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Background Check Program a Reasonable Exercise of Management Rights

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In Canada, pre-employment background checks are generally permissible. With some exceptions in some provinces, these checks can include information about a candidate's employment history, education, credit, fingerprints, and criminal record. Though employers can generally conduct such checks on potential or current employees if they have their consent, the legitimacy and permissibility of the use of criminal background checks by employers has come under fire. In several recent decisions, Arbitrators and Courts have dealt with the question whether an employer's need to access this information outweighs an employee's right to privacy. The recent decision of Arbitrator Watters in [Re Diageo Canada Inc. and C.A.W.-Canada, Local 2098](#) (PDF) has added to the criminal background check dialogue.

Criminal Background Check Process

Criminal background checks are obtained by agencies of the Canadian Police Information Centre (CPIC), a national database of the RCMP. Maintained primarily for law enforcement purposes, the RCMP's database is the sole national database of criminal records, populated by CPIC agencies such as local police forces. Employers can obtain information about job applicants through a CPIC agency, either by contacting an agency directly or by using a commercial service provider. The most basic kind of CPIC check, also called a "Criminal Records Check", identifies whether an individual has a record of a conviction or a discharge in the database. To obtain more details of a conviction, an employer must send the individual to be fingerprinted.

Diageo's Program

In *Diageo*, the employer instituted a criminal background check program in response to the United States Customs-Trade Partnership Against Terrorism (C-TPAT) program. As part of its series of compliance standards, the C-TPAT Importer Security Criteria stated that consistent with foreign, federal, state and local regulation, background checks and investigations should be conducted for prospective employees. The Criteria also recommended periodic checks and reinvestigations of current employees based on cause and/or the sensitivity of the employee's position.

Diageo Canada Inc. enjoyed Tier 3 C-TPAT status, the highest rating under the C-TPAT. The company asserted that this resulted in fast-track movement of its goods into the United States and priority in terms of shipment of product. In order to maintain this status (rather than be downgraded to Tier 2 status), Diageo chose to implement background checks in response to the C-TPAT criminal background check requirements. The employer's background check program would apply to new employees and those transferring into C-TPAT sensitive positions. It would not apply to employees who had been with the company for more than 5 years, or who had been subject to a background check pre-hire. Results were assessed on a case-by-case basis, and pardoned criminal offences and provincial offences (e.g. traffic tickets) would not prevent an employee from working in any of the C-TPAT sensitive positions. Employees were entitled to appeal under the collective agreement if they were disadvantaged by the results of a check.

Notwithstanding all of Diageo's procedures, the union filed a policy grievance challenging the background check program.

The Decision

At the Arbitration, Diageo was unable to demonstrate that failing to conduct background checks would result in a downgrade of C-TPAT status:

- the opinion provided by U.S. Customs and Border Protection Agency stated that background checks were recommended, not required
- the opinion only suggested that failing to conduct background checks "might affect" the Tier 3 status
- it was also not clear how a downgrade in status would affect the movement of goods to the United States

In response, Diageo asserted that anything less than a best practice approach "could expose the company to an element outside of its control."

Arbitrator Watters decided that Diageo's proposed background check program was reasonable and was an appropriate exercise of management rights. He said that the company had legitimate business and operational reasons for adopting a background check policy in response to a risk of reduction of status. Arbitrator Watters accepted that a downgrade in C-TPAT status would likely impact the employer's business by way of increased screening, more intense security checks, and possible quarantine of goods. This would likely culminate in shipment delays, which would compromise the product quality in respect of certain brands with a finite shelf-life.

The Result

In the often discussed and [Ottawa \(City\) and Ottawa Professional Firefighters Assn. \(Re\) case](#) (PDF), another Ontario arbitrator rejected the use of periodic background checks of currently employed firefighters, noting that checks could only be permissible where they were justified by reasonable grounds. The decision of Arbitrator Watters has provided insight into the kind of potential business problems that could constitute such grounds. Although this decision arises in Ontario and in the unionized context, it could be persuasive to other decision-makers in other provinces.

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