

Citation: Condon v. Gov't PEI and H.R.C.
2004 PESCTD 36

Date: 20040506
Docket: GSC-17549
Registry: Charlottetown

**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

Respondents

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

Appearances:

David W. Hooley, Q.C. and P. Alanna Taylor, for the Applicants
Ruth M. DeMone, for The Government of Prince Edward Island
Gregory J. Howard, for The Prince Edward Island Human Rights Commission

Date and place of hearing

November 27, 2003
Charlottetown, Prince Edward Island

Date and place of judgment

May 6, 2004
Charlottetown, Prince Edward Island

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(16 pages)

CONSTITUTIONAL LAW: Charter sections 2(b) and (d) - fundamental freedoms - political belief.

CASES CONSIDERED: *Condon v. Prince Edward Island*, [2002] P.E.I.J. No. 56 (PESCTD); *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (SCC); *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (SCC); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 (SCC); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (SCC); *Gaudette v. Prince Edward Island*, [2002] P.E.I.J. No. 47 (PESCTD); *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 (SCC); *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 (SCC).

RULES CONSIDERED: Prince Edward Island Rules of Court, Rule 21, 22.

STATUTES CONSIDERED: Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982; Human Rights Act, R.S.P.E.I. 1988, Cap. H-12; An Act to Amend the Human Rights Act, S.P.E.I. 1997, Cap. 65; Civil Service Act, R.S.P.E.I. 1988, Cap. C-8; An Act to Amend the Civil Service Act, S.P.E.I. 1998, Cap. 2.

Appearances:

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

Ruth M. DeMone, for The Government of Prince Edward Island

Gregory J. Howard, for The Prince Edward Island Human Rights Commission

Jenkins J.:

[1] ***Condon v. Prince Edward Island***, [2002] P.E.I.J. No. 56 (PESCTD), ("**Condon #1**"), was a determination of a constitutional question which underlies the application for judicial review in this proceeding. The Applicants and many other persons had made complaints against the Government of discrimination in employment based on political belief. While the complaints were pending, the Government caused the Legislature to enact a special legislative limit on the remedy for Government discrimination against casual employees based on political belief. The Commission then made decisions regarding the complaints that determined all settlements were subject to these new legislative limits. The Applicants then brought an application for judicial review of those Commission decisions. The parties considered that determination of a constitutional question about the validity of the special legislative limit to be key to resolution of the matters in the applications under judicial review. Accordingly, the Applicants and the Government jointly brought a motion for determination of a question of law under Rule 21 of the ***Prince Edward Island Rules of Court***. In accordance with its constitutional and judicial duty, this Court decided that motion in **Condon #1**.

[2] The sole issue in **Condon #1** was the application of the equality provisions of the ***Canadian Charter of Rights and Freedoms***, being Part I of the Constitution Act, 1982, (the "**Charter**") s. 15(1) to particular amending provisions of the provincial human rights legislation (***Human Rights Act***, R.S.P.E.I. 1988, Cap. H-12 (the "**HRA**")) which imposed the limit on remedies. Section 28.4(2) to (5) of the **HRA**, which was assented to December 24, 1997, proscribes most of the generally available remedies for a very particular category of discriminatory activity and victim – discrimination in employment, by Government, against a particular category of casual employee, based on political belief, and for complaints then pending and new complaints filed before June 1, 1999. Following full reasons, I rendered an opinion and issued a corresponding declaration. I determined that the statutory limitation on available remedies and the compensation formula prescribed by s. 28.4(2) to (5) of ***An Act to Amend the Human Rights Act***, S.P.E.I. 1997, Cap. 65 constitutes a violation of the Applicants' equality right as protected under s. 15(1) of the **Charter** that is not saved under s. 1 of the **Charter**.

[3] The Government appealed the decision in **Condon #1**. I am since informed that at the commencement of the appeal, it was agreed amongst the parties and the Court that before proceeding further, the Applicants should first ask me for an opinion and a declaration on a related constitutional question. Accordingly, the parties have jointly brought this additional question before me for determination. The additional question is whether the impugned statutory limit prescribed by s. 28.4(2) to (5) of the **HRA** constitutes a violation of the Applicants' fundamental freedoms as protected under s. 2(b) and/or s. 2(d) of the **Charter**; and if it does, then whether the impugned statutory limitation is saved under s. 1 of the **Charter**.

[4] My further involvement at this stage is unusual. It is upon the direction of the Appeal Division to cover the full constitutional ground at the court of first instance before appellate consideration of all questions. I accept that mandate. However, I do need to proceed within particular constraints. My decision in **Condon #1** is rendered and is final. In embarking upon the present exercise, I will not, indeed I cannot, revisit my findings and decision in **Condon #1**. This Court is functus about those matters, and the proper forum for their further discussion is on appeal.

[5] The questions in **Condon #1** and in this Special Case are directly related in law, and are based on the same agreed facts. To the extent it is applicable, my judgment in **Condon #1** regarding s. 15 is necessarily the platform for consideration of the s. 2 issue now before me. I have already passed judgment on many important matters which would normally be covered in my opinion on the kind of question presented in this Special Case. I have already found that the Government action regarding the Applicants is discrimination in a matter of employment based on political belief in contravention of the **HRA**: See **Condon #1**, at paras. 22 to 24. I have already dealt with the **HRA** treatment of discrimination, with the Applicants' standing, and with the limited and appropriate role of this Court on a constitutional review: See **Condon #1**, at paras. 25 to 38. **Condon #1** states my opinion as to the discriminatory treatment imposed by the impugned amendments (at para. 48):

¶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.

[6] The parties have stated that the agreed facts in **Condon #1** (at para. 11) apply to this Special Case. The parties also agreed that on consideration of this Special Case, I may refer to both the Record filed by the Commission and the affidavits filed by the Applicants in **Condon #1**.

[7] My assessment of the vulnerability of casual workers including the Applicants to the Government action is also stated in the s. 15 analysis in **Condon #1** (at paras. 79 to 82). These passages are pertinent to the questions on this Special Case:

¶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.

[8] One question of process arose in this Special Case. **Condon #1** was brought as a motion for an opinion under Rule 21. The present application is brought as a Special Case under Rule 22. In my understanding, my substantive mandate is the same, which is to determine a stated question of law in relation to particular facts.

Relevant Statutory Provisions

[9] The relevant **HRA** provisions are set out in **Condon #1** at paras. 18 and 19. The impugned amendments state:

28.4 (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.

...

[10] The pertinent **Charter** provisions are set out in **Condon #1**, at para. 20. Section 2 of the **Charter** states:

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.

Section 2(b) and (d) Analysis

[11] In order to establish a violation of s. 2(d), the Applicants must demonstrate first that such activities fall within the range of activities protected by s. 2(d) of the **Charter**, and second, that the impugned legislation has, either in purpose or effect, interfered with these activities: **Dunmore v. Ontario (Attorney General)**, [2001] 3 S.C.R. 1016 (SCC), at para. 13.

- *Activities fall within range of protected activities*

[12] The Applicants point out that freedom of association is grounded in an acknowledgement of individual rights in the face of the power of the state. The importance of the freedom has been described by the Supreme Court as protecting individuals from the vulnerability of isolation and ensuring potential and effective participation in society: **Dunmore**, *supra*, at para. 111; **Reference Re Public Service Employee Relations Act (Alberta)**, [1987] 1 S.C.R. 313 (SCC), at paras. 87 and 92. Political expression and association, being essential and valuable because they enhance personal growth and self-realization i.e. acting on political belief, are clearly included in the range of activities protected by the **Charter** s. 2. The importance of the fundamental freedom of association is most poignant in the employment context, which is characterized by vulnerability and imbalance of power and underscored by the importance which our society attaches to employment: See **Delisle v. Canada (Deputy Attorney General)**, [1999] 2 S.C.R. 989 (SCC).

[13] The Government acknowledges that political belief and association is one of the freedoms guaranteed by ss. 2(b) and (d). The Government does not make any distinction between the words “*belief*” and “*expression*” contained in clause (b) and the word “*association*” contained in clause (d) because the right to association is merely a

manifestation of the right to work collectively toward a common goal based on similarity of thoughts and beliefs.

[14] I share the views in these submissions. The protected interests are specific fundamental freedoms. The Supreme Court discussed the concept of freedom in **R. v. Big M Drug Mart Ltd.**, [1985] 1 S.C.R. 295 (SCC). A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms. Freedom must be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept is the right to entertain such beliefs, as applicable, as the person chooses, and the right to express and practise the belief openly without fear of reprisal. But the freedom means more. Freedom can primarily be characterized by the absence of coercion or constraint. A major **Charter** purpose is to protect, within reason, from compulsion or restraint. Freedom means that subject to necessary limitations, no one is to be forced to act in a way contrary to his beliefs or conscience.

[15] Section 2(b) feeds s. 15(1): See **Condon #1**, at paras. 55 to 59 and 64 to 68. These passages especially apply to this discussion:

¶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.

...

¶57 The right to hold political belief feeds the right of freedom of expression, which is a right expressly protected by the Charter. ...

...

¶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. [Emphasis added]

...

- *Purpose or effect which interfered with these activities*

[16] The second question is whether the impugned legislation has a purpose or effect which interfered with these activities.

[17] The Applicants submit the purpose and effect of interfering with the protected activities is very clear.

[18] The Government submits the amendments merely place a limit on the relief available to political belief complainants, and contain nothing that has the purpose or effect of prohibiting or coercing any particular thought, belief, opinion, expression or association, or compelling any particular course of action or inaction.

[19] I reject this Government submission; and I accept the Applicants' submission. In **Condon #1** I addressed a submission on essentially the same vein this way:

¶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.

[20] Both parties referred to the recent Supreme Court decision in *Dunmore, supra*. The Supreme Court stated in *Dunmore, supra*, the purpose of s. 2(d) of the **Charter**, which is to allow the achievement of individual potential through interpersonal relationships and collective action. The purpose commands a single inquiry: Has the state precluded activity because of its associational nature thereby discouraging the collective pursuit of common goals? The central consideration is whether the Legislature's deliberate decision to exclude flowed from a purpose that is in conflict with the fundamental freedom of employees to associate for furtherance of their political beliefs. It is not open to the Legislature to enact a statutory provision where the motivation for enacting the provision is anti-associational, subject of course to s. 1 of the **Charter**.

[21] In the matter now before the Court, the context advises that the Government motivation was to exclude rights to remedies for discrimination inflicted by Government action of terminating or reducing employment of persons known or perceived to be supporters of another party and to make room for supporters of the party of the Government. The purpose of the **HRA** is to protect individuals from discrimination. Political belief is stipulated as a protected right. The protection must be afforded in a manner that is consistent with the fundamental freedoms recognized by s. 2 of the **Charter**. The impugned amendments to the **HRA** manifestly have a purpose and effect that is contrary to the specifically protected rights. The amendments legislatively limit rights specifically granted by the **HRA** and protected by the **Charter**.

[22] I referred to *Dunmore, supra*, in my s. 15 analysis in **Condon #1**, at para. 74. In *Dunmore*, the issue was the exclusion of agricultural workers from the benefit of Ontario collective bargaining legislation. The majority decision found an individual right protected by s. 2(d) of the **Charter** under freedom of association. In *Dunmore*, there was some internal discussion within the majority decision over purpose and effect, and there was one dissenting opinion. In the present case, the analysis is easier. The purpose of the impugned legislation is singular, and is clear – to exclude or limit an existing legislative right to remedies for Government violation of displaced casual workers' human rights of political belief in a matter of employment. There is no other policy objective, except the incidental one of expedience. The impugned legislation has a

chilling effect on the freedom of association of victims of Government action and other like-minded persons. This is especially so in view of the power imbalance in the relationship between Government and casual workers. My analysis yields the clear conclusion that the exclusion of persons including the Applicants from the benefit of the general law of human rights remedies for discrimination substantially interferes with their general freedom to hold their political beliefs, and to express and associate regarding their beliefs. In its purpose and its effect, the amendments to the **HRA** violates ss. 2(b) and (d) of the **Charter**.

[23] Section 2(d) of the **Charter** and *Dunmore, supra*, were considered recently in this jurisdiction by Matheson J. in *Gaudette v. Prince Edward Island*, [2002] P.E.I.J. No. 47 (*PESCTD*). Paragraphs 49 and 50 are a useful reference regarding the freedom of association guaranteed by s. 2(d) and the applicable test. Beyond that, *Gaudette, supra*, does not serve as a precedent for the present case because it involved different circumstances and was decided on a different basis than the present case. Mr. Gaudette claimed he lost his employment because he was a member of a political party. The Government action in question was an administrative action, not legislation. It was held that the termination of the contract did not interfere with Mr. Gaudette's freedom to belong to a political party. The question of whether the Government action targeted associational conduct could not be decided because Mr. Gaudette had not proven factually that the termination was because of his political association. In the present case the Government action is expressed in the impugned legislation, and the Applicants have provided a factual base sufficient to adjudge whether Government action targets associational conduct.

[24] The Legislature heard the concern of discrimination during the legislative debates which preceded passage of the impugned legislation. Hansard, 24 December 1997, at p. 3502 includes this submission from the Leader of the Opposition:

I say this, Mr. Speaker, [that the Opposition cannot support the amendments to the Human Rights Act] because the amendments are in themselves discriminatory. By prescribing the compensation to be paid to Islanders who are discriminated against because of their political belief or association, and by singling out this category of discrimination, government is saying, in essence, that certain rights are more important than others. Indeed, it could be argued that the bill as presently drafted, in effect, legalizes political patronage or, at least, it is a misdemeanour under the law with very little remedy. ...

[25] I do not accept the Government submission that the purpose and effect of the impugned legislation does not amount to a violation of the Applicants' rights on the facts of the present case; that it does not prevent them in a meaningful way from expressing their own beliefs; that they can still file complaints; and the amendments only deal with

the obtainable relief. The impugned legislation discriminates against the Applicants directly and in particular. The Government initiated the **HRA** amendment after the Government did not recall them, and after the Applicants had made their complaints to the Commission. The legislative amendment is expressly retroactive in its application, with the effect that it covers all the complaints that were unresolved as of the date of its coming into force; this includes the Applicants' complaints. The amendment applies only to the cohort of complaints which includes the Applicants, and it is stipulated to apply only to complaints filed with the Commission prior to June 1, 1999.

[26] The Applicants have met the evidentiary burden of showing that they are substantially incapable of exercising their fundamental freedom of holding and expressing their political belief in a meaningful way without the protection of the **HRA** and the remedies available under the **HRA** for victims of discrimination. Examination of the effect of the **Charter** breach, or its severity, involves looking from the point of view of the party whose rights are affected: See **Dumore**, *supra* at para. 142. The evidence on the Special Case shows that the Government discriminated against the Applicants, legislatively proscribed the remedies which were previously available to them and universally available to other victims of discrimination, and then put their previous jobs beyond their qualification by the terms of the Government's new 'Casual Conversion Program'. The impugned amendments are a central component to this Government program. This whole experience would represent serious coercion and discouragement to persons who are or aspire to be casual employees from holding or exercising political beliefs different than those of the Government party through outward expression or association. The effect on the Applicants is apparent. As casual employees they are vulnerable, have limited employment skills, and by their loss of employment have suffered financially and in their dignity. They and other casual workers would now easily see that the safe course is to refrain from political activity that offends the party in power.

[27] The agreement between the parties for this Special Case invites me to take into account certain affidavit evidence of the Applicants. In my assessment, their affidavit evidence describes the effect of Government's action in clear terms. These vignettes are illustrations:

- From 1993 to 1997, **Barbara Steele** was a part-time office assistant with a non-governmental, non-profit organization, the Montague Watershed Enhancement Co-operative Limited. Government provided the entire funding, coordinated the watershed program, and employed the staff. Over time, Ms. Steele's responsibilities and pay were increased, and there was no question about her job performance. Shortly after the 1996 election, she lost her position, and was replaced by a person who lacked the required experience for the job description. Her former employer paid her to train her replacement. Ms. Steele never thought politics would

affect her NGO employer, and had only become a card carrying Liberal immediately before the 1996 election. According to Ms. Steele and the Eastern Graphic newspaper, the position was filled by an applicant put forward by the Premier's office, which denied having any knowledge of Ms. Steele's application to return to the position she had occupied since 1993.

- **Gage Dixon** was employed by the Department of Transportation and Public Works as a heavy equipment operator. His accumulated employment amounted to 20 years over the previous 30 years; his employment was shortening in recent years. He had a satisfactory job record. He worked for a time during the winter after the 1996 election in the midst of new Government-appointed casual workers in what he describes as different and difficult circumstances which were imposed on him. Before the following winter, "*a political official within the Department*" advised him he would not be hired back despite his experience. Mr. Dixon says he was an active and known member of the Liberal Party of Prince Edward Island.
- From 1988 to 1996, **John MacTavish** was employed by Government in Transportation and Public Works on a seasonal basis as an asphalt raker. He is a known and active Liberal. He obtained his placement through his MLA. He believed he had an effective right of annual rehire based on past practice and satisfactory job performance. He received no call back in 1997 or thereafter. He was greatly disappointed that the Premier did not, in his words, "*stand by his words not to fire anyone who ... needed the job...*". He obtained information that the person who filled his position was a known supporter of the governing political party. Later, he understood his former position was being made permanent by the Government under the 'Casual Conversion Program', and that he was rendered ineligible to apply because he did not satisfy a Government-made requirement of being in the position within the preceding two years.
- **Wanda King** married into a Liberal family, and was first hired as a casual employee as a forestry labourer in 1983 by a previous Progressive Conservative administration. She developed skills in office administration, and continued to be seasonally employed in that capacity for the next 13 years. She had an excellent job record. By the 1990's, Ms. King was actively involved in the Island Liberal organization and politics. She understood she had a right of annual or periodic rehiring. In 1997, she was not recalled. She attributes this change to the Respondent Government. She was first called back in December 1996 to cover one

sick day; then told in February 1997, that a Government supporter was assigned to cover sick days. A secretary in her employer's office advised her that an office request in support of her return was refused by the Minister's Office. Ms. King and her family have suffered financially as a result. When she made her affidavit in 2000, she understood that Government was in the process of converting her former position to a permanent part-time position under the 'Casual Conversion Program'. She was advised that she did not qualify to apply because she did not meet the prescribed eligibility requirement of having been in the position for the preceding two years.

- **Carol Dunn** was a part-time Liquor Store clerk/cashier since 1989. Ms. Dunn says she was not involved in politics, and had no idea how the system worked. She was hired after contacting an MLA. She applied and was rehired each year. She always understood she had an effective right of recall subject only to satisfactory job performance, and she satisfied that condition. In 1997, the Government cut her hours of work by more than half, and assigned her hours and more to new workers. In the year 2000, her employer informed her that eight positions in her former work category were being made full-time positions under the 'Casual Conversion Program'. The prescribed eligibility requirements excluded Ms. Dunn from applying because her hours of work from 1997 onward did not meet the minimum qualification. Ms. Dunn's own experience and knowledge of her workplace left her with the belief that *"the prescribed eligibility requirements for the Casual Conversion Program were designed to effectively exclude persons employed prior to the November 1996 election and to favour supporters of the Progressive Conservatives."* The 'notice from employer' with her affidavit supports her belief. It advises that s. 17.1(1) of the **Civil Service Act**, enacted in 1998, is a temporary amendment which permits casual employees with one year of continuous service immediately before March 1, 1999 or 40% service between April 1997 and March 1999 to apply for classified positions notwithstanding the normal requirements of the **Civil Service Act**.

[28] The amendments were enacted in a context, not in isolation. There was a change of Government, a large scale replacement of casual workers, many of whom were employed annually part-time for many years, and over 850 complaints by casual workers of discrimination all based on political belief contrary to the **HRA**. The amendments which capped the payout and precluded other forms of relief available for discrimination under the **HRA** were then enacted. That was followed by the 'Casual Conversion Program' which apparently assured the replacement workers appointed by the Government of job security for the jobs formerly filled by the Applicants and other casual

workers. Actions generally speak most clearly. The vignettes which summarize the Applicants' evidence show clearly both the purpose and effect of the impugned legislation.

[29] The Carol Dunn story is in one sense distinguishable from the first four. It is arguable whether she was discriminated against because of her political involvement or perception of having been a Liberal-sponsored worker. She was in any event displaced to make room for workers who were known supporters of the party of the Government. Ms. Dunn's situation is the only one that might invite discussion of whether the **Charter** s. 2(d) implies a negative right not to associate. That was the subject of a five/four split decision in the Supreme Court of Canada in **R. v. Advance Cutting & Coring Ltd.**, [2001] 3 S.C.R. 209 (SCC). I need not reiterate the two sides of that discussion in the present case. Ms. Dunn has provided some evidence that she was discriminated against in her employment based on perceived political association. The purpose of the impugned **HRA** amendments was to limit her remedies. The effect of exclusion upon her employment and her life is profound and substantial.

Section 1 of the Charter

[30] A violation of ss. 2(b) and (d) being established, the application of s. 1 remains to be determined. Section 1 requires the Government to establish that the limitation imposed in the exercise by the Applicants of their **Charter** rights was undertaken pursuant to objectives that were pressing and substantial. In **Condon #1**, I concluded that s. 15(1) should not be illusory either by itself or by s. 1 justification, and that the Government had not shown that 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, and that the impugned legislation is not saved by s. 1 of the **Charter**.

[31] The s. 1 analysis and assessment of the **Charter** violation which is stated in **Condon #1** at paras. 98 to 118 applies fully to the issue in this Special Case. The impugned legislation is the same. My conclusion on the **Charter** violation is the same. My opinion regarding s. 1, that the impugned legislation is not saved under s. 1 of the **Charter**, is the same.

[32] I wish to add these supplementary comments. According to **Dunmore, supra** (at para. 49), the s. 1 analysis must be undertaken with a close attention to the factual and social context surrounding the enactment of the amendments to the **HRA**. My s. 1 analysis in **Condon #1** is contextual, and I now refer to it rather than repeat it.

[33] One additional case authority rendered since **Condon #1** should be mentioned. In the present case, the Government advanced expediency as a justification, and I

rejected that submission. The Supreme Court of Canada has since pronounced more broadly in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 (SCC), at paras. 109 to 110:

¶ 110 ... Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a Charter right. ...

[34] The Government raised one additional consideration. Regarding legislative context, the Government pointed out that the impugned legislation was not an isolated measure, but part of a package of reforms whose objective was to end a system of hiring that many Islanders considered flawed and to restore confidence in the political process. The other part of the package to which Government referred is *An Act to Amend the Civil Service Act*, S.P.E.I. 1998, Cap. 2, assented to December 17, 1998. Section 1 of that *Act* states:

1. Section 10 of the Civil Service Act R.S.P.E.I. 1988, Cap. C-8 is amended by the insertion of the following subsection:

(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.

[35] Government asserts the effect of this provision was to give casual employees a right of recall. Apparently so. Government asserts that the objective of this package was to reform a number of government systems that were viewed as flawed. Of such matters I cannot know. In any event, I view this submission as fallacious. Section 10 of the *Civil Service Act* deals with casual employees. The Applicants were all casual employees. Any rights conferred by the new subsection 10(5) applied only prospectively, from December 17, 1998 onward. According to the Applicants' affidavit evidence in the Special Case, none of them could benefit. But it can be inferred that the Government-sponsored replacement casual employees could qualify for the new right of recall. That is not a s. 1 justification. To the contrary, the legislative context relied upon makes it more clear that the purpose of the impugned amendments to the *HRA* was to enable the Government, after having discriminated in a matter of employment based on political belief, to open up casual positions for others, and to enact legislation that excludes remedies for the victims of the discrimination.

[36] There was another new provision within the legislative context. Carol Dunn's affidavit brought into focus s. 17.1(1) of the *Civil Service Act* proclaimed on March 1, 1999. This new provision appears in the midst of the existing rules for filling vacancies

within the civil service. It creates a special exemption for casual workers employed since the change of Government. It states:

17.1(1) Notwithstanding section 17, all persons

(a) who have at least one year of continuous service immediately preceding proclamation of this Act; or

(b) who have worked a number of hours equivalent to at least forty per cent of full time employment in at least each of the two years preceding proclamation of this Act;

shall be eligible to apply for in-service competitions.

Section 17.1(2) stated this provision would expire 12 months after proclamation. The Government then emphasized to qualifying casual employees that this amendment was a temporary opportunity. The effect regarding eligibility was that some Government-appointed casual workers would have qualified, and all the Applicants were disqualified.

[37] The consolidated **Civil Service Act**, *supra*, published and updated annually on the Government website now includes only the following historical reference to s. 17.1(1):

17.1(1) Repealed by 2002, c.3, s.1.

[38] The Government has not shown the impugned law is directed at a pressing or 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

[39] 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 the **HRA** constitutes a violation of the Applicants' fundamental freedoms under ss. 2(b) and (d) of the **Charter** and is not saved under s. 1 of the **Charter**.

Costs

[40] As between the Applicants and the Government, the costs discussion in **Condon #1** applies. As well, the Attorney General can appreciate that both applications for these opinions on constitutional matters were jointly made by the parties to address matters underlying the application for judicial review. Costs of this Special Case will follow the result. The Applicants shall have their costs against the Government, to be assessed on

a partial-indemnity basis, and to be payable forthwith.

[41] There will be no order for costs regarding the Commission, which again participated as a respondent in the Special Case only by a watching brief.

May 6, 2004

Justice David H. Jenkins