

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - APPEAL DIVISION**

Citation: Govt.PEI v. Condon et al. 2006 PESCAD 01

Date: 20060216

Docket: S1-AD-0965 and S1-AD-1044

Registry: Charlottetown

BETWEEN:

THE GOVERNMENT OF PRINCE EDWARD ISLAND

APPELLANT

AND:

**MERRILL CONDON, GAGE DIXON, CAROL DUNN,
JOHN FOOTE, WANETTE B. FOOTE, DANIEL KING,
WANDA KING, LISA MACKINNON, JACK MACSWEEN,
JOHN MCTAVISH AND BARBARA STEELE**

RESPONDENTS

AND:

THE PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION

RESPONDENT

Before: The Honourable Chief Justice G.E. Mitchell
The Honourable Madam Justice L.K. Webber
The Honourable Mr. Justice K.R. MacDonald

Appearances:

Ruth M. DeMone, counsel for the Appellant

David W. Hooley, Q.C. and Alanna P. Taylor, counsel for the Respondents

Jacqueline R. O'Keefe, counsel for the Respondent, Prince Edward Island Human Rights Commission

Place and Date of Hearing

Charlottetown, Prince Edward Island
November 23 and November 24, 2005

Place and Date of Judgment

Charlottetown, Prince Edward Island
February 16, 2006

Written Reasons by:

The Honourable Chief Justice G.E. Mitchell

Concurred in by:

The Honourable Madam Justice L.K. Webber

The Honourable Mr. Justice K.R. MacDonald

CONSTITUTIONAL LAW - Charter s.2(d) - Political belief- Validity of amendments to provincial Human Rights legislation removing remedies available to certain group of political belief discrimination complainants.

The Court of Appeal held amendments to the **Human Rights Act** restricting remedies for a certain group of political belief discrimination complainants violated s. 2(d) of the **Charter** and were not saved by s.1.

Authorities Cited:

CASES CONSIDERED: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (SCC); *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1. S.C.R. 313 (SCC); *Dunmore v. Ontario*, [2001] 3 S.C.R 1016 (SCC); *R. v. Oakes*, [1986] S.C.R. 103 (SCC)

STATUTES CONSIDERED: *An Act to Amend the Human Rights Act*, S.P.E.I. 1997, Cap. 65; *Canadian Charter of Rights and Freedoms*, s.52 of the **Constitution Act, 1982**, s.1, s-s.1(d), s-s.2(b), s-s.2(d), s-s.15(1), s.33; **Human Rights Act**, R.S.P.E.I. 1988, Cap. H-12, s-s. 1(m), s-s.6(1), s.28.4, s-s.28.4(1)(b), ss. 28.4(2) to (5), s.28.6, s.28; **Election Act**, R.S.P.E.I. 1988, Cap. E-1, s.24

Reasons for judgment:

Mitchell C.J.P.E.I.:

[1] This appeal concerns the constitutionality of legislation which withdraws access to certain remedies provided by the **Human Rights Act** R.S.P.E.I. 1988 Cap. H-12 (the **HRA**) from a group of political belief discrimination complainants who claim they were victimized by patronage following the provincial election of 1996.

[2] More specifically, the appeal is from decisions of a judge of the Trial Division [2002 PESCTD 41 and 2004 PESCTD 36] declaring that the statutory limitation on the available remedies for political belief discrimination and the compensation formula prescribed by sections 28.4(2) to (5) of the **HRA** are contrary to sections 15(1) 2(b), and 2(d) of the **Canadian Charter of Rights and Freedoms** and not saved by s.1. The limitation and compensation formula came into effect on December 24th, 1997 through **An Act to Amend the Human Rights Act** S.P.E.I. 1997, Cap. 65.

[3] Political belief was added to the **HRA** as a prohibited ground of discrimination in 1975. See: S.P.E.I. 1975, Cap. 72. It is defined in s-s. 1(m) as meaning:

...belief in the tenets of a political party that is at the relevant time registered

under section 24 of the **Election Act**, R.S.P.E.I. 1988, Cap. E-1 as evidenced by

- (i) membership of or contribution to that party, or
- (ii) open and active participation in the affairs of that party.

This is a very specialized type of political belief. The definition makes it obvious the prohibition against political belief discrimination under the **HRA** was aimed specifically at addressing the notorious problem of patronage that so often had resulted in the mass replacement of unprotected workers and service contractors in the public service of this province following a change of government. The practice took place under both Liberal and Progressive Conservative governments. Those dismissed or not rehired or not re-engaged following a change were supporters of the former governing party, or at least were perceived as such, while their replacements were supporters, or perceived as such, of the new governing party.

[4] As a result of the amendments enacted by S.P.E.I.1997, Cap. 65 ss. 28.4 and 28.6 of the **HRA** now provide:

- 28.4 (1) A Human Rights Panel
 - (a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed; and
 - (b) subject to subsection (2), may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:
 - (i) to cease the contravention complained of;
 - (ii) to refrain in future from committing the same or any similar contravention;
 - (iii) to make available to the complainant or other person dealt with

contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;

- (iv) to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;
- (v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.

(2) Subject to subsections (3), (4), and (5), where

- (a) a Human Rights Panel orders compensation in respect of a complaint made pursuant to subsection 6(1) relating to termination of employment or refusal to employ; and
- (b) the complainant has been employed by the respondent in the twelve months preceding the discriminatory act on which the complaint is based,

the amount awarded by the Human Rights Panel shall not exceed the weekly remuneration of the complainant when last employed by the respondent, multiplied by the total number of weeks worked for the respondent divided by fifty-two, multiplied by two.

(3) Subsection (2) applies to all complaints of

discrimination based on political belief, including political belief complaints based on association as described in section 13 that

- (a) relate to employment in the casual division of the civil service as defined in the Civil Service Act, R.S.P.E.I. 1988, Cap. C-8 or contracts for service where the Government of Prince Edward Island or a Crown agency is a party to the contract; and
- (b) are filed with the Commission prior to June 1, 1999, including complaints which are unresolved as of the date of the coming into force of this Act.

- (4) Where a complaint to which subsection (2) applies is based upon a contract for service, the complainant's weekly remuneration for the purposes of subsection (2) is deemed to be the contract amount earned in the last twelve months of service, divided by fifty-two.
- (5) Compensation ordered pursuant to subsection (2) is deemed to be comprehensive and exhaustive, and a Human Rights Panel shall make no other order in respect of any complaint to which subsection (2) applies.
- (6) A Human Rights Panel may make any order as to costs that it considers appropriate.
- (7) A Human Rights Panel shall serve a copy of its decision, including the findings of fact upon which the decision was based and the reasons for the decision, on the parties.

.....

- 28.6 Subject to subsection 28.4(2), no settlement effected pursuant to this Act and no order made by a Human Rights Panel may compensate a person for wages or income lost or expenses incurred prior to one year before the date of the discriminatory act on which the person's complaint is based.

[5] Subsection 6(1) referred to in s-s 28.4(2)(a) provides:

- 6.(1) No person shall refuse to employ or to continue to employ any individual
- (a) on a discriminatory basis, including discrimination in any term or condition of employment; or
 - (b) because the individual has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of the individual.

[6] Discrimination is defined in s.1(d) of the **HRA** as:

- (d) ‘discrimination’ means discrimination in relation to age, colour, creed, ethnic or national origin, family status, marital status, physical or mental handicap, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals;

[7] Subsections 28.4(2) to (5) of the **HRA** set out in para. four establish a special remedial regime for a very particular group of political belief discrimination complaints relating to employment with the Government of Prince Edward Island (the “Government”). According to the Government, the purpose of this legislation was to provide a means to quickly settle the large number of political belief discrimination complaints arising from the aftermath of the 1996 election. [Appellant’s factum in S1-AD-0965 at para. 74.]

[8] Most of the respondents (the term I use herein to refer to the individual respondents but not the Human Rights Commission) were casual employees of the Government or had their wages subsidized by the Government. All were members or supporters of the Liberal Party in 1996. The Liberal Party was at the time registered under s. 24 of the **Election Act**. Typically such employees as the respondents would work several weeks each year and be rehired for the same period of the following year if their work record was satisfactory. In November of 1996 there was a Provincial election resulting in a change of the governing party from the Liberals to the Progressive Conservatives. Following this change, although they all had satisfactory work records, the respondents were either not rehired at all or had their hours of work reduced.

[9] Prior to December 24th, 1997, most, but not all, of the respondents filed

complaints with the Province's Human Rights Commission alleging "political belief" discrimination. The **HRA** provides for investigation of a complaint by the Executive Director of the Human Rights Commission or his delegate, and where there is sufficient evidence, the matter may be referred to a Human Rights Panel which has authority to order certain remedies if it finds a complaint has merit.

[10] At the time the respondents filed their complaints, a Human Rights Panel that found discrimination, whether based on political belief or some other prohibited ground, could have ordered the offending party, pursuant to s. 28.4(1)(b) of the **HRA** as it then was, to do one or more of the following:

- (1) to cease the contravention complained of;
- (2) to refrain from committing the same or a similar contravention in the future;
- (3) to make available to the complainants the rights, opportunities and privileges denied them;
- (4) to compensate them for their lost wages or income; and
- (5) to take any other action the Panel considered proper in order to put the complainants in the position they would have been in but for the contravention.

However, on December 24th, 1997, while the complaints were still pending before the Human Rights Commission, the governing party used its majority in the Legislature to pass Bill No. 80 which became S.P.E.I. 1997, Cap. 65, amending s. 28.4 of the **HRA** as set out above in para. four. [See: **Hansard**, P.E.I. Legislative Assembly, December 24, 1997 at pp.3502-3507 filed in the court below on November 24, 2003]

[11] The amendments to s. 28.4 affected political belief discrimination complaints relating to casual employment with the Government which were filed before, but remained unresolved on, December 24th, 1997 or that would be filed before June 1st, 1999. In these cases, if a Human Rights Panel ordered compensation, the amount could not exceed the sum arrived at according to the formula prescribed in s.28.4(2). Under the formula, the most compensation a Panel could award, if it found such a complaint of political belief discrimination had merit, would be a relatively small sum arrived at by multiplying the employee's weekly wage by the number of weeks worked divided by fifty-two and multiplying the result by two. Furthermore, s. 28.4(5) provides that if a Human Rights Panel awards compensation in accordance with s.28.4(2) of the **HRA**, it can not make any other order in respect of the complaint.

[12] The appellant contends in its factum that s.28.4(5) only limits the amount of

compensation that can be awarded and that it does not prevent access to other remedies under s. 28.4(1). However, even if that were so, the restriction would still be considerable. The maximum compensation that can be awarded under the formula in s. 28.4(2) is only about 4% of the total wages the complainant had received from the Government. On the other hand, where s-s. 28.4(1)(b)(iv) of the **HRA** applies, it empowers a Human Rights Panel to order that someone discriminated against on a prohibited ground be compensated “for all or any part of wages or income lost or expenses incurred by reason of the contravention.”

[13] The Government, on an “*ex gratia*” basis, eventually offered the respondents who had filed complaints with the Human Rights Commission settlements as general damages only for “hurt and humiliation” and “not” as compensation for loss of earnings or wrongful termination of employment. See: Appeal Book Vol. III S1-AD-1044 at page 533. The amounts offered were consistent with the maximum compensation that could be ordered under the formula in s.28.4(2). The offers were refused. The Executive Director of the Human Rights Commission pursuant to s-s. 22(4)(b) of the **HRA** then decided to discontinue the complaints because, in his opinion, the proposals that had been made to the respondents for settlement were fair and reasonable considering the statutory limits on any award a Panel could make following the enactment of the impugned amendments to s. 28.4. The decision of the Executive Director was affirmed by the Chairperson of the Human Rights Commission. As a result, the Chairperson did not appoint a Panel to deal with the respondents’ complaints and therefore no finding of discrimination has been made against the Government.

[14] In September of 1999 the respondents commenced proceedings in the Trial Division by an application seeking:

- (1) declarations that Sections 28.4(2), (3), (4) and (5) of the **Human Rights Act** violated their rights under s. 15(1) and 2(d) of the **Canadian Charter of Rights and Freedoms** and the rule of law;
- (2) various remedies under s.24(1) of the **Charter**;
and,
- (3) relief under the **Judicial Review Act** , R.S.P.E.I. 1988 Cap. J-3 dealing with the decisions of the Executive Director and Chairperson of the Human Rights Commission.

[15] The only claims in the respondents’ originating application that have been heard to date are the ones for declarations that the 1997 legislation, that amended the **HRA** so as to restrict the remedies available for political belief discrimination, is contrary to the **Charter**. These claims were extracted from the main application and

brought forward by separate motions for determination of questions of law by the trial judge. This appeal is from the trial judge's decisions with respect to those motions.

[16] The first motion was filed in April of 2001. It was for a determination of whether the impugned amendments violated s.15(1) of the **Charter** which provides:

- 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[17] For the purposes of the s. 15(1) motion the parties filed the following agreed statement of facts:

1. For the purpose of a motion to be brought by the Applicants under Rule 21 for the determination of a question of law with respect to the constitutionality of section 28.4 of the **Human Rights Act** R.S.P.E.I. 1988 Cap. H-12, the parties have agreed on this statement of facts. The parties have further agreed that this agreed statement of facts has been prepared for the limited purpose set out above and shall not be used for any other purpose.
2. All of the Applicants, except Barbara Steele, were employed by the Respondent Government of Prince Edward Island (herein 'Government') or one of its agencies, boards or commissions on a seasonal basis during 1996, and in most cases, in the years preceding 1996. Barbara Steele was employed by the Montague Watershed Enhancement Group, a non-governmental organization which is partly funded by grants from the Government. Ms. Steele's salary was funded by Government through its Employment Development Agency.
3. The Applicants, except Wanette Foote and Carol Dunn, were employed on a seasonal basis over the course of several years and had received satisfactory performance evaluations during that time to the extent that such performance evaluations were completed. Wanette Foote was employed by Government for six (6) weeks in 1996 only. Carol Dunn was employed seasonally for several years and continues to be employed, but with a reduction in hours from that worked in 1996.
4. After the Provincial Government General Election of November 1996 when the Progressive Conservative Party

of Prince Edward Island was elected the Applicants were either not rehired into the seasonal position they had previously occupied or in the case of Carol Dunn, the hours of work were reduced. The Applicants were either known to have connections to the Liberal Party of Prince Edward Island or perceived to have such connections.

5. All of the Applicants except for Barbara Steele and Lisa MacKinnon filed human rights complaints claiming discrimination in a matter of employment on the basis of political belief. Barbara Steele commenced a civil claim under GSC-16266 through her former counsel, and she alleges that she also instructed her former counsel to file a human rights complaint on her behalf, but that he did not do so. Lisa MacKinnon alleges that she instructed her former counsel to commence a civil claim and file a human rights complaint on her behalf, but that he did not do so.
6. Before the human rights complaints of the Applicants (other than Barbara Steele and Lisa MacKinnon) were resolved, Government passed **An Act to Amend the Human Rights Act** S.P.E.I. 1977, Cap. 65, a copy of which is attached as Schedule 'A,' which prescribed a formula which capped the maximum compensation to which the Applicants would be entitled if their complaints were determined to have merit. The amendment, which received Royal Assent on December 24, 1997, was retroactive with respect to all complaints which were unresolved on December 24, 1997.

[18] That motion was heard in June and July of 2001, and on June 26, 2002, [2002] P.E.I.J. No. 56, 2002 PESCTD 41, the trial judge rendered a decision containing the following declaration:

...that the statutory limitation on the available remedies and the compensation formula prescribed by s. 28.4(2) to (5) of **An Act to Amend the Human Rights Act**, Stats. P.E.I. 1997, Cap. 65 constitutes a violation of the Applicants' equality right as protected under s. 15(1) of the **Charter** and is not saved under s.1 of the **Charter**.

[19] The Government filed a notice of appeal but, because the originating application also challenged the amendments on the basis they violated the respondents' rights under s. 2(d) of the **Charter**, this court directed the parties to have that issue determined by the court below before proceeding with the appeal of the s.15(1) declaration. Accordingly, in November of 2003 the parties filed a motion in the Trial Division for a determination as to whether the impugned amendments

violated s. 2(b) or (2d) of the **Charter**. It is to be noted that s. 2(b) was not included in the originating application nor was it amended to include a claim with respect to s. 2(b). For the purposes of the s. 2(b) and (d) motion, the parties agreed to using the same statement of facts as agreed upon in relation to the previous s. 15(1) motion and, in addition, agreed that the court could refer to the record filed by the Human Rights Commission and affidavits filed by the respondents. [The affidavits and the record of the Human Rights Commission are contained in the 3 volumes of the appeal book filed in S1-AD-1044.] The affidavits all tell a similar tale. That of the respondent John Foote is representative. In his affidavit Mr Foote states:

1. I am an applicant in this Application and as such have the personal knowledge of the matter I have deposed to herein except where otherwise stated.
2. From 1993 to 1996, I worked for the Government of Prince Edward Island (the 'Respondent Government') with the Department of Transportation and Public Works. I was a Special Projects Foreman (level GL2) and worked for ten (10) weeks in each of my four (4) years of employment. As foreman I supervised three (3) people and together we cut grass on roadsides and ditches, painted guard-rails, laid gravel on the roadside, did highway safety flag work and assisted other crews where needed. For this, I earned \$11.35 per hour together with truck rental expenses of over \$400.00 every two weeks, as well as chain saw rental of \$60.00 to \$150.00 every two weeks. Attached hereto as Exhibit 'A' are true copies of receipts relating to my employment earnings for the year 1996, the final year of my employment.
3. During my period of employment, I always received a satisfactory performance evaluation. During my four years I had two supervisors – in 1993 and 1994, George MacPherson and in 1995 and 1996, Irving MacKay. My job record – evaluated on my efficiency as well as my ability to work with my crew and my own supervisors – in no way justified the termination of my employment. I passed a course on flagging and safety, use of highway communications and safety equipment. Attached as Exhibit 'B' are true copies of my performance evaluations for the years 1994 and 1995.
4. I initially applied for my job in the Spring of 1993. Every Spring thereafter I received written or telephone notice to reapply from the Department of Transportation and Public Works. The only thing I was aware of which could result in my not being re-hired was a poor job performance rating. For example, one member of a crew of mine did

fail her performance evaluation and she was not re-appointed with my crew in the next year. As a result, I believed I had the right of being rehired annually subject only to work availability and satisfactory job performance.

5. In the Spring of 1997, despite not receiving notice, I submitted my application for rehiring as I had in previous years. I filed my application at the Montague Regional Service Centre. I was not recalled for work. Someone else now holds my position, who I know to be a Conservative party supporter. I was made aware from the media that my former position as Special Projects Foreman was likely to be made a permanent part time position under the Casual Conversion Program. I was advised and verily believe it to be true that I would not be eligible to apply for this permanent part time position because I did not meet the prescribed eligibility requirements for the Casual Conversion Program in that I had not been in the former position for the preceding two years. I verily believe the prescribed eligibility requirements for the Casual Conversion Program were designed to effectively exclude persons employed prior to the November 1996 election and to favour supporters of the Progressive Conservatives.
6. I lost my employment subsequent to the election in November 1996 when the current Progressive Conservative Government of the Province of Prince Edward Island took office.
7. Like the other Applicants in this case, I verily believe that I lost my position because I was known or thought[t] to have loyalties or connections to the Provincial Liberal Party. I am a Liberal Party of Prince Edward Island member. My parents were active Liberals. I attended and continue to attend Liberal rallies. I support the Liberal Party by buying tickets, working in polls and assisting with sign erection and removal. In the mid-1990's, I attended a Liberal Convention as a Leadership delegate.
8. Through my former legal counsel, John MacDougall in November of 1997, I filed a Complaint to the Respondent Prince Edward Island Human Rights Commission, a true copy of which is attached as Exhibit 'C.' As a result of my Complaint, I received an offer of settlement from the Respondent Government dated 16 February 1998, a true copy of which Settlement offer is attached as Exhibit 'D.' The offer in no way reflected the real damages suffered by me as a result of my termination of employment. I was advised by the Prince Edward Island Human Rights Commission (the 'Commission') that according to the

Human Rights Act, I was not entitled to compensation reflecting the actual level of financial loss I had suffered. No action was taken on my behalf by the Commission to challenge the legal formula and standards which restricted the compensation available to me. I did not accept the offer of settlement.

9. As a result on or about 26 March 1998, the Commission dismissed and discontinued my Complaint, a true copy of which dismissal is attached hereto as Exhibit 'E.' The dismissal and discontinuance was confirmed upon review as stated in a letter from the Commission to my counsel dated 30 August 1999, a true copy of which is attached hereto as exhibit 'F.'

[20] According to exhibit D attached to his affidavit Mr. Foote received an offer of settlement in the amount of \$700.00.

[21] The motion for a declaration with respect to s. 2(b) and (d) of the **Charter** was heard by the trial judge on November 27, 2003 and on May 6, 2004, he rendered a decision, 2004 PESCTD 36, containing the following declaration:

... that the statutory limitation on the available remedies and the compensation formula prescribed by s. 28.4(2) to (5) of the **HRA** constitutes a violation of the Applicants' fundamental freedoms under ss. 2(b) and (d) of the **Charter** and is not saved by s. 1 of the **Charter**.

[22] The Government also appealed this declaration. The two appeals were heard by this court at the same time and treated as one.

DISPOSITION

[23] I have decided to uphold the decision of the trial judge with respect to s. 2(d) of the **Charter**. My reason is that the withdrawal of remedies actually helps to sustain the patronage system and encourages the violation of the right to join and participate in the activities of a political party. Furthermore the restrictions do not meet the test of s.1 of the **Charter**.

[24] As my decision with respect to s.2(d) of the **Charter** is sufficient to determine the fate of the impugned amendments, I do not propose to deal with either s.15(1) or s. 2(b). In any event, a violation of either s.15(1) or s. 2(b) would not result in a different remedy than for a violation of s. 2(d). Furthermore, s.2(b) is not part of the claim in the originating application.

ANALYSIS

[25] Section 2(d) of the **Charter** provides:

2. Everyone has the following fundamental freedoms: ...

(d) freedom of association.

[26] The purpose of the freedom in s.2(d) is to protect the collective pursuit of common goals. See: **Reference re Public Service Employee Relations Act (Alta.)**, [1987] 1 S.C.R. 313, and **Dunmore v. Ontario**, [2001] 3 S.C.R. 1016. The collective pursuit of common goals is of course the principal reason for joining a political party. Hence, doing so is an associative activity protected by s. 2(d).

[27] A legislature can enact any laws it wants to, including ones limiting remedies, provided they are constitutional. By the same token, a legislature can amend any law it has enacted provided the amendment is constitutional. Laws or amendments to laws are not necessarily unconstitutional just because they are unfair or work a hardship. Courts will not interfere with legislation that is constitutional no matter how much it might disapprove of it. On the other hand, laws or amendments to laws that might otherwise be within the legislative authority of a province or Parliament to enact are unconstitutional if they infringe **Charter** protected rights. Such laws must be struck down by the courts unless they are saved by s. 1 of the **Charter** or unless the legislature has properly invoked s. 33 of the **Charter**.

[28] Although the **HRA** is accorded an exalted status among provincial laws it is still only a provincial statute and therefore can be altered by the Legislature without constitutional consequences unless doing so runs afoul of **Charter** rights. The impugned amendments exclude a certain group of political belief complainants from having access to the full range of protection available to other discrimination complainants under the **HRA**. It is true a province is generally under no positive obligation to legislate in an area just because it has constitutional authority to do so. Thus, the Province may have been under no constitutional obligation to add political belief to the list of prohibited grounds of discrimination when it did so in 1975. However, that does not mean that in 1997 it could withdraw the protection it had been providing against political belief discrimination under the **HRA** without such withdrawal having constitutional consequences. That is because s.2(d) of the **Charter** which came into effect in 1982 may, depending on the circumstances, prohibit the selective exclusion of a group from whatever protections are necessary to form and maintain an association. As Bastarache J. stated in **Dunmore** at para 22 "... exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom." Therefore, although there may be no constitutional right *per se* to the protective legislation of the **HRA**, the deliberate

exclusion of a group from such protection may nevertheless substantially impair their exercise of a constitutional right. See: **Dunmore** per Bastarache J. at p. 1051.

[29] Patronage has a long tradition in this Province. It is a systemic problem the existence of which is so notorious and longstanding it requires no formal proof. One of the chief manifestations of the patronage system has been the wholesale purging of unprotected government employees that regularly follows a change of governing party. The addition in 1975 of political belief to the list of prohibited grounds of discrimination in the **HRA** indicates the Legislature's recognition of a need to protect employees from the negative consequences arising from joining and supporting the registered provincial political party of their choice.

[30] The right protected by the **HRA** since 1975 is now an associative activity protected by s. 2 (d) of the **Charter** which came into force in 1982. The question is whether the 1997 amendments to the **HRA** taking away some of its protection against political belief discrimination violate s.2(d) of the **Charter**. The answer lies in whether or not the amendments substantially interfere with the freedom of persons to join and take part in the activities of a political party.

[31] In order to determine whether a law infringes a **Charter** right, it is appropriate to consider its purpose and effect. As was said by Dickson C.J. writing for the majority of the Supreme Court of Canada in **R. v. Big M Drug Mart Ltd.**, [1985] 1 S.C.R. 295 at paras. 80 and 81:

[80] ... both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object, and thus, its validity.

[81] Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where

the object is clearly improper, without inquiring into the legislation's actual impact.

[32] The 1997 amendments to s. 28.4 of the **HRA** were clearly not intended to advance the cause of human rights. Quite the contrary. For casual employees of the Government, the amendments took away access to remedies that had previously been provided to protect and enforce their right to join and support the registered political party of their choice without fear of losing their jobs. It is clear, given the timing and context, the purposes of the amendments were to expedite the disposition of the large number of complaints that followed the 1996 election and to limit Government's exposure in the event a Human Rights Panel found it to have discriminated against its casual employees on the basis of their political belief.

[33] In my view, the exclusion of the employees referred to in s.28.4(3) from the full panoply of remedies available to others under the **HRA** is constitutionally impermissible. The impugned amendments to the **HRA** undermine the values served and protected by s. 2 (d) and create conditions which interfere with the exercise of that constitutional right. History has shown that absent adequate legislative protection against discrimination on grounds of political belief such employees are vulnerable to job loss because of patronage. Allowing the amendments to stand would discourage participation in the Province's political process and trivialize the consequences of discrimination on the basis of affiliation with a registered political party. The amending legislation sends a message that interfering with freedom of political association is not such a bad thing and actually quite affordable in terms of the compensation that can be awarded under the **HRA**. This makes a mockery of the right to join and support a political party. Accordingly, I agree with the trial judge that the legislation removing access to s. 28.4(1)(b) remedies for political belief discrimination violates s.2 (d) of the **Charter**.

[34] In order to be valid, legislation that violates s. 2(d) must meet the standard of s. 1 of the **Charter** which provides:

1. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[35] The Supreme Court of Canada has held that to satisfy the standard of s.1 the limit prescribed by law must address a sufficiently pressing and substantial concern as well as constitute a reasonable and proportionate means of achieving that important objective. See: **R. v. Oakes**, [1986] S.C.R. 103.

[36] I agree with the conclusion of the trial judge that the amendments were not

aimed at a pressing and substantial objective of such importance as to warrant limiting a **Charter** right. The aims were to provide for administrative efficiency and to limit the Government's liability relating to political belief discrimination complaints filed by some of the casual workers and service contractors displaced following the provincial election of 1996. Those objectives, in my view, do not come close to the level of constituting a sufficiently pressing and substantial concern to justify overriding a **Charter** right. As a result of that conclusion it is unnecessary to consider the proportionality aspects of the **Oakes** test. Accordingly, the amendments are not saved by s.1.

[37] A legislature cannot validly enact laws that have the purpose or effect of interfering with s. 2(d) **Charter** rights unless they meet the test of s.1 or unless it invokes the "notwithstanding clause" under s.33. In this case the s.1 test has not been satisfied and the Legislature has not invoked s. 33 of the **Charter**. Therefore, by virtue of s.52 of the **Constitution Act, 1982**, the amendments contained in ss. 28.4(2) to (5) of the **HRA** are of no force or effect.

[38] The foregoing means that the remedies available under the **HRA** remain as they were just prior to December 24, 1997. However, as I noted earlier, not all the respondents filed complaints with the Human Rights Commission. Those who did not file complaints would have no recourse to the remedies under the **HRA**. Their hope for a remedy will have to be through the claim they have made under s.24(1) of the **Charter**.

[39] Unfortunately, the issue of whether the Government's action in not rehiring or in reducing their hours of work violated the respondents' **Charter** rights has yet to be tried. A remedy is only available under s. 24(1) when a **Charter** violation has been established. In his decision resulting in the declaration that the impugned amendments violated s. 15(1), the trial judge found as a fact that the Government discriminated against the respondents on the basis of their political belief. However, that was not the issue before him on the motion. The only issue for the trial judge to determine on the motion was whether the amendments to the **HRA** violated s. 15(1) of the **Charter**.

[40] If the actions of the Government in not rehiring them or in reducing their hours of work violated the respondents' **Charter** rights, the court could impose any remedy it considered appropriate and just in the circumstances regardless of any restrictions in the **HRA**. That power comes from s.24(1) of the **Charter**. A court's authority under s.24(1) to grant a remedy for a **Charter** violation is not limited by or subject to any provincial legislation restricting remedies for violations of provincial human rights legislation. Both s.28.4(2) and s.28.6 of the **HRA** limit the monetary awards that can be ordered by a Human Rights Panel. However, in proceedings under s. 24(1) of the

Charter, a court would have authority to award full compensation if that was the remedy it considered just and appropriate in the circumstances regardless of what the **HRA** provided by way of restrictions or limitations on compensation.

[41] It might be argued that since anyone whose freedom under s.2(d) has been violated can seek a remedy under s. 24 of the **Charter**, there is no need to strike down the impugned amendments to the **HRA**. There are at least two problems with such an argument. First, the fact that there is another source of remedy under the **Charter** does not make the amendments removing access to **HRA** remedies any the more constitutional. Second, although they are not mutually exclusive, it may be that aggrieved persons would prefer to pursue remedies under the **HRA** rather than under the **Charter**. They may find proceedings under the **HRA** easier and less costly. They may also find the remedies available under the **HRA** adequate provided they are as they were prior to the impugned amendments.

[42] As I noted earlier, the trial judge also found that the impugned amendments violate s. 15(1) of the **Charter**. Sections 28.4(2) to (5) of the **HRA** treat the class of political belief complainants whose complaints meet the narrow criteria of s. 28.4(3)(a) and (b) differently from other complainants with complaints based on political belief or other prohibited grounds of discrimination. The difference in treatment is based on a combination of factors consisting of the nature of the complaint, employment relationship with the Government, and timing. It applies to political belief discrimination complaints filed prior to June 1, 1999 relating to employment in the casual division of the civil service or to contracts of service with the Government or a Crown agency. The group of complainants affected included those who had filed such complaints prior to the coming into force of the impugned amendments (December 24, 1997) but which were still unresolved as of that time.

[43] I agree with much of what the trial judge had to say in his decision on the motion respecting s. 15(1). However, in the end I have reservations about whether the situation of the group of complainants referred to in s. 28.4(3) is analogous to the grounds of discrimination listed in s. 15(1) so as to bring that section of the **Charter** into play. In any event, in view of my agreement with the trial judge that the impugned amendments violate s. 2 (d) of the **Charter** and are not saved by s.1, it is unnecessary for me to decide whether or not he erred in finding that the amendments also violated s. 15(1).

[44] The respondents have sought to be awarded costs on a substantial indemnity basis. However, before making such an order the court would want to receive more complete arguments from counsel and would also need to consider the respondents' proposed bill of costs. Accordingly, unless in the meantime they are able to reach an agreement, the parties will have 60 days from the date of this decision in which to

provide the court with written submissions respecting costs. There will be no order respecting costs for or against the Human Rights Commission as it kept only a watching brief both here and in the court below.

The Honourable Chief Justice G.E. Mitchell

I AGREE: _____
The Honourable Madam Justice L.K. Webber

I AGREE: _____
The Honourable Mr. Justice K.R. MacDonald