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

BETWEEN:

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

APPLICANTS

AND:

THE GOVERNMENT OF PRINCE EDWARD ISLAND,
and
THE PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION

DEFENDANTS

Before: The Honourable Justice David H. Jenkins
(In Chambers)

Alan C. McLeod	-	solicitor for applicants
Paul D. Michael, Q.C.	-	solicitor for Human Rights Commission
Ruth M. DeMone	-	solicitor for Government of Prince Edward Island
Place and dates of trial	-	Charlottetown, Prince Edward Island June 28-29 and July 3, 2001
Place and date of judgment	-	Charlottetown, Prince Edward Island June 26, 2002

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Prince Edward Island Supreme Court - Trial Division

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Dates Heard: June 28-29 and July 3, 2001

Judgment: June 26, 2002

(42 pages)

CONSTITUTIONAL LAW: Charter section 15(1) equality rights - political belief.

CASES CONSIDERED: *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *M. v. H.*, [1999] 2 S.C.R. 3; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Hunter v. Southem Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M. Drug Mart Ltd.*, [1984] 2 S.C.R. 295; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Jazairi v. Ontario (Human Rights Commission)* (1999), 175 D.L.R. (4th) 302 (Ont. C.A.); *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Egan v. Canada*, [1995] 2 S.C.R. 513; *M.v.H.* (1996), 132 D.L.R. (4th) 538, (Ont. Ct. (Gen. Div.)); *R. v. Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; *McCarten v. Prince Edward Island* (1994), 112 D.L.R. (4th) 711 (P.E.I.S.C.A.D.); *Rossiter v. Prince Edward Island (Attorney General)* (1996), 139 D.L.R. (4th) (P.E.I.S.C.T.D.); *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Lovelace v. Ontario*, [2000] 1

S.C.R. 950;

.../ii

Little Sisters Book and Art Emporium et al. v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1988), 44 D.L.R. (4th) 501 (Nfld. C.A.).

INTERNATIONAL MATERIALS CONSIDERED: **Universal Declaration of Human Rights.** GA Res. 217 (III). UN GAOR. 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

RULES CONSIDERED: **Rules of Court, Province of Prince Edward Island, Rule 21.**

STATUTES CONSIDERED: *Human Rights Act*, R.S.P.E.I. 1988, Cap. H-12; *An Act to Amend the Human Rights Act*, Stats. P.E.I. 1997, Cap. 65; *Canadian Charter of Rights and Freedoms, Being Part I of the Constitution Act, 1982*; *Civil Service Act*, R.S.P.E.I. 1988, Cap. C-8; *Human Rights Act*, Stats. P.E.I. 1975, Cap. 72.

Alan C. McLeod	-	solicitor for applicants
Paul D. Michael, Q.C.	-	solicitor for Human Rights Commission
Ruth M. DeMone	-	solicitor for Government of Prince Edward Island

Jenkins J.:

[1] All parties request the Court to determine a constitutional question which underlies the application for judicial review in this proceeding. The applicants made complaints against the Government of discrimination in employment based on political belief. The Commission made decisions regarding their complaints which recognized a special legislative limit on the remedy for Government discrimination against casual employees based on political belief. The applicants then brought an application for judicial review of those decisions. Determination of the constitutional question of the validity of that special legislation is key to resolution of the matter under judicial review. Accordingly, the applicants brought this motion for determination of the question of law under Rule 21 of the *Rules of Court*.

Factual background:

[2] The salient facts are quite straightforward. Before the 1996 general election, the applicants were employed by the Government of Prince Edward Island as casual employees on a seasonal basis. All were either known or perceived to have connections with the Liberal Party of Prince Edward Island, and they had only satisfactory employment evaluations. The result of the general election was that the Progressive Conservative Party replaced the Liberal Party and formed the government. Afterwards, the new Government either did not rehire the applicants as casual employees to their previous positions or reduced their hours of work.

[3] In this Province, “political belief” is a human right which is specified by the *Human Rights Act*, R.S.P.E.I. 1988, Cap. H-12, regarding which discrimination is prohibited. Discrimination includes discrimination in employment. Political belief is defined in the *Act* as belief in the tenets of a registered political party as evidenced by membership, contribution, or open and active participation in that party: ss. 1(d), 1(m), and 6(1) of the *Act*.

[4] The *Act* contains a mechanism for investigation by the Executive Director or his delegate, and, where there is sufficient evidence, for hearing by a Human Rights Panel of complaints of discrimination. Where a complaint progresses to a hearing, upon finding that a complaint has merit in whole or in part, a Panel is authorized to order a range of remedies. It can order that a person against whom a finding is made (including the Government) do any or all of five things, namely cease the contravention complained of, refrain in future from the offending act, make available to the complainant and other affected persons the denied right, pay the complainant and such other persons compensation for all or part of their lost wages or income, and take other action as the Panel considers proper to place the complainant and those other persons in the position they would have been in but for the contravention: ss. 22, 26, and 28.4 of the *Act*.

[5] The applicants, except Barbara Steele and Lisa MacKinnon, filed complaints with the Commission whereby they alleged the Government discriminated against them in employment

based on political belief.

[6] Before the complaints were processed, the Legislature enacted Government-initiated amending legislation that specifically limits the power of a Panel to award a remedy regarding one particular category of complaint of human rights violation -- namely, a complaint of discrimination in employment based on political belief by Government casual employees whose complaints were pending on December 24, 1997 or would be subsequently filed prior to June 1, 1999. Under the amending legislation a Panel that finds such a complaint has merit is expressly limited regarding the kind and extent of remedy it can order. A Panel can order only compensation. This excludes the power to order any one or more of the other four kinds of remedy listed in s. 28.4(1). The amount of compensation is limited not to exceed the prescribed formula amount of the weekly remuneration of the casual employee, multiplied by the total number of weeks worked, divided by 52, multiplied by two (which amounts to 3.846% of total wages): ***An Act to Amend the Human Rights Act***, Stats. P.E.I. 1997, Cap. 65, s. 4, which adds ss. 28.4(2), (3), (4) and (5) to the *Act*. Section 6 of the amending legislation restates that the amending provisions apply retroactively to all unresolved complaints then filed with the Commission. The amendments apply to the applicants' complaints.

[7] The Government made settlement proposals to each of the complainants which are consistent with this compensation cap. The complainants declined acceptance. The Commission Executive Director then found pursuant to s. 22(4)(b) of the *Act* that the Government offers for settlement were consistent with the maximum remedy available under the new law, and on that basis he decided that the applicants had refused to accept a proposed settlement that was fair and reasonable. The Executive Director advised the parties to the complaints that his assessment of "fair and reasonable" must be based on the order which a Panel might make under the *Act* as directed by s. 28.4(2) which he compared to the maximum provided for in that section. He concluded that in those circumstances a reasonable settlement offer had been made and rejected; therefore, the Commission would discontinue any further action on the complaints.

[8] The applicants then brought their application to Court for judicial review of that Commission decision.

[9] The applicants also requested the Commission Chair to review the decision of the Executive Director pursuant to s. 25 of the *Act*. The Chair first responded that because of the nature of the issues involved on judicial review his reviews would be suspended pending final resolution of the issue by the courts. He subsequently advised the parties to the complaints he concurred with the decision and reasons of the Executive Director. That Commission decision is also subject to judicial review.

[10] The constitutional validity of the amending legislation being at the heart of the judicial

review, the applicants brought this motion under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for a declaration that the limitation on the available remedies for discrimination in employment based on political belief prescribed by s. 28.2(2) to (5) of the *An Act to Amend the Human Rights Act*, supra, constitutes a violation of their equality rights as protected by s. 15(1) of the *Charter*.

[11] The parties have stated these agreed facts upon which to determine the question in the motion:

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 constitutionally [sic] of section 28.4 of the *Human Rights Act*, STAS. 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 positions 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*, STATS. P.E.I. 1997, 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.

Issue:

[12] At issue is the application of the equality provision of the *Charter* to the provincial human rights legislation which proscribes most of the generally available remedies upon a determination by a Panel of discrimination in employment by Government against a particular category of casual employee based on political belief.

[13] Government submits the issue is whether the impugned legislative provision is discriminatory under s. 15(1) of the *Charter*, and submits on a number of bases that it is not. Government further submits that the legislation is in any event saved by s. 1 of the *Charter* as being a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

[14] The applicants characterize the issue as whether the government of the day can lawfully run its political patronage operation for the casual component of the public service workforce without being held accountable either to pay meaningful compensation or for other employment consequences that can generally follow violation of human rights recognized by the *Act*. Consequences include an order for cessation and refraining in future regarding the offending conduct, reinstatement of the complainant and other persons so affected by the Government's acts, and full compensation for the discrimination. The applicants also express concern over the precedent set by the impugned legislation, and they portray further erosion of human rights that Government could bring about absent *Charter* recognition of political belief as a protected right or freedom.

[15] The applicants submit that political belief is a personal characteristic analogous to the

particularized and prohibited grounds of discrimination enumerated in s. 15(1); and further that the impugned legislation violates their freedom of association protected by s. 2(d) of the *Charter*. They submit that freedom of association includes freedom of political association and belief, and that the impugned legislation violates their freedom of association by creating a distinction between them as persons suffering from discrimination in matters of employment based on political belief and all other persons suffering from all other classes of discrimination in this province. The applicants refute any submission that a s. 15(1) violation is saved by s. 1.

[16] Though not directly in issue in this motion, the relief sought on the judicial review application is noteworthy. The applicants seek orders for (i) reinstatement to their former positions with the Government; (ii) compensation for loss of employment, loss of opportunity to gain employment, and loss of earnings from future employment up to the time of reinstatement; (iii) in the alternative, damages including reasonable compensation for loss of employment and loss of earnings up to the date of disposition or for a reasonable time, or the first available casual part-time or seasonal job for which the respective applicants are qualified; and (iv) aggravated, punitive, and exemplary damages against the Government; plus (v) pre and post-judgment interest. Even following a successful application for judicial review, the remedies sought on the judicial review would remain for consideration by a Commission Panel, as the Commission is the statutory tribunal charged with that decision making authority.

[17] Also noteworthy, and not in issue on this motion, the Court is not called upon to deal with either the applicants' request for an extension of time to bring their application for a judicial review, or for the primary relief sought on judicial review, which is to nullify the impugned decisions of the Commission.

Relevant statutory provisions:

[18] The *Human Rights Act*, supra, provides a statutory scheme for recognition of human rights, and for administration, public information and education, and enforcement. These provisions of the *Act* are pertinent in this analysis:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is recognized in Prince Edward Island as a fundamental principle that all persons are equal in dignity and human rights without regard to race, religion, creed, color, sex, marital status, or ethnic or national origin;

AND WHEREAS in 1968 *An Act Respecting Human Rights* was passed by the

legislature of this province in response to the Universal Declaration of Human Rights passed by the General Assembly of the United Nations;

AND WHEREAS the principles contained in *An Act Respecting Human Rights* require amplification;

AND WHEREAS it is deemed desirable to provide for the people of the province a Human Rights Commission to which complaints relating to discrimination may be made:

1. (1) In this Act

...

(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;

(m) "political belief" means 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.

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.

[19] The authority of a Human Rights Panel to grant relief is stated in s. 28.4(2) of the *Act*. This provision appears in the impugned legislation *An Act to Amend the Human Rights Act*, supra, assented to December 24, 1997. Sections 4 and 6 thereof are pertinent:

4. The said Act is amended by the addition of the following:

...

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 s. 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. The provisions of this Act shall apply to all complaints filed with the Commission, including those that are unresolved as of the date this Act comes into force.

[20] The following provisions of the *Charter* are pertinent:

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.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

...

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.

24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[21] The following provision of the *Civil Service Act*, R.S.P.E.I. 1988, Cap. C-8, are pertinent:

1. In this Act

...

(h) “employee” means a person employed by the Crown in the right of the province or any agency thereof, as a

(i) “casual employee” being an employee hired in the casual division,

...

10. (1) The casual division consists of employees of the following descriptions holding positions which are not permanent:

...

(3) Temporary employees hired by an employer may be retained for a maximum period of six months and their employment shall be terminated no later than the end of that period.

(4) Without prejudice to subsection (3), the Commission may appoint a temporary employee for such specific period as it may determine.

(5) Subject to the rights of employees of the classified division, where a person has received a satisfactory performance evaluation in a seasonal, temporary job, it shall be re-offered to the person in the immediately succeeding season, should that job be available and an annual advertisement shall be made by the Public Service Commission to create a list for future vacancies in the seasonal job category.

Discrimination by Government:

[22] It is a matter of fact that the Government action regarding the applicants is discrimination in a matter of employment based on political belief in contravention of the *Human Rights Act*.

[23] The agreed statement of facts is a sufficient evidentiary base upon which to make this finding. The applicants were casual employees with satisfactory employment evaluations. Under the casual employee provisions of the *Civil Service Act* they had some right of recall. After the applicants filed their complaints with the Commission, the Executive Director apparently investigated under the *Act*. Whatever occurred within the Commission, the agreed facts advise that the Government made offers of settlement to the applicants based on the only remedy and maximum compensation permitted by ss. 28.4(2) - (5) of the *Act*.

[24] Counsel for the Government correctly pointed out that in this motion Government has not acknowledged the fact of discrimination. However, the stated facts considered in the context of the applicable legislation clearly call for this inference. An essential ingredient of the judicial review application is that the Commission made decisions regarding the complainants based upon the Government having offered settlements at the maximum amounts permitted under the new law. This Government action followed its own previous actions against the complainants' employment and its initiation and passage of the amending legislation in the Legislature. In all the circumstances the series of events amounts to tacit and reliable acknowledgement that the alleged discrimination is fact. As well, the Government's participation in the joint request of all parties for determination of the constitutional question on this motion implies the presence of discrimination under the *Act*; or else the constitutional question would be moot and perhaps not proceed.

Treatment of discrimination by the Human Rights Act

[25] The *Human Rights Act* prohibits discrimination regarding access to various services and rights, including matters of employment, based on various listed or enumerated grounds. Political belief is listed in the Act. The purpose of the *Act* is enunciated in its preamble. The preamble proclaims that recognition of that inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. The importance which the Legislature places on human rights legislation is indicated by the primacy accorded it by s. 1(3) of the *Act*, whereby the Legislature deemed that the *Act* prevails over all other laws of this province, and stated that all other laws are to be read as being subject to the *Human Rights Act*. The *Act* does not prohibit all discrimination. It contemplates exceptions, for example age limits on driver's licenses or admission to licensed establishments, or school residences for one gender or another.

[26] The *Act* provides a forum for resolution of complaints, means of ceasing discriminatory action, and education of the public on discrimination. This is expressed as being in an effort to bring about the aims and objects of the *Act*, which are to eliminate discrimination on the basis set out in the *Act*. Compensation is not the primary goal of the *Act*. Compensation is one of the remedies which are available to individuals whose claims are settled or found meritorious upon adjudication by a Human Rights Panel. The *Act* contains a non-exhaustive list of five kinds of remedies.

Context, and limits on constitutional review:

[27] This background provides a necessary perspective for consideration of the constitutional question in issue. These few additional observations address the context for consideration of this motion, which also needs to be understood.

[28] First, there is no question that the Government action of discriminating against the applicants regarding their employment as casual employees is in violation of the *Human Rights Act*. This discriminatory action does not qualify for any statutory exemption, and it is not a matter outside the reach of the *Act*. Political belief is a category of discrimination listed in the *Act*. Discrimination in matters of employment is prohibited. The Government did not advance any exemption from the statutory prohibition against such discrimination.

[29] Second, it is not the role of this Court on this motion to comment on the propriety, or the wisdom, or the social utility of the Government activity which contravenes the province's human rights law, and this Court refrains except in necessary association with the constitutional law decision and limits this judgment to the requested constitutional assessment.

[30] Third, while the Government's acts of discrimination in contravention of a *Human Rights Act* prohibition entitles persons discriminated against to a remedy within the range of remedies and relief specified in the *Human Rights Act*, it does not follow, either automatically or necessarily, that this same Government discrimination constitutes a violation of *Charter* protected equality rights or fundamental freedoms. The *Charter* applies to the Parliament and government of Canada and to the legislature and government of each province in respect of all matters within their authority. However, the *Act* and the *Charter* are not synonymous; they are different statutes, with separate qualifying criteria and other considerations of application. A human rights violation under the *Act* does not necessarily amount to a *Charter* violation.

[31] Fourth, on consideration of the constitutional law issue, it is the provisions of the impugned statute, provisions of provincial law, not the Government acts of discrimination against

the applicants, which are under review for a *Charter* violation. The Government acts of discrimination are the evidentiary base upon which the constitutional question has arisen. What is at issue in this motion is the question of whether the impugned legislation, ss. 28.4(2) - (5) of the *Human Rights Act*, denies the applicants equality rights which are protected within the parameters of s. 15 and/or fundamental freedom of association protected under s. 2 of the *Charter*.

[32] Finally, the effect of the impugned legislation is quite clear. It curtails the remedies available to casual employees whom the Government has discriminated against in employment based on political belief. The scope for constitutional assessment is narrow. It needs to be understood that the Legislature can make a law, such as the impugned law which permits Government itself to discriminate against individual citizens in violation of their human rights recognized in the *Human Rights Act*, and then proscribe all remedies except limited compensation, as long as the legislation is within the competence of the Legislature. Within the scope of its legislative competence the Legislature is supreme. A court is not then authorized to otherwise question the legislation. Only when legislation fails to comply with the *Charter* can the courts intervene. That is because if the legislation does not offend the *Charter*, if it does not contravene an individual's fundamental rights or freedoms which are protected within the scope of the *Charter*, then a court has no further role. If a court finds that legislation offends the *Charter*, then the proper judicial role is to determine whether the legislation which breaches of the protected rights and freedoms is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. If a *Charter* breach is not so justified, then a court's role as the protector of such values comes into play and a declaration that the impugned legislative provision is unconstitutional and cannot stand may follow.

Standing:

[33] The Government submits that two of the applicants, Barbara Steele and Lisa MacKinnon, lack standing in this proceeding. Government's submission is that these two applicants did not pursue complaints before the Commission, so they were not directly affected by and do not have a genuine interest in the validity of the legislation, and accordingly a constitutional declaration would with respect to them be speculative.

[34] The agreed facts advise that the Government discriminated against both MacKinnon and Steele in matters of employment based on political belief and that both of those persons intended and sought but failed to bring complaints before the Commission. The Government agreed for the purpose of this motion that the facts regarding Steele and MacKinnon would be included without Government making a preliminary motion to have them struck subject to the qualification that the issue of standing could be dealt with in the course of this motion.

[35] I am satisfied that these applicants whose standing is challenged meet the legal test for standing. First, there can be no question that the motion raises a serious issue as to the validity of the impugned legislation -- it is a constitutional challenge of human rights amending legislation which clearly diminishes individual's rights to a remedy for discriminatory acts by Government against them. Second, as previously outlined, there is a factual basis for entertaining a *Charter* remedy. Third, s. 28.4(1) of the *Human Rights Act* authorizes a Panel to award remedies including provision of the denied rights and compensation not only to complainants but to "...the complainant or other person dealt with contrary to this act ...".

[36] While the amending legislation does not itself make it clear, the remaining provisions of the *Act* which set out a Panel's authority to grant relief are clear. If the amending legislation is unconstitutional than a Panel upon finding discrimination and awarding a remedy to a complainant can award the full gamut of s. 28.4(1) relief to other persons Government has discriminated against whether or not they are complainants. Viewed in that light, the genuine interest of applicants Steele and MacKinnon in the validity of the impugned legislation becomes apparent. For them, the issue at bar is real, certain, and personal.

[37] Finally, there is no other reasonable and effective way to bring the issue before the Court. The same matter could be raised in a civil action, but the method employed by the applicants involves all affected interests and appears the most reasonable and effective course of proceeding.

[38] In the presence of other applicants whose standing is accepted, upon viewing the relative interests of the applicants Steele and MacKinnon, I find that they have standing on this motion. I leave to the hearing judge determination of the question of whether they have standing in the main proceeding on judicial review.

The Charter s. 15(1) analysis:

! Approach

[39] In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, s. 15(1) of the *Charter* was involved to correct a deficiency in provincial human rights legislation which failed to include the characteristic of sexual orientation. The issue in *Vriend* was politically charged. The Supreme Court's approach to the *Charter's* application to individual rights instructive for the present case. The critical importance of protecting the rights of persons whom the majority perceives as different, and the hidden lesson that fundamental rights are indivisible, are eloquently stated by Cory J. in

his judgment written jointly with Iacobucci J. for the Court (Major J concurred in the result)(at paras. 67-69):

1. Approach to Section 15(1)

[67] The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That is has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.

[68] The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.

[69] It is easy to say that everyone who is just like “us” is entitled to equality. Everyone finds it more difficult to say that those who are “different” from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our Constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

[40] Both counsel referred to the Supreme Court of Canada direction in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 for direction regarding the purpose of s. 15(1) of the *Charter*, and the judicial approach to a *Charter* challenge of legislation. The Supreme Court recognized that since the beginning of s. 15(1) jurisprudence an

essential requirement upon which to found a discrimination claim is the existence of a conflict between an impugned law and the purpose of s. 15(1). This principle applies to each element of a discrimination claim. **Law** directs that the determination of a discrimination claim be grounded in three broad inquiries: (1) whether the law, program or activity imposes differential treatment between the claimant and others; (2) whether this differential treatment is based on one or more enumerated or analogous grounds; and (3) whether the impugned law, program, or activity has a purpose or effect that is substantively discriminatory. Each of these inquiries proceeds on the basis of a comparative analysis which takes into consideration the surrounding context of the claim and the claimant.

[41] Section 15(1) is to be interpreted in a purposive and contextual manner. The main focus of the inquiry is to establish whether a conflict exists between the purpose or effect of an impugned law and the purpose of s. 15(1), which is to protect against the violation of essential human dignity through the imposition of disadvantage based on stereotyping and social prejudice and to promote a society where all persons are considered worthy of respect and consideration. The purpose of s. 15(1) was contemporaneously stated in *M. v. H.*, [1999] 2 S.C.R. 3, as being to prevent the violation of human dignity “...and freedom through imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings and members of Canadian Society, equally capable and equally deserving of concern, respect and consideration”.

[42] The contextual analysis is a directed inquiry; it is focused through the application of contextual factors which have been identified as being particularly sensitive to the potential existence of substantive discrimination. The Supreme Court cautioned, following *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, that the basic principles are guidelines for analysis.

[43] It is inappropriate to attempt to confine the analysis to a fixed and limited formula. The *Charter* is a purposive document and therefore subject to a purposive analysis. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of rights and freedoms it enshrines. It intends to constrain governmental action that is inconsistent with protected rights and freedoms: *Hunter v. Southem Inc.*, [1984] 2 S.C.R. 145, at p. 156. The purpose of the right in question is to be sought by reference to the character and the larger objects of the *Charter* itself, the language chosen to articulate the right, the historical origins of the enshrined concepts, and to the meaning and purpose of associated rights within its text. The interpretation should be generous as opposed to being legalistic, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of *Charter* protection, recognizing that it is important not to overshoot the actual purpose of the right in question: *R. v. Big M. Drug Mart Ltd.*, [1984] 2 S.C.R. 295, at p. 344. A purposive analysis is preferred in order to permit realization of the strong remedial purpose of the equality guarantee, and to avoid pitfalls of a formalistic and

mechanical approach.

[44] The three legs of the test basically boil down to the questions: (1) has there been different treatment based on personal characteristics?; (2) has there been different treatment based on that personal characteristic as an analogous ground to the grounds that are set out in s. 15(1)?; and (3) is the different treatment discriminatory?.

[45] The issue on the motion is considered in the manner directed by the Supreme Court jurisprudence.

! *(i) formal distinction based on personal characteristics*

[46] The impugned legislation draws a formal distinction between the applicants and other persons on the basis of one or more personal characteristics. The distinction is quite clear. There is a substantive difference in treatment of complainants under the *Act*, both in terms of the kind of relief and amount of compensation that a particular category of complainant can obtain for discrimination compared to all other complainants.

[47] The test for substantive difference in treatment is a comparative one. Where the impugned law can be shown to draw a distinction between the person seeking relief under s. 15(1) and a comparator group, the distinction is sufficient for this part of the test to constitute differential treatment. See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 57; *M. v. H.*, supra, at para. 62.

[48] Under s. 28.4(2) - (5) of the *Human Rights Act*, certain complainants, namely casual employees discriminated against by Government in employment based on political belief, are denied the range or remedies available to other persons discriminated against based on any other ground of discrimination to the range of remedies provided for in s. 28.4(1)(b) of the *Act*. The right to compensation of complainants covered by s. 28.4(2) - (5) is based on a limited formula, and their right to other kinds of relief available to all other complainants is proscribed. A Panel is denied its usual discretion on granting a remedy for discrimination. The impugned legislation introduces a two-tier scheme of remedies -- a broad and discretionary scheme for all persons discriminated against regarding any listed right on any listed basis by any discriminator on the one hand, and a defined remedy of limited compensation where the claimant has been discriminated against by the Government in casual employment based on political belief within specific dates, on the other hand. The legislative treatment of persons in the category of the applicants is unique. The legislation denies the applicants the remedy of full redress which under the legislation is available for all other persons discriminated against.

[49] The Government submits the distinction is not drawn on the basis of a personal

characteristic of the complainant. It submits that nothing in the impugned legislation specifies that it applies only to complainants of a particular political belief, and the legislation does not address itself to the content of the political belief complaint. In the Government's submission it is the underlying basis for the complaint which creates the distinction, not the specific belief of a complainant or the content of a complainant's political belief. This submission does not bear up to scrutiny. To the extent that Government recognizes that the underlying basis of the complaint creates the distinction, it acknowledges a substantive difference in treatment as envisaged by *Corbiere*, supra. To the extent Government suggests that the impugned legislative provisions do not refer to a particular political party or content belief, it misses the point of the test. Discrimination naturally occurs against persons without political power who do not share the political belief of the discriminator who exercises power. The human right of political belief does not exist to protect a particular party affiliation or belief, but to protect against discriminatory treatment of a person on account of having a political belief. Equal denial of remedies to all persons who have valid complaints of discrimination in employment based on political belief surely does not remove all such persons from suffering substantially different treatment following violation of their legislatively-recognized human right, except vis-a-vis one another. The impugned law imposes substantially different treatment between such persons and all persons whose human rights are violated on any other basis recognized in the same legislation which protects human rights. A bad law will not be saved merely because it operates equally upon all to whom it has application.

! *(ii) different treatment on the basis of enumerated or analogous ground*

[50] The question for consideration at this stage is whether the impugned legislation subjects persons to differential treatment on the basis of an analogous ground to the grounds enumerated in s. 15(1).

[51] This was the one challenging question in this constitutional analysis. Political belief is not one of the prohibited grounds enumerated in s. 15(1), and it is not already recognized as analogous. The fundamental consideration in those circumstances becomes whether recognition of the basis for treatment as an analogous ground would further the purposes of s. 15(1). Those purposes are previously stated under the discussion of the judicial approach to s. 15(1). The case law has recognized various contextual factors that may demonstrate that a trait or combination of traits by which a claimant is defined has discriminatory potential. A flexible approach to the test is needed to appreciate that stereotyping, prejudice, or denial of human dignity and worth that might occur in various and specific ways for specific groups of people: *Corbiere v. Canada*, supra, at paras. 58-61.

[52] The applicants submit the question on the second leg of the test is whether the impugned legislation is based on a personal characteristic; and they submit it is. The Government submits

that the differential treatment is not discriminatory within the meaning of s. 15(1); and that a distinction based on political belief is not one of personal characteristic. The Government points out that political belief is not immutable and that those persons who hold political belief are not readily identifiable so as to be distinguishable from the general population.

[53] Upon assessment in the manner mentioned, I find that political belief is a right protected by s. 15(1) analogous to one or more of the grounds enumerated in s. 15(1).

[54] The majority judgement in *Corbiere v. Canada*, supra, provides direction on the assessment at this stage:

The next step is to determine whether the distinction is discriminatory. **The first inquiry is whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in considering the general purpose of s. 15(1), i.e. to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration.**

...

The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. **Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory;** if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination at the third stage of our analysis discussed in *Law, supra*, per Iacobucci J.

The same applies to the grounds recognized by the courts as “analogous” to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. **It seems to us that it is not the ground that varies from case to case, but the determination of whether a distinction on the basis of a constitutionally cognizable ground is discriminatory.** Sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory. To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296, suggested that residence might be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law*, supra, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding no analogous ground or no discrimination in fact going to essential human dignity. **[Emphasis added]**

[55] The right to hold political belief exists as a human right. It is not a right created by the *Human Rights Act*. It is a right that exists outside the law. The applicants are persons who hold jobs, and who hold political belief, and that is how they are characterized. Political belief is recognized within the *Charter* jurisprudence and in international law as a fundamental right, and a right which feeds other fundamental rights.

[56] The *United Nations Universal Declaration of Human Rights* adopted in 1948 protected political belief along with the right to be a person, and the right to be a nation, as a right to be protected against tyrants. Discrimination against a person based on his or her political belief is thereby recognized as discrimination upon a basic fundamental factor that makes one a human being. Such discrimination corrodes one's rights generally.

[57] The right to hold political belief feeds the right of freedom of expression, which is a right expressly protected by the *Charter*. Part of the context for assessment of whether the legislation in question violates s. 15(1) of the *Charter* is that freedom to express political opinion is already a fundamental right recognized under the *Charter*. Section 2(b) provides for freedom of thought, belief, opinion and expression.

[58] Much has been said judicially about freedom of expression. In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, Cory J. stated: "*It is difficult to imagine a right more important in a democratic society.*" In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, L'Heureux-Dubé J. stated: "*Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure.*" She then adopted this American jurisprudence:

Jackson J. in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at p. 642, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'

In *Jazairi v. Ontario (Human Rights Commission)* (1999), 175 D.L.R. (4th) 302 (Ont. C.A.) at para. 29 the Ontario Court of Appeal observed that the context for a s. 15(1) analysis of a particular question regarding “*political opinion*” involved recognition that the freedom to express a political opinion is already a fundamental right under the *Charter*.

[59] Is political belief an essential human dignity and freedom? A negative answer begs many questions: (i) Why does the United Nations *Universal Declaration of Human Rights* recognize political belief as a fundamental right? (ii) Why does the *Human Rights Act* amplify the protected human rights, prohibit discrimination based on political belief, provide a forum for dealing with complaints, and authorize meaningful remedies; (iii) Is the right to hold employment fundamental to human dignity, such that the effect on the individual of being discriminated against goes to the core human values? What kind of rights does the *Charter* protect? Consideration of this issue in the face of such various contextual factors indicates candidacy for inclusion.

! *Fundamental personal characteristic*

[60] An analogous ground may be shown by the fundamental nature of the personal characteristic. The *United Nations Universal Declaration of Human Rights* and *The Human Rights Act* recognize political belief as a fundamental and personal characteristic and as a human right. The *Charter* expressly recognizes the right of freedom of thought, belief, opinion, expression, assembly, and association, and the right to vote. Political participation is judicially recognized as essential and valuable because it enhances personal growth and self-realization. In *Committee for the Commonwealth of Canada*, supra, L’Heureux-Dubé J. stated (at p. 173):

Freedom of expression cannot be jettisoned in any system which values self-government -- political participation is valuable in part because it enhances personal growth and self-realization. Rand J. for this Court in *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306, described freedom of expression as “little less vital to man’s mind and spirit than breathing is to his physical existence”. Cardozo J., for the United States Supreme Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327, proclaimed freedom of expression to be “the matrix, the indispensable condition, of nearly every other form of freedom”.

...

It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or “firstness” of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as “fundamental”. They are the political tradition underlying the *Charter*.

...

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfilment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.

[61] Referring to the root importance of freedom of expression based on the fundamental freedom to develop their faculty of reason, which would inherently include political belief without coercion imposed by those with power, L'Heureux-Dubé J. stated (at p. 173):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties. ... They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Political participation is acting upon political belief. Political belief is thereby revealed to appear as a fundamental personal characteristic.

! *Provincial human rights protection*

[62] The characteristic “political belief” is specifically recognized in the ***Human Rights Act*** as a personal characteristic regarding which discrimination is prohibited. Human rights legislation protects only personal characteristics. That itself is an indicator and a factor for its recognition as an analogous ground. The impugned provisions introduce a statutory bar to full redress for one class of person discriminated against into the very legislation which has as its stated purpose prohibiting discrimination on personal grounds including political belief.

[63] Counsel for the Government pointed out that the Legislature could choose to remove political belief as a legislatively recognized basis for discrimination. She noted that only seven, but not all, provinces include political belief in their human rights legislation. Counsel may well be correct on this submission. But this thesis two essential considerations which undermine any force of its submission. One, the Legislature added political belief to its listed bases for discrimination in 1975, by the ***Human Rights Act***, Stats. P.E.I. 1975, Cap. 72, and has not since removed it. Over twenty years experience occurred before the Legislature enacted the impugned legislation. Indeed, since recognizing the right, the Legislature has not only left political belief within the

definition of discrimination in the *Human Rights Act*, it has through various amendments clarified and improved its meaning and presence. The improvements were sometimes made in the wake of expensive and protracted legal challenges which demonstrate a reluctance by the government of the day to treat political belief as a human right worthy of full consideration. The Legislature has not removed political belief; it remains in the *Act*. Two, as mentioned, the right to hold political belief is not created by the *Act*; it exists regardless of the *Act*. Should political belief be shown to be a s. 15(1) *Charter* protected right, then persons in the position of the applicants would have *Charter* protection against Government initiated discrimination based on political belief whatever the Legislature does regarding political belief in its statutory definition of discrimination. It would no longer be a matter solely within the competence of the Legislature.

! Charter protected values

[64] Political belief is directly related to *Charter* protected values. As previously discussed, the right to freely develop one's reason and opinion includes the development of political belief. This is essential underpinning for *Charter* protected values referred by the rights set out in the *Charter*. These include most obviously the enumerated s.2 freedoms and the right to vote stated in s.3.

[65] I associate with the applicant's suggested connection of the Supreme Court's treatment of s.7 rights. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 recognized that the protected right of liberty extends beyond criminal law and the threat to corporeal liberty. It can include the right of an individual to make fundamental personal choices free of state interference. The scope of the extension appears as narrow. However, it does present an identifiable sphere of inherently personal decision making deserving *Charter* protection. Individuals are entitled in our free and democratic society to make decisions of fundamental importance free from state interference. The thesis is that the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. The liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy, and choice in decisions regarding an individual's fundamental being. This right does not encompass all decisions, only inherently private choices which meet the stated criteria. This narrow sphere has been held so far to include parental interest in raising and caring for one's child, choosing where to establish one's home, and decisions that are of fundamental importance: *Blencoe*, supra, at paras. 49 to 54. As mentioned, engaging in political belief has been judicially recognized as a decision of fundamental personal importance: L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada v. Canada*, supra, at p. 170. Every person has the right to participate in the government of Canada and of his or her province, directly or through freely chosen representatives. The *Human Rights Act* adopts the international human right of political belief, and then by the Legislature's definition of political belief makes a direct connection between political belief and participation in party politics.

! *Importance of factor to identify or belonging*

[66] Identity, personhood, and belonging are factors for consideration in the determination of whether a personal characteristic may be shown as analogous to an enumerated ground. The fact that a characteristic is immutable, difficult to change, **or** changeable only at unacceptable personal cost may lead to its recognition: *Corbiere*, supra, majority judgement at para. 13, and minority judgement at para. 60.

[67] The holding of a political belief is probably not immutable, but it is still a very important personal characteristic. It clearly qualifies as being important to personal identity. As well, political belief as being changeable only at unacceptable personal cost. This seems especially pronounced in this province, where the role of government is dominant in daily life and in employment. Since 1975, the Legislature has apparently recognized that the risks associated with expression and identification of one's political beliefs in this small province and associated small economy justifies legislative protection from discrimination.

[68] The Government submits that the impugned legislation does not deny persons the ability to engage in political activity. I find this submission superficial. The insidious effect of a person's involvement in political activity for a recognized party that is not in power is or should be manifest. The exercise of power by government agents in the realm of casual job placement is pervasive. The message conveyed to the applicants is not subtle. Government having a free-hand to terminate the employment of casual workers, and then to cause the Legislature to enact legislation which eviscerates the otherwise available remedies for breach of their recognized human rights in the critical matters of their livelihood, reads clear. Acceptance of this Government submission would involve a naive vantage point and mechanical application. It is easy to see that the safe course for the casual worker is to refrain from political activity that offends the party in power. The challenged legislation strengthens the power relationship. Absent freedom, political belief is stifled. The right to political belief is a basic aspect of full membership in Canadian society. Absent protection for this human right, the right itself and the democratic rights which it feeds corrode. In this light, it appears very much a right of equality under the law.

[69] Government submits that political belief is disqualified from being a s. 15(1) analogous ground because it is not immutable. I reject this submission. In my opinion, the law now advises that immutability is not a necessary ingredient. It is sufficient that the personal characteristic be important to personal identity or changeable only at unacceptable personal cost. A number of indicators contribute to this opinion.

[70] Some enumerated grounds in s. 15(1) and some grounds recognized as analogous grounds are mutable. Religion is the most obvious. A person can change religion, which is based

on belief; and one's religion is usually demonstrated by membership or adherence and participation in an organized religion. In all of its facets as a human right, political belief is akin to the enumerated ground of religion.

[71] Sexual orientation has been determined an analogous ground. Sexual orientation is identified by the Supreme Court as being a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost: *Egan v. Canada*, [1995] 2 S.C.R. 513. This criteria was endorsed in *M.v.H.*, supra, in which it was discussed at trial in *M.v.H.* (1996), 132 D.L.R. (4th) 538, (Ont. Ct. (Gen. Div.)), at pp. 549-550. This assessment is worthy of observation because it recognizes that, like political belief, sexual orientation can sometimes involve personal choice. Sexual orientation was considered again in *Vriend*, supra. *Vriend*, which also dealt with human rights legislation, determined that the Alberta law violated s. 15 of the *Charter* by failing to state that gay and lesbians were entitled to formal equality and protection from discrimination afforded to other disadvantaged groups.

[72] Poverty has been held to be an analogous ground. In *R. v. Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.), (affirmed N.S.C.A.), provincial legislation known as the "man-in-the-house rule" which disqualified single parents from welfare payments was held unconstitutional because it discriminated against poor people who were mostly women.

[73] The requirement for actual immutability was put to rest in 1999 by the majority decision in *Corbiere*, supra. MacLaughlin J., writing jointly with Iacobucci J. on behalf of an eight judge majority, expressly recognized that some qualifying characteristics, like religion, are really mutable, and classified such factors as "*constructively immutable*". She stated (at para. 13):

What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds, enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. **It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.** This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to **reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.** To put it another way, s. 15 targets the denial of equal treatment on grounds that are **actually immutable, like race, or constructively immutable, like religion.** Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[Emphasis added]

[74] In recent Supreme Court jurisprudence dealing with occupational status L’Heureux-Dubé J. stated that being immutable is not a requirement. In *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, her concurring minority opinion was the sole s.15(1) analysis which dealt with immutability. She stated (at para. 166):

In other words, “[t]o say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality” (Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 at para. 8). **A ground need not be immutable to be analogous; it can be based on characteristics that the government has no legitimate interest in expecting claimants to change to receive equal treatment under the law, or, in other words, characteristics that are difficult to change, or changeable only at great cost (Corbiere, supra, at paras. 13-14; see also Vriend, supra, at para. 90).** In Egan, supra, I took the position that reliance on grounds amounts to an “indirect means by which to define discrimination” (para. 35), whereas the preferable approach would be to focus on the group adversely affected by the distinction as well as on the nature of the interest affected. I remain convinced that this is the most direct and truthful way of addressing the problem of discrimination. Nonetheless, even under the majority’s current “grounds” approach, there is no reason why an occupational status cannot, in the right circumstances, identify a protected group. (Emphasis added)

It is noteworthy in passing that the issue in *Dunmore*, supra, was the exclusion of agricultural workers from benefit of Ontario collective bargaining legislation. The rest of the majority of the Court found an individual right protected by s.2(d) of the *Charter* under freedom of association, and found it unnecessary to consider s. 15(1) at all. L’Heureux-Dubé J. built upon the majority’s judgement. She expressed the opinion that since the impugned legislation infringes s. 2(d), it is necessary to make but a single observation with respect to whether the exclusion of agricultural workers from collective bargaining constitutes discrimination under s. 15(1) of the *Charter*. She found the occupational status of agricultural workers constitutes an “analogous ground” for the purposes of an analysis under s. 15(1), noting there is no reason why an occupational status cannot, in the right circumstances, identify a protected group. A foundation of her thesis was that employment is a fundamental aspect of an individual’s life and an essential component of identity, personal, dignity, self-worth and emotional well-being. She found that agricultural workers generally suffer from disadvantage and the effect of the distinction made by their exclusion from collective bargaining is to devalue and marginalize them within Canadian society. L’Heureux-Dubé J. concluded that in light of their relative status, low levels of skill and education, and limited employment and mobility, agricultural workers could change their occupational status only at great cost, if at all.

[75] The Government relies on *McCarten v. Prince Edward Island* (1994), 112 D.L.R.

(4th) 711 (P.E.I.S.C.A.D.), leave to appeal to Supreme Court of Canada refused (1994), 115 D.L.R. (4th) 714. The discussion of immutability in that case is confined and is superseded by the more recent Supreme Court jurisprudence. In any event, I will address it. In *McCarten*, the majority held regarding a distinction between resident and non-resident property owners for property tax purpose that the residential qualification did not offend rights protected by s. 15(1). Counsel for the Government referred to the majority's reference to the purpose of s. 15(1) regarding immutable personal characteristics, as previously discussed in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is my respectful observation that the *McCarten*, supra, analysis was confined to the particular facts with which it dealt. The reference to immutability was made in the midst of the proposition that non-resident property owners were not a group regarding which there was distinction based on personal characteristics. *McCarten* is distinguishable. The group traits of place of residence and ownership of vacation property in *McCarten* and individual rights of political belief and loss of employment by a casual employee in the present case are plainly different considerations.

[76] I also respectfully observe that on my reading of *Andrews*, supra, the Supreme Court did not foreclose s. 15(1) relief to mutable personal characteristics. Two protected traits, one enumerated and the other analogous, are discussed above. Citizenship, which was the subject in *Andrews*, is as well is sometimes changeable, at one's personal volition, albeit subject to approval of a state. The dissenting opinion of McQuaid J.A. in *McCarten*, supra, (at p. 723) now appears prescient, in his address of the purposive approach of encompassing some mutable personal characteristics within s. 15(1):

... In particular, the respondent referred to the comments of Mr. Justice La Forest in *Andrews* when he stated as follows at p. 39:

The characteristics of citizenship is one typically not within the control of the individual *and, in this sense, is immutable*. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.

(Emphasis added.)

Mr. Justice La Forest found citizenship to be immutable because it could not be changed by unilateral action and because it could only be changed with unacceptable costs, which I assume includes both social and economic cost.

There are some characteristics listed in s. 15(1) which are unchangeable such as race, national or ethnic origin, colour and possibly, sex. **There are others, however, which are changeable such as religion, as well as some mental and physical disabilities.** The latter, while changeable, are only changeable with the consent or assistance of others and oftentimes, depending on the circumstances, with unacceptably high economic or emotional cost.

Furthermore, there are other characteristics not mentioned in s. 15(1), but upon which discrimination is sometimes based, which are changeable in much the same sense as is citizenship. These are: **political affiliation**, membership in certain organizations, and social rank. **[Emphasis added]**

Contrary to being restrictive, *Andrews* pointed the way to showing both that the s. 15 list of prohibited grounds is not an exhaustive list and that the rights are indivisible.

[77] The Government also referred to **Rossiter v. Prince Edward Island (Attorney General)** (1996), 139 D.L.R. (4th) 88, (P.E.I.S.C.T.D.). This was a *Charter* reference regarding pension legislation affecting retired members of the Legislature in which it was held that retired status does not qualify as an analogous ground because retired persons are a heterogenous group, and as well do not necessarily lack political, social or economic clout. I did not see that this judgement assists Government's submission on immutability. *Rossiter*, supra, was also decided based on its own particular facts. It does not purport to create or follow a prerequisite of immutability. In any event, casual workers are not disqualified from consideration because they are heterogenous. No differently than persons sharing the same religion, or sex, or age, or any other enumerated ground, casual workers are persons each with their own individual and personal characteristics who flow into and out of the casual work force by different points of birth, death, degree of definition, work, etc. But all of that is beside the point in any event. What is important in this assessment is that they hold a political belief and they are employees. Political belief is the personal characteristic upon which they are discriminated against; employment is the medium of discrimination. The *Charter* protects individual rights as well as group rights. The applicants are individuals. They are only a group by this court proceeding. It matters not whether each one shares the same political belief, or supports the same political party. One person discriminated against in his or her employment based on political belief could have brought this proceeding.

[78] This whole confluence of factors clearly points to the result that a mutable factor, in this case political belief, can be a protected right. The objective of the analysis is to ensure that the claim fits within the overall purpose of s. 15(1). The fact that the characteristic is mutable should not necessarily detract from its deserving protection as a right. Indeed, the mutability of political belief emphasizes the need for its protection. Because it is subject to influence and coercion by the discriminator through the granting and withdrawal of employment political belief is a mutable characteristic that is very vulnerable to being affected by real discriminatory action. Unskilled casual workers who depend on seasonal employment appear especially vulnerable. Governments in this province have demonstrated in plain view that patronage is practised extensively in the casual employment sector of the public service workforce, and that the exercise of governmental power includes the discriminatory activities of which the applicants complain.

! *Political power*

[79] The final factor I will mention for consideration in the second stage of the test is the power of the individual discriminated against. Lacking of political power, being disadvantaged, or being vulnerable to become disadvantaged or having their own interests overlooked, can be an indicator of an analogous ground: *Corbiere*, supra, at para. 60.

[80] Provincial Government casual employees who hold political belief are plainly vulnerable to the exercise of political power by the Government. The Government holds and exercises overwhelming power over the casual employee. Government and the Legislature apparently view the individual discriminated against as a person whose political belief somehow justifies or permits the Government to discriminate against him or her. Such discrimination occurred in the present case and then the impugned legislation was enacted.

[81] The discussion needs to be elevated above whether the person discriminated against is a Liberal. No one suggests that a Liberal per se is a disadvantaged person. But that is not a factor. The personal characteristic is that the person discriminated against by Government in the medium of his or her casual employment is discriminated against because he/she holds a political belief, as defined by the *Human Rights Act*, which is demonstrated by party participation.

[82] Casual employees are vulnerable to Government acts of discrimination. First, they are very much the weak party in the employment relationship in which the Government controls most of the terms. Second, the Government controls the remedy for its own breach of the law, namely of termination of employment by discrimination based on political belief. Except for constitutional constraint, Government can minimize the right of complainant redress and the consequences for itself of its violation of the employees' recognized human right. Third, the relationship has a fundamental political aspect. Given the striking power imbalance, it is easy to see that Government acts of discrimination would influence and coerce persons who are casual employees and sometimes their close relatives from exercising their political beliefs. To work or speak against the Government would be to "bite the hand that feeds you". The vulnerability of the person and of the right to hold political belief is acutely palpable.

! *Conclusion*

Upon this analysis it becomes clear that political belief is an analogous ground. In *Law*, supra, at para. 51, it is stated that human dignity means that a person feels self-respect and self-worth. It is concerned with physical and psychological empowerment and integrity. Human dignity is harmed by unfair treatment premised on personal traits or circumstances which do not relate to individual needs, capacities, or merits. Political belief is a human right, a very personal characteristic, one of fundamental personal importance to the person in a democratic society. It is synonymous with, and feeds, expressly stated *Charter* protected values. It is changeable, if at all, only at great

personal cost and qualifies as being constructively immutable. Its' mutability increases the vulnerability. Persons who hold political belief different than those of the discriminator who exercises political power are highly vulnerable and are relatively disadvantaged. Government practices demonstrate this; the effect of the legislation on the casual employee is central to their being; and is acutely palpable. The individual right to freely hold and exercise political belief falls squarely within the statement of the majority judgement in *Corbiere*, supra at para. 13 as being something that government has no legitimate interest in expecting persons to change to receive equal treatment under the law.

! (iii) Discrimination which involves a s. 15(1) remedy

[83] The final question on the s. 15(1) analysis is whether the treatment of the applicants by the impugned legislation discriminates in a substantive sense, such that the purpose of s. 15(1), which is called upon as a means of remedying such ills as prejudice, stereotyping, and historical disadvantage, should be invoked. In *Corbiere*, supra, at paras. 16 and 17, McLaughlin J. stated the question and the analysis this way:

...In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based --that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?

Applying the applicable *Law* factors to this case -- pre-existing disadvantage, correspondence and important of the affected interest -- we conclude that the answer to this questions is yes. ...

[84] This determination of whether differential treatment imposed by legislation is discriminatory is to be undertaken in a purposive and contextual manner: *M. v. H.*, supra, at para 65. Differential treatment is permitted under s. 15 provided it is “*without discrimination*”: *R. v. Turpin*, [1989] 1 S.C.R. 1296, at para 48. A person must show that the legislative impact of a law is discriminatory, and not only unequal treatment under the law or differential impact on him or her in the protection or benefit of the law: *Andrews*, supra, at p. 182. The four contextual factors which provide a basis for organizing this stage of the analysis are discussed by the Supreme Court in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, commencing at para. 68, and are employed below. The purpose of s. 15(1), is previously discussed: *M. v. H.*, supra, at para. 47.

[85] In my assessment, the purpose of s. 15(1) is expressly and directly violated by the impugned legislation. Section 28.4(2) - (5) of the Act proscribes most of the legislatively prescribed relief when the person whose human rights are violated is a casual employee of Government who is discriminated upon based on his or her political belief. The legislation imposes a distinction which undermines the presumption upon which the guarantee of equality is

based. It undermines recognition of the applicants as individuals discriminated against having equal worth regardless of political belief. *Law*, supra, at para. 62 highlights contextual factors in a non-exhaustive list for consideration.

! Pre-existing disadvantage, stereotyping, prejudice and vulnerability

[86] Persons who suffer from employment discrimination are subject to stigmatizing by stereotyping that goes to recognition of their worth and dignity. Segregation of rights of one created class of these persons and confining their redress to a significantly lesser remedy publicly declares that those persons are less worthy than all other persons who suffer discrimination in employment based on any other personal characteristic and less worthy than all other persons who suffer discrimination. It is contrary to the purpose of s. 15(1) that these persons should be viewed and treated as less worthy, less dignified, and less deserving of the remedies deemed by the *Human Rights Act* to be universally available to all other persons whose human rights are violated. The applicants have demonstrated that the impugned legislation has the effect of perpetrating or promoting the view that as individuals they are less capable as human beings or less worthy of recognition or value. This is sufficient to establish a s. 15(1) infringement: *Law*, supra, at para. 64. But it does not stand alone.

[87] Another indicator is vulnerability. The denial of a potential benefit which may impose a financial burden contributes to vulnerability: see *M. v. H.*, supra, at para. 69. The applicants as casual employees are dependent on the favour of Government for their livelihood and for their dignity as employed persons. The Government took away their employment, and then the Legislature enacted legislation which cuts down their rights. Vulnerability is palpable, and is underlined by such Government and legislative action. Persons who hold a political belief which is at odds with the government of the day, or associates them with a political party opposed to the government of the day, are exquisitely vulnerable.

[88] The vulnerability suffered by persons who hold political belief is an obvious disadvantage which has existed historically. In 1975, the Legislature recognized this by adopting into provincial human rights law the natural law and international law right to hold political belief. This legislative activity reflects history. However, since the evidentiary base for discussing historical disadvantage is somewhat thin in this case, it is sufficient to observe that historical disadvantage is an important *indicium* of discrimination, but not determinative. The Supreme Court has stated: “... it is of course *not necessary* to show such [historical] disadvantage in order to establish a s. 15(1) violation, ...”: *Law*, supra, at para. 65.

[89] In any event, as Iacobucci J. went on to note in para. 66, the *Charter* guarantees equality rights to individuals. It may therefore be misleading or inappropriate in some cases to refer to historical disadvantage in terms of a group in which the individual person holds membership. The

right to hold political belief is not dependent on the party affiliation definition in the *Human Rights Act*, or indeed on any association with a group. It is a standing individual right to hold a political belief.

! Relationship between ground and claimant / ameliorative purpose or effects

[90] This factor is discussed in *Law*, supra, at paras. 69-72. It does not have much impact on the analysis in this case. There is no relationship between the ground and the applicants in the present case. The impugned legislation does not address any actual needs, capacity, or circumstances of the applicants or other persons who hold political belief in a manner that respects their value as human beings. The differential treatment has the effect of violating human dignity. Any valid purpose of s. 28.4(2) - (5) does not permit it to function to deny an equality claim where the effect of the legislation on the individual conflicts with the purpose of s. 15(1) of the *Charter*.

[91] The impugned legislation does not have any ameliorative purpose and effect on some more disadvantaged group in society which accords with the purpose of the *Charter*. Surely it would not be suggested as any justifiable basis that the replacement of Government casual workers holding one political belief with persons who pronounce that their political beliefs ascribe to the political belief supposedly exercised by the party in power should be a qualifying purpose. That proposition would represent a constitutional entrenchment of political patronage in which individual workers continue to be beholden to the favour and whim of political masters who would exercise power in return for loyalty for their employment, and of the obvious associated tendency to stifle political belief that is at odds with the government agents in power. Such a misinformed submission would as well miss a sometimes hidden lesson of *Charter* jurisprudence, which is that mistreating others rebounds on the discriminators.

! Nature of the interest affected

[92] Consideration of this factor involves evaluation of the constitutional, societal, and economic significance attributed to the interest adversely affected by the impugned legislation. All else being equal, the more severe and localized the consequences on the affected group, the more likely the distinction responsible for these consequences is discriminatory within the meaning of s. 15(1): *Law*, supra, at para. 74; *Egan*, supra, at paras. 63-64.

[93] It is hard to imagine a more serious economic significance for casual workers than that created by the legislative bar. The impugned legislation prevents a Panel from granting most remedies available under s. 28.4(1) of the Act, including ordering the Government to stop discriminating against them and other such persons, both presently and in future, ordering

reinstatement of their employment with Government, and ordering what the Panel views as fair and just compensation subject to judicial review by a court. It denies a class of persons discriminated against, persons who depend on the Government for casual employment, an effective remedy in the vital matter of their employment.

[94] The constitutional and societal significant is great, too. The stigmatization of persons who exercise their political beliefs and related rights of political association undermines the fundamental nature of free pursuit of political belief in a democratic state. The *Charter* and the jurisprudence recognize political participation as valuable because it enhances personal growth and self-realization. The centrality of the rights associated with freedom of conscience to basic beliefs about human worth and dignity and to a free and democratic society underlies that they are fundamental. See L'Heureaux-Dubé J. in *Committee for Commonwealth of Canada v. Canada*, supra, at p. 17. Creation of legislation which encourages fears of negative economic consequences and stigmatization undermines fundamental constitutional principles.

“Jazairi” submission

[95] The Government referred to *Jazairi* for the proposition that the omission of political belief from human rights legislation has been held not to constitute discrimination under the *Charter* s. 15(1). I do not share Government's interpretation or application of that judgement or that it assists the Government's position. *Jazairi* was decided narrowly and on its facts. It rejected the claim by a university professor that his personal opinion on the relationship between Palestinians and Israel prevented his promotion and amounted to a creed. Finlayson J.A. found that there was no evidence which showed his human dignity was even engaged, much less violated, or that his political views disintitled him to consideration for promotion. The Court stated that it would not on the facts before it in *Jazairi* consider the issue of whether political opinion could amount to a creed. In addressing s. 15(1) this Court referred to the *Law*, supra, approach and confining it analysis to the third leg of the test decided, based on the facts of the case, not on the ground of political belief, there was no evidence that his political beliefs disintitled him to advancement. Finlayson J.A. concluded that *Jazairi* was not a good case to deal boldly with a new analogous ground.

! *Conclusion on the third leg of the test*

[96] These factors overlap. Consideration of all facets of the test reveals the conclusion that the treatment of the applicants by the impugned legislation discriminates against the applicants in a substantive sense. Discrimination is established. Prejudice and vulnerability are apparent. The effect is palpable on the interest and on the persons holding the interest. The difference in treatment it imposes is not justified at all on a purposive or contextual analysis. There is no amelioratory effect. It does not pretend to help persons holding political belief; no bettering of

their lot is attempted. The discrimination which occurs pursuant to the legislation is discrimination within the s. 15(1) equality guarantee. In *Andrews*, supra, McIntyre J. defined discrimination in the context of s. 15(1) this way (at p. 18):

“I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”

! Conclusion of Charter s. 15(1) analysis

[97] Upon employing the assessment advised by *Law*, supra, I find that the applicants have satisfied their burden of proof under s. 15(1). In the present case it is necessary for the applicants to satisfy each leg of the test ie. a formal distinction based on a personal characteristic, differential treatment based on an analogous ground, and discrimination by differential treatment within the purpose of s. 15(1). The foregoing discussion demonstrates that the applicants have established that their rights protected by s. 15(1) of the *Charter* have been infringed. The agreed facts and applicable legislation, along with consideration of abundant Supreme Court precedent and direction, provide a sufficient platform upon which to apply logical reasoning and reach this conclusion.

Section 1 of the Charter:

[98] By virtue of s. 1 of the *Charter*, the rights and freedoms guaranteed are guaranteed “*subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society*”. Section 1 requires the Government to establish that the limitation imposed on the exercise by the applicants of their *Charter* rights was undertaken pursuant to objectives that were pressing and substantial. At this stage, the Government bears the onus of demonstrating the justification.

[99] In *M. v. H.*, supra, Iacobucci J. rendered the Supreme Court’s judgement on s. 1. The analytical framework for determining whether a law constitutes a “*reasonable limit*” that can be “*demonstrably justified in a free and democratic society*” under s. 1 has been well established. The principles animating this general approach apply. “*Free and democratic*” is the standard of justification and refers to the purpose of the *Charter*. The *Charter* has brought about a redefinition of our democracy, which involves “*a dialogue of mutual respect between*

the courts and the legislatures". This includes the idea that courts do not second-guess legislatures and executives; rather they uphold the Constitution as they are expressly invited by the **Charter** to do. The jurisprudence recognizes that **Charter** rights are not so absolute that limits can never be justified. A s. 1 evaluation is always in order. There is a role for deference but "*deference is not a kind of threshold inquiry under s. 1*". The notion of judicial deference to legislative choices should not be used to completely immunize legislation from **Charter** scrutiny. Fulfilment of the Government's burden of proof will depend on the circumstances, and the question of deference is intimately tied with the nature of the claim or evidence at issue, and considered in relation to the issues itself.

[100] The test for s. 1 analysis was recently reaffirmed in *Little Sisters Book and Art Emporium et al. v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120. The test consists of three essential requirements as follows:

- (i) the limit on **Charter** freedoms must be "prescribed by law";
- (ii) the law in question must be directed at a "pressing and substantial objective";
- (iii) the means chosen must a rational response to the legislative objective.

[101] I conclude that the impugned legislation is not shown to qualify as a reasonable limit as can be demonstrably justified in a free and democratic society on either of the requirements in issue.

! (i) *Prescribed by law*

[102] The first requirement "prescribed by law" is not in issue. The limitation on redress for violation of the applicants' right to hold political belief is contained in legislation ie. the impugned s. 28.4(2) - (5) of the **Human Rights Act**.

! (ii) *No pressing and substantial objective*

[103] Government states that the purpose of the impugned legislation is, as described in **Hansard**, to accord political belief complainants whose complaints were determined by a Human Rights Panel to have merit to a level of compensation which recognizes their salary level or contract rate of pay and the years of service expressed as a full-time equivalent. Government submits it can also be inferred that the purpose of the limitation on monetary compensation for political belief complainants was to provide monetary compensation in meritorious cases while limiting taxpayer exposure to the consequences of numerous "political belief" complaints.

[104] Fiscal responsibility in all its aspects is obviously a laudable objective. Indeed, Desroches J. of this Court held in **Rossiter**, supra, that reducing the unfunded liability in a pension plan was a

pressing and substantial objective. I do not disagree with that assessment. However, a laudable objective does not automatically qualify legislation as satisfying the criterion of being directed at a pressing and substantial objective. *Rossiter*, supra, was decided on the basis that there was no s. 15(1) violation. In the present case, a s. 15(1) violation is found. It is to be remembered that it is the right to substantive equality and the accompanying violation of human dignity that has been infringed when a violation of s. 15(1) has been found. In those circumstances legislation must be made in a manner that respects the dignity of those affected and recognizes them as equally capable, deserving, and worthy of recognition.

[105] In my assessment, the legislative limit on remedies following the Government's own violation of the human right of political belief is not directed at a pressing and substantial objective. The impugned provisions are seeded into human rights legislation. The purpose of human rights legislation is to recognize the inherent dignity and equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, and among other things to provide a mechanism by which complaints of discrimination can be dealt with. Legislative objective is not to be understood in isolation, but in the context of its surrounding legislation. The impugned amendment constitutes a cap on compensation and denial of all other remedies. In the face of the objective of the *Act* this is not shown to be in accord with a pressing and substantial objective surrounding the *Human Rights Act* itself. The *Human Rights Act* prevails over all other laws of the province. The impugned legislation is antagonistic to the rest of the *Act*. It attacks from within the objectives of the *Act* by creating a mechanism for prevention of the full enforcement and redress contemplated by the *Act*. The impugned legislation segregates from full and ordinary level of compensation and other kinds of remedy those persons against whom the Government has discriminated in their employment based on the political belief. The impugned legislation undermines the right expressed in the *Act* of individuals to hold political belief. The impugned legislation exacerbates the circumstances of vulnerability and disadvantages of the persons discriminated against. From the perspective of the human rights legislation within which it resides, the impugned legislation is only an unjustifiably erosion of rights.

[106] Financial or fiscal responsibility is not in any event sustainable as a basis for showing a pressing and substantial objective. According to Government, the impugned legislation creates a formula to provide for an expeditious and equitable resolution to the great volume of cases which occur with a change of Government. This begs the question of why this should be viewed as a pressing and substantial objective? Considering the circumstances, it should not. The Legislature and the Government have the ability to control the cost to Government and the taxpayer by other means. Government can refrain from discriminating; and comply with the provincial human rights law. Government could reorganize its' system of casual employment to some other model that enables it to accomplish legitimate objectives without infringing on fundamental rights.

[107] The only argument advanced by Government of an ameliorative purpose is expedition.

History shows this proposition is dangerous. As the Supreme Court emphasized in *Vriend*, supra, Canada is a democratic society which recognizes that fundamental rights, being indivisible, will not be casually sacrificed. The proposition is illogical, too. Surely the Government's need to control taxpayers exposure to the consequences of its acts of discrimination cannot be built to the level of "*pressing and substantial*" on the foundation that Government's actions have produced numerous political belief complaints. Political belief is recognized in law as a valid human right. Government has acknowledged applicants' complaints as valid. In the circumstances there is no justifiable or logical reason why Government as the steward of the taxpayers assessment should be excused from the consequences of its violation of human rights because it has discriminated against many as opposed to few.

! (iii) Means chosen not rational response to objective

[108] There are three elements to the third requirement that the means chosen must be a rational proportionate response to the legislative objective. First, the law must show a rational connection to the government's objective; second it must minimally impair the rights in question; and third benefit of the legislation must outweigh its deleterious effects on *Charter* rights: *Little Sisters Book and Art Emporium*, supra, at para. 215.

[109] The means chosen by the Government and employed by the Legislature by the impugned legislation are not a rational proportionate response to the legislative objective. According to s. 1 of the *Charter*, the limits on *Charter* rights and freedoms must be demonstrably justified in a free and democratic society. The analysis focuses on the objective of the impugned legislation, not in isolation, but in the context of the purpose of the legislation in which it is found. The objective of the *Human Rights Act* is previously stated. The limitation on available remedies does not promote that objective.

! Proportionality

[110] The Legislature can enact laws that limit remedies. However, it must do so in a reasonable and proportionate manner having regard to the individual right protected by s. 15(1) of the Charter. By way of analogy see *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 83. The guidance from all of the Supreme Court jurisprudence is that the limitations are to be employed in a balanced and reasonable way. The impugned legislation goes much further. Where discrimination by the Government against a person in employment based on political belief is proven or admitted, the impugned legislation bars four out of the five kinds of remedies available to all other complainants and stipulates a limiting formula on the claimants' right of compensation. In the absence of a remedy, there really is no right. The natural progression from legislation that denies remedies and abrogates rights is toward a broader license for government to exercise unbridled power without due regard for other fundamental individual rights. That is not the kind

of society toward which the *Charter* promotes.

[111] The Government submits that the question is whether the legislation has an ameliorative purpose or effect. Government concedes the impugned law was not aimed at improving the lot of any particular group; but that the objective of the legislation was to deal with numerous complaints of a similar nature in an expeditious and equitable fashion by creating a formula which would be applied to all complaints. In my view, there is no foundation for that submission. Complaints are filed by individuals. The situation of each claimant is distinctive. To the extent their claims are related or similar, the *Act* already contemplates that a Panel can make that determination.

[112] Further, the Government's means chosen to accomplish its stated objective is not a rational response. There is no proportionality in denying claimants most of their rights in order to achieve uniformity based on what the discriminator itself defines as full redress. A person cannot be a judge of his own case. Neither should Government be in this situation. The law provides a fair and protected mechanism for determination of remedies. A Panel hears from all interested parties to the complaint, including the complainant, the Government, and the Commission and then makes its decision. Should a Panel decision be made unlawfully, or be unreasonable in the result, then any party can bring an application to the Court for judicial review of the decision. The law contains full guidance for the determination of reasonable compensation for discrimination in employment.

! Rational connection

[113] Courts respect that the Charter does not require legislative policy be perfect. It is not required that a legislature choose the best method to address its objective. Goodridge C.J.N. stated in *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1988), 44 D.L.R. (4th) 501 (Nfld. C.A.), at p. 524:

If a scheme is reasonable and fair when viewed globally, it will not be condemned notwithstanding that it may have imperfections.

(That case is otherwise distinguishable as the Newfoundland legislation in issue was found not to be discriminatory.) The present case is not one of questionable choice of policy vehicle. In the present case there is no rational connection shown. In my view, the Government has not shown an evidentiary link connecting the legislative scheme with the stated objective. From a human rights perspective the limit on the maximum compensation available to persons who suffer discrimination in employment increases the prejudicial effect of discrimination based on political belief. This creation of a substantive discriminatory effect within the *Human Right Act* directly opposes objectives of the *Act*. It undermines the objective by advising casual-employees, would be casual-employees, and their families that the Government will utilize the Legislature to make

law to restrict the ramifications of its own politically based discriminatory actions. From a perspective of cost savings and expedition, surely it is not rational to condone denial of remedies for the purpose of enabling government violation of human rights without normal consequences.

! Minimal impairment

[114] A minimum impairment analysis must be sensitive to the previously discussed contextual factors. Minimum impairment must be achieved in a context which does not perpetrate stereotyping and which respects dignity. The impugned legislation does not specifically impair the right to be free from discrimination in employment based on political belief. What it does is strike at persons discriminated against where they are acutely vulnerable - their financial security and their dignity. It subjects the casual employee to the power and authority of the government of the day in a manner which is insupportable and is corrosive of their rights and of the objects of the **Human Rights Act**. The Government has not demonstrated that the statutory bar and cap on remedies imposed by the impugned legislation is a minimal impairment. No infringement of the applicants' equality rights has been shown necessary to achieve the ostensibly stated purpose of saving the taxpayers' money. Government has at its disposal full ability to avoid the costs of such awards. It can employ and apply other solutions that do not involve individual discrimination against the human rights of the citizens it serves, and do not cause expense for the taxpayer. Government has choices. Where discrimination does occur, there is no good reason shown for denying persons discriminated against their right to be treated equally under the law. There is no reason to deny their right to a normal range of remedies determined by an independent Panel under the **Act**.

[115] Government submits the impugned legislation minimally impairs any infringement in any event because upon a claim being determined meritorious the claimant can have the satisfaction of knowing that a Human Rights Commission Panel has found in their favour and found that the Government was wrong. With great respect, that submission comes across as being rash. It would be a hollow victory for a person discriminated against in employment to be able only to show that the discriminator who holds the power was wrong. Absent eligibility to the normal remedies of cessation of the practice, reinstatement, and full compensation, victory would be illusory.

[116] Under the subject of '*Minimal impairment*', I wish to elaborate on my reason for rejection of the Government's submission that the compensation cap created by the impugned legislation does not preclude a Panel from ordering the other remedies available for other human rights claimants under s. 28.4(1). I have indicated previously my opinion that the legislation does have exactly that effect. Counsel for the Government stated in the hearing that the impugned legislation has never been tested by a Panel, that it has never come to the situation where it has been called upon to apply that particular section. The record put before the Court shows that

the Executive Director and the Chairman were of the opinion that the compensation offered by the Government to the claimants in accordance with the legislative cap is exhaustive of the complainants' remedies. Otherwise they would not in the circumstances have said that the Government had offered the maximum relief available and then declined to take any further steps. Within the hearing, counsel for the Commission, who conducted only a watching brief on the motion, advised the Court "...that since that compensation level was mandated by the Act, and if a tribunal cannot award anything further, that has to be deemed a reasonable settlement." Counsel for the applicants referred to s. 28.4(5) as further amplification that the compensation formula is exhaustive because it states: "*Compensation ordered pursuant to subsection (2) is deemed to be comprehensive and exhaustive, and the Human Rights Panel shall make no further order in respect of any complaint to which subsection (2) applies.*" Based on Government's submission, its misinterpretation on this basic factor may have contributed to its advancing a s. 1 justification for the s. 15(1) **Charter** breach.

! *Overall Proportionality*

[117] I find no balance between the deleterious effects and the salutary objectives of the impugned legislation. See *Little Sisters*, supra, at paras. 152-153.

! *Conclusion on s. 1 analysis*

[118] Section 15(1) should not be illusory, either by itself or by s.1 justification. The Government has not shown the impugned law is directed at a pressing and substantial objective, or that the means chosen are a rational or proportionate response to the legislative objective. The impugned legislation is not saved by s.1 of the **Charter**.

Declaration:

[119] A declaration will issue 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**.

Costs:

[120] Costs of this motion will follow the result of this motion. The applicants' shall have their costs against the Government to be assessed on a party and party basis and payable forthwith.

There will be no order of costs regarding the Commission, which participated as a respondent in the motion only by a watching brief.

Justice David H. Jenkins

June 26, 2002