Slaight Communications Inc. *v.* Davidson, [1989] 1 S.C.R. 1038

Slaight Communications Incorporated
(operating as Q107 FM Radio) *Appellant*

v.

Ron Davidson *Respondent*

indexed as: slaight communications inc. *v.* davidson

File No.: 19412.

1987: October 8; 1989: May 4.

Present: Dickson C.J. and Beetz, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Freedom of expression -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

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* Le Dain J. took no part in the judgment.

Labour relations -- Unjust dismissal -- Jurisdiction of adjudicator -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether s. 61.5(9)(c) of Canada Labour Code authorizes adjudicator to make such orders -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Whether orders unreasonable in administrative law sense.

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. Respondent filed a complaint and an adjudicator appointed by the Minister of Labour under s. 61.5(6) of the *Canada Labour Code* held that respondent had been unjustly dismissed. Based on s. 61.5(9)(*c*) of the Code, the adjudicator made an initial order imposing on appellant an obligation to give respondent a letter of recommendation certifying (1) that he had been employed by the radio station from June 1980 to January 20, 1984; (2) the sales quotas he had been set and the amount of sales he actually made during this period; and (3) that an adjudicator had held that he was unjustly dismissed. The order specifically indicated the amounts to be shown as sales quotas and as sales actually made. A second order prohibited appellant from answering a request for information about respondent except by sending the letter of recommendation. The Federal Court of Appeal dismissed an application by appellant to review and set aside the adjudicator's decision. The purpose of the appeal at bar is to determine whether s. 61.5(9)(*c*) of the Code authorizes an adjudicator to make such orders; and in particular, whether the orders infringed appellant's freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

Held (Beetz J. dissenting and Lamer J. dissenting in part): The appeal should be dismissed. The orders infringe s. 2(*b*) of the *Charter* but are justifiable under s. 1.

The *Charter* applies to orders made by the adjudicator. The adjudicator is a creature of statute. He is appointed pursuant to a legislative provision and derives all his powers from statute. The Constitution is the supreme law of Canada, and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. It is thus impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require this Court to declare the legislation to be of no force or effect, unless it could be justified under s. 1 of the *Charter*. It follows that an adjudicator, who exercises delegated powers, does not have the power to make an order that would result in an infringement of the *Charter*.

The word "like" in the English version of s. 61.5(9)(*c*) of the *Canada Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (*a*) and (*b*) of that subsection. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. It is impossible to apply this rule in the case at bar since one of the conditions essential for its application -- the presence of a common characteristic or common genus -- has not been met. The interpretation according to which the word "like" in the English version of para. (*c*) does not have the effect of limiting the general power conferred on the adjudicator is also more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

Per Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ.: The adjudicator's orders were reasonable in the administrative law sense. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact, in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The adjudicator's first order infringed s. 2(*b*) of the *Charter* but is saved under s. 1.

The adjudicator's second order also infringed s. 2(*b*) of the *Charter*. It was an attempt to prevent the appellant from expressing its opinion as to the respondent's qualifications beyond the facts set out in the letter. But this order, too, was justifiable under s. 1. First, the objective was of sufficient importance to warrant overriding appellant's freedom of expression. Like the first order, the objective of the second order was to counteract the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. The adjudicator's remedy was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. The governmental objective, in a general sense, was that of protection of a particularly vulnerable group, or members thereof. To constitutionally protect freedom of expression in this case would be tantamount to condoning the continuation of an abuse of an already unequal relationship. Second, the means chosen were reasonable. Like the first order, the second order was rationally linked to the objective. With the proven history of promoting a fabricated version of the quality of respondent's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that the employer's representatives did not subvert

the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference. Further, no less intrusive measure could have been taken and still achieved the objective with any likelihood. Monetary compensation would not have been an acceptable substitute because it would only have been compensation for the economic, not the personal, effects of unemployment. Labour should not be treated as a commodity and every day without work as exhaustively reducible to some pecuniary value. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not really contested. The appellant was not forced to state opinions which were not its own. The prohibition was also very circumscribed. It was triggered only in cases when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other then prospective employers. In short, the adjudicator went no further than was necessary to achieve the objective. Finally, the effects of the measures were not so deleterious as to outweigh the objective of the measures. The objective in this case was a very important one, especially in light of Canada's international treaty commitment to protect the right to work in its various dimensions. For purposes of this final stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part): The adjudicator did not exceed his jurisdiction by ordering appellant to give respondent a letter of recommendation with a specified content. Apart from the *Charter*, the only limitation imposed by s. 61.5(9)(*c*) is that the order must be designed to "remedy or counteract any consequence of the dismissal". That is the case here. The order prevents appellant's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute is not as such

unreasonable and there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner.

However, the adjudicator exceeded his jurisdiction by prohibiting appellant from answering a request for information about respondent other than by sending the letter of recommendation. Though the order is also meant to remedy or counteract the consequences of the dismissal, its effect, by prohibiting appellant from adding any comments whatever, is to create circumstances in which the letter could be seen as the expression of appellant's opinions. This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada. Parliament therefore cannot have intended to authorize such an unreasonable use of the discretion conferred by it. The adjudicator lost this jurisdiction when he made a patently unreasonable order.

The first order limits appellant's freedom of expression but this limitation, which is prescribed by law -- the order made by the adjudicator is only an exercise of the discretion conferred on him by statute -- can be justified under s. 1 of the *Charter*. The purpose of the order is clearly, as required by the Code, to counteract the consequences of the unjust dismissal. Such an objective is sufficiently important to warrant a limitation on freedom of expression. It is essential for the legislator to provide mechanisms to restore equilibrium in employer/employee relations so the employee will not be subject to arbitrary action by the employer. Additionally, the means chosen to attain the objective are reasonable in the circumstances. The order is fair and was carefully designed. The purpose of the letter of recommendation is to correct the false impression given by the fact of the dismissal and it contains only facts that are not in dispute. It is rationally connected to the dismissal since in certain cases it is the only way of effectively remedying the consequences of the dismissal. Finally, the consequences of the order are proportional to the objective sought. The latter is important in our society. The limitation on freedom of expression

is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance.

Per Beetz J. (dissenting): Except for the attestation relating to the unjust dismissal, the first order violated the appellant's freedoms of opinion and of expression and could not be justified under s. 1 of the *Charter*. This order forced the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In short, the order may force the appellant to lie. To order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them constitutes a *prima facie* violation of the freedoms of opinion and expression. Such a violation was totalitarian in nature and could never be justified under s. 1 of the *Charter*.

The second order, coupled with the first, also violated the former employer's freedoms of opinion and of expression in a manner which was not justified under s. 1 of the *Charter*. The sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer had no further comment to make upon the performance of the respondent and that, accordingly, the letter reflected the opinion of the former employer. In any event, the second order was disproportionate and unreasonable. One should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Further, in cases of unjust dismissal, the issuance by an adjudicator of a blanket and perpetual prohibition against a former employer to write or say anything to a prospective employer but what the adjudicator has dictated in the letter of recommendation can lead to absurd and even

counter-productive results. The adjudicator cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal. If it is disproportionate and unreasonable from a practical point of view, then it has to be unreasonable from an administrative law point of view and it is difficult to conceive how it could be reasonable within the meaning of s. 1 of the *Charter*.

Cases Cited

By Dickson C.J.

Distinguished: *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269; **referred to**: *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

By Lamer J. (dissenting in part)

National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 269; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *R. v. Oakes*, [1986] 1 S.C.R. 103.

By Beetz J. (dissenting)

National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 269; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *Reference re Alberta Statutes*, [1938] S.C.R. 100.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(6) [ad. 1977-78, c. 27, s. 21], 61.5(9)(*a*), (*b*), (*c*) [*idem*].

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 52(*d*).

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, Doc. A/6316 U.N. (1966), s. 6.

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APPEAL from a judgment of the Federal Court of Appeal, [1985] 1 F.C. 253, 58 N.R. 150, 85 C.L.L.C. {PP} 14,053, dismissing appellant's application pursuant to s. 28 of the *Federal*

Court Act to set aside an order made by an adjudicator under s. 61.5(9)(*c*) of the *Canada Labour Code*. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

Brian A. Grosman, *Q.C.*, and *John Martin*, for the appellant.

Morris Cooper and *Fern Weinper*, for the respondent.

//*The Chief Justice*//

The judgment of Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ. was delivered by

THE CHIEF JUSTICE --

I

The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant, Slaight Communications Incorporated, operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, ".

. . our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

> In Ms. Stitt's letter to Labour Canada of February 27, 1984 . . . she specified that the "major complaint" was Mr. Davidson's failure to achieve "monthly sales budgets since October of 1983." To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

> From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: "If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more." By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of "the real reason for dismissal," but there was no response.

He concluded:

> An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

> **61.5.** . . .
>
> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
>
> (*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (*b*) reinstate the person in his employ; and
>
> (*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

He ordered payment of $46,628.96 plus interest and legal costs of $2,500. He made a further order, which is central to this appeal, reading:

> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
>
> (2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;
>
> (3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;
>
> (4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;
>
> (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.
>
> I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

An appeal by the employer to the Federal Court of Appeal was dismissed (Urie and Mahoney JJ., Marceau J. dissenting): [1985] 1 F.C. 253.

The question to be decided by this Court is whether para. (*c*) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (*c*), it will be recalled, reads:

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(*c*) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

Resolution of the problem involves (1) the construction and the true meaning and effect of para. (*c*), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II

The Relationship Between Administrative Law Review and Review Under the *Charter*

I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision-making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to

give the respondent a specified letter of reference) infringes s. 2(*b*) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order), I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in the administrative law sense but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

I agree with Mahoney J. of the Federal Court of Appeal, at pp. 260-61, that:

> The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(*c*).

The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at pp. 494-95), in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the

context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, and, therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (*per* Beetz J., at p. 296) which was exacerbated by the wide publication of the letter -- to all employees and management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

III

The Negative Order and Section 2(*b*) of the *Charter*

Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(*b*) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent, decreased job prospects for Mr. Davidson, is only relevant to s. 1 analysis and not to s. 2(*b*) analysis.

IV

Section 1 of the *Charter*

The basic test for s. 1 analysis formulated in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

1. *Importance of the Objective*

I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal, at p. 260, was designed to "forclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, I stated for the majority at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in Davies and Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination . . . The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation -- legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether -- must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

The objective of both the positive and negative orders made by adjudicator Joliffe is sensitive to the reality identified by Kahn-Freund, Davies and Freedland. The courts must be just as concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. It must be recalled that *Oakes*, *supra*, at p. 136, stated that "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with those underlying principles and values for the *Charter* to be successfully invoked by an employer. The inequality in one employment relationship would be continued even after its termination with the result that the worker looking for a new job would be placed in an even more unequal bargaining position *vis-à-vis* prospective employers than is normally the case. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

2. *Proportionality*

(a) Rational Connection

The negative order is very much rationally linked to the objective, no less than the positive order. The adjudicator was plainly of the view that the respondent had been the subject of some kind of personal vendetta or "set-up", as Mahoney J. termed it, *supra*, at p. 258, which had been initiated by the employer's general manager and executed by its sales manager, the latter of whom was Mr. Davidson's immediate superior.

As I have indicated, the representative of the employer was found to have engaged in bad faith and duplicitous conduct, giving misleading evidence about the Mr. Davidson's work performance both at the time of his dismissal and during the unjust dismissal hearing. Further, in deciding that reinstatement was not a viable remedy, the adjudicator gave as his reason that "[t]here is no sign that he would receive fair treatment by an employer which has made such vigorous efforts to justify the indefensible". With this proven history of promoting a fabricated version of the quality of Mr. Davidson's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference.

(b) Minimal Impairment

In my view, there was no less intrusive measure that the adjudicator could have taken and still have achieved the objective with any likelihood. To the extent there was a likelihood that

representatives of Q107 would not be content to pass on the letter of reference absent the kind of untrue comments that had resulted in the finding of unjust dismissal, the letter of reference would have been rendered illusory to the same degree of likelihood.

While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute. Even if the adjudicator had ordered that the Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance, for the actual period out of work, this would only be compensation for the economic effects of lack of employment not the personal effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor Beatty puts it in "Labour is not a Commodity" in Reiter and Swan, eds., *Studies in Contract Law* (1980), at pp. 323-24:

> The personal meaning of work is seen to go beyond rather than to be completely dependent upon the purposes of production . . . [R]eflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs . . . It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution . . . [E]mployment is seen as providing recognition of the individual's being engaged in something worthwhile . . . [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance.

Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1

S.C.R. 313, at p. 368, "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator. To posit monetary compensation as a less intrusive measure is, in effect, to challenge the legitimacy of the objective.

Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of facts which, we saw, were not really contested. As already discussed, unlike in *National Bank*, *supra*, the employer has not been forced to state opinions ("views and sentiments", *per* Beetz J., at p. 295) which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other then prospective employers. In sum, this is a much less intrusive and carefully designed order than that in *National Bank* in which the bank was required to send to a very large audience (all the employees and management staff of the bank) what amounted to a letter of contrition which conveyed the impression that certain opinions expressed therein were those of the employer.

Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding

a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression.

(c) Deleterious Effects

It is clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes*, *supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.), supra*, I had occasion to say at p. 349:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by

the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.

In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(*b*) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(*b*) than, for instance, occurred in the *National Bank* case.

V

Conclusion

In conclusion, I am of the opinion that both of the adjudicator's orders at issue (the positive order and the negative order) infringe s. 2(*b*) but are saved by s. 1. I would answer both constitutional questions in the affirmative and dismiss the appeal with costs.

The following are the reasons delivered by

//*Beetz J.*//

BEETZ J. (dissenting) --

I - Introduction

I have had the advantage of reading the reasons for judgment written by Justice Lamer and then the reasons for judgment written by the Chief Justice. I refer to their statements of the facts, proceedings and constitutional questions as well as to their summary of the decisions rendered by the adjudicator and the Federal Court of Appeal.

Like the Chief Justice, I am in agreement with Lamer J.'s discussion of the applicability of the *Charter* to administrative decision-making. I also agree with Lamer J.'s construction of s. 61.5(9)(*c*) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21.

However, I have the misfortune of not being able to concur with one of the two main conclusions reached by both my colleagues, and while I agree with the other main conclusion reached by Lamer J., I do so for reasons which differ in part from his own reasons.

The two impugned orders issued by the adjudicator in the case at bar read as follows:

> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
>
> (2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;

(3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;

(4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

The first order, which has been labeled the positive order, relates to a letter of recommendation comprising five attestations numbered (1) to (5).

The second order, which has been labeled the negative order, forbids the appellant to answer any inquiry about the respondent's employment at Q107 otherwise than by the letter of recommendation dictated by the adjudicator in the first order.

The main issues are whether these two orders infringe or deny the freedoms guaranteed to the appellant by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are justified by s. 1 of the *Charter*.

Sections 1 and 2(*b*) of the *Charter* provide:

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:

. . .

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

I state my conclusions at the outset. In my view, the first order, that is the positive one, except attestation number (5) thereof, as well as the second order, that is the negative one in its entirety, violate the appellant's freedom of opinion and expression and cannot be justified under s. 1 of the *Charter*.

I hasten to add that the flaw which I find in the first order can easily be corrected. As for the second order, it can be replaced by another order which tends toward the same end without violating the *Charter*.

II - The First Order

The flaw which I find in the first order, with particular reference to its attestations numbered (1) to (4), is that this order forces the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the first order may force the former employer to tell a lie. In this particular respect, this case cannot in my opinion be distinguished from the case of *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, where a majority of this Court held as follows at p. 296:

> Remedies Nos. 5 and 6 thus force the Bank and its president to do something, and to write a letter, which may be misleading or untrue.
>
> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the

> power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

It was argued that the case at bar is different in that the letter of recommendation in question is totally factual and that the facts stated therein and found by the adjudicator were undisputed. In the Federal Court of Appeal, [1985] 1 F.C. 253, Mahoney J. accepted this argument. He wrote at p. 260:

> I am, of course, aware of the decision in *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984] 1 S.C.R. 269. The letter ordered in that case required the employer to express, or at least imply, opinions which it did not necessarily hold. Here, the applicant has simply been ordered to tell the truth. The letter sets out bald facts that are neither misleading nor disputed. [Emphasis added.]

With the greatest of respect, in so accepting the argument, Mahoney J. missed the point altogether and begged the essential question: what is the truth? The facts found to be true by the adjudicator are binding for the purpose of establishing whether or not there had been an unjust dismissal. But the former employer cannot be forced to acknowledge and state them as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth, he tells a lie. He may not have disputed these facts at the time of the hearing but he could change his mind later, for instance on the basis of evidence discovered after the adjudicator's decision was rendered.

There may be a distinction, somewhat difficult to apply, between being forced to express opinions or views which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of the freedoms of opinion and expression or, at the very least, of the

freedom of expression. That is why, with respect, I cannot possibly agree with the suggestion that the restriction to freedom of expression which results from the first order is not very serious or very grave. The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom of expression. It is one thing to prohibit the disclosure of certain facts. It is quite another to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them. The prohibition constitutes a *prima facie* violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the *Charter*. On the other hand, to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression, as was held in the case of the *National Bank of Canada*, *supra*. In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the *Charter*. It does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus. As was stated in the unanimous reasons of this Court in *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, s. 1 of the *Charter* cannot be used to justify a complete negation of a constitutionally protected right or freedom, at p. 88:

> The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments to the *Charter*. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(*a*) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. [Emphasis added.]

(See also the *Reference re Alberta Statutes*, [1938] S.C.R. 100, with respect to *The Accurate News and Information Act* of Alberta.)

In spite of its gravity however, and as indicated earlier, the flaw which I find in the first order can easily be corrected. It would suffice to add to the letter a sentence or sentences indicating that the attestations numbered (1) to (4) refer to facts as found by the adjudicator.

As for attestation number (5), it does not give rise to any difficulty in my view since it refers to a matter of record.

III - The Second Order

The second order is in the form of a prohibition to answer enquiries relating to the respondent's employment at Q107 otherwise than be the letter of recommendation described in the first order.

I agree with Lamer J. that the sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer has no further comment to make upon the performance of the respondent and that, accordingly, the letter reflects the opinion of the former employer. This being the case, the second order, coupled with the first, also violates the former employer's freedoms of opinion and expression in a manner which, for the reasons given above, cannot be justified under s. 1 of the *Charter*.

The risks of such an implication might be reduced and perhaps eliminated should the first order be corrected as I suggested earlier. But I believe that we must decide the case on the basis of the orders as they now stand, and not as we would if they were corrected.

In any event, I find the second order disproportionate and unreasonable. I believe one should view with extreme suspicion an administrative order or even a judicial order which has the effect

of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Adjudicators and boards who, in cases of unjust dismissal, order the sending of letters of recommendation by former employers face a dilemma. They cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. They accordingly issue a blanket and perpetual prohibition to write or say anything but what they have dictated in the letter of recommendation. This can lead to absurd and even counter-productive results.

Thus, in the case at bar, if after having received the letter dictated by the adjudicator, a prospective employer were to address specific questions to the former employer, relating for instance to the respondent's health or drinking habits, the appellant would have to go on answering with sales statistics. This could not but compromise the respondent's chances for employment. Or if the former employer finally saw the light and, out of remorse, became inclined to write a letter considerably more complimentary and flattering than the one dictated by the adjudicator, he could not do so.

The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal, in my view. It is disproportionate and unreasonable from a practical point of view. Then it has to be unreasonable from an administrative law point of view and I have difficulty in conceiving how it could be reasonable within the meaning of s. 1 of the *Charter*.

This being said, I agree that the adjudicator was legitimately concerned by the risk that the former employer undermine the effect of the letter of recommendation. While I believe that the prohibition he issued to foreclose that possibility is disproportionate and unreasonable, I think

that other legitimate means might have been devised towards the same end. The adjudicator could for instance have ordered the former employer to write in the letter that he had been instructed by the adjudicator to tell prospective employers that they would be well advised to read the adjudicator's decision. I do not believe that such a neutral order would be punitive, but it might alert prospective employers to the animosity displayed by the former employer towards the respondent.

IV - Conclusions

One last point before I reach my conclusions properly so-called.

I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the *Charter*, freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal as well as the first and second order of the adjudicator quoted in these reasons for judgment, and refer the matter back to the adjudicator so that these orders be replaced by an order or orders compatible with these reasons.

I would give an affirmative answer to the first constitutional question and a negative answer to the second constitutional question.

I would not make any order as to costs.

//*Lamer J.*//

English version of the reasons delivered by

LAMER J. (dissenting in part) -- An adjudicator appointed by the Minister of Labour pursuant to s. 61.5(6) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, made an order in favour of an employee based on s. 61.5(9) of the Code. The employer challenged the said order but its appeal was dismissed by the Federal Court of Appeal. With leave of this Court, the employer is now appealing here from this judgment of the Federal Court of Appeal. The outcome of this appeal involves determining whether, under s. 61.5(9) of the *Canada Labour Code*, as it read at the time of his decision, the adjudicator had the power to make the order at issue.

Facts

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. It is not in dispute that when he was dismissed respondent received all monies to which he was entitled under his employment contract.

However, respondent filed a complaint with an inspector alleging that he had been unjustly dismissed. As the parties were unable to settle this complaint and respondent asked that it be referred to an adjudicator, the Minister of Labour appointed an adjudicator to hear and decide the matter in accordance with the Code.

After hearing the evidence and the submissions of the parties, the adjudicator made an order directing the employer to pay respondent as compensation the sum of $46,628.96 with interest

at the rate of 12 per cent and to pay his counsel the sum of $2,500 to reimburse him for the legal costs incurred. The said order further imposed on the employer an obligation to give respondent a letter of recommendation certifying that he had been employed by Station Q107 from June 1980 to January 20, 1984, and that an adjudicator had found he was unjustly dismissed and indicating the sales quotas he had been set and the amount of sales he actually made during this period. It should be noted that the order made specifically indicates the amounts to be shown as sales quotas and as sales actually made. Finally, the order directed appellant to answer requests for information about respondent only by sending this letter of recommendation.

This order reads as follows:

> In the matter of compensation, I am satisfied that had he not been dismissed, the sales and commissions of the complainant would have at least equalled those of 1983. After taking into consideration the fact that he worked until January 20, 1984, and received certain commissions (at reduced levels) thereafter, my order is that he be paid forthwith the equivalent of 75 per cent of his 1983 earnings of $62,171.95, being the sum of $46,628.96.
>
> I further order that interest be paid at the rate of 12 per cent per annum, divided by two, on the said amount from January 20 to November 20, 1984. Thereafter interest will be payable on any unpaid balance at the rate of 12 per cent per annum, which is not to be divided by two.
>
> I say nothing of the U.I.C. payments received by the complainant, which is a matter to be resolved between the complainant and the Commission.
>
> I further order payment of legal costs in the amount of $2,500.00 to the complainant's solicitor and counsel, Mr. Morris Cooper.
>
> Further orders are necessary, resembling the order made by Adjudicator Adams in the *Roberts* case, but in greater detail.
>
> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;

(2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;

(3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;

(4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

Appellant is challenging in this Court only the parts of the order relating to (1) the sending of a letter of recommendation and (2) the prohibition on answering a request for information in any other way than by sending this letter.

Judgments of Lower Courts

Appellant challenged this order by filing an application with the Federal Court of Appeal to set it aside. However, the Federal Court of Appeal, made up of Urie and Mahoney JJ. with Marceau J. dissenting, dismissed this application to set aside: [1985] 1 F.C. 253.

In his reasons, Mahoney J. first said that the purpose of s. 61.5(9)(*c*) and the fact that it would be difficult or even impossible to find remedies similar to the remedies expressly authorized in paras. (*a*) and (*b*) meant that the presence of the word "like" in the English version of s. 61.5(9)(*c*) was not intended to restrict the powers conferred on the adjudicator. In his opinion, this paragraph simply expressed a kind of *ejusdem generis* rule which did not have the effect of limiting the scope of the powers conferred.

Ordering the employer to give respondent a letter of recommendation was in his opinion an equitable remedy designed to remedy the consequences of the dismissal, not to punish the employer. This letter, he thought, only stated objective facts that were not in dispute and so simply required the employer to tell the truth.

However, he agreed with appellant's argument that the part of the decision ordering the employer to issue a letter of recommendation imposed limitations on its freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. In his view, however, such a limitation was justified under s. 1 of that *Charter*. He stressed that the limitation on freedom of expression was prescribed by law, since it was the Act which authorized the adjudicator to make such an order.

Urie J., for his part, agreed with the reasons stated by his brother judge Mahoney. However, he indicated that he was not sure that the *ejusdem generis* rule applied in any way to the interpretation of s. 61.5(9)(*c*).

Finally, Marceau J. wrote his own reasons, which differ from the majority reasons in certain respects. First, he expressed agreement with Mahoney J. as to the way in which s. 61.5(9)(*c*) should be construed, but expressed some reservations regarding application of the *ejusdem generis* rule. He noted that the powers conferred on the adjudicator were already clearly limited by the fact that the orders he was empowered to make under para. (*c*) must be aimed at remedying or counteracting the consequences of the dismissal.

In his view the remedies ordered in the case at bar were of two types, positive and negative. The part of the order directing the employer to furnish respondent and any person seeking information about him with a letter of recommendation having a specified content was, in his

opinion, an order that could be characterized as positive. It directed the employer to do something and sought to remedy the consequences of the dismissal found to be unjust: accordingly, it was authorized by s. 61.5(9)(*c*). The part of the order which also prohibited the employer from answering any request for information about respondent other than by issuing this letter might for its part be characterized as negative, since it prohibited the employer from doing something. Such an order, in his view, was not aimed at remedying the consequences of the dismissal and so was not authorized by the said paragraph.

He also considered that this part of the order infringed the freedom of thought, belief, opinion and expression guaranteed appellant by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. He said he did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question. He added, however, that in any case in his opinion these freedoms were not subject to reasonable limits that could be demonstrably justified in a free and democratic society. He therefore concluded that the application to set aside should be allowed and the matter referred back to the adjudicator concerned for him to determine what remedies it would be appropriate to impose in order to counteract the effects of the dismissal.

Legislation

The following legislation is relevant to this appeal:

Canada Labour Code

61.5. . . .

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(*b*) reinstate the person in his employ; and

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Canadian Charter of Rights and Freedoms

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.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Analysis

To begin with, appellant argued that the adjudicator had no power to make these parts of the order since the orders he is authorized to make under s. 61.5(9)(*c*) must be of the same kind as the orders expressly mentioned in s. 61.5(9)(*a*) and (*b*), in view of the word "like" that appears in the English version.

As can readily be seen, the English and French versions of s. 61.5(9)(*c*) are different. Section 61.5(9)(*c*) of the English version confers a general power on the adjudicator as follows:

> **61.5.** . . .
>
> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
>
> . . .
>
> (*c*) do any other <u>like</u> thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal. [Emphasis added.]

The French version, for its part, does not contain any word or expression equivalent to the word "like" used in the English version. The general power conferred on the adjudicator is conferred in the following language:

> **61.5.** . . .
>
> (9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur
>
> . . .
>
> *c*) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

In the case at bar I consider, like the Federal Court of Appeal judges, that the presence of the word "like" in para. (*c*) of the English version was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (*a*) and (*b*) of that subsection, and does not have that effect. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. I think it is impossible to apply this rule in the case at bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (*a*) and (*b*)) which precede the general term (the power conferred on the adjudicator in para. (*c*) to make any order that is equitable) must have a common characteristic, a common genus. As Maxwell writes in *Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 299:

> Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.

Professor Côté also notes this requirement when he writes in his work titled *The Interpretation of Legislation in Canada* (1984), at p. 245:

> As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, *ejusdem generis* does not apply.

In the case at bar I do not see what characteristic could be described as common to a compensation order and a reinstatement order. The only "denominator" which seems to me common to these two orders in the context of s. 61.5(9) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (*c*) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the *ejusdem generis* rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic. Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. Section 61.5 is clearly a remedial provision and must accordingly be given a broad interpretation. The consequence of interpreting para. (*c*) in the manner suggested by appellant would be to limit considerably the type of order the adjudicator could make. It would in fact be very difficult to find remedies <u>like</u> the remedies mentioned in paras. (*a*) and (*b*). The extent of the compensation that can be ordered has been carefully limited by the legislator and there is not really any similarity between reinstatement and any other measure. I believe that, on the contrary, by enacting s. 61.5(9)(*c*), the legislator intended to vest in the adjudicator powers that would be sufficiently wide and flexible for him to adequately perform the duties entrusted to him, in each of the cases that come before him. I therefore consider that the meaning to be given to both versions is what clearly appears on the face of the French version and that accordingly the type

of order the adjudicator can make should not be limited to orders like those expressly authorized in paras. (*a*) and (*b*).

Appellant further argued that the adjudicator exceeded his jurisdiction since there is no connection between the order made in the case at bar, the dismissal and the consequences of that dismissal. I cannot entirely agree with him in this regard. The part of the order dealing with the sending of a letter of recommendation is, in my view, clearly meant to counteract the consequences of the dismissal found to be unjust by the adjudicator. This part of the order is designed to prevent the employer's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. The letter of recommendation is intended to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust and by clearly setting out certain "objective" facts relating to respondent's performance. The situation is therefore very different from that which existed in *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269.

In that case the Canada Labour Relations Board had found that the National Bank of Canada, which had closed a unionized branch and incorporated it in a non-unionized branch, had taken its decision for anti-union reasons and had therefore infringed s. 184(1)(*a*) and (3)(*a*) of the *Canada Labour Code*. These provisions prohibit an employer, *inter alia*, from interfering with the formation or administration of a trade union and from suspending, transferring or laying off an employee on the ground that he is a member of a trade union. The Canada Labour Relations Board had therefore ordered the Bank to do a number of things. Among these were that it create a trust fund to further the objectives of the Code among all its employees and send the employees a letter telling them this fund had been created. The order specifically indicated what the wording of this letter should be and prohibited the employer from adding or deleting anything

in its wording. Chouinard J., with whose reasons the other members of this Court concurred, said that in his opinion the part of the order prescribing the creation of a trust fund should be set aside since there was no relationship between this remedy and the alleged act and its consequences. He thought that the announcement of the creation of the fund was the key feature of the letter the employer was required to send, and concluded that this part of the order should suffer the same fate as that reserved for the part of the order dealing with the creation of the fund. Beetz J., for his part, added that in his opinion both the creation of the fund and the letter were open to the interpretation that they resulted from an initiative taken by the National Bank of Canada, reflecting the views of the Bank and in particular its approval of the *Canada Labour Code* and its objectives. He stated that in his opinion this part of the order was contrary to the democratic traditions of this country and so could not have been authorized by the Parliament of Canada.

In the case at bar the letter the employer is required to give respondent is of a different nature from the letter the National Bank of Canada was required to send in that case. It expresses no opinions and simply sets out facts which, as counsel for the appellant admitted at the hearing, and it is important to note this, are not in dispute. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute does not seem to me to be as such unreasonable. Such an order may be completely justified in certain circumstances, and in the case at bar there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner. As this order was not unreasonable, it is not the function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.

Accordingly, I am not prepared to say at this stage that the nature of this part of the order is such that the adjudicator necessarily exceeded his jurisdiction in making it. Quite apart from the

constitutional argument that this order infringes the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, therefore, I consider that the adjudicator had the power to make this part of the order at issue here. The only limitation placed by s. 61.5(9) on the type of order the adjudicator can make is that any order must be designed to "remedy or counteract any consequence of the dismissal". In my view, this part of the order is clearly intended for that purpose.

However, I take a different view of the part of the order that prohibits the employer from answering a request for information about respondent other than by sending this letter of recommendation. Although this part of the order is probably meant to remedy or counteract the consequences of the dismissal, I believe that the issuing of this letter in such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada*, *supra*, at p. 296:

> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H. W. R. Wade, in his text titled *Administrative Law* (4th ed. 1977), says the following at pp. 336-37:

> For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. [Emphasis added.]

This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, and *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, *inter alia*. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard*, *supra*, at pp. 494-95:

> An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.
>
> Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.
>
> In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

In the case at bar I consider that the adjudicator was not authorized by s. 61.5(9)(*c*) to order the employer not to answer a request for information about respondent except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

Appellant further argued that s. 61.5(9)(*c*) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at bar, by enacting para. (*c*), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives <u>all</u> his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the

inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Professor Hogg when he wrote in his text titled *Constitutional Law of Canada* (2nd ed. 1985), at p. 671:

> The reference in s. 32 to the "Parliament" and a "legislature" make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

Section 61.5(9)(*c*) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or

freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

First, there are two important principles that must be borne in mind:

-- an administrative tribunal may not exceed the jurisdiction it has by statute; and

-- it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

-- It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

-- It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;

-- if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

-- if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

There is no doubt in the case at bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as

to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

I consider that the objective sought by the order made in the case at bar is sufficiently important to justify some limitation on freedom of expression. The purpose of the order is clearly, as required by the Code and as I indicated above, to counteract, or at least to remedy, the consequences of the dismissal found by the adjudicator to be unjust. In my opinion such an objective is sufficiently important to warrant a limitation on a right or freedom mentioned in the *Charter*. I think it is important for the legislator to provide certain mechanisms to restore equilibrium in the relations between an employer and his employee, so that the latter will not be subject to arbitrary action by the former. These observations should not be taken as meaning that in my view all employers necessarily try to abuse their position. However, it cannot be denied that some employees are in an especially vulnerable position in relation to their employers and that the forces involved are usually not equal. Accordingly, I think that mechanisms designed to remedy or counteract the consequences of an unlawful action taken by an employer are justified in such a context. It should also be noted that in these circumstances the limitation on rights or freedoms is not in fact made until after the act committed by the employer has been found by an adjudicator to be unlawful, and only in order to remedy the consequences of that act found to be unlawful.

An order directing the employer to give respondent a letter of recommendation containing objective facts also seems to me to be reasonable and justifiable in these circumstances. It has the three characteristics necessary to meet the proportionality test. As I mentioned earlier, the purpose of the letter of recommendation is to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust, and by clearly indicating certain "objective" facts that are not in dispute regarding the respondent's

performance. A reinstatement order is not always desirable and a compensation order is not always adequate to remedy the consequences of an unjust dismissal. It is possible in some cases for a dismissal to have very negative consequences on the former employee's chances of finding new employment. It seems to me, therefore, that there will be times when such an order is the only means of attaining the objective sought, that of counteracting or remedying the consequences of the dismissal. It is certainly very rationally connected to the latter, since in certain cases it is the only way of effectively remedying the consequences of the dismissal. It is also limited to requiring that the employer state "objective" facts which, in the case at bar, are not in dispute and do not require the employer to express any opinion, since the part of the order regarding the prohibition on answering a request for information about respondent other than by issuing this letter has been found to be unreasonable, and accordingly outside the jurisdiction conferred on the adjudicator. The employer may thus, if this part found to be unreasonable is removed, indicate for example that he was directed to write the letter and that it therefore does not necessarily contain all his views about the work done by respondent. Taking these circumstances into account, I do not see any way of attaining this objective in the case at bar without impairing the employer's freedom of expression. Finally, I consider that the consequences of the order are proportional to the objective sought. As I have already said, the latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance. This limitation on freedom of expression mentioned in the *Charter* is thus in my opinion kept within reasonable limits that can be demonstrably justified in a free and democratic society. In making this part of the order, therefore, the adjudicator did not infringe the *Charter* and acted within his jurisdiction.

As this appeal is covered by s. 52(*d*) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, I would refer the matter back to the adjudicator in question for him to make an order consistent with this judgment.

Accordingly, I would allow the appeal at bar, reverse the judgment of the Federal Court of Appeal, invalidate the order made by the adjudicator and refer the matter back to him so he may make a new order consistent with the instant judgment; the whole with costs.

Appeal dismissed with costs, BEETZ J. *dissenting and* LAMER J. *dissenting in part.*

Solicitor for the appellant: Brian A. Grosman, Toronto.

Solicitor for the respondent: Morris Cooper, Toronto.