CANADA V CRAIG – THE COMMON LAW AS THE SERVANT OF SOCIETY

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In *Canada v Craig*,[1] the Supreme Court used the opportunity to rearticulate the criteria for reversing its own precedent. Thus, this tax decision transcends the narrow statutory interpretation point it clarified. In *Craig*, the Court confronted the institutional fallibility that is a feature of the common law system, and articulated the criteria which it utilizes to decide whether to overrule its own precedent. This paper proceeds in four parts. The first part describes *Canada v Craig* and, in particular, the Court's reasoning on the reversal of precedent. The second part describes the historical background of *stare decisis*. The third part reviews the jurisprudence on the reversal by a court of its own precedent. The final part discusses the current criteria for a reversal of its precedent.

1. The Craig Decision

A) Historical Background

Section 31 of the *Income Tax Act* limits tax deductions for hobby farming.[2] In *Moldowan v the Queen*,[3] a taxpayer, in addition to other sources of income, bought, sold, and maintained racehorses, and sought to deduct his losses from the farming business. The Supreme Court held that, since the taxpayer's farming business was a "subordinate" source of income, section 31 applied.

Remarkably, in 2008 in *Canada v Gunn,*[4] Sharlow JA for the Federal Court of Appeal warned against finding "unexpressed legislative intention" to require that farming be the taxpayer's primary business in order to exclude section 31, stating:

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1 2012 SCC 43, 2 SCR 489 [*Craig*].

2 *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s 31. Section 248(1) provides: "'farming' includes … maintaining of horses for racing …"

3 [1978] 1 SCR 480 [*Moldowan*].

4 2006 FCA 281, [2007] 3 FCR 57.

> Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act. [5]

The Federal Court of Appeal, in effect, refused to follow Supreme Court precedent and offered an alternative interpretation of section 31 to that found in *Moldowan*.

B) Holding

In *Craig*, the taxpayer's primary source of income was his law practice, with some income from investments. In addition, he was in the business of buying, selling, training and maintaining horses for racing,[6] and sought to deduct his losses.[7]

Rothstein J delivered the unanimous decision of the Supreme Court of Canada. Having surveyed the case law, and in particular the apparent inconsistency between *Moldowan* and *Gunn*, Rothstein J criticized the Federal Court of Appeal for following its own decision in *Gunn* and purporting to overrule *Moldowan*. While the Federal Court of Appeal is bound by its own precedents, as a general proposition,[8] this principle does not extend to permit the Federal Court of Appeal to depart from a Supreme Court ruling.[9]

Having commented on the Federal Court of Appeal's error in purporting to overrule *Moldowan*, Rothstein J turned to the merits of such a step if taken by the Supreme Court:

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5 *Ibid* at para 43.

6 *Craig*, *supra* note 1 at para 4.

7 *Ibid* at para 5.

8 See e.g. *Miller v Canada (AG)*, 2002 FCA 370, (2002), 220 DLR (4th) 149 (FCA).

9 *Craig*, *supra* note 1 at para 22. In contrast, as the Supreme Court has reaffirmed most recently, where the Supreme Court's holding is merely *obiter*, the lower courts are free to depart from it; see *R v Prokofiew*, 2012 SCC 49, 2 SCR 639 [*Prokofiew*]. See also *R v Henry*, 2005 SCC 76 at para 57, [2005] 3 SCR 609 [*Henry*]:

> All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding."

> The Federal Court of Appeal's purported overruling of *Moldowan* does not, however, affect the merits of this appeal or the core question of whether *Moldowan* should in fact be overruled.[10]

Having acknowledged that overruling its own precedent is a step "not to be lightly undertaken" by the Supreme Court,[11] Rothstein J nevertheless acknowledged that the Supreme Court has overruled its own decisions on a number of occasions.[12] He continued:

> The vertical convention of precedent is not at issue with respect to the decision as to whether the Supreme Court should overrule one of its own precedents. Rather, in making this decision the Supreme Court engages in a balancing exercise between the two important values of correctness and certainty. The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error. Indeed, because judicial discretion is being exercised, the courts have set down, and academics have suggested, a plethora of criteria for courts to consider in deciding between upholding precedent and correcting error.[13]

Rothstein J then listed "relevant considerations [that] justify overruling *Moldowan*:"[14]

(i) It was decided incorrectly; "having regard to the words of the provision, [there are] two separate exceptions to the loss deduction limitation and each must be given meaning." In contrast, *Moldowan* "collapsed the second exception into the first."[15]

(ii) There has been "significant judicial, academic and other criticism" of the decision since its issuance in 1977. It is appropriate for the Supreme Court to "notice and acknowledge the difficulties identified with the *Moldowan* interpretation."[16]

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10 *Craig, ibid* at para 23.

11 *Ibid* at para 24, citing *Ontario (AG) v Fraser*, 2011 SCC 20, 2 SCR 3 [*Fraser*].

12 *Ibid* at para 25, citing *R v Chaulk*, [1990] 3 SCR 1303 at 1353 [*Chaulk*]; *R v B (KG)*, [1993] 1 SCR 740; *R v Robinson*, [1996] 1 SCR 683 [*Robinson*]; *R v Salituro*, [1991] 3 SCR 654 at 665 [*Salituro*]; *Minister of Indian Affairs and Northern Development v Ranville*, [1982] 2 SCR 518 at 527 [*Ranville*]; *Hamstra (Guardian ad litem of) v British Columbia Rugby Union*, [1997] 1 SCR 1092 at paras 18-19 [*Hamstra*]; *Henry*, *supra* note 9 at para 44.

13 *Craig, ibid* at para 27, citations omitted.

14 *Ibid* at para 28.

15 *Ibid* at para 28.

16 *Ibid* at para 29.

(iii) *Moldowan* represents a finding of "unexpressed legislative intention under the guise of purposive interpretation." It reads into the section a limitation not found on the plain reading of the text.[17]

The Court thus expressly overturned its own precedent in *Moldowan*, and changed the interpretation of section 31(1) of the *Income Tax Act*, following academic and judicial criticism of its earlier precedent. The conditions under which the Supreme Court will reverse its own precedent form the subject of this paper. First, however, it is appropriate to consider the role of precedent in Canadian jurisprudence and common law justice systems more generally.

C) Historical Development of the Stare Decisis Doctrine

Historically, in many cultures, law developed from oral custom.

While English judicial decisions began to be written down in Year Books accessible to judges and the more eminent practitioners in the later Middle Ages,[18] the concept of binding precedent was *not* originally the prevalent doctrine in England.[19] Nevertheless, for cases that were factually close to cases that had been earlier decided, the semblance of a doctrine of *stare decisis* began to emerge.[20]

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17 *Ibid* at para 30.

18 Geoffrey J Hand and DJ Bentley, *The English Legal System*, 6th ed (London: Butterworths, 1977) at 369-70. See also Gerald L Gall, *The Canadian Legal System*, 5th ed (Toronto:Thomson Carswell, 2004) at 56ff.

19 Hand and Bentley, *ibid* at 371. Thus, John Vaughan, the Chief Justice of the Common Pleas (served 1668-1674), wrote that not only are readers of cases to distinguish between *ratio* and *obiter* reasons, but even the *ratio* of a case may be rejected by subsequent cases if it is in conflict with fundamental principles. Similarly, in the eighteenth century, Lord Mansfield held that while precedents served to illustrate principles, principles of law were not to be sought from individual cases. This concept of *stare decisis* continued to be reflected in the English common law even after the emergence of the formal doctrine of precedent:

> A case is only an authority for what it actually decides … Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

See *Quinn v Leathem*, [1901] AC 495 (HL).

20 Thus, Sir William Blackstone, writing in 1770 could state:

> For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any

In the eighteenth century, the doctrine of precedent, and the precedents themselves, began to be imported into Britain's colonies in the New World including the future provinces of Upper Canada and Lower Canada.[21] Thus,

> [l]ong before there was any well understood or articulated doctrine of *stare decisis* respecting the binding effect of at least House of Lords decisions in Canadian courts, English judgments were followed or applied simply because they represented the source of the common law received in the colonies.[22]

In the nineteenth century, it became established that decisions of a superior court were strictly binding upon inferior courts, that principles of law could be distilled from previous decisions of the superior courts, and, most controversially, that the highest tribunal was bound by its own decisions.[23] The doctrine of binding precedent assisted the judiciary to answer the critics' calls for more European-style codes in the British Empire. The need for certainty was the driver of the *stare decisis* doctrine.

Yet, it was precisely the near-absolute certainty inherent in strict adherence to *stare decisis* that led English and Canadian courts, in the second half of the twentieth century, to the realization that rigid adherence to *stare decisis* could sacrifice correctness in favour of certainty. This was expressed by Lord Donovan in *Myers v Director of Public Prosecution*:

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subsequent judge to alter or vary from, according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

William Blackstone, *Commentaries on the Laws of England,* (Oxford: Clarendon Press, 1770) vol 4 at 69, cited in *Salituro*, *supra* note 12 at 665.

21 For example, under the *Constitutional Act*, formally the *Clergy Endowments (Canada) Act*, 1791 (UK), 31 Geo 3, c 31, the provinces of Upper Canada and Lower Canada were created. In the province of Upper Canada, a legislature was created and, as its first statute, enacted a law making the English civil law applicable to the new province. The date of October 15, 1792, when the statute received royal assent is generally regarded as the date for the reception of English law in the province of Ontario; see Gall, *supra* note 18 at 59. Interestingly, over time, and to a far smaller extent, the reverse process has also occurred. Cases from Britain's Dominions began occasionally to be cited by the English courts; see Jeremy Finn, "Sometimes Persuasive Authority: Dominion Case Law and English Judges, 1895-1970," in Hamar Foster, Benjamin L Berger and AR Buck, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2009) at 101.

22 Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 60.

23 Gall, *supra* note 18.

> The common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds.[24]

One year later, in *Practice Statement (Judicial Precedent)*, the House of Lords reaffirmed the idea in expressly stating that "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper redevelopment of the law." The House of Lords proposed to "modify" its "present practice" and "while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."[25]

The debates of that era were best captured by Chancellor Megarry in *A Second Miscellany-at-Law*, where he wrote:

> At one extreme lies the goal of such certainty in the law as to obviate virtually all litigation save on disputed questions of fact; and the price to be paid is that of injustice in unforeseen cases. At the other extreme there is the goal of perfect hand-tailored justice in very case, at the price of great uncertainty in the law, and of a flood of litigation. Each price is too great, and inevitably the greatest of judges have differed in their views as to the point between the extremes at which the line is to be drawn. Those who feel most assured that they are wiser than their fathers are the most bold.[26]

The way in which the Supreme Court of Canada has historically strived to strike the balance between these two extremes forms the subject of the next section of this article.

2. The Supreme Court of Canada – the Evolution of Stare Decisis

Laskin CJC, writing in 1975, noted:

> A final court must accept a superintending responsibility for what it or its predecessors have wrought, especially when it knows how little time legislatures today have (and also, perhaps, little inclination) to introduce into fields of law fashioned by the courts alone, although legislatures may, of course, under the prodding of law reform agencies, and of other public influences, from time to time do so.[27]

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24 [1965] AC 1001 at 1047 (HL).

25 [1966] 1 WLR 1234.

26 Robert Megarry, *A Second Miscellany-at-Law* (London: Stevens & Sons Ltd, 1973) at 134.

27 Hon Chief Justice Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975) 53 Can Bar Rev 469 at 478. Similarly, the US Supreme Court has long recognized that the doctrine of *stare decisis* has only "a limited application in the field of constitutional law;" see *St Joseph Stock Yards Co v United States*, 298 US 38 at 94 (1936) (concurring opinion of Justices Cardozo and Stone). See also *Glidden Co v Zdanok*, 370 US 530 at 543 (1962); Passenger Cases, 7 How 282 at 470

Laskin CJC's academic comments are reflected in his own jurisprudence. In *Reference re Agricultural Products Marketing*,[28] which dealt with dovetailing federal and provincial agricultural marketing regulation, one of the issues before the Court was whether agricultural products marketing levies were taxes as opposed to regulatory charges, and thus *ultra vires*, in that context. In an earlier case, *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Limited*,[29] the Privy Council had held that such levies were in the nature of taxes. Laskin CJC held that levies were not in fact taxes, as they related to the administration or price mechanisms of the schemes, and thus were properly based upon the provincial authority to regulate intraprovincial transactions. Laskin CJC expressly acknowledged the apparent inconsistency with *Crystal Dairy*, but nevertheless refused to follow the Privy Council precedent:

> [The inconsistency with *Crystal Dairy*] would give me considerable pause if the *Crystal Diary* case had not been attenuated in succeeding case, *and if I was not firmly persuaded that it was mistakenly based on the taxing power instead of turning on provincial regulatory authority in relation to intraprovincial transactions*.[30]

While the *Agricultural Products Marketing Reference* demonstrated the Supreme Court's willingness to depart from the Privy Council precedent it considered to be "mistakenly" decided, the Court had not yet confronted its willingness to depart from its own precedent. One of the first cases in which the Court confronted precisely such a decision was *Minister of Indian Affairs v Ranville*.[31] In that case, a county court judge, exercising jurisdiction under the *Indian Act*, reversed a decision of the Registrar of the Department of Indian Affairs and Northern Development that the respondents' children were not entitled to be included in the Indian Register. The Federal Court of Appeal dismissed the application for judicial review. It held that a county court judge acting pursuant to the

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(1849) (dissenting opinion of Chief Justice Taney). The classic explanation of this position was presented by Justice Brandeis in one of his oft-quoted dissents:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right… This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically possible, this Court has often overruled its earlier decisions.

Burner v Coronado Oil & Gas Co, 285 US 393at 406-07 (1932), cited in Jerold H Israel, "*Gideon v Wainright*: The 'Act' of Overruling" (1963) Sup Ct Rev 211 at 215-16.

28 [1978] 2 SCR 1198 [*Agricultural Products Marketing Reference*].

29 [1933] AC 168 [*Crystal Dairy*].

30 *Agricultural Products Marketing Reference*, *supra* note 28 at 1256 [emphasis added].

31 *Supra* note 12.

statutory authority of the *Indian Act* acted as a judge, rather than an administrative decision maker (*persona designata*), and hence was not subject to judicial review. Dickson J stated that he was "not unmindful" of the fact that such a holding contradicted the Court's earlier opinion in *Commonwealth of Puerto Rico v Hernandez*.[32] He stated, however, that there were compelling reasons to depart from the earlier precedent, including the fact that the earlier decision created an unworkable interpretive scheme:

> The traditional justification for the *stare decisis* principle is certainty in the law. This of course remains an important consideration even though this Court has announced its willingness, for compelling reasons, to overturn a prior decision. … In this instance, adherence to the *stare decisis* principle would generate more uncertainty than certainty.[33]

The Court returned to the dilemma concerning the reversal of its own precedent in the 1988 case of *R v Bernard*.[34] In that case, an accused was charged with sexual assault causing bodily harm. At issue was whether the trier of fact could consider the defence of intoxication in the context of *mens rea* on this charge. The majority held that intoxication could not serve as a defence. Dickson J in dissent argued, however, that it was time to permit the trier of fact to consider intoxication, along with other circumstances, when determining whether the requisite *mens rea* for a "general intent" offence was formed. In articulating this position, Dickson J reaffirmed that earlier precedent must only be reversed in "compelling circumstances." He then set out the criteria (subsequently adopted by the majority of the Supreme Court in *R v Chaulk*,[35] discussed below) for making such a reversal. These have been summarized as follows:

> Whether the rule or principle under consideration must be varied in order to avoid a *Charter* breach;
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> Whether the rule or principle under consideration has been attenuated or undermined by other decisions of this or other appellate courts;
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> Whether the rule or principle under consideration has created uncertainty or has become "unduly and unnecessarily complex and technical";

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32 [1975] 1 SCR 228.

33 *Ranville*, *supra* note 12 at 527.

34 [1988] 2 SCR 833 [*Bernard*].

35 *Supra* note 12.

> Whether the proposed change in the rule or principle is one which broadens the scope of criminal liability, or is otherwise unfavourable to the position of the accused.[36]

The next year, the Supreme Court again refused to reverse its own precedent in *Watkins v Olafson*.[37] In that case, the appellant was injured while riding as a passenger in a van operated by the respondent. Earlier jurisprudence had established that courts could not award damages in tort cases on a periodic basis. Nevertheless, the trial court substituted a lump sum in favour of a periodic payment obligation. The Manitoba Court of Appeal upheld the decision. McLachlin J in the Supreme Court held that a change in the law was not appropriate in these circumstances. Having observed that "the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them," she noted that "the court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make."[38] She added that major changes in the law require a broader perspective than that possessed by the court that has before it a single case. Furthermore, in a constitutional democracy, such changes are to be introduced by legislatures, as the elected representatives of the people.[39]

The strict dicta in *Watkins* did not prevent the Court from, once again, reversing its own precedent the following year, in *Chaulk*.[40] At issue in *Chaulk* was whether section 16(4) of the *Criminal Code*, which creates a rebuttable presumption of sanity, contravenes the presumption of innocence guaranteed by section 11(d) of the *Charter*. The definition of criminal insanity is traditionally traced to *M'Naghten's Case*, where the House of Lords stated that an accused is criminally insane "if he did not know he was doing what was wrong." In *R v Schwartz*,[41] the Supreme Court of Canada interpreted "wrong" as no more than the capacity to know that what one is doing is against the law of the land. Dissenting in *Schwartz*, Dickson J stated that the inability to know "wrong" in *M'Naghten's Case* must include the inability to know that one's actions are *either* legally or morally wrong. In *Chaulk*, Lamer CJC endorsed Dickson J's dissent in *Schwartz*. Reemphasizing that "this Court should not easily overrule its prior judgments" in the absence of "compelling

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36 *Supra* note 12 at para 63; see *Bernard*, *supra* note 34 at paras 31 to 55.

37 [1989] 2SCR 750 [*Watkins*].

38 *Ibid* at para 17.

39 *Ibid* at para 18.

40 *Supra* note 12.

41 [1977] 1 SCR 673 [*Schwartz*], citing *M'Naghten's Case* (1843), 10 C & F 200.

circumstances,"[42] the Court nevertheless held that the fourth factor identified in *Bernard* as justifying departure from precedent applied in this case:

> It is not for the courts to create new offences, or to broaden the net of liability, particularly as changes in the law through judicial decision operate retrospectively. The same argument does not apply, however, where the result of overruling a prior decision is to establish a rule favourable to the accused.[43]

The Court thus overruled its own precedent in *Schwartz*. It held that the insanity defence was available to those accused that did not know their acts breached "the standard of moral conduct that society expects of its members."[44]

The Supreme Court returned to the question of precedent reversal in *R v Salituro*.[45] In that case, the accused was charged with signing his wife's name on a cheque payable to them jointly and cashing the cheque. At issue was whether the wife could testify for the Crown, contrary to the common law rule against spousal competence. The Crown argued that, in light of the changing social norms, an exception to the common law rule was needed to permit spouses to testify against one another where the spouses were separated, with no reasonable possibility of reconciliation. Iacobucci J, writing for the Court, stated:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law.[46]

Iacobucci J then observed that, in light of McLachlin J's *dictum* in *Watkins*, in a constitutional democracy it is the legislature, rather than the court, that has the primary responsibility for law reform. Accordingly,

> The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

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42 *Chaulk*, *supra* note 12 at para 103 citing Dickson J, dissenting, in *Bernard*, *supra* note 34 at para 28.

43 *Ibid* at para 104, citing Dickson J, dissenting, in *Bernard*, *supra* note 34 at 860-61.

44 *Ibid* at para 108.

45 *Supra* note 12.

46 *Ibid* at para 39.

> … [I]n appropriate cases, judges can and should change the common law. … The common law should be the servant of society.[47]

In this case, the change required was incremental enough, and the societal evolution substantial enough to permit the Court to properly reverse its own precedent to bring the common law in step with the evolving societal understanding of marriage.

The Supreme Court was next called to reverse its precedent in the area of criminal law in *R v B (KG)*.[48] In that case, the accused and three friends were involved in a fight. The friends gave videotaped statements to the police incriminating the accused. At the trial of the accused, the three youths recanted their earlier statements and stated that they had lied to the police. The traditional common law rule stated that prior inconsistent statements could only be used to impeach, but not as substantive proof. Accordingly, the trial judge acquitted the accused for lack of identification. On appeal to the Supreme Court, the Crown was successful. Observing that the rules of evidence were primarily judge-made, the Court held:

> [It is the] duty of the courts to review common law rules on a pragmatic basis. [C]ourts are best situated to assess the operation and possible deficiencies of common law rules in practical situations.[49]

Citing the holding in *Salituro* regarding the necessity to "adapt" and develop common law rules that reflect the changing circumstances of the society at large, the Court overturned the common law rule and expanded the use of prior inconsistent statements.

In 1996, the Supreme Court dealt with the proper jury instruction in cases involving intoxication in *R v Robinson*.[50] The common law rule, stated in *MacAskill v The King*,[51] postulated that intoxication was not a relevant factor for triers of fact, except where the intoxicant removed the accused's capacity to form the requisite intent. The Court noted that the orthodox rule began to be questioned in its own prior decisions and that "it [was] clear that this Court may overrule its own decisions."[52] The Court cited developments in England, New Zealand and Australia in support of

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47 *Ibid* at para 62.
48 *Supra* note 12.
49 *Ibid* at para 56.
50 *Supra* note 12.
51 [1931] SCR 330.
52 *Robinson*, *supra* note 12 at para 16, citing *Ranville*, *supra* note 12 at 527.

overturning the traditional rule.[53] It held that the traditional rule was inconsistent with the *Charter*. This constituted "compelling circumstances"[54] and necessitated the reversal of the Supreme Court's precedent.[55]

In *Hamstra (Guardian ad litem of) v British Columbia Rugby Union*,[56] the plaintiff was rendered quadriplegic in a rugby match held under the auspices of the British Columbia Rugby Union. At trial, a witness stated that he assumed an insurance company would pay any damages awarded against the defendant. In accordance with the common law rule[57] that a jury should be discharged automatically if something occurs from which it might reasonably infer that the defendant is insured, the trial judge discharged the jury. On appeal to the Supreme Court, the plaintiff argued that it was appropriate to depart from the traditional rule. The Court agreed. Noting that "the strict rule set out in [its own precedent] in *Theakston* has been eroded by the passage of time,"[58] the Court continued:

> The criticisms of the rule in today's society are sound. The fact that courts have not followed it for some time is significant. It is now generally accepted that the jury in a civil action should not be discharged automatically simply because something has occurred in the trial from which the jury might reasonably infer that the defendant is insured.[59]

Finding "compelling reasons" to do so, the Court overruled its precedent in *Bowhey v Theakston* and held the mere mention of insurance did not necessitate the discharge of a jury.

The Court returned to the issue of precedent in relation to prior inconsistent statements in *R v Henry*.[60] At issue was whether contradictory testimony from a previous trial was admissible in the retrial of the same accused. The accused cited the Supreme Court decision in *R v Mannion*[61] in support of the position that exposure of contradictory testimony from a previous trial violated the *Charter* guarantee against self-incrimination. Nevertheless, in *Henry*, the Supreme Court, citing the jurisprudence

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53 *Ibid* at paras 35-38. Courts in these countries began to deviate from the traditional rule and to hold that the issue for the trier of fact was not whether the accused had the capacity to form intend, but whether he in fact had the intent.

54 *Bernard*, *supra* note 34 at 849.

55 *Ibid* at para 48.

56 *Supra* note 12.

57 See e.g. *Bowhey v Theakston*, [1951] SCR 679.

58 *Hamstra*, *supra* note 12 at para 16.

59 *Ibid* at para 17.

60 *Supra* note 9.

61 [1986] 2 SCR 272.

developed in the two decades since *Mannion*, held that "notwithstanding the strong Court that decided *Mannion*," section 13 did not prevent the introduction of prior inconsistent statements of an accused at a subsequent trial in which he chose to testify. In reversing its precedent, the Court stated:

> The Court's practice, of course, is against departing from its precedents unless there are compelling reasons to do so … The Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protections.[62]

The Court noted that since the amendments to the *Supreme Court Act*,[63] the Supreme Court's mandate became oriented less to error correction and more to development of the jurisprudence.[64] The traditional view that "every judgment must be read as applicable to the particular facts proved" is no longer sustainable.[65] The Court's work, particularly in the post-*Charter* period, requires the development of a "general analytical framework" which necessarily transcends the circumstances of a particular case.[66] Thus, reversals of incorrectly decided precedents have assumed greater importance.

In *United States of America v Burns*,[67] the Supreme Court considered the argument that the extradition of two suspects in a triple homicide to the United States, where they could face the death penalty, was a breach of their *Charter* rights, including the section 7 guarantee of life, liberty and security of the person. The Court effectively (although not explicitly) overruled its own decisions in *Kindler v Canada (Minister of Justice)*[68] and *Reference re Ng Extradition*,[69] which held that extradition of a criminal to a foreign jurisdiction, even in the absence of an assurance that the death penalty would not be sought, was not a breach of the *Charter*. In *Burns*, the Court held that extradition, in the absence of such an assurance from the American prosecutors, deprived the two accused of their section 7 rights.[70]

In the 2007 case of *Canadian Western Bank v Alberta*,[71] the Supreme Court *in effect* reversed its precedent, without framing the issue as one of

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62 *Henry*, *supra* note 9 at para 44.
63 RSC 1985, c S-26.
64 *Henry*, *supra* note 9 at para 53.
65 *Ibid*, citing *Quinn v Leathem*, *supra* note 19.
66 *Ibid*
67 2001 SCC 7, 1 SCR 283 [*Burns*].
68 [1991] 2 SCR 779.
69 [1991] 2 SCR 858.
70 *Burns*, *supra* note 67 at para 143.
71 2007 SCC 22, 2 SCR 3 [*Canadian Western Bank*].

precedent reversal. At issue were amendments to the *Insurance Act* (Alberta),[72] purporting to make federally chartered banks subject to the provincial licensing scheme governing the promotion of insurance products. Several banks objected, arguing that the province had no jurisdiction to regulate their business, pursuant to the doctrine of "inter-jurisdictional immunity."[73] In an innovative development, in *Canadian Western Bank*, the Court found that the doctrine of inter-jurisdictional immunity, does not apply to federal "activities," but only to federal "things" (such as Aboriginal lands) and "persons" (such as Aboriginal peoples and corporations created by the federal Crown). The application of the doctrine of inter-jurisdictional immunity to federally-regulated activities, such as banking, was held to create "practical problems."[74] Despite well-established precedent that the business of banking is within the sole jurisdiction of the federal government, the legislation was upheld. Rather than a departure from prior precedent, the holding was conceptualized as a refinement of the doctrine of inter-jurisdictional immunity, and its correct application to the facts.

Most recently, in *Ontario (Attorney General) v Fraser*,[75] the Supreme Court has again emphasized the importance of restraint in reversing its own precedent. The case arose out of the enactment of the *Agricultural Employees Protection Act* (*AEPA*) by the Ontario Legislature,[76] which excluded farm workers from the protection of the *Labour Relations Act*. The *AEPA* was challenged soon thereafter, in *Fraser*. The farm workers alleged the legislative scheme infringed their rights under sections 2(d) and 15 of the *Charter*. Between the enactment of the legislative scheme and the hearing of the challenge at the Court of Appeal, the Supreme Court decided *Health Services & Support - Facilities Subsector Bargaining Assn v British Columbia*,[77] which held that section 2(d) of the *Charter* included protection of collective bargaining rights. On appeal, the Supreme Court refused to overturn its recent precedent in *Health Services* but held that the *AEPA* did not run afoul of the constitutional protections afforded by the *Charter*, as interpreted in *Health Services*. In a concurring opinion, Rothstein J argued that *Health Services* represented a marked departure from earlier precedent, was wrongly decided, and that section 2(d) does not

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72 RSA 2000, c I-3.

73 *Canadian Western Bank*, *supra* note 71 at para 40, citing *Ontario (Attorney General) v Winner*, [1954] 4 DLR 657 (NB ProvCt); *Toronto (City) v Bell Telephone Co* (1904), [1905] AC 52 (PC); and *Derrickson v Derrickson*, [1986] 1 SCR 258.

74 *Canadian Western Bank, supra* note 71 at para 42.

75 *Supra* note 11.

76 SO 2002, c 16.

77 2007 SCC 27, 2 SCR 391 [*Health Services*].

protect collective bargaining.[78] He called for *Health Services* to be overturned.[79] McLachlin CJC and LeBel J, writing for the majority, rejected this argument, stating:

> The constitutional nature of a decision is not a primary consideration when deciding whether or not to overrule, but at best a final consideration in difficult cases. Indeed, the fact that *Health Services* relates to a constitutional Charter right may militate in favour of upholding this past decision.[80]

In refusing to reverse *Health Services*, the McLachlin CJC and LeBel J reemphasized the importance of adherence to the Court's own precedents.[81]

3. Conclusion

As noted in a recent academic article, the Supreme Court of Canada has undergone a significant evolution since the 1970s in the way it regards its own precedent:

> The last few decades have seen a weakening of the notion of precedent, such that the Supreme Court is now willing on occasion bluntly and candidly to reverse itself and to renounce earlier doctrine. In a sense, all precedent is persuasive now, and none is binding …[82]

The *Craig* decision is the latest illustration of this trend. Contrary to its own decision in *Moldowan*, the Supreme Court held that as long as a taxpayer devoted considerable time and resources to the farming business, the fact that he had another, possibly greater, source of income did not eliminate the statutory deduction.[83] Craig was thus permitted to deduct his farming losses. The Court's conceptual shift, from strict adherence to its precedent to willingness to overrule its own decisions in order to properly "balance" the values of correctness and certainty,[84] is emphasized by the relative brevity of the discussion concerning precedent reversal. Indeed, only four paragraphs in the decision are dedicated to the doctrinal propriety of such a step.[85]

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78 *Ibid* at para 181.

79 *Ibid* at paras 141-43.

80 *Ibid* at para 58.

81 *Fraser*, *supra* note 11 at paras 57, 60 and 97.

82 Peter McCormick, "Waiting for Globalization: an Empirical Study of the McLachlin Court's Foreign Judicial Citations" (2009-2010) 41 Ottawa L Rev 209 at 241.

83 *Craig*, *supra* note 1 at para 41.

84 *Ibid* at para 27.

85 *Ibid* at paras 24-27.

It is important not to overstate the pervasiveness of this development. While a reversal of Supreme Court precedent is no longer impossible, it remains exceedingly rare. Indeed, as the classic American article on this topic observes,

> [The public perception of] the Court as an impersonal adjudicator has depended to some degree on the assumption that the judge, unlike the legislator, is sharply restricted in relying upon his personal predilections by the necessity of following the decisions of his predecessors.
>
> The importance of *stare decisis* in promoting an acceptable image of judicial review thus imposes a special burden upon the Court in overruling its prior decision.
>
> …
>
> Decisions can hardly gain acceptance as based upon the enduring principles of the Constitution without the prospect that they will live an "indefinite while," at least beyond the life expectancy of the Justices deciding them.[86]

In line with these principles, the Supreme Court of Canada continues to overrule its precedents only reluctantly, as a matter of utmost exception. As the case law surveyed above illustrates, several trends emerge from the Supreme Court's jurisprudence in relation to the reversal of its own precedent. The Supreme Court will be more likely to reverse its own precedent where the law in the area is judge-made, where no recent Supreme Court jurisprudence exists, and where a minor adjustment is being urged upon it. Where its previous opinion is *obiter*, the Court will be prepared to reverse itself.[87] Academic criticism and divergence with other common law jurisdictions, while not themselves a ground to overturn a prior precedent, are taken into consideration.[88] The Supreme Court will also be more likely to reverse its precedent where the rule or principle under consideration must be varied in order to avoid a *Charter* breach (although the mere fact that the prior decision concerns constitutional law does not elevate the chance of it being overruled), or where the rule or principle under consideration has been attenuated or undermined by its other decisions or by other appellate courts.[89]

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86 See Henkin, "Some Reflections on Current Constitutional Controversy"(1961) 109 U Pa L Rev 637at 660.

87 *Prokofiew*, *supra* note 9.

88 While academic criticism is not itself a reason to overrule precedent, it is a reason for the Court to "take notice and acknowledge the errors that have been identified." (Rothstein J, dissenting, in *Fraser*, *supra* note 11 at para 147). "The Court has abandoned its pre-1970 indifference to legal periodicals and now regularly cites these sources in much the same way that it uses prior judicial decisions. Perhaps this is a better place to look for the modern transmission of judicial ideas;" see McCormick, *supra* note 82 at 241.

89 *Henry*, *supra* note 9 at para 45, citing *Bernard*, *supra* note 34 at 859.

Conversely, the Supreme Court will refrain from reversing its precedent if the reversal will expand criminal liability, if the legislator or the Court itself has recently turned attention to the issue, if the reversal would result in a major change in the law, and if the reversal would increase the uncertainty in the law.

As the *Craig* decision demonstrates, the Supreme Court's precedent no longer presents an insurmountable obstacle, although in the vast majority of cases it will remain so. Creative counsel, armed with academic criticism of the Court's prior jurisprudence, appellate jurisprudence that deviates from it, or with evidence of changing societal norms, now stands a chance, albeit a limited one, to affect change in the face of existing precedent. The Court no longer invariably adheres to its own precedent, elevating certainty at the expense of correctness. In appropriate cases, it will correct itself, placing the common law at the service of society.