 (U.K.).

<sup>73</sup> [1944] K.B. 718, [1944] 2 All E.R. 293 (C.A.).

<sup>74</sup> [1978] 1 All E.R. 841 (C.A.), at p. 855.

<sup>75</sup> *Ibid.*

Lord Diplock's response to the Court of Appeal was that: "this House should take this occasion to re-affirm expressly, unequivocally and unanimously that the rule laid down in the *Bristol Aeroplane* case as to *stare decisis* is still binding on the Court of Appeal."<sup>76</sup> Viscount Dilhorne, Lord Kilbrandon, Lord Salmon and Lord Scarman either specifically concurred with these remarks by Lord Diplock or expressed very similar views. It would appear that Lord Diplock had obtained the unanimous condemnation of this heresy for which he sought. However, Lord Salmon after stating that "the Court of Appeal is bound by its previous decisions subject to the three exceptions laid down in *Young v. Bristol Aeroplane Co. Ltd.*",<sup>77</sup> subsequently agrees that it is but a practice. Lord Salmon gives the show away by tacitly admitting the faulty logic of the position adopted by the House of Lords when he states:<sup>78</sup>

In the nature of things however, the point could never come before your Lordships' House for decision or form part of its *ratio decidendi*. This House decides every case that comes before it according to the law. If, as in the instant case, the Court of Appeal decides an appeal contrary to one of its previous decisions, this House, much as it may deprecate the Court of Appeal's departure from the rule, will nevertheless dismiss the appeal if it comes to the conclusion that the decision appealed against was right in law.

Lord Salmon has thus clearly admitted that the alleged rule, that the Court of Appeal is bound by its own prior decisions, is a rule without a sanction and therefore no rule at all. It is, therefore, a custom or practice of the Court of Appeal. Lord Salmon also expresses sympathy with the views of Lord Denning about *stare decisis* but says that "until such time, if ever, as all his colleagues in the Court of Appeal agree with those views, *stare decisis* must still hold the field".<sup>79</sup> It is submitted that this statement is directly contrary to the longer quotation set out above. As long as Lord Denning or any other Lord Justice can obtain a majority sitting on a particular case rather than unanimity of all seventeen Lord Justices in the Court of Appeal, the Court of Appeal so constituted can refuse to follow a former decision without bringing itself within the three exceptions to the *Bristol Aeroplane* case. They should also be able to do so without being reversed on appeal provided that the House of Lords believes the case to have been decided "according to the law".

The function of an appellate court is to ensure that the result achieved is as fair to the litigants as the rules of law and legal principles permit and also to articulate, clarify or amend legal rules

<sup>76</sup> *Supra*, footnote 71, at p. 1139.

<sup>77</sup> *Ibid.*, at p. 1152.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, at p. 1153.

so that lower courts may in the future be better equipped to dispense individualized justice. It is submitted that Lord Salmon truly describes the role of the House of Lords when he says that it "decides every case that comes before it according to the law". The failure of the Court of Appeal to follow a prior decision should not be the basis for allowing the appeal if "the decision appealed against was right in law". The House of Lords has the power to regard a decision of the Court of Appeal which is contrary to a previous decision of that Court as contrary to the law. However, it is submitted that utilizing its power in this way would be an abuse of power and the Law Lords would be acting contrary to their judicial oaths. An appellate court should decide whether an appeal is to be allowed "according to the law"—to be construed as the law currently stands or as it may be expanded or amended in a way consistent with existing legal rules and principles through the exercising of sound judicial policy. This should be done, ignoring completely any failure of the lower court to follow an earlier decision of its own which cannot reasonably be distinguished. This, it is submitted, is what the House of Lords did in *Davis v. Johnson* and the strong statements that the Court of Appeal is bound by the "rule" in *Bristol Aeroplane* must be taken with a large grain of salt.

The House of Lords must in the end lose the debate over the existence of the alleged rule prescribing that the Court of Appeal is to follow its own prior decisions subject to the three exceptions in the *Bristol Aeroplane* case. Parliament has not enacted such a rule,<sup>80</sup>

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<sup>80</sup> One of the very rare instances in which a statute has prescribed that a court should adhere to its former decisions is to be found in s. 79 of The Judicature Act, 1895, S.O., 1895, c. 12. It was amended on a number of occasions and became s. 31 of the R.S.O., 1927, c. 88 and reads as follows: "31.—(1) The decision of a Divisional Court on a question of law or practice unless overruled or otherwise impugned by a higher court shall be binding on all Divisional Courts and on all other courts and judges and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision. (2) It shall not be competent for any Judge of the High Court Division in any case before him to disregard or depart from a prior known decision of any other judge of co-ordinate authority on any question of law or practice without his concurrence. (3) If a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to a Divisional Court. (4) Where a case is so referred, it shall be set down for hearing, and notice of hearing shall be given in like manner as in the case of an appeal to a Divisional Court."

Subs. (1) & (2) were not repealed until the enactment of The Judicature Act, 1931, S.O., 1931, c. 24, s. 5. Subs. (3) & (4) of the above statute continue in a slightly modified form as s. 35 of The Judicature Act, R.S.O., 1970, c. 228.

Various writers have noted that the Ontario Court of Appeal adheres to *stare decisis* to a greater extent than other provincial Courts of Appeal. M.R. McGuigan, for instance, in *Precedent and Policy in the Supreme Court* (1967), 45 Can. Bar Rev. 627, at p. 652 states: "With respect to the important question of whether appellate

neither has Parliament delegated such power to their Lordships, nor did Parliament delegate such power to the full Court of Appeal as it was constituted on July 28, 1944 when it delivered its judgment in *Young v. Bristol Aeroplane Co. Ltd.*<sup>81</sup> Professor Glanville Williams is undoubtedly correct when he states that: "*Stare decisis* is, in fact, merely the practice of the particular court, and a court can establish and change its own practice notwithstanding what it may have said in the past and notwithstanding what a higher court may say."<sup>82</sup> In addition, there is no reason to suppose that it requires unanimity of members of a court to decide that it is or is not bound by its prior decisions. The fact that the 1966 Practice Statement of the House of Lords was concurred in by all the Law Lords and the 1944 statement of the Court of Appeal was unanimous does not mean that this is the only way in which such change can occur.

### Conclusion

The fact that the Supreme Court of Canada, the High Court of Australia and the House of Lords have now all decided that they are free from all binding precedent does not necessarily forecast a great spate of judicial law-making. As A.W.B. Simpson has stated the only power which a court loses when it declares itself to be bound by its own prior decision is the power to decline to follow its own decisions without distinguishing them.<sup>83</sup> Thus in casting off the mooring ropes of binding precedent, there is little or no accretion of power. It is to be hoped that it signals a change of attitude. It may indicate that the court is prepared to leave the safe harbour of binding precedent and to commence an exciting voyage dedicated to the rejuvenation of the law.

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courts can overrule themselves, there is a sharp contrast between the most freewheeling Canadian Court, the British Columbia Court of Appeal, and the most conservative court, the Ontario Court of Appeal." No writer, to my knowledge, has ever attributed this attitude to s. 79 of the 1895 Act. It is submitted that the greater adherence to *stare decisis* in the Ontario Court of Appeal is derived from that section which continued in slightly amended form until 1930. The Court of Appeal up to 1930 might have concluded that as a Divisional Court of the Appellate Division and the judges of the High Court were bound by their own prior decisions, the Court of Appeal should also follow its own decisions. Undoubtedly this attitude continued to prevail in spite of the repeal in 1930 of the statutory basis for this attitude.

<sup>81</sup> The policy reason which Lord Salmon gives for insisting that the Court of Appeal adheres to *stare decisis* is that: "There are now as many as 17 Lord Justices in the Court of Appeal, and I fear that if *stare decisis* disappeared from that court there is a real risk that there might be a plethora of conflicting decisions which would create a state of irremediable confusion and uncertainty in the law." This policy reason does not appear very persuasive as an appellate court of seventeen might be regarded as a relatively compact court in many jurisdictions.

<sup>82</sup> G. Williams, *Learning the Law* (10th ed., 1978), p. 82.

<sup>83</sup> *Op. cit.*, footnote 26, p. 155.

The results of the new voyage launched by the House of Lords' 1966 practice statement must be classified as disappointing. So much so that one questions the degree of enthusiasm of the Law Lords to commence the voyage. There might even be some question of the voyage being entirely voluntary. The Lord Chancellor in 1966 was the Gerald Gardiner who had edited a book entitled *Law Reform Now* in 1963 in which he had written:<sup>84</sup>

The cost of appeals to the House of Lords with its £1,000 security for costs has become prohibitive save to the few or to the recipient of legal aid. One appeal is enough if the appellate court is sufficiently strong, as the Court of Appeal would be if it had the present combined strength of both tribunals. The balance of advantage and disadvantage lies in favour of a strong and final Court of Appeal, able to reconsider any previous decision.

The Law Lords reading the Lord Chancellor's book and perhaps recalling from their knowledge of legal history that the Judicature Act, 1873<sup>85</sup> had initially made the Court of Appeal the final appellate court, might have decided without enthusiasm that it was perhaps advisable to accede to the suggestion of the Lord Chancellor that they should be prepared to depart from their previous decisions. Whether or not there is any validity in this conjecture, it is evident that the House of Lords has been very reticent in utilizing its new-found freedom. A cartoon in the Daily Express on the day after the 1966 declaration portrayed one Law Lord saying to another: "I say, Uptort, I can't get used to the fact that we can ever have been wrong."<sup>86</sup> This attitude still seems to be very prevalent among the Law Lords. The case of *Davis v. Johnson* also indicates that the House of Lords, with the exception of Lord Salmon, has not yet evolved a very satisfactory concept of *stare decisis* as it applies in the Court of Appeal.

Since the final casting off of the mooring ropes of binding precedent occurred in 1978 in both the Supreme Court of Canada and the High Court of Australia, it is too early to judge the course which these courts may chart. It is to be hoped that *Cherneskey v. Armadale Publisher Ltd.* is not a precursor of the way in which the freedom from precedent will be utilized by the Supreme Court. The *Cherneskey* case is an excellent but unfortunate example of scrap-book jurisprudence in which interesting excerpts from earlier decisions are cut and pasted together to form a new decision which

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<sup>84</sup> G. Gardiner and F.E. Jones, *The Administration of Justice*, in *Law Reform Now* (ed. by G. Gardiner and A. Martin, 1963), p. 16.

<sup>85</sup> Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, s. 20. For an account of the debate about the final appellate court see R. Stevens, *The Final Appeal: Reform of the House of Lords and Privy Council 1867-1876* (1964), 80 L.Q. Rev. 343.

<sup>86</sup> Quoted by G. Williams, *op. cit.*, footnote 82, p. 79.

utterly fails to come to grips with the competing interests which are in conflict.

The *Cherneskey* decision does not appear to be in step with the movement towards greater access to information. In 1965, Professor D. C. Rowat published his landmark paper attacking governmental secrecy.<sup>87</sup> Since that time there have been significant developments. There has been a strong movement away from the tradition that all governmental administrative information is to remain secret except that which the government decides to release, and towards the principle that all administrative information is to be open to the public except that which may be kept secret as determined by the law. This has already resulted in the enactment of freedom of information statutes by Nova Scotia<sup>88</sup> and New Brunswick.<sup>89</sup> The Canadian Government published a Green Paper entitled "Legislation on Public Access to Government Documents" in June, 1977. The Green Paper asserts that "open government is the basis of democracy" and that "effective accountability—the public's judgment of the choices taken by government—depends on knowing the information and options available to decision-makers".<sup>90</sup> The issue is no longer whether there are to be freedom of information statutes but rather how narrow or wide the exceptions to disclosure will be.

It appears that Canada is on the threshold of a new era in which far more information will be available. However, freedom of information is not enough. What will be sorely needed will be informed comment on the information. To the extent that the comment and opinion becomes spirited the *Cherneskey* decision may stand in the way of its dissemination through letters to the editor, one of the few ways in which an individual may gain access to the press.

The casting off of the mooring ropes of binding precedent in Australia probably foreshadows the jettisoning of the Privy Council itself, through the abolition of all appeals from Australia. However, this process may be interesting because there is no power in the Commonwealth of Australia Constitution Act<sup>91</sup> comparable to section 101 of the British North America Act, the section under which the Canadian Parliament abolished appeals in 1949.<sup>92</sup> There is even some doubt that abolition of appeals from the State courts can

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<sup>87</sup> How Much Administrative Secrecy? (1965), 31 Can. J. Econ. Pol. Sc. 479.

<sup>88</sup> Freedom of Information Act, S.N.S., 1977, c. 10.

<sup>89</sup> Right to Information Act, S.N.B., 1978, c. R-10.3.

<sup>90</sup> John Roberts, Secretary of State, Legislation on Public Access to Government Documents (June 1977), p. 1.

<sup>91</sup> Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12.

<sup>92</sup> An Act to amend the Supreme Court Act, S.C., 1949, c. 37, s. 3.

be accomplished by legislation in Australia even with the concurrence of the State governments.<sup>93</sup> It could be accomplished within Australia by way of a constitutional amendment under section 128 but this is notoriously difficult.<sup>94</sup> Another way would be to request the Parliament of the United Kingdom to abolish appeals from the State courts. If this route were adopted by the Commonwealth Government without the concurrence of the States, the response of the United Kingdom Parliament would have direct relevance for Canadian constitutional law.<sup>95</sup> The decision of the High Court in *Virgo v. The Queen* is likely to have a significant impact upon both judicial and constitutional matters in Australia for a considerable period of time.

Although attention has been focused upon the final appellate court, it should not be inferred that judicial law-making is confined to that court. It is undoubtedly true that the higher the court in the judicial hierarchy the larger will be the proportion of cases which will permit or require judicial law-making. At the trial level, once the facts have been determined many cases will be decided by a fairly straight forward application of the appropriate rule. However, there will be some cases at that level which will create real difficulties. The trial judge is bound by the judgments of higher courts to which his decision may be appealed. He must select the appropriate binding precedent to apply. There may be no apposite precedent, or two precedents may appear to be equally suitable. Nevertheless, he must decide and in doing so in these situations, he makes new law. Sir C. K. Allen emphasized that judicial decision-making is never a mechanical process by stating:<sup>96</sup>

We say that he [the judge] is bound by decisions of higher courts; and so he undoubtedly is. But the superior court does not impose fetters upon him; he places the fetters on his own hands. He has to decide whether the case cited to him is truly apposite to the circumstance in question and whether it accurately embodies the principle which he is seeking. The humblest judicial officer has to decide for himself whether he is or is not bound, in the particular circumstances, by any given decision. . . .

The law-making of a judge, other than a judge of an ultimate appellate court, must be accomplished in a way which is persuasive

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<sup>93</sup> G. Nettheim, *The Power to Abolish Appeals to the Privy Council from Australian Courts* (1965), 39 *Australia L. J.* 39.

<sup>94</sup> It requires the amendment to be passed by a majority in both houses of the federal parliament and then to receive approval through a referendum in which not only a majority of those voting approve but also a majority of those voting in a majority of the States.

<sup>95</sup> For a concise discussion of this issue see P.W. Hogg, *Constitutional Law of Canada* (1977), pp. 18-21. For another point of view see W.R. Lederman, *The Process of Constitutional Amendment for Canada* (1967), 12 *McGill L.J.* 371.

<sup>96</sup> C.K. Allen, *Law in the Making* (7th ed., 1964), p. 290.



to the court above him. Even the law-making of an ultimate appellate court will not endure unless it is compelling and adequately reconciles the underlying competing interests.

The tone of the comments directed at the Supreme Court of Canada may appear somewhat strident. It is easy to criticize. It is more difficult to create. It is incumbent on all lawyers to see that the freedom from all precedent recently declared by the Supreme Court ushers in a new era of creativity. It is only by carefully discovering and analyzing all the competing interests involved in a case that good creative judicial law-making can occur. This is as much a responsibility of lawyers, including law teachers, as it is of the judges of the Supreme Court of Canada. It should never be forgotten that an existing precedent, even though it is now only a persuasive precedent in the Supreme Court, may in a considerable number of cases represent the most appropriate balance of competing interests.<sup>97</sup>

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<sup>97</sup> It is submitted that the *Cherneskey* case failed to achieve a proper reconciliation of the competing interests. As a result the Attorney General of Ontario introduced Bill 1 on March 11th, 1980. It will amend The Libel and Slander Act, R.S.O., 1970, c. 243, by adding a s. 25 which reads: "Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion."

The Uniform Law Conference of Canada at its meeting in August, 1979, adopted a somewhat similar provision to rectify the perceived problem. The Institute of Law Research and Reform (Alberta) in its Report No. 35, *Defamation: Fair Comment and Letters to the Editor*, October, 1979, recommended that the section approved by the Uniform Law Conference be enacted.