



SUPREME COURT OF CANADA

CITATION: Association of Justice Counsel v. Canada
(Attorney General), 2017 SCC 55

APPEAL HEARD: April 19, 2017
JUDGMENT RENDERED: November 3, 2017
DOCKET: 37014

BETWEEN:

Association of Justice Counsel
Appellant

and

Attorney General of Canada
Respondent

OFFICIAL ENGLISH TRANSLATION: Reasons of Côté J.

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT: Karakatsanis J. (McLachlin C.J. and Abella, Wagner,
(paras. 1 to 53) Gascon, Brown and Rowe JJ. concurring)

REASONS DISSENTING IN PART: Côté J. (Moldaver J. concurring)
(paras. 54 to 82)

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ASSN. OF JUSTICE COUNSEL v. CANADA (A.G.)

Association of Justice Counsel

Appellant

v.

Attorney General of Canada

Respondent

Indexed as: Association of Justice Counsel v. Canada (Attorney General)

2017 SCC 55

File No.: 37014.

2017: April 19; 2017: November 3.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Labour relations — Arbitration — Grievances — Collective agreements
— Residual management rights — Work schedule — Balancing of interests approach
— Employer unilaterally imposing directive making after-hour standby shifts
mandatory for lawyers in order to respond to urgent immigration matters — Lawyers
no longer compensated for entire period spent on standby but only for hours actually*

worked on urgent requests — Whether mandatory standby duty directive is reasonable and fair exercise of employer's management rights under collective agreement — Whether adjudicator's assessment of different interests at stake and ultimate balancing of those interests was reasonable.

Constitutional law — Charter of Rights — Right to liberty — Scope of right — Privacy — Collective agreement prohibiting employer from imposing workplace policy that would restrict lawyers' constitutional rights — Employer unilaterally imposing directive making after-hour standby shifts mandatory for lawyers in order to respond to urgent immigration matters — Lawyers no longer compensated for entire period spent on standby but only for hours actually worked on urgent requests — Whether employer's mandatory standby duty directive infringes right to liberty protected by s. 7 of Canadian Charter of Rights and Freedoms.

In the early 1990s, the employer established a standby shift system to respond to urgent immigration matters outside of normal business hours, whereby a lawyer in the Immigration Law Directorate in the Quebec Regional Office of the Department of Justice Canada would be available evenings and weekends to attend on short notice to any urgent stay applications that might arise. Until 2010, the system worked on a volunteer basis. Lawyers who volunteered to cover standby shifts were compensated with paid leave and received the same amount of compensation irrespective of whether they were called into work. In March 2010, the lawyers were informed that they would no longer be paid for time spent on standby. Instead, they

would be compensated — through either overtime pay or paid leave, depending on their seniority status — only for the time they spent working if they received an urgent request. With this change in policy, there were no longer enough volunteers to cover the standby periods. In response, the employer issued a directive making after-hour standby shifts mandatory. The Association of Justice Counsel then filed a grievance on behalf of lawyers working in the Immigration Law Directorate.

The collective agreement at issue is silent on standby duty, but it specifies that the employer retains all management rights and powers that have not been modified or limited by the collective agreement. The labour adjudicator concluded that the directive was not a reasonable or fair exercise of management rights and infringed the lawyers' right to liberty under s. 7 of the *Charter*. He ordered the employer to immediately cease applying the directive. The Federal Court of Appeal allowed the government's application for judicial review and set aside the adjudicator's decision.

Held (Moldaver and Côté JJ. dissenting in part): The appeal should be allowed in part. The adjudicator's decision that the directive contravened the collective agreement is reasonable and his order that the employer stop applying the directive should be reinstated.

Per McLachlin C.J. and Abella, **Karakatsanis**, Wagner, Gascon, Brown and Rowe JJ.: At issue is the interpretation of a management rights clause in a collective agreement, clearly a matter on which labour arbitrators are owed deference.

Management's residual right to unilaterally impose workplace rules is constrained by the collective agreement, as it provides that in administering the collective agreement, the employer must "act reasonably, fairly and in good faith". The approach to determining whether a policy that affects employees is a reasonable exercise of management rights is the "balancing of interests" assessment. This approach requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance between management and employees' interests. Whether the unilateral imposition of a standby period is reasonable and fair will depend on the circumstances and the terms of the particular collective agreement. This determination is highly fact-based.

The adjudicator applied the appropriate analytical framework to assess the exercise of management rights and the surrounding circumstances of the directive supported his conclusion that the employer's directive was neither reasonable nor fair. There was no standby clause in the recently finalized collective agreement, no mention of the requirement in the lawyers' employment contracts or job descriptions, nor were similar policies the norm in the sector. The fact that the directive affects the lawyers' lives outside of working hours is a significant factor in the assessment of the directive's impact on employees. Further, there is some apparent unfairness in a policy or directive that unilaterally withdraws compensation for standby duty, when the provision of such compensation had been a long-standing practice. While an employer does not need to provide evidence that there were no other alternatives, the

availability of realistic, but less intrusive, means to meet organizational needs may be a relevant consideration in the balancing of interests assessment. The adjudicator was entitled to note the lack of such evidence. There is also no indication that the adjudicator misunderstood the factual impact of the directive on the lawyers, as set out in the agreed statement of facts. The Federal Court of Appeal therefore erred by substituting its own balancing of the interests involved for that of the adjudicator.

The directive does not violate the lawyers' s. 7 *Charter* right to liberty. The directive requires them, as a condition of their employment, to be potentially less available to their families or to forego certain personal activities for, at most, two to three weeks a year. This incursion into the private, after-work lives of the lawyers does not implicate the type of fundamental personal choices that are protected within the scope of s. 7.

Per Moldaver and Côté JJ. (dissenting in part): The adjudicator erred in concluding that the mandatory standby duty directive represented an unreasonable and unfair exercise of the employer's management rights and infringed counsel's right to liberty guaranteed by s. 7 of the *Charter*.

The adjudicator's reasoning was clearly influenced by his erroneous conclusions with respect to s. 7 of the *Charter*, as he considered the issue of whether the directive represented a reasonable and fair exercise of the employer's management powers through the prism of those conclusions. For example, in concluding that the directive seemed to him quite simply neither reasonable nor fair,

the adjudicator noted, *inter alia*, that it would instead be fair for counsel to be compensated for the time during which the employer continued to exercise a certain control over their lives. The adjudicator's conclusions on the violation of the collective agreement with respect to the exercise of the management power and the protection of counsel's constitutional rights were thus based on the same characterization of the impact of the directive on the lawyers' lives. This characterization seems flawed in that it disregards key elements of the agreed statement of facts.

Because the grievance should be remitted to another adjudicator, it would not be appropriate to rule on the reasonableness and fairness of the directive. It should be noted, however, that the conclusions of the adjudicator in this case do not seem defensible in respect of either the facts or the law. Regarding the facts, his conclusion that the employer had a certain control over the organizational need underlying the unilateral imposition of standby duty goes against the common evidence submitted by the parties to the effect that a stay application can arise unexpectedly and should be processed on an emergency basis. For this reason, therefore, to the extent that the adjudicator has disregarded certain essential facts in his reasons, his decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts.

Nor does the adjudicator's decision seem defensible in respect of the law. The analysis of the reasonableness and fairness of a unilaterally imposed directive is

based on a balancing of interests approach, not an approach focusing on whether the employer has adopted the least intrusive means of meeting its operational requirements. In considering whether the employer had acted reasonably, fairly and in good faith in issuing the directive, the adjudicator noted that he had not been presented with any evidence establishing that standby duty was the employer's only way of responding to emergencies on weeknights and weekends. But that is not the applicable legal test in this case. Requiring the employer to prove that there were no other alternatives to solve its problem imposes on it the far too onerous burden of proving a negative. As a result, to the extent that the adjudicator's decision is based on a test that differs from the one applicable in law and that has the effect of imposing an excessive burden on the employer, it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the law.

Cases Cited

By Karakatsanis J.

Applied: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; **not followed:** *United Nurses of Alberta v. Alberta Health Services*, 2014 CanLII 50285; **referred to:** *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29; *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Maple Leaf Mills Inc. and U.F.C.W., Loc. 401, Re*

(1995), 50 L.A.C. (4th) 246; *Shell Canada Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 835*, [2001] A.G.A.A. No. 51; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307.

By Côté J. (dissenting in part)

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedom, ss. 1, 7.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Financial Administration Act, R.S.C. 1985, c. F-11, ss. 7, 11.1.

Authors Cited

Brown, Donald J. M., and David M. Beatty, with the assistance of Christine E. Deacon. *Canadian Labour Arbitration*, vol. 1, 4th ed. Toronto: Canada Law Book, 2017 (loose-leaf updated June 2017, release 58).

Charney, Richard J. and Thomas E. F. Brady. *Judicial Review in Labour Law*. Aurora, Ont.: Canada Law Book, 1997 (loose-leaf updated April 2017, release 28).

APPEAL from a judgment of the Federal Court of Appeal (Trudel, Boivin and de Montigny JJ.A.), 2016 FCA 92, [2016] 4 F.C.R. 349, 488 N.R. 198, [2016] F.C.J. No. 304 (QL), 2016 CarswellNat 824 (WL Can.), [2016] AZ-51267589, allowing an application for judicial review and setting aside a decision of an adjudicator of the Public Service Labour Relations and Employment Board, 2015 PSLREB 31, 2015 LNPSLREB 31 (QL), 2015 CarswellNat 1181 (WL Can.). Appeal allowed in part, Moldaver and Côté JJ. dissenting in part.

Bernard Pillion, Nicolas Charron and Daniel Boudreault, for the appellant.

Alain Préfontaine and Catherine A. Lawrence, for the respondent.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. was delivered by

KARAKATSANIS, J. —

I. Overview

[1] This is an appeal of the judicial review of a grievance adjudicator's decision concerning a federal government employer's mandatory standby duty directive. The Association of Justice Counsel (AJC) filed the grievance on behalf of lawyers working in the Immigration Law Directorate in the Quebec Regional Office of the Department of Justice Canada. The grievance was filed after the employer, Department of Justice, issued a directive making after-hour standby shifts mandatory for lawyers working in the Directorate.

[2] The labour adjudicator agreed with the AJC that the directive was not a reasonable or fair exercise of management rights and violated the constitutional rights of the lawyers. The Federal Court of Appeal set aside the decision and directed another adjudicator to find that the directive represented a fair and reasonable exercise of management rights.

[3] I would allow the appeal in part. In my view, the adjudicator's decision that the directive was not a proper exercise of management rights under the collective agreement was reasonable. However, I agree with the Federal Court of Appeal that the directive did not engage any liberty interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.

II. Background

A. *The Standby System*

[4] The Attorney General of Canada is sometimes required to respond to urgent immigration matters outside of normal business hours. In response to this need, the employer established a standby shift system, whereby a government immigration lawyer in the Quebec Regional Office would be available evenings and weekends to attend on short notice to any urgent stay applications that might arise. Since the standby system's inception in the early 1990s and up until 2010, the system worked on a volunteer basis. Lawyers who volunteered to cover standby shifts were compensated with paid leave at the rate of 2.5 days of paid time off for a week's shift of evenings and weekend days, with additional compensation for holidays. They received the same amount of compensation irrespective of whether they were called into work.

[5] With the finalization of a collective agreement between the AJC and the employer in the fall of 2009, many of the lawyers became eligible for overtime pay, although more senior lawyers continued to only be eligible for paid leave. In March 2010, the Director of the Immigration Law Directorate in the Quebec Regional Office informed the lawyers that they would no longer be paid for time spent on standby. Instead, they would be compensated only for the time they spent working if they received an urgent request. The directive envisioned that the lawyers would be compensated for time worked through either overtime pay or paid leave, depending on their seniority status.

[6] With this change in policy, there were no longer enough volunteers to cover the standby periods. In response, management made the standby duty shifts mandatory. All qualified lawyers in the office were required to cover the evening and weekend shifts one to three weeks per year.

[7] The standby period is from 5:00-9:00 p.m. on weekdays and from 9:00 a.m.-9:00 p.m. on weekends. While on standby, the lawyers need to be ready to prepare and argue possible stay applications on short notice. They must carry an employer-issued pager and cell phone and be able to reach their office within approximately an hour if called. The parties agree that the employer took any accommodation required under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, into account when establishing the standby schedule. The lawyers subject to the schedule are also able to trade shifts amongst themselves.

[8] The evidence before the adjudicator was that in 2010, the Immigration Law Directorate had to respond to approximately 120 stay applications, six of which arose during a weekend. It was unclear how many emergency stay applications required response during weekday evenings.

B. *The Collective Agreement*

[9] The collective agreement at issue is silent on standby duty. That said, there are several provisions relevant to the government's ability to impose workplace

policies. Clause 5.01 specifies that the employer retains all management rights and powers that have not been modified or limited by the collective agreement:

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.

[10] But these management rights are not unfettered. Under clause 5.02 of the collective agreement, the employer is required to “act reasonably, fairly and in good faith in administering this Agreement”.

[11] Furthermore, clause 6.01 prohibits the government from imposing a workplace policy that would restrict the lawyers’ constitutional rights, or other rights granted to them through federal legislation:

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.

III. Decisions Below

A. *The Arbitration Decision, 2015 PSLREB 31*

[12] The AJC grieved the mandatory standby directive. The adjudicator found that the directive was neither reasonable nor fair and that it was therefore contrary to clause 5.02 of the collective agreement. He noted that standby clauses are common in

collective agreements governing federal public servants. In such agreements, the employees generally exchange availability outside of normal working hours for compensation. In the adjudicator's view, the lack of such a clause did not give the employer *carte blanche* to require uncompensated standby availability. The adjudicator recognized the legitimate need for Department of Justice lawyers to respond to emergencies outside of normal office hours, but questioned whether standby duty was essential to respond to that need, given that it was not mentioned in the employment contract or job description.

[13] Furthermore, the adjudicator found that the directive infringed the lawyers' constitutional rights. Specifically, he concluded the standby requirement implicated the liberty rights guaranteed to the lawyers under s. 7 of the *Charter*, and that the infringement did not conform to the principles of fundamental justice. Consequentially, the adjudicator concluded the directive also breached clause 6.01 of the collective agreement and he ordered the employer to immediately cease applying the directive.

B. *Judicial Review, 2016 FCA 92, [2016] 4 F.C.R. 349*

[14] Justice de Montigny of the Federal Court of Appeal (Trudel and Boivin JJ.A. concurring) allowed the government's application for judicial review. The court set aside the adjudicator's decision that the directive did not comply with clause 5.02 of the collective agreement. The court reasoned the adjudicator had placed an unreasonable burden on the employer to justify the need for the standby directive and

had ignored evidence that showed there were not enough volunteers after the lawyers were informed that they would no longer be compensated for being on standby.

[15] In the Federal Court of Appeal's view, the adjudicator also erred in his analysis of s. 7 of the *Charter* and clause 6.01 of the collective agreement. The court reasoned the adjudicator had unreasonably extended the right to liberty beyond that established through this Court's jurisprudence.

[16] While the court returned the grievance to the Public Service Labour Relations and Employment Board, it also directed the new adjudicator to recognize that the contested directive represented a reasonable and fair exercise of residual management rights set out in clause 5.02 and that it did not infringe on the lawyers' s. 7 *Charter* rights.

IV. Analysis

A. *Does the Directive Breach Clause 5.02 of the Collective Agreement?*

(1) Residual Management Rights

[17] The standard of review for judicial review of grievance arbitrators' decisions is reasonableness (*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at paras. 32-33). At issue is the interpretation of a management rights clause in a collective

agreement, clearly a matter on which labour arbitrators are owed deference (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 7).

[18] In unionized workplaces, labour arbitrators recognize management's residual right to unilaterally impose workplace policies and rules that do not conflict with the terms of the collective agreement (D.J.M. Brown and D.M. Beatty, with the assistance of C. E. Deacon *Canadian Labour Arbitration*, (4th ed. (loose-leaf)), vol. 1, at topic 4:1520). Often, this residual power is recognized expressly in a "management rights" clause. Clause 5.01 of the collective agreement is one such clause, as it reserves for the employer the right to exercise all management powers that have not been "specifically abridged, delegated or modified" by the collective agreement.

[19] For federal government employers, many of these residual management rights are set out in legislation. Under ss. 7 and 11.1 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, the Treasury Board is authorized to exercise a number of different powers with respect to its human resources management responsibilities. These rights include providing for the allocation and effective use of human resources (s. 11.1(1)(a)); determining and regulating the pay of employees, the hours of work and leave and any related matters (s. 11.1(1)(c)); and providing for any other matters necessary for effective human resources management (s. 11.1(1)(j)).

[20] That said, management's residual right to unilaterally impose workplace rules is not unlimited. Management rights must be exercised reasonably and consistently with the collective agreement (Brown and Beatty, at topic 4:1520; *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Ont.); *Irving*, at para. 24).

[21] Clause 5.02 of the collective agreement also constrains management's ability to exercise these rights, as it provides that in administering the collective agreement, the employer must "act reasonably, fairly and in good faith". Any unilaterally imposed workplace policy must comply with these limitations.

[22] The question raised before the adjudicator was whether the standby directive represented a reasonable and fair exercise of management rights. The employer's good faith is not in issue.

[23] Before this Court, the respondent argued that when answering this question the adjudicator's role was to decide whether the employer's mandatory standby directive was within the range of possible, reasonable choices that have a supportable relationship with the employer's operational needs.

[24] I do not find this a helpful articulation of the arbitrator's task. The well-established approach to determining whether a policy that affects employees is a reasonable exercise of management rights is the "balancing of interests" assessment,

as set out in the leading arbitral decision *KVP*, and recently endorsed by this Court in *Irving*, (para. 27, quoting the intervener the Alberta Federation of Labour):

Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.

[25] Although, in this instant case, the adjudicator did not mention *Irving* or *KVP* explicitly in his decision, he applied this balancing of interests approach. He reasoned that he was required to assess, on the one hand, the lawyers' terms of work, as defined in the collective agreement, and the effect of the directive on their personal lives and, on the other hand, the employer's objective and approach to meeting this objective.

[26] In contrast, the respondent relies on a single arbitral decision, *United Nurses of Alberta v. Alberta Health Services*, 2014 CanLII 50285, at p. 12 (Alta.), for its proposed approach. In that decision, the labour arbitrator ruled that, as long as a management policy "is within a range of possible choices and has a supportable relationship to the business objectives, the arbitrator is not empowered to substitute his or her views for what management has in fact done" (para. 49). In the oral hearing before this Court, counsel for the respondent conceded that he was not aware of any other arbitral decisions that have followed this authority.

[27] In my view, the *United Nurses of Alberta* approach is problematic, as it imports the judicial review reasonableness inquiry into the labour arbitrator's task of assessing the exercise of management rights. This conflates the distinct roles that arbitrators and reviewing courts play in the context of labour grievances. It also runs counter to this Court's recent endorsement in *Irving* of the *KVP* test. Furthermore, the arbitrator's statements in *United Nurses of Alberta* appear to have been directed solely at determining whether an exercise of management rights was reasonable. Here, the language of clause 5.02 of the collective agreement also required the adjudicator to decide whether the directive was a fair exercise of management rights that had been made in good faith.

[28] Thus, I am satisfied that in following the well-established balancing of interests approach, the adjudicator applied the appropriate analytical framework to assess the exercise of management rights under this collective agreement.

(2) Application

[29] The Federal Court of Appeal concluded the adjudicator's decision was unreasonable because it found a number of the adjudicator's justifications to be untenable. The respondent echoes this reasoning. It argues the requirements of the directive — carrying a pager and staying within an hour of the office while on standby — were minimally invasive and rationally connected to the employer's responsibilities. Therefore, in its view, the adjudicator ought to have concluded that the directive was reasonable.

[30] The appellant submits the Federal Court of Appeal erred by substituting its own view on what qualified as a reasonable exercise of management rights for the adjudicator's view. It argues the adjudicator's conclusion was a reasonable outcome, defensible on the facts and law, and his reasons were justifiable, transparent, and intelligible.

[31] For the reasons that follow, I agree with the appellant that the adjudicator's decision on the interpretation of clause 5.02 of the collective agreement was reasonable. Reading the adjudicator's decision with the degree of deference required on judicial review, I conclude that his assessment of the different interests at stake and ultimate balancing of them was reasonable.

(a) *The Outcome Was Reasonable*

[32] The adjudicator's task was to draw on his specialized labour expertise and consider whether, in this particular context, the balance struck by the directive was reasonable (*Irving*, at para. 27). Clause 5.02 also required him to decide whether the exercise of the management rights was fair. The adjudicator concluded it was neither.

[33] The adjudicator's conclusion on this issue falls within the range of acceptable, possible outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47). It is supported by a number of factors, which he appropriately relied on.

[34] First, the adjudicator properly considered the surrounding context of the collective agreement. He noted that availability clauses are generally negotiated in collective agreements involving federal public servants, with employee availability traded for some form of compensation. Furthermore, as the adjudicator noted, the job descriptions and employment contracts provided by the parties did not mention standby obligations. In this context, it was not unreasonable for the adjudicator to question whether mandatory standby duty was essential.

[35] Second, the adjudicator noted the distinction between policies that affect employees during normal working hours and those that unilaterally extend the time during which employees are under the employer's control. While the agreement recognized that the lawyers might need to work overtime (and be compensated for it), the directive affected how the lawyers lived their lives outside of work in a way that was not contemplated in either the collective agreement or in their contracts of employment. The adjudicator found this unfair, stating that "Instead, it would be fair for [the lawyers] to be compensated for the time during which the employer continues to exercise a certain control over their lives" (para. 45).

[36] The adjudicator's conclusion that the directive was an unfair exercise of management rights is supported by the circumstances surrounding the policy change. The lawyers had set out the *quid pro quo* nature of their relationship with their employer in the collective agreement. Under its terms, the lawyers agreed to exchange hours worked for specific compensation. The agreement recognized that the

lawyers might need to work overtime to ensure their professional obligations and the Attorney General's responsibilities were met. Yet soon after the relevant terms were finalized, the employer unilaterally increased the time the lawyers were mandated to be under their employer's control without providing any additional compensation. While standby duty may not be taxing or onerous work, it is a period of time during which the employer exercises a degree of control over the movements and activities of the lawyers. This exercise of control benefits the employer, who might otherwise have to employ lawyers to work evening and weekend shifts to ensure a timely response to urgent applications.

[37] Further, this determination is highly fact-based. As the Federal Court of Appeal recognized, there is no clear arbitral consensus on whether the imposition of mandatory uncompensated standby duty is a fair and reasonable unilateral exercise of management rights. Rather, the decisions presented by the parties indicate that the answer depends on the context, including the terms of the relevant collective agreement. For example, in *United Nurses of Alberta*, the arbitrator found there was “no question” that time spent on on-call duty was “work”, even if it did not qualify as overtime work within the meaning of the relevant collective agreement (p. 15). In *Maple Leaf Mills Inc. and U.F.C.W., Loc. 401, Re* (1995), 50 L.A.C. (4th) 246 (Alta.), at p. 254, the arbitrator concluded that uncompensated time spent on standby was not “time worked” within the meaning of the relevant collective bargaining agreement. In another arbitral decision, an arbitrator found that a management-imposed directive requiring employees to fill standby shifts and be within an hour of

their workplace was a reasonable exercise of management rights, but in that case the collective agreement included an on-call provision (*Shell Canada Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 835*, [2001] A.G.A.A. No. 51 (Alta.) [QL]). What these decisions indicate is that the question of whether the unilateral imposition of a standby period is reasonable and fair will depend on the circumstances and the terms of the particular collective agreement.

[38] In sum, the surrounding circumstances of the directive supported the adjudicator's conclusion that the directive was neither reasonable nor fair. There was no standby clause in the recently finalized collective agreement, no mention of the requirement in the lawyers' employment contracts or job descriptions, nor were similar policies the norm in the sector. I agree with the adjudicator that the fact that the directive affects the lawyers' lives outside of working hours is a significant factor in the assessment of the directive's impact on employees. And as the adjudicator noted, there is some apparent unfairness in a policy or directive that unilaterally withdraws compensation for standby duty, when the provision of such compensation had been a long-standing practice. In my view, the adjudicator's conclusion that the standby directive did not conform with clause 5.02 of the collective agreement fell within the range of reasonable outcomes.

(b) *The Adjudicator's Reasons*

[39] That said, the respondent's challenge to the reasonableness of the decision focuses on a number of statements the adjudicator made in his reasons. In

particular, the respondent argued that the adjudicator mischaracterized the nature of the Attorney General's relationship with other government departments: the adjudicator's use of language describing the "offer[ing] or sell[ing]" of professional services indicated a lack of appreciation for the context and the special role the Attorney General and government lawyers play in the administration of justice. The respondent also argues that the adjudicator unreasonably placed the burden on the employer to justify that there were no other alternatives to the imposition of the directive. Finally, the respondent argues the adjudicator misunderstood and overstated the impact of the directive on the lawyers.

[40] Many of these concerns fall away on an appropriately deferential reading of the adjudicator's reasons. Reviewing courts must consider an arbitrator's reasons in light of the outcome as part of an organic exercise (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). Considering this standard, the adjudicator's conclusion in the case at hand was in the range of defensible outcomes and his reasons in support met the necessary indicia of justification, intelligibility, and transparency (*Dunsmuir*, at para. 47).

[41] The respondent takes particular issue with para. 47 of the adjudicator's reasons, where the adjudicator questioned whether the employer's need to impose standby duty was unavoidable, and stated that the need was "triggered instead by the employer's choice to provide and sell its employees' professional services outside

their normal work hours”. Similarly, the Federal Court of Appeal characterized the adjudicator’s decision as failing to appreciate that immigration stay applications require the Attorney General to respond immediately, as the parties had agreed in the agreed statement of facts.

[42] While the adjudicator’s reasons on this point could have been clearer, I do not accept that he misunderstood the nature of the government’s need or objective. In the same paragraph, the adjudicator expressly recognized that “the organizational need is triggered by an emergency over which the employer has no control” (para. 47). Yet, the adjudicator also recognized that the employer had a degree of control over how it responded to this reality. It chose to address this organizational need through mandatory, unpaid standby duty, as opposed to other possible approaches (such as a flexible work scheduling approach or compensation for standby). Viewed in its entirety, the passage does not indicate that the adjudicator failed to appreciate the Attorney General’s important role as Chief Law Officer of the Crown.

[43] Another aspect of the decision the respondent criticizes is the adjudicator’s statement at para. 49 of his reasons that he was not presented with any proof that the standby directive was the only way for the employer to deal with after-hour emergencies. In the Federal Court of Appeal’s view, the adjudicator’s reasoning on this issue indicated that he placed an excessive burden on the government to justify the reasonableness of the directive.

[44] While I agree that an employer does not need to prove there were no other alternatives, the availability of realistic, but less intrusive, means to meet organizational needs may be a relevant consideration in the balancing of interests assessment, alongside the nature of the employer's interests and the policy's impact on employees (*Irving*, at para. 27). Evidence that no such alternatives were available would have supported the respondent's position that the directive was a necessary response. The adjudicator was therefore entitled to note the lack of such evidence. By doing so, he was not placing an unreasonable burden on the employer to justify the directive, but rather was noting the absence of a factor that would have weighed in the employer's favour had it been present.

[45] Finally, the respondent argues the adjudicator misconstrued the impact of the directive on the lawyers. From his analysis on whether the directive breached the right to liberty of the lawyers under s. 7 of the *Charter*, it is clear that the adjudicator viewed its effects on the after-work lives of the lawyers as significant. And as I explain below, I agree with the respondent that the adjudicator erred in his legal characterization of the impact of the directive on the lawyers in his s. 7 *Charter* analysis. But in my view, even accepting that the adjudicator also placed too much weight on the directive's impact in his assessment of its reasonableness under the balancing of interests analysis, court intervention on this point is unwarranted. There is no indication that the adjudicator misunderstood the factual impact of the directive on the lawyers, which was set out by the parties in the agreed statement of facts. Further, the adjudicator's conclusion that the directive was neither reasonable nor fair

did not turn on his understanding of these effects. Rather, the focus of his reasons was on the surrounding context and general nature of the directive. In particular, the adjudicator emphasized the lack of a standby clause in the collective agreement or employment contracts, the exceptional nature of the directive in the sector and the fact that it changed a long-standing practice of providing compensation for standby time. These considerations alone were sufficient to support his conclusion.

[46] In my view, it is clear the adjudicator would have come to the same decision on clause 5.02 even if he had not erred in his analysis on the directive's compliance with s. 7 of the *Charter*. The two analytical frameworks did not intersect; nor did he transpose any conclusion or finding from one to the other. His stand-alone conclusion that the directive was neither reasonable nor fair was within the range of reasonable outcomes and I agree with the appellant that it should not be disturbed.

(c) *The Overall Balance*

[47] I add that I also agree with the appellant that the Federal Court of Appeal erred by substituting its own balancing of the interests involved for that of the adjudicator. The court set aside the adjudicator's decision and directed the next adjudicator to conclude the directive was a fair and reasonable exercise of the employer's residual management rights (para. 49). But a court's jurisdiction to substitute its own conclusion on the outcome of a grievance is limited (R. J. Charney and T. E. F. Brady, *Judicial Review in Labour Law*, (loose-leaf), at para. 17.40). In construing the proper interpretation of clauses in collective agreements, arbitrators do

not make assessments in a vacuum. Rather, they take into consideration the surrounding context and history of labour relations in the industry (Brown and Beatty, at topic 4:2300). This is particularly true with respect to issues relating to management rights (*ibid.*, at topic 4:2310). The expertise labour arbitrators bring to this analysis is a further reason why their role should be respected. This was not an instance where there was clearly only one reasonable result, justifying a court disposition to this effect (Charney and Brady, at para. 17.61).

B. *Section 7 of the Charter*

[48] The appellant also submits the directive violates the lawyers' s. 7 *Charter* right to liberty in a way that does not comply with the principles of fundamental justice. The appellant argues that the directive limits the choices the lawyers are able to make about how to lead their private lives, and therefore engages their liberty interests. In consequence, it argues the directive also breached clause 6.01 of the collective agreement, which prohibited interpretations of the agreement that would restrict the constitutional rights of the lawyers. The adjudicator agreed with these submissions. Of course, it was unnecessary for him to decide this issue given his conclusion that the directive was not a reasonable or fair exercise of the employer's management rights.

[49] The extent to which s. 7 of the *Charter* applies outside the context of the administration of justice has yet to be settled in this Court, see e.g. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at paras. 77-79;

Chaoulli v. Quebec (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791, at paras. 196-99. But even assuming s. 7 applies to the relationship at issue here, I would agree with the Federal Court of Appeal that the adjudicator clearly overstated the breadth of the right to liberty protected under s. 7. Section 7 protects a sphere of personal autonomy involving “inherently private choices” (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 85, quoting *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66). However, such choices are only protected if “they implicate basic choices going to the core of what it means to enjoy individual dignity and independence” (*ibid.*).

[50] The directive’s incursion into the private, after-work lives of the lawyers does not implicate the type of fundamental personal choices that are protected within the scope of s. 7. *Malmo-Levine* and *Godbout* are clear that not all activities that an individual happens to define as central to his or her lifestyle are protected by s. 7. As examples, *Malmo-Levine* noted that a taste for fatty foods, an obsessive interest in golf and a gambling addiction are not afforded constitutional protection (para. 86). By analogy, the ability of the lawyers — for two to three weeks per year — to attend operas or piano lessons, or to train for a triathlon without having to keep a pager nearby are not protected by s. 7.

[51] The directive also affects the ability of the lawyers to spend time with their children and families. While on standby, some of the lawyers are unable to visit family or provide the level of attention to their children that they would like to

because they must stay within an hour of the office. But again, these consequences do not affect the lawyers' ability to make fundamental personal choices (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 49; *Malmö-Levine*, at para. 85). Instead, the directive requires them, as a condition of their employment, to be potentially less available to their families for, at most, two to three weeks a year. This does not fall within the scope of s. 7.

[52] Thus, the directive clearly does not engage the lawyers' liberty interests under s. 7 and so does not engage their constitutional rights.

V. Conclusion

[53] I would allow the appeal in part, with costs to the appellant. Because it is clear that the lawyers' s. 7 *Charter* rights were not implicated by the directive, I would not disturb the Federal Court of Appeal's conclusion on this issue. However, the adjudicator's declaration that the directive did not comply with clause 5.02 of the collective agreement was reasonable. I would therefore restore his disposition that the mandatory standby duty directive contravened clause 5.02 of the relevant collective agreement and reinstate his order that the employer stop applying the directive.

CÔTÉ J. —

[54] I agree with the conclusion of my colleague Karakatsanis J. that the mandatory standby duty directive of the Immigration Law Directorate of the Department of Justice's Quebec Regional Office, which requires counsel — an average of one to three times a year — to be available evenings and weekends on a rotational basis without compensation, does not infringe counsel's right to liberty guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* and incorporated into their collective agreement by means of clause 6.01.

[55] However, I disagree with her view that the adjudicator was right to conclude that the directive resulted from an unreasonable and unfair exercise of the employer's management power. (I) First, I am of the view that the adjudicator's flawed analysis on the issue of infringement of the right to liberty protected by s. 7 of the *Charter* taints the whole of his reasons. (II) Second, a closer review of his reasoning reveals that his conclusions are not defensible in respect of either the facts or the law.

I. The Adjudicator's Flawed Analysis of the Right to Liberty Taints the Rest of His Analysis

[56] My colleague states: "it is clear the adjudicator would have come to the same decision on clause 5.02 even if he had not erred in his analysis on the directive's compliance with s. 7 of the *Charter*" (para. 46).

[57] Her position seems contradictory to me. In reviewing the adjudicator's decision on the reasonableness and fairness of the directive, my colleague states that she agrees "with the adjudicator that the fact that the directive affects the lawyers' lives outside of working hours is a significant factor" (para. 38 (emphasis added)). But then, in reviewing the adjudicator's decision on the infringement of s. 7 of the *Charter*, she expresses the view that "[t]he directive's incursion into the private, after-work lives of the lawyers does not implicate the type of fundamental personal choices that are protected within the scope of s. 7" (para. 50).

[58] I cannot subscribe to my colleague's reasoning.

[59] In my view, the adjudicator's error vitiates his entire decision, because it taints the rest of his analysis. I find that the adjudicator's reasoning was clearly influenced by his conclusions with respect to s. 7 of the *Charter*, as he considered the issue of whether the directive represented a reasonable and fair exercise of the employer's management powers through the prism of those conclusions.

[60] For example, in concluding that the directive "seems to me quite simply neither reasonable nor fair", the adjudicator noted, *inter alia*, that "[i]nstead, it would be fair for [counsel] to be compensated for the time during which the employer continues to exercise a certain control over their lives" (2015 PSLREB 31, at para. 45 (CanLII) (emphasis added)).

[61] What is more, the adjudicator's conclusions on the violation of clauses 5.02 and 6.01 of the collective agreement were based on the same characterization of the impact of the directive on the lawyers' lives. As I will explain in the next section, this characterization seems flawed to me in that it disregards key elements of the agreed statement of facts. In light of this, I fail to see how it can be said that the adjudicator would necessarily have come to the same conclusion on the reasonableness of the directive independently of his analysis of the infringement of the lawyers' right to liberty. The adjudicator erred in reaching that conclusion, and I would dismiss the appeal on this basis.

[62] That being said, it seems to me — without ruling on the reasonableness and fairness of the directive given my opinion that the grievance should be remitted to another adjudicator to decide this issue — that the adjudicator's conclusions are not defensible in respect of either the facts or the law. The interpretation given in this case of the employer's directive and art. 5 of the collective agreement therefore appears to me to be unreasonable.

II. The Adjudicator Erred in Concluding That the Directive Represented an Unreasonable and Unfair Exercise of the Employer's Management Rights

[63] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 68, this Court recalled that it “has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference”. As a result, “[i]t

cannot be seriously challenged, particularly since *Dunsmuir* . . . that the applicable standard for reviewing the decision of a labour arbitrator is reasonableness” (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 7). There is therefore no doubt that it is the reasonableness standard of review that applies to the adjudicator’s decision on the issue of whether the directive represented a reasonable exercise of the employer’s management rights.

[64] In applying the reasonableness standard, a reviewing court inquires into whether the decision-making process was transparent and intelligible. It also inquires into whether the decision is defensible, that is, whether it falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47 (emphasis added)). The deference required by the reasonableness standard means that reviewing courts must give “due consideration to the determinations of decision makers” (*Dunsmuir*, at para. 49). However, this does not mean that an adjudicator’s decision is totally immune from judicial review; the decision must be “reasonable”.

A. *The Adjudicator’s Decision Does Not Seem Defensible in Respect of the Facts*

[65] I will begin by noting what the adjudicator stated at para. 47 of his reasons:

I agree that an emergency that occurs outside normal work hours may be a legitimate organizational need that will result in the employer exercising its management right and, consequently, overtime for employees. In this case, the organizational need is triggered by an emergency over which the employer has no control. Can the same analogy be made concerning the unilateral imposition of standby duty? In this case, the organizational need is triggered instead by the employer's choice to provide and sell its employees' professional services outside their normal work hours, over which the employer has a certain control. [Emphasis added.]

[66] Yet the adjudicator had the following agreed statement of facts before him, and he even reproduced it at para. 7 of his reasons:

[TRANSLATION]

...

8. Applications [for stays] may be filed outside working hours and must be handled promptly. 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 during the weekend are less frequent (about six times per year at the time) but just as unpredictable.

9. The employer requires that counsel responding to a stay application be available in accordance with the rol[1] that the Federal Court established and in accordance with the schedule of the judge appointed to hear the application. The Federal Court clerk calls the Immigration Directorate's emergency number in anticipation of the hearing of the case. Written arguments may be prepared and filed, depending on the level of urgency, followed by a hearing or teleconference with the Federal Court Judge, who hears the parties on the merits of the application. . . .

...

12. Due to their nature, weekend emergencies occur erratically. Several may occur in a row, or several weeks might pass before another occurs. [Emphasis added.]

[67] I am therefore in full agreement with the Federal Court of Appeal, per de Montigny J.A., that the adjudicator's conclusion that the employer had a certain control over the organizational need underlying the unilateral imposition of standby duty "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" (2016 FCA 92, [2016] 4 F.C.R. 349, at para. 31).

[68] Moreover, the following also appears in the agreed statement of facts reproduced by the adjudicator in his reasons:

[TRANSLATION]

19. In the absence of volunteers, in an email dated April 13, 2010, the employer imposed the requirement that all counsel (including those identified below) be available on a rotational basis, an average of 1 to 3 times per year, for standby duty. . . .

20. The employer prepared a standby duty table for the period from April 1, 2010, to March 31, 2011. To that end, the employer asked counsel for their availability for the entire period covered by the list. The employer then established the list according to counsel's availability and situations (e.g., a situation requiring accommodation under the [*Canadian Human Rights Act*, R.S.C. 1985, c. H-6]). In addition, the employer allowed counsel to arrange with each other in case they needed someone to fill in for them. [Emphasis added.]

[69] The adjudicator does not seem to have considered these facts in his analysis. I agree with de Montigny J.A.'s conclusion that "[c]learly, [these were] important factor[s] in assessing the reasonableness of the directive, yet the adjudicator did not take [them] into account in his analysis" (F.C.A. reasons, at para. 32).

[70] In my view, to the extent that the adjudicator's conclusions contradict the common evidence submitted by the parties and that he has disregarded certain essential facts in his reasons, his decision does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts" (*Dunsmuir*, at para. 47).

B. *The Adjudicator's Decision Does Not Seem Defensible in Respect of the Law*

[71] Under clause 5.01 of the collective agreement, "[a]ll the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are . . . retained" by the employer. Among these residual rights are those held by the Treasury Board in respect of "human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it" (*Financial Administration Act*, R.S.C. 1985, c. F-11, s. 7(1)(e)). The exercise of these rights relating to human resources management is governed by s. 11.1 of the *Financial Administration Act*.

[72] In *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 32, this Court noted that "[g]enerally management has a residual right to do as it sees fit in the conduct of its business" and that "[t]his right is subject to any express term of a collective agreement or human rights and other employment-related statutes providing otherwise".

[73] In the instant case, therefore, the employer's residual rights are subject to clause 5.02 of the collective agreement, which requires the employer to "act reasonably, fairly and in good faith in administering this Agreement". This clause codifies principles that have already been recognized by the courts, including the fact that "[w]hen employers in a unionized workplace unilaterally enact workplace rules and policies, they are not permitted to 'promulgate unreasonable rules and then punish employees who infringe them'" (*Irving*, at para. 22).

[74] In considering whether the employer had acted reasonably, fairly and in good faith in issuing the directive, the adjudicator noted that he had not been "presented any evidence establishing that standby duty is the employer's only way of responding to its client departments' emergencies on weeknights and weekends" (para. 49 (emphasis added)).

[75] But that is not the applicable legal test in this case. Indeed, it is not even the applicable test for the justification of an infringement of a *Charter* right under s. 1 of the *Charter*. At the minimal impairment stage under s. 1 of the *Charter*, "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160; see also *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2

S.C.R. 391, at para. 150). It would be surprising if a burden that the Constitution does not even impose on the government were imposed on employers.

[76] In *Irving*, at paras. 4, 24 and 27, this Court described the approach the adjudicator should have taken in assessing the unilateral exercise of management rights:

A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated “balancing of interests” proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees’ privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.

...

The scope of management’s unilateral rulemaking 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 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

...

In assessing . . . reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a “balancing of interests” approach. As the intervener the Alberta Federation of Labour noted:

Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer’s policy strikes a reasonable balance. Assessing the reasonableness of an employer’s policy can include assessing such things as the nature of the employer’s interests, any less intrusive means available to

address the employer's concerns, and the policy's impact on employees. [Emphasis added.]

[77] The analysis of the reasonableness and fairness of a unilaterally imposed directive is thus based on a balancing of interests approach, not an approach focusing on whether the employer has adopted the least intrusive means of meeting its operational requirements. In my view, the adjudicator in the case at bar did not take a balancing of interests approach. He had to determine whether the directive was reasonable, but that is not what he did.

[78] As a result, I also agree with the following comments of de Montigny J.A. (at para. 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.

[79] Furthermore, and with all due respect, my colleague's position is ambiguous on this point. Although she says she is not requiring the employer to prove

that there were no other alternatives to solve its problem, she finds that “[e]vidence that no such alternatives were available would have supported the respondent’s position that the directive was a necessary response”, and that “[t]he adjudicator was therefore entitled to note the lack of such evidence” (para. 44). In my view, this reasoning does exactly what she claims it does not do: it imposes on the employer the far too onerous burden of proving a negative.

[80] In my opinion, to the extent that the adjudicator’s decision is based on a test that differs from the one applicable in law and that has the effect of imposing an excessive burden on the employer, it does not fall within a range of “possible, acceptable outcomes which are defensible in respect of the . . . law” (*Dunsmuir*, at para. 47).

III. Conclusion

[81] For these reasons, I would allow the appeal in part.

[82] I would remit the grievance to another adjudicator to decide the case on the basis that the impugned directive does not infringe s. 7 of the *Charter* and therefore does not violate clause 6.01 of the collective agreement. However, unlike the Federal Court of Appeal, I would leave it to the new adjudicator to undertake the balancing of interests and reach his or her own conclusions on the issue of whether the employer acted reasonably, fairly and in good faith, in accordance with clause 5.02 of the collective agreement, in issuing the directive.

*Appeal allowed in part with costs to the appellant, MOLDAVER and
CÔTÉ JJ. dissenting in part.*

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