

BRITISH COLUMBIA LABOUR RELATIONS BOARD

ROYAL DIAMOND CASINOS

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS UNION OF
CANADA (CAW-CANADA), LOCAL 3000

(the "Union")

PANEL:	Keith Oleksiuk, Chair Frances R. Watters, Associate Chair (Adjudication) Michael Fleming, Vice-Chair
COUNSEL:	Larry Page, for the Employer John Bowman, for the Union
CASE NO.:	37956
DATE OF HEARING:	January 21, 1999
DATE OF DECISION:	January 18, 2000

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This is an application by the Employer under Section 141 of the *Labour Relations Code* seeking leave and reconsideration of BCLRB No. B376/98 (the "original decision"). The original decision granted an application by the Union to vary an existing bargaining unit by adding surveillance and security employees. The Employer submits that the decision is inconsistent with principles expressed or implied in the Code.

II. BACKGROUND

2 The original decision granted the Union's application to add by variance a group of seven security officers and six surveillance officers to an existing bargaining unit of approximately 150 dealers.

3 The original decision's review of the evidence on the Employer's operation and the duties of the security officers and surveillance employees' duties does not need to be repeated in full. The essential elements do however bear repeating. Security officers and surveillance officers receive direction from the Director of Surveillance and Security. Surveillance officers are directly accountable to the casino manager. British Columbia Lottery Corporation (the "BCLC") procedures also require surveillance staff to "operate cooperatively and independent of staff employed to operate the casino". Two surveillance officers work each of the two daily shifts. They work in a surveillance room. Access to this room is restricted to surveillance staff, the site administrator, designated BCLC employees, police and other persons approved by the BCLC.

4 The surveillance officers use television monitors to observe gaming, financial control and other activities in the casino. Gaming activities are recorded either for evaluation of employees or for security purposes. Tapes of the activities of new employees are provided to management to ensure that proper procedures are being employed. BCLC procedures require surveillance staff to report all illegal activities to the Gaming Control Manager and to maintain in the surveillance room a written record summarizing unusual or suspected illegal activities.

5 The original decision described the surveillance officer's role concerning suspicious activities as follows:

Suspicious activities or irregularities are identified by surveillance officers acting on their own initiative, or they are brought to a surveillance officer's attention by the staff. Once suspicious activity is identified, it is observed by the surveillance officers, recorded separately and shared with one or more of senior management, the director of security, the police or the gaming control manager. Earlier tapes may be viewed by any or all of

these persons to determine whether the activity was an anomaly or a repeated occurrence and to confirm or refute suspicions of collusion. The surveillance officers do not confront employees with their observations. Any and all contacts with employees concerning the contents of a surveillance video tape are made by management personnel. (para. 12)

6 One of the surveillance officers on each shift also spends approximately one and one-half hours on each shift handing out cheques and tips to casino employees.

7 As part of its efforts to minimize the amount of contact between surveillance employees and other staff the Employer is in the process of providing a separate locker room for surveillance and security employees.

8 The duties of the security officers are described in the original decision:

The security officer job is presently evolving through training to include greater responsibility for observing and reporting irregular or suspicious gaming activities, but at the present time they primarily provide physical security and crowd control in and around the casino. They handle drunks, eject underage patrons and keep the aisles clear. They accompany the chips whenever they move between the cashiers' cages and the gaming tables, and they supervise the cash counts that take place in the cash room.

The security department is also responsible for "conducting background screening of employees". The background of new managers are checked in a detailed and thorough manner. Less intrusive checks are done on the backgrounds of the Casino's other employees.

Under the BCLC Procedures casino employees are not permitted to "fulfill the responsibilities of more than one position in a casino unless approved by the BCLC". Surveillance and security employees do not provide holiday or other relief in other positions. Employees do not move from surveillance and security positions to dealer positions and movement in the opposite direction is rare. (paras. 17-19)

The original panel reviewed the *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161 ("*IML*") factors in considering the Employer's position that the surveillance and security employees had a separate community of interest which justified a second bargaining unit. The original panel was not persuaded by that argument, holding instead that the Employer had not overcome the presumption against multiple bargaining units.

9 The original decision also dismissed the Employer's argument that conflict of interest between the surveillance and security staff and the dealers in the existing bargaining unit would make the proposed unit inappropriate. The original decision

granted the Union's application to vary the surveillance and security guard employees into the existing bargaining unit.

III. ANALYSIS AND DECISION

10 The standard to be applied in determining whether leave for reconsideration under Section 141 of the Code will be granted is set out in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043 ("*Brinco*"). An applicant is required to "demonstrate a good arguable case of sufficient merit that [he] may succeed on one of the established grounds for reconsideration": *Brinco*, CLRBR p. 53. A *prima facie* case will not suffice; rather, under Section 141, an applicant must raise a serious question as to the correctness of the original decision.

11 The Employer asserts that the original decision is inconsistent with principles expressed or implied in the Code. The Employer identifies three errors in the original decision. One is that the finding of an appropriate bargaining unit is wrong on the face of the decision. A second is that the original decision mis-applied the *IML* test for appropriate bargaining units on an application for a second unit. The third is that the original decision mis-applied the Board's jurisprudence concerning security functions.

12 We are satisfied that the Employer's application and in particular the second ground raises a serious question as to the policy to be taken to security functions in the casino industry and thus to the correctness of the original decision. Accordingly, leave is granted.

13 The issue before the original panel was that of the appropriateness of a second bargaining unit. The determination of whether an additional bargaining unit is appropriate involves a weighing of two basic objectives, access to collective bargaining on the one hand and industrial stability on the other hand. In weighing these competing objectives in this context the Board starts with the *IML* presumption against multiple bargaining units and then considers the evidence about the factors described in *IML*:

In addition to the four factors we have already outlined in determining community of interest - similarity in skills, interests, duties, and working conditions, the physical and administrative structure of the employer, functional integration, and geography - on initial applications for certification, we now add these two additional factors that are to be examined in determining community of interest at the second or additional stage of certification:

- The practice and history of the current collective bargaining scheme.
- The practice and history of collective bargaining in the industry or sector.

Included within these six community-of-interest factors are the size of the employer, the number of existing units and whether the employer is in the private or public sector (where access is often of much less of a concern). As well, the reason why an incumbent union does not represent the employees may be relevant. Therefore, depending upon the outcome of these community-of-interest factors, the presumption against multiple bargaining units will or will not be rebutted. (p. 188)

14 Where the union representing the existing bargaining unit seeks to vary other employees into the existing unit, thus providing access to collective bargaining to the affected employees the focus of the appropriateness inquiry is on evidence that goes to the viability of collective bargaining of the unit as amended.

15 The Employer's second line of argument is that the evidence established the existence of a conflict of interest between the duties of the surveillance and security employees on the one hand and the dealers on the other hand such that surveillance and security employees should not be included in the same bargaining unit as the dealers. It is implicit in this argument that the conflict of interest is a threat to the viability of collective bargaining if the variance is granted.

16 Before beginning our analysis of this argument, we note that it was common ground between the parties that the surveillance officers are entitled to access to collective bargaining. It was also common ground that a separate bargaining unit, even with the same bargaining agent, was available to these employees.

17 We further note that the Employer provided a statutory declaration setting out the following evidence which was not included on the face of the original decision. The Employer's statutory declaration was not contested by the Union. It included the following statements:

1. The Director of the Gaming and Audit Investigation Office of the Ministry of the Attorney General provided an opinion that placing the surveillance and security employees in the same unit as the other employees could lead to divided loyalties and that the industry norm in Canada is that surveillance employees are either not unionized or are in a separate bargaining unit.
2. The Manager of Corporate Security for the BCLC gave opinion evidence that it was important that surveillance employees be separated from other gaming employees and that surveillance employees not associate with other employees.
3. The Director of Security for the Royal Diamond Casino gave evidence concerning recent close surveillance of two dealers by surveillance and security personnel. The surveillance and security personnel maintained constant surveillance on the dealers, reviewed archive tapes and assembled evidence as to the misconduct. Police became involved in that investigation and made the arrest on the gaming floor. The employees were subsequently terminated as a result of misconduct because of the subject of the investigation.

18 The overall duties of the surveillance officers, as set out in the original decision as well as in the statutory declaration, are not in dispute. The surveillance officer's primary job function is to monitor gaming activities including the activity of other employees for the purposes of detecting illegal activity. Once illegal activity is detected they report it. Responsibility is then assumed by other staff and/or external agencies. The nature of the primary duties of the surveillance officers raise the question of whether the duties of the surveillance employees create a potential conflict of interest with the dealers in the existing bargaining unit such that their inclusion in the unit would make the unit inappropriate for collective bargaining. Put slightly differently, should the Board have a concern, and if so to what extent, that placing these employees in the same unit as the dealers would create a concern about the viability of collective bargaining such that the unit should be found to be inappropriate.

19 The issue of conflict of interest between security guards and other employees, although not in the casino industry, was originally addressed in *St. Vincent's Hospital*, BCLRB No. 55/74:

This Board has no firmly determined policy on security guard units. ... *Any policy development will focus its attention on conflicts of interests between employees who have authority over fellow employees and their fellow employees. The nature of this authority will have to be examined to determine whether the employees designated as guards are employed to monitor the actions of their fellow employees and perhaps to admonish or report employees for actions tainted with illegality.* Where persons are employed principally to exercise this sort of surveillance over fellow employees, the Board *may* find it inappropriate to include them in the same unit as their fellow employees. *Central to a policy developed on the appropriateness of the unit for guards will be concern as to whether the guards and the employer are placed in a position where the guard's duties conflict with his interests as a member of the bargaining unit.* ... (p. 10; emphasis added)

20 Conflict of interest between security guards and other employees was subsequently considered in a number of cases including *Sun Rype Products Ltd.*, BCLRB No. L351/82 and *B.C. Systems Corporation*, BCLRB No. 228/83. In *Sun Rype*, the exercise of considerable monitorial and certain admonitory responsibilities over other employees was found to create a serious conflict of interest that justified a separate unit of security guards. In *B.C. Systems Corporation*, the responsibility of Data Security Officers to check on the activities of other employees and to investigate and report on irregularities was one of the sources of conflict of interest that led to exclusion of the officers from an existing bargaining unit.

21 We agree with the original panel that the duties of the surveillance and the security guard employees in this case may be factually distinguished from the security guards in *Sun Rype* and *B.C. Systems Corporation*. However, the fact that they can be distinguished does not provide an answer to the critical question in this case. For that

answer we must focus more narrowly on the casino industry and the evidence before the original panel.

22 The issue of conflict of interest in the casino industry was considered by the Ontario Labour Relations Board in *Windsor Casinos Limited*, [1995] OLRB Rep. February 206. In that case, the CAW was certified to represent a bargaining unit of dealers. It was also certified to represent a separate bargaining unit of security guards consistent with subsection 6(6) and (7) of the *Ontario Labour Relations Act*, S.O. 1995, c.1 Sched. A, which states:

(6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

(a) if the applicant trade union or the employer requests that the Board do so; and

(b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

(7) The Board may include other guards in the bargaining unit described in subsection (6). (para. 18)

23 The issue before the Ontario Board was whether surveillance employees should be included in the same bargaining unit as the security guards or whether they should have a separate bargaining unit of their own. The Ontario Board granted a separate, third, bargaining unit for their surveillance employees reasoning:

Counsel for the applicant submits that the self-monitoring of security guards and surveillance staff is not the sort of conflict of interest contemplated by the Act. Counsel also argues that any conflict of interest is merely incidental since the primary focus for the surveillance staff is on gaming activities. The type of monitoring which occurs between security guards is generally not the sort of conflict of interest contemplated by the Act. The sort of monitoring by surveillance operators of security guards is of a different degree and character. Their function, as noted earlier, entails the monitoring of security guards which is not merely incidental. It is precisely this type of monitoring which creates a conflict of interest. We also disagree with the proposition that no conflict of interest would exist if both groups were placed in the same bargaining unit. As noted earlier, surveillance operators monitor all activities and they monitor security guards. They look for criminal offences and observe whether security guards are following proper procedures. The surveillance operators make reports of what they hear or observe and they collect evidence for prosecutions. If a security guard was terminated for failing to follow proper procedures, it is likely that a surveillance operator would be

involved in compiling and giving evidence. In our view, this does create a conflict of interest which sub-section 6(6) was intended to prevent. The same consideration which caused the parties to agree to create a security guard unit separate from the larger employee bargaining unit are present to keep surveillance operators in a bargaining unit of their own separate from security guards.

The gaming industry is a new and unique industry in this Province. A fundamental objective of the security system is to ensure that the casino operates in the public interest and that its honesty and integrity are not compromised. The separation of surveillance operators from other employees including security guards is critical to the viability of the security system. By placing surveillance operators in a bargaining unit with security guards there is a risk that the independence and impartiality of surveillance operators will be compromised. Although the Board prefers larger units, fragmentation is only one factor the Board takes into account in shaping bargaining units. The security guard provision itself provides for a degree of fragmentation. In any event, any concerns the Board might have about fragmentation in this case are outweighed by the considerations referred to above. (paras. 23-24)

24 The Ontario Board decided to place surveillance staff in a unit separate from the security guard unit, on the basis that the type of conflict of interest that the subsection 6(6) provision for separate units for security guards was intended to address was the same type of conflict of interest that arose in contemplating inclusion of surveillance staff in a unit with security guards.

25 There is no provision in the Code that is equivalent to, or similar in any way to, subsections 6(6) and (7) of the *Ontario Labour Relations Act*. However, we find the conflict of interest concerns underlying that provision and the reasoning in *Windsor Casino* concerning the casino industry, to be relevant to the critical issue in this case.

26 The primary job function of the surveillance employees is critical to the operation of this industry. The primary job function of the surveillance employees is to monitor gaming activities, including the activity of other employees, for the purpose of detecting illegal activity. As a result of their primary job function surveillance employees are also involved in investigations and in the assembling of evidence of employee misconduct. It is reasonable to expect that they will be involved in disciplinary and arbitration proceedings. In our view the inclusion of these employees in a unit with the other employees necessarily gives rise to an ongoing underlying tension between the surveillance employees and the other employees.

27 In these circumstances, we are convinced that there is sufficient potential concern about the viability of collective bargaining as a result of the conflict of interest, to justify the exclusion of the surveillance staff from the existing bargaining unit. The nature of the industry and the role of the primary job function within the industry

produces an ongoing high degree of potential conflict. Accordingly, we find that this concern is sufficient to overcome the *IML* preference for inclusion in a single unit.

28 We further note that the parties did not distinguish between the surveillance employees and security employees for the purposes of this application. Accordingly, we find that both the surveillance and the security employees should also be excluded from the existing bargaining unit.

29 In coming to this decision, we recognize that the surveillance and security employees have already spent a period of time included in the existing bargaining unit. The Employer did not oppose a separate unit of surveillance and security employees with the Union as the bargaining agent. Thus, the objective of access to collective bargaining for those employees is not at issue, simply the form. In these circumstances we direct the parties to discuss (with the assistance of Board Mediation or SIO staff if the parties so wish) how to implement this decision in a manner that protects the interests of the surveillance and security employees in achieving collective bargaining in light of the Employer's position concerning the appropriateness of a second bargaining unit. If the parties are not able to agree on a solution, either or both parties may return the matter to the Board to discuss terms and conditions of a resolution that will not disadvantage the surveillance and security employees' access to union representation.

IV. CONCLUSION

30 The Employer's application is granted.

LABOUR RELATIONS BOARD

"KEITH OLEKSIUK"

KEITH OLEKSIUK
CHAIR

"FRANCES R. WATTERS"

FRANCES R. WATTERS
ASSOCIATE CHAIR (ADJUDICATION)

"MICHAEL FLEMING"

MICHAEL FLEMING
VICE-CHAIR