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Trial and Error - Balancing the Scales of Justice Through the Doctrines of Stare Decisis and Ex Proprio Motu

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Many will be familiar with the legal axiom: “Great cases, like hard cases, make bad law”. This comment addresses the obverse: “Bad cases, like ordinary cases, make hard law”. Put another way, to what extent should a judge or appellate court be bound by the doctrine of stare decisis when confronted with a legal precedent which is incorrect?

The concept of jurisdiction (from the Latin jus, juris meaning “law” and dicere meaning “to speak”) is the foundation for both the substantive and procedural aspects of the common law adversarial system. The judge “speaks the law” as a neutral arbiter in two ways. First, the court must decide the justiciability of the claims made and defences raised by the litigants in the pleadings. Second, the trial judge must reach a just (i.e. fair and correct) result after considering all of the relevant facts, weighing admissible evidence and hearing the arguments advanced by both sides via opposing counsel.

The word jurisprudence – a corollary of jurisdiction -- is derived from the Latin term juris prudentia, which means “the study, knowledge, or science of law.” In most common law systems, including Canada (except Québec) it is colloquially (if not inaccurately) ascribed to the doctrine of stare decisis [Latin, “let the decision stand”] which refers to the doctrine of precedent, according to which the rules formulated by judges in earlier decisions are to be similarly applied in later cases. Canadian and American courts apply the stare decisis doctrine differently from English courts. In Canada and the United States, under this doctrine a lower court is bound to follow the decision of a higher court within the same jurisdiction. In England, the former rule under which courts were bound by their own prior decisions was reversed by the House of Lords which declared that it considered itself no longer formally bound by its own precedents and pronounced its intention “to depart from a previous decision when it appears right to do so.”

However, the doctrine of stare decisis is not absolute. In David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co. and Seven Other Appeals, the five-member panel of the Ontario Court of Appeal reconsidered and overruled one of its own decisions interpreting an aspect of insurance law. Laskin, J.A. made the following admonition:

The values underlying the principle of stare decisis are well known: consistency, certainty, predictability and sound judicial administration. Adherence to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty. “Consistency”, wrote Lord Scarman, “is necessary to certainty – one of the great objectives of law”; see Farrell v. Alexander, [1976] 1 All E.R. 129, [1977] A.C. 59 (H.L.), at p. 147 All E.R. People should be able to know the law so that they can conduct themselves in accordance with it. Adherence to precedent also enhances the legitimacy and acceptability of judgemade law, and by so doing enhances the appearance of justice.

Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case. Justice Cardozo put it this way in his brilliant lectures on The Nature of the Judicial Process (New Haven: Yale University Press, 1960) at p. 149:

T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.

Laskin J.A. referred to five factors the Supreme Court of Canada identified as relevant to deciding whether to overrule a prior decision:

… [W]here a previous decision does not reflect the values of the Canadian Charter of Rights and Freedoms; where a previous decision is inconsistent with or “attenuated” by a later decision of the Court; where the social, political, or economic assumptions underlying a previous decision are no longer valid in contemporary society; where the previous state of the law was uncertain or where a previous decision caused uncertainty; and, in criminal cases, where the result of overruling is to establish a rule favourable to the accused.

Instead of focusing on phrases such as “manifestly wrong”, the approach I prefer … calls on the court to weigh the advantages and
disadvantages of correcting the error in a previous decision. This approach focuses on the nature of the error, and the effect and future impact of either correcting it or maintaining it. In doing so, this approach not only takes into account the effect and impact on the parties and future litigants but also on the integrity and administration of our justice system.

Similarly, the Manitoba Court of Appeal in R. v. Neves has posited that:

“…The principle of stare decisis is a bedrock of our judicial system. There is great value in certainty in the law, but there is also, of course, an expectation that the law as expounded by judges will be correct, and certainly not knowingly incorrect, which would result when a decision felt to be wrong is not overruled. The tension when these basic principles are in conflict can be profound.

This approach provides a useful framework for balancing the conflicting elements in a situation such as the present one. It facilitates the conversion on logical, principled and comprehensible grounds of what might otherwise be the slippery slope referred to above to terra firma, at least so much as possible. It is an approach that is not necessary to utilize where the prior conclusion was plainly per incuriam, or based on manifest slip or error, but it is particularly helpful where nevertheless the prior conclusion is perceived to be wrong.”

Quaere: what happens when neither counsel nor the court refers to binding precedent in the case at bar?

Recently, the Court of Appeal reinforced the principle that claims are framed by the pleadings. Thus, the primary burden on counsel to ensure that all causes of action and material facts are properly pleaded. Furthermore, in McCunn Estate v. Canadian Imperial Bank of Commerce, Madam Justice Feldman, in dissent, sternly admonished counsel regarding their advocacy obligations:

[43] It is the obligation of the parties to bring the relevant authorities to the attention of the court. If the court finds further authorities which support or contradict the positions of the parties on the issues, it is the duty of the court to apply the law as it exists. In some circumstances, the court may wish to have the submissions of the parties on some case law which was not brought to the court’s attention, for example, where the law has undergone a significant change and the court intends to base its decision on that change. That was not the case here. It was open to the application judge to consider all authorities which pertain to the matter as framed by the parties. [emphasis added]

Counsel’s obligation to accurately state the law stems from two sources: (1) a negative professional obligation, and (2) a positive procedural obligation. The negative professional obligation is found under Rule 4.01(2) of The Rules of Professional Conduct which states in part:

4.01 (2) When acting as an advocate, a lawyer shall not:

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct;
(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority;
(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent;…

The positive procedural obligation arises from the text of the rule requirements for filing a factum, which is required in certain types of motions and appeals. Generally, the text of the various rules regarding facta read as follows:

“…each party shall serve on every other party to the motion [application, appeal] a factum consisting of a concise argument stating the facts and law relied on by the party.” [emphasis added]

Nevertheless, a section 96 superior court judge has inherent jurisdiction to apply the legal maxim, ex proprio motu, which means “of its own accord” to apply the existing law when deciding a case. In the recent Supreme Court of Canada decision in Pro Swing Inc. v. Elta Golf Inc., the Supreme Court of Canada, by a razor-thin 4-3 margin dismissed Pro Swing’s appeal on the issue of recognition and enforceability of a foreign non-monetary judgment. However, Deschamps, J., writing for the majority confirmed the court’s inherent power or discretion (and obligation) to apply the doctrine of ex proprio motu, where public policy, international commitments or constitutional values are at stake:

59. Elta Golf did not raise a public policy defence. However, public policy and respect for the rule of law go hand in hand. Courts are the guardians of Canadian constitutional values. They are sometimes bound to raise, proprio motu, issues relating to public policy. An obvious example of values a court could raise proprio motu can be found in United
States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7. In that case, the Court took Canada’s international commitments and constitutional values into consideration in deciding to confirm a direction to the Minister to make a surrender subject to assurances that the death penalty would not be imposed. Public policy and constitutional requirements may also be at stake when the rights of unrepresented third parties are potentially affected by an order. In the case at bar, over and above the concerns articulated by the Court of Appeal and the defences raised by Elta, there are, in my view, concerns with respect to parts of the contempt order inasmuch as it requires the disclosure of personal information that may prima facie be protected from disclosure.19

A priori, the doctrine of stare decisis—which espouses finality, predictability and certainty—appears to inherently conflict with the doctrine of ex proprio motu—which promotes public policy, fairness and accuracy. This conflict may be more apprehended than real. The answer may lie within the systemic differences between the common law and civil law systems. With respect to the resolution of legal issues, the civil law system is based on the principle “jura novit curia” (“the Court is supposed to know the law”), which means that there is no need for parties to plead the law. On the other hand, in the common law system, the law has to be pleaded, the precedents for or against have to be submitted and distinguished. The use of the terms “adversarial” and “inquisitorial” is somewhat a misnomer, insofar as the Quebec civil law system is an amalgam of both common law procedures, the Civil Code of Quebec and the Code of Civil Procedure, such that these two terms could be used for both procedures.20

While the court (i.e. the superior court or appellate court judge) is presumed to know the law, it is ultimately the responsibility of legal counsel to plead not only the facts, but also the correct law when litigating a case. Since judges are neither infallible nor omniscient, they must rely upon counsel appearing before them to argue the merits and justice of their cases based upon a full factual, evidentiary and legal record, which promotes the coherent and consistent development of the common law, both on a substantive and procedural level.

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1 From the famous admonition of the great American jurist, Mr. Justice Oliver Wendell Holmes, dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904): “Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and, before which, even well settled principles of law will bend.”

2 just-i-ci-a-ble (jʌstɪˈsiəbəl) adj.
1. Appropriate for or subject to court trial: a justiciable charge.
2. That can be settled by law or a court of law: justiciable disputes.

3 Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (as am.) - Rule 20.01(1)-(3), 20.04(1)-(5), 20.05 (Summary Judgment); Rule 21.01(1)(a)-(b), Rule 20.01(3)(a)-(d) (Determination of an Issue Before Trial); Rule 22 (Special Case); Rule 25.11 (Pleadings in an Action—Striking out a Pleading or Other Document); Rule 52.10 (Trial Procedure—Failure to Prove a Fact or Document); Rule 54 (Directing a Reference); Rule 55 (Procedure on a Reference); Rule 59.06 (Orders-Amending, Setting Aside or Varying Orders); Courts of Justice Act, R.S.O. 1990, c.C.43 (as am.) s106 (Stay of Proceedings).

4 Judex Debet Judicare Secundum Allegata et Probata—The judge ought to decide according to allegations and to proofs. BLACK’S LAW DICTIONARY. Revised 4th Ed., p.975.


8 David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co. and Seven Other Appeals (2005), 76 O.R. (3d) 161 at 190-191 (C.A.) per Laskin, J.A. (Simmons, Cronk, Armstrong JJ.A. and Then J. (ad hoc) concurring).[hereinafter “Polowin”] See also, Lawrence v. Wright [2007] O.J. No. 381, 2007 ONCA 74 (Ont. C.A.) where the five-member panel Ontario Court of Appeal reconsidered its position on mortgage fraud, priority of title and deferred indefeasibility and concluded that its decision a year ago in Household Realty Corp. Ltd. v. Liu (2005),...
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261 D.L.R. (4th) 679 (Ont. C.A.) was incorrect and should be overruled.


See Rule 25.06 (Pleadings in an Action-Rules of Pleading-Applicable to All Pleadings).


Rule 40.01(2)(e), (f) and (h) of the Rules of Professional Conduct, available online at http://www.lsuc.on.ca/regulation/a/proconduct/rule4/

Rule 20.03 (summary judgment), Rule 21.03 (determination of issue before trial), and Rule 22.02 (special case), Rule 40.04(Interlocutory Injunction/ Mandatory Order); 42.02(2) (Motion to Discharge Certificate of Pending Litigation), and, generally, Rule 37.10(6) of the Rules of Civil Procedure.

Rule 38.09 (1) and (3) of the Rules of Civil Procedure (applications), cf. Rule 38.09(4) (dispensing with factum).

Rule 61.03.1(4)-(13) (leave to appeal to Court of Appeal); Rule 61.03(2), (3) (leave to appeal to Divisional Court); Rule 61.12(4) (cross-appeal) ; 62.01(7)-(9) (appeals from interlocutory orders); Rule 61.11-61.12 (appeals to appellate court) ; Rule 61.16(4) (motions in appellate court); Rule 68.04(1), (3), (4), (6) (7), (judicial review proceedings) Rule 68.06 (failure of application to file factum).

Constitution Act, 1867, s.96: Appointment of Judges 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Most American (and some Canadian) decisions refer to the court acting on its own accord or voluntarily by using the Latin maxim, sua sponte. See http://www.law.cornell.edu/wex/index.php/Sua_sponte.


Contracting Parties Beware: Court of Appeal Implies Duty of Good Faith

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The Ontario Court of Appeal has recently held that, in certain circumstances, contracting parties owe a duty of good faith to one another and, further, that an "entire agreement" clause will not preclude the implication of a duty of good faith as a term of a contract.

In Civiclife.com Inc. v. Canada (Attorney General), Industry Canada contracted with Civiclife.com Inc. ("Civiclife") and SmartSources.com Technologies Inc. ("SmartSources") to develop a portal to make all information and services of federal government ministries and agencies accessible on-line, called "Access.ca". The primary contractor for the creation of the portal was the plaintiff, Civiclife. SmartSources was to provide two specific components for the portal: a search engine and a context information manager. It was Civiclife’s responsibility to integrate the components supplied by SmartSources and deliver a completed portal for implementation of pilot projects at up to twenty sites across Canada.

The development of the portal did not proceed as planned. SmartSources and Civiclife did not work together as envisaged by the contracts. Eventually, Civiclife’s portal was approved by the independent software technology company retained by Industry Canada to evaluate it, but it did not include the components to be supplied by SmartSources. SmartSources, instead of supplying the two components it had agreed to provide, developed its own stand-alone portal using its search engine and context information manager. The two portals were each independently tested at only two pilot locations. Civiclife was not involved in any further expansion of the Access.ca project and ultimately went into receivership.

The trial judge found that Roger Casselman, the Industry Canada representative responsible for the deliverables from Civiclife and SmartSources, deliberately encouraged SmartSources to provide only parts of the deliverables from Civiclife and SmartSources, instead of supplying the two components as specified in the contract. Casselman and SmartSources “paint a picture of deceit and sabotage”. SmartSources “decision not to co-operate