

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

APHRIA INC.

APPELLANT
(Appellant)

and

CANADA LIFE ASSURANCE COMPANY, et al.

RESPONDENT
(Respondent)

and

**PUBLIC INTEREST LITIGATION INSTITUTE, REAL PROPERTY
ASSOCIATION OF CANADA, BETTER WAY ALLIANCE, and BOMA
BUILDING OWNERS AND MANAGERS ASSOCIATION OF BRITISH COLUMBIA**

INTERVENERS

FACTUM OF THE INTERVENER
OF PUBLIC INTEREST LITIGATION INSTITUTE
(Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

Lawrence David, LLM
Public Interest Litigation Institute
1030 Berri Street – Suite 102
Montréal, Québec, H2L 4C3
Tél : (343) 961-6186
Fax : (514) 868-9690
ldavid@clg.org

Counsel for the Intervener
Public Interest Litigation Institute

ORIGINAL TO: THE REGISTRAR
 Supreme Court of Canada
 301 Wellington Street
 Ottawa, ON K1A 0J1

COPIES TO:

Derek J. Bell Christopher Liang DLA Piper (Canada) LLP Suite 5100 – 333 Bay Street Toronto, Ontario M5H 2R2 Telephone: (416) 365-7960 Email: derek.bell@dlapiper.com Counsel for the Appellant: Aphria Inc.	Marie-France Major Supreme Advocacy LLP Suite 100 – 340 Gilmour Street Ottawa, Ontario K2P 0R3 Telephone: (613) 695-8855 Ext: 102 FAX: (613) 695-8580 Email: mfmajor@supremeadvocacy.ca Agent of the Appellant: Aphria Inc.
Jeremy Opolsky Jon Silver Torys LLP 79 Wellington Street West, 30th Floor Box 270, TD Centre, South Tower Toronto, Ontario M5K 1N2 Telephone: (416) 865-8117 FAX: (416) 865-7380 Email: jopolsky@torys.com Counsel for the Respondent: Canada Life Assurance Company	Graham Ragan Gowling WLG (Canada) LLP 2600-160 Elgin Street Ottawa, Ontario K1P 1C3 Telephone: (613) 786-8699 FAX: (613) 563-9869 Email: graham.ragan@gowlingwlg.com Agent of the Respondent: Canada Life Assurance Company
Gasper Galati Dina Peat Wolfgang Kaufmann Daoust Vukovich LLP 20 Queen Street West, Suite 300 Toronto, Ontario M5H 3R3 Telephone: (416) 597-6888 Email: ggalati@dv-law.com Counsel for the Respondents: I.G. Investment Management, Ltd, as trustee for IG Mackenzie Real Property Fund, and Optrust Office Inc.	Graham Ragan Gowling WLG (Canada) LLP 2600-160 Elgin Street Ottawa, Ontario K1P 1C3 Telephone: (613) 786-8699 FAX: (613) 563-9869 Email: graham.ragan@gowlingwlg.com Agent of the Respondents: I.G. Investment Management, Ltd, as trustee for IG Mackenzie Real Property Fund, and Optrust Office Inc.

Paul-Erik Veel Lenczner Slaght LLP 130 Adelaide Street West, Suite 2600 Toronto, Ontario M5H 3P5 Telephone: (416) 865-2842 Email: pveel@litigate.com Counsel for the Intervener: Real Property Association of Canada	
Brian T. Duong Aubin P. Calvert Paul S. Jon Hunter Litigation Chambers 1040 West Georgia Street, Suite 2100 Vancouver, British Columbia V6E 4H1 Telephone: (604) 891-2400 FAX: (604) 647-4554 Email: bduong@litigationchambers.com Counsel for the Intervener: BOMA Building Owners and Managers Association of British Columbia	Dahlia Shuhaibar Olthuis Van Ert 66 Lisgar Street Ottawa, Ontario K2P 0C1 Telephone: (613) 501-5350 Email: dshuhaibar@ovcounsel.com Agent of the Intervener: BOMA Building Owners and Managers Association of British Columbia
Matthew Latella Akkila Thirukesan Baker & McKenzie LLP 181 Bay Street, Suite 2100 Toronto, Ontario M5J 2T3 Telephone: (416) 863-1221 FAX: (416) 863-6275 Email: Matthew.Latella@bakermckenzie.com Counsel for the Intervener: Better Way Alliance	Marie-France Major Supreme Advocacy LLP 340 Gilmour Street Suite 100 Ottawa, Ontario K2P 0R3 Telephone: (613) 695-8855 Ext: 102 FAX: (613) 695-8580 Email: mfmajor@supremeadvocacy.ca Agent of the Intervener: Better Way Alliance

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PART I : INTERVENER’S POSITION AND OVERVIEW OF FACTS

A – Intervener’s Position

1. The fundamental question raised in the present appeal is whether this Honourable Court’s precedent in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [\[1971\] S.C.R. 562](#) should be revisited and affirmed, overruled or otherwise departed from. In unanimous reasons, the Court of Appeal for Ontario¹ affirmed the Ontario Superior Court of Justice’s² refusal to overrule or otherwise depart from *Highway Properties* on the basis of vertical *stare decisis* and of the exceptions for precedential departure not being satisfied.
2. But the discussion of *Highway Properties* and *stare decisis* is not confined to the vertical axis of that doctrine. As the appeal is now before this Honourable Court, considerations pertaining to the horizontal axis of *stare decisis* become particularly salient and significant. This specific question of vertical and horizontal *stare decisis* and the precedent in *Highway Properties* is the specific and narrow issue on which PILI intervenes.
3. PILI takes no position as to whether *Highway Properties* should be affirmed, overruled or otherwise departed from. Instead, PILI submits that this Court should seize the opportunity afforded by the present appeal to revisit *Highway Properties* in light of legal and factual developments and illuminate the interaction between horizontal and vertical *stare decisis*.
4. PILI also submits that this Honourable Court’s power to depart from its own precedents as a matter of horizontal *stare decisis* is broader than lower courts’ ability to depart from this Court’s precedents as a matter of vertical *stare decisis*; that the two exceptions to vertical *stare decisis* set out in *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) apply to both constitutional and common law precedents; and that precedential departures based on the common law’s ability to adapt to new social conditions fit within the second exception concerning fundamental shifts in the factual matrix under which a precedent was decided.
5. PILI further submits that the joint concurring reasons in *R. v. Kirkpatrick*, [2022 SCC 33](#) did not displace the “compelling reasons” standard this Honourable Court has applied to determine whether to overrule or otherwise depart from its own precedents as a matter of horizontal *stare decisis* since at least 1967. A clear statement to this effect will ensure clarity in the law.

¹ *Canada Life Assurance Company v. Aphria Inc.*, [2024 ONCA 882](#), at paras. 22, 30, 31.

² *The Canada Life Assurance Company et al. v. Aphria Inc.*, [2023 ONSC 6912](#), at paras. 1, 81.

B – Overview of the Facts

6. PILI takes no position as to the facts at issue in this appeal.

PART II – LEGAL ISSUES FOCUSED ON BY INTERVENER

7. PILI’s intervention focuses on a single issue: should this Honourable Court’s precedent in *Highway Properties* be affirmed, overruled, or otherwise departed from?

PART III – PILI’S ARGUMENTS

I. Highway Properties Should Be Revisited

8. *Highway Properties* was decided in 1971 – almost 55 years ago at the time these words are being written. *Highway Properties* itself distinguished this Honourable Court’s precedent in *Attorney General of Saskatchewan v. Whiteshore Salt and Chemical Co. Ltd. and Midwest Chemicals Ltd.*, [1955] S.C.R. 43 and overruled the governing authority in Ontario at the time, namely, *Goldhar v. Universal Sections and Mouldings Ltd.*, [1963] 1 O.R. 189. The interest in the stability of contracts did not preclude these precedential revisitations.
9. Nor did this central private law interest prevent this Honourable Court from recognizing a duty of honest contractual performance flowing from the organizing principle of contractual good faith in *Bhasin v. Hrynew*, 2014 SCC 71. As well, in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, this Court held that appellate review of judicial interpretation of contracts is generally a question of mixed fact and law, overruling the longstanding common law rule that the question is always one of pure law.³ The Court also extended the precedent in *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59 to hold that fraud by a third party that is known to and participated in by beneficiary of a letter of credit triggers the fraud exception to an issuing bank’s duty to honour a demand for payment under that letter.⁴
10. The common law’s longstanding vitality reflects its propensity for principled adaptation to reflect evolved social, economic, and technological conditions.⁵ Judicial reform of the common law reflects the view that “[t]he restrictions of the past should not be used today to separate the legal system from the world at large.”⁶ In this light, it is perfectly natural, healthy, and

³ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at paras. 43-50.

⁴ *Eurobank Ergasias S.A. v. Bombardier inc.*, 2024 SCC 11, at paras. 84, 92-95, 111, 127-132.

⁵ Roscoe Pound, *The Spirit of The Common Law* (Francetown, NH, Marshall Jones Co. (1921)).

⁶ *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, at para. 44.

legitimate for this Court to occasionally revisit common law judgments to assess their ongoing precedential validity in light of subsequent legal and factual developments. The precedent in *Highway Properties* is no exception and should be revisited.

11. Importantly, however, the revisitation of precedent should not be confused for precedential departure. Precedential departure is *one of the possible outcomes* of the revisitation exercise and is not automatic.⁷ Other possible outcomes are to affirm the precedent, or to expand or narrow its applicational scope.⁸ To suggest that *Highway Properties* should be revisited does not mean that it should be overruled or otherwise departed from. PILI expresses no view on this specific point, except to say that the Court does not lightly depart from its own precedents.⁹
12. PILI, however, suggests that *Highway Properties* should be revisited in light of significant evolution in the law of contractual good faith – including in *Bhasin, C.M. Callow Inc. v. Zollinger*, [2021 SCC 45](#), and *Wastech Services v. Greater Vancouver Drainage and Sewerage District*, [2021 SCC 7](#). In particular, does contractual good faith ever impose a duty to mitigate on commercial landlords following a repudiatory breach of a lease by commercial tenant? Is it consistent with good faith for contractual discretion to be exercised so that “the Premises sits idle while the Landlord holds steadfast in not leasing the Premises” after a breach?¹⁰ This precise question was expressly raised in the judgment at first instance and merits this Honourable Court’s close consideration.
13. The revisitation exercise will not necessarily lead to *Highway Properties* being overruled or otherwise departed from. The precedent may very well be affirmed after finding that its precedential validity is unaffected by subsequent legal or factual developments, that the rule it sets out remains certain and consistent with commercial realities, and that there are simply no other compelling reasons warranting this Court to depart from it as a matter of horizontal *stare decisis*. This will, in turn, uphold commercial actors’ reliance on this precedent and further the interests of certainty, stability, and predictability vouchsafed by the rule of law.

⁷ [Lawrence David, *Stare Decisis, The Charter and The Rule of Law in The Supreme Court of Canada* \(Toronto: LexisNexis, 2020\)](#), at 44.

⁸ [David](#), at 8 to 25.

⁹ e.g., *Canada v. Craig*, [2012 SCC 43](#), at para. 24; *R. v. Nur*, [2015 SCC 15](#), at para. 59.

¹⁰ *The Canada Life Assurance Company et al v. Aphria Inc.*, [2023 ONSC 6912](#), at para. 80.

14. However, if the revisitation exercise reveals one of more compelling reasons to overrule or otherwise depart from it, commercial actors' reliance on an anachronistic precedent will be replaced by an updated legal status quo under which they are to govern their affairs. This is salutary: it is trite law that legal certainty and stability do not preclude departure from precedent whose meaning, scope, or application is itself unstable or uncertain.¹¹
15. Overall, *Highway Properties* should be revisited. The revisitation exercise will be beneficial to all stakeholders regardless of its ultimate outcome and further the values of *stare decisis*.

II. Horizontal Stare Decisis in This Honourable Court is Broader Than Vertical Stare Decisis in Respect of This Court's Precedents

16. This Honourable Court's constitutional authority to overrule its own precedents as a matter of horizontal *stare decisis* is broader than the authority conferred to lower courts to depart from its precedents as a matter of vertical *stare decisis*. The two must not be conflated.
17. Under *Bedford*, lower courts may only *depart from* Supreme Court precedent based on subsequent legal developments and/or based on a shift in the factual or evidentiary matrix that "fundamentally shifts the parameters of the debate."¹² Lower courts cannot, however, *overrule* this Court's precedents.¹³ If neither *Bedford* exception is met, a lower court must apply the precedent but can voice reasons for disagreeing with it or wishing to see it overruled by this Court. The precedent in *Craig* to this effect was not displaced by *Bedford*, and the two are perfectly complementary.¹⁴ A lower court's departure from Supreme Court precedent on the basis of one or both *Bedford* exceptions is to be reviewed for correctness. The application of said exceptions is a question of law.
18. By contrast, this Honourable Court may overrule or otherwise depart from its own precedents in the face of "compelling reasons."¹⁵ Said "reasons" include – but are not limited to – the two *Bedford* exceptions,¹⁶ but also extend to precedents that are "unsound in principle,"

¹¹ *Minister of Indian Affairs and Northern Development v Ranville*, [1982] 2 S.C.R. 518, at 528; *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, at para. 141; *David*, at pp. 59-60.

¹² *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 42, *David* at pp. 135-137.

¹³ *Canada v. Craig*, 2012 SCC 43, at paras. 18-23; *David*, at pp. 129, 141-153.

¹⁴ *David*, at pp. 129, 141-153.

¹⁵ E.g., *Binus v. The Queen*, [1967] S.C.R. 594, at 601; *R. v. Bernard*, [1988] 2 S.C.R. 833, at 849; *R. v. Henry*, 2005 SCC 76, at para. 44; *Canada v. Craig*, 2012 SCC 43, at para. 25; *R. v. Jordan*, 2016 SCC 27, at para. 45; *R. v. Edwards*, 2024 SCC 15, at para. 66, *David*, at 47-69.

¹⁶ *Edwards*, at para. 66; *John Howard Society v. Saskatchewan (AG)*, 2025 SCC 6, para. 6, 34.

unworkable, validly criticized, or that “result in unfairness.”¹⁷ Additional compelling reasons are identified in the reservoir of precedents rendered by this Honourable Court and summarized in doctrinal texts synthesizing them.¹⁸ Importantly, the “compelling reasons” standard applies to both common law *and* constitutional precedents,¹⁹ reconciling stability and progress in the law by treating precedent as presumptively binding without “condemning the law to stasis.”²⁰

19. This Court’s broad constitutional authority to depart from its own precedents reflects its status as Canada’s apex court. Maintaining a clear distinction between horizontal and vertical *stare decisis* is therefore critical to emphasizing respect for the judicial hierarchy,²¹ and to ensuring that this Court has the last word on whether its own precedents should be discarded.

III. **R. v. Kirkpatrick, 2022 SCC 33 Does Not Govern Horizontal Stare Decisis**

20. The joint concurring reasons in *R. v. Kirkpatrick*, [2022 SCC 33](#) did not displace the compelling reasons standard this Honourable Court has applied to determine whether to overrule or otherwise depart from its own precedents since 1967.²² Importantly, the *Kirkpatrick* concurrence was not endorsed by a majority of the Court. It is not, therefore, authoritative or binding as a matter of horizontal *stare decisis*.²³
21. The concurrence in *Kirkpatrick* states that this Court can only overrule one of its own precedents if it “1) was rendered *per incuriam*; 2) is unworkable; or 3) has had its foundation eroded by significant societal or legal change.”²⁴ Respectfully stated, the attractive simplicity of this approach belies several significant issues compelling considerable caution.
22. **First**, *Kirkpatrick* is itself a departure from this Honourable Court’s precedents that, since 1967, have held that this Court may overrule or otherwise depart from its own precedents in the presence of “compelling reasons.”²⁵ The “compelling reasons” standard was, in turn, by

¹⁷ *Michel v. Graydon*, [2020 SCC 24](#), at para.107, citing *Vavilov*, at para. 20.

¹⁸ See e.g., *David*, at Part II.

¹⁹ e.g., *Teva Canada Ltd. v. TD Canada Trust*, [2017 SCC 51](#), at para. 65; *R. v. Edwards*, [2024 SCC 15](#), at para. 66; *Canada (Attorney General) v. Power*, [2024 SCC 26](#), at para. 77;

²⁰ *Carter v. Canada (Attorney General)*, [2015 SCC 5](#), at para. 44.

²¹ *David*, at pp. 154-159.

²² See *Binus v. The Queen*, [\[1967\] S.C.R. 594](#), at 601; *David*, at pp. 36-37, 49.

²³ *R. v. Kirkpatrick*, [2022 SCC 33](#), at para. 96-97.

²⁴ *R. v. Kirkpatrick*, [2022 SCC 33](#), at para. 117.

²⁵ See e.g., *Binus v. The Queen*, [\[1967\] S.C.R. 594](#), at 601; *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, [2025 SCC 6](#), at para. 33, *David*, at 47.

inspired by the UK House of Lords’ seminal *Practice Statement (Judicial Precedent)*, [\[1966\] 3 All ER 77](#) (U.K.H.L.),²⁶ that was subsequently adopted by apex courts across the Commonwealth,²⁷ and even enshrined in certain Commonwealth constitutions.²⁸

23. Adopting *Kirkpatrick* would make the Supreme Court of Canada an outlier whose practices diverges from sister apex courts including the United Kingdom Supreme Court, the High Court of Australia,²⁹ and the New Zealand Supreme Court.³⁰ This would be an unwelcome development. As well, the Supreme Court of the United States will depart from its own precedents in the presence of “special justification,”³¹ which is functionally equivalent – if not identical – to “compelling reasons.”
24. **Second**, *Kirkpatrick* purported to depart from the unbroken chain of precedent applying the “compelling reasons” standard without compelling reasons for doing so. *Kirkpatrick*’s proposed departure from the “compelling reasons” standard jurisprudence was also unjustified under the three bases it itself identified as the three circumstances when this Honourable Court may depart from precedent, namely, (1) legal error (the *per incuriam* exception); (2) unworkability; and (3) foundation erosion caused by significant societal or legal change.³²
25. No legal error was identified in the “compelling reasons” jurisprudence, let alone a foundational erosion. The fact that the “compelling reasons” standard has been repeatedly applied by this Honourable Court since 1967 and had never been questioned in this Court’s case law prior to the concurring reasons in *Kirkpatrick* also rebuts the view that the standard is unworkable.
26. **Third**, *Kirkpatrick*’s identification of only three bases for precedential departure in this Honourable Court represents a spectacular unilateral truncation of its expansive constitutional

²⁶ [David, at pp. 36-38.](#)

²⁷ [David, at pp. 37-38.](#)

²⁸ e.g., [Constitution of The Gambia, s. 126\(2\); Constitution of Ghana, at s. 129; The Constitution of Sierra Leone, 1991, at s. 122\(2\); Constitution of The Republic of Uganda, 1995, at s. 132\(4\).](#)

²⁹ *Queensland v. Commonwealth*, [\[1977\] HCA 60](#), at para. 23, citing *Hughes & Vale Pty. Ltd. v. New South Wales*, [\[1953\] HCA 14](#) (“strong reasons” or “grave reason[s]”)

³⁰ e.g., *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)*, [\[2010\] NZSC 27; \[2010\] 3 NZLR 149](#), at paras. 104-105, 210 (“compelling circumstances”).

³¹ e.g., *Arizona v. Rumsey*, [467 U.S. 203 \(1984\)](#), at p. 212; *Kimble v. Marvel Entertainment, LLC*, [135 S. Ct. 2401 \(2015\)](#), at p. 2409; *Kisor v. Wilkie*, [139 S. Ct. 2400 \(2019\)](#), at 2418, 2422; *Dobbs v. Jackson Women’s Health Organization*, [597 U.S. 215 \(2022\)](#), at 388, 390.

³² *R. v. Kirkpatrick*, [2022 SCC 33](#), at para. 116.

jurisdiction to overrule precedent, and restricts the Court’s role and abilities in the dispensation of justice. The three bases of precedential departure identified in *Kirkpatrick* are fundamentally underinclusive and unfitting for an apex court.

27. It is true that *Kirkpatrick* has been cited by this Court in precedents involving horizontal *stare decisis*. However, this is only because its statement that precedent may be overturned if it “has had its foundation eroded by significant societal or legal change” is one of the “compelling reasons” previously identified in this Honourable Court’s jurisprudence.³³ Indeed, this basis for precedential departure was not pioneered in *Kirkpatrick* and neither was the proposition that precedent may be departed from if it is unworkable.³⁴ Both were and remain examples of “compelling reasons” warranting precedential departure.³⁵ Properly understood, *Kirkpatrick* simply proposed to limit this Honourable Court’s salutarily broad authority to depart from its own precedents to these three narrow grounds. This is not – and should not be – the law.
28. Significantly, this Honourable Court has applied the compelling reasons standard since *Kirkpatrick* was decided.³⁶ However, continued reference to *Kirkpatrick* in subsequent precedents risks creating the impression among practitioners that the latter’s joint concurring reasons have eclipsed the longstanding “compelling reasons” standard, or that this standard must, from thereon, only be understood as encompassing the three bases for precedential departure it identified.
29. As the rule of law thrives under clarity, predictability, and stability,³⁷ and as this Honourable Court has a special role in upholding these principles as Canada’s apex forum of legal principle,³⁸ it should clearly state that the joint concurring reasons in *Kirkpatrick* have not supplanted the “compelling reasons” standard as the norm it applies in revisiting and departing from its own precedents as a matter of horizontal *stare decisis*.

³³ e.g., *Sriskandarajah v. United States of America*, [2012 SCC 70](#), at para. 21; *Bedford*, at para. 42; *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#), at paras. 43-50; *Reference re Agricultural Products Marketing*, [\[1978\] 2 S.C.R. 1198](#), at 1234; *David*, at 56-58.

³⁴ e.g. *Minister of Indian Affairs and Northern Development v. Ranville*, [\[1982\] 2 S.C.R. 518](#), at 528; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), at para. 20.

³⁵ *Canada (Attorney General) v. Power*, [2024 SCC 26](#), at para. 98; *David*, at pp. 56-64.

³⁶ *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, [2025 SCC 6](#), at para. 33; *Power*, at paras. 77, 98; *R. v. Edwards*, [2024 SCC 15](#), at para. 66.

³⁷ *Reference re Secession of Quebec*, [\[1998\] 2 S.C.R. 217](#), at para. 70.

³⁸ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018 SCC 40](#) at para 144.

30. Overall, the *Kirkpatrick* approach to horizontal *stare decisis* is not the law of Canada and should not now be adopted by a majority of this Honourable Court.

III. The Exceptions to Vertical *Stare Decisis* Apply to Common Law Precedents

31. In its discussion of *vertical stare decisis*, the Superior Court appears to suggest that the two exceptions to *vertical stare decisis* established in *Bedford* are confined to constitutional precedents decided under the *Charter* and do not apply to common law precedents.³⁹ The Superior Court’s rationale is premised on the Ontario Court of Appeal’s judgment in *Black v. Owen*, [2017 ONCA 397](#) (at paras. 44-45), which held that the exceptions were inapplicable in part because *Bedford* and *Carter v. Canada (Attorney General)*, [2015 SCC 5](#) were decided under s. 7 of the *Charter* and because *Black v. Owen* did not involve the *Charter* or s. 7. The Supreme Court of British Columbia has also highlighted the “controversy” over this issue.⁴⁰
32. The distinction attempted to be drawn in *Black v. Owen* is, with respect, incorrect. **First**, *Bedford* does not state or suggest that the two exceptions are so confined. *Bedford*’s elaboration of said exceptions was part of its broader discussion of *vertical stare decisis*. Because *Bedford* did indeed involve s. 7 of the *Charter*, the Court then simply applied the exceptions in assessing whether the *Prostitution Reference* had correctly been departed from.
33. Indeed, *Bedford*’s discussion of *vertical stare decisis* begins with the admonition that *stare decisis* is “the foundational principle upon which the common law relies.” (emphasis added). The Court then highlighted that *vertical stare decisis* concerns “when, if ever, a lower court may depart from a precedent established by a higher court.”⁴¹ The Court did not confine this to ‘constitutional precedent’ or to ‘*Charter* precedents decided under s. 7.’
34. The Court then emphasized that “the threshold for revisiting a matter is not an easy one to reach... [and] is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence” in relation to which the relevant precedent was decided.⁴² The Court concluded that its approach “balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to

³⁹ *The Canada Life Assurance Company et al. v. Aphria Inc.*, [2023 ONSC 6912](#), at paras. 67-72.

⁴⁰ *H.C.F. v. D.T.F.*, [2017 BCSC 1226](#), at para. 107.

⁴¹ *Bedford*, at paras. 38-39.

⁴² *Bedford*, at para. 44.

perform its full role.”⁴³ Again, the Court did not state that the “threshold” only applies to constitutional precedents or *Charter* precedents decided under s. 7, or that lower courts may only revisit precedents of this nature. The Court would otherwise have said so.

35. **Second**, *Carter* also does not state or suggest that the two *Bedford* exceptions are confined to precedents decided under s. 7 of the *Charter*. Had the Court stated as such, it would arguably have constituted a spectacular truncation of *Bedford* less than two years after it was decided – and this, without any “compelling reasons” for precedential departure as matter of horizontal *stare decisis*. Instead, the Court simply affirmed what it said in *Bedford*: “Trial courts may reconsider settled rulings of higher courts... where a new legal issue is raised; and ... where there is a change in the circumstances or evidence that ‘fundamentally shifts the parameters of the debate’” in the original precedent being revisited.⁴⁴ The expression “settled rulings” necessarily encompasses both common law and constitutional precedents.
36. **Third**, *R. v. Comeau*, [2018 SCC 15](#) involved this Court reviewing a lower court’s departure from the precedent in *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424 which involved s. 121 of the *Constitution Act, 1867* – not the *Charter*. *Comeau* does not at all state or suggest that the *Bedford* exceptions are confined to constitutional precedents, generally, or to *Charter* precedents, specifically. Rather, *Comeau* affirms that the exceptions apply to “legal precedent.” (emphasis added) The *Bedford* exceptions have not been at issue in any appeal in this Court since *Comeau*.
37. **Fourth** – and as *Bedford*, *Carter*, and *Comeau* do not limit the two *Bedford* exceptions to constitutional precedents – courts lower in the Canadian judicial hierarchy are bound to apply the exceptions to constitutional precedents, common law precedents, and precedents involving statutory interpretation as a matter of vertical *stare decisis*. None of the two *Bedford* exceptions apply to allow lower courts to depart from *Bedford* by restricting the exceptions to constitutional precedents. This Court should explicitly affirm this.
38. Fundamentally, there is no principled doctrinal reason to require different rules for vertical *stare decisis* in respect of constitutional and common law precedents.

⁴³ *Bedford*, at para. 44.

⁴⁴ *Carter*, at para. 44, citing *Bedford*, at para. 42.

39. First, as *Bedford* applies to constitutional precedents, a higher standard could not be required for common law precedents. The constitution is, after all, the supreme law of Canada and precedents interpreting and applying it are its necessary extensions. Nor could a lower standard for precedential departure be required for this Honourable Court's common law precedents, as this would erode the authority of said precedents and generate instability and uncertainty. A lower standard would also be inconsistent with this Court's adaptation of the common law to be consistent with the constitutional standards.⁴⁵ As well, the *Bedford* exceptions easily apply to common law and constitutional precedents, in addition to precedents on questions of statutory interpretation. New legal or factual issues can arise in each of these contexts, and proof of facts does not vary based on whether the litigation involves common law or constitutional principles.
40. Finally, the adoption of different standards of vertical *stare decisis* for common law and constitutional precedents is unnecessary. Precedential departure based on the common law's ability to grow and adapt to new social, economic, or technological conditions fits within the second *Bedford* exception concerning fundamental shifts in the factual and evidentiary matrix under which a precedent was decided. A lower court may depart from this Court's common law precedents on the basis of evidence of social, economic or technological developments that satisfies the second *Bedford* exception. This is a seamless, natural fit.
41. This conclusion further coheres with the institutional strengths and distribution of labour between the courts comprising the Canadian judicial hierarchy. Due to their familiarity with the evidentiary record, trial and other first instance courts are ideally suited to identifying developments in the factual matrix that can constitute foundational erosion justifying departure from this Honourable Court's common law precedents as a matter of vertical *stare decisis*. It should not be forgotten that the life of the common law is not logic, but experience.⁴⁶
42. Fundamentally, doctrinal consistency requires that the same approach applies for lower courts to depart from this Honourable Court's precedents as a matter of vertical *stare decisis* – whether common law, constitutional or statutory precedents. This is the approach set in *Bedford*.

THE WHOLE RESPECTFULLY SUBMITTED THIS 27th DAY OF OCTOBER 2025



Lawrence David, LL.M

⁴⁵ e.g., *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, [2002 SCC 8](#), para. 19, 22.

⁴⁶ [Oliver Wendell Holmes, Jr., *The Common Law* \(1881\)](#), at 1.

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