IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Casino Nova Scotia v. Nova Scotia (Labour Relations Board), 2008 NSSC 251

Date: 20080605
Docket: SH 291348
Registry: Halifax

In the Matter of:

The *Trade Union Act*, R.S.N.S., 1989, c. 475

- and -

In the Matter of:

An Application by Casino Nova Scotia/Casino Nouvelle Ecosse for an Order to Quash and Set Aside the Decision of the Nova Scotia Labour Relations Board, dated January 18, 2008

- and -

Between:

Casino Nova Scotia/Casino Nouvelle Ecosse

Applicant

- and -

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

Respondent

Judge:	The Honourable Justice John D. Murphy
Heard:	Special Time Chambers Application April 21, 2008, in Halifax, Nova Scotia
Written Decision:	August 29, 2008 *{Oral decision rendered June 5, 2008, Halifax, N. S.}* Editing in written decision limited to improving grammar, providing citations for authorities referred to, and inserting quotations which were referenced but not read during oral delivery.
Counsel:	Eric B. Durnford, Q.C., for the applicant Raymond F. Larkin, Q.C., for the respondent, (Service Employees International Union, Local 902) Ed Gores, Q.C., for the respondent (Labour Relations Board)

By the Court:

INTRODUCTION

[1] This *Application* was brought by Casino Nova Scotia, seeking an order to quash and set aside the January 18, 2008 Decision of the Labour Relations Board, which certified the Respondent Union as bargaining agent for a bargaining unit consisting of all full-time and regular part-time employees in the Casino Security Department working in Halifax, including "Dual Rate Security Supervisors." The Board provided written reasons for its unanimous decision.

FACTS

Background

[2] The background facts (as opposed to the correctness of certain findings made by the Board) are not in dispute. They are accurately set out by the Board and the parties (with some obvious overlap) as follows:

<u>NOTE:</u> When delivering judgment orally, I cited but did not read statements in the Board's reasons and the parties' briefs. For ease of reference, they are reprinted in the following paragraphs (1), (2) and (3):

(1) By the Board, in its reasons for decision, paragraphs 6, 7, 8, 9, 10, 11 and 12:

> 6. The Service Employees International Union, Local 902 (hereafter "the Union") initially applied to certify a single unit at the Casino that included both the general staff and security staff (LRB-6160). A certification vote was taken of that larger unit within days of the application. It was not counted until much later.
>
> 7. In the meantime, in its formal Reply and in communications between the parties, the Employer took issue with the composition of the proposed unit and the Union sought to head off some of the anticipated resistance by amending its original application to exclude the security staff and making a separate application for security employees only. A separate vote for the proposed security unit was then taken.

8. The application for certification is dated May 31, 2007 and seeks certification of a 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*."**

9. In its Reply, the Employer took the position that the persons described in the application were not "employees" within the meaning of s.2 of the Trade Union Act; that the unit was "inappropriate" and, in the alternative, that the Applicant Union should not represent these workers in the event that it is successful in its application to certify the proposed larger unit at the Casino.

10. The issue of whether Dual-Rate Security Supervisors should be included in the unit only came up later.

11. Hearings before the Board were scheduled for September 4, 5, 6 and 7, 2007. It had been hoped that all issues could be dealt with on those days, but we did not complete all of the evidence or argument concerning the security unit. The hearing did result in an interim ruling, with more reasons to follow, if requested, to the effect that the vote could be counted for the general employees unit. That occurred on September 7, 2007 and it was determined that a majority of the eligible votes favoured certification. The formal certification order has recently been issued by the Board.

12. Further evidence and argument on the security application was heard on the 11th and 12th of October 2007. We reserved our decision.

(2) By the Applicant, Casino Nova Scotia in its brief, paragraphs 1-11 and 22:

1. The Applicant Casino operates a casino in downtown Halifax under contract with the Nova Scotia Gaming Corporation.

2. The Respondent SEIU (also referred to herein as the "Union") is a trade union under the *Act*. Initially, the Union applied to certify a single bargaining unit of employees of the Casino that included both the general staff (over 500 employees) (hereinafter the "general unit") and the Security Officers (approximately 40).

3. The Casino immediately took issue with the suggested inclusion in the general unit of Security Officers and the Union amended its application to exclude them from the general unit and made a separate application for security staff only (the "security unit").

Reference: Board Decision, paras. 6-7, Record, p. 2.

4. In this new application, the Union proposed that the security unit be described as follows:

> 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*.

Reference: Application for Certification, Record, p. 103.

5. The Casino in its Reply took the position that the security unit was inappropriate because all of the persons in it were deemed to not be "employees" as that term is defined in section 2 of the *Act*. It further submitted in the alternative, that if the "not employees" argument was unsuccessful, the Union could not represent these workers if it was successful in becoming the certified agent for the general unit.

Reference: Casino Reply, para. 6, Record, p. 70.

6. In the alternative, the Casino disputed the inclusion of the position of Dual Rate Security Supervisor in the proposed bargaining unit on the same basis, that employees in these positions were not "employees" pursuant to section 2 of the *Act*.

7. In it[s] decision, the Board summarized the positions advanced by the Casino 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 of other jurisdictions (such as Ontario) where the functions are independent of each other. (emphasis added)

Reference: Board Decision, para. 17, Record, pp. 3-4.

8. The Board dealt with the two applications together. It held Examination Proceedings on July 24, 25 & 26, 2007 and August 1 & 3, 2007 with respect to specific disputed positions in both applications and held joint hearings on September 4, 5, 6 & 7, 2007, October 11 & 12, 2007, on the two applications.

9. At the hearing, the Union called no witnesses to give *viva voce* testimony; the Casino did.

10. The *viva voce* testimony was summarized by the Board in the following passages:

> Suzanne Lalonde is the Assistance 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).

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.

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.

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.

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.

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 had 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.
>
> 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.
>
> 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.
>
> ***Reference:*** Board Decision, at paras. 19-26, Record, pp. 4-5.

The Union did not call evidence to contradict any of the above.

11. The Board also had before it the Casino's Human Resources Policy 053.

> 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, or per the Investigations policy**. The Security Department is responsible for ensuring a safe and secure environment for all employees and guest and to safeguard and protect the assets of the Company. Except in case of a bona fide

> emergency, no security manager or officer will enter a washroom, dresser 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 confidentially *[sic]* or information about the business, its strategic planning, the conduct of the business and operations, patrons or other information may be subject to immediate termination.
>
> Security Department personnel, by this policy shall be directed to the senior Vice President and Manager. (emphasis added)
>
> ***Reference:*** Board Decision, at para. 27, Record, pp.5-6.

...

22. In its Decision, the Board concluded that the unit applied for was appropriate for collective bargaining, consisted of "employees" under the *Act*, and the Dual Rate Security Supervisors should be included in the unit. The Union was certified as bargaining agent, effective December 21, 2007, for a bargaining unit described as follows:

> ... all full-time and regular part-time employees in the security department of Casino Nova Scotia, working at 1983 Upper Water Street, Halifax, Nova Scotia, excluding supervisors and those above the ran[k] of supervisor and those excluded by Paragraphs (a) and (b) of subsection (2) of Section 2 of the *Trade Union Act*.
>
> ***Reference:*** Board Decision, at p. 1, Record, p. 1.

(3) By the Respondent Union, in its brief, paragraphs 8, 9(first sentence only), 10-19:

B. The parties

8. The parties to the application for certification in issue were the Union, the SEIU, Local 902 and the Employer, Casino Nova Scotia. The Union is a trade union certified to represent bargaining units of employees of several employers in Nova Scotia, including, since November 1, 2007, a bargaining unit of approximately 400 employees of the Employer. The Employer operates two casinos in Nova Scotia, including one in Halifax.

> *Casino Nova Scotia*, LRB Decision No. 6160 (November 1, 2007), Union Book of Authorities, Tab 1.

C. The Security Officers

9. The proposed bargaining unit for the application in issue included forty-one Security Officers employed by the Employer at its Halifax Casino....

10. Two of the Security Officers were Dual Rate Security Supervisors. The Dual Rate Security Supervisors worked some shifts as Security Supervisors and some shifts as Security Officers. The Dual Rate Security Supervisor position is a training position and, as such, employees working in that position did not perform all of the duties of Security Supervisors.

> Board Decision, paras. 13-16, Record, p. 3.

D. Two applications for certification

11. The Union first applied for certification as bargaining agent of a bargaining unit of employees of the Employer on April 27, 2007. The bargaining unit initially proposed by the Union included the Employer's Security Officers and many other employees at the Halifax Casino.

> *Casino Nova Scotia*, Union's Book of Authorities, Tab 1.

12. In its reply to the application, the Employer objected to the inclusion of its security personnel in the bargaining unit. It proposed a different bargaining unit that did not include the security personnel.

> Cover letter from Raymond Larkin to Mary-Lou Stewart, Record, p. 100-101.

13. On May 31, 2008,in response to the Employer's objection to including the security personnel in the same bargaining unit with other employees, the Union

amended its application to accept the bargaining unit proposed by the Employer. On the same day, the Union filed a separate application for certification for a bargaining unit of Security Officers employed at the Halifax Casino.

Cover letter from Raymond Larkin to Mary-Lou Stewart, Record, p. 100-101.

E. The Employer's objections

14. The Employer contested both applications. It contested the Security Officer application because it claimed that:

a) the Security Officers were not "employees" under the *Trade Union Act* because they exercised management functions and were employed in a confidential capacity in relation to labour relations;

b) the Dual Rate Security Supervisors were not "employees" under the *Trade Union Act* because they exercised management functions; and

c) the proposed bargaining unit was inappropriate because it would create a conflict of interest for the Security Officers if they were represented by the same union that represented other employees at the same casino.

Reply – June 15, 2007, Record pp. 69-70.

F. The hearing

15 The Board held a hearing to deal with both applications. The first four days of hearing dealt with both applications. The Board had two further days of hearing exclusively for the Security Officer application.

Board Decision, p. 3, paras. 11-12.

G. The certification

16 Approximately two months after the final day of hearing, the Board notified the parties that it had determined that the Security Officer unit was appropriate and that the Dual Rate Security Supervisors were properly included.

Board Decision, p. 1, Record, p. 1.

17. The Board then confirmed that the Union had met the requirements for certification. The Board satisfied itself that the Union had more than forty percent of the employees in the bargaining unit as members in good standing when the application was filed.

Board Decision, p. 1, Record, p. 1.

18. The Board then counted the ballots cast in the representation vote. Twenty-two of the twenty-nine Security Officers who voted had voted in favor of the Union.

Ballot of Employees, Record, p. 82.

19. The Board granted the application and certified the Union as bargaining agent for a bargaining unit of:

> ...all full-time and regular part-time employees in the security department of Casino Nova Scotia, working at 1983 Upper Water Street, Halifax, Nova Scotia, excluding supervisors and those above the rank of supervisor and those excluded by Paragraphs (a) and (b) of subsection (2) of Section 2 of the *Trade Union Act*.

Board Decision, Record, p. 1

The Hearing and Board's Decision

[3] There is no transcript of the hearing before the Board, which involved evidence and argument over six days.

[4] The Board summarized the testimony of witnesses presented by the Casino at paragraphs 19-26 of its Reasons. **(<u>NOTE:</u> Those paragraphs, which were not repeated orally, are reproduced for ease of reference.)**

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.

[5] The Board also referred, in paragraphs 29 and 30 of its Reasons, to evidence of two "dual-rate" security supervisors who testified during examinations conducted by the Board's Chief Executive Officer prior to the hearing. **(<u>NOTE:</u> Paragraphs 29 and 30, referenced but not read during the oral decision, state as follows:)**

> **Examinations**
>
> 29. We found particularly helpful the examiner evidence of the two Dual Rate Security Supervisors, Paul Leon and Blair Morris, not so much for their evidence of their supervisory roles but for what they do as Security Officers.
>
> **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.
>
> 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.

[6] Throughout the Decision, the Board referred to and made findings of fact based upon the evidence.

[7] In granting the Application and certifying the Union as bargaining agent for full-time and regular part-time employees in the Security Department, including "dual-rate supervisors", the Board made the following determinations, which are summarized in the Respondent's brief at paragraphs 20-23.

(1) The Security Officers were "employees" under the *Trade Union Act*. The Board concluded that the Security Officers were not managers and did not exercise management functions. It noted that while Security Officers occasionally monitor and investigate other employees, they acted only as "mere conduits of information" for the Employer and had no role in deciding what actions would be taken as a result of this information. Board Decision, paras. 35-36, Record, p. 10.

(2) Security Officers were not employed in a confidential capacity in relation to labour relations. The Board found that the Security Officers did not have access to confidential information about labour relations. Board Decision, paras. 52-54, Record, p. 15-16.

(3) The Dual Rate Security Supervisors should be included in the bargaining unit. They had a community of interest with other Security Officers, and they did not perform management duties when working in a supervisory role. Board Decision, paras. 13-16, Record, p. 3.

(4) The Board rejected the Employer's objections to the appropriateness of the bargaining unit for two reasons. First, it found no evidence to suggest that Security Officers would be in a conflict of interest if represented by the same union as their co-workers. To the extent that there might be a conflict of interest, the Board ruled that this was already addressed by having the Security Officers in a separate bargaining unit. Second, the Board concluded that it did not have discretion pursuant to the *Trade Union Act* (Section 25(8)) to refuse an otherwise proper certification application on the basis that it did not believe that a particular bargaining agent should be certified. Board Decision, paras. 37-51, Record, pp. 10-15.

ISSUES

[8] Although the parties expressed the issues somewhat differently, the matters for consideration in the *Application* are:

(1) What is the appropriate standard of review?

(2) Should the Board's decision be overturned on the basis that:

(a) the security officers are not "employees" under the *Trade Union Act*;

(b) the unit applied for was not appropriate for collective bargaining because the same union was already certified to represent a larger group of employees at the Casino;

(c) Dual-rate security supervisors should be excluded from the unit?

STANDARD OF REVIEW

[9] The parties agree that the appropriate standard for review of the Board's decision in this case is reasonableness. In **Dunsmuir v. New Brunswick**, [2008] S.C.J. No. 9, the Supreme Court of Canada, in determining that there are now only two standards of review, "reasonableness" and "correctness", defined reasonableness in the following terms at paragraph 47:

> ***47*** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] The Supreme Court commented as follows in **Dunsmuir** concerning the concept of deference in the context of the new "reasonableness" review standard:

> **48** The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts.... What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect to the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (**Mossop**, at p. 596, **per** L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., **The Province of Administrative Law** (1997), 279, at p. 286 (quoted with approval in **Baker**, at para. 65, **per** L'Heureux-Dubé J.; **Ryan**, at para. 49).
>
> **49** Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 **C.J.A.L.P.** 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[11] Guidance concerning questions to be reviewed on a reasonableness standard was provided by the majority in **Dunsmuir** at paragraphs 54-56, referenced in the Applicant's brief at paragraph 28.

> **54** Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative

> tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.
>
> **55** A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system...and outside the...specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> **56** If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[12] That recent direction provided by the Supreme Court has been recognized by this Court in **Weilgart v. Halifax (Regional Municipality)** (2008), N.S.S.C. 130, at paras. 64 and 65.

[13] In **Lake v. Canada**, [2008] S.C.J. No. 23, (post **Dunsmuir**) the Supreme Court elaborated on the assessment of "reasonableness" at paragraphs 40 and 41, indicating that the reviewing court's role is to determine whether the decision falls within a range of reasonable outcomes. That determination requires examining whether the decision-maker considered the relevant facts and reached a defensible conclusion

based on those facts. The conclusion should be upheld by a reviewing court unless it is unreasonable. The Court stated as follows in paragraph 41:

> 41 Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes....the court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts....the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable....Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

[14] I agree with the submission made in paragraph 32 of the Applicant's brief that in determining whether the decision of a board is reasonable, the reviewing court must now consider:

(1) the tribunal's process in articulating its reasons and the route to the outcomes of those reasons;

(2) whether the tribunal's decision is justified, transparent and intelligible;

(3) whether the tribunal's decision falls within an acceptable range of outcomes that are defensible in respect of the facts and the law;

(4) whether the tribunal's reasons support the decision.

I adopt the Respondent Union's analysis, outlined in paragraphs 32-47 of its Brief, leading to the Result set out in paragraph 48, which I accept, that the contextual factors weigh in favour of deference in this case. The conclusions of the Board are protected by the privative clause in Section 19(1) of the *Trade Union Act*, the Board has a responsibility to promptly and effectively resolve labour disputes and should not be faced with undue court intervention, the employee status and bargaining unit appropriateness issues are fact specific and policy laden, and the Board has

highly-developed expertise in labour relations and on the questions under review in particular.

[15] After considering the authorities referenced in paragraphs 51-58 of the Respondent's brief, I agree with the conclusion the Union advances in paragraph 59 that the reasonableness standard requires this Court to adopt a deferential approach when reviewing the Board's decision, so that I should:

(1) recognize that there may be more than one reasonable result for the issues which were before the Board;

(2) examine the reasoning path of the Board to determine whether there is any line of analysis that reasonably supports the conclusion of the Board and assess whether its conclusions are defensible in respect to the facts and the law; and

(3) not re-weigh the evidence which was before the tribunal.

CONCLUSION and ANALYSIS

[16] Applying the reasonableness standard in this case, including the appropriate level of deference prescribed by the authorities, I have concluded that it would be inappropriate for this Court to interfere with the Board's decision, which I find to be justified, transparent, intelligible, and within an acceptable range of outcomes that are defensible with respect to the facts and law. I am satisfied that the tribunal applied proper process and gave adequate reasons in support of its decision. The Board's conclusions that the security officers are employees, that the dual-rate security supervisors are employees, and that the proposed bargaining unit is appropriate for collective bargaining, were in my view all supported by a reasonable analysis in respect of the facts and law and represent an acceptable outcome. The Board dealt rationally with all the issues raised by the Casino.

"Employee" Status of Security Officers

[17] It was not unreasonable for the Board to find that the security officers are employees under the *Trade Union Act*. The Board considered testimony, and reviewed statements from examinations as well as the Applicant's security department

policy, before concluding that the security officers do not exercise management functions. Its conclusion that the role of the security officers is "primarily designed to protect the assets of the Casino and create a safe and honest environment" is a reasonable outcome, as was the Board's finding that the officers are not employed in a confidential capacity in relation to labour relations, and are not managers. In its decision, the Board referenced and assessed evidence - absent any transcript of the hearing, this Court's role is not to re-weigh the evidence considered by the Board or seek out information to contradict the Board's findings of fact.

[18] The Board's decision on the employee status issue is also defensible at law. The Applicant's reliance upon **O.P.S.E.U. v. Complex Services Inc.** (2001), 75 C.L.R.B.R. (2d) 117 (Ont. L.R.B., McLean) in support of its position that security guards were in conflict of interest must be considered in the context of Ontario's *Labour Relations Act* provisions, which permit its Board to exclude guards from a bargaining unit or prohibit a bargaining agent from representing them. There are no similar provisions in the Nova Scotia legislation.

Appropriateness of the Bargaining Unit

[19] In my view, it was also reasonable for the Board to conclude that the proposed bargaining unit was appropriate.

[20] The Board recognized that the Union had already been certified to represent the general unit of employees at the Casino, and in paragraphs 37 to 40 of its reasons assessed the evidence and considered the Casino's arguments. The Board found that there was no evidence to support submissions that a conflict would arise because a larger bargaining unit might exert an improper influence, or that the security officers' loyalty to fellow Union members might interfere with their duty to the employer. The Board also considered relevant case law, particularly **Canadian Paperworkers' Union (C.P.U.), Local 4 v. Fraser Inc.**, [1985] N.B.I.R.D. No. 5., and applied the following principles developed in that decision:

> (1) Placing security guards in a separate unit is the most appropriate way to deal with any potential for conflict of interest with other employees;
>
> (2) Representation of security guards in a separate or distinct unit by the same or an affiliated bargaining agent representing other employees of the same employer does not place them in an intolerable position of conflict;

> (3) The experience in other sectors (such as municipal where policemen routinely are represented by affiliated locals of the same bargaining agent as other municipal employees) has not been problematic.

[21] The Board also determined, in the alternative, that it was doubtful that it had the authority to refuse an application based on the identity of the Applicant Union, suggesting that once the conditions required for certification set out in Section 25(8) of the *Trade Union Act* are met, the Board could not refuse certification (Decision - paragraph 41). The Board's conclusion that it had no discretion to exclude the Union from being the one to represent an otherwise suitable unit for collective bargaining has support at law, and follows the New Brunswick Board's conclusion in the **Canadian Paperworkers' Union** case (*supra*) and decisions referenced in that ruling. The Board's conclusion was reasonable, given the absence in Nova Scotia (as in New Brunswick) of legislation containing provisions such as those in Ontario, which expressly or impliedly empower the Board to refuse to certify a particular bargaining agent for security personnel. The Board also properly considered other authorities, which in similar circumstances did not go beyond requiring a separate unit (but not a different union) for security employees at casinos (Decision - paragraphs 49-51). It was not unreasonable for the Board to determine that there was no conflict of interest in this case which would make it inappropriate for the Respondent Union to represent the Security Officers. Similarly, the finding that its authority under the *Trade Union Act* was limited (which was an alternative basis for the Board's conclusion, and did not dictate the result), was not unreasonable.

Dual-Rate Security Supervisors

[22] The Board's Decision to include these employees in the unit was based on factual findings set out in paragraph 13-16 of the Reasons. The Board's analysis is logical and the result, while it may not represent the only defensible conclusion which might have been reached, follows a line of analysis reasonably supporting the Decision. Revisiting the Board's conclusion in the manner suggested by the Applicant would entail re-weighing the evidence before the Board, which would be inconsistent with the level of deference to which it is entitled in the circumstances of this case.

DISPOSITION

[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.

[24] The *Application* will be dismissed.

Note: **Following delivery of oral decision, the parties agreed that the Applicant pay costs in amount $1,500.00 to the Respondent.**

J.