Federal Court  Cour fédérale

Date: 20130722

Docket: T-136-12

Citation: 2013 FC 806

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Vancouver, British Columbia, July 22, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to review the lawfulness of a decision rendered by Michèle A. Pineau (adjudicator), who, pursuant to paragraph 223(2)(*d*) of the *Public Service Labour Relations Act*, SC 2003, c 22 (PSLRA), was designated by the Chairperson of the Public Service Labour Relations Board (Board) to hear the applicant's grievance. The grievance was dismissed. Hence, this application for judicial review.

[2] The applicant, the Association of Justice Counsel (the Association) is the exclusive bargaining agent for a group of legal officers (the bargaining unit) working for the Department of Justice (the employer). The Treasury Board represents the employer with regard to the determination of terms and conditions of employment and may enter into any collective agreement binding Her Majesty the Queen in Right of Canada. The Treasury Board and the employer are represented in this application for judicial review by the Attorney General of Canada (respondent).

ASSOCIATION'S POLICY GRIEVANCE

[3] The facts giving rise to this litigation are not in dispute and arise out of the filing, on May 18, 2010, of a policy grievance (Association's grievance) challenging the reasonableness, and legality, of the changes made by the employer, in March 2010, to its policy on standby duty in immigration.

[4] The working conditions of legal officer s in the bargaining unit were initially set by an arbitral award rendered on October 23, 2009, in lieu of a collective agreement. The collective agreement came into effect on November 7, 2009, subject to certain other provisions which only became effective on February 20, 2010. However, the arbitral award of October 23, 2009, does not specifically deal with standby duty in immigration such that the issue falls under the exercise of the employer's management rights.

[5] A legal officer must be available to respond to stay applications and urgent opinion requests outside working hours. In the case of legal officers with the Immigration Law Directorate in the

Quebec Regional Office, which has approximately fifty legal officers, the two elements of the former policy on standby duty at issue here are found in an e-mail dated February 8, 2007, from Michel Synnott: (1) a lawyer on standby duty will be compensated in the form of two-and-half days' discretionary time off; and (2) as long as there are enough volunteers, standby duty will not mandatory (former policy). The changes made by the employer in March 2010 to the former policy, which the Association challenges in its grievance, are that standby duty is now mandatory for all legal officers and that standby duty is no longer compensated, as stated in an e-mail from Annie Van Der Meerschen dated April 13, 2010 (new policy).

[6] The Association's grievance only concerns changes to Friday night and weekend duty. Here is how the Association describes the nature of the grievance:

> [TRANSLATION]
>
> The Association is grieving the fact that, in imposing standby duty outside regular working hours, the Employer has failed to act reasonably, fairly and in good faith, both in the exercise of its managerial rights and the administration of the arbitral award. The Association is of the opinion that the imposition of mandatory standby duty outside regular working hours is inconsistent with the terms of the arbitral award.
>
> There is nothing in the arbitral award or the managerial rights that allows the Employer to impose restrictions on lawyers' private life while on standby duty outside regular working hours.
>
> The Association is grieving the fact that the Employer imposes standby duty outside regular working hours which, if refused, may result in disciplinary action for the bargaining unit's lawyers.
>
> The Association is grieving the fact that lawyers will no longer be compensated for standby duty assigned outside regular working hours despite the restrictions on their private life.
>
> The Association is grieving the Employer's unilateral decision to change its policy for duty outside regular working hours.

> The Association is grieving the fact that the change in the Employer's policy contravenes the following:
>
> - The Employer's duty to inform and consult the Association when the Employer considers changing one of its previous policies;
> - The Employer's policy on working hours and the arbitral award that encourages flexible work schedules.

[7] On July 2, 2010, the grievance was denied at the final level of the grievance process by Hélène Laurendeau, Assistant Deputy Minister, Compensation and Labour Relations Sector, Treasury Board Secretariat, who considered that the grievance was not arbitrable and that, in any event, was without merit:

> [TRANSLATION]
>
> I have carefully reviewed Ms. Guttman's representations on the admissibility of the policy grievance, as well as on the substance of the grievance. I have also examined the case law submitted in support of her arguments. Given that the arbitral award is silent on the issue of on-call duty, I have come to the conclusion that the grievance should be denied based on the fact that it does not meet the definition of a policy grievance in section 220(1) of the PSLRA as it does not deal with an alleged violation of the arbitral award.
>
> I have nevertheless considered Ms. Guttman's representations concerning the substance of the grievance. I have concluded that general management rights permit the employer to require lawyers to be on-call duty in order to meet operational requirements given that the arbitral award is silent on the issue of on-call status. The requirement and burden on the employees are reasonable when one takes into account the fact that employees would be paid for each hour worked, when called, and that they could, in many cases, be paid the applicable overtime rate.
>
> Finally, I would add that since all previous policies were either replaced by the new collective agreement or are covered, as is the case here, by residual management rights, the argument of past practice must fail.

> In light of the above, the grievance is denied and the corrective action sought is not granted.

[8] On July 15, 2010, the Board referred the grievance to adjudication.

[9] On July 27, 2010, and hence before the matter was heard by the adjudicator, the Association entered into a collective agreement with the Treasury Board effective on the date of its signature and scheduled to expire on May 9, 2011. The hearing before the adjudicator began in Montréal from March 2 to March 4, 2011; the hearing continued on September 16 and 26, 2011, when negotiations for renewal of the collective agreement were already underway.

OBJECTION TO THE ADJUDICATOR'S JURISDICTION

[10] When the hearing opened, the employer made a preliminary objection that the adjudicator does not have jurisdiction to hear the grievance, on the ground that the grievance does not concern a subject matter that is covered by section 220(1) of the PSLRA, which states:

220. (1) If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally	220. (1) Si l'employeur et l'agent négociateur sont liés par une collective agreement ou une décision arbitrale, l'un peut présenter à l'autre un policy grievance portant sur l'interprétation ou l'application d'une disposition de la convention ou de la décision relativement à l'un ou l'autre ou à the bargaining unit de façon générale.

[Emphasis added.]

[11] The Association invited the adjudicator to dismiss the objection and hear the matter on the merits, arguing that the adjudicator has jurisdiction under section 220 of the PSLRA and that the grievance was arbitrable, as it involves section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter), whereas the new policy on standby duty is neither fair nor reasonable within the meaning of articles 5 and 6 of the collective agreement.

[12] At this point, it will be useful to reproduce article 5 of the collective agreement (the managerial rights clause):

> 5.01 All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.
>
> 5.02 The Employer will act reasonably, fairly and in good faith in administering this Agreement.

[13] Moreover, the managerial rights clause was already included in the provisions stipulated in the arbitral award of October 23, 2009, and had been in effect since November 1, 2009.

[14] In passing, the term "Employer," used in the managerial rights clause or elsewhere in the collective agreement, means Her Majesty in right of Canada as represented by the Treasury Board, and includes any person authorized to exercise the authority of the Treasury Board (article 2.01f). Reference must therefore be made to the relevant provisions found in the important framework statute that is the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA), in particular sections 7 to 13.

[15] Article 6 of the collective agreement (the rights of legal officers clause) counterbalances the managerial rights clause:

> 6.01 Nothing in this Agreement shall be construed as an abridgement or restriction of any lawyer's constitutional rights or of any right expressly conferred in an Act of the Parliament of Canada.

[16] However, it is precisely the rights of legal officers clause that the Association specifically relies on to argue that the managerial rights clause must be interpreted and applied in light of section 7 of the Charter, which protects the right to private life. At first blush, the Association's grievance is thus a policy grievance, and it is not surprising that the adjudicator chose to reserve on the employer's preliminary objection and hear all of the evidence before making a final decision in this case.

PARTIES' EVIDENCE AND THE ADJUDICATOR'S FINAL DECISION

[17] On the merits of the grievance, five legal officers with the Immigration Law Directorate in the Quebec Regional Office—Jocelyne Murphy, Isabelle Brochu, Caroline Doyon, Émilie Tremblay and Gretchen Timmins—testified before the adjudicator about the restrictions and inconveniences imposed on their private lives by the obligation to perform standby duty, particularly the fact that it is now mandatory and is not compensated. For instance, the pager must be kept on and legal officers must remain within the operating range required by the employer. In short, legal officers on call are forced to reorganize their entire personal and family lives on Friday nights and weekends.

[18] Management's witness, Michel Synnott, explained to the adjudicator that emergencies are unpredictable in immigration and that the policy on standby duty is rationally based. Also, the encroachment on legal officers' private lives is minimal. Furthermore, according to the new policy, standby services are now limited to certain hours: 17:00 to 22:00 on weekdays and 09:00 to 21:00 on weekends. Since compensatory time off is no longer available, legal officers no longer volunteer. However, if they are required to work on a Friday night or the weekend, legal officers are paid in cash (LA-1 and LA-2A) or compensated in leave (LA-2A and LA-3).

[19] On November 28, 2011, the adjudicator allowed the employer's preliminary objection to her jurisdiction and ordered the file closed. In substance, the adjudicator concluded that she did not have jurisdiction under section 220(1) of the PSLRA. The policy on standby duty "is not expressly or implicitly part of a matter dealt with by the collective agreement," whereas "time spent on standby . . . cannot be considered time worked." Furthermore, by its behaviour, "the Association rescinded its right to claim compensation for standby duty and, in this case, to have the policy declared illegal or contrary to another Act of Parliament." Articles 5 and 6 of the collective agreement "do not have a general application that might create an entitlement to a remedy on a matter excluded from the collective agreement." Because she does not have jurisdiction to decide the grievance, the adjudicator concluded that the "issue . . . to grant a *Charter* remedy is moot."

IS THE APPLICATION FOR JUDICIAL REVIEW MOOT?

[20] The Association is asking this Court today to review the impugned decision on the standard of correctness; it is seeking to have the decision set aside because the adjudicator has jurisdiction and is requesting that the Court order the Board to refer the grievance to a new adjudicator. As for the respondent, he submits that the impugned decision must be reviewed on the standard of reasonableness and is requesting that this application be dismissed as the impugned decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*)).

[21] However, before considering the merits of this application for judicial review, it is first necessary to dispose of the respondent's preliminary submission that there is no need for the Court to address the adjudicator's jurisdiction or the reasonableness of the impugned decision because the matter has become moot, which is contested by the Association.

[22] At the hearing, counsel for the respondent argued that this application for judicial review has become moot and that there is no need to determine the question of jurisdiction or any constitutional issues raised by the grievance. With respect to the alleged violation by the employer of article 6.01 of the collective agreement and section 7 of the Charter, for example, the legal officers affected can always present individual grievances.

[23] The respondent argues that the first collective agreement has since been replaced by a new collective agreement, signed on March 12, 2013, and which will now expire on May 9, 2014. The parties expressly agreed to remove all earnings for work performed by legal officers outside

working hours. In consideration of the increase in legal officers' base salary, the Association apparently agreed to concessions regarding standby duty. Thus, a clause was added clause specifically providing for compensation that may be granted, at the employer's discretion, for Friday night and weekend duty, as well as for time worked outside working hours.

[24] At the hearing, counsel referred to the French version of the "memorandum of understanding" signed on June 25, 2012. One can see that article 13.02(e) of the collective agreement was amended (the underlined portions show what is different from the first collective agreement):

> [TRANSLATION]
>
> (e) Lawyers are eligible for ~~exceptional~~ management leave with pay, as the delegated manager considers appropriate, for a period of up to five (5) days in one (1) fiscal year. Examples of situations where such leave ~~sont~~ may be granted are where lawyers are required to work excessive hours or where a lawyer is significantly restricted as a result of being on standby duty.

[25] In short, the respondent submits that by signing the new collective agreement, the Association waived any right to seek the setting aside of the impugned decision and to request that the grievance be referred to adjudication. Although it is true, according to counsel for the respondent, that a policy grievance is now arbitrable—because the question of standby duty is now expressly regulated by the new article 13.02(e) of the collective agreement—the Association has nonetheless lost all legal interest in pursuing or file a policy grievance challenging the legality of the policy on standby duty.

[26] As would be expected, the Association completely disagrees with all the "assumptions" the employer is now making about its intentions. Furthermore, the interpretation and scope given by the employer to the new provisions of the collective agreement respecting "management leave" is wrong in law. As evidence, the so-called [TRANSLATION] "duty to be on call," referred to in French version of the memorandum of understanding of June 25, 2012, is not found in the final version signed by the parties on March 12, 2013, which reads as follows:

> (e) Lawyers are eligible for management leave with pay, as the delegated manager considers appropriate, for a period of up to five (5) days in one (1) fiscal year. Examples of situations where such leave may be granted are where lawyers are required to work excessive hours or where a lawyer is significantly restricted as a result of being on standby duty.
>
> e) Le juriste est admissible à un congé de direction payé que le gestionnaire délégué considère comme approprié pour une période d'au plus cinq (5) jours par exercice financier. Les exemples de situation où ces congés peuvent être accordés sont lorsque le juriste doit travailler un nombre d'heures excessif ou lorsque le juriste est limité d'une manière significative, dû aux périodes où il doit être en disponibilité.
>
> [Emphasis added.]

[27] For the Association, the issue of whether the employer can force all legal officers to participate, failing which they will face disciplinary sanctions, in standby duty is neither resolved nor moot, and furthermore, by signing the new collective agreement, the Association did not waive its right to have the new policy declared unlawful under the Charter. Moreover, the employer's interpretation of its residual rights is in direct conflict with the rights of lawyers (article 6 of the

collective agreement), and in particular, violates their fundamental right to their private life (section 7 of the Charter).

[28] The Association also submits that legal officers with the Immigration Directorate ne should not have to file individual grievances to challenge a policy generally applicable to all members of the bargaining unit. According to the principle "work now, grieve later," such individual grievances will become moot, unless legal officers refuses to be on standby duty, which will expose them, of course, to disciplinary sanctions. The Association has a duty of fair representation to all members of the bargaining unit, such that the policy grievance remains the best vehicle to challenge the legality of the policy on standby duty.

[29] I have considered the factors usually applicable when a Court is asked to decline to hear a case on the ground that the issue has become moot (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). It is a discretionary decision and no particular factor is determinative. On balance, I am not satisfied that the important issues raised in this application for judicial review are moot, nor am I convinced that it is in the best interest of the parties and the administration of justice to decline to decide on the merits of this application for judicial review.

[30] I will explain.

[31] I begin by reiterating that under section 233(1) of the PSLRA , every decision of an adjudicator is final and may not be questioned or reviewed in any court. Nonetheless, the same privative clause cannot immunize an adjudicator's decision on a judicial review because as the

Supreme Court notes in *Dunsmuir* at paragraph 30 "the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent."

[32] If the Court declines to hear the matter, the impugned decision will remain, and legally speaking, shall have effect. In practice, the employer may rely on this case to argue that an adjudicator does not have jurisdiction when it comes to the exercise of a residual power involving the policy on standby duty.

[33] Despite that a provision on compensation was added to the new collective agreement, the issue of the adjudicator's jurisdiction is still relevant today. The signing of a new collective agreement did not cancel the existing grievances and nor is the grievance of May 18, 2010, the only one with regard to the lawfulness of the policy on standby duty. Beyond the strict question of compensation, the scope of the managerial rights clause continues to be the source of a heated dispute between the parties. Also, the application of section 7 of the Charter remains an open question.

[34] Finally, what is being referred to here are substantive rights and not mere procedural rights. Unit members, who wish to obey the law, should not be forced to avail themselves of the constitutional rights they assert or face disciplinary sanctions. Policy grievances may be presented. The issue is whether the adjudicator made a reviewable error by refusing to decide on the merits of the Association's grievance. Lastly, any assumptions about the Association's intentions seem to me inappropriate at this point. Furthermore, I have heard all of the parties' arguments on the issue of the

adjudicator's jurisdiction and on the merits of this application for judicial review. It is thus best to decide these issues.

[35] I therefore turn to consider this application for judicial review.

THE STANDARD OF REVIEW

[36] The parties disagree as to the standard of review applicable in this case.

[37] In *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraph 48, the Supreme Court notes that a court deciding an application for judicial review must engage in a two-step process to identify the proper standard of review, while adding the following to what has already been written on the subject in *Dunsmuir*:

- First, the reviewing court must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence.
- The second inquiry becomes relevant if the first is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage, the court performs a full analysis in order to determine what the applicable standard is.

[38] However, the first major challenge is that the two parties disagree on the characterization of the issues raised in the application for judicial review.

[39] If we characterize the issue of whether the adjudicator has jurisdiction under section 220 of the PSLRA to hear the Association's grievance as a "jurisdictional issue," whereas according to *Dunsmuir*, the impugned decision should be reviewed on a standard of correctness. That is the Association's position. However, the respondent submits that the same case also leads the reviewing court to show deference where the question of jurisdiction is within the expertise of the decision-making body. In the respondent's view, the arbitrability of the grievance raises a question of mixed fact and law falling within the expertise of the adjudicator.

[40] Knowing that if I happen to err on the applicable standard of review, my decision will be reviewed by the Federal Court of Appeal, I believe it is appropriate to adopt a nuanced approach.

[41] On the one hand, as noted in *Dunsmuir* at paragraph 50, "[a]s important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law." On the other hand, it is important here to take a "robust view" of the notion of jurisdiction, and as stated in paragraph 59, "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."

[42] I note that under section 221 of the PSLRA, a party that presents a "policy grievance" may refer it to adjudication, so the adjudicator certainly had jurisdiction <u>in the narrow sense</u> to decide whether or not the Association's grievance was a policy grievance as defined in subsection 220(1) of the PSLRA , that is to say, generally involving the interpretation or application of the collective

agreement or the decisions of an adjudicative tribunal. However, the Supreme Court noted in 2003 in *Parry Sound (District), Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, at paragraph 16 (*Parry Sound*), that "[w]here an arbitration board is called upon to determine whether a matter is arbitrable, it is well-established that a reviewing court can only intervene in the case of a patently unreasonable error."

[43] The fact of the matter according to pre-*Dunsmuir* case law, the degree of deference to be accorded to a question of arbitrability was very high. The standard referred to was the "patent unreasonableness" standard. In any event, as noted in *Dunsmuir*, notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory, such that if the jurisprudence determined "in a satisfactory manner" that it was the standard of patent unreasonableness that applied, logically speaking, the standard of reasonableness should be the standard of review applicable to a general question of arbitrability of the grievance. The latter finding correlates well with the recent developments in the law of judicial review that the adjudicator benefits from the presumption of particular familiarity with the interpretation of the collective agreement and its enabling statute: *Dunsmuir* at paragraphs 54 and 147; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, at paragraphs 31 and 36; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paragraph 30; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 13; *King v Canada (Attorney General)*, 2012 FC 488, at paragraph 95 (*King*), affirmed by 2013 FCA 131.

[44] However, the presumption of deference with respect to decisions of an adjudicative tribunal in labour law referred to above is not absolute. It surely does not include issues that are dependant upon the interpretation of a provision of the Constitution (*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11), including the Charter, or an enactment other than the enabling statute that the adjudicator is required to consider or apply to dispose of a grievance. In such cases, the standard of correctness must be maintained: *Syndicat des professionnelles du centre de jeunesse de Québec (CSN) c Desnoyers*, 2005 QCCA 110, at paragraphs 5, 21 and 22; *Isidore Garon Ltée v Tremblay; Fillion et Frères (1976) inc v Syndicat national des employés de garage du Québec inc*, 2006 CSC 2, at paragraph 90. That is the case, for example, when considering whether the substantive rights and obligations of the Charter and the *Canadian Human Rights Act*, RSC, 1985, c H-6, are incorporated into each collective agreement over which the adjudicator has jurisdiction (*Parry Sound*, at paragraph 23). The Association relies here on the application of section 7 of the Charter, via article 6 of the collective agreement.

MERITS OF THIS APPLICATION FOR JUDICIAL REVIEW

[45] Having carefully reviewed the adjudicator's reasons for concluding that the Association's grievance is not arbitrable in light of the evidence in the record and the applicable law, I am of the view that her conclusion of lack of jurisdiction is unreasonable in this case, as the adjudicator undoubtedly had jurisdiction under the Act to determine the constitutional question raised by the Association's grievance.

[46] The source of the parties' rights and obligations is of course the collective agreement (*McGavin Toastmaster Ltd v Ainscough*, [1976] 1 SCR 718), but in the federal public service,

consideration must also be given to articles 7 and 11.1 of the FAA, which grants the Treasury Board and deputy heads very broad residual powers in the exercise of their human resources management responsibilities, even within a union environment (*King*, at paragraphs 110 to 127).

[47] However, nor is there any dispute that the adjudicator has jurisdiction over any matter involving Charter rights, that may be raised in the administration or application of a collective agreement: *McLeod v Egan*, [1975] 1 SCR 517 (*McLeod*); *Weber v Ontario Hydro*, [1995] 2 SCR 929, at paragraphs 58-60 (*Weber*) *Parry Sound*, at paragraphs 28-29. Furthermore, in *Nova Scotia (Worker's Compensation Board) v Martin*, 2003 CSC 54, at paragraph 3, the Supreme Court has already established that

> Administrative tribunals which have jurisdiction -- whether explicit or implied -- to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision.

[48] Also, according to paragraph 226(1)(*g*) of the PSLRA , the adjudicator cannot refuse to interpret or apply any other Act of Parliament relating to employment matters on the ground that there is a conflict between the Act and the collective agreement. Said provision reads as follows:

226. (1) An adjudicator may, in relation to any matter referred to adjudication,	226. (1) Pour instruire toute affaire dont il est saisi, the adjudicator de grief peut :
…	[…]
(g) interpret and apply the Canadian Human Rights Act and any other Act of Parliament relating to employment matters, other than the provisions of the Canadian Human Rights Act related to the right to equal pay	g) interpréter et appliquer la Loi canadienne sur les droits de la personne, sauf les dispositions de celle-ci sur le droit à la parité salariale pour l'exécution de fonctions équivalentes, ainsi que toute autre loi fédérale

for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;	relative à l'emploi, même si la loi en cause entre en conflit avec une collective agreement;
…	[…]

[Emphasis added.]

[49] However, the adjudicator's refusal to exercise her jurisdiction on the so-called ground that the grievance was not arbitrable seems unreasonable to me. The adjudicator reasoning is in all respects capricious and arbitrary because it fails to take into account applicable legislation and the overall scheme of the provisions of the PSLRA and the collective agreement. Before this Court, counsel for the respondent also acknowledged that the employer's managerial rights are not absolute and cannot be interpreted in such a way as to limit a constitutional law or other right derived from an Act of Parliament (section 32 of the Charter and article 6 of the collective agreement).

[50] In determining whether the grievance was arbitrable, the adjudicator had to simply ask herself, as required by subsection 220(1) of the PSLRA , whether the subject matter in respect of the interpretation or application of a provision of the collective agreement or an arbitral award. On its face, the grievance is specifically in respect of an alleged violation of articles 5.02 and 6 of the collective agreement, including section 7 of the Charter, in the exercise of the employer's residual managerial rights as outlined in article 5.01 of the collective agreement, derived from any other Act of Parliament relating to employment matters applicable in this case, namely, the FAA (paragraph 226(1)(*g*) of the PSLRA).

[51] Contrary to what the adjudicator surmises in the impugned decision, the arbitrability of the Association's policy grievance does not depend on the existence of a specific provision in the collective agreement allowing the employer to compensate legal officers who agree or are forced to be on standby duty on Friday nights and weekends. As the Association has argued from the outset, the grievance is based on a specific provision in the collective agreement which requires the employer to act reasonably, fairly and in good faith, in the administration of the collective agreement, which of course includes any of the employer's policies or decisions taken or adopted by the employer under the purported authority of the managerial rights (5.01 of the collective agreement).

[52] The issue of compensation is not the focus of the policy grievance. In the impugned decision, the adjudicator made much of the fact that the Association "rescinded its right to claim compensation for standby duty and, in this case, to have the policy declared illegal or contrary to another Act of Parliament" (paragraph 89). And therein, in my view, lies the problem as "[u]nder *McLeod*, a collective agreement cannot extend to an employer the right to violate the statutory rights of its employees" (*Parry Sound*, at paragraph 32).

[53] As the Supreme Court itself stated in *Parry Sound* at paragraphs 28 and 29:

> As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not

> constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.
>
> As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. Under *McLeod*, there are certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the work force otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.
>
> [Emphasis added.]

[54] Beyond the mere issue of financial compensation, while the time on standby cannot be considered "work" (*Maple Leaf Mills Inc v UFCW Loc 401*, (1995) 50 LAC (4th) 246), what the Association's grievance contests is a condition of employment unilaterally set by the employer, which obliges legal officers on call, while they are away from the workplace during non-working hours, to carry a pager that must be kept on and be available on call to respond to emergencies, meet with the client and argue a stay at the time that the Federal Court requires, where applicable. In such cases, is the employer acting in a reasonable and fair manner by not obtaining the individual consent of each legal officer concerned? In the absence of consent, should the employer offer compensation to the legal officer concerned (time off or overtime pay)?

[55] It is precisely because legal officers on call are not at work that the Association's policy grievance raises the issue of reasonableness and legality of a policy that applies to the members of the bargaining unit on a mandatory basis. The question is whether the abolition of the former

compensation policy regarding legal officers who volunteer for standby duty in immigration outside regular working hours is allowed under the collective agreement, and if so, whether all of the provisions relied upon by the employer are rendered inoperative because they violate a fundamental Charter right. Is this an infringement on the legal officers' private life, and if so, is the new policy justifiable and reasonable in the absence of consent or compensation?

[56] Without ruling on the merits of the Association's grievance, I note that the case law recognizes that an individual's right to private life is protected under section 7 of the Charter. In such cases, the adjudicator will have to ask whether the employer's policy "strikes a reasonable balance."

[57] Thus, as noted by the Supreme Court in *Communications, Energy and Paperworkers Union of Canada, Locale 30 v Irving Pulp and Paper, Ltd*, 2013 SCC 34, at paragraph 27:

> In assessing *KVP* reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a "balancing of interests" approach. As the intervener the Alberta Federation of Labour noted:
>
> > Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees. [I.F., at para. 4]

[58] I repeat myself and note once again so that it is clear: in concrete terms, the Association's grievance deals with the scope of the residual powers that the employer submits that it has under the

collective agreement and the Act (the FAA) to force legal officers to share between them standby duty and be available for standby duty on a rotational basis. The fact of the matter is that the so-called "jurisdiction" argument raised by the employer in the arbitration, in the form of a preliminary objection, had all the characteristics of a circular and specious argument. Moreover, the whole question of "reasonable balance" was fully understood by the employer, which had Mr. Synnott testify at arbitration, to counter any allegation that standby duty constitutes an unreasonable unilateral sanction or an unjustified infringement on the employees' private life.

[59] I find it regrettable that, after several days of hearing the matter and after hearing all of the evidence, the adjudicator still chose not to rule, at least alternatively, on the merits of the grievance. At the very least, the reasonableness of her findings on the merits could have been reviewed by the Court in judicial review. This would have spared the parties the burden of having to start over again before another adjudicator, because, unfortunately, I cannot exercise my discretion to refer the matter to the same adjudicator appointed by the Board pursuant to paragraph 223(2)(*d*) of the PSLRA, as Ms. Pineau is no longer a member of the Board.

[60] Nor is this an exceptional case in which the Court should render a decision on the merits in the stead of the adjudicator. On the one hand, I did not hear the witnesses and there are no transcripts of their testimony before the adjudicator, whereas the denial of the grievance is based strictly on the finding of lack of jurisdiction of the adjudicator. On the other hand, I cannot state here that the Association's grievance cannot succeed or that it is obvious that the Association will succeed. I would add that even if the employer seems to have a serious defence to the rationality of

the policy on standby duty and minimal impairment, that in itself is not sufficient to refuse to grant the remedies sought by the Association in this application for judicial review.

[61] In the exercise of my judicial discretion, it is therefore appropriate to set aside the impugned decision and refer to the matter to another adjudicator so that it be decided on its merits.

CONCLUSION

[62] For these reasons, the application for judicial review will be allowed. The impugned decision allowing the employer's preliminary objection and closing the file on the ground that the adjudicator does not have jurisdiction will be set aside and the Association's grievance will be referred back to the Board so that a new adjudicator decide the grievance on its merits.

[63] In view of the result, costs will be awarded in favour of the Association.

JUDGMENT

THE COURT ADJUGES AND ORDERS:

1. The application for judicial review is allowed;
2. The impugned decision allowing the employer's preliminary objection and closing the file on the ground that the adjudicator does not have jurisdiction is set aside and the Association's grievance is referred back to the Board so that a new adjudicator decide the grievance on its merits; and
3. Cost in favour of the Association.

"Luc Martineau"
Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ASSOCIATION OF JUSTICE COUNSEL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
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DATED:	July 22, 2013

APPEARANCES:

Bernard Philion	FOR THE APPLICANT
Adrian Bieniasiewicz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Philion Leblanc Beaudry, Avocats s.a. Montréal, Quebec	FOR THE APPLICANT
William F. Pentney, Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT