WRITING ON A BLANK SLATE: THE ALBERTA COURT OF APPEAL'S EARLY *CHARTER* CASES

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This article describes several cases heard by the Alberta Court of Appeal during the first five years after the Charter *was proclaimed. In doing so, it highlights the key contributions made by the Court of Appeal to early* Charter *interpretations. It further explores how the Alberta Court of Appeal's* Charter *judgments were received by the Supreme Court of Canada. It outlines the contributions that these judgments made to foundational principles of* Charter *interpretation and ultimately concludes that the Alberta Court of Appeal had a significant role in shaping how the* Charter *was understood and applied.*

Cet article traite d'un certain nombre de causes portées devant la Cour d'appel de l'Alberta au cours des cinq années ayant suivi la proclamation de la Charte*. Ce faisant, il met en lumière les contributions clés de la Cour d'appel de l'Alberta relativement à l'interprétation initiale de la* Charte*. Outre la façon dont la Cour suprême du Canada a accueilli les arrêts de la Cour d'appel de l'Alberta, l'auteur examine comment ces arrêts ont contribué à établir les principes fondamentaux de l'interprétation de la* Charte *et en conclut que la Cour d'appel de l'Alberta a joué un rôle prééminent dans la compréhension et l'application de la* Charte*.*

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I. INTRODUCTION

It was 17 April 1982. In the South Atlantic, British warships steamed towards the Falkland Islands to repel Argentine invaders. In the Middle East, Israeli tanks rumbled eastwards completing Israel's withdrawal from the Sinai Peninsula under the peace agreement with Egypt. And in North America, on what was a blustery spring day on the south bank of the Ottawa River, the Queen and the Prime Minister of Canada endorsed their names on a document which proclaimed into force the *Constitution Act, 1982*, the first 34 sections of which comprised the *Canadian Charter of Rights and Freedoms*.[1]

As a young lawyer at the time, less than two years at the bar, I remember the unease I felt concerning the arrival of the *Charter*. A powerful new instrument had been placed in my legal toolbox but I had no idea how it worked or how to use it. Nothing had prepared me for such a tool, explained its purpose, the circumstances in which it might be employed, the kinds of results it might achieve, or the scope and limits of its application, because it did not exist at the time of my legal training. It was new, powerful, and unknown, and frankly I was

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

scared of it. I can only imagine then what it must have been like to be a judge in those early days of the *Charter*, vested with unprecedented new authority and profound new responsibilities, but without formal legal education, precedent, or doctrine to guide their use, and with uncertainty regarding the most fundamental questions of the meaning and scope of the *Charter*.

Some commentators, notably Ted Morton and Rainer Knopff in their 2000 publication *The Charter Revolution and the Court Party*, have suggested that judges reveled in this new role, asserted it with relish, and in the process stepped outside the proper boundaries of their place in Canada's governance.[2] This suggestion fundamentally misapprehends the duty which the *Charter* imposed on judges, the challenge which the judiciary faced as a result, and the way the courts have met that challenge. As Pierre Trudeau said in his remarks at the Proclamation Ceremony on 17 April 1982: "We now have a Charter which defines the kind of country in which we wish to live, and guarantees the basic rights and freedoms which each of us shall enjoy as a citizen of Canada. It reinforces the protection offered to French-speaking Canadians.… It recognizes our multicultural character. It upholds the equality of women, and the rights of disabled persons."[3]

But the *Charter* is not self-executing, and its realization fell to the courts with the constitutional grant of authority to order "such remedy as the court considers appropriate and just in the circumstances" for infringements or denials of guaranteed rights and freedoms, and to enforce section 52 of the *Constitution Act, 1982* which declares all laws inconsistent with the Constitution to be, to the extent of that inconsistency, of no force and effect.[4]

The Courts could not avoid the duties imposed on them by the *Charter* and the Constitution. Those duties required the development of an entire new body of law to interpret the *Charter*, define the scope and application of the rights it contained, establish a suite of remedies for the breach of those rights, and articulate doctrines that would provide guidance as new questions arose about the meaning and scope of the *Charter*.

And thus, when almost 30 years later I returned to school to study Canada's modern constitution and fill in the gap in my education which I had so keenly felt in 1982 (and for many years after), what had been a jurisprudential vacuum had been filled to overflowing with a rich and complex body of precedent giving life and meaning to the bare text of the *Charter*.

The purpose then of this article is to consider, on the occasion of its 100th anniversary, some aspects of the Alberta Court of Appeal's role in this evolution. In keeping with the historical nature of this topic, this article looks at what part the Alberta Court of Appeal played during the seminal days of *Charter* jurisprudence by discussing some of the cases the

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2 FL Morton & Ranier Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 57-58.

3 The Right Honourable Pierre Elliott Trudeau, "Remarks at the Proclamation Ceremony, April 17, 1982," online: Library and Archives Canada <https://www.collectionscanada.gc.ca/primeministers/h4-4024-e.html>.

4 *Charter*, *supra* note 1, ss 24(1), 52.

Court considered during the first five years of the existence of the *Charter* in an approach that is more narrative than analytical.

II. IN THE BEGINNING

To begin, there is a reasonable basis to think that the Alberta Court of Appeal was the first senior appellate court in the country to be invited to apply the *Charter*. The first reported decision of this Court involving the *Charter* came less than two weeks after its proclamation although it appears the Court dealt with a *Charter* issue on an interim basis even sooner, during the first week it was in force.

The reported case was *R. v. Drinnan* in which the redoubtable veteran of the Calgary criminal courts, Webster MacDonald Sr., sought prohibition against a provincial court judge continuing a preliminary inquiry into charges arising from a securities violation.[5] His client had already admitted to infractions under the *Securities Act* for which penalties had been imposed and MacDonald sought to persuade the Court that continuing with criminal charges would be a violation of the newly proclaimed section 11(h) of the *Charter*; the legal right not to be tried and punished again for an offence of which he had already been found guilty and for which he had already been punished. This challenge was heard by the Alberta Court of Appeal on 30 April, just 13 days after the *Charter* came into force, at which time MacDonald argued that the terms "tried" and "offence" in section 11(h) should be given a broad meaning and the preliminary inquiry stayed.[6]

Certainly on this first encounter with the *Charter*, the Court seemed in no hurry to "test drive" its new authority. Justice Kerans pointed out that the accused was seeking discretionary relief, and that the better time to consider his arguments was when, and if, he was committed for trial, at which time he would be in true jeopardy and the *Charter* claim could be considered in conjunction with other arguments.[7] As a result, the Court found it unnecessary to address whether *Charter* relief was available at that juncture of the proceedings or if the proposed interpretation of section 11(h) which would encompass the previous *Securities Act* charges was sound.[8]

III. THE PURPOSIVE *CHARTER*

The Court's next brush with the *Charter* was considerably more consequential. Four days before the proclamation of the *Charter*, Lawson Hunter, the Director of Investigations under the *Combines Investigation Act*, had issued an authorization empowering his officers to enter the premises of the *Edmonton Journal* and to examine, copy, or take away any documents they found there pertaining to an investigation relating to the "Production, Distribution and Supply of Newspapers and Related Products in Edmonton."[9] What the search was looking for was not disclosed then, or later, but appears to have been related to recent events in the newspaper publishing world. In Winnipeg, Southam had ceased publication of the *Winnipeg*

5 *R v Drinnan*, 1982 ABCA 120 (CanLII).
6 *Ibid*.
7 *Ibid.*
8 *Ibid*.
9 *Southam Inc v Hunter* (1983), 42 AR 93 at para 9 (CA) [*Southam* (CA)].

Tribune leaving the Thomson chain with the sole paper in town. Meanwhile in Ottawa, Thomson had closed the doors on the *Ottawa Journal* leaving the field to Southam's *Citizen*. These closings were suspected to be more than coincidental and spawned a Royal Commission on Newspapers (the Kent Commission) and other investigations.[10]

The search authorization issued by Hunter was exercised a week later, on 20 April 1982. Four Combines officers entered the *Edmonton Journal* and demanded to see every file (other than those in the newsroom) the newspaper had. They expressed particular interest in the contents of publisher Patrick O'Callaghan's office. However much had changed in the seven days since the authorization had been issued.[11]

Within hours, on what was the second court day of the *Charter* era, the *Journal*'s counsel Allan Lefever (most recently Deputy Chief Judge of the Provincial Court) issued a Statement of Claim alleging a *Charter* breach. That same day he appeared before a Queen's Bench Justice seeking an interlocutory injunction prohibiting the search on the grounds that the legislation under which the authorization was issued violated section 8 of the *Charter* by mandating an unreasonable search and seizure.[12]

The injunction was refused on the grounds that the balance of convenience favoured the government, and Southam immediately appealed.[13] A hearing was obtained on short notice at which the Alberta Court of Appeal allowed the search to continue but directed that anything taken be sealed and held by the Court pending the conclusion of the proceedings.[14] That unreported decision, which appears to have occurred within the first week of the *Charter*, was followed by a further hearing three weeks later in which the Court continued the sealing order and directed that the hearing of the appeal on the main issue, whether or not the search provisions of the *Combines Investigation Act* contravened section 8 of the *Charter*, be heard that fall.[15]

A five-member panel led by Chief Justice McGillivray and flanked by Justices Kerans, Laycraft, McClung, and Prowse heard the appeal over two days in September 1982. Their decision, issued in January 1983, was the Court's first major pronouncement on the *Charter* and articulated a foundational principle for *Charter* interpretation that has prevailed ever since. After laying out the facts and the central issue at stake, Justice Prowse, speaking for a unanimous court, observed that the *Charter* was a constitutional document which should not, in the famous words of Lord Sankey, be "cut down … by a narrow and technical construction but rather [be given] a large and liberal interpretation."[16] Justice Prowse reiterated this point with a second quote, this one from the Privy Council concerning the Constitution of Bermuda, in which that Court held that a constitutional document should not be subject to the same rules of construction as an ordinary enactment but be treated as "sui

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10 *Royal Commission on Newspapers* (Ottawa: Minister of Supply and Services of Canada, 1981).
11 *Southam Inc v Hunter* (1982), 42 AR 109 at para 86 (QB).
12 *Ibid* at para 78.
13 *Ibid* at para 122.
14 *Southam* (CA), supra note 9 at para 3.
15 *Southam Inc v Hunter* (1982), 42 AR 108 at paras 73-74, (CA).
16 *Southam* (CA), *supra* note 9 at para 11, citing *Edwards v Canada (AG)*, [1930] AC 124 at 136 (PC).

generis, calling for principles of interpretation of its own, suitable to its character."[17] In construing such a document, the Privy Council said the court should "take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the [Bermuda] Constitution commences."[18]

"With those principles in mind," Justice Prowse wrote for the Court, "I turn to consider s. 8 of the *Charter*," the purpose of which he found to be to protect "the right to be secure against encroachment upon the citizens' reasonable expectation of privacy."[19] A year later, in the third *Charter* case to come before it, the Supreme Court of Canada heard the appeal from the Alberta Court of Appeal decision in favour of Southam. Justice Dickson (as he then was), also writing for a unanimous Court, cited the same two passages in support of his conclusion that the interpretation of the *Charter* called for a "broad [and] purposive analysis, which interprets specific provisions … in the light of its larger objects."[20] This remains the central tenet of *Charter* interpretation today.

The Alberta Court of Appeal's conclusion that the statutory scheme of the *Combines Investigation Act* provided for no genuinely independent review of search authorizations and thus failed to meet the minimum standard for a reasonable search was also upheld by the Supreme Court of Canada.[21] That analysis of section 8 still holds today.

IV. WHAT IS FREEDOM? WHO IS EVERYONE?

One of the fundamental *Charter* issues that the *Southam* case did not address was whose rights were protected by the *Charter*. Did a corporate entity like *Southam* fall within the scope of the "everyone" who was entitled to freedom from unreasonable search and seizure, or was that freedom limited to natural persons? The Crown deliberately chose not to raise the issue in *Southam*, perhaps thinking that there were other rights that might provide a more secure foundation for the argument to exclude corporations from the reach of the *Charter*. Freedom of conscience and religion was a more promising candidate, since corporations were normally considered to possess neither.

One Sunday, about a month after the *Charter* came into force, Calgary police officers staked out Big M, a large Calgary drugstore, where they observed the sale of some groceries, plastic cups, and a bicycle lock. Such transactions were prohibited by the federal *Lord's Day Act*[22] and so charges were laid against Big M which were duly heard in a Calgary provincial court. Big M argued that the charges could not stand on the dual grounds that the *Act* was ultra vires the federal parliament and that it infringed the freedom of conscience and religion protected by section 2(a) of the *Charter*.[23]

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17 *Southam* (CA), *ibid* at para 12, citing *Minister of Home Affairs v Fisher* (1979), [1980] AC 319 at 329 (PC) [*Fisher*].
18 *Ibid*.
19 *Ibid* at para 13.
20 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 156.
21 *Ibid* at 170.
22 *Lord's Day Act*, RSC 1970, c L-13.
23 See *R v Big M Drug Mart Ltd* (1983), 49 AR 194 at para 2 (CA) [*Big M* (CA)].

Provincial Court Judge Stevenson, in a bold decision, relied upon both grounds to find the *Act* invalid and to acquit Big M.[24] In a particularly fearless passage, he concluded that whatever religious purpose may have originally justified the *Act* as being a proper subject for federal criminal legislation, that basis had long since evaporated with the social changes of the twentieth century. Therefore, the *Act* could no longer be considered a valid expression of the federal criminal jurisdiction.[25] In doing so, he relied heavily on an earlier trial decision of Justice Riley which had reached a similar conclusion, but which unfortunately had been overturned by the Court of Appeal.[26] However, Judge Stevenson's decision on the *Charter* issue proved to have a sturdier foundation.

The acquittal was appealed to the Alberta Court of Appeal, which considered two major issues — federalism and the *Charter* — as well as two subsidiary ones; namely, was the provincial court competent to grant a *Charter* remedy, and could Big M invoke the *Charter* protection for freedom of religion and conscience which, as a body corporate, it could not directly enjoy itself.[27]

As in *Southam*, a five-member panel was convened. Chief Justice McGillivray and Justice Laycraft were joined by Justices Harradence, Belzil, and Stevenson, and unlike the court in *Southam,* they were not unanimous. While the entire Court agreed that the provincial court judge had erred in finding the *Lord's Day Act* to be ultra vires Parliament, the three-member majority, for whom Justice Laycraft spoke, upheld the acquittal on the *Charter* ground.[28] In dissent, Justice Belzil would have found the *Lord's Day Act* to be *Charter*-compliant.[29] When the case came before the Supreme Court of Canada, Justice Dickson said of the two sets of reasons: "The two judgments delivered reflect, with clarity, the conflicting values, concerns and interests raised in this litigation. It is difficult to do justice to the judgments in brief compass."[30]

For Justice Belzil, who was joined in dissent by Chief Justice McGillivray, the suggestion that the *Charter* might invalidate the *Lord's Day Act* meant rejecting Canada's roots as "a part of 'Western' or European civilization molded in and impressed with Christian values and traditions."[31] Continuing in this vein, in what Justice Dickson described as a *cri de coeur*,[32] Justice Belzil continued:

> I do not believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the *Lord's Day Act* eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar. Such interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident and result in an

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24 *R v Big M Drug Mart Ltd*, [1983] 4 WWR 54 at 79 (Alta Prov Ct).
25 *Ibid* at 71-72.
26 *Ibid* at 69.
27 *Big M* (CA), *supra* note 23 at paras 1, 15.
28 *Ibid* at para 66.
29 *Ibid* at para 120.
30 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 306 [*Big M* (SCC)].
31 *Big M* (CA), supra note 23 at para 114.
32 *Big M* (SCC), *supra* note 30 at 310.

> amorphous, rootless and Godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.[33]

As with the decision of Justice John W. McClung in *Vriend* more than a decade later, one hears in these reasons some of the distress that the *Charter* has occasioned by its challenge to past practices and accepted certainties.[34] But unlike in *Vriend*, the majority in *Big M* placed itself on the right side of history and in doing so contributed significantly to the foundation of *Charter* jurisprudence.

With the Supreme Court of Canada's first pronouncements on the *Charter* and its interpretation still in the future, the majority of the Court of Appeal once again addressed the principles that should govern *Charter* analysis, this time in the context of the Crown's subsidiary arguments that, under the *Charter*, corporations had no rights and provincial court judges had no power. In a sweeping rejection of those arguments, Justice Laycraft (as he then was) wrote that "to accede to the rigid interpretation of the *Charter* urged by the Attorneys General would deprive Canadians of the full measure of rights and freedoms the *Charter* was intended to guarantee."[35] He went on to quote constitutional scholar Alexander Smith who "enjoined judges to bring to the exposition and interpretation of constitutional documents, not a restricted legalistic approach but, 'the genius of statecraft.'"[36] He also quoted a different passage from the Privy Council's decision concerning the constitution of Bermuda which found that document's terms "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[37] Justice Laycraft concluded unequivocally: "There can be no question that these principles must govern the exposition of the *Canadian Charter of Rights and Freedoms*."[38]

Applying these principles, the Court found that the alleged inability of a corporation to hold religious beliefs was irrelevant since anyone charged under the law was entitled to challenge its validity, regardless of whether the alleged cause of that invalidity was personal to them.[39] As for the jurisdiction of the provincial court, the majority took note of the "remarkable inconvenience" that would flow from a finding that such a court could not enforce the *Charter* and adopted the practical view that any court with jurisdiction over a matter to which the *Charter* applied should be competent to grant a *Charter* remedy, thereby foreshadowing decades of jurisprudence concerning the authority of other tribunals to apply the *Charter*.[40]

Turning to the central questions, the majority accepted the view, on ample authority, that the *Lord's Day Act* existed for a religious (and therefore moral) purpose, "to enforce the Sunday of the majority of the Christian religion."[41] This made it a proper subject for the

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33 *Big M* (CA), *supra* note 23 at para 115.
34 *Vriend v Alberta* (1996), 181 AR 16 (CA) [*Vriend*].
35 *Big M* (CA), *supra* note 23 at para 16.
36 *Ibid* at para 17, citing Alexander Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 180.
37 *Ibid* at para 18, citing *Fisher*, *supra* note 17 at 328.
38 *Ibid* at para 19.
39 *Ibid* at para 25.
40 *Ibid* at para 30.
41 *Ibid* at para 40.

criminal law.[42] However that very purpose, which saved the *Act* from challenge on federalism grounds, rendered it vulnerable to *Charter* review. The majority did not flinch from what the *Charter* required, and in a passage at the heart of the majority decision, Justice Laycraft wrote:

> As a statute with a religious purpose, does the *Lord's Day Act* infringe the fundamental freedom of conscience and religion? It is said that it does so by enforcing the Christian Sunday, if not Christian religious observance, on those whose religion requires them to observe a different Sabbath or whose conscience forbids the observance of any Sabbath. For those whose religion requires observance of a different Sabbath, this is said to produce at the very least an economic dis-incentive to the practice of their own religion and at worst a coercive atmosphere in which the nation is perceived to require all its citizens to observe the Christian Sunday.
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> It is not desirable, in my view, at this stage of *Charter* history to attempt a comprehensive definition of "freedom of religion" or "freedom of conscience". The latter term seems designed to encompass the rights of those whose fundamental principles are not founded on theistic belief. Whatever is comprehended by the terms, however, at the very least they mean that *henceforth in Canada government shall not choose sides in sectarian controversy. Standards shall not be imposed for purely sectarian purposes. Sectarian observance shall neither be enforced nor forbidden whether by economic sanction or the more subtle (but even more devastating) means of imposing the moral power of the state on one side or the other*.[43]

Nor was the defect in the *Act* limited to its purpose. Its effect on those who held another day sacred was significant, causing them to potentially lose not one but two days of work or business each week. "Moreover," Justice Laycraft concluded, "emphasis on economic effects alone ignores an even more serious burden: the coercive effect of the statute in imposing the Christian Sunday on all persons, Christians and non-Christians, alike."[44]

The majority went on to address one of the primary arguments in support of the *Act*: a pre-*Charter* decision of the Supreme Court of Canada which had upheld the *Act* against a challenge under the *Canadian Bill of Rights* which the Crown argued was binding on the Alberta Court of Appeal.[45] If *Charter* interpretation were subject to the dead hand of *Bill of Rights* jurisprudence, the efficacy of the *Charter* would have been dramatically diminished.

Justice Laycraft rejected such an approach, stating: "The most fundamental difference between the *Charter* and the *Bill* is the enhanced status of the *Charter* as part of 'the supreme law of Canada.' … It is not merely a declaration of existing law or a tool for use in statutory construction. By s. 24 … the Judiciary is charged with the task of devising appropriate remedies for infringement."[46] This difference in status required the conclusion that *Bill of Rights* jurisprudence did not apply to *Charter* cases. Unlike the *Bill of Rights*, whose protections (such as they were) were frozen in time, Justice Laycraft said, "The *Canadian*

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42 *Ibid* at para 14.
43 *Ibid* at paras 41-42 [emphasis added].
44 *Ibid* at para 48.
45 *Ibid* at para 51.
46 *Ibid* at para 57.

Charter of Rights and Freedoms will grow with Canada; it will survive and flourish with changing perceptions and a changing society."[47]

These conclusions, with various amplifications and supplemental comments, were adopted in their entirety by the Supreme Court of Canada.[48] Two passages in particular highlight how the conflicting reasons emerging from the Alberta Court of Appeal helped to clarify the meaning of the *Charter* guarantee of religious freedom. At the conclusion of his lengthy reasons, Justice Dickson made an observation that might be construed as a comment on the minority reasons in the Alberta Court of Appeal:

> In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. *The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to*.[49]

Justice Dickson echoed Justice Laycraft's comment on the extent of the change that the *Charter* had wrought:

> In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the *Charter*, it is no longer legitimate. With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. The state shall not use the criminal sanctions at its disposal to achieve a religious purpose, namely, the uniform observance of the day chosen by the Christian religion as its day of rest.[50]

V. STRIKE THAT

In 1983, with the Alberta economy in a tailspin which many blamed on the National Energy Policy, the Alberta government amended three key labour statutes in order to curtail the right to strike of unionized public servants, hospital workers, and police officers, subjecting them instead to compulsory interest arbitration. The affected unions responded with a legal challenge under section 2(d) of the new *Charter* which was set for trial before Justice D.C. McDonald, whose interest and expertise in *Charter* matters was already well established.[51] However, before the case could be heard, it was headed off by the government's decision to refer the constitutionality of the provisions in question directly to the Court of Appeal for an advisory opinion. As a result, the trial was stayed and as with the previous significant *Charter* cases, a five-member panel of the Court was convened to hear it.[52] The resulting decision was the leading case in what became the Supreme Court of Canada's labour trilogy that defined the relationship between freedom of association and the rights (if any) of workers to take collective action for the next two decades.

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47 *Ibid* at para 56.
48 *Big M* (SCC), *supra* note 30.
49 *Ibid* at 350 [emphasis added].
50 *Ibid* at 351.
51 *Alberta Union of Provincial Employees v Alberta* (1984), 52 AR 19, McDonald J, rev'd (1984) 53 AR 277.
52 *Reference Re Compulsory Arbitration* (1984), 57 AR 268 (CA).

Unlike the first two major cases, which emphasized the generous and purposive interpretation of *Charter* rights, the labour reference sounded a note of caution. While acknowledging the purposive approach, Justice Kerans stated that "it is not a *Charter* for revolution, and a court should hesitate to accept an interpretation which would have an extreme effect."[53] This case also differed from the first two in that the Court, for the first time in a key *Charter* case, could refer to relevant decisions from other Canadian jurisdictions which had, by then, also heard cases involving challenges to legislation on behalf of labour organizations relying on section 2(d).

In the reasons that followed, Justice Kerans touched on a wide variety of treaties and international instruments concerning freedom of association and the rights of labour, and referred to decisions from the Supreme Courts of India and the United States as well as the Privy Council.[54] He also considered arguments based on the writings of nineteenth-century political philosophers, applied the concepts of "weak" and "strong" rights articulated by the noted twentieth-century American legal philosopher Ronald Dworkin, and drew on the writings of Sir Ivor Jennings and Julius Stone.[55] Much of this was placed before the Court in argument by a veritable who's who of the Alberta labour bar (three of whom now sit on the Court of Queen's Bench, one of whom became long-time chair of the Labour Relations Board, and another who became the University of Alberta's dean of law).[56]

In the end, Justice Kerans for the majority concluded that the impugned legislation did not offend the *Charter* based on two broad factors. First he was unable to find any conclusive support either in precedent or relevant legislative facts for the proposition that freedom of association necessarily included (or was code language for) the right of unions to bargain collectively and to strike.[57] Second, the case was argued on the basis not that the asserted right of collective action by trade unions was a unique and socially indispensable instance of freedom of association, but that it was simply an example of a broader asserted right of all associations, be they trade unions or book clubs, to carry out the purposes for which they had joined together which, in Justice Kerans' view, lay beyond the scope of section 2(d).[58]

This second point was of particular significance. As Justice Kerans noted, on the one hand interpreting section 2(d) to protect the right to form associations without protecting the right to pursue their objects was "open to the criticism that it approves a sham freedom which says that we cherish groups but not what they do."[59] On the other hand, recognizing freedom of association as including the association's right to act "leads to the conclusion, for example, that a lynch mob has a prima facie right to act!"[60] Since those opposing the labour legislation took the position "that, for their purposes, we must not only accept that all associations have a right to exist, but also to act" the latter point was conclusive.[61] As Justice Kerans observed,

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53 *Ibid* at para 18.
54 *Ibid* at paras 38, 50.
55 *Ibid* at paras 56-57, 63-64, 76.
56 Current Alberta Court of Queen's Bench Justices Brian Burrows, Sheila Greckol, and June Ross appeared for various parties as did former University of Alberta Dean of Law, Timothy Christian, and Andrew Sims.
57 *Ibid* at paras 36, 78.
58 *Ibid* at paras 31, 36, 59-60.
59 *Ibid* at para 31.
60 *Ibid* at para 34.
61 *Ibid* at para 31.

the result of this approach would be to extend *Charter* protection to activities carried out by a group simply because they were performed by a group and all laws regulating group activity would have to be justified under section 1.[62] This, he felt, could not have been the intention of the *Charter*. He stated: "I am not persuaded that all actions by all groups to carry out all group purposes are *Charter*-protected."[63]

In the ensuing appeal to the Supreme Court of Canada, three of the six justices who participated in the decision adopted the reasoning of Justice Kerans as a complete answer to the appeal.[64] Justice McIntyre, concurring in the result, agreed that extending *Charter* protections to all group activities was not what section 2(d) intended but allowed that freedom of association did cover group activities which, if done by an individual, would attract *Charter* protection.[65] But this did not assist those challenging Alberta's labour laws because there was no individual equivalent to a strike and thus no *Charter* protection for it.

Only Chief Justice Dickson and Justice Wilson dissented. In their view, trade union activity was *sui generis* and *Charter* protection for it did not rest on or imply "unlimited constitutional license for all group activity."[66] Taking Justice McIntyre's point regarding the lack of any individual equivalent to strike action to reach the opposite result, they concluded the labour legislation offended the *Charter* guarantee of freedom of association precisely because it purported to preclude an activity which could only be performed in association with others.[67]

In the result the majority, following the Alberta Court of Appeal's lead, rejected the existence of constitutional protections for any and all associational activities, including collective bargaining or strike activity by a trade union, a view that was to prevail and shape the Canadian labour landscape for the next two decades.[68] Of course this account would not be complete without reference to the decision of the Supreme Court of Canada to revisit and reverse this conclusion in 2007. Speaking for a virtually unanimous Court in *Health Services and Support v. B.C.*, Chief Justice McLachlin wrote:

> An overarching concern is that the majority judgments in [*Reference Re PSREA*] and [*Professional Institute of Public Service of Canada v. Northwest Territories*, [1990] 2 SCR 367] adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The result was to forestall inquiry into the purpose of that *Charter* guarantee. The generic approach of the earlier decisions to s. 2(d) ignored differences between organizations. Whatever the organization — be it trade union or book club — its freedoms were treated as identical. The unfortunate effect was to overlook the importance of collective bargaining — both historically and currently — to the exercise of freedom of association in labour relations.[69]

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62 *Ibid* at para 34.
63 *Ibid* at para 36.
64 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, Beetz, Le Dain, and La Forest JJ [*Reference Re PSREA*].
65 *Ibid* at 409.
66 *Ibid* at 366.
67 *Ibid* at 367, 371.
68 *Ibid* at 390.
69 *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at para 30.

This decision therefore validated not only Chief Justice Dickson's dissent, but also the words of Justice Laycraft 25 years earlier that the *Charter* would not only grow, but "survive and flourish with changing perceptions."[70]

VI. LEGAL WRONGS

No account of the early years of Alberta Court of Appeal *Charter* jurisprudence would be complete without some reference to the Court's early decisions in criminal matters. The first of these cases to receive Supreme Court of Canada scrutiny was the 1984 decision in *Rahn* in which the accused was charged with operating a motor vehicle with an impermissibly high level of alcohol in his blood.[71] In convicting the accused, the provincial court judge had rejected the defence's argument that because the driver had not been informed of his right to instruct and retain counsel prior to producing a breath sample, his rights under section 10 (b) of the *Charter* had been breached.[72] The provincial court judge went on to hold that even if such a breach had occurred, the breath sample evidence should be allowed in because to exclude it would bring the administration of justice into disrepute.[73]

The accused appealed to the Alberta Court of Appeal where the primary issue was whether he had been detained so as to trigger the operation of section 10(b). The facts were not promising for the Crown, but an imaginative and persuasive prosecutor by the name of Jack Watson (now Justice Watson of the Court of Appeal) managed to convince the three member panel that the accused motorist, who had been ordered to pull over by the police, placed in the locked back seat of a police cruiser, subjected to a demand to accompany the officer to the police station to provide a breath sample on pain of criminal sanctions, and faced with the threat of arrest should he choose to leave, nevertheless had not been "detained" so as to trigger his rights under section 10(b).[74]

The Crown's argument and the Alberta Court of Appeal decision drew heavily on an earlier *Bill of Rights* decision of the Supreme Court, which had held that a motorist asked to provide a roadside breath sample had not been detained within the meaning of the *Bill*.[75] As we have seen, *Bill of Rights* precedent even when it emanated from the Supreme Court of Canada, had been discounted by the Alberta Court of Appeal in the *Big M* case because of the very different nature of that document from the *Charter*, a view that was confirmed by the Supreme Court. However in *Rahn*, the Alberta Court of Appeal took a different approach, suggesting that the similarity between the language in the *Bill of Rights* and the *Charter* indicated that the drafters of the *Charter* intended the word "detained" to be understood in the same manner as it had been interpreted under the *Bill of Rights*.[76]

On appeal, in conjunction with similar cases emanating from Saskatchewan and Newfoundland, the Supreme Court rejected this approach and reiterated the position

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70 *Big M* (CA), supra note 23 at para 56.
71 *R v Rahn* (1984), 50 AR 43 (CA) [*Rahn*].
72 *Ibid* at paras 1-3.
73 *Ibid* at para 4.
74 *Ibid* at paras 2-3, 28.
75 *Ibid* at para 17.
76 *Ibid* at para 24.

expressed by the Alberta Court of Appeal and the Supreme Court in *Big M*.[77] The *Charter*, being a constitutional document, must be viewed as "a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection" which should not be fettered by previous decisions or interpretations concerning the specific words it employed.[78] The resurrection of *Bill of Rights* precedent by the Alberta Court of Appeal and other courts provided the Supreme Court of Canada with the opportunity to put the final nail in the coffin of *Bill of Rights* jurisprudence as a tool for interpreting similar *Charter* rights. In a remarkably frank statement, with which the other Justices concurred, Justice LeDain observed:

> In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the *Charter*, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the *Charter* was emphasized by this Court in its recent decisions in *Law Society of Upper Canada v. Skapinker* … and *Hunter v. Southam Inc.*[79]

The second criminal case from the Alberta Court of Appeal to reach the Supreme Court was *Dubois* which concerned the application of the section 13 guarantee against the use of evidence gathered in one proceeding to incriminate the witness in another proceeding.[80] The accused was charged with murder. At his trial he gave evidence in his defence but was convicted. On appeal he was successful in obtaining a new trial. At his second trial the Crown entered the transcript of his evidence given at the first trial in order to incriminate him and obtained a second conviction. The accused appealed again arguing that the entry of the transcript infringed his section 13 right.[81]

The Alberta Court of Appeal concluded that the circumstances fell squarely within the ambit of section 13, noting that the drafting history of the section indicated that the protection involved extended to voluntary witnesses, like the accused, as well as those who testified under compulsion.[82] It also found the fact that the evidence in the first trial had been given before the proclamation of the *Charter* was irrelevant to the availability of the *Charter* protection and did not involve giving the *Charter* retrospective effect. The significant time frame was when previous evidence was used.[83]

The real issue in the view of the Alberta Court of Appeal was whether the second trial fell within the meaning of "any other proceedings" or was merely another step in a single proceeding in which case the section 13 protection would not apply.[84] This question the Court answered by reference to what it understood as the purpose of the protection: "[t]he

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77 *Rahn v The Queen*, [1985] 1 SCR 659 at 661.
78 *R v Therens*, [1985] 1 SCR 613 at 638.
79 *Ibid* at paras 638-39.
80 *R v Dubois* (1984), 51 AR 210 (CA) [*Dubois*].
81 *Ibid* at paras 3-4.
82 *Ibid* at para 7.
83 *Ibid* at para 4.
84 *Ibid* at para 8.

key is that, to trigger the rule, the witness must face some new risk in the new or other proceeding. Conversely, if the witness later faces precisely the same risk as he did on the occasion when he testified, he remains unprotected."[85] Since the accused faced no new or different risk than he had during the first trial, section 13 did not apply and the conviction was upheld.[86]

At the Supreme Court of Canada, many of the Alberta Court of Appeal conclusions were upheld. The availability of section 13 protection for voluntary witnesses was confirmed, the Court's analysis of the "retrospective" issue was upheld, as was the finding that the Crown sought to use the evidence at the second trial in order to incriminate the accused.[87] It was on the "other proceedings" issue that the Supreme Court and the Court of Appeal parted company. In the view of the Supreme Court, allowing the use of the transcript of evidence at the first trial to be entered by the Crown at the second, violated the accused's rights under section 11(c) "not to be compelled to be a witness in proceedings against [themselves]."[88] Thus, the Supreme Court reasoned: "[t]o hold that a new trial is not 'any other proceedings' within the meaning of s. 13 would in fact authorize an interpretation of a *Charter* right which would imply a violation of another *Charter* right. Such a result should be avoided."[89] As a result, the accused's appeal was allowed and a third trial ordered. But that is not the end of the story.

After the Alberta Court of Appeal's decision in *Dubois* but before the Supreme Court of Canada decision that reversed it, a similar case known as *Mannion* came before the Alberta Court of Appeal.[90] Like *Dubois*, the *Mannion* case involved an accused convicted following a trial at which he gave evidence in his own defence. On appeal he succeeded in winning a new trial at which he again testified. The Crown cross-examined him at the second trial on the evidence he gave at the first and another conviction followed.[91] Appealing this second conviction, the accused claimed that the cross-examination had been a violation of his section 13 rights. The Court of Appeal concluded that there was no meaningful difference between this case and *Dubois*.[92] In particular the Court considered that it made no difference that in one case the Crown cross-examined the accused on his earlier evidence and in the other the Crown entered the transcript of the earlier evidence.[93] As a result, based on its own decision in *Dubois*, the Court of Appeal concluded there had been no breach of section 13.[94]

This decision also advanced to the Supreme Court of Canada, which by that time had heard and reversed the Alberta Court of Appeal decision in *Dubois*. The Supreme Court agreed with the Court of Appeal that there was no meaningful distinction between *Dubois* and *Mannion*, but of course with the opposite result.[95] In the opinion of the Supreme Court

85 *Ibid* at para 23.
86 *Ibid* at para 26.
87 *Dubois v The Queen*, [1985] 2 SCR 350 at 359-61, 364.
88 *Charter*, *supra* note 1, s 11(c); *ibid* at 385.
89 *Dubois v The Queen*, *ibid* at 366.
90 *R v Mannion* (1984), 53 AR 81 (CA) [*Mannion*].
91 *Ibid* at para 3.
92 *Ibid* at paras 5-6.
93 *Ibid* at para 6.
94 *Ibid* at para 7.
95 *R v Mannion*, [1986] 2 SCR 272.

the cross-examination of *Mannion* on his prior evidence offended section 13 and required the second conviction be set aside. But that is not the end of the story either.

The principles articulated in *Dubois* and *Mannion* came to be seen as increasingly impractical, allowing accused persons who won a retrial to tell a different story at their second hearing with impunity. This in turn led prosecutors to seek ways of narrowing the scope of section 13, persuading courts to draw a distinction between using prior evidence to incriminate the accused (not acceptable under section 13) and using prior evidence to impeach the accused's credibility (acceptable under section 13). The difficulties involved in drawing such distinctions became increasingly apparent in subsequent cases. Based on the Supreme Court of Canada decisions in *Dubois* and *Mannion* these distinctions were applied equally to voluntary and compelled evidence. This had the effect of diluting the section 13 protection for witnesses who actually had been compelled to give evidence the first time around since it opened the door to the use of that evidence against them to impeach their credibility. And in any event, drawing a line between the use of evidence to impeach as opposed to incriminate was almost impossible.

The result of this unsatisfactory state of affairs was the 2005 Supreme Court of Canada decision in *Henry*, which undertook a wholesale review and revision of the Court's section 13 jurisprudence.[96] That review, to a considerable extent, vindicated the position which had been taken by the Alberta Court of Appeal in its rulings in *Dubois* and *Mannion*. Based on an analysis of the purpose of section 13, the Court of Appeal had concluded that the section's protection is limited in the case of an accused at a retrial. Twenty years later the Supreme Court came to essentially the same conclusion. Justice Binnie, speaking for the unanimous Court in *Henry*, noted the difference between the trial of an accused who had been a compelled witness in an earlier proceeding and the retrial of an accused who volunteered evidence at both the first and second trials, and concluded no section 13 protection was afforded the latter.[97]

The Supreme Court of Canada decision in *Dubois* was considered to have ultimately been correct because the accused had not testified at his second trial, and entering the entire transcript from the first trial violated his right to remain silent at his second trial.[98] But the decision in *Mannion* could no longer be considered good law.[99] Justice Binnie attributed the Supreme Court mistake in *Mannion* to the fact that it (unlike the Alberta Court of Appeal) had not followed its own purposive approach in its interpretation in section 13.[100]

VII. CONCLUSION

This short article attempts to capture some of the flavour of Alberta Court of Appeal *Charter* jurisprudence during the first five years of the life of the *Charter*. There can be little doubt that those were exciting years to be a judge, exploring the meaning and scope of the newly entrenched rights enjoyed by Canadians and addressing fundamental questions about

96 *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609 [*Henry*].
97 *Ibid* at paras 60-61.
98 *Ibid* at para 39-40.
99 *Ibid* at paras 44-46.
100 *Ibid* at para 47.

the direction in which the *Charter* would take the law. It is of course axiomatic that courts like the Alberta Court of Appeal do not get to choose the cases they hear. The law they apply and sometimes make is a product of the cases litigants bring before them. In that respect the Court of Appeal was fortunate to be on the receiving end of early cases raising significant questions about the meaning of the *Charter* and how it should be interpreted and applied. The Court responded with judgments that in many respects presaged and contributed to the foundational principles adopted by the Supreme Court. Its rejection (in *Big M* at least) of the restricting influence of *Bill of Rights* jurisprudence, its advocacy for a generous interpretation of *Charter* rights, and its endorsement of the view that the interpretation of rights would evolve to meet changing societal conditions and perceptions, helped set the tone for the direction *Charter* jurisprudence has taken ever since.

Judging the significance of the Alberta Court of Appeal's contributions by the extent to which they have found favour with the Supreme Court of Canada is (as this brief survey illustrates) a dubious yardstick. As we have seen in one instance (freedom of association) it took the Supreme Court of Canada 20 years to conclude that the Alberta Court of Appeal had been wrong and in another (protection against self-incrimination) the same length of time to conclude that it had been right. Nonetheless, the degree to which the Supreme Court of Canada in those early cases embraced principles and conclusions reached by the Alberta Court of Appeal suggests a contribution of which this Court can be proud.