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

Syndicat des agents de sécurité Garda, Section CPI-CSN,

applicant,

and

Garda Canada Security Corporation,

employer,

and

Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers,

bargaining agent.

Board File: 27823-C
Neutral Citation: 2010 CIRB **549**
November 12, 2010

The Board, composed of Ms. Louise Fecteau, Mr. Graham J. Clarke and Mr. William G. McMurray, Vice-Chairpersons, reviewed the parties' submissions.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. In this matter, the Board is satisfied that the documents on file are sufficient for it to decide the matter without an oral hearing.

Counsel of Record

Mr. Éric Lévesque, for the Syndicat des agents de sécurité Garda, Section CPI-CSN;

Mr. Jean Martel, for Garda Canada Security Corporation;

Mr. Nicolas Charron, for the Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers.

The reasons for decision of the majority were written by Ms. Louise Fecteau, Vice-Chairperson. The dissenting opinion was written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] On November 18, 2009, the Syndicat des agents de sécurité Garda, Section CPI-CSN (the CSN or the applicant) filed an application pursuant to section 18 of the *Code* seeking reconsideration of the decision issued by the Board on October 18, 2009, in *Garda Canada Security Corporation*, 2009 CIRB 477 (RD 477). In that matter, the Board had dismissed an application for certification of a bargaining unit comprising security guards working for Garda Canada Security Corporation (Garda or the employer) assigned to the Canada Border Services Agency (CBSA) at the Immigration Prevention Centre (IPC) of Citizenship and Immigration Canada in Laval.

[2] The employees covered by the certification application are represented by a union certified by the Commission des relations du travail du Québec, the Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers (the Steelworkers).

[3] Garda objected to the application for certification on the ground that the security operations carried out for the CBSA fell within provincial jurisdiction and under the provisions of a Quebec decree, the *Decree respecting security guards*, R.R.Q., c. D-2, r.1. The employer challenged the Board's jurisdiction to deal with an application for certification filed in a raid situation.

[4] The Board heard the parties at a hearing held from April 28 to April 30, 2009, and on May 27, 2009, and dismissed the CSN's certification application for two reasons. The first related to the Board's jurisdiction. The Board expressed it as follows in RD 477:

> [122] The Board must find in favour of Garda and the bargaining agent with regard to the dismissal of this certification application, both on the preliminary issue of the Board's jurisdiction and on the issue of the timeliness of the application.
>
> [123] The guard and transportation work performed by the Garda security guards is not an integral, vital and essential part of the CBSA's activities at the IPC. It is merely ancillary to all the activities carried out by the CBSA in relation to both border surveillance and the enforcement of the *Immigration and Refugee Protection Act*. There is significant evidence in this regard.

[5] Relying in particular on the testimony of one witness at the hearing, the Board stated the following in RD 477:

> [124] The testimony of Ms. Marilyne Paradis, CBSA's head of operations at the IPC, clearly showed that the building in which the IPC is located is used to hold non-violent individuals and that the IPC's purpose is to keep family members together. Violent individuals are transferred to the Rivière-des-Prairies Detention Centre and decisions in this regard are always made by the CBSA officers.
>
> [125] That witness stated that the IPC is a medium-security holding centre, that it is not identified as a Correctional Service of Canada facility and its operation is not subject to directives of that agency. Garda security guards have no power to decide whether to place or keep detainees in custody or to investigate, arrest, interrogate or release individuals. They do not have access to detainees' files and are not required to identify detainees. Moreover, Ms. Paradis clearly indicated that the guards do not engage in interprovincial transportation even though the collective agreement makes provision for it.
>
> [126] The Board must determine the application for certification according to the analysis of Garda's activities at the IPC. Based on that analysis, the Board finds that those activities are not severable from its other guard and transportation activities. Although they are necessary, they are not vital or essential to the federal undertaking. They are not essential security activities like those in an airport, and no other evidence was presented to the Board in support of their being a first line of security.

[6] The second reason for the decision in RD 477 reads as follows:

> [132] The Board also finds that this application for certification is untimely, as no change in activity has occurred. In addition, since a notice to bargain was duly issued on April 16, 2007, with a view to renewing the collective agreement and bargaining sessions took place until the signing of the agreement on June 26, 2008, the application was filed outside the time frames provided for in section 24(2)(*d*) of the *Code*, as it was filed on February 22, 2008 (see *The Corporation of the City of Thunder Bay / Telephone Division (operating as Thunder Bay Telephone)*, *supra*).

II–Grounds for Reconsideration Cited by the CSN

[7] The CSN alleges that the decision under review contained "errors of law or policy that cast serious doubt on the interpretation of the *Code*," contrary to the provisions of section 44(*b*) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), and submits the following:

> a) The evidence filed with the Board shows that Garda Canada Security Corporation is a federal work, undertaking or business subject to the provisions of the *Canada Labour Code* in that its operations are essential and vital to the core undertaking, the IPC.
>
> b) The Board disregarded its own jurisprudence respecting the criteria to be applied to legally define a federal undertaking.
>
> (translation)

[8] In support of its application, and relying on the principles that generally apply for determining whether operations of a provincially regulated undertaking are essential, vital or integral to a federally regulated one, the CSN cites several decisions of the Board and the courts. It specifically cites two decisions of the Supreme Court of Canada, *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112; and *Northern Telecom Limited* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115.

[9] The CSN alleges primarily that the Board neglected the entire **detention component** in considering the evidence in its decision in RD 477 and disregarded all of its own jurisprudence in similar matters.

[10] The CSN reminds the Board of the role of the CBSA, the primary mission of which is to provide integrated border services that support national security and public safety. It also submits that the CBSA has a number of obligations related to the application and enforcement of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) and that, in enforcing that Act, it has the power to arrest persons who commit or are suspected of committing an offence. According to the CSN, a person who is arrested may be detained by the CBSA in one of its prevention centres, that is, the IPCs in issue in this matter.

[11] The CSN submits that the CBSA's "detention" mission is set out in section 4 of the IRPA and that the detention operations—operations exercised by the IPC on its behalf—are an identifiable part of the federal undertaking. Section 4 of the IRPA reads as follows:

[Minister of Citizenship and Immigration]

4.(1) Except as otherwise provided in this section, the Minister of Citizenship and Immigration is responsible for the administration of this Act.

...

[Minister of Public Safety and Emergency Preparedness]

(2) The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to

(*a*) examinations at ports of entry;

(*b*) the enforcement of this Act, including arrest, detention and removal;

(*c*) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or

(*d*) determinations under any of subsections 34(2), 35(2) and 37(2).

(emphasis added)

[12] The CSN adds that "the CBSA's 'detention' mission must be carried out in accordance with national standards, departmental policies and administrative guidelines respecting detention."

[13] In addition, in support of its application, the CSN refers to the service contract between the CBSA and the employer, the IPC, to show that the CBSA determines the employment standards, personnel selection and hiring criteria, quality control over the performance of the work, dress standards for the guards, standards of conduct and performance, and IPC employee work schedules and assignments. For instance, with regard to performance of the work, the CSN states the following:

Performance of Work

I) The CBSA requires the services of the respondent employer's employees to drive CBSA vehicles and monitor persons in custody;

ii) The duties of the respondent employer's employees in driving the said vehicles include transporting the detainees and baggage in accordance with the instructions of the CBSA project manager or the manager's substitute;

iii) All guidelines, post orders, emergency guidelines, and regional and national directives are drafted and provided by the CBSA...

(translation)

[14] The CSN alleges that the CBSA's high level of supervision over IPC employees is evidence not only of the importance and vital nature of the "detention" component, but of the integration of the IPC and its employees with the CBSA as well.

[15] The CSN also indicates that the Board had reached an erroneous finding in the decision under review (RD 477):

> [126] ... Based on that analysis, the Board finds that those activities are not severable from its other guard and transportation activities.

[16] According to the CSN, the evidence filed with the Board shows that Garda has no other contract of the same type as that with the CBSA and that its operations essentially involve the transportation of securities and the monitoring of buildings and premises. The CSN submits that "the lodging operation in a detention centre severed Garda from its normal operations" (translation).

[17] The CSN also submits that the Board erred in finding that the length of the contract between Garda and the CBSA affected the nature of the relationship between the two parties. It argues that the length of a contract has never been a major factor in determining provincial or federal jurisdiction.

[18] Lastly, the CSN indicates that it does not understand paragraph 132 of the decision under review (RD 477). The paragraph in question reads as follows:

> [132] The Board also finds that this application for certification is untimely, as no change in activity has occurred. In addition, since a notice to bargain was duly issued on April 16, 2007, with a view to renewing the collective agreement and bargaining sessions took place until the signing of the agreement on June 26, 2008, the application was filed outside the time frames provided for in section 24(2)(*d*) of the *Code*, as it was filed on February 22, 2008 (see *The Corporation of the City of Thunder Bay / Telephone Division (operating as Thunder Bay Telephone)*, *supra*).

[19] The CSN argues that, on the contrary, had the Board determined that Garda was federally regulated, this would have been an "open field" situation and, in any case, the application for certification filed on February 22, 2008, was within the time limit provided for in section 24(2)(*d*)(ii) of the *Code*.

[20] The CSN is asking the Board to reconsider its decision and grant the application for certification filed on February 22, 2008.

III–Responses of the Employer and the Steelworkers

A–The Employer

[21] According to the employer, this application for reconsideration does not meet the test set out in section 44(*b*) of the *Regulations*. Referring to the Board decision in *John D. Kelly*, 2002 CIRB 202, it argues that the purpose of reconsideration or review of a decision by the Board is to correct serious errors, not to interfere with the decision of the Board "by substituting the views of the reconsideration panel." In the employer's opinion, the CSN is simply attempting to obtain a different decision based on the same factual considerations.

[22] According to the employer, the decision in RD 477 was based on an analysis of the evidence and factual information presented by the CSN that showed that the services provided by Garda were not an essential and vital part of the CBSA's operations. The employer argues that the CSN failed to discharge the burden of proof on it, adding that the Board's decision was " simply based on the factual aspects of the situation governing relations between Garda and the CBSA" (translation).

[23] Finally, the employer indicates that the CSN has not raised any new facts that would allow the Board to amend the decision made in RD 477 and has not shown any error of law or denial of natural justice.

[24] The employer is asking the Board to dismiss the CSN's application for reconsideration.

B–The Steelworkers

[25] According to the Steelworkers, the CSN has failed to show that the Board "made an error of law or policy that casts serious doubt on the interpretation of the *Code*" (translation). Among other things, it submits the following:

• the Board issued a very detailed decision, "applying the case law principles and weighing the evidence in a reasonable manner without error of law or principle that might render the decision void";

• none of the grounds raised by the CSN shows that the Board made "errors of law or policy that cast serious doubt on the interpretation of the *Code* by the Board and rendered void the decision" under review herein (translation);

• the CSN's application "amounts to a back-door appeal of the decision" (translation) of the Board and is just a means of challenging the findings of the said decision;

• the way in which the CSN has attacked the decision in RD 477 and the claims it has made in support of its application for reconsideration "are contrary to what the case law has taught us in this respect" (translation).

[26] The union refers to several Board decisions regarding its power of reconsideration, including those in *Transport Besner Inc.*, 2005 CIRB 329; *Robert Adams*, 2001 CIRB 121; and *Société Radio-Canada*, 2002 CIRB 195, to show that the CSN has not shown that any of the circumstances provided for under section 44(*b*) of the *Regulations* exist in this case.

[27] Regarding the CSN's allegation that the IPC is a detention centre, the Steelworkers submits "that such a claim was never produced in evidence before the initial panel by the CSN or by the other parties" (translation). Moreover, it argues that there is no mention in the contract between the CBSA and Garda that the IPC is a detention centre. It argues that the contract actually states that the primary role of the IPC is to "transport, lodge and ensure the safety of detainees" (translation). It adds that the evidence filed with the Board indicates that the contract was entered into by Public Works and Government Services Canada and Garda, and is no different from the other contracts regarding Garda's normal operations.

[28] The Steelworkers asks that the Board dismiss the application for reconsideration filed by the CSN.

IV–Reply of the CSN

[29] In reply, the CSN states that, contrary to what the Steelworkers and the employer are alleging, it is not trying to get the Board to change its mind on reconsideration merely because it is dissatisfied or is seeking a different decision based on the same facts. Referring to the Board's decision in *Rivtow Marine Ltd. and Tiger Tugz Inc.*, 1999 CIRB 30, the CSN submits that that Board actually made "an error of law or policy by relying solely on the 'vital and essential' test and interpreting the term 'essential' according to its extended meaning, which encompasses the idea of 'reasonably necessary'" (translation).

[30] The CSN submits that the problem in the decision under review is that the Board "literally neglected a reasonably necessary, vital, essential and integral part of the operations of the federal undertaking, that is, the detention operations" (translation). According to the CSN, "the Board made errors of law by not properly gauging the worth of the CBSA's very mission at the IPC" (translation) pursuant to the *Canada Border Services Agency Act*, S.C. 2005, c. 38, and the IRPA. It argues that "the detention component is therefore at the very heart of the CBSA's legislative mission" and that "no one other than the Garda Canada Security Corporation employees handle these operations for the CBSA at the IPC" (translation). According to the CSN, without this contribution, the CBSA would in no way be able to assume its legislative mission.

[31] The CSN further submits that, as part of the services it provides at the IPC, under the control of the CBSA, Garda takes charge of the detainees at entry points into Canada, escorts them to the IPC, holds them in detention at the IPC in facilities that are fully compliant with detention centre specifications and, in the case of detainees who, following a regulatory or quasi-judicial process under the IRPA, are being removed from Canada, escorts the detainees to the point of removal.

[32] According to the CSN, "the CBSA must carry out its 'detention' mission in accordance with national standards, departmental policies and administrative guidelines respecting detention, to which the employer's employees are subject, either directly or indirectly" (translation).

[33] With regard to the contract binding Garda, the CSN states that the "detention" component cannot be minimized or neglected, as it is included in the stated purpose of the contract. The CSN cites a clause of the contract that reads as follows:

> The primary role of the Immigration Prevention Centre (IPC) is to transport, accommodate and ensure the safety of **detainees in accordance with the IRPA** and related memoranda of understanding. The IPC's objective is to support CBSA operations by holding all **detainees** in custody while complying with departmental policies and national standards on detention. The IPC team aims to ensure the safety of the various people concerned, that is, both the **detainees** and our partners in the field who are involved in enforcement operations (**detention component**).
>
> (translation; emphasis added)

[34] The CSN moreover states that the evidence adduced at the hearing "amply showed that detainees are held in a detention centre, where they are lodged and monitored throughout the regulatory or quasi-judicial process required by the Canadian government" (translation), in accordance with the IRPA.

[35] The CSN argues that the "monitoring" and "lodging" operations carried out by Garda are "also essential, vital and reasonably necessary to the core operations of the CBSA's federally regulated operations" (translation).

[36] The CSN refers to the Board case law cited in support of its application, *Securiguard Services Limited*, 2005 CIRB 342 (affirmed by a reconsideration panel of the Board in *Securiguard Services Limited*, 2006 CIRB LD 1379); and *A.S.P. Incorporated*, 2006 CIRB 368. It submits that the Board should characterize Garda's operations at the IPC as vital and essential to core federal operations.

V–Issues to Be Determined

[37] The **primary** issue raised in this matter is the following: did the Board make an error of law or policy within the meaning of section 44(*b*) of the *Regulations* when, at paragraph 123 of the decision in RD 477, it found as follows:

> [123] The guard and transportation work performed by the Garda security guards is not an integral, vital and essential part of the CBSA's activities at the IPC. It is merely ancillary to all the activities carried out by the CBSA in relation to both border surveillance and the enforcement of the *Immigration and Refugee Protection Act*. There is significant evidence in this regard.

[38] **Alternatively**, the reconsideration panel must determine the effect, if any, of the interpretation error that may have been made by the Board in regard to the time frame for filing an application for certification in a case such as this, that is, a case where a provincial bargaining certificate had already been issued. Paragraph 132 of the decision in RD 477 reads as follows:

> [132] The Board also finds that this application for certification is untimely, as no change in activity has occurred. In addition, since a notice to bargain was duly issued on April 16, 2007, with a view to renewing the collective agreement and bargaining sessions took place until the signing of the agreement on June 26, 2008, the application was filed outside the time frames provided for in section 24(2)(*d*) of the *Code*, as it was filed on February 22, 2008 (see *The Corporation of the City of Thunder Bay / Telephone Division (operating as Thunder Bay Telephone)*, *supra*).

VI–Analysis

[39] Section 18 of the *Code* provides the Board with the authority to reconsider its past decisions. The circumstances under which a reconsideration application may be made are set out in section 44 of the *Regulations*, which reads as follows:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
>
> (*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
>
> (*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
>
> (*c*) a failure of the Board to respect a principle of natural justice; and
>
> (*d*) a decision made by a Registrar under section 3.

[40] The finality of the Board's decisions as provided for in section 22(1) of the *Code* is of primary concern to the Board. Thus, the rescinding of a Board decision remains the exception rather than the rule. The applicant has the burden of proving that there are serious reasons or even exceptional circumstances that would justify reconsideration of a decision (see *591992BC Ltd.*, 2001 CIRB 140).

A–Issue of Constitutional Jurisdiction

[41] In the applicant's opinion, the decision under review contains errors of law or policy that cast serious doubt on the interpretation of the *Code*, given the evidence it says it submitted to the Board. The applicant adds that the Board disregarded its own jurisprudence respecting the criteria to be applied to "legally define" (translation) a federal undertaking. According to the applicant, the error committed by the Board relates to the **detention operations component**. The applicant alleges that the Board neglected this component.

[42] The majority of the reconsideration panel does not share this view but believes that the decision under review shows that the Board adhered strictly to the applicable legal principles in determining its jurisdiction in cases, such as the Garda case, where the employer generally carries out operations under provincial jurisdiction. It needed to be satisfied that Garda's operations for the IPC were severable from its other guard and transportation operations and were vital or essential to the CBSA, a federal undertaking. However, according to the evidence heard, this was not the case.

[43] With regard to the applicant's allegation that the Board neglected the detention operations component, the majority of the panel again does not share this view. It is clear from the decision under review that the Board took the union's argument respecting the detention component into account and, after reviewing all of the evidence, determined that the security operations performed by the Garda security guards were not essential security operations, such as those in an airport. According to the majority of the panel, the detention component lay at the very heart of the debate leading to the decision under review, and the applicant failed to satisfy the Board that the Garda security guards were carrying out detention operations. In its decision in RD 477, the Board stated the following in this regard:

> [120] In the view of the applicant, detention is an essential component of the CBSA and **it is that component, the monitoring and transportation aspects of which are assigned to Garda security guards, that makes the activities carried out by Garda necessary and vital to the IPC.**
>
> [121] **This is the issue the Board must decide, that is, whether the "monitoring" and "transportation" aspects of the detention are ancillary to the activities of the CBSA at the IPC or are vital, essential and necessary.**
>
> ...
>
> [123] The guard and transportation work performed by the Garda security guards is not an integral, vital and essential part of the CBSA's activities at the IPC. It is merely ancillary to all the activities carried out by the CBSA in relation to both border surveillance and the enforcement of the *Immigration and Refugee Protection Act*. There is significant evidence in this regard.
>
> [124] The testimony of Ms. Marilyne Paradis, CBSA's head of operations at the IPC, clearly showed that the building in which the IPC is located is used to hold non-violent individuals and that the IPC's purpose is to keep family members together. Violent individuals are transferred to the Rivière-des-Prairies Detention Centre and decisions in this regard are always made by the CBSA officers.
>
> [125] That witness stated that the IPC is a medium-security holding centre, that it is not identified as a Correctional Service of Canada facility and its operation is not subject to directives of that agency. Garda security guards have no power to decide whether to place or keep detainees in custody or to investigate, arrest, interrogate or release individuals. They do not have access to detainees' files and are not required to identify detainees. Moreover, Ms. Paradis clearly indicated that the guards do not engage in interprovincial transportation even though the collective agreement makes provision for it.
>
> [126] The Board must determine the application for certification according to the analysis of Garda's activities at the IPC. Based on that analysis, the Board finds that those activities are not severable from its other guard and transportation activities. Although they are necessary, they are not vital or essential to the federal undertaking. They are not essential security activities like those in an airport, and no other evidence was presented to the Board in support of their being a first line of security.
>
> (emphasis added)

[44] The applicant is of the view that the Board's decision in *Securiguard Services Limited (342)*, *supra*, is similar to that under review. The majority of the panel does not share this view, however. The context of airport security is quite distinctive, especially since the events of September 11, 2001. In the above-mentioned matter, the Board had before it an application for certification filed by the International Association of Machinists and Aerospace Workers, Transportation District 140, Local 16, to represent a group of employees of Securiguard Services Limited (Securiguard) who provided perimeter security at the Vancouver International Airport. Securiguard argued that the Board lacked jurisdiction to certify the union.

[45] The Board stated the following regarding the question of jurisdiction in *Securiguard Services Limited (342)*, *supra*:

> [3] In order to decide whether the union can be certified under the *Canada Labour Code*, it is necessary to decide whether Securiguard's services contract is severable from other security work it performs and whether it acts as an integral part of the Vancouver International Airport, another core federal undertaking.

[46] In other words, the Board considered two main issues:

1) Was the employer's services contract severable from its other services contracts?
2) Was the undertaking an integral part of a federal undertaking?

[47] The Board was of the view that the contract services provided by Securiguard at the Vancouver International Airport were different from the services provided under contracts with other clients. To determine whether the employer's services contract was severable from its other services contracts, the Board considered the following:

> [29] ... • the importance of perimeter access control as part of overall airport security;
>
> • the specialized knowledge and ongoing training required to meet the standards set out in the Standing Orders;
>
> • the use of the airport's security cameras to monitor movements within the airport;
>
> • the involvement in investigating security breaches on behalf of the airport;
>
> • the exclusive assignment of employees to the airport contract;
>
> • the required restricted area passes to conduct work at the airport.

[48] Relying also on factors and tests established by the Supreme Court of Canada, particularly in *Northern Telecom Limited* v. *Communications Workers of Canada*, *supra*, the Board found that the services performed by Securiguard at the airport were sufficiently connected to the operations of the airport authority to be severable from its routine services contracts. According to the Board, there was a sufficient nexus between the airport as a core federal undertaking and Securiguard as a subsidiary operation to weigh in favour of federal jurisdiction over labour relations.

[49] The majority of the reconsideration panel is of the view that the circumstances in the matter before it are different. The evidence considered by the Board did not show that the contract under which Garda provided security services at the IPC was severable from its other contracts, under which it provides security guard services. The evidence shows that Garda employee assignments to the IPC are not exclusive; Garda provides security and transportation services for a number of other undertakings in Quebec, and can assign its security guards to them to enable them to complete their weekly hours of work. In addition, the security guards are not given specialized training when assigned to the IPC. The evidence also shows that the operations of taking charge of and transporting detainees and handcuffing, searching and holding them in detention are performed under the authority of a CBSA officer, and that Garda guards therefore have no decision-making power in this regard. The basic security services provided by Garda to its other clients include guarding, monitoring, and providing safety and protection for premises, assets and people. Garda security guards also conduct searches and, when authorized to do so, issue violation notices. In short, there is nothing to show that the services provided by Garda at the IPC are severable from its other operations.

[50] It is true that the decision in *Securigard Services Limited (342)*, *supra*, served as an authority for several others decisions, including the decisions in *Securiguard Services Limited*, 2006 CIRB LD 1517; *A.S.P. Incorporated*, *supra*; and *Nova Scotia Division of the Canadian Corps of Commissionaires*, 2007 CIRB LD 1647.

[51] However, although the decision in *Securiguard Services Limited (342)*, *supra*, has been relied on almost exclusively to invoke the Board's jurisdiction in cases involving perimeter security at airports, it is important to note the following statement made in the decision in *Securiguard Services Limited (LD 1379)*, *supra*, affirming the earlier decision:

> ... the issue of jurisdiction over airport security perimeter services has been in a process of change and is evolving. The Board therefore hastens to say **that a decision in respect of the jurisdiction over perimeter security in the context and operations of a single airport is not determinative of the issue of jurisdiction for perimeter security at all airports nor does it necessarily change the established jurisprudence as it applies to security services performed for other federal undertakings found to fall within provincial jurisdiction**. Each application has to be independently assessed. No doubt that in

> today's environment of heightened security in airports, jurisprudence on this issue will continue to develop and evolve as decisions are rendered by this Board and other labour boards.
>
> (pages 8–9; emphasis added)

[52] Thus, the decision in *Securiguard Services Limited (342)*, *supra*, does not necessarily change the principle that security services provided for other federal undertakings are provincially regulated—a principle derived from a decision of the Board's predecessor, the Canada Labour Relations Board, in *Burns International Security Services Ltd. and Canada Post Corporation* (1989), 78 di 39; and 3 CLRBR (2d) 264 (CLRB no. 746). In that decision, the CLRB held that the duties of security guards in Canada Post Corporation facilities did not come under federal jurisdiction, as the security guards essentially handled access control, and did not provide "a service that is directly connected to ... CPC's core functions of collection, transmission and delivery of the mail."

[53] In a recent decision of the Supreme Court of Canada, *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53; [2009] 3 S.C.R. 407, the majority reiterated the principle that federal jurisdiction over labour relations must be interpreted narrowly. In that decision, the majority of the Supreme Court found that labour relations in the Calgary branch of Consolidated Fastfrate Inc. came under provincial jurisdiction. Fastfrate contracted with trucking and railway companies for the interprovincial carriage of goods and, with one exception, its employees played no role in the operation of those companies' transportation systems. Fastfrate performed the pick-up and consolidation of freight in the province from which it was shipped and the deconsolidation and delivery of freight from another province.

[54] The majority of the Court determined that an undertaking that performs consolidation and deconsolidation and local pick-up and delivery services does not become an interprovincial undertaking simply because it has an integrated national corporate structure or contracts with third-party interprovincial carriers.

[55] Although the scope of that decision appears limited to the field of interprovincial transportation, the Supreme Court reiterated the principles set out in the decision in *Northern Telecom Limited* v. *Communications Workers of Canada*, *supra*, emphasizing that the question of whether an undertaking, service or business is a federal one depends on the nature of its operations.

[56] Thus, the question of constitutional jurisdiction, whether in the context of perimeter security services at airports or security services in an immigration prevention centre such as the ones in question here, must be considered on the basis of the **particular** circumstances of each case and depends on the nature of the operations in question.

[57] It must also be kept in mind that, in the matter under review, the Board held a four-day hearing and heard a number of witnesses, including three called by the applicant who, on cross-examination, all admitted that Garda security guards at the IPC had no power to arrest, investigate or interrogate individuals or take them into custody.

[58] It seems that the evidence presented at the hearing did not convince the Board that it should apply the exception to the principle that labour relations are provincially regulated.

[59] It is true that, in its decision in *Bhagat Ram Mehmi*, [2004] OLRB Rep. January/February 16, the Ontario Labour Relations Board (the OLRB) ruled that it did not have the jurisdiction to hear the complaint in that case because it considered that the company's operations were federally regulated. The case involved a complaint filed against the union by a security guard with Group 4 Falck assigned to an immigration detention centre in Ontario. The Board referred to the decision in *Bhagat Ram Mehmi*, *supra*, in the decision under review here without, however, providing any context. The reconsideration panel thus analyzed the decision in question and, with respect, the majority determined that that case was different from the one before it. In the first place, the OLRB held a consultation rather than a public hearing, as was the case in the matter under review. The opportunity to call witnesses and adduce evidence is more limited in a consultation. In second place, the security guards in that case were performing a role similar to that of the correctional services officers. The detention centre in question was used to detain individuals who had violated the IRPA and consequently had been arrested or detained by Immigration Canada because there was reason to believe that they would not appear when summoned or even that they were a danger to the public. In contrast, according to the evidence filed, the security guards in the instant matter work in a building in Laval, Quebec, that houses non-violent detainees, to keep family members together, a

circumstance that requires much less stringent security measures that those in *Bhagat Ram Mehmi*, *supra*.

[60] Further, the parties to the collective agreement in *Bhagat Ram Mehmi*, *supra*, had reached an agreement according to which federal law was to apply in the circumstances. In the matter before the panel here, however, the security operations of Garda in Quebec, including those performed at the IPC, are subject to the provisions of a Quebec decree respecting security guards issued pursuant to *An Act respecting collective agreement decrees*, R.S.Q. c. D-2. This Quebec legislation provides that parties to a collective agreement in a given industry may ask the Government of Quebec to extend, by decree, certain provisions of the collective agreement to all employees and employers in the industry. Consequently, the majority of the panel is not satisfied that the decision of the OLRB in *Bhagat Ram Mehmi*, *supra*, can apply in the particular circumstances of the matter under review, given the scope of the evidence adduced at the hearing.

[61] For the above reasons, the majority of the reconsideration panel is not satisfied that the Board erred in law in finding that Garda's operations at the IPC fall under provincial jurisdiction. The majority is of the view that the Board applied all the tests established by case law in regard to constitutional jurisdiction and took into account all of the relevant evidence, including the "detention" aspect raised by the applicant. Consequently, the majority dismisses the part of the reconsideration application related to the Board's jurisdiction.

B–Alternative Issue: Timeliness of the Application for Certification

[62] With regard to the alternative issue raised by the applicant, relating to the timeliness of the application for certification, the majority of the reconsideration panel is of the view that the question is moot given that, in its decision in RD 477, the Board ruled that it did not have jurisdiction. However, the Board wishes to make it clear that, in cases where the parties are under the misapprehension that their labour relations are provincially regulated, the collective agreement entered into under provincial authority is generally a valid agreement under the *Code*, as voluntary recognition is involved (see *Cable TV Limited (1979)*, 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRB no. 188); *Emde Trucking Ltd.* (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB

no. 501); and *The Corporation of the City of Thunder Bay / Telephone Division (operating as Thunder Bay Telephone)* (1994), 96 di 67; and 27 CLRBR (2d) 87 (CLRB no. 1097)).

[63] That said, the majority of the reconsideration panel is of the view that the Board erred in law in finding that the application for certification was untimely. It believes that, had the Board determined that Garda came under its jurisdiction, the certification application filed on February 22, 2008, would have been on time, as it was filed within the time limits set out in section 24(2)(*d*)(ii) of the *Code*. The collective agreement in question was valid for more than three years, from November 8, 2002, to July 1, 2007. The application for certification was filed on February 22, 2008, after the commencement of the last three months of application of the collective agreement. As submitted by the applicant, this was an "open field" situation. The notice to bargain given on April 16, 2007, for the renewal collective agreement did not modify the length of application of the existing collective agreement, but rather started the bargaining process for a new collective agreement.

[64] Consequently, had the Board determined that it had constitutional jurisdiction to entertain the application for certification, the majority of the reconsideration panel would have allowed the part of the reconsideration application relating to the application's timeliness.

VII–Conclusion

[65] For the reasons set out above, the application for reconsideration is dismissed.

Certified Translation
Communications

Louise Fecteau
Vice-Chairperson

William G. McMurray
Vice-Chairperson

Dissent of Graham J. Clarke, Vice-Chairperson

I–Introduction

[66] I have had the opportunity to review my colleagues' reasons for upholding RD 477, and respectfully disagree with their conclusion that the Board lacks constitutional jurisdiction over the instant matter.

[67] Garda provides security guards to the CBSA for use at its IPCs. The IPCs could not function without the vital assistance coming from the guards' regular daily activities.

II–Issues

[68] These reasons will comment on three issues:

A. The role of a reconsideration panel in a constitutional jurisdiction case;
B. Are the guards integral to the work of the CBSA? and
C. Was the certification application timely under section 24 of the *Code*?

III–Analysis and Decision

A–The Role of a Reconsideration Panel in a Constitutional Case

[69] A reconsideration application is not an appeal.

[70] Indeed, for matters which fall within the Board's exclusive jurisdiction, a reconsideration panel must resist the temptation to substitute its discretion or judgment for that of the original panel.

[71] A failure to exercise proper restraint not only delays labour relations and increases costs for the parties, but could lead to reconsideration applications in virtually every case. A lack of restraint also

ignores the importance of the *Code*'s privative clause which foresees that Board decisions will be final when issued.

[72] As set out in section 44 of the *Regulations*, a reconsideration panel ought not to intervene unless there is an error of law, and, additionally, that error casts serious doubt on the interpretation of the *Code*:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
>
> ...
>
> (*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board.

[73] These principles are long established and reconsideration panels usually respect them.

[74] For matters involving the Board's constitutional jurisdiction, a reconsideration panel must intervene if it believes that the original decision on jurisdiction was wrong.

[75] In the course of that exercise, however, a reconsideration panel must accept the original panel's findings of fact. In the instant case, the original panel heard evidence over several days. It is not up to a reconsideration panel to make different factual findings.

B–Are the Guards Integral to the Work of the CBSA at its IPC?

[76] This section of the decision will be divided into three subsections:

1. The constitutional facts;
2. The constitutional principles; and
3. The application of the law to the facts.

I–The Constitutional Facts

[77] The CBSA, through Public Works and Government Services Canada (PWGSC), entered into a contract with Garda to provide guards for certain IPC locations in Laval and Montréal, Quebec.

[78] The CSN filed a certification application with this Board to represent those guards.

[79] Quebec's labour board, the Commission des relations du travail du Québec (CRTQ), had already certified the Steelworkers to represent the same guards.

[80] RD 477 described how, in Quebec, a decree applies to security guard agencies like Garda and imposes province-wide terms and conditions of employment. The Steelworkers were party to the collective agreement for the guards working at the IPC.

[81] The contract's Statement of Work described an IPC's role and objective under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

> **The primary role of the Immigration Prevention Centre** (IPC) is to transport, accommodate and ensure the safety of detainees in accordance with the IRPA and related memoranda of understanding. The IPC's objective is to support CBSA operations by holding all detainees in custody while complying with departmental policies and national standards on detention. The IPC team aims to ensure the safety of the various people concerned, that is, both the detainees and our partners in the field who are involved in enforcement operations (detention component).
>
> (page 14; translation)

[82] Under the contract, Garda undertakes to provide uniformed, unarmed security guard services to the CBSA for the monitoring and transportation of detainees in accordance with the IRPA. (RD 477, paragraph 15)

[83] The evidence showed that, at the Laval IPC, the detainees were immigrants who were out of status in Canada or under a removal order. (RD 477, paragraph 20)

[84] The guards are primarily responsible for the transportation, monitoring and detention of these persons pending a decision by the CBSA. (RD 477, paragraph 21)

[85] Under the authority of a CBSA officer, guards may take detainees into custody, transport them, handcuff them and place them in detention. (RD 477, paragraph 25)

[86] CBSA officers, who were described by one witness as "the ones who manage us", may request a specific guard for a particular transportation assignment. (RD 477, paragraph 31)

[87] Guards monitor and transport IPC detainees, activities which can include handcuffing, but always on the instructions of a CBSA officer. (RD 477, paragraphs 49 and 58)

[88] Guards may transport detainees at all hours of the day, from airports, border crossings or police stations, and transport them to hospitals (rarely), dentists' offices, embassies or courts. (RD 477, paragraphs 59 and 69)

[89] When guards transport detainees from airports, airport patrol officers will escort them. (RD 477, paragraph 60)

[90] Guards transport violent detainees from the IPC, which is described as a "medium security holding centre", to a higher-security detention centre, but only on the orders of a CBSA officer. (RD 477, paragraph 66)

[91] Guards search and handcuff detainees, and put them in cells when a CBSA officer so instructs. (RD 477, paragraph 60)

[92] The parties do not contest these facts, which, as the references above illustrate, came from the testimony of several different witnesses. The difference between the parties arises from the application of constitutional law principles to these facts.

2–The Constitutional Principles

[93] The RD 477 decision accurately described the constitutional principles the Supreme Court of Canada has established and which labour boards regularly apply.

[94] A succinct description of the well-known test comes from *Northern Telecom Limited* v. *Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115:

> ... the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, ... to look at the "normal or habitual activities" of [that operation] as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.
>
> (page 133)

[95] In *National Protective Service Cie* c. *Union des agents de sécurité du Québec, Local 8922*, D.T.E. nº 91T-283 (T.T.), Mr. Justice Lesage found that general and peripheral security guard services for buildings used by the federal government did not fall within federal jurisdiction:

> There is general agreement that the purpose of federal departments is not to provide security for their buildings or to monitor the movement of the people in those buildings or the property located therein. The purpose of the federal government is to administer public affairs, and security is merely peripheral and incidental to this activity and is strictly a support activity.
>
> (pages 23–24; translation)

[96] This Board similarly found that general security provided by third-party security guards to the Canada Post Corporation (CPC) did not bring those services within federal jurisdiction. In *Burns International Security Services Ltd. and Canada Post Corporation*, *supra*, the Board analyzed the guards' connection to CPC's core federal mail undertaking:

> To re-emphasize the point, while businesses need to keep their premises clean and secure, such **general** functions, although necessary, are hardly vital or essential to a particular federal undertaking. In our view, the services supplied by Burns to CPC are not an integral part of CPC's core operations, they are merely one of the many **general** facets required by any business whether they be federal or provincial. There is nothing in these security guard services that has any real or **specific** relationship to the collection, transmission or delivery of mail. ...
>
> (pages 50; and 274–275; emphasis in original)

[97] The distinction between general security guard work at a building which houses federal government offices versus specific functions which are vital and essential to the core federal undertaking is a helpful analytical tool. It focuses on the functional integration of an employer's services with the core federal undertaking.

[98] In *Securiguard Services Limited*, *supra*, this Board found that security guards involved in perimeter security at an airport were vital to the core federal aeronautics undertaking and were severable from the security company's other provincial operations:

> [34] In light of these answers, the Board is of the view that Securiguard's services at the airport are sufficiently connected to the operations of the airport authority to be severable from more routine security contracts. There is no evidence that the cleaning staff, book sellers, shop sellers, food vendors and other service providers must similarly comply with the *Aeronautics Act* or that their operations are essential to the airport's operation.

[99] In *Bhagat Ram Mehmi*, *supra*, the Ontario Labour Relations Board (OLRB) considered its jurisdiction over security officers working at a Canada Immigration Holding Centre, which was described, in wording similar to that describing an IPC, as a minimum-security detention centre. The OLRB declined jurisdiction because the security officers were integral to the detention centre's ability to operate:

> 26. In my view the employees at issue in this case are of entirely different nature than those in the cases discussed in the federal cases. Immigration and Citizenship Canada has chosen to operate a detention centre in a converted hotel. The security officers at issue are not simply providing services to the building, they are an integral part of the operation. They transport and guard detainees. Without these services the detention centre could not operate.

[100] The issue is whether the guards supplied by Garda are integral to the IPC's functioning, as in *Bhagat Ram Mehmi*, *supra*, or provide only peripheral services as found in *National Protective Service Cie* c. *Union des agents de sécurité du Québec, Local 8922*, *supra*, or *Burns International Security Services Ltd. and Canada Post Corporation*, *supra*.

3–Applying the Law to the Facts: Garda's Guards are Integral to the IPC

[101] In RD 477, the Board correctly appreciated its task of applying the applicable law to the facts:

> [115] In applying these principles to this application for certification, the Board must determine whether Garda's activities are an essential part of the operation of the IPC by the CBSA, that is, whether those activities are intrinsically linked with this federal undertaking and whether the work of the security guards is an integral part of the federal activity in question.
>
> [116] The Board must determine the nature of the operation and, in particular, look at the normal or habitual activities of the undertaking as a going concern and determine whether there is a level of functional integration with the federal undertaking that could lead to a conclusion of a vital or essential connection with that undertaking.

[102] With due respect to my colleagues, Garda falls under this Board's jurisdiction. The guards' services involve regular tasks that are essential to the CBSA's federal immigration undertaking. The guards' regular, daily duties involving the IPC's detainees are light years beyond the general type of building security services that remain within provincial jurisdiction.

[103] Before explaining further my conclusion why this Board has jurisdiction, it is necessary to comment on some factors raised in RD 477 which, with respect, should have no influence on the jurisdictional determination.

[104] In analyzing the functional integration of Garda's services in RD 477, the Board referred to Garda's existing collective agreement and the Quebec Decree:

> [127] ... All of Garda's security guards are governed by the same collective agreement and decree. This makes it easier to recruit new personnel, using both Garda's and the bargaining agent's lists, as the evidence shows that turnover among Garda personnel at the IPC is very high.

[105] Ease of recruitment and a high level of turnover are not relevant to a constitutional determination, no matter how critical they may be to the operation of a business.

[106] The original panel also considered the length of Garda's Contract with PWGSC:

> [128] As for the nature of the relationship between Garda and the CBSA at the IPC, it is essentially a short-term contractual relationship that expires in November 2009. At that time, Garda may bid on a new three-year contract, with no renewal option.

[107] The length of the relationship between Garda and the CBSA is irrelevant to a constitutional determination in the specific circumstances of this case. The length of a contract may be relevant,

such as in the case of *Construction Montcalm Inc.* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754, because the nature of the relationship in that case involved the one-time construction of an airport runway. By contrast, while Garda may not have a lengthy contract, the CBSA continually requires security companies to provide the types of services the Guards perform. The services remain constant regardless of the identity of the contractor.

[108] RD 477 also took into account Quebec's legislation over security guards as well as mobility and seniority rights:

> [129] The Board has also considered the history of legislation and regulations applicable to security guards in Quebec. Two aspects that stand out in this case are the potential for mobility of the Garda security guards assigned to the IPC and the fact that seniority is earned within Garda's ranks, regardless of where the work is performed. Both are provided for in the collective agreement.

[109] It may be useful, by way of background, to explain how a decree works in Quebec labour law and how it impacts security guards under provincial jurisdiction. But the decree has no relevance to deciding between federal or provincial jurisdiction. Similarly, employees' existing mobility and seniority rights have never been a factor when determining a labour board's competence over a matter.

[110] A finding of federal jurisdiction may result in a change for the guards' entitlements. But this type of change has never been a factor when making a constitutional determination.

[111] Moreover, the *Code* has recognized the challenges for guards whose employment comes from repeated term contracts. The *Code* deals explicitly with security guards who screen passengers. These protections can be expanded to cover other guard services within federal jurisdiction:

> 47.3(1) In this section, "previous contractor" means an employer who, under the terms of a contract or other arrangement that is no longer in force,
>
> (*a*) provided pre-board security screening services to another employer, or to a person acting on behalf of that other employer, in an industry referred to in paragraph (*e*) of the definition "federal work, undertaking or business" in section 2; or
>
> (*b*) provided any other service that may be designated by regulation of the Governor in Council, on the recommendation of the Minister, to another employer or a person acting on behalf of that other employer

> in any industry that may be designated by regulation of the Governor in Council on the recommendation of the Minister.
>
> (2) An employer who succeeds a previous contractor as the provider of services, in accordance with a contract or other arrangement, must pay to the employees providing the services under that contract or arrangement remuneration not less than that which the employees of the previous contractor who provided the same or substantially similar services were entitled to receive under the terms of a collective agreement to which this Part applied.

[112] Whether the guards would benefit more in one jurisdiction than the other is again not a relevant factor to consider in a constitutional analysis.

[113] Unfortunately, the labour relations status quo can be disrupted when a dispute exists between federal and provincial jurisdiction: *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters, supra*. Avoiding such a disruption, however, is not a relevant factor in these cases.

[114] In RD 477, the Board also repeatedly highlighted the fact that guards acted only on orders from CBSA officers. It is unclear why the fact the guards did not exercise the same management or supervisory powers as CBSA officers impacts the constitutional determination. The issue is what the guards actually do in relation to the CBSA's core federal undertaking, not whether they have the power on their own initiative to investigate, arrest, or detain individuals.

[115] The facts in RD 477 demonstrate that Garda's services to CBSA, through its guards, are an integral part of the IPC. The guards are not merely providing general building security at the IPC. Rather, their security functions relate explicitly to how the IPC carries out its mandate over detainees under its care and control.

[116] The very concept of a "detainee' includes the fact that they are not free to come and go as they please. The contract foresees that the guards will personify the coercion that is inherent in the daily operations of any IPC.

[117] In this role, the guards transport detainees to different locations. They occasionally handcuff detainees. They search detainees. They place detainees in cells. The work is carried out in a medium-security facility as opposed to in a public building. If a detainee is violent, the guards may transport that individual to a higher-security detention centre.

[118] The guards' functions in this regard are vital and essential to an IPC's daily operations. It does not matter to what extent the guards are involved in all aspects of Canada's immigration system. The focus must be on their functions at the specific IPCs in question.

[119] Because of the normal and habitual activities of its guards, a portion of Garda's otherwise provincial business is severable and becomes subject to the *Code*.

[120] Based on the facts as found by the Board in RD 477, the reasoning of the OLRB in *Bhagat Ram Mehmi*, *supra*, applies equally to this case. Up until RD 477, this Board had taken jurisdiction over guards in these situations. While previous decisions, by themselves, do not constitute a reason to find in favour of federal jurisdiction, and each case must be analyzed on its merits, the facts in this case do not suggest there is any need to deviate from established practice.

[121] I am satisfied the CSN has displaced the presumption in favour of provincial jurisdiction over labour relations: *Communications, Energy and Paperworkers Union of Canada* v. *Native Child and Family Services of Toronto*, 2010 SCC 46.

C–Timeliness of the Certification Application

[122] Given the role of a reconsideration panel as described earlier, this issue should have been returned to the original panel. The conclusion and reasons why the CSN's application was untimely are fully contained at paragraph 132 of the decision.

[123] The reasons in support of this conclusion are vague. It is not up to a reconsideration panel to analyze the issue *de novo*. Rather, the original panel should have been requested to provide the legal analysis in support of its conclusion which would allow, if need be, a reconsideration panel to consider the issue properly: *Vancouver International Airport Authority* v. *Public Service Alliance of Canada*, 2010 FCA 158.

[124] Therefore, I would have concluded that the Board had jurisdiction to decide the CSN's application for certification. I would also have returned the question of the certification application's timeliness to the original panel, given the fact the reasons supporting this conclusion were vague.

Certified Translation
Communications

Graham J. Clarke
Vice-Chairperson