

Re Diageo Canada Inc. and C.A.W.-Canada, Local 2098

[Indexed as: Diageo Canada Inc. and C.A.W.-Canada, Local 2098 (Re)]

File No. MPA/Y901598

Ontario
M.V. Watters

Heard: June 1, September 23, and November 6, 2009

Decision rendered: January 20, 2010

Management rights — Employer rules — Employer adopted policy requiring criminal background checks for employees bidding into security-sensitive positions — Policy complying with anti-terrorism program administered by United States Customs and Border Protection Agency — Reasonable for employer to adopt “best practices” policy to avoid security-related disputes with Customs and Border Protection Agency — Legitimate business and operational reasons supporting adoption of criminal background check policy.

Privacy — Searches — Criminal background check policy — Policy applying only to employees bidding into security-sensitive positions — Three categories of employees exempt under policy — Appeal mechanism under collective agreement if employee disadvantaged by results of criminal background check — Corporate-wide initiative — Employees at this site not singled out — Employer entitled to adopt policy subject to identified amendments.

Privacy — Statutory obligations — Criminal background check policy requiring employee’s consent before employer may embark on criminal background check — Refusal to consent not exposing employee to discipline or threatening their continuing status as employee — Policy compliant with provincial privacy legislation — Policy reasonable exercise of management rights and not contrary to collective agreement.

[See *Brown & Beatty*, 4:1520; 4:1554; 4:2326; 7:3625]

Cases referred to

Canadian National Railway Co. and C.A.W.-Canada (Re) (2000), 95 L.A.C. (4th) 341, 64 C.L.A.S. 21, [2000] C.L.A.D. No. 465

Greater Toronto Airports Authority and P.S.A.C., Local 0004 (Kosta) (Re) (2004), 135 L.A.C. (4th) 179, 79 C.L.A.S. 494

KVP Co. and Lumber & Sawmill Workers’ Union, Loc. 2537 (Re) (1965), 16 L.A.C. 73, [1965] O.L.A.A. No. 2

Ottawa (City) and Ottawa Professional Firefighters Assn. (Re) (2007), 169 L.A.C. (4th) 84, 92 C.L.A.S. 229; affd [2009] O.J. No. 2914

P.I.P.E.D.A. Case Summary #2002-65, Office of the Privacy Commissioner of Canada, August 14, 2002

Statutes referred to

Freedom of Information (Amendment) Act 2003, Number 9/2003

Freedom of Information Act, 1997, Number 13/1997

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Human Rights Code, R.S.O. 1990, c. H.19

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56

UNION GRIEVANCE concerning criminal background check policy.

F. Baloo and others, for the union.

M. Marcotte and others, for the employer.

AWARD

[1] This proceeding arises from a policy grievance filed by the Union on November 20, 2008. The material part of the grievance reads:

“We as CAW Local 2098 have a grievance under this collective agreement whereas: Diageo Amherstburg is insisting on going ahead with requesting criminal background checks for “Sensitive Roles”. This practise (sic) is a direct violation of Article #31 (Discrimination) and of our basic human rights in Ontario.”

[2] The above grievance was filed as a result of the following notice, which was posted in the plant on or about November 3, 2008:

“To: All Employees

From: Angelo DeMarco

Re: Change to the Bid Process for Customs Compliance

Date: October 31, 2008

The movement of goods across borders is a key element to our business and creates opportunities for avoiding costs if we are in compliance with customs regulations for expedited shipments. In order to maintain our preferred status, we need to ensure that we are meeting the compliance requirements. As a result we will need to make an adjustment to our job bidding process.

For bidding to sensitive roles in our facility (those roles that involve the movement or handling of finished goods, including liquid & any paper-work), it will require that we have completed a criminal background check on the applicant if they have not had a background check completed at their time of hire. A clean background will be required to be a successful applicant for the sensitive role. Employees currently in role or who have been with the organization for longer than 5 years are exempt from this process. Effective November 1, 2008 you will see a change to our job postings.

The roles that are considered sensitive include:

| Department | Role |
|------------------|-------------------|
| Casebond | Leadhand |
| Casebond | Lift Truck Driver |
| Casebond | Shunt Drivers |
| Casebond | MHCB Pool |
| Clerical Clerk | (Casebond) |
| Clerical Company | Excise Clerk |
| Clerical | Clerk Pool |
| Maturing | Bulk Spirits |
| Maturing | OTMM Pool |

In addition to changes in the Biding Process [sic], when we are required to hand piling loads (ie. France Loads), only General Help employees who have either had a background check at their time of hire or have been with the organization for longer than 5 years are eligible to work on such loads.

We thank you in advance for understanding the required change.”

The Employer initiated the above-described change to its practice in response to the Customs-Trade Partnership Against Terrorism (C-TPAT) program, administered by the U.S. Customs and Border Protection Agency (CBP). The nature of this program is set out below.

[3] Mr. Richard Dunn and Mr. Angelo DeMarco presented evidence on behalf of the Employer. Mr. Dunn has served as Diageo’s Director of Risk Management for North America since April, 2008. Prior to that date, he held several positions in the company’s Bailey’s operations in Ireland. Mr. Dunn has developed considerable expertise in risk management and compliance issues, and has served as the Chair of Diageo’s Global Risk Leadership Team. Mr. DeMarco has been the Human Resources Manager for the Employer’s Amherstburg, Ontario plant since September, 2006. In this capacity, he is responsible, inter alia, for labour relations, staffing, benefits administration and employee performance.

[4] Mr. Adam Hutchins presented evidence on behalf of the Union. Mr. Hutchins has worked for the Employer since August, 2001 in a number of hourly positions. He currently works as a Utility employee in the Casebond Department. Mr. Hutchins was the President of the Local at the time the instant grievance was filed.

[5] At the outset of the hearing, counsel for the Employer advised that there was no intent on the company’s part to violate the provisions

of the *Human Rights Code*, R.S.O. 1990, c. H.19. More specifically, she clarified that the new policy here in question does not apply to criminal offences for which a pardon has been granted nor to Provincial Offences. On the basis of this clarification, counsel for the Union advised that she was withdrawing any argument that the policy contravened the requirements of the *Code*. She further advised that, in the context of this proceeding, the Union was not taking any position with respect to the Employer's practice of conducting criminal background checks on new hires.

[6] The parties also agreed to bifurcate the hearing in the sense that they would first address whether the policy is consistent with the collective agreement and whether it is reasonable in all of the circumstances. They elected to defer consideration of how it was implemented and the positions to which it applies.

[7] Mr. Dunn testified at length about the C-TPAT program. His evidence may be summarized as follows:

- (i) C-TPAT is designed to broaden supply chain security with respect to goods being exported to the United States of America. The program was started by CBP in or about 2004. At that time, any industry exporting product to the U.S. was asked to complete a questionnaire. The process was then voluntary, as failure to complete the document did not limit a company's ability to export into the U.S. During this initial phase of the program, CBP started to develop a more formal structure, including the identification of consequences which could result from compliance or non-compliance;
- (ii) The structure, ultimately developed, identified three (3) tiers or levels of designation. Tier 3 status is accorded to those companies validated by CBP and which employ best practices. Tier 2 status is applied to companies validated by CBP and, lastly, Tier 1 status is given to companies accepted into the program but not validated. Tier 3 status is the highest rating under C-TPAT. Mr. Dunn testified that as you move down from there, goods are subjected to greater security inspection at U.S. ports. Companies below Tier 1 are considered to be non-compliant;
- (iii) C-TPAT has developed a series of compliance standards relating to a broad range of security issues, one of which

speaks to background checks and investigations. Its ‘Importer Security Criteria’ references the following standard on this aspect of security:

“Consistent with foreign, federal, state and local regulations, background checks and investigations should be conducted for prospective employees. Once employed, periodic checks and reinvestigations should be performed based on cause and/or the sensitivity of the employee’s position.”

In the same vein, C-TPAT’s ‘Supply Chain Security Best Practices’ presentation sets out the following standard under the heading of ‘Personnel Security’:

“• Documented policies and procedures

- Comprehensive background/criminal checks for employees, contractors, temps, and vendors, as permitted by law.”

For purposes of C-TPAT, employees in security sensitive roles are those who load and handle product and who prepare and control related paperwork;

- iv) CBP conducts periodic on-site audits to assess the compliance status of affected companies. Mr. Dunn advised that sites are chosen for audit based on two (2) criteria, the first being volume of exports to the U.S. and the second being the extent of geographic risk;
- v) The Employer’s Shield Hall site in Glasgow, Scotland was audited in August, 2006 and its Bailey’s operations in Ireland were audited in April, 2008. Diageo received a Tier 3 designation from both audits. Criminal background checks were not being performed at either site at the time of the audits given the local law applicable. In both jurisdictions, an employee is legally entitled to refuse an employer’s request for a criminal background check; and
- vi) Under the C-TPAT program, CBP views a global company, such as Diageo, as a single entity. As a consequence, the rating received at one location is applied across its world-wide operations. More specifically, CBP considers the outcome at a single location as a reflection of the nature of a company’s operations globally. Simply put, a negative audit at one (1) specific site impacts the certification for the entire company globally.

[8] It was the thrust of Mr. Dunn’s evidence that the Employer attempts to meet C-TPAT’s best practices standards to ensure, to the extent possible, that Diageo maintains its Tier 3 status. He stated that

Tier 3 status is vitally important to the company as a lesser designation could translate into less access to the fast track movement of goods and less priority in terms of the shipment of product. In his judgment, a reduction in status could lead to increased screening, more intensive security checks and possible quarantine of product. Mr. Dunn acknowledged that he could not be certain as to how CBP would respond to a Tier 2 designation. He expressed the concern, however, that to adopt anything less than a best practice approach could expose the company to “an element outside of its control”. Simply stated, Mr. Dunn wishes to maintain the Employer’s current tier status in order to avoid any undue interference or delay in the movement of product from the plant to the marketplace.

[9] Mr. DeMarco advised that the Employer started to use pre-employment criminal background checks for new hires in the latter part of 2007. His first exposure to C-TPAT was by way of a presentation delivered by Ms. Melanie Scheaffer in mid-2008 to the North American Human Resources Team. Ms. Scheaffer reports to Mr. Dunn. Mr. DeMarco testified he knew, on the basis of the aforementioned presentation, that there was a “compliance gap” at the Amherstburg plant, as criminal background checks were not then required for employees moving into security sensitive roles. It was his evidence that Mr. Todd Cunningham, Director of Labour Relations for North America, was responsible for developing a plan of action for the sites most affected. Mr. DeMarco stated, in this regard, that the Amherstburg plant is the most significant site in Canada vis-à-vis C-TPAT given that eighty-three percent (83%) of its volume is shipped to the U.S. market. The Employer operates other facilities in Gimli, Manitoba and in Dorval and Valleyfield, Quebec. I was left with the impression that their exports to the U.S. are substantially less than from Amherstburg.

[10] Mr. DeMarco reviewed all of the roles at the Amherstburg plant and identified those that were security sensitive for purposes of C-TPAT. This task was done in consultation with other members of management. Ultimately, it led to the identification of the roles listed in the posted notice. A slide presentation about C-TPAT, which was prepared by Mr. Cunningham, was shown to the leadership of the Local Union in August, 2008. A revised version of same was given to Mr. Hutchins in September, 2008. The latter presentation stated that criminal background checks would not be required of

employees who had such a check completed at the time of their hire or of those employees who had been with the company for more than five (5) years. Shortly after the second presentation, Mr. Hutchins delivered the following notice to Diageo:

“We as CAW LOCAL 2098 hereby put you on notice that the proposed CT-PAT program is a direct violation of our collective agreement under ART#31 DISCRIMINATION. In this article RECORD OF OFFENCES is clearly stated. Also by doing this you are in direct violation of our basic HUMAN RIGHTS CODE which under FREEDOM FROM DISCRIMINATION you may not hold RECORD OF OFFENCES against anyone working in Ontario.

We as the CAW and with the CAW NATIONAL OFFICE are requesting that you cease and desist this discriminatory practice or you will force us to take further action.”

[11] Mr. DeMarco stated that, within a few days of receiving the above notice, he provided Mr. Hutchins with excerpts from the *Human Rights Code* and advised him, that consistent therewith, the Employer would not hold a pardoned or provincial offence against any employee. The revised policy was subsequently drafted by Mr. DeMarco and Mr. Cunningham. As mentioned earlier, the document dated October 31, 2008 was posted on or about November 3, 2008. Mr. DeMarco acknowledged that it was an oversight not to have specifically excluded pardoned or provincial offences in the body of the policy. At about this same time, the Employer prepared a Consent Form to be signed by applicants for security sensitive positions. The form references “record of Criminal Code convictions for which a pardon has not been granted”. It further states that the consent and investigation process is “in compliance with all applicable human rights”.

[12] The bargaining unit encompasses somewhere between three hundred (300) and three hundred and twenty (320) active employees. Mr. DeMarco estimated that the contested policy could potentially impact approximately one hundred (100) employees, these being persons who have not had a prior criminal background check, have worked for the company for less than five (5) years and are not currently in a security sensitive role. It was the substance of Mr. DeMarco’s evidence that the policy would not apply to an employee presently in a security sensitive role who wishes to transfer laterally to another similar role. On his interpretation, the benefit of the grandfathering provision is carried forward into the new position. Lastly, Mr. DeMarco advised that since the new policy was implemented,

there has only been one (1) security sensitive position posted in respect of which an employee was asked to consent to a criminal background check.

[13] Mr. DeMarco advised that the section in the new policy relating to France Loads is no longer part of either the company's policy or its practice. These loads, which were infrequent, were done by hand rather than by lift truck. The necessary work was performed on a seniority basis by the pool of employees who had more than five (5) years tenure with Diageo. Mr. DeMarco explained that the initial inclusion of France Loads in the policy was not related to the C-TPAT program. Rather, it was inserted because of a similar European initiative. Given Mr. DeMarco's evidence on this point, I will construe the policy here in issue as if it did not reference France Loads.

[14] Mr. Hutchins testified that the instant grievance was filed as the Union believed the new policy violated the *Human Rights Code* and article 31 of the collective agreement. It was the view of the Union, at the time, that the Employer was not entitled to the type of private information being asked for and that the policy was indeed unnecessary. Mr. Hutchins stated that the membership were concerned that the requirement for a criminal background check could impede their advancement within the company given that security sensitive positions are higher paying. He also referenced the relatively large number of employees with less than five (5) years of seniority. Mr. Hutchins advised that these employees are mostly in the General Help or Machine Operator classifications. Lastly, Mr. Hutchins did not read the policy as excluding employees who move from one (1) sensitive role to another. Put another way, he thought that employees are only grandfathered for the security sensitive role they are in. In cross-examination, he agreed that the policy, as written, is not supportive of that belief.

[15] Following the filing of the grievance, Ms. Scheaffer forwarded an email to Mr. George Rudy, Diageo's contact with CBP, to inquire as to what the effect would be if the Employer did not pursue criminal background checks. More specifically, she asked if Diageo would lose its certification, be reduced from Tier 3 to Tier 2 status, be given a period of time to change such practice, or be presented with some other option. Mr. Rudy's reply of April 3, 2009 reads, in part:

“It probably won’t affect anything for right now. Back ground checks on employees are not required, but they are recommended. I would think that in the future re-validation it might affect the tier status of your company being that back ground checks are pretty much a standard across the board for higher tiered companies. You won’t lose your certification. I have seen where in some countries where criminal b/g checks are not permitted, the company would ask the employee to voluntarily turn in a police record indicating their current status. Also, work references, and telephonic contacts of other reference checks also paint a pretty good picture of an employee if the criminal b/g can’t be conducted.”

On my reading, this response seems to indicate that the Employer’s tier status could be reduced in any future revalidation.

[16] Before turning to the submissions of the parties, I wish to summarize the evidence as to the application of the policy relating to criminal background checks. First, on its face, the policy exempts those employees who have had a pre-employment criminal background check, who are already in a security sensitive position, or who have more than five (5) years of service with the company. In this regard, I am satisfied that it exempts employees already in a security sensitive position who wish to transfer into a similar role. Second, it is now a matter of record that the policy has no application to criminal offences for which a pardon has been granted nor to Provincial Offences. Third, the criminal background checks are done for the prior seven (7) year period. Four, if a check is not clean, and the Employer is uncertain as to whether the conviction has safety implications, it will seek the advice of its risk management group. Five, an “unclean” background check will not result in the affected employee losing his or her employment. Instead, they will simply be ineligible to move into the sensitive role and will remain in their current position. Six, the policy does not apply to France Loads. Seven, any information obtained through the background check will only be accessible to Mr. DeMarco and his assistant on site and will be kept in a locked file. The information will not be available to line Managers. Lastly, an employee may complain through the grievance procedure if they do not receive a promotion because of the results of a criminal background check. I note the comment of Employer counsel that the company would be prepared to draft an internal appeal process to be utilized prior to resort to the grievance procedure.

[17] Generally, it is the position of the Union that the Employer’s policy relating to the requirement for criminal background checks, in respect of employees seeking to post into security sensitive roles, is

fundamentally flawed and constitutes an unwarranted and unjustified interference with the privacy rights of such employees. From the Union's perspective, the latter rights far outweigh any interest the Employer may have. More specifically, counsel for the Union challenged the policy on the following four (4) grounds:

- i. The policy represents an unreasonable exercise of management rights and is inconsistent with the requirements set out in *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson);
- ii. The C-TPAT program does not require criminal background checks in Ontario;
- iii. Even if such checks are required, CBP would waive the requirement were I to conclude that they are "illegal" in the sense they violate the collective agreement; constitute an unreasonable exercise of management rights; or breach applicable privacy legislation. In this regard, counsel noted that C-TPAT accommodates local laws; and
- iv. Even if the policy is warranted in the circumstances, it is unreasonable on its face.

[18] Counsel for the Union submitted that the contested policy is not sufficiently related to any significant interest of the Employer. She observed that the policy was implemented only because of C-TPAT and that, under such program, there is no requirement to have a criminal background check policy in place. On her analysis, C-TPAT merely recommends the conduct of this type of check and that it contemplates the use of alternate measures if local laws do not permit same. Counsel observed that Diageo was audited in both Scotland and Ireland and passed "with flying colours", even though criminal background checks were not performed in those jurisdictions because of local law. She further asserted that participation in C-TPAT is voluntary rather than mandatory. Additionally, counsel argued that it is "pure speculation" the company could lose its Tier 3 designation by choosing not to perform criminal background checks on the affected employees working in the Amherstburg plant. She suggested that no firm evidence was presented to support Mr. Dunn's statement that the Employer's business would be adversely affected through additional delay in moving goods across the international border if it was downgraded to Tier 2 status. Simply stated,

I was asked to find that any business interest the Employer may have is outweighed by the privacy interests of its employees.

[19] Counsel for the Union referenced numerous provisions of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. Both pieces of legislation provide that, subject to limited exceptions, personal information, including the criminal history of an individual, shall not be disclosed without the prior written request or consent of the individual. It was counsel's submission that the release of such information would amount to an unjustified invasion of personal privacy under the above-mentioned legislation. Counsel compared the Ontario legislation to the Irish *Freedom of Information Act, 1997*, as amended by the *Freedom of Information (Amendment) Act 2003*. On her reading, the Ontario and Irish legislation are substantially similar. She noted that under the latter, an employer can ask an employee to consent to a criminal background check, but the employee is entitled to refuse the request. Counsel emphasized that Diageo received Tier 3 status in both Ireland and Scotland, notwithstanding that criminal background checks were not performed at those locations. I was, as a consequence, invited to conclude that the Employer could in like fashion use the Ontario legislation as the basis for not engaging in such checks in Ontario and that, similarly, such a response would not impact the company's Tier status.

[20] Counsel submitted that if criminal background checks are, in fact, required under the C-TPAT program, CBP would likely waive the requirement were I to find that it is inconsistent with, or in breach of, the collective agreement and/or Provincial privacy legislation. It was her submission that such a finding would be tantamount to "local law" for purposes of the program. Counsel argued that, as was the case in Scotland and Ireland, Diageo's Tier status would not be jeopardized for compliance with local law.

[21] Lastly, counsel argued that even if the policy providing for criminal background checks is warranted, the policy is unreasonable on its face. She asserted that the policy is unreasonable for the following reasons:

- i. It captures offences of any nature without any temporal limit. Counsel suggested that the policy should articulate what are

- considered to be relevant offences and establish the time period in respect of which the background check is performed. On a similar point, she observed that there is no element of discretion built into the policy, as it requires “a clean background”. On her analysis, an employee could be disadvantaged by a conviction for an offence entirely unrelated to their employment;
- ii. It does not distinguish between pre-hires and new employees. Counsel suggested that some lesser period of review should be established for existing employees;
 - iii. It is vague and unpredictable and is open to arbitrary and inconsistent decision making. Counsel observed that the consequences to an employee of having a criminal offence on record is unclear. She further noted that the policy is unfair, as it serves to limit advancement into security sensitive, and higher paying, roles for those employees with less than five (5) years of service;
 - iv. Insufficient privacy safeguards are built into the policy. In this regard, counsel argued that the policy fails to address the following matters: who conducts the criminal background checks; how the resulting information is communicated internally and who has access to same; how the information is stored and how long it is kept on file; and how the information is subsequently used; and
 - v. There is no appeal mechanism internal to the policy.

[22] The Union cited the following authorities in support of its position that the policy should be declared void and unenforceable: *Re Ottawa (City) and Ottawa Professional Firefighters Assn.* (2007), 169 L.A.C. (4th) 84 (M.G. Picher); *City of Ottawa v. Ottawa Professional Firefighters Association*, [2009] O.J. No. 2914 (Div. Ct.); *Re Canadian National Railway Co. and C.A.W.-Canada* (2000), 95 L.A.C. (4th) 341 (M.G. Picher); *KVP Co. Ltd. v. Lumber and Sawmill Workers' Union, Local 2537*, previously cited.

[23] It is the Employer's position that it had a legitimate rationale for implementing the policy requiring criminal background checks of employees bidding on sensitive roles at the Amherstburg plant. I was asked to focus on the evidence of Mr. Dunn concerning the potential consequences that might ensue from the loss of Tier 3 status and, more specifically, the adverse impact such change could

have on the flow of product to the company's main market. To reiterate, it was Mr. Dunn's evidence that additional delay could result in market loss and, to a lesser extent, the spoilage of certain products. Counsel for the Employer acknowledged that Mr. Dunn could not be certain about the extent of the delay which might occur, as that is a matter within the knowledge and control of CBP. She asserted, however, that he had a legitimate concern about the prejudicial consequences which could result from increased delay in the shipment of product across the international border. In the words of counsel, Mr. Dunn gave the best evidence he could in all of the circumstances.

[24] Counsel for the Employer referenced the unique concerns affecting the Amhersburg facility. As previously mentioned, the bulk of its product is exported to the United States. Additionally, it is located very close to the border. In counsel's submission, it was reasonable, as a consequence, to introduce the policy at the Amherstburg plant.

[25] On the counsel's reading, the C-TPAT program speaks to more than just recommendations or guidelines. She noted that its documents and Validation Reports focus heavily on best practices. I was asked to conclude that the best way for the company to remain compliant and to maintain Tier 3 status is for it to continue to incorporate best practices, as defined by C-TPAT, into the activities at its plants. Counsel repeated that it is very difficult to predict how CBP would react to a decision not to require criminal background checks of employees in safety sensitive roles. From her perspective, enacting the policy was preferable to having to react to a crisis in the event Tier 3 status was lost because of a failure to conduct such checks.

[26] Counsel stressed that the policy incorporates a consent component, as an employee's consent is a precondition for the Employer to conduct a criminal background check. She argued that this requirement renders the policy compliant with the Ontario privacy legislation referenced above. She asked that I devote more attention to that legislation than to the laws of Ireland. Counsel noted that the sole consequence for an employee who does not consent is that they will not form part of the candidate pool for the security sensitive position. Such an employee will simply continue on in their current job as before.

[27] The Employer accepts that a criminal background check involves the screening, and potential acquisition, of sensitive information. Counsel submitted, however, that such a check must be balanced against the company's legitimate business needs in the ultimate assessment as to the validity of the policy. Indeed, both parties to this dispute agree that I must weigh the competing privacy and business interests in reaching a decision on the instant grievance. Counsel argued that the following features of the policy should be given considerable weight in applying a balancing of interests approach: employees with more than five (5) years of service are exempt from its application; it is restricted to security sensitive roles, and does not apply to all jobs; and any employee currently holding a security sensitive position is "grandfathered" and is, therefore, exempt from the requirement. Lastly, counsel noted that the Employer does require pre-employment criminal background checks. She suggested that this practice will reduce the impact of the contested policy going forward.

[28] Counsel submitted that the policy is reasonable as per the requirements set out in the *KVP Co. Ltd.* award. It was her assessment that the policy is not inconsistent with any provision of the collective agreement. She further referenced the fact that it was discussed with the Union at some length prior to its implementation. Counsel also noted that no disciplinary sanction is imposed on an employee for failing to provide the requisite consent.

[29] Counsel acknowledged that the wording of the policy, as posted, could have been clearer. By way of illustration, she stated that it could have identified the Employer's intent to comply with both the *Human Rights Code* and article 31 of the collective agreement. Counsel advised that the Employer was open to amendments with a view to making the policy clearer to the employees working in the plant. She indicated, in this regard, that the Employer is prepared to incorporate the following items into the policy for purposes of clarity:

- i. The policy is to be applied in a manner consistent with the *Human Rights Code*;
- ii. Employees currently in a security sensitive role are exempt from the requirement under the policy if they apply for another similar role;

- iii. The results of any criminal background check will be reviewed on an individual, or case by case, basis to determine if the employee is suitable for a security sensitive role. Counsel cautioned that it would be impractical to establish detailed criteria as to how decisions are to be made;
- iv. The company will treat the information obtained in a confidential manner; and
- v. While any adverse decision stemming from a criminal background check may be grieved, the Employer is amenable to drafting an internal appeal process to be utilized prior to the filing of a grievance.

Counsel also invited this Arbitrator to suggest any further guidelines that might be appropriate. It was the thrust of her submission that any deficiencies in the policy, as worded presently, should not render it void, particularly so given that the Union was provided with considerable information about what the policy entailed.

[30] The Employer cited the following authorities in support of its position that the policy should be sustained as reasonable and legitimate: PIPEDA Case Summary #2002-65; *Re Greater Toronto Airports Authority and P.S.A.C., Local 0004 (Kosta)* (2004), 135 L.A.C. (4th) 179 (Brent).

[31] Article 31 of the collective agreement reads:

ARTICLE 31- DISCRIMINATION

The Company and the Union agree that they will not discriminate against any employee by reason of ancestry, age, marital status, sex, race, creed, colour, national origin, record of offences, family status, political or religious affiliations, disability, sexual orientation nor by reason of Union membership or status. The parties agree to abide by the provisions set forth in the Ontario Human Rights Code.

[32] I accept that C-TPAT is a voluntary program in the sense that companies, such as Diageo, are free to decide whether they will participate in same. It is clear, however, that there are consequences flowing from both non-involvement in the program and failure, once involved, to satisfy the standards established thereunder. The negative consequence in both instances is that product exported to the United States will likely be subject to increased screening, more intense security checks, and possible quarantine. It is a matter of public record that the United States government is materially more security conscious in the post 9-11 era and that it

responds aggressively to perceived weaknesses in border security. The creation of C-TPAT itself reflects this new world reality.

[33] Once the Employer elected to enter the program, I think it reasonable for the company to want to achieve, and then maintain, Tier 3 status through the adoption of the best practices identified by C-TPAT. While it is difficult to precisely gauge how CBP would respond to a change to Tier 2 status, I am inclined to accept the Employer's view that a reduction in Tier status, as a consequence of a decision not to require criminal background checks for employees in sensitive roles, would likely result in increased screening of the company's product and resulting delay in the shipment process. I was given no reason to reject Mr. Dunn's evidence that delay at the ports of entry into the United States could result in the loss of market share as consumers move to the available product of some other competitor. I further note his testimony that delay could compromise product quality in respect of certain brands with a finite shelf-life.

[34] I consider it material that the Employer, since the inception of C-TPAT, has not experienced significant problems in the shipment of product into the United States. In this period, as mentioned above, the Employer has sought to comply with the best practices identified by C-TPAT. I can readily understand why Diageo would not want to engage in a course of action that could jeopardize its Tier status and lead to the potential adverse consequences referenced earlier. Simply put, I conclude that the Employer has reasonably decided to continue in a way which has successfully enabled it to avoid security related issues or disputes with CBP.

[35] While there is no certainty as to what location C-TPAT may select for the next Diageo audit. I cannot find fault with Mr. Dunn's assessment that the Amherstburg plant could very well be the next target given the volume of product shipped from there to the United States market, its proximity to the international border, and the fact that the two (2) prior audits were done at European facilities. In view of the impact a negative audit, or a reduction in status, at the Amherstburg plant could have on Diageo's global operations, I can readily understand the company's logic in wanting to pursue a best practices approach. This is particularly so given the extent of product shipped to the United States from all of the company's global sites. In this regard, I am satisfied that Mr. Dunn and the Employer were motivated to enact the contested policy in response

to legitimate business concerns. I also note Mr. Dunn's evidence that he expects the next audit to occur sooner rather than later.

[36] In summary, I find that legitimate business and operational reasons support the creation and implementation of the criminal background check policy at the Amherstburg facility. In my judgment, the Employer was entitled to engage in this initiative as a proper exercise of its management rights.

[37] I have not been persuaded that the Employer's policy violates Provincial privacy legislation. To the contrary, the policy is compliant therewith as an employee must provide consent in order for the Employer to embark on a criminal background check. This case is distinguishable from the situation set out in the *Ottawa Professional Firefighters Association* award relied on by the Union. In that instance, the employees were subject to a mandatory requirement to submit to a criminal background check every three (3) years. It raised the issue of whether the continued renewal of an initial pre-employment consent to such a check could be said to be a condition for keeping the job. Here, the criminal background check is not mandatory and a refusal to consent to same does not render the employee subject to discipline nor does it threaten their continuing status as an employee. At most, the refusal to provide consent simply means that the employee remains in their existing position and does not move into the pool of candidates eligible for a security sensitive role.

[38] I recognize that the Employer was able to obtain and then retain Tier 3 status in the prior two (2) audits, notwithstanding that criminal background checks were not done in Scotland and Ireland due to local law. While the Irish legislation would appear similar to the Ontario privacy legislation, the Employer here is not inclined to incur the risk of a reduction in status that could arise from a less than favourable audit at the Amherstburg operation. After reviewing all of the circumstances, I am not prepared to second guess that risk assessment.

[39] In arriving at the conclusion that the policy of conducting criminal background checks is reasonable, and that it reflects an appropriate exercise of management rights, I have also considered the following:

- i. The policy applies to sensitive roles, rather than to all of the positions at the plant. As the policy now reads, it applies to nine (9) roles. Put another way, the policy does not apply to

- all employees but, instead, only has application to those bidding on sensitive roles;
- ii. The policy, on its face, sets out three (3) categories of employees who are exempt from its application, these being: (1) those employees who underwent a criminal background check prior to their hire; (2) employees who have been with Diageo for longer than five (5) years; and (3) those employees currently in a security sensitive role;
 - iii. There is an appeal mechanism under the collective agreement if the result of a criminal background check disadvantages an employee. An employee so affected may proceed with a grievance and may challenge, inter alia, whether a particular offence on record is relevant to the security sensitive role being sought. I note, at this juncture, the Employer's willingness to consider the implementation of an internal appeal mechanism that could be resorted to prior to the filing of the grievance; and
 - iv. The policy here in question reflects a Corporate wide initiative. The Employer, ultimately, intends to also implement it at Dorval, Valleyfield and Gimli. I was told that, at present, all the employees in sensitive roles at those locations have been with the company for more than five (5) years. The future intent of the Employer to extend the policy to these other sites is some evidence that the employees at Amherstburg have not been singled out for special treatment.

[40] In the final analysis, I have not been persuaded that the Employer's policy is contrary to any provision of the collective agreement or that it violates Provincial privacy legislation. Additionally, I am satisfied that it generally conforms to the requirements set out in the *KVP Co. Ltd.* award.

[41] The Employer has fairly acknowledged that the policy, as initially crafted, is lacking in clarity. As stated by counsel, for purposes of greater clarity, the Employer is prepared to incorporate the items listed in paragraph [29] of this award into the policy. While it is arguable that these items should have been included within the policy from the outset, I do not think that the failure to do so renders it fundamentally flawed or void. Ultimately, I conclude that the Employer is entitled to conduct criminal background checks on

employees bidding on security sensitive roles. The Employer is, however, ordered to amend the policy to include the matters listed in paragraph [29]. I note that these matters, generally, reflect how the policy is currently being administered and applied, as described in paragraph [16] of this award. I will remain seized with respect to the implementation of this decision and the other issues which the parties have agreed to defer.

[42] For all of the above reasons, this aspect of the grievance is denied.