Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

General Teamsters, Local Union 979,

applicant,

and

Garda Security Screening Inc.,

respondent.

Board File: 31914-C
Neutral Citation: 2017 CIRB **856**
June 30, 2017

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Messrs. André Lecavalier and Gaétan Ménard, Members.

Parties' Representatives of Record

Mr. Paul McKenna, for General Teamsters Local Union 979;
Mr. Michel Brisebois, for Garda Security Screening Inc.

These reasons for decision were written by Ms. Ginette Brazeau.

I. Nature of the Application

[1] On December 8, 2016, the General Teamsters Local Union No. 979 (Teamsters or the union) filed an application, pursuant to section 24 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), seeking to be certified as bargaining agent for Check Point Managers (CPMs) and Quality Leads (QLs) working for Garda Security Screening Inc. (Garda or the employer) at the Winnipeg International Airport (WIA).

[2] The employer opposes this application on the basis that the incumbents of the positions affected by the proposed bargaining unit are not employees within the meaning of the *Code*. It submits that the CPMs and QLs perform managerial functions and have access to confidential information.

[3] On December 19, 2016, the Board ordered a representation vote and, noting the employer's objection to the proposed bargaining unit, ordered that the ballots be sealed and segregated until that matter could be determined.

[4] On April 3, 2017, the Board wrote to the parties and requested their comments on the Board's recent decision in *G4S Secure Solutions (Canada) Ltd.*, 2017 CIRB 850 (G4S or *RD 850*) and the relevance, if any, of that decision to the present application. In G4S, the Board held a hearing in a certification application for a group of Service Delivery Managers and Operations Centre Managers which appeared to the Board to be very similar in nature to the positions of CPMs and QLs that are subject of the present application. The parties responded to the Board's request with helpful submissions, the last of which was received on April 28, 2017. Having reviewed the parties' submissions and all the materials on file with respect to this application, the Board issued a bottom-line decision on May 8, 2017, finding that the CPMs and QLs are employees within the meaning of the *Code* and that the unit applied for in the present application is appropriate for collective bargaining. The Board also ordered the ballots to be counted. Having received the support of the majority of employees, the Teamsters was certified by the Board to represent the unit in question (order no. 11142-U).

[5] The following are the reasons in support of the Board's decision concerning the employee status of the CPMs and the QLs covered by the certification application.

II. Background and Facts

[6] Garda is a federal corporation offering airport security screening services at the WIA pursuant to a services agreement with the Canadian Air Transport Security Authority (CATSA).

[7] On or around October 6, 2011, Garda acquired Aerogard Inc. (Aeroguard), which previously held the airport security screening contract with CATSA at the WIA. Garda concluded its own services agreement with CATSA and since November 1, 2011, has been in charge of all aspects relating to security screening services at the WIA. As the provider of screening services, Garda's activities at the WIA consist mainly of the management of all aspects of human resources for the purpose of:

- Monitoring and managing the screening services delivered to CATSA;
- Ensuring the efficiency of the pre-boarding screening;
- Providing qualified personnel to deliver screening services; and
- Complying with CATSA's policies, procedures and operational requirements with respect to screening.

[8] Under Aerogard, the security officers working at WIA were structured into two bargaining units represented by the Teamsters; a "screeners unit" covered by the Board's order no. 8783 U and a "supervisors unit" covered by Board order no. 8988-U. Following the sale of business from Aerogard to Garda, the Teamsters sought a successorship declaration with this Board pursuant to section 44 of the *Code*. In the course of those proceedings, the parties negotiated a memorandum of agreement, which in part, jointly requested a merger of the two aforementioned bargaining units into a single bargaining unit that excluded CPMs. The Board considered the joint request and, on December 8, 2011, certified an "all employee" bargaining unit that excluded CPMs and those above the rank of CPM (Board order no. 10193-U).

[9] This application is for the certification of a separate bargaining unit of employees composed of CPMs and QLs who supervise approximately 200 Screening Officers (SOs). The positions affected by this application consist of sixteen (16) CPMs and three (3) QLs.

III. Positions of the Parties

A. The Employer

[10] The employer objects to this application and argues that CPMs and QLs are not employees within the meaning of the *Code*. It submits that the CPMs and QLs perform managerial functions and have access to confidential information.

[11] Garda explains that CPMs and QLs perform managerial functions every day. It states that CPMs and QLs are not only expected to supervise the SOs activities, but also to manage and evaluate every part of their routine. It submits that CPMs effectively manage the screening operations at the WIA by coaching, mentoring, disciplining and ensuring the performance of the SOs pursuant to the strict regulatory guidelines established by CATSA. QLs supervise the work of the SOs and report on infractions committed by SOs. In addition, QLs are involved in developing, issuing and tracking corrective action plans based on performance evaluations and

incidents. In short, Garda submits that the CPMs and QLs are its management representatives both in the eyes of CATSA and in relation to the overall work of the SOs.

[12] Garda acknowledges that the Board has historically interpreted the managerial exclusion narrowly by focusing on the independent decision-making responsibilities of the position. But, in this case, the employer urges the Board to adopt a wider approach that takes into account the context of airport security operations and its interplay with national security interests in Canada. In very detailed submissions both in response to this application and to the Board's request for comment on *RD 850*, Garda stresses the importance of considering the organizational context and operational realities affecting Garda's mandate from CATSA. Garda essentially argues that the unique environment in which its business operates lowers the threshold of independent decision-making responsibilities required for excluding positions on the basis of their involvement in managerial work. In the employer's view, the reasoning in *RD 850* is flawed because the Board failed to properly consider the context of airport security operations and the growing concerns over national security when it evaluated the managerial functions of the Service Delivery Managers working at the Vancouver International Airport.

[13] Highlighting the ever-increasing risk of terrorism, Garda explains that it plays a critical role in ensuring the safety and security of the travelling public. It asserts that CPMs and QLs are the eyes and ears of the business in ensuring high levels of surveillance in a dangerous world. The employer explains that the CPMs and QLs do more than mere supervision of the SOs work. Among other things, it submits that their involvement in generating incident reports and other workplace observations play a major role in the disciplinary process for their subordinates, in evaluating termination cases and ultimately, in protecting the public. Citing *Alberta Wheat Pool*, 1999 CIRB 34, the employer also submits that their exclusion from any bargaining unit representation is necessary so as to avoid being placed in a conflict of interest between their duties to their employer and their loyalty to other union members. Because the security stakes are so high, Garda invites the Board to deviate from the traditional analysis that stems from its jurisprudence for evaluating managerial exclusions and to consider the safekeeping role that CPMs and QLs play in protecting our national borders from terrorist threats.

[14] Garda also submits that CPMs and QLs cannot be deemed to be employees in light of their access to confidential information. Garda explains that in order to conduct their performance appraisal of SOs, the CPMs and QLs regularly use software applications that contain personal information and records of all Garda employees. The employer submits that the nature of the

information on this software includes not only personal information, but also information on competence, performance and grievance procedures; all of which, in its view, is directly relevant to industrial relations and creates a conflict with Garda's interest. It suggests that a unionized person holding this type of information would be tempted to use it to their advantage, for example through collective bargaining. In Garda's view, the CPMs and QLs should be denied employee status on the basis of their access and regular contact with this information. It states that applying the exclusion for persons employed in a confidential capacity is the only way this information can be properly secured.

[15] Finally, Garda asserts that when the parties negotiated the memorandum of agreement requesting the merger of the two former bargaining units into one, neither the employer nor the Teamsters considered that the CPMs were employees under the *Code*. According to Garda, this is why the CPMs were specifically excluded from the Board's order no. 10193-U.

B. The Applicant Union

[16] The union states that it has a history of representing workers who supervise the pre boarding screening operations at the WIA. Specifically, the Teamsters explain that in addition to holding the bargaining unit rights for the screeners unit working under Aerogard from 2005 to 2011, it also represented a unit of supervisors composed of Service Delivery Manager's (SDMs). The union states that during that time, issues relating to conflicts of interests never arose, even though the unionized SDMs supervised the unionized screeners.

[17] Contrary to Garda's assertion that neither it nor the Teamsters considered CPMs to be employees under the *Code*, the union submits that the employer mischaracterized the circumstances predicating the joint request that was filed to the Board over the course of the successorship proceedings. The union states that over the course of the sale of business from Aerogard to Garda in the fall of 2011, it received notice from Garda that the duties of the CPMs were going to extend beyond those that had been previously assigned to the SDMs. In light of this, the union decided to wait and see how the actual duties of the CPMs would evolve and therefore agreed, at that time, to exclude the CPMs from the screeners unit. In the union's view, this does not amount to conceding that CPMs and QLs are not employees for the purpose of the *Code*.

[18] The union notes that Garda raises concerns over national security and terrorism in the airport security industry, urging the Board to consider a broad interpretation of the concept of

management functions. The union submits that the Board should not deviate from its established jurisprudence for determining employee status within the meaning of the *Code*. In the Teamster's view, there is no nexus between the unionization of front-line supervisors, such as the CPMs and QLs, and an increased danger to the public. Relying on *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, 2015 SCC 1, the union submits that Garda's views on unionization and the purported effects of unionization and the collective bargaining process on public safety are outdated. The Teamsters also take issue with the series of broad, hypothetical and unsubstantiated assertions contained in the employer's response that suggest unionized personnel 'must' be excluded from 'any' bargaining unit in order to avoid being placed in a conflict of interest between their duties to the employer and their loyalty to union members. In this regard, the union submits that section 27(5) of the *Code* displaces the employer's outdated views. The union argues that since Parliament included section 27(5) of the *Code* to endorse the unionization of supervisory personnel, there has been a clear trend in the Board's case law to extend bargaining unit rights to the first echelons of management. The union also points to *Cominco Ltd.* (1980), 40 di 75 (CLRB no. 240) to argue that the Board has previously dealt with the notion of conflicting interests and discussed the criteria that should be weighed before concluding that competing interests rise to a level that would warrant the denial of employee status.

[19] The union further argues that the actual duties and responsibilities of the CPMs and QLs are akin to the numerous types of front-line supervisors who have been considered employees by this Board. Firstly, the union suggests that the CPM duties are very similar to those that were previously performed by SDMs under Aerogard, when those employees were certified under Board order no. 8988-U. Secondly, the union argues that CPMs and QLs essentially play an "observe and report" role throughout the disciplinary and performance appraisal processes, with limited independent authority to decide on these matters. While the union concedes that on rare occasions QLs may be asked to recommend a certain level of discipline for a particular incident, in its view, this is only meant to ensure consistency with past levels of discipline for similar conduct. Finally, having reviewed the Board's decision in *RD 850*, the union submits that the SDMs at the Vancouver International Airport held very similar, if not slightly higher levels of independent decision making authority for matters relating to discipline and performance appraisals. With this, the union submits that the Board correctly found them to be employees within the meaning of the *Code*. In the union's view, the Board's reasoning in *RD 850* applies to

the present application and reinforces the Teamsters position that the CPMs and QLs should be granted employee status.

[20] With regard to the employer's argument that the CPMs or QLs should be excluded on the basis of their access to the employer's human resources software and the personnel information contained therein, the Teamsters argue that this type of exclusion is strictly defined and applies only to confidential matters in relation to industrial relations. It submits that the exclusion does not extend to personnel records or personal employee information and is not justified with mere access to this information that is attainable through Garda's computer system. The union argues that neither CPMs nor QLs meet the strict test for confidential exclusions that is laid out in *Island Telephone Company Limited* (1990), 81 di 126 (CLRB no. 811) given that the CPMs and QLs are not involved in collective bargaining or the planning of bargaining strategy, they are not involved with Labour Relations Committees that meet quarterly to address labour relations issues involving the SO unit and they are not involved with budgeting for collective bargaining.

[21] In the unions' view, CPMs and QLs are typical first-line supervisor and their duties and responsibilities do not meet the threshold for management exclusion.

IV. Analysis and Decision

A. Request for an Oral Hearing

[22] The Board notes that the employer requested an oral hearing in this matter.

[23] The Board wishes to remind the parties that section 16.1 of the *Code* clearly provides that the Board may decide any matter before it without holding an oral hearing. The Board has the discretion, on a case-by-case basis, to decide whether a particular matter warrants an oral hearing or whether the documents on file are sufficient to deal with it. The Board's authority to decide solely on the basis of written material filed was outlined in *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30. Furthermore, there is no requirement for the Board to give notice to the parties of its intention not to hold a hearing (see *NAV CANADA*, *supra*).

[24] In the present application, the Board is fully aware that the employer raised a novel argument regarding the impact of heightened national security concerns in the airport security industry on the traditional factors applied by the Board for determining employee status within the meaning of the *Code*. The Board finds that the documents on file are sufficient to deal with

the present application and concludes, in this case, that a hearing is not necessary. The Board therefore uses its discretion pursuant to section 16.1 of the *Code* to decide the matter without holding an oral hearing.

B. Employee Status within the Meaning of the *Code*

[25] In certification applications, the Board determines whether the bargaining unit applied for is appropriate for collective bargaining. In doing so, the Board must decide which employees are to be included in the unit.

[26] The exclusion of certain employees derives from the Board's enabling legislation and is rooted in section 3 of the *Code*, where "employee" is defined as follows:

> ***employee*** means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.

[27] The Board's approach to considering exclusions from collective bargaining on the basis of employee status is set out in *Algoma Central Marine, a division of Algoma Central Corporation*, 2010 CIRB 531, (affirmed by the Federal Court of Appeal in *Algoma Central Marine* v. *Captains and Chiefs Association*, 2011 FCA 94):

> [26] Individuals can be denied the right to collective bargaining under the *Code* on one of two grounds: if they perform management functions or if they are employed in a confidential capacity in matters relating to industrial relations. The *Code* expressly envisions that supervisory employees have the right to organize and bargain collectively (see section 27(5) of the *Code*). With respect to certification applications involving supervisory employees, the Board must determine, on a case by case basis, whether it is appropriate to include these employees in the same unit as those whom they supervise, or in a separate bargaining unit of their own.
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> [27] In the years since the *Cominco Ltd.*, *supra*, decision was issued, Parliament has enacted the *Canadian Charter of Rights and Freedoms* and the Supreme Court of Canada has affirmed that the Charter right to freedom of association, section 2(d), protects the right to collective bargaining (*Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391). These developments reinforce the Board's view that any decision that has the effect of removing collective bargaining rights from individual citizens, including a decision that they exercise management functions and thus are not employees entitled to the benefits and protections of the *Code*, is one that must not be taken lightly.

[28] As both parties noted in their submissions, the Board and its predecessor, the Canada Labour Relations Board, have interpreted the managerial exclusions narrowly. Building on the Board's views in *Algoma Central Marine*, *supra*, the Board must also consider the recent pronouncements from the Supreme Court of Canada that recognize the right to organize, to bargain collectively and to strike as fundamental *Charter*-protected rights and freedoms (see *Mounted Police Association of Ontario*, *supra*, *Meredith v. Canada (Attorney General)*, 2015 SCC 2, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4). In essence, the Board must interpret the *Code* in a way that makes it an effective guardian of these fundamental rights and freedoms. As a general approach, the Board will continue to favour an interpretation that promotes access to collective representation and to collective bargaining for individuals who wish to exercise those rights.

[29] It is also well-established that the onus is on the party claiming that a person is not an employee within the meaning of the *Code* to demonstrate such claim (*Consortium de télévision Québec Canada Inc.*, 2003 CIRB 224). In the present application, the burden of proof rests with the employer to demonstrate that the individuals at issue in this case perform management functions or hold a position of confidence that involves access to confidential information about labour relations.

[30] The Board will now turn to the grounds on which the employer opposes this application.

1. Management Functions

[31] There is no definition of "management functions" contained in the *Code*.

[32] As such, the Board must turn to the facts and circumstances of each case to determine whether a position falls within the management category. The Federal Court of Appeal stated in *Bank of Nova Scotia* v. *Canada Labour Relations Board*, [1978] 2 F.C. 807 (dismissing the application for judicial review of *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91)) that:

> ... the concept of "management functions" must be interpreted and applied according to the circumstances of each case and, except in very extreme cases, I am inclined to the view that its precise ambit is a question of fact or opinion for the Board rather than a question of law ...
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> (page 813)

[33] When evaluating whether a position falls within the management category, the Board generally looks beyond job titles and turns to the actual duties and functions of the position in order to assess whether the incumbent actually exercises independent decision making authority in what the Board considers to be key management functions (see *Algoma Central Marine*, *supra*).

[34] The factors that the Board considers when assessing management functions try to shine a light on whether the position has actual authority over the employment conditions of other employees. Traditionally, the Board has placed particular emphasis on evidence relating to the authority to hire, fire, promote and discipline employees, but these are not the only criteria (see *Algoma Central Marine*, *supra*; *NorthwestTel Mobility Inc.*, 2006 CIRB 346). The Board may also consider other elements such as the assigning/planning of work and the scope of responsibilities over financial matters (see *Serco Aviation Services Inc.*, 2000 CIRB LD 191; *Greater Moncton Airport Authority Inc.*, 1999 CIRB 20). In *Pelmorex Communications Inc., division of MétéoMédia*, 2003 CIRB 238, the Board also noted that the size of the bargaining unit, the number of subordinate employees, the type of supervisory functions, decision-making authority and the nature of the work are all criteria that may influence the Board's decision.

[35] In *NorthwestTel Mobility Inc.*, *supra*, the Board outlined the principles from its previous decisions on the management category and explained that true management functions go beyond mere supervision of subordinates or coordination of their work; they influence either the decision-making process that is undertaken or its results:

> [20] These decisions point to a consistent view that a true management position involves significant independent decision-making responsibilities, supervision of employees beyond mere direction and evaluation of their work, a power to recommend that impacts on decisions to hire, promote, discipline or terminate. A position will more likely be considered as a team leader, where the employee's duties include essentially the same work as his subordinates and direction consists in leading the team in accordance with set policies; that is, where the employee acts as a coordinator, rather than a decision-maker with respect to authorizing leave, approving overtime or evaluating performance.

[36] The conclusion to draw from the above principles is that the Board has consistently drawn a clear distinction between work that is supervisory, and work that is managerial for the purposes of an exclusion under the *Code*.

[37] In the present case, the Board is not satisfied that the positions in question are truly management positions.

[38] A review of the documents filed with the Board shows that the main function of the CPMs and QLs is to plan and oversee the pre-boarding security screening operations at the WIA. The Board recognizes the important role these individuals play in ensuring the efficient and safe flow of passenger screening at the WIA and accepts that CPMs and QLs are accountable for ensuring that screening operations are conducted in strict adherence to the regulations prescribed by CATSA. The Board also accepts that the CPMs and QLs are involved in the disciplinary process with matters that arise for the SOs; however, the Board notes that their authority in this regard is limited. For example, in the circumstances where they observe a security breach during the screening process, the CPM or the QL will intervene directly with the SO to immediately "coach and correct" the issue and restrict the SO from performing that particular screening function, but in those circumstances the CPM does not have the authority to suspend the SO. Rather, the incident report generated by the event is referred to a performance committee that will ultimately review the incident report, which contains the information gathered by the CPM and/or the QL, and decide on the appropriate level of discipline to impose on the employee.

[39] The Board is not convinced that other functions performed by the CPMs and QLs are of the same nature as those of management positions. The evidence shows that their work is very closely controlled by various rules, be it from the prescribed regulations imposed by CATSA for the conduct of screening operations or the employer imposed processes relating to human resource management.

[40] The Board also finds that they are not directly involved in the hiring or firing process. The Board notes that while the incident reports generated by CPMs and QLs may form the basis of a SOs annual performance assessment, the performance appraisal itself is prepared by the Performance Manager. Similarly, incident reports generated by CPMs and QLs may form the basis of discipline or even termination but the evidence is clear that any such decision is not made independently by a CPM or a QL. In sum, the Board acknowledges that incident reports generated by CPMs and QLs undoubtedly have significant implications for SOs, however, the Board finds that this type of oversight is much more akin to that of a supervisor who observes and reports incidents than that of a manager who independently imposes discipline. As such, the Board concludes that the CPMs and QLs do not exercise real independent decision-making authority with respect to fundamental employment rights of the employees they supervise.

[41] Further, the Board accepts that the CPMs and the QLs do not perform the same functions as the SOs and that clearly, Garda has given them the distinct role of overseeing the pre-boarding security screening operations by assigning them responsibility for the work of SOs. However, in the Board's view, these functions are much more akin to that of a supervisor than that of a manager within the meaning that the Board has given to this concept for the purpose of the *Code*.

[42] In contesting the present application, Garda has specifically urged the Board to focus on the specific organizational configuration and the operational reality of the business in which the CPM and QL work. It has suggested that because the screening procedures are tightly controlled by the CATSA's regulations as opposed to policies or procedures imposed by Garda, the CPMs and QLs are, effectively, more than mere supervisors. It has argued that the national security interests at play in the airport security industry are of such importance that these should shift the Board's traditional analysis of distinguishing between managerial functions and supervisory ones towards a broader interpretation of the managerial exclusion. In essence, and just as G4S argued in *RD 850*, Garda urges the Board to recognize the uniqueness of its business environment and to define a line of management that may be different than in other traditional operations. In a way, Garda is asking the Board to focus on the consequences that arise from a failure to properly supervise, rather than focus on the extent of the supervisory functions performed.

[43] The Board does not find the employer's argument compelling. To be clear, the Board accepts the employer's evidence that highlights the importance of national security interests in today's society, that the threat of terrorism persists and that airports are international gateways for the movement of individuals who present this type of threat. The employer urges the Board to adopt an analysis that recognizes the evolution of the duties of the CPMs and QLs and focuses on their role as the eyes and ears of the employer in ensuring the safety and security of the travelling public. However, the Board is not convinced that the operational environment in which the CPMs and QLs work changes the Board's analysis for evaluating whether they perform management functions for the purpose of the *Code*.

[44] The Board's analysis for determining whether certain positions perform management functions must be understood in the overall context of labour relations purposes and principles. The statutory exclusion contained in the *Code* for those performing managerial functions has always been premised on the need to avoid a conflict of interest arising between one's duty to

his/her employer and one's loyalty to his/her union. This potential conflict is greater when the authority of the manager extends to having actual authority over the employment conditions of other employees and ultimately, their continued employment. This is the context in which the Board considers whether an employee has the requisite level of decision-making authority to justify an exclusion; it relates to both the employment relationship and its interplay with collective bargaining.

[45] The Board has adopted a narrow interpretation of the managerial exclusion in order to give greater effect to the principles of freedom of association and access to collective bargaining, which continue to serve as the foundation to fundamental labour relations rights under the *Code*. The Board will not want to deny access to collective bargaining to any more employees than is necessary. The Board is further supported in its approach by the recent decision of the Supreme Court of Canada in which it determined that the exclusion of the Royal Canadian Mounted Police members from the collective bargaining regime was unconstitutional. The majority of the Court concluded that there was no rational connection between the denial of a right to organize and bargain collectively and maintaining a neutral, stable and reliable police workforce (*Mounted Police Association of Ontario*, *supra*, at paras. 145-148).

[46] The employer in this case raises particular concerns with the apparent conflict of interest as the basis for its request to lower the threshold for exclusion. Garda argues that because the CPMs and QLs perform duties and functions that contribute to protecting the safety of the travelling public, they must be free of any conflicting loyalty, such as that to the union or other union members, which would interfere with their ability to perform those important functions relating to national safety. In the employer's view, the CPMs and QLs are acting as representatives of the employer and are given a sufficient level of autonomy in dealing with the significant challenges they face that they should not be represented by any third party. In light of this, the employer argues that the Board should view the CPMs and QLs as being in a conflict of interest with those they supervise, monitor and evaluate in carrying out their duties. In particular, the employer points to a hypothetical prospect of the CPMs and QLs refusing to cross a picket line of SOs in the name of loyalty to the union, and the potential impact such a scenario may have on national security.

[47] The Board does not subscribe to such a view, which it sees as representing an outdated view of the perceived incompatibility between collective bargaining and job responsibilities. In a decision from 1980, *Cominco Ltd*, *supra*, the Board discusses the history and development of

the Board's approach to the managerial exclusion. In that decision, the Board explains how collective bargaining and trade union membership are no longer viewed as incompatible with performing responsibilities in professions such as teaching, policing, firefighting or public service and how access to collective bargaining has expanded to such various and different occupational groups. The Board, in *Cominco*, *supra*, made the following statement at page 88:

> ... Society accepts that citizens may exercise duties of social trust and find no conflict with their exercise and membership in trade unions or participation in collective bargaining. ...

[48] It expanded on this concept, as follows:

> In this context it is no longer apposite to view the conflict of interest rationale for the managerial exclusion in terms of sworn oaths of membership in unions and unswerving loyalty to the brotherhood of membership. These terms are clearly outdated. The potential conflict of interest to be considered is one between employment responsibilities and the union as an instrument for collective bargaining in a climate where there is legal protection for the individual in his relationship to the union both as bargaining agent and organization. To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the "management presence" is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.
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> (page 90)

[49] In this regard, the Board accepts that the CPMs and QLs perform critical functions related to national security and the protection of the public, but does not find this fact, on its own, is reason enough to deny these employees the right to access collective bargaining. As the Board also stated in *Cominco*, *supra*, at page 90 "[w]e do not subscribe to a view that says an employee will become dishonest or abuse responsibility because he is represented by a union." Similarly in the case before us, the Board is unable to conclude that the collective representation of CPMs and QLs in their efforts to bargain terms and conditions of employment with their employer will in anyway diminish their loyalty to the employer or their dedication and professionalism in the very important work that they perform on a daily basis.

[50] The Board rejects the employer's statement suggesting that union representation somehow diminishes one's judgment such that the security responsibilities of the CPMs and QLs would be compromised. There is simply no evidence to support such an argument, and further, it is notable that the previous group of supervisors of the SOs were represented by a bargaining

agent and successfully negotiated collective agreements with the previous contractor without a workstoppage.

[51] In the Board's view, the employer has failed to present any convincing argument of a potential link between union representation and the national security concerns present at the WIA, that would warrant a shift away from the Board's traditional approach and cause it to lower the threshold of what constitutes independent decision-making responsibility for the purposes of applying the managerial exclusion contained in the *Code*.

[52] In the present case, the Board is satisfied that the creation of a separate bargaining unit of CPMs and QLs will eliminate any potential conflict that could arise in the exercise of their functions as they relate to the SOs.

2. Employment in a Confidential Capacity in Matters Relating to Industrial Relations

[53] The Board will deny employee status, within the meaning of the *Code*, where an individual, as a regular part of their duties, has access to or is involved with sensitive information the disclosure of which would adversely affect the employer. The information at issue in this context must be specific to industrial relations. The Board's approach in considering this type of exclusion was discussed by the predecessor Board to the CIRB, the Canada Labour Relations Board, in *Bank of Nova Scotia*, *supra*, the CLRB explained the nature of the confidential exclusion in the following terms:

> The denial of collective bargaining rights to persons employed in a confidential capacity in matters relating to industrial relations is also based on a conflict of interests rationale. The inclusion of that person in a unit represented by a union might give the union access to matters the employer wishes to hold close in its dealings with the union. These include bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedoms and rights conferred by Part V.
>
> To this end this Board and other Boards have developed a three fold test for the confidential exclusion. **The confidential matters must be in relation to industrial relations**, not general industrial secrets such as product formulae (e.g. *Calona Wines Ltd.*, [1974] 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21). It does not include personal history of family information that is available from other sources or persons. **The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties.** It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can

> gain access to it. (See *Greyhound Lines of Canada Ltd.* [1974] 4 di 22, and *Hayes Trucks Ltd.* [1974] 1 Canadian LRBR 284).
>
> (page 460; emphasis added)

[54] The evidence shows that the CPMs and QLs use Garda's personnel records software to input incident reports that document security breaches and/or other observations as part of their daily oversight of the SOs work. This software also contains employee files and personal information ranging from performance issues, to grievances and discipline. The employer suggests that because of this access, CPMs and QLs would be tempted to use the information contained therein to their advantage in matters relating to industrial relations, such as collective bargaining.

[55] The Board is prepared to accept that some of the information stored on this system is of a personal nature, and in some circumstances, may include grievance related information with respect to disciplinary action of employees. That being said, access to this type of information does not justify exclusion on this ground. The Board's approach in reviewing this type of exclusion must consider the nature of the work performed by the affected position to determine whether the person is involved with information related to the employer's collective bargaining or labour relations approaches and strategies on a regular basis. Having reviewed the evidence on file, the Board finds that the CPMs and QLs are not involved in or consulted for the collective bargaining process, nor are they involved in or consulted for the labour relations committee meetings that deal with industrial relations issues involving the SO bargaining unit. They are not involved in any budgeting discussions. Furthermore, there was no evidence that the CPMs or QLs have any involvement in the development of collective bargaining strategies or have access to negotiation, grievance or arbitration strategy.

[56] While there is no doubt that the CPMs and QLs have access to employees' personal information and personnel records, the Board concludes that the CPMs and QLs play no role in matters relating to industrial relations as a regular part of their duties and therefore neither the CPMs nor the QLs are employed in a confidential capacity in matters relating to industrial relations.

C. Appropriateness of the Bargaining Unit

[57] Section 24(1) of the *Code* grants a trade union the right to apply for certification of a bargaining unit that it considers appropriate for collective bargaining. The Board, for its part, will

confirm whether that unit is appropriate for the purposes of collective bargaining or in cases where it is not, the Board may review or modify the bargaining unit description. In the present application, and as noted in the Industrial Relations Officer's Letter of Understanding communicated to the parties on December 15, 2016, Garda has not opposed the bargaining unit description. The Board notes that the parties agreed that the sole issue for the Board to determine in this matter was the employee status of the CPMs and QLs.

[58] Furthermore, the Board is attentive to the fact that the employees affected by this application will form a separate bargaining unit from those whom they supervise. Having determined that the CPMs and QLs are employees within the meaning of the *Code*, the Board finds the bargaining unit description appropriate for the purposes of collective bargaining.

V. Conclusion

[59] Accordingly, for the foregoing reasons, the Board has determined that the CPMs and QLs are employees within the meaning of the *Code* and that the unit proposed for collective bargaining is an appropriate bargaining unit.

[60] This is a unanimous decision of the Board, and it is signed by

_____
Ginette Brazeau
Chairperson

_____
André Lecavalier
Member

_____
Gaétan Ménard
Member