

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

H.N.

APPELLANT
(Appellant)

and

**THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 61
(GREATER VICTORIA), WILLIAM HASELL and JAMES GORDON
KALYN AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL
AND TESTAMENT OF GARY JOHN REDGATE, DECEASED**

RESPONDENTS
(Respondents)

and

**PUBLIC INTEREST LITIGATION INSTITUTE
RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS**

INTERVENERS

**FACTUM OF THE INTERVENER
PUBLIC INTEREST LITIGATION INSTITUTE**

(Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

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PARTS I & II – OVERVIEW AND ISSUES FOCUSED ON BY INTERVENER

1. A central question raised in this appeal is whether this Court should overrule its common law precedent in *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570.¹ A related question is whether horizontal *stare decisis* in this Court is governed by the approach expounded in the dissenting reasons in *R. v. Kirkpatrick*, 2022 SCC 33. Public Interest Litigation Institute (“PILI”) takes no position as to whether *Jacobi* should be overruled or otherwise departed from. PILI’s proposed intervention will instead focus on the doctrine and mechanics of horizontal *stare decisis*. PILI submits that:

- A. Since 1967, this Honourable Court has emphasized that it will only overrule or otherwise depart from its own precedents as a matter of horizontal *stare decisis* if there are “compelling reasons” for doing so;²
- B. This Court’s precedents since *Kirkpatrick* show that it did not displace the “compelling reasons” standard, and that the *Kirkpatrick* grounds for departing from precedent are simply non-exhaustive examples of “compelling reasons”;
- C. As this Court’s case law demonstrates, the “compelling reasons” standard applies to common law, statutory, and constitutional precedents, and there is no compelling reason to depart from this harmonized approach;

PART III – PILI’S ARGUMENTS

A – Since 1967, “Compelling Reasons” are Required For This Court To Overrule or Otherwise Depart From Its Own Precedents as a Matter of Horizontal Stare Decisis

2. Over time, this Honourable Court’s practice of horizontal *stare decisis* has evolved from a posture of rigidity to one characterized by principled incremental flexibility. From the Court’s establishment in 1875 to the 1909 precedent in *Stuart v. Bank of Montreal*, 41 S.C.R. 516, the Court’s position was that it could not overrule or otherwise depart from its own precedents. Only the Judicial Committee of the Privy Council could do so.³ *Stuart* slightly modified this absolutist conception by allowing for precedential departures when justified by “very exceptional circumstances.” (pp. 535 and 549). The 1967 precedent in *Binus v. The Queen*, [1967] S.C.R. 594 marked a turning point in this history, as the earliest instance of the Court deviating from one of its previous decisions after being elevated to the apex of the Canadian judicial hierarchy as a result

¹ *Appellant’s Factum*, at paras. 62-91; *Respondents’ Memorandum on Application for Leave to Appeal*, at paras. 66-76.

² *Binus v. The Queen*, [1967] S.C.R. 594, at 601, per Cartwright J., for the majority.

³ L. David, *Stare Decisis, The Charter and The Rule of Law in The Supreme Court of Canada* (LexisNexis, 2020), at 30 (“David, *Stare Decisis*”), also released as *S.C.L.R. 2nd Series Vol. 97*.

of criminal appeals to the JCPC having been abolished in 1949.⁴ Writing for the majority, Justice Cartwright (as he then was) stated:

“I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam*, and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons.”⁵ (p. 601) (emphasis added)

3. While Cartwright J. did not expressly state this, it appears that this articulation of the governing standard for horizontal *stare decisis* in the Supreme Court of Canada was prompted or otherwise inspired by the UK House of Lords’ famous *Practice Statement (Judicial Precedent)*, [1966] 3 All ER 77 (UKHL).⁶ A variation of the “compelling reasons” standard is also used by apex and constitutional courts across the Commonwealth. For example, the New Zealand Supreme Court only departs from its own precedents in the face of “compelling circumstances”⁷ and the High Court of Australia requires “strong reasons” or “grave reasons.”⁸ As well, the Supreme Court of the United States will only depart from its own precedents in the presence of “special justification,” which is functionally equivalent to “compelling reasons.”⁹

4. In the decades since *Binus*, this Court has repeatedly and consistently applied the “compelling reasons” standard in determining whether to overrule or otherwise depart from one of its own precedents as a matter of horizontal *stare decisis*. Non-exhaustive examples from the 1970s, 1980s, 1990s, 2000s, 2010s, and 2020s appear in the following footnote.¹⁰

⁴ As highlighted in *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, at 1257.

⁵ Most recently cited in *R. v. Hussein*, 2026 SCC 2, at para. 56.

⁶ David, *Stare Decisis*, at 37; M.R. McGuigan, “Precedent and Policy in the Supreme Court” (1967), 45 Can. B. Rev. 627; W.F. Ehrcke, “*Stare Decisis*” (1995) 53:6 The Advocate 847, 853.

⁷ 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.

⁸ e.g., *Queensland v. Commonwealth*, [1977] HCA 60, at para. 23.

⁹ e.g., *Arizona v. Rumsey*, 467 U.S. 203 (1984), at p. 212; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at 2418; *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), at 388, 390.

¹⁰ **1970s:** *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198; **1980s:** *Minister of Indian Affairs and Northern Development v. Ranville et al.*, [1982] 2 S.C.R. 518, at 527, 529; **1990s:** *R. v. Chaulk*, [1990] 3 S.C.R. 1303; **2000s:** *R. v. Henry*, 2005 SCC 76, at paras. 43-44; **2010s:** *Canada v. Craig*, 2012 SCC 43, at para. 25; **2020s:** *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 77, 98 (majority), 209-210 (Jamal J., dissenting in part).

5. While being consistent in its *adherence* to the “compelling reasons standard” for horizontal *stare decisis*, this Court has been inconsistent as to its *articulation* in different judgments. Three formulations of the compelling reasons standard emerge from the jurisprudence ([David](#), at 46-68)

6. **The first formulation** is that “the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled.”¹¹ In other words, the precedent must be wrongly decided and there must be compelling reasons for arriving at this conclusion. This conception of horizontal *stare decisis* is retroactive in nature: it focuses on whether the relevant precedent was wrongly decided and does not consider forward-facing factors like its unworkability, whether it has become undermined by subsequent legal and/or extralegal developments, or whether the precedent generates unjust results or outcomes.

7. **The second formulation** is that compelling reasons in addition to legal error will be necessary to overrule or otherwise depart from precedent.¹² In other words, legal error is, in and of itself, insufficient. Additional compelling reasons distinct from legal error must be identified.

8. **The third formulation** is that compelling reasons with or without legal error will justify this Court in overruling or otherwise departing from precedent. In other words, compelling reasons and legal error are not synonymous, and compelling reasons are in and of themselves sufficient to warrant precedential departure whether or not such reasons are accompanied by legal error. One articulation of this formulation identifies a type of legal error as an example of a compelling reason – namely, “if the precedent was inconsistent with a binding authority or statute.”¹³ One may, however, question whether this is consistent with this Court’s repeated admonition that horizontal *stare decisis* balances correctness versus certainty,¹⁴ reflecting the aphorism that it is more important that a legal issue have been *decided* than the issue have been *decided correctly*.¹⁵ In some cases, stability, certainty, and longstanding reliance generated by a given precedent can indeed weigh against overruling it, and this, even if it was indeed wrongly decided.

¹¹ e.g., *Craig*, at para. 25; *Teva Canada Ltd. v. TD Canada Trust*, [2017 SCC 51](#), at para. 65; *R. v. Salituro*, [\[1991\] 3 S.C.R. 654, 665](#); and cases cited at p. 49, footnote 120 of *David*, *Stare Decisis*.

¹² e.g. *Ontario (Attorney General) v. Fraser*, [2011 SCC 20](#), at paras. 141, 231, 233, 275; *Reference re Agricultural Products Marketing*, [\[1978\] 2 S.C.R. 1198](#), at 1221-1222, 1238-1239, 1256-1258.

¹³ *Power*, at para. 98, cited in *Quebec (Attorney General) v. Senneville*, [2025 SCC 33](#), at para. 77.

¹⁴ e.g., *Craig*, at para 27; *R. v Bernard*, [\[1988\] 2 S.C.R. 833](#), 849 per Dickson C.J., cited in *Chaulk*, per Lamer C.J.; *Vavilov*, at para 18; *Ontario (Attorney General) v Fraser*, [2011 SCC 20](#), para. 133.

¹⁵ e.g., Brandeis J.’s famed dissent in *Burnet v. Coronado Oil & Gas Co.*, [285 U.S. 393](#), 406 (1932).

9. In PILI’s view, this Honourable Court should affirm that the third formulation of the “compelling reasons” standard represents the correct articulation. Indeed, there are several reasons why this third formulation is accurate and desirable as a matter of law and judicial policy. **First**, the third formulation includes but is not exhausted by the first two formulations. **Second**, it is legally and empirically incorrect to posit that this Court only departs from precedents it considers to have been wrongly decided, whether or not legal error is accompanied by other compelling reasons. **Further**, the third formulation is the most consistent with this Court’s practice of horizontal *stare decisis* in the interceding period between its ascension to the apex of the Canadian judicial hierarchy in 1949 and the adoption of the *Charter*, as well as the approach applied under the *Charter*. The third formulation **also** best reflects this Court’s broad appreciation of its constitutional jurisdiction under s. 101 of the *Constitution Act, 1867*, of which “*stare decisis* is an indispensable component.”¹⁶

B – Kirkpatrick Did Not Displace The “Compelling Reasons” Standard

10. Despite an unbroken chain of precedents applying the “compelling reasons” standard to horizontal *stare decisis* since 1967 – and despite a veritable reservoir of such reasons identified in the Court’s jurisprudence since then¹⁷ – the concurring reasons in *R. v. Kirkpatrick*, [2022 SCC 33](#) state that the Court “has never definitively set out the circumstances in which it may depart from precedent.”¹⁸ The concurring reasons also identify three exhaustive bases for precedential departure, namely: (1) that a precedent “failed to have regard to a binding authority or relevant statute (*per incuriam*);” (2) “[t]he decision has proven unworkable”; or (3) “[t]he decision’s rationale has been eroded by significant societal or legal change (“foundational erosion”).¹⁹

11. While superficially attractive in its simplicity, this represents a spectacular unilateral truncation by this Honourable Court of its constitutional authority as Canada’s apex court to overrule or otherwise depart from its own precedents. It is, moreover, not the law of Canada.

12. To wit, the discussion of horizontal *stare decisis* in appears in the concurring reasons in *Kirkpatrick* as part of the argument that the majority reasons had overruled the precedent in *R. v.*

¹⁶ *R. v. Wetmore*, [\[1983\] 2 S.C.R. 284](#), 299, per Laskin CJC.

¹⁷ See David, [Stare Decisis](#), at 55-65.

¹⁸ *Kirkpatrick*, at para. 198, per Côté, Brown, and Rowe JJ., jointly concurring.

¹⁹ *Kirkpatrick*, at para. 202, per Côté, Brown, and Rowe JJ., jointly concurring.

Hutchinson, [2014 SCC 19](#).²⁰ Not only did the majority refuse to “overrule, revise or revisit” it, the majority insisted that it was “distinguishing *Hutchinson*, not overruling it,” and did not endorse the concurring justices’ discussion of horizontal *stare decisis*.²¹ As a result, this discussion cannot be understood as having displaced the “compelling reasons” standard to horizontal *stare decisis* that this Court has applied since the 1967 precedent in *Binus*. As was said by the majority in *Kirkpatrick* itself when discussing *Hutchinson*: “what the minority says is not the law and what the minority said about the majority judgment is also not the law. Neither bind this Court.”²²

13. The same is true, *mutatis mutandis*, as concerns the concurring reasons in *Kirkpatrick*. And this is, of course, stated with the highest respect for all members of this Honourable Court.

14. As well, this Court’s precedents since *Kirkpatrick* show that it did not displace the “compelling reasons” standard, and that the *Kirkpatrick* grounds for departing from precedent are simply non-exhaustive examples of “compelling reasons” previously identified in this Court’s case law. It is a mistake to contend otherwise; however, litigants before this Court consistently refer to *Kirkpatrick* as encapsulating the law on horizontal *stare decisis*.²³ This Court should therefore provide clarification on this point once and for all. As counsel in certain appeals have also referred to *R. v. Sullivan*, [2022 SCC 19](#) as articulating the standard for horizontal *stare decisis* in this Court, it should also be clarified that *Sullivan* only applies to courts of coordinate jurisdiction at the first instance levels of the judicial hierarchy.²⁴ It is, indeed, in the interests of justice and in the broader public interest for this Court to preserve to itself the broadest possible discretion to depart from its own precedents, all while maintaining the cardinal interests in “consistency, certainty, fairness, predictability, and sound judicial administration” vouchsafed by the rule of law and the doctrine of *stare decisis*.²⁵

15. The best way to achieve this is to insist upon the “compelling reasons” standard and to affirm that the three circumstances warranting precedential departure under *Kirkpatrick* are simply three non-exhaustive reasons of this nature. In other words, *Kirkpatrick* provides for three examples of “compelling reasons” but does not exhaust or displace the reservoir of such reasons

²⁰ *Kirkpatrick*, at paras. 113-117, per Côté, Brown, and Rowe JJ., jointly concurring.

²¹ *Kirkpatrick*, at paras. 96-97, majority reasons of Martin J, *R. v. McGregor*, [2023 SCC 4](#), fn [3].

²² *Kirkpatrick*, at para. 95, majority reasons of Martin J.

²³ See e.g., [Appellant’s Factum](#), at paras. 64-65.

²⁴ *Sullivan*, at paras. 73-75.

²⁵ *Senneville*, at para. 77, citing *R. v. Sullivan*, [2022 SCC 19](#), at para. 64.

identifiable in this Court’s jurisprudence since 1967. Nor does *Kirkpatrick* foreclose the identification of additional “compelling reasons” in the future.

16. This is analytically sound. Every single judgment of this Court involving horizontal *stare decisis* since *Kirkpatrick* has affirmed the “compelling reasons” standard.²⁶ At the same time, several of these judgments have cited to *Kirkpatrick* as identifying examples of “compelling reasons.”²⁷ A significant recent example is *Canada (Attorney General) v. Power*, [2024 SCC 26](#), in which seven of the nine justices who heard the appeal – five in the majority, and two dissenting in part – identified *Kirkpatrick* as identifying three non-exhaustive “compelling reasons” authorizing precedential departure. Indeed, the majority reasons in *Power* state:

[98] This Court may depart from precedent where there is a compelling reason to do so, **including** if the precedent was inconsistent with a binding authority or statute, it has proven unworkable, or its rationale has been eroded by significant social or legal change (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44; *R. v. Kirkpatrick*, 2022 SCC 33, at para. 202). There are no compelling reasons to overrule *Mackin*. The state’s immunity has been and remains qualified. **(emphasis added)**

17. Jamal J.’s reasons dissenting in part are to the same effect:

[209] [...] This Court’s practice is “against departing from its precedents unless there are compelling reasons to do so” (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44). Such reasons **can include** where the prior decision overlooked binding authority or a relevant statute (a decision rendered *per incuriam*), has proven unworkable, or if its rationale has been eroded by significant societal or legal change (*R. v. Kirkpatrick*, 2022 SCC 33, at para. 202, per Côté, Brown and Rowe JJ., concurring in the result). **(emphasis added)**

18. On this basis, PILI proposes the following framework that maintains the compelling reasons standard as the guidepost for horizontal *stare decisis* while enhancing its role in ensuring “consistency, certainty, fairness, predictability, and sound judicial administration.”²⁸ Two questions guide the exercise:

- I. First, are any of the three compelling reasons identified in *Kirkpatrick* present to justify precedential departure? If so, the Court may proceed to do so.

²⁶ *R. v. Edwards*, [2024 SCC 15](#), at para. 66 ; *Power*, at paras. 77, 98, 209-210; *John Howard*, at para. 33; *Senneville*, at paras. 77-78; *R. v. Hussein*, [2026 SCC 2](#), at para. 177;

²⁷ *Edwards*, at paras. 65-66; *Power*, at paras. 77, 98, 209-210; *Hussein*, at para. 177; *R. v. Vrbanic*, [2026 SCC 19](#), at paras. 112-113, per Rowe J., concurring.

²⁸ *Senneville*, at para. 77, citing *R. v. Sullivan*, [2022 SCC 19](#), at para. 64.

- II. If the answer is negative, the second question is whether there are *other* compelling reasons for departing from precedent. If the answer is affirmative, the Court may proceed to do so. If the answer is negative, the invitation to depart may be declined.

19. The Court may proceed to identify additional compelling reasons under the second step even if the answer to the first question is affirmative. Indeed, “a decision to depart from precedent must be carefully considered and justified”, as *stare decisis* contributes to the Court’s legitimacy.²⁹

20. One example of a “compelling reason” not captured under the three examples identified in *Kirkpatrick* arises when the rule crystallized in a precedent generates injustice.³⁰ Injustice here refers to results that are unconscionable, intolerable, or blatantly unfair. The rule may have been developed without overlooking “a binding authority or relevant statute”; it might not be “unduly complex or difficult to apply” so as to be unworkable; and its rationale might not have “been eroded by significant societal or legal change.”³¹ Under *Kirkpatrick*, this Court would be powerless to overrule or otherwise depart from the precedent. Yet, this Court has shown itself – and should continue to be – unwilling remain complacent when the situation “cries out for a remedy.”³²

21. The Court’s posture should be no different in the domain of *stare decisis*. And, indeed, the jurisprudence shows that unfair rules have previously been harbingers of precedential change. In *Law*, this Court stated that a claimant seeking to establish unconstitutional discrimination under s. 15(1) of the *Charter* was required to identify a “mirror comparator group” at the first stage of the inquiry.³³ The problem, however, was that “a misidentification of the proper comparator group [would] doom the outcome of the whole s. 15(1) analysis”³⁴ and “thwart the identification of... the discrimination at which s. 15 is aimed.”³⁵ This was in addition to the comparator group approach being “difficult to apply” (e.g., unworkable).³⁶ The Court in *Withler* thus departed from *Law* and the cases applying it by holding that comparator groups are *useful* but not *necessary*.³⁷ Had *Withler* arisen after this Court’s adoption of PILI’s proposed framework, it could have arrived

²⁹ *Senneville*, at para. 77; *Kirkpatrick*, at paras. 172, 188, jointly concurring reasons.

³⁰ e.g., *Henry*, at para. 46; *Michel v. Graydon*, [2020 SCC 24](#), at para. 107; *Fraser*, at para. 135.

³¹ *Kirkpatrick*, at para. 202, 207, jointly concurring reasons.

³² *Ahluwalia v. Ahluwalia*, [2026 SCC 16](#), at para. 180.

³³ *Law v Canada (Minister of Employment and Immigration)*, [\[1999\] 1 S.C.R. 497](#), at paras. 56-58.

³⁴ *Hodge v. Canada (Minister of Human Resources Development)*, [2004 SCC 65](#), at para. 18.

³⁵ *Withler v. Canada (Attorney General)*, [2011 SCC 12](#), at para. 60.

³⁶ *Withler*, at para. 60.

³⁷ *Withler*, at paras. 40, 63.

at the same result by analyzing both steps, and this, whether or not it had answered the first question in the affirmative. Preserving this Court’s discretion is more than just theoretically attractive.

22. The fundamental objective of PILI’s framework is to preserve to this Court a powerful but necessary latitude to overrule or otherwise depart from its own precedents in a manner that fully reflects its position as the “forum of principle”³⁸ at the apex of the judicial hierarchy.

C – The “Compelling Reasons” Standard Applies to Statutory, Common Law, and Constitutional Precedents

23. This Court’s case law clearly demonstrates that the “compelling reasons” standard applies to common law, statutory, and constitutional precedents. There is no compelling reason to depart from this harmonized approach, which ensures that the essential values of predictability, fairness, and stability are upheld in this Court’s practice of horizontal *stare decisis*.

24. **First**, the Court’s case law demonstrates that the “compelling reasons” standard applies to common law precedents in both private law and public law. For example, in *Nishi*, a unanimous Court held that there were no compelling reasons to overrule its precedents endorsing the “long-standing doctrine” of purchase money resulting trust.³⁹ In *Hamstra*, this Court found “compelling reasons” to overrule a common law rule of civil procedure requiring the automatic discharge of the jury if it is led to infer that defendant is insured.⁴⁰ As for public law, in *Vavilov*, the majority departed “from the Court’s existing jurisprudence on standard of review” at common law, stating that it was justified by “compelling circumstances.”⁴¹ These examples are not exhaustive.

25. **Second**, this Court has applied the “compelling reasons” standard in determining whether to overrule or otherwise depart from statutory precedents – that is, precedents concerning the interpretation of statutory provisions. In *Craig*, a leading precedent of this Court on *stare decisis*, this Court overruled *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 and its erroneous interpretation of s. 31 of the *Income Tax Act*.⁴² In *Teva*, a majority of this Court held that there were “no compelling reasons” to overrule precedents concerning the interpretation of s. 20(5) of the *Bills of Exchange Act*, while the dissenting reasons contended that such “compelling reasons” were

³⁸ Ronald Dworkin, “The Forum of Principle”, (1981) N.Y.U. L. Rev. 469, 518.

³⁹ *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, at paras. 23-28.

⁴⁰ *Hamstra v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at paras. 18-19, overruling *Bowhey v. Theakston*, [1951] S.C.R. 679.

⁴¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 18.

⁴² *Craig v. Canada*, 2012 SCC 43, at paras. 17, 24-32.

present.⁴³ In *R. v. Hussein*, [2026 SCC 2](#) (paras. 55-56), Wagner C.J.’s majority reasons cited *Binus* in emphasizing that compelling reasons are required to overrule a precedent concerning statutory interpretation. These examples are not exhaustive.

26. **Third**, this Court has also repeatedly applied the “compelling reasons” standard in determining whether to overrule or otherwise depart from constitutional precedents involving the interpretation or application of the Canadian constitution. For example, a leading precedent of this Court on *stare decisis*, *R. v. Henry*, [2005 SCC 76](#), holds that “compelling reasons” must be present for this Court to overrule one of its precedents, and applied this standard in overruling *R. v. Mannion*, [\[1986\] 2 S.C.R. 272](#) and its interpretation of s. 13 of the *Charter*.⁴⁴ In *John Howard Society*, identified “compelling reasons” to overrule the precedent in *R. v. Shubley*, [\[1990\] 1 S.C.R. 3](#) to hold that inmate disciplinary proceedings are criminal in nature for the purposes of engaging the protections in s. 11 of the *Charter*.⁴⁵ The “compelling reasons” standard has also been applied in federalism cases involving the division of powers.⁴⁶ These examples are not exhaustive.

27. Ironically, there is no compelling reason to depart from this Court’s jurisprudence holding that the “compelling reasons” standard applies when this Court determines whether to overrule or otherwise depart from *any* of its precedents – whether common law, statutory, or constitutional. The opposite is actually true: there are compelling reasons *not* to depart from that jurisprudence, the foremost being that this Court should preserve to itself the widest possible scope of discretion to depart from its own precedents beyond the three grounds stated in *Kirkpatrick*.

28. It may, of course, be the case that the “compelling reasons” standard will apply differently to different types of precedent – for example, some “compelling reasons” that apply to common law and constitutional precedents may not – or may not always – apply to statutory precedents. For example, “[c]onstitutional precedents, like common law precedents, may be revisited in light of legal or societal changes.”⁴⁷ This is consistent with the living tree doctrine and with the spirit of judicial empiricism that characterizes the incremental development of the common law.⁴⁸ While legal changes may also be cause for revisiting statutory precedents, the same may not always be

⁴³ *Teva Canada Ltd. v. TD Canada Trust*, [2017 SCC 51](#), at paras. 65-66, 139-154.

⁴⁴ *Henry*, at paras. 43-44.

⁴⁵ *John Howard Society of Saskatchewan v. Saskatchewan (AG)*, [2025 SCC 6](#), at paras. 33-50.

⁴⁶ *Reference re Agricultural Products Marketing*, [\[1978\] 2 S.C.R. 1198](#), at 1257.

⁴⁷ *R. v. Vrbancic*, [2026 SCC 19](#), at para 114, Rowe J., concurring; David, *Stare Decisis*, at 378-99.

⁴⁸ Roscoe Pound, *The Spirit of The Common Law* (Jones Co., Francetown, NH, 1921), at 166-92.

true for “societal changes,” since statutory interpretation is based on legislative intent at the time of enactment.⁴⁹ The dynamic interpretation of a statute according to “new sociological or technological circumstances”⁵⁰ may, however, alter the calculus, as may statutory provisions that incorporate common law rules or doctrines.⁵¹

29. As a further example, the compelling reason that a precedent was wrongly decided (e.g. *per incuriam*) might only scarcely apply to a common law precedent introducing a new principle, rule, standard, or cause of action. While not technically impossible, judge-made law is created with a keen sensitivity to surrounding legal authorities, operating in interstitial fashion where the law does not already provide a solution.⁵² As a result, revisitation of common law precedents will mostly be justified on the basis of unworkability, of having been undermined by subsequent legal and/or extralegal developments, or based on generating unfair or unjust results. This is perhaps why this Court only referenced unworkability and subsequent legal and extralegal developments in recently refusing to depart from two of its common law precedents.⁵³ In the particular case, the precedent in *Jacobi* may be revisited and departed from on the basis of unworkability, being unsound in principle, having been undermined by subsequent legal and/or extralegal developments, or because it generates unjust outcomes. However, no one contends that *Jacobi* was wrongly decided in the case of the test for vicarious liability having “failed to have regard to a binding authority or relevant statute.” (*Kirkpatrick*, at para. 202)

30. Notwithstanding the distinctions between precedent types and the application of reasons that must exist to justify departure, this Court should continue to apply a single, uniform standard to horizontal *stare decisis*. As a result, PILI’s proposed framework for compelling reasons should be applied for common law, statutory, and constitutional precedents. This best ensures the balance between flexibility and certainty at the heart of the modern conception of horizontal *stare decisis*.

THE WHOLE RESPECTFULLY SUBMITTED THIS 14th DAY OF JULY 2026



Lawrence David, JD/BCL, LL.M

⁴⁹ e.g., *Taylor v. Newfoundland and Labrador*, [2026 SCC 6](#), at para. 92.

⁵⁰ *Telus Communications Inc. v. Federation of Canadian Municipalities*, [2025 SCC 15](#), at para 33.

⁵¹ *R. v. D.L.W.*, [2016 SCC 22](#), at para. 14; David, *Stare Decisis*, at 99.

⁵² *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205, at 221, per Justice Oliver Wendell Holmes, cited in *Harrison v. Carswell*, [\[1976\] 2 S.C.R. 200](#), at 218.

⁵³ e.g., *CBC v. Named Person*, [2024 SCC 21](#), at para. 58; *R. v. Vrbanic*, [2026 SCC 19](#), at para. 81.

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C – DOCTRINE

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Ronald Dworkin, “The Forum of Principle”, (1981) <i>N.Y.U. L. Rev.</i> 469	22
Roscoe Pound, <i>The Spirit of The Common Law</i> (Marshall Jones Co., Francetown, NH, 1921)	28