NOVA SCOTIA COURT OF APPEAL

Citation: Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board) , 2009 NSCA 4

Date: 20090121
Docket: CA 298319
Registry: Halifax

Between:

Casino Nova Scotia/Casino Nouvelle Ecosse

Appellant

v.

Nova Scotia Labour Relations Board and Service Employees International Union, Local 902

Respondents

Revised judgment: The text of the original judgment has been corrected according to the erratum dated **July 22, 2009.** The text of the erratum is appended to this decision.

Judge(s): Oland, Hamilton, Fichaud, JJ.A.

Appeal Heard: December 5, 2008, in Halifax, Nova Scotia

Held: Appeal is dismissed with costs of $1500 all inclusive, per reasons for judgment of Fichaud, J.A.; Oland and Hamilton, JJ.A. concurring.

Counsel: Eric Durnford, Q.C. and Amy Bradbury, for the appellant
Raymond Larkin, Q.C. and Joel Schwartz, for the respondents

Reasons for judgment:

[1] The Labour Relations Board certified a bargaining agent for a unit of security officers at a casino. The employer applied to quash the certification. The Supreme Court of Nova Scotia dismissed the application, and the employer appeals. The issues are whether the Board committed a reviewable error by (1) ruling that the security officers neither are "employed in a confidential capacity in matters relating to labour relations" nor "exercise management functions" and (2) allowing the same union to represent separate units for general and security employees, which the employer says is a conflict of interest.

Background

[2] The Board's decision recited the background facts.

[3] Casino Nova Scotia ("Casino") operates a casino in Halifax under contract with the Nova Scotia Gaming Corporation.

[4] The Service Employees International Union, Local 902 ("Union") applied to the Nova Scotia Labour Relations Board ("Board") initially to certify a single bargaining unit for over 500 general staff and about 40 security officers. The Casino objected to the inclusion of security officers in the unit. So the Union amended that application to exclude security officers from that General Unit. The Union then made a separate application for security staff only ("Security Unit"), described as:

> All full-time and regular part-time Security Officers and Security Guards employed at Casino Nova Scotia, working at 1983 Upper Water Street in Halifax, except surveillance employees, managers and those above the rank of manager and persons excluded by section 2(2) of the *Trade Union Act*.

[5] This appeal relates to the Security Unit.

[6] The Union's proposed unit includes 41 security officers. The Board found that their primary function is to protect the Casino's assets and promote a safe and honest environment for the gaming activity. These duties involve, to a degree that was contested between the Casino and Union, some monitoring, investigation and

reporting on the activity of Casino staff from the General Unit. Two security officers are classified as dual rate security supervisors, a training position in which the employee works some shifts as a security officer and other shifts as a security supervisor.

[7] The Casino did not argue that these security officers were status "managers". Rather the Casino submitted that they performed functions that were either “confidential in matters relating to labour relations” or “managerial”. Either functional characterization would exclude the worker from the definition of "employee” by s. 2(2) of the *Trade Union Act*, R.S.N.S. 1989, c. 475 ("*Act*"). For these reasons, the Casino took the position that (1) everyone in the Security Unit, and (2) alternatively at least the dual rate security supervisors, were outside the *Act*'s definition of "employee". The Casino also submitted that, because of conflict of interest, the Union could not be certified for a security unit if the Union was certified for the General Unit.

Board's Decision

[8] The Board heard both applications together over eleven days between July and October, 2007. Because the standard of review will require the court to track the Board's reasoning, I will plot the Board's analytical path in some detail. The Board's decision of January 18, 2008 (No. LRB-6174) summarized the Casino's submissions:

> 17. The Employer's arguments against certification of this unit can be summarized as follows:
>
> - Security personnel work in a confidential capacity and ought not to be unionized because their duties to the Employer could come into conflict with their loyalty to fellow union members;
>
> - Security personnel work closely with surveillance personnel, which itself is a group that works in a confidential capacity;
>
> - Security officers monitor other employees; therefore they are not “employees” under the *Trade Union Act* and not eligible to be unionized;
>
> - The unit is inappropriate for collective bargaining because the same union would represent these employees, which represents the much larger unit at

> the Casino, and because of the internal workings and constitution of the Union, members in the security unit could be at a disadvantage and prejudiced in their collective bargaining simply because they perform jobs and make decisions that may not be popular with members of the larger unit.
>
> - The unique legislation and regulations in Nova Scotia determine what security officers are obliged to do, and mandate that they work closely with surveillance. This is said to be unlike that in other provinces, which undermines the applicability of precedents from those other jurisdictions (such as Ontario) where the functions are independent of each other.

[9] The Union called no witnesses and the Casino called four witnesses. There is no transcript of their testimony. The Board's decision summarized their *viva voce* evidence:

> **Witnesses**
>
> 19. Suzanne Lalonde is the Assistant General Manager of the Casino and has an oversight responsibility for Security. She described the Security function as providing a physical presence (unlike surveillance which is behind the scenes).
>
> 20. Patricia Mosher is the Security Manager. She stated that both Security and Surveillance have access to cameras, although Surveillance have many more and are monitoring them constantly. Both departments are involved in investigations, which may involve fellow employees. She gave a few concrete examples of recent investigations undertaken by Security. One involved a bag of marijuana dropped near an entrance to the Casino, which was traced back to an employee. Another investigation by Security revealed an employee passing out tokens to family and friends.
>
> 21. She regards Security as an extension of management. Security is often asked to stand by to avert trouble during a termination. Their very presence can act as a deterrent to dishonesty by employees.
>
> 22. It was her evidence that “Security moves with Casino money,” which is to say that when money (or chips) changes hands, is counted or is transported from one place to another, Security is there to monitor and protect it. Security staff have some responsibility to be alert to possible cheating, either by dealers or guests.
>
> 23. She conceded that in the context of any serious incident, Security Officers play a minor reporting role while the investigation will be conducted by

higher-ups. She likened Security Officers to “beat cops,” who stay close to the ground to deter problems and notice things, in contrast (we infer) from detectives who investigate after the fact. Security Officers are encouraged to develop a sixth sense - to notice when something just does not feel right.

24. Brent Severeyns is the Surveillance Manager for the Casino. He described the clandestine role of Surveillance and how it works together with Security. At times Security will call upon Surveillance for support, for example where an incident has occurred and surveillance footage may assist in determining what happened. At other times, Surveillance will call upon Security, for example when something is detected, such as cheating at play, and someone needs to act upon it immediately.

25. He conceded that the people in the best position to detect deficiencies in gaming procedure (i.e. errors by dealers) are the Table Supervisors (who are neither Surveillance nor Security), in which case Surveillance would play a supporting role to the Supervisor.

26. He also testified that the Security and Surveillance operations are similar to those found in other casinos which he has visited throughout Canada and the United States, and that (as far as he knows) the regulatory regimes are similar.

[10] Under the Board's examination process, the parties had questioned certain witnesses, including the two dual rate security supervisors. Their transcripts were evidence before the Board, and are in the record for judicial review and appeal. The Board’s decision described as "particularly helpful" the following testimony of the two dual rate security supervisors:

29. . . .

Paul Leon

Q: Tell me what kind of work a Security Officer does?

A: Basically we control access to the Casino, monitor the doors for underage guests, Top Security Guests, support system for all departments for the Casino, run Jackpots for the Slot Department, bring chips to the Tables when they need a fill, we are responsible for first aid emergencies and we are also responsible for escorting visitors into non-sensitive areas, protection of assets, safety of guests and employees.

Blair Morris

> Q: Describe for me what type of work a Security Officer does?
>
> A. Security Officer is responsible for access control to the establishment, and we ensure that individuals are the proper age, whether or not individuals have had a lot to drink, we are not allowed to let anybody in who is under the influence, we transport chips to the tables, we go along with slot representatives when they are paying out Jack-Pots and we are responsible for all the staff here and the pay checks.

The Board then said:

> 30. These responses are particularly telling when contrasted to the emphasis that the Employer placed in argument on the alleged confidential nature of the Security Officers' duties; their involvement in investigations of fellow employees and their close relationship to the Surveillance Department. While we do not doubt that there is some involvement in those matters, it is clearly not the way Security Officers see their core job.

[11] The Board's decision referred to the Casino's Human Resources Policy # 053:

> 27. . . .
>
> HUMAN RESOURCES POLICY 053
> EFFECTIVE DATE: January 1, 2002
>
> SECURITY DEPARTMENT
>
> It is Casino Nova Scotia's policy that the Security Department and its managers, supervisors or officers are to be considered an extension of the management of the casino properties. They have full authority to access all areas unless expressly prohibited by Nova Scotia Gaming Regulations or the General Manager, to conduct authorized inspections and confidential investigations on incidents or situations which may be in violation of company policy or situations which may be detrimental to the business or dangerous to employees or patrons, as per the Investigations policy. The Security Department is responsible for ensuring a safe and secure environment for all employees and guest[s] and to safeguard and protect the assets of the Company. Except in case of a bona fide emergency, no security officer or manager will enter a washroom, dressing locker room of the opposite sex without first having that area cleared by a member of the appropriate sex.

> Security Department personnel in the course of their duties may be privy to, or may be entrusted with confidential and proprietary information related to the operation of the business, management of its employees, strategic planning and/or forecasting all aspects of the business. All Security Department Personnel are expected and required to conduct themselves as examples of professional and ethical conduct at all times.
>
> Any Security Department employee (manager, supervisor or officer) who violates confidentiality or information about the business, its strategic planning, the conduct of the business and operations, patrons or any other information may be subject to immediate termination.
>
> Security Department personnel, by this policy shall be directed to the Senior Vice President and Manager.

[12] Referring to this Policy, the Board made the following finding that underlaid the Board's reasoning:

> 28. While this policy may reflect a concept or belief that security is an "extension of management," the evidence did not really bear out that it is treated as such. The notion that security personnel might be "privy to, or may be entrusted with confidential and proprietary information related to the operation of the business, management of its employees, strategic planning and/or forecasting all aspects of the business" was not reflected in the evidence.

[13] The Board then referred to the *Casino Regulations* (NS Reg. 40/95) under the *Gaming Control Act*, S.N.S., 1994-95, c. 4, and in particular Regulations 125-134. Regulation 125 prescribes that the Casino have surveillance and security departments, who monitor, detect and report fraud, theft and unusual or illegal activity. The Board commented as follows on the Regulations:

> 33. The regulation is lengthy, but nowhere are the activities of Security (as opposed to Surveillance) catalogued in such detail. A number of sections require "security personnel or the approved designate" (e.g. s.175) to transport chips from the cashier's cage to the tables, or to perform other tasks where money moves or is counted.34. It also appears that although the regulations require casinos to have both Security and Surveillance departments, it does not require both departments to do precisely the same thing. It would appear that the Employer has a great deal more flexibility in organizing its Security Department than it does with its Surveillance Department.

[14] The Board found that the security officer's role is "primarily designed to protect the assets of the Casino and create a safe and honest environment". The Board gave examples: preventing entry of minors, which could imperil the Casino's licence; dealing with intoxicated persons; responding to various incidents such as injuries or medical emergencies; supervising money counts and providing physical security when money is moved. Respecting their suggested managerial and confidential functions, the Board said:

> 35. ... Security occasionally acts in a supporting capacity in matters that are or could become disciplinary, such as providing reports to supervisors or management, but they are not privy to any confidential labour management information in the sense that they are not involved in the processing or interpreting of the evidence or in the decision about what action to take in consequence of it.
>
> 36. As to whether or not the Security Officers are "employees," that distinction in the Act is designed to distinguish employees from managers. The traditional test for whether employees are managers is to ask whether they are responsible for hiring, firing, promotions, discipline etc. In this case, the answer has to be a resounding "no" since Security Officers do none of those things. The limited amount of monitoring and investigating that they do is not managerial, although it is done for the benefit of management. They are mere "conduits" of information.

[15] The Board contrasted the confidentiality of security officers' functions in a Casino from security officers' functions in other sectors:

> 51. We were also supplied with examples from other industries in Nova Scotia and elsewhere, where units of security staff have been permitted. There are also several cases from the 1960's where proposed units of security guards in other industries have been denied certification on the basis that they were employed in a confidential capacity in matters pertaining to labour relations. All we have on those cases are the orders of this Board, not the reasons for the decision nor any account of the evidence. Those cases were in the marine and dairy industry - both essentially manufacturing facilities. What these cases demonstrate, perhaps, is that security guards in some contexts do act in a confidential capacity. It would be wrong to extrapolate that into a conclusion that all security personnel in all contexts act in a confidential capacity. It is to be expected that in some such other industries, security personnel focus far more of their energy on plant employees than would be the case with a casino. A casino is open to the public at all times, and while staff are also under scrutiny, it is obvious that Security Officers are

> more immediately and routinely concerned with what patrons are doing or might do.

[16] The Board found that "there is very little evidence that security officers are involved in a confidential capacity in matters *pertaining to labour relations*." (Board's emphasis). The Board cited *Canada (Labour Relations Board) v. Transair Ltd.*, [1977] 1 SCR 722, at ¶ 50 to differentiate confidential functions related to personnel relations from those related to industrial relations. The Board then concluded:

> 54. To the extent that Security Officers are required to investigate and report on other Casino employees, their knowledge gained does not involve them in matters pertaining to industrial (or labour) relations in the sense that is meant in the Trade Union Act or other labour statutes that adopt this distinction. A Security Officer observing and reporting upon something that an employee does, learns no more than the employee him or herself knows and could tell the Union.

[17] The Board dismissed the Casino's submission that the Union should not represent the security officers while the Union represented another unit of the Casino's general staff. The Board referred to the Union's constitution, that prescribed discipline for union members who act contrary to the interests of other union members. The Board nonetheless found that there was no ascertainable conflict of interest, and held that s. 25(8) of the *Act* did not allow the Board to reject a certificate to a union that receives the majority vote in an appropriate bargaining unit:

> 39. On the facts, we would say that all this is totally theoretical and speculative. There were no examples brought to our attention from other jurisdictions or from other industries, where something of this nature has actually occurred. In a relatively small province such as Nova Scotia, there are a number of large unions with locals of all sizes. The Employer produced not a shred of evidence that would substantiate the notion that larger bargaining units exert an improper influence or otherwise dominate smaller units, either from within the same Employer or otherwise.
>
> 40. In our view, employees who are asked to join a union or support a unionization drive are in the best position to decide whether that union is the right one for them, or whether they should be seeking representation elsewhere.

> 41. Even so, there is very good reason to doubt that we have the legal authority to refuse an otherwise proper certification on the basis that we do not believe that a particular union should be certified. We agree with the Union's argument that s.25(8) of the Trade Union Act does not allow for such a discretion. That section reads:
>
> > 25 (8) Where as a result of a vote taken and counted pursuant to clause (b) of subsection (7) the majority of the votes cast are in favour of the applicant trade union, the Board shall, subject to subsection (10), [unfair labour practice] certify the applicant trade union as bargaining agent of the employees in the unit.
>
> The language of s.25(8) is mandatory.

[18] The Board adopted the reasoning of the New Brunswick Labour Relations Board in *Canadian Paperworkers Union (CPU) , Local 4 v. Fraser Inc.*, [1985] NBIRB No. 5, ¶ 13-14, 20-24, and also referred to authorities cited by the Casino. The Board concluded that placing security officers in a unit separate from the General Unit cauterized any potential conflict of interest. The Board noted the experience in the municipal sector where the same union commonly represents different units of policemen and other municipal employees.

[19] The Board ruled that the security officers, including the dual rate security supervisors, comprised an appropriate bargaining unit. The bargaining unit had held a vote on December 21, 2007. After the Board's decision of January 18, 2008, the Board counted the vote. The Board determined that a majority had voted for certification. The Board certified the Union as the exclusive bargaining agent for the Security Unit.

Judicial Review and Appeal

[20] The Casino applied to the Supreme Court of Nova Scotia to set aside the Board's decision. Justice Murphy heard the application in chambers on April 21, 2008, and issued an oral decision on June 5, 2008 followed by a written decision on August 29, 2008. The judge dismissed the application.

[21] The judge referred to *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Lake v. Canada*, 2008 SCC 23 and applied a reasonableness standard of review. He held

that the Board's reasoning was intelligible and transparent, and the Board's conclusions were within the range of acceptable outcomes. The judge summarized his ruling:

> [23] Applying the "reasonableness" standard of review enunciated in *Dunsmuir*, *Lake,* and *Weilgart* (*supra*), the Board's Decision represents a supportable, justified and acceptable outcome, and should not be disturbed. Had the matter come to the court prior to *Dunsmuir*, my conclusion would not be different. Previous decisions, including *Granite Environmental v. Nova Scotia (Labour Relations Board)*, [2005] N.S.J. No. 441 (C.A.), and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, suggested a degree of deference and acknowledgment of a tribunal's reasoning path which would have precluded the court's interference with the Board's Decision in this case.

[22] The Casino appealed to the Court of Appeal.

Issues

[23] The Casino submits that the judge erred by not determining that the Board made the following reviewable errors under the standard of review:

> 1. The Board erred in its interpretation and application of the *Trade Union Act*, particularly the exclusions for "managerial functions" and "confidential capacity" in s 2(2)(a):
>
> (a) for all security officers, and
>
> (b) alternatively, at least for the dual rate security supervisors.
>
> 2. The Board erred by certifying the Union despite the Union's conflict of interest as the bargaining representative for the Casino's General Unit.

Standard of Review

[24] The parties agree that the standard of review is reasonableness. But the parties' agreement does not necessarily determine the standard: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services*), [2004] 3 SCR 152, at ¶ 6. The court still must consider the contextual factors, at least in abbreviated form.

[25] In *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74, this court summarized the standard of review analysis from *Dunsmuir:*

> [38] The Supreme Court issued *Dunsmuir v. New Brunswick*, 2008 SCC 9 after the judge's decision here. Justices Bastarache and LeBel, for five justices, stated the following principles governing the administrative SOR.
>
> [39] Correctness and reasonableness are now the only standards of review (¶ 34). The court engages in "standard of review analysis", without the "pragmatic and functional" label (¶ 63).
>
> [40] The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (¶ 49).
>
> [41] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (¶ 62, 54, 57).
>
> [42] If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (¶ 55):
>
> (a) Does a privative clause give statutory direction indicating deference?
>
> (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (¶ 64).
>
> (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (¶ 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2)

> any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (¶ 55-56, 58-60).

[26] Under *Dunsmuir*'s first step, I will begin with the existing authority. The courts have emphasized the importance of deference to the decisions of Labour Relations Boards on core issues under industrial relations legislation, including the appropriateness of the unit and the definition of "employee": *Dunsmuir* ¶ 54; *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.*, [1996] 2 SCR 432, ¶ 24; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 SCR 369, ¶ 51-60; *CBC v. Canada (Labour Relations Board)*, [1995] 1 SCR 157, ¶ 31; *Canada (Labour Relations Board) v. Transair Ltd.*, [1977] 1 SCR 722, pp. 735-739; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141, ¶ 21-29; *Re Nova Scotia Liquor Commission* (1974), 9 NSR (2d) 248 (AD), ¶ 92-93; *Moncton (City) v. Moncton Police Force Senior Officers' Assoc.* (1991), 82 DLR (4^{th}) 112 (NBCA) at p. 117.

[27] As to the contextual factors, the *Trade Union Act*, subsections 19(1)(a) and (g) say that the Board's conclusions on employee status and definition of the bargaining unit are "final and conclusive and not open to question, or review". The Board is specialized in the field of labour relations. Its decisions are fact specific and informed by the Board's view of industrial relations policy. Issues of bargaining unit appropriateness and employee status are in the Board's core of expertise that the legislature intended to govern the certification process. In *Granite Environmental*, ¶ 21-29, this court reviewed the contextual factors with respect to the Construction Industry Panel's assessment of unit appropriateness. Similar considerations apply to the Board's functions here.

[28] The reviewing judge, in my view, correctly chose the reasonableness standard of review.

[29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the

tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.

[30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, ¶ 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia* (*Director of Assessment) v. Wolfson*, 2008 NSCA 120, ¶ 36.

[31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, ¶ 47-49; *Lake*, ¶ 41; *PANS Pension Plan*, ¶ 63; *Nova Scotia v. Wolfson*, ¶ 34.

First Issue - Definition of "employee"

[32] The Casino's factum says that the Board's conclusions in ¶ 35 and 36 [quoted above ¶ 14] "are lacking in intelligibility and justification". The Casino cites evidence and the Board's findings that security officers have access to information from the surveillance department monitoring possible cheating by dealers, the security officers' presence is supposed to deter that behaviour, and they are to act quickly upon detection of cheating by the surveillance department. The security officers at times monitor and report on suspicious behaviour by the Casino's floor staff. The Casino says that, given the Board's findings, the Board's conclusion that the security staff do not exercise managerial or confidential functions "simply does not make sense", and is "unintelligible and lacking justification".

[33] I respectfully disagree with the Casino's forceful argument. I agree that a tribunal's conclusion, disconnected from the tribunal's factual findings, may be

unintelligible. But there is no orphaned conclusion here. The Board cited evidence to support its view of the security officers' functions and, from that perspective, inferred that the security officers exercised no significant managerial or confidential responsibilities.

[34] The Board referred to the testimony and described the security officers' job functions. The Board (¶ 29-30) quoted the testimony of the two dual rate security supervisors and found that the Casino's characterization of the security officers' confidential functions "is clearly not the way Security Officers see their core job".

[35] The Board distinguished the activities of the security officers from those of the Casino's surveillance department, who are not in the Security Unit. The surveillance staff are the clandestine "eye in the sky" who monitor floor staff. The Board (¶ 23) referred to the evidence of the Casino's Security Manager that the security officers, on the other hand, "are like 'beat cops' who stay close to the ground to deter problems and notice things". The Board (¶ 35) described these floor activities as preventing entry of underage persons, dealing with intoxicated patrons, responding to incidents including medical emergencies, supervising and securing moving and counting of money. The Board (¶ 51) found that, unlike security staff in more privately operated businesses, the Casino "is open to the public at all times, and while staff are also under scrutiny, it is obvious that Security Officers are more immediately and routinely concerned with what patrons are doing or might do".

[36] The Board (¶ 35) said that a Security Officer "occasionally acts in a supporting capacity in matters that are or could become disciplinary". On those occasions, the security officers' function is "providing reports to supervisors or management, but they are not privy to any confidential labour management information in the sense that they are not involved in the processing or interpreting of the evidence or in the decision about what action to take in consequence of it" (¶ 35). The Board said (¶ 36) that, as to whether the security officers had responsibility for discipline, "the answer has to be a resounding 'no' ", and that the "limited amount of monitoring and investigating they do is not meaningful". Their limited connection to the disciplinary process is to monitor and pass on their observations to superiors, and it is the superiors who exercise managerial functions over discipline.

[37] The Casino's Organizational Chart, filed at the Board's hearing, locates the security officer classification at the lowest rung beneath, in upward linear progression (1) security supervisor, (2) security shift manager, (3) security manager/investigator and (4) director of security, who reports to the general manager. This chart shows four levels of security personnel above the security officers.

[38] The Board (¶ 28) said the suggestion that security officers were entrusted with confidential information "related to the operation of the business, management of its employees, strategic planning and/or forecasting all aspects of the business" was "not reflected in the evidence". The Board found (¶ 52):

> To reiterate, there is very little evidence that Security Officers are involved in a confidential capacity in matters *pertaining to labour relations*.
> [Board's emphasis]

[39] In my view, the Board's reasoning exhibits intelligibility, transparency and justification. I understand why the Board reached its decision. The Board found, on the evidence, that the security officers performed no meaningful managerial functions and enjoyed no confidential capacity relating to labour relations, particularly discipline. The decision affords the reviewing court with the resources to assess whether or not the Board's conclusion lies within the range of acceptable outcomes.

[40] The Casino makes several submissions that the Board's decision is outside the range of acceptable outcomes.

[41] The Casino notes that s. 2(2)(a) of the *Act* excludes three categories from the definition of "employee": (1) managers (2) persons "who exercise management functions", and (3) persons in a "confidential capacity in matters relating to labour relations". The Casino says that the second and third categories must include persons who are not status managers. The Casino submits that, while the Board (¶ 36) said the security officers were not managers, the Board "failed to apply two of three possible bases for determining the question of whether security officers should have been deemed non-employees within the meaning of s. 2(2)(a) of the *Act*". This would be a reviewable error of law and unreasonable under the reasonableness standard of review (*Lake*, ¶ 41).

[42] The Board dealt with the functional managerial and confidential categories. The Board's comments quoted earlier (Board ¶ 35-36, above ¶ 14) relate to the security officers' managerial functions, not merely their job status. The Board (¶ 51 and 54, above ¶ 15-16) expressly ruled that the security officers were not involved in a confidential capacity in matters relating to labour relations. There was no error of law under any standard of review.

[43] The Casino next submits that the Board's inferences, that the security officers had no significant managerial and confidential functions, are unsupported by the evidence.

[44] A factual challenge on judicial review, under the reasonableness standard, must establish that there was no evidence capable of reasonably supporting the finding: *Lester (W.W.) 1978 Ltd. v. UAJAPPI, Local 740*, [1990] 3 S.C.R. 644, p. 649; *Toronto Board of Education v. OSSTF District 15*, [1997] 1 S.C.R. 487 at ¶ 44-51, 48, 60, 78; *Dr. Q. v. College of Physicians and Surgeons of B.C.*, [2003] 1 S.C.R. 226 at ¶ 33-35, 38-41. An applicant for judicial review may be hampered in satisfying his onus for a factual challenge when there is no transcript of the oral testimony to the Board (see *Granite Environmental*, ¶ 85-86). The Board cited evidence that the security officers' activities involved no meaningful managerial or confidential functions. I refer to my earlier comments on the evidence and the Board's findings (above ¶ 9-16, 33-38). From the summaries of evidence in the Board's decision, the exhibits and examinations on the record, in my view, the Board's findings occupy the range of inferences that may reasonably be drawn from the evidence. The Casino would recalibrate the evidentiary scale. But it is not the reviewing court's role to reweigh evidence.

[45] The Casino submits that the dual rate security supervisors at least should be excluded. This is a training classification for elevation to the position of security supervisor, which is excluded as confidential and managerial.

[46] The Board's decision said the following about the dual rate security supervisors:

> 13. Dealing with the latter issue first, we understand that the Dual-Rates are regular security staff who are in training to become supervisors, and that while in

> this phase of their careers they take some shifts as security officers and some as supervisors, although not yet having received all of the training, and not yet with all of the duties that supervisors eventually perform.
>
> 14. This type of hybrid job straddles any bright lines that we could seek to draw between front line officers and supervisors. We have already ruled in connection with the certification application for the larger unit that Dual Rate Dealer Supervisors are to be included in the unit which includes Dealers. There are even stronger reasons to hold consistently in connection with the Dual Rate Security Supervisors, since the evidence was to the effect that they do not perform all of the functions of a Supervisor, unlike the Dual Rate Dealer Supervisors who, when assigned as a Supervisor, are performing the full range of duties.
>
> 15. The mere fact that the Dual Rate Security Supervisors perform supervisory functions would not disqualify them from inclusion in the unit. The supervision that they provide, on the evidence, falls far short of being a management job. And moreover there is no tradition in this province, let alone any legal requirement, that every bargaining unit be entirely non-hierarchical. But most importantly, when performing the job of Security Officer (which they do at least half the time) they have a clear community of interest with all of the other Security Officers. It would not make good labour relations sense for them to perform that job while excluded from the unit, alongside their unionized brothers and sisters doing the very same job.

[47] The Board said that the status of dual rate security supervisors "straddles any bright lines that we could seek to draw between front line officers and supervisors." The finding is a shades of gray, mainly factual, rendering from partially untranscribed testimony. The Board's comment about the "labour relations sense" of including these persons "alongside their unionized brothers and sisters doing the very same job" is a value judgment from a policy perspective, an exercise that the legislators assigned to the Board. (*Granite Environmental*, ¶ 84-88)

[48] The evidence that is available in the appeal book shows that the dual rate security supervisors "will be supervised at all times" (Job Description), and neither make decisions related to discipline nor have access to personnel files. It is a training position. If the dual rate security supervisor becomes a security supervisor, he leaves the bargaining unit.

[49] The Board's conclusion is one, though not the only, reasonably acceptable outcome derivable from the evidence and statutory framework. The reviewing judge made no error, and the Board made no reviewable error respecting whether the security officers and dual rate security supervisors are "employees" under the *Act*.

Second Issue- Identity of Union

[50] The Casino's factum describes its submission:

> The appellant takes the position that the Security Unit is **not appropriate for collective bargaining** because the same Union has already been certified to represent a larger group of employees at the Casino (the "general unit").
> [Casino's emphasis]

The Casino says that the Union would have a conflict of interest, and this renders the bargaining unit inappropriate.

[51] The Board rejected the Casino's submission. The Board said that the suggested conflict was "totally theoretical and speculative" and supported by "not a shred of evidence". The Board found that the employees in the unit are in the best position to assess whether they should seek representation from another union because of the suggested concern. The Board cited the decision of the New Brunswick Industrial Relations Board in *Canadian Paperworkers Union (CPU), Local 4 v. Fraser Inc.*, [1985] NBIRB No. 5 at ¶ 22-23, for the principles that separation of the bargaining units is the appropriate Board response to a potential conflict of interest, and that the Board had no statutory jurisdiction, simply because of the union's identity, to deny certification when the application satisfied the legislation's prerequisites.

[52] The Board's reasoning process is transparent and intelligible. I understand why the Board reached its decision, and I am able to assess the acceptability of the outcome.

[53] The Casino's submission is that, under the heading of bargaining unit appropriateness, the Board must dismiss the application outright because of the applicant union's trait. This confuses the constituency with the candidate. Except as

prescribed by the *Trade Union Act*, the appropriateness of the unit is independent from the union's identity.

[54] Section 25 of the *Act* speaks of an application by a "trade union", defined by s. 2(1)(w) as:

> 2 (1) In this Act,
>
> (w) "trade union" or "union" means any organization of employees formed for purposes that include regulating relations between employers and employees which has a constitution and rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continued in membership;

Section 25(4) directs the Board to decide whether the unit "is appropriate for collective bargaining". Section 2(1)(x) defines "unit" as "a group of two or more employees" and "appropriate for collective bargaining" reflexively as a "unit that is appropriate for such purposes". Section 25(14) requires that the Board consider the employees' community of interest respecting the appropriateness of the unit. Section 25(8) says that, if the majority of votes cast favor the applicant union, the Board "shall, subject to s-s. (10), certify the trade union as bargaining agent of the employees in the unit". Subsections (10), (11), and (15) of s. 25 entitle the Board to dismiss a certification application if (1) the union has contravened the *Act* and the membership information or vote does not reflect the employees' true wishes or (2) the union is dominated or improperly influenced by the employer.

[55] Nothing suggests the Union is not a "trade union", or is employer dominated, or that the membership information and vote does not reflect the employees' true wishes. Nova Scotia's *Act* does not contain a provision like Ontario's *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch A., s. 14, dealing specifically with bargaining units for security guards. Nothing in Nova Scotia's *Act* directs the Board to dismiss the Union's application, that satisfies the statutory conditions for certification, based simply on the union's identity as a bargaining agent for another unit.

[56] The Casino cites *International Association of Machinists and Aerospace Workers, District Lodge 692 v. United Brotherhood of Carpenters & Joiners of America (CJA), Local 2736 (Millwrights)* (1993), 10 DLR (4^{th}) 418 (BCCA) leave to appeal denied [1994] SCCA No. 113 for the proposition that the union's identity is relevant to the appropriateness of the unit. The *Machinists* case involved a craft

unit. Section 41(1) of British Columbia's *Industrial Relations Act* required that the applicant union "pertain to the craft". Justice Lambert (p. 427) referred to s. 41(1) and said "The unit and the union operate as one. The character of each follows the character of the other." This authority has no application here. This is not a craft unit. Part I of Nova Scotia's *Act*, governing this proceeding, has no equivalent to s. 41(1) of British Columbia's statute to require a connection between the character of the Security Unit and the applicant Union.

[57] When an application for certification satisfies the *Trade Union Act*'s prerequisites, and s. 25(8) prescribes certification, the Board does not retain an inherent jurisdiction to dismiss the certification application: - *The New Brunswick Teachers' Federation v. Province of New Brunswick and CUPE* (1990), 17 D.L.R. (3d) 72 (NBCA) at pp. 76-77; *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association* (1972), 26 D.L.R. (3d) 63 (OCA) at p. 66; *Canada Association of Trades and Technicians v. Canada (Treasury Board)*, [1992] 2 F.C. 533 (FCA) at pp. 537-38.

[58] In short, the Casino raised a concern about a potential conflict of interest. The Board found the concern to be speculative and unproven, but concluded that separate Security and General Units dissipated any potential conflict. The Board turned its mind to the concern by defining the appropriate bargaining unit to isolate the security officers. The record before the Board (exhibits 54-55 in Appeal Book pp. 807-1172) included Canadian examples of certified security units, in casinos and elsewhere, represented by the same union that represents other workers. The Board's conclusion was within the range of the acceptable outcomes available to the Board. The Board reasonably concluded that outright dismissal of the Union's application, which met every statutory condition for certification, was not an acceptable outcome. The reviewing judge made no error by dismissing this ground for review.

Conclusion

[59] I would dismiss the appeal with $1500 costs all inclusive, the amount agreed by both parties, payable by the Casino to the Union.

Fichaud, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.

NOVA SCOTIA COURT OF APPEAL

Citation: Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board) , 2009 NSCA 4

Date: 20090121
Docket: CA 298319
Registry: Halifax

Between:

Casino Nova Scotia/Casino Nouvelle Ecosse

Appellant

v.

Nova Scotia Labour Relations Board and Service Employees International Union, Local 902

Respondents

Revised judgment: The text of the original judgment has been corrected according to this erratum dated **July 22, 2009.**

Judge(s): Oland, Hamilton, Fichaud, JJ.A.

Appeal Heard: December 5, 2008, in Halifax, Nova Scotia

Held: Appeal is dismissed with costs of $1500 all inclusive, per reasons for judgment of Fichaud, J.A.; Oland and Hamilton, JJ.A. concurring.

Counsel: Eric Durnford, Q.C. and Amy Bradbury, for the appellant
Raymond Larkin, Q.C. and Joel Schwartz, for the respondents

Erratum:

[60] The last sentence in ¶ 17 states:

> "[17] . . . The Board nonetheless found that there was no ascertainable conflict of interest, and held that s. 22(8) of the *Act* did not allow the Board to reject a certificate to a union that receives the majority vote in an appropriate bargaining unit: . . .

The reference to "s. 22(8)" in ¶ 17 is incorrect and should read s. 25(8).