Federal Court of Appeal | Cour d'appel fédérale

Date: 20160323

Docket: A-384-15

Citation: 2016 FCA 92

[ENGLISH TRANSLATION]

CORAM: **TRUDEL J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ASSOCIATION OF JUSTICE COUNSEL

Respondent

Heard at Montréal, Quebec, on January 11, 2016.

Judgment delivered at Ottawa, Ontario, on March 23, 2016.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: TRUDEL J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] On April 2, 2015, grievance adjudicator Stephan J. Bertrand (the adjudicator), of the Public Service Labour Relations and Employment Board (the Board) allowed a policy grievance from the Association of Justice Counsel (the Association) against a directive from the Immigration Law Directorate of the Department of Justice, Quebec Regional Office (the employer or Directorate). This directive imposes a duty on counsel to be available weeknights and weekends, on a rotational basis, and without compensation. The adjudicator concluded that

this directive infringes on counsels' right to liberty under section 7 of the *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, found in Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the Charter) and thus violated clause 6.01 of the collective agreement between the Treasury Board and the Association, in addition to constituting an unreasonable and unfair exercise of residual management rights under clause 5.02 of the collective agreement.

[2] For the reasons that follow, my opinion is that this application for judicial review against that decision should be allowed. The adjudicator erred in deciding that the directive does not comply with the collective agreement and violates the right to liberty guaranteed by section 7 of the Charter.

I. The facts

[3] The facts are not disputed and were the subject of an agreed statement of facts before the adjudicator. I will summarize the main facts for the purposes of this application.

[4] Since the early 1990s, the Directorate has provided client departments with standby staff weeknights and weekends in order to process urgent stay applications before the Federal Court concerning immigration. When on standby duty, counsel must be available by pager or cell phone, ready at all times to arrive at the office within one hour, and, as needed, be prepared to provide the services required. The agreed statement of facts illustrates the impact this duty can have by providing the personal situations of four counsel working for the Directorate.

[5] The adjudicator summarized the constraints imposed by the directive on these four counsel as follows (Applicant's file, page 30, at paragraph 59):

> The conditions imposed on counsel directly affect their abilities and capacities to do certain things and to perform certain activities such as picking up children from school and taking them home, in cases in which the school is located more than an hour from the office; attending opera performances; visiting family members who live more than an hour from their workplaces; committing themselves to piano lessons; going on outings with friends during which they could otherwise consume even moderate amounts of alcohol; accompanying children to arenas to play hockey; spending time with family at a cottage, when the cottage is located more than an hour from the counsel's workplace or in an area in which pagers or cell phones are not functional; skiing with children or accompanying them to water slides; having friends or family over for dinner; training for a triathlon or participating in one; and choosing personal or family activities held more than an hour from their workplace....

[6] Until the impugned directive came into force in March 2010, counsel on standby were compensated by days of leave at the discretion of the employer, and nobody was regained to be on standby when there were enough volunteers. The employer then notified employees around March 22, 2010, that from then on they would be compensated only for hours actually worked while on standby and not for the entire period spent on standby. In the absence of volunteers after that announcement, the employer imposed the requirement that all counsel of the Directorate be on call on a rotational basis for. A table was prepared according to the availability and personal situation of each counsel, who was required to be on standby an average of 1 to 3 times per year. The employer allowed the counsel to arrange with each other in case they needed someone to fill in for them.

[7] The working conditions for counsel who were part of the bargaining unit were initially established by an arbitral award handed down on October 23, 2009, which served as a collective agreement. It came into force on November 1, 2009, with the exception of certain provisions that

did not come into force until February 20, 2010. Neither this arbitral award nor the job descriptions of employees address time spent by counsel on standby or compensation for such a period. Paragraphs 13.01*c*) and 13.02*c*) of the collective agreement signed July 27, 2010, provide for one normal work week of 37.5 hours, which extends from Monday to Friday "except where a lawyer is required to work on what would normally be a day of rest or a paid holiday in order to carry out his or her professional responsibilities" (Applicant's file, volume 1, page 142).

[8] The employer invoked management rights granted to it under sections 7 and 11.1 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 [FAA], as reproduced in Article 5 of the collective agreement, to justify the directive it issued. Article 5 of the collective agreement states the following (Applicant's file, volume 1, page 137):

> 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.

[9] These management rights are limited by Article 6 of the collective agreement, which provides as follows. (Applicant's file, page 137):

> 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.

[10] On May 15, 2010, the Association filed a policy grievance pursuant to section 220 of the *Public Service Labour Relations Act*, S.C. 2003, c.22, s. 2 [PSLRA], alleging that this new directive was an unreasonable exercise of the employer's management rights, and calling for the following corrective measures: (1) that the employer cease to impose mandatory standby duty;

(2) alternatively, that the employer treat standby duty hours as hours worked; (3) alternatively, that the employer compensate counsel for standby duty hours according to the former policy; and (4) any other relief that the court deems appropriate (Applicant's file, volume 1, page 126).

[11] Following a first hearing, the grievance was rejected because the adjudicator did not have jurisdiction to address it since the standby duty policy was not expressly or implicitly addressed in the collective agreement. That decision was set aside by judicial review, with Justice Martineau ruling that the grievance did pertain to the alleged violation of clause 5.02 and Article 6 of the collective agreement, which incorporates section 7 of the Charter *(Association of Justice Counsel v. Canada (Attorney General),* 2013 FC 806, [2013] F.C.A. no. 849).

[12] On October 28 and 29, 2014, the grievance was heard by a new adjudicator. At the hearing, the Association withdrew the claims that appeared in points 2 and 3 of the list of corrective measures cited above, i.e., the claims of an economic nature aimed at receiving compensation for standby duty hours. No direct evidence of that withdrawal was filed before this Court, even though the adjudicator took it into consideration at paragraphs 25 and 32 of his decision.

II. The impugned decision

[13] While recognizing that the employer retained residual management rights pursuant to clause 5.01 of the collective agreement, the adjudicator added that the employer was required to act reasonably, fairly and in good faith in exercising its rights and particularly to comply with section 7 of the Charter. With that in mind, he concluded that the directive was not reasonable:

> [45] Such a directive seems to me quite simply neither reasonable nor fair. On the contrary, instead, it is reasonable for counsel to expect to be free to act and to conduct themselves as they see fit outside their workplace and outside normal work hours, with no interference from their employer. Instead, it would be fair for them to be compensated for the time during which the employer continues to exercise a certain control over their lives.

[14] The adjudicator also noted that clauses on compensation are often found in collective agreements for federal employees, where by the parties agree on the terms addressing the availability of employees outside of normal work hours, with certain compensation to avoid an unreasonable exercise of power by management. In his opinion, the fact that a collective agreement is silent on standby duty hours does not mean that the employer has free reign to require standby duty and to impose conditions.

[15] While recognizing that an emergency over which the employer has no control outside of normal work hours may constitute a legitimate organizational need, the adjudicator found that the organizational need in this instance is triggered instead by the employer's choice to provide and sell its employees' professional services outside their normal work hours. Otherwise, the employer would have specified availability to work standby duty as a condition of employment. The adjudicator also noted that no evidence was presented establishing that the standby duty period is the only way for the employer to respond to emergencies.

[16] Finally, the adjudicator distinguished the case law of the provincial administrative tribunals cited by the applicant on the grounds that they address the interpretation of a clause in the collective agreement on standby duty availability. On the contrary, he noted that the applicant did not refer to any case decided by the Board or federal courts suggesting that the employer's

decision on mandatory standby duty and the conditions governing the conduct of public servants required to perform such standby duty outside the workplace and normal work hours, without compensation, would be a reasonable exercise of the employer's management duties.

[17] Secondly, the adjudicator concluded that the directive infringes on the right to privacy protected under section 7 of the Charter and clause 6.01 of the collective agreement. He begins by referring to the Supreme Court decision in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577 [*Godbout*], where the Court found that the choice of location where to reside was a right protected under section 7 of the Charter and section 5 of the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 (Quebec Charter).

[18] The adjudicator recognized that the Charter does not protect all activities that individuals consider essential to their lifestyles. However, he distinguished between the examples provided in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 [*Malmo-Levine*] (choice to smoke marijuana, play golf, gamble or eat fatty foods), which refer more to personal preferences, and the examples of restriction provided by counsel, which are choices that resemble essentially private decisions bordering on the very nature of personal autonomy. Rather than characterize the liberties the counsel seek to protect "as recreational, social and family activities or personal preferences that do not merit any protection", he relates them instead to "a willingness to develop family ties, to assume parental responsibilities, to structure personal and family lives, to engage in any of the ordinary occupations of life, and to develop and attain their maximum potential" (at paragraph 61 of the decision).

[19] Given his conclusion that the right to liberty pursuant to section 7 of the Charter includes the right to enjoy a private life outside of the workplace and normal work hours, the adjudicator concluded that the directive violates this right to privacy. He concluded his analysis on this in the following terms:

> [63] In my opinion, if the Supreme Court is sympathetic to the idea that section 7 of the *Canadian Charter* protects the right to private life and advocates the importance of personal autonomy and the fundamental nature of family unit integrity (*Children's Aid Society of Metropolitan Toronto* and *Godbout*), then it goes without saying that the employer's standby duty directive, through its clearly intrusive nature in the counsel's private lives, infringes the guarantees set out in that section by directly interfering with several areas of its employees' personal autonomy.

[20] As to the question of determining whether the infringement on the counsel's right to liberty is consistent with the principles of fundamental justice, the adjudicator answered in the negative. While acknowledging that a rational link exists between the objective of responding to stay applications and working overtime hours, he noted that the deleterious effects of the directive are completely disproportionate to its objective. In his opinion, other less intrusive ways could achieve the same result. He mentions, for instance, that the manager could call employees, on a rotational basis, until a counsel is reached who is available, failing which a manager could provide the service; amend the standby duty directive to ensure that it is carried out voluntarily; or add an availability clause to the collective agreement.

III. Analysis

[21] The case law is well settled. The standard of review applicable to an adjudicator's decision on labour relations is that of reasonableness: *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 68; *British Columbia Teachers' Federation v. British*

Columbia Public School Employers' Association, 2014 SCC 70, [2014] 3 S.C.R. 492; *United Food and Commercial Workers, Local 503 v. Wal−Mart Canada Corporation*, 2014 SCC 45, [2014] 2 S.C.R. 323, at paragraph 85; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at paragraph 7 [*Irving*]. In this case, the parties do not dispute that the adjudicator's decision concerning the fairness and reasonableness of the impugned directive with regard to clause 5.02 of the collective agreement calls for deference. This applies notably because of the privative clause protecting adjudicators of the Board (s. 233 of the PSLRA), their expertise in the matter and the fact-based nature of the exercise. As my colleague, Justice Stratas, recently reiterated in *Canada (Attorney General) v. Delios*, 2015 FCA 117, [2015] F.C.A. no. 549, at paragraph 20:

> … interpretations of collective agreement provisions involve elements of factual appreciation, specialization and expertise concerning collective agreements, the disputes that arise under them, the negotiations that lead up to them and, more broadly, how the management−labour dynamic swirling around them plays out in various circumstances. These elements all point to the standard of reasonableness, not correctness ...

[22] The parties do not agree, however, on the standard applicable to the adjudicator's decision stating that the directive violates section 7 of the Charter and, by extension, Article 6 of the collective agreement. The applicant argues that the standard of correctness should apply because it is a non-discretionary decision related to the interpretation of the Charter. The Association, for its part, cites primarily *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*] and argue that the standard of reasonableness should apply when an administrative tribunal does not determine the constitutionality of a law, but seeks only to protect the rights granted by the Charter in exercising its powers.

[23] In my opinion, the question of whether the constraints to which counsel are subjected during periods on standby duty infringe on the right to liberty guaranteed under section 7 of the Charter does not call for deference on the part of this Court. This issue goes much farther than the issue in *Doré*, which was whether an administrative decision-maker had sufficiently taken into account the values granted by the Charter in making a decision following the exercise of discretionary powers. In other words, the Court was called upon to determine whether the decision-maker had restricted the right protected by the Charter in a disproportionate, and thus, unreasonable, manner. In this case, it is the very delimitation of the right to liberty under section 7 that is at issue. It is then essentially a question of law, indeed, of constitutional law, that cannot be subject to various interpretations. While the interpretation of the collective agreement falls without a shadow of a doubt within the adjudicator's jurisdiction, this is far from the case for the interpretation of a constitutional text. In the same way as the scope and meaning of the concept of family status as prohibited grounds of discrimination (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pages 576 to 578, 100 D.L.R. (4th) 658) and the concept of discrimination (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2006] 3 F.C.R. 392), the determination of that which the notions of private life and personal autonomy involve shouldn't lead to inconsistent decisions and must therefore be scrutinized rigorously. See: *Erasmo v. Canada (Attorney General)*, 2015 FCA 129, [2015] F.C.A. no 638, at paragraphs 29 and 30; *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595, at paragraphs 36-52. Indeed, the application of the interpretation that must be given to these concepts in this case must be reviewed on the standard of reasonableness.

A. *The reasonableness of the interpretation by the adjudicator of Article 5 of the collective agreement*

[24] There can be no doubt that the Treasury Board, as a public service employer, has been given broad powers by Parliament. More specifically, paragraph 7(1)(*e*) of the FAA provides that the Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to "human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it". In the exercise of these responsibilities, the Treasury Board may "determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any related matters" (at paragraph 11.1(1)(*c*) of the FAA). The law is well settled : in exercising its duties, the employer may do anything that is not expressly or implicitly prohibited by a collective agreement or a law: see *Brescia v. Canada (Treasury Board)*, 2005 FCA 236, [2006] 2 F.C.R. 343, at paragraphs 40-45 and 50; *Peck v. Canada (Parks Canada)*, 2009 FC 686, [2009] F.C.A. no 1707, at paragraph 33; *P.S.A.C. v. Canada (Canadian Grain Commission)* (1986), 5 F.T.R. 51 (F.C.1st inst.), [1986] A.J.C. No. 498, page 19; *Public Service Alliance of Canada v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 165, [2013] P.S.L.R.B. no 135, at paragraph 83, aff'd. by 2014 FC 1152, [2014] F.C.A. no 1198; *Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLRB 18, [2014] P.S.L.R.B. no 18, at paragraph 48. The collective agreement also expressly acknowledges the employer's residual management rights in clause 5.01.

[25] The residual management rights of an employer, however, are not absolute. In the public service, the powers of the Treasury Board are subject to a number of restrictions under the terms of the PSLRA and do not extend to issues addressed in the *Public Service Employment Act*, R.S.C. 2003, c. 22, ss. 12 and 13. In more general terms, it is recognized that the measures taken by an employer in exercising its management rights must not breach the collective agreement, and must be reasonable and associated with a legitimate objective. As the Supreme Court stated in *Irving*, at paragraph 24:

> The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The heart of the "*KVP* test," which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable (Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), volume 1, at topic 4:1520).

[26] This requirement is essentially reproduced in clause 5.02 of the collective agreement, which expressly stipulates the employer's responsibility to act reasonably, fairly and in good faith, while clause 6.01 states that the employer cannot abridge or restrict any lawyer's constitutional rights or any right expressly conferred in an Act of the Parliament of Canada. I will revisit the latter clause later.

[27] The applicant contends that the adjudicator erred in concluding that the directive pertaining to days of standby duty was unreasonable; he did not abide by the well settled case law where this type of directive was considered a reasonable exercise of management rights as long as the employee is not required to remain at home. The applicant also alleges that this decision is not intelligible or justified given that the adjudicator, first, cited economic reasons to

conclude that the directive is unreasonable even though the Association had abandoned all conclusions of the grievance that involved monetary or other compensation and, second, built his rationale on the erroneous premise that a policy about standby duty hours and days must be authorized by an availability clause in the collective agreement.

[28] I do not find that the adjudicator erred in considering the absence of remuneration for standby duty time even though the Association was no longer claiming an alternative order relating to compensation. It is true that the adjudicator highlighted that "instead, it would be fair for them to be compensated" during the time they are available (at paragraph 45), that an availability clause provides "certain compensation" for availability (at paragraph 46), that there is no federal precedent on imposing periods of availability "without compensation" and that the parties "usually negotiate an availability clause setting out favourable terms and conditions for both parties" (at paragraph 51). A close reading of these paragraphs, however, reveals that these references to monetary compensation were part of a discussion on the reasonableness of the directive and the employer's exercise of its management rights. I fail to see how the adjudicator could have failed to mention this important consideration, especially since it is the employer's decision to no longer compensate counsel for standby duty, which is the root of the grievance. Even though the Association had abandoned all claims in damages (for reasons that seem more related to the argument based on section 7 of the Charter), the adjudicator was completely justified in considering the absence of compensation in his assessment of the reasonableness of the directive. Though this is not necessarily a deciding factor, I find it difficult to deny that it is at the very least a relevant one.

[29] Moreover, I do not find that the adjudicator erred by basing his assessment on a false premise, i.e., whether standby duty availability should be included in the collective agreement so that the employer can exercise its powers of management in that area. It is true that the adjudicator stressed the absence of a standby duty availability clause for employees, and noted that such clauses are found in other collective agreements governing federal employees. However, that is one factor among others that convinced the adjudicator that the directive in this case was unreasonable. As indicated at paragraph 46 of his reasons, it is precisely to avoid a potentially unreasonable and unfair exercise of management rights that the parties often include in collective agreements a clause on employee availability in exchange for certain compensation. From this, I do not infer that the adjudicator required that the employer codify every exercise of its management powers, as the applicant suggests. Instead, he concluded that a unilateral directive restricting the activities of employees outside of the workplace and paid work hours, without compensation and when neither the collective agreement nor letters of employment or descriptions of duties indicated any obligation to be available, was unreasonable. I consider that reading to be corroborated by the final paragraph of his analysis on this issue, which reads as follows:

> [52] This case is not about a management right that the employer tries to exercise at the workplace during normal work hours. On the contrary, it is about a management right that the employer exercises outside the workplace and outside its employees' normal work hours. Hence the increased importance of ensuring that that management right is exercised "reasonably, fairly and in good faith," which was not so in this case.

[30] The applicant also maintained that the adjudicator's decision deviates from the well settled case law, according to which imposing mandatory availability would constitute a reasonable exercise of management rights: *United Nurses of Alberta v. Alberta Health Services*

(On-Call Program Grievance), [2014] A.G.A.A. No. 24, 2014 CanLII 50285 (A.B. G.A.A.); *Shell Canada Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 835 (Call-Out Grievance)*, [2001] A.G.A.A. No. 51 (Q.L.); *Pembroke General Hospital v. Canadian Union of Public Employees, Local 1502 (Collective Agreement Grievance)*, (1974) 6 L.A.C.(2d) 149, [1974] O.L.A.A. No. 6; *Re Corporation of the County of Hastings and International Union of Operating Engineers, Local 793* (1974), 2 L.A.C.(2d) 78, [1972] O.L.A.A. No. 71. A close reading of this case law does not permit me to arrive at that conclusion. Instead, what I note is that an adjudicator has limited discretion when asked to rule on terms and conditions (and especially compensation) involved in imposing mandatory standby duty otherwise provided in a collective agreement. Although it was deemed unreasonable to impose mandatory standby duty on employees requiring that they remain at home throughout the availability period, compensation was denied when it was not provided for in the collective agreement. That case law also stands for the proposition that it will be easier to show the reasonableness of mandatory standby duty if it is set out in the collective agreement.

[31] That being said the adjudicator's decision appears unreasonable in his analysis of the employer's justifications. Firstly, the adjudicator notes at paragraph 47 of his reasons that processing a stay application does not constitute an emergency outside the employer's control because the mandatory standby duty flows only from the employer's choice to provide its clients with legal services outside of normal work hours. This conclusion goes against the common evidence submitted by the parties, to the effect that a stay application can arise unexpectedly and should be processed as an emergency. The employer cannot refuse to provide these services, because it would then be denying client departments the possibility of being represented in these

proceedings before the Federal Court. This appears to me to be a legitimate organizational need over which the employer has very little control.

[32] Secondly, the adjudicator does not seem to account for the fact that each counsel is responsible for standby duty only two or three weeks per year, that the employer considers their availability and personal situation when preparing the standby duty table, and that counsel are permitted to make arrangements with each other in case they need someone to fill in for them. Clearly, that was an important factor in assessing the reasonableness of the directive, yet the adjudicator did not take it into account in his analysis.

[33] Lastly, the adjudicator imposes an excessive burden on the employer when he notes at paragraph 49 of his reasons that there was no evidence showing that standby duty is the employer's only way of responding to emergencies. The employer is not required to demonstrate that its decision is the only way or the best way to resolve the problem; instead, its responsibilities consist of demonstrating that its solution is reasonable under the circumstances. When an adjudicator is called upon to interpret clause 5.02 of the collective agreement, his role is not to determine whether the employer made the best decision possible; instead, he is to question whether the employer acted reasonably, fairly and in good faith. Although the adjudicator may consider other ways that the employer could have achieved its objectives, he must also leave the employer some flexibility and intervene only when, for instance, another much less intrusive and more efficient way makes the employer’s decision unreasonable.

[34] In this case, the adjudicator not only imposed an excessive burden on the employer to demonstrate the reasonableness of its directive, but also ignored the evidence showing that none of the counsel volunteered after the employer made the announcement that employees would be compensated only for hours worked while on standby duty. In fact, there is every reason to believe that only financial compensation would have led the adjudicator to consider imposing standby duty to be a reasonable exercise of management rights. In my opinion, such reasoning clearly goes against the applicable law on this matter.

[35] For all of the above reasons, I find the adjudicator's decision regarding the directive's compliance with Article 5 of the collective agreement to be unreasonable.

B. *Does the directive violate section 7 of the Charter?*

[36] There is no doubt that the scope of the right to liberty in section 7 of the Charter has evolved since 1982. The concept of liberty was initially interpreted quite narrowly, and focused particularly on the fact that it appears in a section of the Charter on legal rights. This approach is found in the reasons given by Justice Lamer in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 S.C.R. 1123, at pages 1173 and 1174, 109 N.R. 81, which was subsequently reiterated in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1 [*B.(R.)*], at paragraph 21:

> At pages 1173-1174 of *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, above, I also expressed the opinion that "the interests protected by s. 7 are those that are properly and have been traditionally within the domain of the judiciary" and, more specifically, when the state "invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm" (emphasis added). I have not changed my opinion. Since the principles of

> fundamental justice are elements that are essentially within the domain of the justice system, the type of liberty s. 7 refers to must be the liberty that may be taken away or limited by a court or by another agency on which the state confers a coercive power to enforce its laws.

[37] The Supreme Court has progressively moved away from that interpretation, and now favours a broader approach to the idea of liberty, likely to include some form of right to a private life and personal autonomy. However, the Court took care in specifying that the right to liberty as protected by section 7 of the Charter does not mean the right to act as one chooses under all circumstances nor to participate in an activity a person may choose to consider as essential to their lifestyle. It seems to me that the following excerpt from the decision in *Godbout*, at paragraph 66, is an apt statement of the law on this issue:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private." Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
>
> [See also: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraphs 49-54; *Malmo-Levine*, at paragraph 85; *B.(R.)*, at paragraph 80; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, at paragraph 31 [*Clay*].]

[38] According to that logic, some courts have held that the right to liberty protects the rights of parents to choose the medical care provided to their children (*B.(R.)*) and give them access to

their children (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124). Along the same lines, Justice Wilson said that the right to liberty and security of the person guarantees women the right to decide to terminate a pregnancy (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, pg. 171, 44 D.L.R. (4th) 385). However, it is important to note that all of these opinions were in the minority, the majority often preferring an analysis based on the right to security of the person.

[39] Conversely, courts have had no difficulty to decide that the choice of a lifestyle based on sporting or recreational activities, or the consumption of a product like marijuana, and the rights that are essentially economic in nature (such as the right to exercise a profession or to choose not to undergo a medical examination for employment) cannot be compared to issues that involve "basic choices going to the core" of what it means to enjoy individual dignity and independence. See, for example: *Malmo-Levine*, at paragraph 86; *Clay*, at paragraphs 32 and 33; *R. v. S.A.*, 2014 ABCA 191, 575 A.R. 230, at paragraph 154, leave to appeal to the Supreme Court of Canada refused, 36050 (December 11, 2014); *R. v. Schmidt*, 2014 ONCA 188, [2014] O.J. No. 1074, at paragraph 40; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at paragraphs 45 and 46; *British Columbia Teachers' Federation v. Vancouver School District No. 39*, 2003 BCCA 100, 224 D.L.R. (4th) 63, at paragraphs 205-210. It is also noteworthy that the Supreme Court has to this day refused to enshrine the right to choose the location of one's residence as a right guaranteed under section 7, despite the minority judgement in *Godbout*: see *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, at paragraph 93.

[40] In concluding that the directive on standby duty infringes on the right to liberty (and a private life) protected under the Charter, the adjudicator seems to have erred in several respects. First, the adjudicator's decision seems to broaden the scope of the right to liberty considerably, in that he appears to take for granted that participating in certain sporting or recreational activities are not personal choices, but rather "choices that resemble essentially private decisions bordering on the very nature of personal autonomy" (at paragraph 60). Several of the activities that counsel cannot engage in during their standby duty period seem to go far beyond what the case law considers to be choices inherently related to an individual's personal and fundamental autonomy.

[41] With regard to the constraints and restrictions the employer's directive imposes on parents' ability to care for their children, support their development and maintain a rich and harmonious family life, I would find the Association's argument based on the right to liberty more convincing if the mandatory standby duty periods were more frequent. I find it difficult to seriously consider that the duty not to travel farther than one hour from one's residence and to be available to provide professional services weeknights and weekends two or three times per year could infringe on a fundamental right. This duty does not jeopardize the rights of parents to raise their children, to support their development or to make fundamental decisions for them, as stated in *B.(R.)*. In my opinion, accepting an argument to the contrary would only trivialize the rights a constitutional instrument like the Charter aims to protect.

[42] Lastly, I find that the adjudicator erred in using the case law pertaining to the Quebec Charter to interpret section 7 of the Charter and the right to liberty there in it. In contrast with the Charter, the Quebec Charter explicitly protects the right to a private life in article 5. It was also

on that basis that six of the nine justices in *Godbout* declared a municipal resolution invalid that required all new permanent employees to reside within the limits of the municipality. Although the two charters undeniably overlap in many ways, I find it hazardous to import a concept specifically mentioned in one Charter to interpret a distinct concept, although related in some respects, in another Charter the architecture of which is very different. It is therefore on the basis of the case law developed in the context of section 7 of the Charter that the rights asserted by the applicant must be examined; the right to a private life and personal autonomy that the counsel may claim cannot extend beyond the scope of these concepts in the interpretation of the right to liberty granted by the Charter. It goes without saying, also, that the Quebec Charter cannot be directly applied to areas of federal jurisdiction.

[43] I will conclude by highlighting that in any case, a violation of the right to life, liberty and security of the person does not infringe upon section 7 of the Charter unless it violates the principles of fundamental justice. The Supreme Court has reiterated many times that this requirement assumes that the right at issue is weighed against the objectives of the State in infringing upon that right. As Justice L'Heureux-Dubé wrote in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at page 583, 67 D.L.R. (4th) 161, "Fundamental justice ... is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens." Provisions shall be considered non-compliant with principles of fundamental justice when they are arbitrary or infringe upon a right in an overbroad or grossly disproportionate manner: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paragraphs 93-123.

[44] In this case, the adjudicator's approach is unsound. First, he seems to consider it disproportionate to infringe on counsels' right to liberty "365 days a year and beyond 40 hours per week" while stay applications before the Federal Court occur on weekends "no more than six times per year" (at paragraph 65). This premise is not at all consistent with the evidence, which reveals that each counsel is, instead, responsible for standby duty two or three weeks per year, and that stay applications occur more frequently on weeknights, for a total of about 120 applications per year.

[45] Second, the adjudicator does not seem to give much weight to the fact that the employer attempted to limit the counsel's standby duty time, not only by imposing such periods for only a few weeks per year, but also by stipulating that the counsel were not required to stay at home so long as they could be reached and were able to arrive at the office in less than one hour, that they know their periods of availability well in advance in order to make arrangements, that the periods of availability are scheduled taking into account the preferences and situations of each counsel, and that the counsel can make arrangements to fill in for one another.

[46] Lastly, the adjudicator does not question the coherence between the approach taken by the employer and the desired objective, as required by the case law, but instead asks whether there were other ways to achieve the same objective. Not only is that not the applicable test, but moreover the alternative approaches proposed by the adjudicator appear to be quite speculative, to say the least. The adjudicator suggests that the manager could call counsel until one is reached who is available and able to perform the task. This approach does not account for the urgency of the services counsel are called upon to perform on evenings and weekends. As for the possibility

of amending the directive so that standby duty is performed on a voluntary basis, this overlooks the evidence that this approach was attempted but proven unsuccessful.

[47] The possibility remained of adding an availability clause to the collective agreement, as suggested by the adjudicator. The success of such an approach is evidently entirely unpredictable. To the extent that it can be assumed that the insertion of such a clause would be subject to financial compensation, as suggested by the adjudicator himself, it would be appropriate to question the economic aspect of the right the counsel are asserting. This would result, in a sense, in admitting that the right to liberty is violated by the imposition of mandatory standby periods only when it is not accompanied by financial compensation. As mentioned above, the law is clean section 7 of the Charter does not protect economic interests.

[48] For all of the above reasons, I rule that the adjudicator erred in concluding that the directive on mandatory standby periods violates clause 6.01 of the collective agreement signed July 27, 2010, because it infringes on the right to liberty guaranteed by section 7 of the Charter, and that this infringement does not comply with the principles of fundamental justice.

IV. Conclusion

[49] The application for judicial review should therefore be allowed, with costs. Consequently, the adjudicator's decision should be set aside, and the grievance should be returned to another adjudicator for decision, on the basis that, first, the contested directive does not infringe on counsel's right to liberty as protected by section 7 of the Charter and, therefore, does not violate clause 6.01 of the collective agreement dated July 27, 2010, and, second, that it

constitutes a reasonable and fair exercise of residual management rights set out in clause 5.02 of that same agreement.

"Yves de Montigny"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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