Date: 20111128

File: 569-02-94

Citation: **2011 PSLRB 135**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Association of Justice Counsel v. Treasury Board

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Bargaining Agent: Bernard Philion, counsel

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Montreal, Quebec,
March 2 to 4 and September 16 and 26, 2011.
(PSLRB Translation)

I. Policy grievance referred to adjudication

A. Background

[1] On May 18, 2010, the Association of Justice Counsel ("the Association" or "the bargaining agent") filed a policy grievance contesting the obligation of legal officers with the Immigration Law Directorate in the Quebec Regional Office ("the legal officers") to be available for standby duty on a rotational basis without compensation Friday nights and weekends. That standby availability is commonly called "Friday night and weekend duty." The legal officers referred to in the grievance work for the Department of Justice ("the employer") and provide their services to client departments, such as the Canada Border Services Agency and the Department of Citizenship and Immigration.

[2] On July 2, 2010, the grievance was denied at the final level of the grievance process by the Assistant Deputy Minister, Compensation and Labour Relations Sector, and it was referred to adjudication on July 15, 2010.

[3] The Association maintains that the obligation to be available for standby duty without compensation on Friday nights and weekends, which encroaches on the private lives of the legal officers, is contrary to section 7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and is incompatible with the terms of an arbitral award of October 23, 2009.

[4] The Association was certified on April 28, 2006 (see 2006 PSLRB 45). An arbitral award establishing certain provisions of the collective agreement was rendered on October 23, 2009. The parties continued to negotiate. The Association signed a first collective agreement with the Treasury Board on July 27, 2010, with an expiry date of May 9, 2011 ("the collective agreement"). It contains no provisions about the obligation of legal officers to be available for standby duty and, consequently, makes no provision for compensation for that availability.

[5] Before the arbitral award, the obligation to perform Friday night and weekend duty was voluntary and compensated. Since the arbitral award came into effect, standby duty has been mandatory for all legal officers and is not compensated. Legal officers also perform standby duty on weekdays, between 17:00 and 22:00 Monday through Thursday, but that availability for duty is not in dispute. This ruling deals

solely with the employer's decision to change its compensation policy for Friday night and weekend duty.

B. Description of standby work

[6] The employer requires standby duty to respond to stay applications before the Federal Court. Applications are of two types. The first type is filed in the Federal Court to temporarily suspend a deportation for which the date and time have been determined until the Court can rule on the application for judicial review of the removal decision. The second type is by the Minister, opposing a release order about to be rendered.

[7] The applications may be filed at any time of the day or night and must be handled immediately. It is normal for stay applications to be filed in the late afternoon and for the work to reach late into the evening. Applications filed on weekends are less frequent but just as unforeseeable.

[8] The legal officer responding to a stay application must be available in accordance with the role established by the Federal Court and in accordance with the schedule of the judge appointed to hear the application. The Federal Court clerk calls the Immigration Directorate in anticipation of the application being filed. Once the application is filed, written arguments are prepared and filed, followed by a hearing or teleconference with the Federal Court judge. The judge hears the parties on the merits of the application. To access the file and work tools outside regular working hours, the legal officer must go into the office, although exceptionally he or she may take part in the teleconference from home.

C. Circumstances that led to the grievance being filed

[9] Starting in the early 1990s, if not before then, the Department of Justice required legal officers with the Civil Affairs Directorate in the Montreal office to be available on standby from 17:00 Friday until 08:00 Monday morning. A team of two legal officers was on standby, one civil lawyer and one legal officer specialized in immigration law, since the emergencies most often concerned stay applications. The team was formed so that it would be able to provide bilingual services. The legal officers who volunteered for standby duty were paid in compensatory time off based on the number of days normally not worked, whether or not an emergency required them to go into the office, as follows: 2.5 days for a 2-day weekend, 3.5 days if the

weekend included a statutory holiday, and 5 days for Easter and Christmas. Since volunteers always came forward, no legal officer was ever forced to perform standby duty.

[10] In 2005, the Civil Affairs Directorate was split, with the Immigration Law Directorate becoming a separate unit. Owing to budget cuts, standby duty was reduced to a single legal officer from the Immigration Law Directorate, who had to provide bilingual services. Consequently, unilingual legal officers were not required to perform standby duty unless paired with a bilingual legal officer or when a new legal officer was being trained.

[11] On March 24, 2010, after the arbitral award was issued, legal officers with the Immigration Law Directorate were informed that time spent on standby duty would no longer be compensated. On March 31, 2010, the employer ceased all compensation for standby duty. In the absence of volunteers on April 14, 2010, the employer imposed the obligation for all legal officers to perform Friday night and weekend duty on a rotational basis two or three weekends each year ("the new policy").

D. Employer's objection to the adjudicator's jurisdiction

[12] The employer maintains that I do not have jurisdiction to rule on the grievance because it is excluded from referral to adjudication under section 220 of the *Public Service Labour Relations Act* (*PSLRA*). It does not deal with the interpretation of the collective agreement or the content of an arbitral award. The arbitral award and the collective agreement are both silent about the availability of legal officers on standby.

[13] The Association maintains that the grievance is arbitrable, as it involves section 7 of the *Charter*, and that the policy is neither equitable nor reasonable within the meaning of articles 5 and 6 of the collective agreement. The Association maintains that the adjudicator's jurisdiction arises from paragraph 226(1)(*g*) of the *PSLRA*, concerning the obligation to interpret and apply the collective agreement, even if the adjudicator must resort to applying an external law.

[14] The employer replies that, if a grievance refers to the *Charter*, a notice must first be given under section 222 of the *PSLRA*, which the Association failed to do.

[15] I reserved on the employer's objection and heard the evidence.

E. The employer's policy

[16] The employer's policy that applies to Friday and weekend standby duty was first outlined in an email that Michael Synnott sent on February 8, 2007, before the collective agreement was signed. The new policy was communicated in an email on April 13, 2010, by Annie Van Der Meerschen. The following are the relevant excerpts, in the form of a comparative table:

[Policy in effect, from an email of February 8, 2007]	[New policy in effect, from an email of April 13, 2010]
[Translation]	[Translation]
. . .	. . .
In response to questions about different standby duties in immigration, here is a summary of how they function:	While waiting for the weekend and Friday duty list to be issued, I would like to remind you about the different standby duties in immigration and how they function. Please review the information. Thank you.
. . .	. . .
Evening and weekend duty: The Immigration and Law Directorate provides its clients with standby duty 365 days per year, 24 hours per day (i.e., certain emergencies may occur at the CPI or at the border at any time). Consequently, the purpose of evening and weekend duty is to respond to urgent stay applications served outside business hours and to requests for opinions of the same nature.	Evening and weekend duty: The Immigration and Law Directorate provides its clients with standby duty 365 days per year, 24 hours per day (i.e., certain emergencies may occur at the CPI or at the border at any time). Consequently, the purpose of evening and weekend duty is to respond to urgent stay applications served outside business hours and to requests for opinions of the same nature.
The weekend duty lawyer (i.e., on standby duty weekday evenings from 17:00 to 09:00, **and weekends**) may, at a team leader's discretion, be assigned a stay that is served on us on Friday and that is likely to require weekend work. That implies that an urgent stay (i.e., which can be heard on the weekend or at the beginning of the following week) will generally be handled by the person on weekend duty.	The weekend duty lawyer (i.e., on standby duty weekday evenings, from 17:00 to 21:00 **and weekends from 09:00 to 21:00 - subject to change**) may, at a team leader's discretion, be assigned a stay that is served on us on Friday and that is likely to require weekend work. That implies that an urgent stay (i.e., which can be heard on the weekend or at the beginning of the following week) will generally be handled by the person on weekend duty.
Consequently, to the extent that that person could be assigned a stay during	Consequently, to the extent that that person could be assigned a stay during

the day on Friday, we ask the lawyer to be present in the office (i.e., CGF) all day Friday.
Consequently, to the extent that that person could be assigned a stay during the day on Friday, we ask the lawyer to be present in the office (i.e., CGF) all day Friday.

A lawyer on standby duty will be compensated in the form of two-and-a-half days' discretionary time off (699).
As long as there are enough volunteers, standby duty will not be mandatory.

Stays that arise on evenings and weekends will be posted on the stay assignment list. To avoid the problems that occurred in the past, we urge you to make sure that the pager is working properly when issued to you. You can also call the client to better plan your weekend.

Friday duty:

The Friday list was created primarily in response to the concerns expressed by certain lawyers who were assigned a Friday well before their turn on the regular list of stays because of the smaller number of lawyers present in the office on that day.

Each week, one lawyer will be designated on call for stays on Friday between 09:00 and 17:00. In fairness to everyone, attendance will be mandatory, and every lawyer whose name could appear on the regular list of stays will be called on two or three times per year.

If a stay is assigned and part of the work is performed on the weekend, the lawyer will not normally be compensated; however, his or her contribution, if there is a stay, will be counted on the stay assignment lists and toward his or her workload. The lawyer must be present in the office on Friday.

Depending on the circumstances, the team

the day on Friday, we ask the lawyer to be present in the office (i.e., CGF) all day Friday.
Consequently, to the extent that that person could be assigned a stay during the day on Friday, we ask the lawyer to be present in the office (i.e., CGF) all day Friday.

Standby duty is mandatory.

Stays that arise on evenings and weekends will be posted on the stay assignment list. To avoid the problems that occurred in the past, we urge you to make sure that the pager is working properly when issued to you. You can also call the client to better plan your weekend.

Friday duty:

The Friday list was created primarily in response to the concerns expressed by certain lawyers who were assigned a Friday well before their turn on the regular list of stays because of the smaller number of lawyers present in the office on that day.

Each week, one lawyer will be designated on call for stays on Friday between 09:00 and 17:00. In fairness to everyone, attendance will be mandatory, and every lawyer whose name could appear on the regular list of stays will be called on two or three times per year.

A stay could be assigned, and part of the work could be performed on the weekend. If there is a stay, it will be counted on the stay assignment lists and toward workload. The lawyer must be physically present in the office on Friday.

Depending on the circumstances and

leaders will determine who, between the lawyer on the weekend duty list and the lawyer on the Friday list, will be assigned a stay served at our offices during the day Friday. Generally, a stay that could carry over into the weekend will be assigned to the lawyer on weekend duty. Depending on the circumstances, it may be decided otherwise.	other different factors, the team leaders will determine who, between the lawyer on the weekend duty list and the lawyer on the Friday list, will be assigned a stay served at our offices during the day Friday.
In closing, we invite you to speak with your team leader if you have any questions. Sincere thanks for your usual cooperation.	In closing, we invite you to speak with your team leader if you have any questions. Sincere thanks for your usual cooperation.

[The clause in dispute is in bold.]

II. <u>Summary of the evidence</u>

[17] The Association's witnesses testified about the restrictions and inconveniences imposed on them by the obligation to perform standby duty, particularly the fact that it is now mandatory and is not compensated. The employer's witness explained the policy's history and that the employer has had no choice but to apply the collective agreement as negotiated.

[18] Jocelyne Murphy has worked in immigration law since 1998. She has a compressed work schedule, with the result that she accrues one day off each month by working longer hours each day. She takes her days off on Fridays.

[19] As a legal officer classified LA-2B, she is not entitled to overtime when on standby duty or when reporting to work to respond to a stay application. However, she can ask for up to five days of compensatory time off each year in case she works an excessive number of hours. Last year, she accrued 60 hours, not counting her availability for standby duty, and she received 4 days' compensatory time off. She said that, according to the collective agreement, legal officers classified LA-1 and LA-2A are entitled to full payment for their overtime if they report to work while on standby duty.

[20] Ms. Murphy explained that the work teams are organized so that emergencies during regular working hours between Monday and Thursday are assigned to legal officers on a rotational basis in accordance with a predetermined list. They then organize their work schedules accordingly. The legal officers do not contest that system.

[21] However, emergencies that occur on Friday and that could go beyond regular working hours are assigned to the legal officer scheduled for Friday night and weekend duty. Legal officers working a compressed schedule, working part-time or teleworking are required to report to work on Friday when on weekend duty, despite the fact that they do not usually work Fridays. They are paid for that day.

[22] Ms. Murphy testified that compensatory time off ended on March 31, 2010. Compensatory time off was intended to compensate legal officers for unforeseen circumstances and limitations imposed on their private lives while on standby duty. Before March 31, 2010, unilingual legal officers unable to practice in English were excluded from volunteering because applications are argued most often in English. Once it stopped compensating time spent on standby, the employer had no volunteers. Consequently, a compulsory duty list was drawn up for all legal officers with the Immigration Directorate, without considering their language skills, levels or work schedules.

[23] While on standby duty, a legal officer is required to carry a pager so that the Federal Court is able to contact him or her, as well as a cell phone with several contact numbers. The pager must be kept on until 21:00. While on standby duty, a legal officer must stay within pager and cell phone range.

[24] Ms. Murphy testified that, while on standby duty, she is unable to move about as she wishes or to engage in her regular weekend activities. For example, she cannot attend a performance of the Montreal Opera because she cannot hear her pager or make a call during the performance. She cannot visit her family, which lives outside Montreal, take her piano lessons Friday evening, or pick her son up after sports activities, for fear of not being able to answer a call promptly to prepare a case or report to the office within one hour after the call from the court clerk. It is difficult for her to visit her friends, other than those who live close to her home, drink an alcoholic beverage, or engage in recreational activities such as skiing or snowboarding with her son in the Eastern Townships.

[25] When compensation was paid, Ms. Murphy volunteered, because she could choose her weekend based on her activities and make up for lost time with her family when it was convenient. Now, she has to comply with a schedule, and she receives no compensation for the inconvenience.

[26] Isabelle Brochu has worked in immigration law since 1999. She is classified LA-2A. She works part-time three days per week as follows: Monday in the office, Tuesday teleworking and Thursday in the office, except when court hearings require her to change her schedule. When her second child arrived, she made a personal choice to work part-time to prioritize her family life and its numerous activities.

[27] The new directive obliging standby duty applies to her and, disproportionately, to her work schedule. When on standby duty, Ms. Brochu is paired with a less-experienced legal officer so that services can be provided in English because she does not practice law in English. Before being forced to perform standby duty, she rarely volunteered, except to accommodate a colleague who needed experience.

[28] Between September and March, hockey season for her son, she travels each weekend to different locations across the province. The pager does not work in all the arenas, so she cannot attend a game with her boys when on standby duty. She then has to find a replacement to watch over her children in the arena. She cannot plan ski trips or sports activities either, because they take her more than an hour away from the office, or accept invitations to get together with family or friends. She cannot drink alcohol because of the chance that she might have to argue a stay. Her spouse is not always around to take her place, as he has to travel often, sometimes at the last minute. In short, her private life prevents her from being available on weekends.

[29] Caroline Doyon has worked in immigration law since 1996. She is classified LA-2A. Since 2005, she has worked four days a week, from Monday to Thursday, because of her family obligations. Before 2005, she performed standby duty only when paired with a bilingual legal officer because she cannot plead in English. When the duty team was reduced to a single legal officer, she stopped performing standby duty.

[30] Once standby duty became mandatory, she had to reorganize her life so that she could go into the office on Friday. She cannot visit her family in Trois-Rivières on weekends when she is on standby duty; activities with her spouse and children are limited, as she cannot go very far. Ms. Doyon stated that she is annoyed and stressed by waiting for calls when on standby duty. Were the duty not mandatory, she would not agree to perform it. In the past year, she performed standby duty twice. The last time, the requested stay was in French, and she pleaded the case from her home via teleconference. Ms. Doyon is paid when she works on Friday but not while she is on standby duty.

[31] Émilie Tremblay has worked for the Department of Justice in immigration law since 2008. She is classified LA-1 and works full-time. She trains weekends with a triathlon team. When swimming, she finds it extremely unpleasant having to constantly watch her pager at the edge of the pool for fear of missing a call. For her, standby duty means not being able to leave the island of Montreal for her sporting events. When on standby duty, she does not accept invitations from her family or friends who live in Québec, and she does not drink alcohol. She can ask to change weekends to accommodate her training schedule, but at some point, she has to take her turn like everybody else.

[32] Gretchen Timmins has been a legal officer since 1983 and has worked in immigration law since 2002. For personal reasons, she now works four days a week. She did not learn until after she was hired that she had to be on standby duty two or three times a year. That unforeseen responsibility has directly affected her family life. She and her spouse own a ski chalet in Mansonville, 1 hour and 40 minutes from Montreal in the Eastern Townships, where they go every weekend with their three children. Their family and social life is organized around ski club activities, including sporting competitions during the winter. When on standby duty, Ms. Timmins has to stay in Montreal. Her spouse refuses to accept social invitations on those weekends, to the family's great disappointment. She resigned herself to that fact when she received compensation. She feels that performing standby duty and not being paid for it infringes on her private life. She would never agree to it were she not forced, even more so without compensation.

[33] Michel Synnott has worked in immigration law since 1987 and with the Department of Justice since 1991. He took on a managerial position in 2002 and was promoted to general counsel in 2006. He supervises a group of 40 legal officers, including those witnesses already heard. Legal officers are called on to appear before the Superior Court, Federal Court, Federal Court of Appeal, Immigration and Refugee Board, and Immigration Appeal Division.

[34] Standby duty has existed for about 20 years. When it was introduced, the legal officers in the office on a given Friday, inevitably the same ones, took care of emergencies. In 2001, more structured lists were established. In 2005, for budget and operational reasons, a single legal officer in immigration law was assigned to perform standby duty on weekends. Between 2001 and 2010, standby duty was paid in the form

of compensatory time off. Standby duty was reorganized so that services were provided from 17:00 to 22:00, Monday through Thursday. At that time, two or three emergencies occurred each year on weekend duty. Between 2005 and 2006, the number of cases increased substantially, and stay applications tripled. According to an informal survey done at that time, approximately six stay applications were filed during weekend duty each year. Mr. Synnott testified that the number of applications varies and that it is unpredictable. Cases are most often English or bilingual; French cases are rare. At that time, the Department of Justice hired five new bilingual legal officers to meet its needs. According to Mr. Synnott, the number of stay applications on weekends has dropped since then.

[35] After the collective agreement was signed, Mr. Synnott learned that standby duty would no longer be compensated. Several solutions were proposed to his superiors, but none was adopted. On March 22, 2010, a meeting was held with the legal officers to explain the changes and to ask for volunteers for standby duty. No one came forward. Consequently, standby duty was imposed on them. Individual grievances were filed, followed by this policy grievance.

[36] Mr. Synnott explained that standby duty serves to accommodate emergencies, mostly about deportations by the Canada Border Services Agency, which was very disappointed when standby services were reduced to 09:00 to 21:00 on weekends and to 17:00 to 22:00 on weekdays. Mr. Synnott testified that few urgent applications come in after 21:00 and that he has had to manage the risks of not having a legal officer on call outside those hours. Legal officers classified LA-1 and LA-2A are compensated for services rendered after 17:00 and are paid overtime for more than 150 hours of work each month. Overtime to respond to emergencies does not need preauthorization. Mr. Synnott admitted that most legal officers prefer to receive compensatory time off rather than overtime pay.

[37] The standby duty list has to accommodate everyone's language, religion, obligations and schedules. The list is prepared and posted for April through December, and then to the end of March. Legal officers arrange replacements with each other. With no compensation, Christmas and Easter standby are difficult to fill.

[38] The arbitral award was filed on October 23, 2009, but compensatory time off as payment for standby duty officially ended on March 31, 2010, because several legal officers had already taken their compensatory time off. To avoid having to recover

time already awarded and to treat all legal officers fairly during the transitional year, compensatory time off was awarded until March 31, 2010. The new standby duty arrangements without compensation were then introduced.

[39] Mr. Synnott admitted that billable hours worked by legal officers at the Immigration Law Directorate are charged to client departments, since 2008 for the Canada Border Services Agency and starting recently for the Department of Citizenship and Immigration. Billing clients for standby duty has yet to be resolved. The frequency of stay applications is dependent on client policy and world political events. When compensatory time off existed, legal officers volunteered readily and agreed to replace their colleagues. The only restrictions imposed on legal officers on standby duty are that they carry a pager, that they engage in activities that allow them to respond promptly to calls and that they report to the office within one hour of receiving a call from the Federal Court.

[40] When questioned about the practice in effect at the Public Prosecution Service of Canada, Mr. Synnott testified that its situation differs somewhat, because its legal officers are compensated for specific appearances between 08:00 and 16:00 on Saturdays. For the Immigration Directorate, emergencies are unpredictable. The need for standby service has been a real client need 365 days per year since 1987.

III. Summary of the arguments

(Note: The parties' arguments were heard in two stages. They presented their arguments at the end of the hearing. They were then called again to answer the adjudicator's specific questions. To simplify the text, the arguments are summarized together.)

A. For the Association

[41] The Association argues that the *Charter* provisions are incorporated in the collective agreement via article 5 and that the employer must exercise its authority in good faith, fairly and reasonably.

[42] In this case, the employer requires that legal officers be available on call two or three weekends a year, including statutory holidays. Without compensation, hours not included in the regular workweek constitute an individual's private life. Each individual must have the discretion to use that free time as he or she so pleases. In this case, the obligation to carry a pager, to stay within a specific radius of the office and to respond to emergencies within a short time are unwarranted restrictions. The result is that

legal officers on standby duty must limit their personal, social and family activities. The obligation of Friday night and weekend duty forces part-time legal officers to work Fridays and to reorganize their personal lives so that they are available at unusual times.

[43] Before 2010, weekend duty was voluntary. Legal officers were prepared to be available since they received compensation that allowed them to later make up those days. The choice was free and voluntary, and no one complained. The legal officers who testified unanimously stated that they would not perform standby duty were they not forced. The employer's only reason for refusing compensation is the lack of a collective agreement provision.

[44] Section 7 of the *Charter* includes the right to respect for private life. The choice of residence is a choice of private life, as are personal activities outside work, children's education and family activities. An employer cannot decide unilaterally that an employee will provide services outside the hours specified in his or her employment contract without compensation. The Association cites *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, to the effect that an individual must have enough personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In that case, the Supreme Court of Canada affirmed the liberal interpretation given by the United States Supreme Court to the concept of liberty, as it relates to family matters. The Association also cites *R. v. O'Connor*, [1995] 4 S.C.R. 411, in support of its position that the notion of private life includes the notion of liberty. Additionally, in *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, the Supreme Court recognized that international instruments are part of our law. Canada adheres to the *Universal Declaration of Human Rights*, which protects not only private life but also home life.

[45] To extinguish such a right, the employer must demonstrate that the means chosen are reasonable and that they are exercised while honouring the values of a free and democratic society. Therefore, the employer's rights must be exercised not arbitrarily and not intrusively and in a manner proportional to the protected values. Minimal infringement is no infringement. The Association cites the following cases in support of its position: *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844 (residence requirement); *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591 (right to one's

image); *Gazette (The) (Division Southam inc.) c. Valiquette*, [1997] R.J.Q. 30 (right to remain anonymous); *Syndicat des professionnelles du Centre jeunesse de Québec - CSN c. Desnoyers*, [2005] 2 R.J.Q. 414 (integrity of the home); and *Rassemblement des employés techniciens ambulanciers de l'Abitibi-Témiscamingue (C.S.N.) et Ambulance du Nord.*, D.T.E. 99T-36 (integrity of the home).

[46] Even though those decisions originated in Quebec, the Supreme Court maintained in *Godbout* that the Quebec *Charter of Human Rights and Freedoms*, R.S.Q, c. C-12 ("the Quebec *Charter*"), must be interpreted and applied in the same manner as the *Charter*. The same liberties are protected in the *Charter* as in the Quebec *Charter*. Quebec courts have rendered more decisions on the concept of private life under the Quebec *Charter* than the *Charter*. However, that does not prevent a federal court from drawing on Quebec decisions to interpret the meaning to be given to the concept of protecting private life.

[47] The Association maintains that the obligation to carry a pager or a cell phone is not in itself injurious; it is the overall directive that states that legal officers must be prepared to answer a call any time they are on standby duty that is. To be ready and available within one hour after a call, the legal officers must make choices that limit their personal lives, including the care of their children, their family lives and their leisure activities. Essentially, the employer cannot exercise its managerial right by forcing employees to be available by limiting their private lives. The right to liberty includes the right to engage in the common occupations of life. When the legal officers are available for duty, they cannot engage in the common occupations of life.

[48] In this case, the employer has a perfectly simple means of not infringing on the rights of legal officers, namely, to obtain their consent in return for compensation. The Association asks that I allow the grievance and that I declare that the employer must cease its practice of imposing weekend duty without compensation.

[49] The Association argues that it was not required to give notice under section 222 of the *PSLRA* because it did not raise an issue of the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). The *Charter* is not subordinate to the *CHRA*. The Association cites *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, in support of its argument that the *Charter* is part of the Canadian constitution, that it is the supreme law of Canada and that it must not be given a narrow and technical interpretation. The Association argues that it was not

required to give a notice to the attorneys general of a constitutional matter because the grievance does not attack the validity of a statute or regulation. The Association simply seeks that an action of the employer be declared contrary to the fundamental liberty of its employees. No need exists to give any notice whatsoever in this type of dispute. In support of that argument, the Association cites *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 265.

[50] The Association argues that estoppel does not apply in this case because the collective agreement replaced the individual employment contract that existed before the arbitral award. A collective bargaining arrangement is now in effect between the parties, and the collective agreement has replaced the policies and directives applicable to individual contracts, as decided in *McGavin Toastmaster Ltd. v. Ainscough,* [1976] 1 S.C.R. 718; *General Motors v. Brunet*, [1977] 2 S.C.R. 537; and *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paperworkers Union, Local 219*, [1986] 1 S.C.R. 704.

B. <u>For the employer</u>

[51] The employer now admits that the Association was not required to give notice under section 222 of the *CHRA*. The objection made at the start of the hearing was raised in anticipation of a position that the bargaining agent could have taken with respect to that section.

[52] The employer argues that the testimonies indicate that legal officers like their jobs and that they are devoted professionals, even when not compensated. According to the employer, the Association has no remedy for having the new policy overturned because the collective agreement is silent in that case. Article 5 is declaratory, and article 6 must be read with another article to have effect. The Association had to provide evidence that the employer contravened clause 5.02. It did not.

[53] The employer maintains that the working conditions that existed before the collective agreement was signed were revoked by the new employment conditions dictated by the arbitral award. However, the arbitral award is silent on standby duty. If the Association wanted legal officers to be compensated for standby duty, it had only to include a provision to that effect in its bargaining demands. The employer argues that I cannot alter the collective agreement by adding compensation that it does not reference. When legal officers are called to work while on weekend duty, they are paid

overtime or in compensatory time off, as specified in the collective agreement. Those provisions provide payment for time actually worked. Before the collective bargaining arrangement, legal officers were not paid for overtime.

[54] The employer argues that the adjudicator's jurisdiction is limited by section 220 of the *PSLRA*, which states that a policy grievance may be filed only in respect of the interpretation or application of a collective agreement or arbitral award. The overtime clause is the only possible clause in dispute. On that point, legal officers required to work weekends are paid for overtime.

[55] The employer points out that the number of standby duty weekends required of a legal officer is minimal, and the number of times an officer has to respond to an emergency is minimal as well. The encroachment on legal officers' private lives is minimal. When on standby duty, a legal officer can perform activities to a certain extent, provided that he or she is available to go into the office. While on standby duty, legal officers are not working; they are awaiting calls.

[56] Legal officers know in advance the weekends on which they will be on call. The employer accommodates them if personal activities prevent their availability. They can exchange their standby duty weekends with others. Two weekends each year do not constitute a permanent and ongoing infringement of private life. Section 7 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*), allows the employer to organize the public service in accordance with its needs. Standby duty is provided to respond to emergency cases. The employer does not act unreasonably or in bad faith when it asks legal officers to provide a required service to its clients.

[57] The employer argues that the Quebec *Charter* does not apply to decisions of a federal court and cites *Rivet v. Canada (Attorney General)*, 2007 FC 1175, *Elkayam v. Canada (Attorney General)*, 2005 FCA 101, and *R c. Breton*, [1967] R.C.S. 503, in support of its position. The employer argues further that the *Charter* does not apply in this case.

[58] The employer argues that no decision has interpreted section 7 of the *Charter* within the Association's desired meaning. The decisions that the Association cites concern penal law, which is an altogether different area.

[59] The evidence demonstrated that the lawyers can perform their activities. Any infringement is minimal and practically non-existent, based on the test outlined in *R. v. Oakes,* [1986] 1 S.C.R. 103. The importance of the objective must be examined. In this case, the objective is to provide emergency service before the Federal Court when a stay application is made against a deportation order. That important objective aligns with the legitimate interests of society that orders be executed.

[60] A rational connection exists between the obligation to be available and the reason for imposing that availability. Infringement is minimal because legal officers are required to be available no more than two or three weekends each year, and they know their schedules well in advance. Carrying a pager gives the legal officers the liberty to attend to most of their usual obligations, because they are not required to stay home and await calls.

[61] The employer agrees with the bargaining agent that the doctrine of estoppel does not apply. An arbitral award was rendered on October 23, 2009. The legal officers were informed on March 24, 2010 that, effective April 1, 2010, they would no longer be paid for standby duty. The Association filed its policy grievance against the change in policy on May 18, 2010. Bargaining talks continued after the arbitral award. The parties signed a collective agreement on July 27, 2010, which does not refer to pay for standby duty. The employer cites *Dubé v. Canada (Attorney General)*, 2006 FC 796, in support of its position.

[62] The employer maintains further that it can ask legal officers to perform standby duty under its residual managerial rights as outlined in article 5 of the collective agreement and the powers conferred under section 7 of the *FAA* with respect to the organization of the public service and the determination and control of its establishments.

[63] The employer adds that the evidence is solely that legal officers at the Montreal Regional Office used to be compensated for being available for Friday night and weekend duty. As such, even though doubts might exist about past practice, the employer clearly informed the legal officers that it was ending that compensation. The employer cites *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

[64] In spite of everything, the Association signed a collective agreement on July 27, 2010.

[65] The employer asks that I deny the grievance.

C. The Association's rebuttal

[66] The Association maintains that the employer's opinion does not answer the real question, that is, whether the change to its policy on the availability of legal officers for weekend duty is an infringement on an individual's private life. The employer did not demonstrate that its objective is important enough to warrant violating the *Charter*. The employer fell back on the opinion that it provides a service at its clients' request.

[67] Since standby duty continues despite the absence of a provision in the collective agreement, it arises from a management policy, which must meet the criteria of article 5 of the collective agreement. The Association asks that I declare the policy unreasonable and unfair because it violates an employee's fundamental right to his or her private life.

[68] The policy is no less unreasonable because emergency calls do not occur every weekend. The employer requires legal officers to be available outside their working hours and under conditions that infringe on their private lives, an individual liberty guaranteed by the *Charter*. As minimal as that intrusion might be, the conditions presented do not warrant it.

[69] The Association adds that the constitutional rights of legal officers are not restricted by the collective agreement (*Parry Sound* and *McLeod v. Egan* (1974), 46 D.L.R. (3d) 150 (S.C.C.)). Managerial rights are subordinate to employment legislation, including the *Charter*, and the adjudicator can grant remedies founded on the *Charter*. Additionally, the parties expressly included in the collective agreement a provision about the rights of legal officers, awarded by an Act of Parliament. The Association observes that section 220 of the *PSLRA* includes the rights preserved in article 5.

[70] The Association maintains that *Chafe* deals with an argument founded on a past practice and not estoppel.

[71] The Association asks that I allow the grievance.

IV. Reasons

[72] The Association's grievance raises the following two issues: the adjudicator's jurisdiction, given subsection 220(1) of the *PSLRA*, and the adjudicator's jurisdiction to grant a remedy under the *Charter*.

[73] The employer maintains that I do not have jurisdiction under subsection 220(1) of the *PSLRA* to decide the grievance because it deals with neither the interpretation of the collective agreement nor the content of an arbitral award, as both the arbitral award and the collective agreement are silent on the availability of legal officers for standby duty. Section 220 of the *PSLRA* states as follows:

> ***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.*
>
> [Emphasis added]

[74] The Association maintains that an adjudicator's jurisdiction to decide the grievance arises from paragraph 226(1)(*g*) of the *PSLRA*, which concerns the obligation to interpret and apply the collective agreement, even if the adjudicator must resort to applying an external statute, in this case section 7 of the *Charter*. It adds that the new policy is neither fair nor reasonable within the meanings of articles 5 and 6 of the collective agreement. Paragraph 226(1)(*g*) of the *PSLRA* reads as follows:

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .
>
> *(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 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. . . .*
>
> [Emphasis added]

[75] According to subsection 220(1) of the *PSLRA*, to be arbitrable, a policy grievance must be in respect of the interpretation or application of a provision of the collective

agreement. Under paragraph 226(1)(*g*), the adjudicator may consider, when interpreting the grievance, any other Act of Parliament relating to employment, even a conflict between that Act and a collective agreement.

[76] An adjudicator's jurisdiction to interpret a law of general application, besides the collective agreement, arises from the Supreme Court decision in *McLeod*. Before *McLeod* was decided, the guiding principle was that an adjudicator, in the context of adjudicating a grievance, had jurisdiction only to interpret and apply the provisions of a collective agreement, regardless of other statutes and except for interpretation purposes, even if the result might be contrary to the law. In *McLeod*, the Supreme Court ruled that a collective agreement provision giving the employer a broad managerial power, to the point of requiring that employees work overtime, was contrary to the provincial standards in effect and, consequently, unlawful.

[77] The principle in *McLeod* that a collective agreement must be interpreted while considering all applicable statutes received a broad interpretation in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. In *Weber*, the Supreme Court favoured the adjudicator's exclusive jurisdiction in cases where the essential character of the dispute is the interpretation, application, administration or violation of the collective agreement:

. . .

> *[58] To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the* Labour Relations Act. *It accords with this Court's approach in* St. Anne Nackawic. *It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts . . . .*

. . .

[78] In *Weber*, the Supreme Court endorsed the jurisdiction of adjudicators to deal with *Charter* claims, as follows:

. . .

> *[59] The appellant Weber submits that the arbitrator cannot deal with his* Charter *claims. The Court of Appeal shared his concern, voicing uncertainty about whether* Charter *claims*

> *raise unique policy considerations which are best left to the superior courts of inherent jurisdiction.*
>
> *[60] In so far as this argument turns on policy considerations, it is answered by the comments of the majority of this Court in* Douglas/Kwantlen Faculty Assn. v. Douglas College, supra. *That case, like this, involved a grievance before a labour arbitrator. In that case, as in this,* Charter *issues were raised. It was argued,* inter alia*, that a labour arbitration was not the appropriate place to argue* Charter *issues. After a thorough review of the advantages and disadvantages of having such issues decided before labour tribunals, La Forest J. concluded that while the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their* Charter *rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.* Douglas/Kwantlen Faculty Assn. v. Douglas College *also answers the concern of the Court of Appeal below that the* Charter *takes the issue out of the labour context and puts it in the state context. While the* Charter *issue may raise broad policy concerns, it is nonetheless a component of the labour dispute, and hence within the jurisdiction of the labour arbitrator. The existence of broad policy concerns with respect to a given issue cannot preclude the labour arbitrator from deciding all facets of the labour dispute.*
>
> . . .

[79] Even more recently, in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, the Supreme Court affirmed the principle set out in *McLeod* and *Weber* concerning an adjudicator's power to interpret statutes having an impact on labour relations between the parties as well as the principle that the bargaining agent and the employer cannot enter into a collective agreement that would be contrary to the law. The Supreme Court stated as follows:

> *[28] 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.*
>
> [29] *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.*
>
> . . .

[80] That jurisprudence supports the principle that an adjudication tribunal is a competent authority to decide not only disputes over collective agreements, but also *Charter* matters.

[81] However, it is important to remember that the jurisprudence does not give the adjudicator unlimited jurisdiction. It must also be said that, in *Weber*, the Supreme Court did not broaden the type of disputes over which an adjudicator has jurisdiction but rather decided the extent to which courts can intervene in labour conflicts.

[82] If a unionized employee exercises a civil right with no connection to the collective agreement, *Weber* does not give the adjudicator jurisdiction to make a ruling. That right remains within the exclusive jurisdiction of the civil courts. However, if the grievance raises the interpretation of the collective agreement as well as another employment-related statute, which would include the *Charter*, *Weber* relegates exclusive jurisdiction to the adjudicator. In short, since *Weber*, adjudicators have had exclusive jurisdiction to decide all matters raised in a grievance in the sole forum of adjudication.

[83] The most important effect of *Weber* is that it changed how adjudicators deal with disputes in the workplace by giving them a larger set of tools with which to resolve disputes and grant remedies.

[84] It should also be noted that disputes in the federal public service are adjudicated under specific limitations. For example, the following are excluded from adjudication: termination of employment or deployment under the *Public Service Employment Act* (section 211 of the *PSLRA*), a disciplinary action not resulting in termination, demotion, suspension or financial penalty (paragraph 209(1)(*b*)), and, in the case of a policy grievance, the existence of an administrative procedure for redress under any other federal statute (subsection 220(2)).

[85] As for the facts relevant to this grievance, my opinion is that the policy about which the Association complained is not expressly or implicitly part of a matter dealt with by the collective agreement. Standby duty must not be confused with overtime or even with working hours. Standby duty is not a new concept for legal officers; nor is it exclusive to them. Similar provisions exist in countless federal public service collective agreements, such as for the CS, SH and RE groups, in which standby clauses exist separately from overtime clauses.

[86] The employer maintains that being on standby duty is not "work." On that issue, I must agree with the employer. *Maple Leaf Mills Inc. v. U.F.C.W., Loc. 401* (1995), 50 L.A.C. (4th) 246, provides a good overview of the law on that issue. In that case, the employer exercised its managerial rights and unilaterally obliged two maintenance employees with the least amount of seniority to carry a pager and to be on call outside working hours. The employer called on those two employees only when no more senior employee could be found. The two employees filed a grievance asking for compensation while they were away from the workplace during non-working hours and had to be available on call. According to the new provisions of the collective agreement, they were paid only for when they reported to work. The union never negotiated the obligation of carrying a pager, and the collective agreement contained no provision to that effect. Citing past jurisprudence on that issue, adjudicator Sims was of the opinion that hours during which employees carried a pager were not working hours eligible for overtime pay within the meaning of the collective agreement, as follows:

> *39. To the extent the cases referred to above deal with the situation, they uniformly hold that time spent on standby is not time worked. Carrying a pager may be an inconvenience, and remaining within the pager's range is undoubtedly so, but this does not turn being on standby into working time as contemplated by the collective agreement. This is true*

> *whether or not the Employer's rule is validly imposed under the* KVP *test. For this reason, I must dismiss the grievance as filed.*
>
> . . .

[87] As in the cited arbitral jurisprudence, my opinion is that time spent on standby as claimed by the legal officers cannot be considered time worked. Although carrying a pager and a cell phone is undoubtedly an inconvenience, and it restricts the legal officers' movements and activities on weekends when they are on standby duty, the current provisions of the collective agreement are silent on the right to compensation for such an inconvenience.

[88] Another piece of evidence convinced me that availability for standby duty is not a matter implicitly dealt with in the collective agreement. The uncontradicted evidence is that a policy on standby duty existed before the arbitral award. Following the arbitral award, the parties continued, for several months, to negotiate other matters not covered by the arbitral award. During negotiations, the employer informed the legal officers of a change in policy about compensation for standby duty, as allowed by its managerial rights. The Association filed a policy grievance but did not claim compensation for standby duty at the bargaining table.

[89] I believe that, by signing a collective agreement after the legal officers had been informed of the change in policy without raising the issue, when able, 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. That conclusion does not exclude negotiating the issue in future bargaining talks. Nonetheless, that issue must be the subject of an agreement between the parties. Consequently, I am not convinced that the Association was misled by the employer's conduct or that the employer took advantage of the situation.

[90] Additionally, articles 5 and 6 must be interpreted in light of the provisions and rights set out in the collective agreement. Those articles do not have a general application that might create an entitlement to a remedy on a matter excluded from the collective agreement.

[91] As the Supreme Court determined in *McGavin Toastmaster Inc.*, a collective agreement is the master instrument governing collective labour relations between the parties. The common law applicable to an individual employment contract, including

the policies and directives in effect up to that point, no longer apply once labour relations are governed by a collective agreement.

[92] I conclude that I do not have jurisdiction to decide the grievance.

[93] Consequently, the issue of the adjudicator's jurisdiction to grant a *Charter* remedy is moot.

[94] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[95] The employer's preliminary objection to my jurisdiction is allowed.

[96] I order the file closed.

November 28, 2011.

PSLRB Translation

Michele A. Pineau,
adjudicator