IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1315949 B.C. Ltd. v. British Columbia (Labour Relations Board),* 2025 BCSC 1483

Date: 20250801
Docket: S245761
Registry: Vancouver

Between:

1315949 B.C. Ltd.

Petitioner

And

British Columbia Labour Relations Board; United Food and Commercial Workers International Union, Local 1518; Sobeys Capital Incorporated; 101296729 Saskatchewan Ltd.; Philly Foods Inc.; Stafflyn Retail Inc.; and 1197785 B.C. Ltd.

Respondents

Before: The Honourable Justice Marzari

On judicial review from: An order of the Labour Relations Board, dated June 26, 2024 (*Sobeys Capital Incorporated*, 2024 BCLRB 89, 2023-001018, 2023-001038, 2023-001041, 2023-001043, and 2023-001045)

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. May 26–27, 2025
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INTRODUCTION

[1] Sobeys Capital Incorporated and five of its franchisees in British Columbia seek judicial review of a decision of the Labour Relations Board which declared them to be a common employer for the purposes of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [the *Code*]. Fundamentally, they argue that the Board's decision was patently unreasonable in finding that they should be treated as a common employer for labour relations purposes, because the lack of control exercised *as between* the Franchisees, as opposed to the degree of control

exercised by Sobeys *over* the Franchisees, was not properly considered by the Board.

[2] The decision under review was issued by a reconsideration panel of the Board (the "Reconsideration Panel") consisting of the Chair, Associate Chair, and Registrar on June 26, 2024, indexed as Sobeys Capital Incorporated, 2024 BCLRB 89 (the "Reconsideration Decision"). The Reconsideration Decision dismissed six applications for reconsideration brought by Sobeys and the Franchisees of a 2023 decision of the Board made by the original panel (the "Original Panel"), consisting of its Vice-Chair, indexed as Sobeys Capital Incorporated, 2023 BLCRB 105 (the "Original Decision").

[3] The Original Decision granted the application of the United Food and Commercial Workers International Union, Local 1518's (the "Union") pursuant to s. 38 of the *Code* for a declaration that the petitioner franchisee, 1315949 B.C. Ltd., and the respondent franchisees 101296729 Saskatchewan Ltd., Philly Foods Inc., Stafflyn Retail Inc., and 1197785 B.C. Ltd. (collectively, the "Franchisees") and the respondent Sobeys Capital Incorporated ("Sobeys"), are a common employer for the purposes of the *Code*.

FACTUAL AND PROCEDURAL BACKGROUND

[4] As found by the Board, Sobeys operates a national wholesale and retail grocery business in various formats, which include various trade names or "banners." The two banners relevant to the matter before the Board, and on judicial review, are Sobey's Safeway stores, and their discount banner, FreshCo.

[5] The Union represents workers in various industries. In or around 2017, almost 5000 of its members were employed by Sobeys at approximately 60 Safeway stores in BC. Those members' employment was subject to a 10-year collective agreement between Sobeys and the Union with a term from 2013 to 2023. That collective agreement also addressed the possibility that Sobeys might open stores under a new banner other than Safeway, and required further negotiations with the Union if that were to occur.

[6] Pursuant to these provisions, Sobeys gave the Union notice in 2017 that it planned to convert up to 25% of existing Safeway stores in Western Canada to FreshCo stores. In early 2018, Sobeys advised the Union that it planned to close

ten of its BC Safeway stores and terminate those employees in accordance with their rights under the collective agreement. Sobeys also advised that five of the closed stores “may open as FreshCo locations” depending on the outcome of the collective agreement negotiations.

[7] In 2018, Vince Ready was appointed by the Minster of Labour under s. 106 of the *Code* to deal with the collective bargaining dispute between Sobeys and the Union, including with respect to the collective agreement that would govern any employees of Sobey’s new planned FreshCo stores. In that process, Sobeys sought single store collective bargaining units, and the Union sought to continue the province-wide collective agreement in place with Safeway for all of these stores.

[8] In December 2018, Arbitrator Ready issued an award that required a single collective agreement for all of Sobey’s banners, including its Safeway and FreshCo stores (the “Ready Award”).

[9] In early 2019, Sobeys informed the Union that it would continue to close several Safeway stores, which stores would be converted to FreshCo and other discount banners, but that those stores would be franchised before reopening. This was done at Sobey’s cost. Upon the reopening of these stores as franchises, Sobeys advised the Union that all labour relations issues at the franchised stores (other than pre-existing grievances and pharmacy personnel who would still be employed by Sobeys) were to be directed to the new owners/franchisees of these stores. The Franchisees involved in this judicial review are the owners of these five stores.

[10] The Union then filed with the Board the s. 38 common employer applications at issue here, seeking to maintain a single collective agreement and bargaining unit structure with respect to these Franchisees and Sobeys. In the alternative, the Union sought relief that would make each of the five Franchisees a common employer with Sobeys. The alternative relief sought by the Union would, as I understand it, likely require Sobey’s to participate in collective bargaining for each of the Franchisees but would be unlikely to require the single collective agreement and bargaining table for Sobeys and all of the Franchisees together which was the Union’s primary relief sought.

[11] Section 38 of the *Code* provides:

> **Several businesses treated as one employer**
>
> **38** If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

[12] The purpose of s. 38 has been established by Board jurisprudence, endorsed by the Court of Appeal as recently as 2021 in *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211 [*Team Transport*], as follows:

> [44] This characterization of the statutory purpose is consistent with the reasoning in the Board's remedy decision in this case, adopted in the reconsideration decision:
>
> > [37] Finally, Section 38 of the Code is to be given a full and liberal interpretation. Its purpose is to protect acquired bargaining rights from the labour relations consequences of corporate changes or structures that would otherwise defeat the legitimate rights of employees and trade unions under the Code. For instance, new corporate entities can be created or ended. While the Board has recognized that such corporate change and diversity may offer perfectly legitimate business advantages or be based on *bona fide* business reasons, Code-related consequences may also result: *Concerned Contractors Action Group*, BCLRB Decision No. 32/86, [1987] 13 CLRBR 121 at p. 133–136 …, *Baywood Enterprises Ltd.,* [1975] 1 CLRBR 173 at 180–181.

[13] In declaring Sobeys and the Franchisees to be a common employer, under this section, the Board identified 4 well-established factors that it considers in such applications, which generally track the language of s. 38, as follows:

a) There must be more than one entity carrying on business;

b) The entities must be under common control or direction;

c) The entities must be engaged in associated or related activities or businesses; and

d) There must be a labour relations purpose served by making the declaration.

[14] It was agreed before the Original Panel, the Reconsideration Panel, and on judicial review that that there was no dispute with respect to (a) and (c) that more than one entity was carrying on business, and that they were engaged in associated or related activities or businesses. The focus of the submissions before the Board was on whether Sobeys and the Franchisees were under common control or direction, and whether there was a labour relations purpose for the Board making a common employer declaration in this case.

[15] The Original Panel concluded that "Sobeys exercises substantial control over the Franchisees' FreshCo stores" (Original Decision at para. 468) and that there was a labour relations purpose for issuing the common employer declaration sought by the Union as its primary relief. It granted the Union's application for a common employer declaration.

[16] Sobeys and the Franchisees applied for reconsideration of the Original Decision, resulting in six applications that were heard together. In general, they asserted that the Original Panel had erred in making the common employer declaration, primarily on the basis that Sobeys did not exercise sufficient control over the Franchisees to warrant that determination and that the common employer declaration would not serve a labour relations purpose. The Reconsideration Panel dismissed the applications and upheld the Original Decision.

[17] Having been unsuccessful in their internal appeals to the Board's Reconsideration Panel, the Franchisees and Sobeys seek judicial review of the Reconsideration Decision. Instead of filing six separate judicial review petitions, the petitioner filed this single petition, and the remaining Franchisees and Sobeys filed responses in support of the relief sought. They all argue that the Reconsideration Decision is patently unreasonable.

[18] The Union responded to the petition arguing that the Reconsideration Decision is not patently unreasonable.

[19] The Board also participated in this judicial review, primarily on the issue of standard of review, and filed the record before the Reconsideration Panel.

[20] The grounds of review are couched slightly differently by each of the Franchisees and Sobeys, but in essence they all argue that the Reconsideration Decision is patently unreasonable with respect to the manner that it addressed (or

failed to address) the degree of control exercised as between the Franchisees themselves, and not just between the Franchisees and Sobeys, when finding them all to be a common employer. Many of them also argue that the Board improperly distinguished an earlier Board decision indexed as *Shoppers Drug Mart Inc*., BCLRB No. B110/2006 [*Shoppers*], where a s. 38 declaration of common employer was refused, they say, because of precisely this lack of control as between franchisees.

[21] Unlike their position on reconsideration, the Franchisees and Sobeys accept for the purposes of this judicial review that the Reconsideration Decision is not patently unreasonable to the extent that it concludes that Sobeys exerted sufficient central control over each of the Franchisees to warrant a finding that Sobeys is a common employer with each of the Franchisees, but says the evidence is insufficient to establish them as a collective employer collectively. They accept now that the findings in the Original Decision and the reasoning in the Reconsideration Decision would have been sufficient for the Board to grant the Union's alternative application before the Original Panel for a common employer declaration for each Franchisee together with Sobeys, with separate bargaining units for each Franchisee.

[22] However, they say that the reasoning of the Board is insufficient, even non-existent, with respect to what they argue is the critical consideration of the degree of control between each of the Franchisees, which they argue was necessary for the Board to grant a s. 38 order providing that there is only one single employer and one bargaining unit that encompasses Sobeys and all of the Franchisees together.

[23] For the reasons that follow, I find that the Reconsideration Decision is not patently unreasonable.

THE ORIGINAL DECISION

[24] Although this is a judicial review of the Reconsideration Decision only, the Original Decision formed part of the record before the Reconsideration Panel, and it is helpful to also review the Original Decision as chronological context: *College of New Caledonia v. Faculty Association of the College of New Caledonia*, 2020 BCSC 384 at para. 21.

[25] The Original Decision was made after a full *viva voce* hearing on the s. 38 application of the Union. I note that an earlier decision, not under review, had been made on the basis of written submissions but was remitted back to the Original Panel for an oral hearing.

[26] The Original Decision set out the background to the dispute above, reviewed the franchising structure and agreements put in place by Sobeys for the Franchisees, and considered the testimony of witnesses including the principals of the Franchisees. The evidence is summarized in the Original Decision at paras. 29–240.

[27] A number of issues are addressed in the Original Decision. Discussion of the Union's common employer application begins at para. 394, and, as stated in the Original Decision at para. 396, the "parties focused their submissions on whether there is common control or direction between Sobeys and the Franchisees and whether there is a labour relations purpose for a common employer declaration".

[28] With respect to the issue of common control or direction, the Board considered seven well-established factors set out in the Board's earlier decision of *Concerned Contractors Action Group*, BCLRB No. 32/86 [*CCAG*], in deciding whether there was "common control or direction" for purposes of s. 38 of the *Code*. Those seven factors are listed at para. 397 of the Original Decision as:

a) Common ownership;

b) Financial control;

c) Contractual arrangements;

d) Control of labour relations;

e) Common management;

f) Interrelationship or interdependence of operations; and

g) Representation to the public as a single integrated employer or business.

[29] The Board does not treat these factors as a checklist, and notes that:

> [397] ... In the context of a franchise, the Board looks to see if the franchisor exercises control over a representative cross-section of the *CCAG* factors, particularly those that have a direct impact on collective bargaining in order to determine whether the franchisor enjoys substantial control or direction over the franchise…

[30] The Board reviews the evidence in light of each of the above *CCAG* factors. In doing so, it considers the leading past decisions of the Board on common control in franchise situations, including *White Spot Limited,* BCLRB No. B352/96 (Leave for Reconsideration of BCLRB No. B191/95) [*White Spot #1*] and *KFCC/Pepsico Holdings Ltd.*, BCLRB No. B283/2001 (Leave for Reconsideration of BCLRB No. B225/98). In its review of these decisions and the principles involved, the Board generally frames its analysis of common control in a franchise operation as the degree to which the franchisor controls each of the franchisees, versus the amount of control each franchisee wields over its own business.

[31] Starting at para. 458, the Board considers the factor of the interrelationship between the corporate entities under the heading as follows:

> *Interrelationship or Interdependence of Operations*
>
> [458] In *White Spot*, the panel stated as follows regarding the concept of interrelationship or interdependence:
>
> > To satisfy the common control or direction criterion, there does not have to be actual legal control or ownership; nor does there not have to be a single guiding force who has complete control of the day-to-day operations. The interdependence of the operations may be sufficient. Throughout this decision we have used a number of different terms interchangeably as reflected in the case law (operational interrelationship, functional coherence and interdependence, economic interdependence, or functional integration). We conclude that these terms fall within the umbrella term: functional interdependence. Functional interdependence suggests a mutuality of operation where complete or exclusive control need not be vested solely in one entity. Rather, control or direction over the factors which have been traditionally used to ground a common employer declaration may be shared between two or more entities.
> >
> > (para. 165)
>
> [459] In *Tober*, the panel noted the following with respect to interdependence in a franchise relationship:
>
> > ... They are interdependent. HYL can offer its services in the manner it does because most of the franchisees use them, thus giving the benefit of economies of scale. HYL benefits because it supports customers of its product. The franchisees benefit from the competitive financing and pricing of product and the services they receive in return for the payment of the royalty.

> (para. 70)
>
> [460] The Respondents also rely on the further words of the panel in *Tober* at paragraph 72, already reproduced in this decision, regarding a franchisee's use of services offered by a franchisor.
>
> [461] The Respondents do not dispute Sobeys' interdependence with the Franchisees, but also emphasizes that functional interdependence is only one of the seven factors.
>
> [462] I find the interrelation and interdependence of operations is apparent by the nature of a franchise operation, as well as Sobeys' use of the Franchisees' stores to run its own pharmacies and lease out the lottery kiosks. I also consider this interdependence within the unique context of franchising.
>
> [Emphasis added.]

[32] Thus, while the Franchisees are each individually owned and operated, the Original Panel found that there is an "interrelationship or interdependence of operations" with Sobeys as the franchisor which is to be expected in a franchise relationship: para. 462.

[33] After examining all of the evidence and arguments, and each of the *CCAG* factors, the Original Panel concluded that the common control or direction requirement of the s. 38 requirements were met. It summarized its reasoning as follows:

> *Summary*
>
> [465] The purpose of Section 38 of the Code is to protect the rights secured by trade unions and the employees they represent in the face of corporate changes on the employer side (*CCAG*, p. 136). In *CCAG*, the Board noted the relevant factors are not a checklist, but are rather considered together:
>
> > ... In the final analysis, each panel of the Board must make a decision based on the totality of the evidence before it, using the above-mentioned criteria or factors as a guide, as to whether the entities are in fact under common control or direction.
> >
> > (p. 146)
>
> [466] In *KFCC*, the Board explained that, in order to establish common control or direction by a franchisor, the degree of control must be substantial:
>
> > Thus, the *White Spot* reconsideration panel affirmed that common control or direction could be established in circumstances where no one corporate entity or person has complete or exclusive control or direction. However, we note that mutuality of operations or functional interdependence is only one of the seven *CCAG* factors. If common control or direction is to be found it is in the degree of

> control exercised by the franchisor over the franchisee through all of the *CCAG* factors, including functional interdependence.
>
> That raises the question of what degree of control by the franchisor will be sufficient to establish common control or direction. In our view the degree of control by the franchisor over the franchisee must be substantial. By substantial we mean "of real importance or value, of considerable amount": The *Concise Oxford Dictionary*, 7th ed., (Oxford, 1986). It is both a qualitative and quantitative test.
>
> (paras. 158-159)
>
> [467] Looking to the *CCAG* factors generally, I find Sobeys exercises substantial financial control, something inherent in the profit-sharing nature of this franchise arrangement in which Sobeys obtains the majority of the profits. I also find Sobeys exercises substantial control within the contractual arrangements and through common management. There is also a clear interrelationship and interdependence of operations. The representation to the public as a single business is mixed, as the stores do identify a store owner but, as one would expect in a franchise, the stores are generally uniform in branding and appearance. There is no common ownership and Sobeys does not generally exercise control over labour relations beyond the labour percentage, though the COVID-19 policies demonstrate that at least in exceptional circumstances it can and will impose policies over labour relations.
>
> [468] When considering the overall relationship between Sobeys and the Franchisees, I conclude Sobeys exercises substantial control over the Franchisees' FreshCo stores.
>
> [Emphasis added.]

[34] The Board then considered whether the Union had demonstrated a labour relations purpose for the requested common employer declaration, at paras. 469–485.

[35] It is under the auspices of this analysis that the Original Panel addressed the Franchisees arguments regarding their own disparate interests as Franchisees not being in common, and whether, as a group, they were sufficiently related to each other to warrant a common employer declaration. In this regard, the Original Panel noted at para. 472 that this same issue was dealt with in *White Spot et al.*, BCLRB No. B207/97 [*White Spot #2*], albeit in a context where common control or direction by White Spot over the franchisees was conceded as already addressed in *White Spot #1* (which had only involved a single franchisee). What was at issue in *White Spot #2* was whether there was a labour relations purpose to a common employer declaration where there were now seven franchisees, each with their own owners and priorities, and with no common control or direction as between them.

[36] The Original Panel's reasoning with respect to these arguments is set out at paras. 472–485, key portions of which provide:

> [472] In the result, the panel made a common employer declaration with respect to the franchisor and franchisee. In *White Spot et al.*, BCLRB No. B207/97 ("*White Spot 2*"), the Board dealt with the same issue in the present case of whether to make a common employer declaration with respect to a franchisor and a group of franchisees. While the issues addressed in *White Spot* were being adjudicated, separate applications filed by the union pursuant to Section 38 of the Code were held in abeyance. Those applications related to seven other franchisees who franchised formerly corporate-owned stores that had fallen within the scope of the union's certification. Following *White Spot*, the union sought to have the franchisor declared a common employer with all its franchised stores previously falling within the union's single multi-site certification. The franchisor and the franchisees did not contest the issue of whether common control or direction existed on the basis of the reasoning in *White Spot* and the existence of an outstanding judicial review application of that decision, but were prepared for the purpose of the applications to address the issue of whether there was a labour relations purpose. The respondents' arguments were similar to those in the present case, and they asserted the sought declaration could not be made as there was no common control or direction between the franchisees. The respondents also raised the issue the collective bargaining structure sought by the union would not let the franchisees address their own concerns.
>
> [473] The panel rejected these arguments, finding as follows:
>
> > A common employer declaration creates a new structure to the extent that more than one entity is treated as one employer for purposes of the Code; whereas before the common employer declaration the entities were treated as separate employers. The labour relations purpose outlined in the Gilley decisions was to preserve the collective bargaining structure. Granting the Union's applications will not create a new collective bargaining structure. The original White Spot certification created a bargaining unit comprising 18 locations. One collective agreement for the 18 locations evolved from the one certification. The original Gilley decision resulted in a conclusion that White Spot and Gilley are common employers. The labour relations purpose was to preserve the collective bargaining structure. Adding a number of other franchisees who are common employers with White Spot does not create a new structure. The result is the same as in the original Gilley decision. The collective bargaining structure is maintained. A franchisee is bound with White Spot by virtue of the franchise agreement. This particular group of Franchisees is also bound in a group by virtue of 18 locations being named on one certification. In issuing a Section 38 declaration the Board would be preserving the collective bargaining structure that existed prior to franchising. Those 18 White Spot locations were inter-related by virtue of the common certification and master collective agreement. A Section 38 declaration maintains the relationship for purposes of the Code. The Franchisees are still separate entities for other purposes.
> >
> > (*White Spot 2*, para. 40)

[474] The panel also found that while each franchisee may have issues related to their specific location, this was a matter that could be addressed through bargaining protocol. The panel further noted the Board was proceeding "cautiously" with respect to labour relations matters involving franchise arrangements, and declared that, should the bargaining structure prove unstable, the parties could then pursue an application under Section 142 of the Code to vary the certification (para. 57).

[475] In discussing *White Spot*, the panel in *KFCC* found that decision, and certain decisions it relied on, illustrated that where the franchise arrangement has not shifted the locus of power and the seat of real economic control from the franchisor, preservation of the existing bargaining structure and collective agreement rights constitute valid labour relations purposes for a common employer declaration. It further stated that implicit in these decisions is the reasoning that the franchisor, which agreed to the bargaining structure prior to the franchise arrangement, continues to exercise substantial control while the franchisee enjoys virtually no control or only some control over the franchise (para. 213).

[476] In panel in *KFCC* also stated that the Board has a number of options when considering the appropriate bargaining structure (paras. 221-222). Such a structure may involve a single certification naming the franchisor and franchisee as the common employer of both the franchise and corporate outlets, in which case there would be a single bargaining table or a main table and side table. On the other hand, there may be separate certifications naming the franchisor and franchisee as the common employer of only the franchise (para. 221). In deciding what structure to maintain, the case for maintenance of the pre-existing bargaining structure weakens the further one moves away from the situation where the franchisor is clearly dominant; the more control a franchisee has over the franchise, the less the case for maintaining the pre-existing bargaining unit structure and the more carefully the Board must scrutinize the matter (*KFCC*, paras. 222, 234). Other relevant factors for determining appropriate bargaining structure include consideration of how many bargained rights would be preserved through Section 35 and the level of potential conflict between a franchisor and a franchisee (*KFCC*, para. 223-224). The parties did not devote much argument following the hearing to which bargaining structure would be appropriate should a labour relations purpose be found, though the Union did argue that a single bargaining unit would be appropriate as multiple bargaining units would create the risk of multiple strikes and lockouts caused by leapfrogging and whipsawing, and it notes the presence of 11 other FreshCo stores that are also the subject of similar applications for a common employer declaration.

[477] In the present case, Sobeys has transitioned from operating multiple stores under one collective agreement to franchising the corporate stores which now operate under individual successor employers. The existing arrangement demonstrates the Franchisees possess only some control, given, in part, the extent to which Sobeys creates and monitors budgets for the purpose of its own interests in profit sharing subject to potential termination of the franchise agreement, creates policies the Franchisees are required to implement and follow, controls much of the source of inventory as wholesaler, controls pricing and pricing policies, and makes mandatory requirements regarding such matters as the use of accounting and payroll services and equipment. In many cases, the

standards imposed by Sobeys go beyond maintenance of the brand and dictate matters that detract from the ability of the Franchisees to operate as an independent business. This is most clear in how the Franchisees' principals do not even have the authority to set their own remuneration. I find the following from the Original Decision remains applicable here, notwithstanding Sobeys divesting itself of its preferred share in each Franchisee:

> In the present case I find the franchising arrangement has not shifted the seat of real economic control from Sobeys to a third party.... Fragmenting the existing bargaining unit into a series of smaller, stand-alone units creates the risk of industrial instability through competitive bargaining scenarios, competing unions in the context of raiding of existing stores, and the possibility of work stoppages across some locations but not others.
>
> (para. 191)

[478] In the result, I am satisfied that preserving the pre-existing bargaining structure is the appropriate remedy at this time.

[479] In opposing this outcome, the Respondents asserted the Franchisees are not in any way linked and will not have a commonality in negotiation goals during bargaining. I find this is a matter that at this stage is best left to the parties to explore with respect to bargaining format, including whether a single bargaining table or multiple tables are appropriate.

[480] I also address the Respondents' reliance on *Shoppers*, which was discussed in the Original Decision. In that case, the union sought a declaration under Section 38 of the Code that a franchisor and 19 franchisees were together a common employer, or alternatively that the 19 franchisees were a common employer. The union had stand-alone bargaining units with each franchisee. On the issue of common control or direction, the panel rejected the notion that the franchisees could together be declared common employers, finding there was no evidence of any control or direction between the franchisees (paras. 270-273). In the Original Decision, I distinguished this decision on the basis of Sobeys' status and power as a shareholder. In the present case, the Respondents state this decision remains relevant and favours a finding a common employer declaration should not be made covering all the Franchisees.

[481] In *Shoppers*, the panel considered it relevant that the franchisees and union operated under separate collective agreements which were ratified on an individual bargaining unit basis. The panel further stated as follows:

> Because the structure is informal, I conclude that from a legal perspective you revert by default to the certification structure. Furthermore, on the overall evidence I am not satisfied that there is one collective agreement. Therefore, the *status quo* is not one Collective Agreement. Accordingly, there is no labour relations purpose to declare a common employer. Granting the Union's application would not maintain the *status quo* but would alter the structure during collective bargaining.
>
> (*Shoppers*, para. 288)

> [482] In effect, the panel found making a common employer declaration would not have prevented the erosion of bargaining rights but rather would have altered the structure of collective bargaining. This distinguishes *Shoppers* from the present case, the circumstances of which instead mirror those in *White Spot 2*.
>
> […]
>
> [485] In summary, I find the Board's policy endorses an approach whereby individual franchisees and a franchisor can be declared common employers where it prevents the erosion of bargaining rights, the franchise arrangement has not resulted in a shift in the locus of power and the seat of real economic control from the franchisor, and the franchisees exert some control but not substantial control. I find those considerations are applicable in the present case, and I find there is a labour relations purpose for granting a common employer declaration and further find the preferred bargaining structure is the maintenance of a single bargaining unit.
>
> [Emphasis added.]

[37] It is apparent from the reasoning above that the Board considered the arguments regarding the connections and exercise of control (or lack thereof) between the Franchisees and determined that this was an issue most appropriately addressed as one of labour relations purpose, as was done in *White Spot #2.*

[38] As I read the Original Decision, the Board considered that the respondents' arguments about the lack of mutual interest and control as between the Franchisees were most relevant to the question of the appropriate bargaining structure, and whether that structure should reflect the proliferation of employers through the franchise process or maintain the pre-franchise structure of a single bargaining unit (para. 488). I find that the Board treated these arguments as key considerations in relation to the presence or absence of a labour relations purpose for the declaration, as was done in *White Spot #2*.

[39] With respect to that issue, the Board reasoned that the degree of control of the franchisor, established by the common control factor of the s. 38 analysis, to be highly relevant to this determination (para. 477). The Board specifically considered its findings regarding the degree and substance of that control in this case, and found with respect to that control, and the degree to which that control changed after the franchising, that "the franchising arrangement has not shifted the seat of real economic control from Sobeys" to the Franchisees: para. 477.

[40] With respect to Sobeys' and the Franchisees' reliance on *Shoppers,* the Board in the Original Decision distinguishes that decision on the basis of the significant differences between the labour relations implications of the bargaining structures in that case, and the pre-existing bargaining structures in Sobey's case. While acknowledging that the Board in *Shoppers* found no common control or direction in that case because there was no evidence of common control or direction between the franchisees, the Board cites para. 288 of the *Shoppers* decision, noting there was no labour relations purpose to declare a common employer in that case.

[41] The Board in the Original Decision finds that the circumstances of this case "mirror" those in *White Spot #2* (para. 482) where a common employer declaration was made to maintain a pre-existing single bargaining unit structure with multiple franchisees.

[42] The Original Decision concludes as follows:

> [486] In the result, I find Sobeys and the Franchisees constitute more than one entity carrying on a business or activity through the franchising and operation of the FreshCo stores. I further find the entities are under common control or direction, and there is a labour relations purpose for making a common employer declaration.
>
> [487] I therefore make the following declaration and order:
>
> - I declare pursuant to Section 38 of the Code that Sobeys and the Franchisees are a common employer for the purposes of the Code.
> - Pursuant to Section 142 of the Code. I order the Union's certification with Sobeys be varied to reflect that Sobeys and the Franchisees are common employers of the Franchisees' FreshCo and Chalo stores.

THE RECONSIDERATION APPLICATIONS

[43] The Franchisees and Sobeys sought reconsideration of the Original Decision. I find that the main focus of the internal appeals was the adequacy of the Original Panel's finding of sufficient control by Sobeys to make any common employer declaration at all (a broader argument than they make here).

[44] However, several of the Franchisees directly raised the issue that is now raised on this judicial review, that there was insufficient evidence of control *as between* the Franchisees to grant a common employer declaration in this case. While some of them did so in relation to the labour relations purpose of such a

declaration, others focused these arguments on the analytical requirement of common control or direction under s. 38.

[45] For example, Sobeys (for itself and for its wholly owned Franchisee 101296729 Saskatchewan Ltd.) submitted that, in addition to committing palpable and overriding errors with respect to is application of the *CCAG* factors relating to its conclusion that Sobeys exercises substantial common control or direction over the FreshCo Franchises, and in misconstruing the labour relations purpose for granting the Union's application, the Board "misapplied the principles of the *Code* and made palpable and overriding errors with respect to determining that each FreshCo Respondent exercises sufficient common control or direction over each of the other FreshCo Respondents to declare all of them to be a common employer with Sobeys collectively."

[46] Sobeys goes on in its application for reconsideration to develop this argument in the alternative, though it does so under the heading of whether there was a valid labour relations purpose. Sobey's application includes the following submissions:

> No Valid Labour Relations for Common Employer Declaration
>
> […]
>
> [139] In the alternative, the Applicants submit that the Board's analysis of a valid labour relations purpose for declaring Sobeys and the FreshCo Respondents to be a common employer collectively, rather than Sobeys and each FreshCo Respondent individually, is not consistent with the preceding Franchise Jurisprudence, the principles of the *Code*, and the Board's own conclusions in the Referral Decision.
>
> […]
>
> [144] Rather than undertaking the required analysis of any connection between and among the FreshCo Respondents in determining whether there was common direction and control, the Board abandoned the analysis completely and moved to consideration of a labour relations purpose. However, without a finding of any connection between and among the FreshCo Respondents, the analysis ends there, and there is no need to consider a labour relations purpose. This was a clear deviation from the Board's case law and fundamentally changed the outcome of the decision.

[47] The Franchisee 1315949 BC Ltd. (who is the petitioner in this judicial review) also included in its grounds of error for reconsideration, after alleging the Board erred in the finding that there was common control at all, or that there was a labour relations purpose, that the Original Decision was flawed in "concluding the

Franchisees are common employers between each other, without any analysis." It complains that that Original Decision considers only the Union's primary application, not the Union's alternative relief. Franchisee 1197785 BC Ltd. argued that the Original Decision was inconsistent with the principles expressed or implied in the *Code* on a number of grounds, including that the Board's previous decision in *Shoppers* was "clear and unequivocal" that "where there is no evidence of any control or direction between franchisees, there can be no common employer declaration." This is a very similar position to the position it takes on judicial review.

[48] Overall, while the issue raised before this Court on judicial review was not the primary focus of the reconsideration applications, it would not be correct to say that the issue about whether a common employer declaration can be made where the franchisees do not exercise control over each other, was not advanced on those reconsideration applications.

[49] I find this was an argument raised before the Reconsideration Panel. I also find that it was addressed by the Reconsideration Panel, albeit not in the manner or in the part of the analysis desired by the Franchisees and Sobeys.

THE RECONSIDERATION DECISION

[50] On reconsideration, the Reconsideration Panel of the Board dismissed all of the reconsideration applications. The Reconsideration Panel found that the Original Panel did not make a reviewable error in finding that Sobeys had sufficient control over the Franchisees to warrant a common employer declaration, or in finding that there was a valid labour relations purpose in preserving the pre-existing single employer bargaining structure.

[51] The first several pages of the Reconsideration Decision reviews the findings of the Original Decision, including the findings of the Original Panel on each of the *CCAG* factors, and the finding that "Sobeys exercises substantial control over the Franchisees" at para. 468 of the Original Decision. With respect to the reasoning in the Original Decision in relation to the labour relations purpose for the common employer declaration sought, the Reconsideration Decision quotes extensively from the Original Decision, including from the paragraphs cited above, and the conclusion at para. 485 above.

[52] At para. 37, the Reconsideration Decision directly references the Original Decision's consideration of Sobey's and the Franchisees' arguments that the Franchisees "are not in any way linked and will not have a commonality in negotiation goals during bargaining." The Reconsideration Panel endorses the treatment by the Original Panel of this issue as primarily related to whether there is a labour relations purpose for the common employer declaration sought in the context of the specific remedy that would result from this declaration in the form of a single province-wide bargaining structure, as opposed to multiple bargaining units.

[53] The Reconsideration Decision also quotes, at para. 38, the summary of the Board's policy with respect to the elements of s. 38 at para. 485 of the Original Decision, including the extent of control that must be exercised by the Franchisor in relation to the Franchisees, and any changes in the seat of that control:

> [485] In summary, I find the Board's policy endorses an approach whereby individual franchisees and a franchisor can be declared common employers where it prevents the erosion of bargaining rights, the franchise arrangement has not resulted in a shift in the locus of power and the seat of real economic control from the franchisor, and the franchisees exert some control but not substantial control. I find those considerations are applicable in the present case, and I find there is a labour relations purpose for granting a common employer declaration and further find the preferred bargaining structure is the maintenance of a single bargaining unit.

[54] Ultimately, the Reconsideration Panel finds no error in this summary of the Board's policy and the conclusion drawn by the Original Panel.

[55] At paras. 40–128 the Reconsideration Decision reviews the submissions and arguments made before it on reconsideration, only a small portion of which relate to the error now alleged before me on judicial review. It is clear from this summary of the arguments that the Original Panel's findings with respect to the elements of common control by Sobeys of the Franchisees was a significant focus of the arguments before the Reconsideration Panel, as was the issue of whether the declaration of common employer served a labour relations purpose, including what should be considered as the status quo for that analysis. Many of these arguments relate to the evidentiary foundation of factual findings made on the evidence by the Original Panel, and the extent to which the Original Panel departed from or complied with previous Board decisions and policy.

[56] Among the myriad arguments raised before Reconsideration Panel are Sobey's argument in the alternative and the arguments of several of the Franchisees that have become the focus of this judicial review proceeding. These arguments are summarized and set out in the Reconsideration Decision as follows:

> [58] Sobeys submits, in the alternative, that the original panel's analysis of labour relations purpose for making a common employer purpose does not justify making the declaration collectively, rather than with respect to Sobeys and each Franchisee individually. Sobeys says Section 38 expressly requires there to be common control or direction among entities to be declared a common employer and submits there was no evidence or finding of such common control or direction between the Franchisees. Sobeys submits that, to the contrary, the evidence was that the Franchisees operate as business competitors with conflicting interests. Sobeys submits the original panel's solution to this issue of "multiple [bargaining] tables" (para. 479) "is a clear indication that a valid labour relations purpose did not exist to declare Sobeys a common employer with [the Franchisees]". It further submits that one party to bargaining does not have the ability "to force multiple bargaining tables on the other", and that even if multiple bargaining tables were agreed to, that would be "recognition that a common employer declaration was inappropriate in the first place".
>
> […]
>
> [66] Philly Foods submits in the alternative that if there was a labour relations purpose for making a common employer declaration, it could only be between it and Sobeys, as there was no evidence of common control or direction as between the Franchisees themselves. Philly Foods says the absence of common control or direction between the Franchisees themselves meant the situation was the same as found in *Shoppers Drug Mart Inc.*, BCLRB No. B110/2006 ("*Shoppers*"), where the Board found common control or direction as between a central corporate entity and individual stores, but not between the individual stores (paras. 270-271).
>
> […]
>
> [77] Blundell further says the analysis in the Original Decision "considering Sobeys' control over individual franchisees — could only result in the Union's alternative application being successful". That is, the only appropriate remedy would have been the creation of separate bargaining units with Sobeys and individual franchisees as common employers. Blundell says there was no basis in law or fact for individual franchisees to be declared part of a common employer "simply because they share the same corporate parent". Blundell says the Original Decision "contains no analysis whatsoever as to whether the franchisees exercise common control or direction as between each other, or whether there is a labour relations purpose for declaring the franchisees to be a common employer with other franchisees". It submits the original panel's common employer order (that Sobeys and all Franchisees are a single common employer) "cannot be sustained based on the lack of any analysis of the relationship between the separate franchisees and, ultimately, complete

> lack of control each franchisee has over the business of any other franchisee, and any labour relations purpose for such a declaration".
>
> […]
>
> [86] Mission also says the original panel erred in paragraphs 477 to 499 of the Original Decision, in saying the appropriate remedy in the circumstances was to "preserve" the pre-existing structure of one collective agreement among Sobeys and the Franchisees. Relying on *Shoppers*, Mission submits there needed to be a finding of common control or direction among the Franchisees before they could be found a common employer with each other. It says the Original Decision purports to distinguish *Shoppers* on the basis of Sobeys' status and power as a shareholder; however, Sobeys has divested itself of its preferred share in each Franchisee. Mission submits that therefore "the only basis upon which the Original Panel distinguished *Shoppers* no longer exists."
>
> [87] Mission submits there was no evidence of any common control or direction as between the Franchisees, and accordingly the original panel erred in going on to consider whether there was a labour relations purpose for making a common employer declaration as between them. As such, Mission submits the original panel "failed to apply the principles expressed or implied in the Code and committed a palpable and overriding error by finding there is a labour relations purpose to declare the Franchisees common employers without finding there is common control or direction amongst them". It submits this is both contrary to the Board's policy in *Shoppers* and contrary to the explicit wording of Section 38 of the Code.
>
> […]
>
> [92] Stafflyn submits there is also "no, or clearly insufficient evidence for the [original panel's] apparent finding that there was common control and direction as between the Franchisees". It says the original panel did not in fact engage in any analysis of whether there was common control or direction as between the Franchisees, and "seems to have simply assumed that this flowed automatically from its finding that there was common control and direction as between Sobeys and each of the Franchisees". Stafflyn submits this was an error of fact and law which is inconsistent with the law and policy of the Code. It submits there is "no evidence, much less significant evidence" before the original panel upon which it could be found that there is common control or direction between the Franchisees, particularly "no evidence of any franchisee having or exerting any control or direction over the operations or decisions of any other franchisee".

[57] I note from this summary, that this issue was argued both as a matter of the common control element of s. 38 by some of the parties, and as an aspect of the required labour relations purpose by others, or as related to a combination of these factors.

[58] The Reconsideration Panel begins its analysis of the reconsideration applications at para. 139 of its reasons.

[59] The Reconsideration Panel sets out its approach to the reconsideration as follows:

> [160] In many cases where an original panel hears and weighs evidence for the purpose of applying a multi-factored test to come to a conclusion on a labour relations issue, it will be possible to quarrel with some aspects of how the original panel describes or weighs the evidence in light of the test. However, the Board's role on reconsideration is not to second-guess such assessments by an original panel, unless reviewable error can be shown. That is particularly the case where the evidence is extensive and the test is one which requires consideration of a number of factors in a holistic way in order to come to a decision. Here, the original panel heard and considered extensive evidence to which it applied the *CCAG* test to determine whether Sobeys exercises substantial control over the Franchisees' operations.

[60] Later in that same paragraph, the Reconsideration Panel found the Original Panel's analysis on the factors related to the presence and sufficiency of common control, and its conclusions, to have been available on the evidence:

> [160] … We are not persuaded the conclusion the original panel reached on this issue lacked an evidentiary foundation or was otherwise one which could not have been reached absent reviewable error. To the contrary, while we appreciate the Applicants strongly disagree with the original panel's conclusion, we find it was one which was open to the original panel to find, and we are not persuaded the original panel committed a reviewable error or errors in stating: "When considering the overall relationship between Sobeys and the Franchisees, I conclude Sobeys exercises substantial control over the Franchisees' FreshCo stores" (para. 468).
>
> [Emphasis added.]

[61] The finding of substantial control by Sobeys over the Franchisees is no longer challenged on this judicial review, but its sufficiency to make the s. 38 declaration is.

[62] Whether something more was required in this regard, and more specifically the requirement that the Board also find that the Franchisees also exercise control over each other before the Board may order a single collective bargaining structure instead of franchise specific bargaining structures, is discussed at para. 162 of the Reconsideration Decision as follows:

> [162] The Applicants further argue the Original Decision errs in finding that declaring Sobeys and all of the Franchisees to be a common employer constitutes "preserving the pre-existing bargaining structure" (para. 478). They submit the pre-existing bargaining structure was a number of closed Safeway locations which were opened as franchised FreshCo locations. At each of those locations, the Franchisee as employer

> for labour relations purposes was subject to the FreshCo Collective Agreement with the Union. However, the Applicants submit, the Union's preference for a single bargaining unit encompassing all FreshCo stores does not constitute a labour relations purpose for declaring them all a common employer with Sobeys. At most, they argue, the finding that Sobeys retained substantial control of each Franchisee's operation justified a finding that Sobeys was a common employer with each Franchisee. The Franchisees in particular argue there was no evidence or analysis suggesting they share any common control or direction and no justification (beyond the Union's preference for a single bargaining unit) for declaring them to be a common employer with each other.
>
> [Emphasis added.]

[63] The Reconsideration Decision rejects these arguments and concludes as follows:

> [167] To the extent Sobeys argues that the bargaining structure imposed by the Ready Award never came to exist because Sobeys did not and does not own or operate the FreshCo stores at issue, and that therefore the *status quo* to be preserved actually involves separate bargaining units for each store, we find that argument to be circular and unpersuasive. The Ready Award created – over Sobeys' objections – a broad-based bargaining unit for Sobeys' FreshCo stores and rejected the concept of separate units at each store. Consequently, if Sobeys were to directly operate the FreshCo stores which were at issue before the original panel, those stores would be part of the broad-based bargaining unit contemplated by the Ready Award. The primary purpose of the Code's common employer provision is to protect collective bargaining rights won by trade unions for the benefit of the employees they represent, where corporate changes might otherwise have a prejudicial effect on those continuing rights (*White Spot Limited*, BCLRB No. B352/96 (Leave for Reconsideration of BCLRB No. B191/95), para. 150). Sobeys argument effectively amounts to an argument that its corporate arrangement with the Franchisees – which the original panel found were entities under common direction or control and engaged in similar or related activities with Sobeys – defeated the rights won by the Union through the Ready Award. We find that is precisely the harm that the common employer provisions of the Code seek to protect against.

[64] The Reconsideration Panel specifically addresses the argument that unless there was common control among the franchisees, a franchisor and franchisees could not be made a common employer. The Reconsideration Panel examined the argument and found on the facts before it, the Original Panel could make the order that it did, although it was not obliged to do so.

> [168] The original panel considered the Applicants' arguments that the Franchisees are "not in any way linked" and "will not have a commonality in negotiation goals during bargaining" (para. 479) but it found that preserving the existing bargaining structure was the appropriate remedy (para. 478). To that end, it found the decision in *Shoppers*, on which the Applicants

> continue to rely on application for leave and reconsideration, to be distinguishable. Specifically, the Original Decision notes that, in *Shoppers*, a common employer declaration encompassing the franchisor and all of the franchisees in that case would have resulted in an alteration of the existing bargaining structure; it would not have prevented the erosion of bargaining rights as the original panel found would be the case here (para. 482).
>
> [169] We find no error in the Original Decision's finding that the Ready Award imposed a broad-based bargaining structure pertaining to FreshCo stores. As a result, it was open to the original panel as an exercise of its discretion to order a common employer declaration that preserved that bargaining unit structure. As a result, we find the remedy ordered in the Original Decision is consistent with the Board's policy in *KFCC*. Whether the original panel could have ordered that Sobeys and each of the Franchisees be declared a common employer for Code purposes, for the reasons the Applicants argued before him and on application for leave and reconsideration, he was not obliged to do so. We find the Applicants have not raised a serious question as to the correctness or fairness of the original panel's exercise of remedial discretion.
>
> [Emphasis added.]

[65] As I read the above, the Reconsideration Panel endorses the approach of the Original Panel to the *Shoppers* decision as relating primarily to the issue of whether there is a labour relations purpose for the declaration sought. Specifically, the Reconsideration Decision, like the Original Decision, treats the issue of the relative control of the Franchisees as between each other as being primarily related, in the Board's analytical framework, to the remedy sought in terms of the resulting bargaining structure. Consideration of that factor includes whether the Franchisees should be declared to be common employers only with Sobeys and not with each other (as they say should be the result in this judicial review) or whether the remedy sought by the Union as its primary relief of a single bargaining unit including Sobeys and all of its Franchisees would serve a labour relations purpose.

[66] In finding no error in the Original Panel's reasoning in this respect, or with respect to the reasoning of the Original Panel regarding the issue of common control or direction being primarily related to the control exercised by the Franchisor *over* the Franchisees, the Reconsideration Panel rejects the arguments set forth by Sobeys and the Franchisees that control *as between* the Franchisees is a necessary requirement for a finding of common control or direction or a declaration of a single common employer and a single bargaining unit, under s. 38.

[67] For those reasons, and many more reasons articulated in the Reconsideration Decision regarding other arguments and issues, the Reconsideration Panel dismissed the applications, leading to this judicial review.

STANDARD OF REVIEW

[68] All of the parties agree that the standard of review applied by the Court in its review of the Reconsideration Decision is whether it is patently unreasonable, pursuant to the *Code* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[69] Section 139 of the *Code* provides the Board with "exclusive jurisdiction to decide a question arising under this Code", and s. 138 states that a decision of the Board on a matter within its exclusive jurisdiction under the *Code* is "final and conclusive and is not open to question or review in a court on any grounds". Section 136 of the *Code* confirms the exclusive jurisdiction of the Board to hear and decide applications and complaints under the *Code*, and s. 137 states a court "does not have and must not exercise any jurisdiction in respect of a matter that is, or may be... a matter referred to in section 136...".

[70] Together, ss. 136–139 of the *Code* "assign exclusive jurisdiction to the Board in respect of all issues arising under the *Code*" and "are broad privative provisions in relation to matters over which the Board has exclusive jurisdiction": *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152 at paras. 24–28 [*Red Chris*]; and *Team Transport* at para. 26.

[71] Subsection 58(1) of the *ATA* states that "relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction". Subsection 58(2)(a) of the *ATA* states that in a judicial review proceeding, "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable" [emphasis added].

[72] The Franchisees and Sobeys take the position that, notwithstanding the statutory standard of review applicable in this case, the common law approach to judicial review expressed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, continues to have some bearing on the review before this

Court to the extent that it endorses a "reasons first" analysis: *Connors v. MacLean,* 2022 BCSC 1990 at para. 20; and *Champ's Fresh Farms Inc. v. British Columbia (Employment Standards Tribunal),* 2023 BCSC 1075 at para 33.

[73] The Board in its submissions before me does not disagree that it is possible to apply the patently unreasonable standard and also take a "reasons first" approach. The Board, however, directs the Court to the direction given by the Court of Appeal in *Red Chris* at para. 29 (and endorsed in the context of a judicial review of the Board's interpretation of s. 38 of the *Code* in *Team Transport* at para. 27) that the meaning of patently unreasonable itself in s. 58 of the *ATA* is not affected by the common-law "reasonableness" standard described in *Vavilov*.

[74] In *Red Chris,* the Court of Appeal overturned a decision of this Court that had found the decision of the Board patently unreasonable because the Board's reasons were insufficiently stated (or not stated at all) on an important point raised by the petitioners (a significant ground argued in this case as well). In overturning this Court and upholding the Board's decision on judicial review, the Court of Appeal at paras. 29–30 of *Red Chris* (and para. 28 of *Team Transport*) reaffirmed the application of the patently unreasonable test articulated in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109, aff'd 2009 BCCA 229:

> [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the Ryan formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in Ryan, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.
>
> [Emphasis added].

[75] In the year prior to the issuance of *Vavilov,* the Supreme Court of Canada had occasion to comment on the statutory standard of patently unreasonable under the *ATA*. In *West Fraser Mills Ltd. v. British Columbia (Workers'*

Compensation Appeal Tribunal), 2018 SCC 22 [*Fraser Mills*], the Court held as follows:

> [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).
>
> [29] By stipulating the standard of patent unreasonableness, the Legislature has indicated that courts should accord the utmost deference to the Tribunal's interpretation of the legislation and its decision.

[76] In my view, the *Fraser Mills* articulation of the test, albeit before *Vavilov,* still requires that a reviewing court start with the statutory interpretation stated in the tribunal's decision, and is therefore amenable to reconciliation with the "reasons first" analysis endorsed in *Vavilov*.

[77] I also note that in *Red Chris,* while rejecting the direct application of *Vavilov* to an *ATA* review on the patently unreasonable standard*,* the Court of Appeal stated that reasons which "failed to answer a question that was fundamental to the issues before [the Board]" would be patently unreasonable: para. 32. I prefer this formulation of the standard that applies to the Franchisees' and Sobey's argument that the Board's reasons must "meaningfully account for the central issue raised by the parties" even where the standard of review is one of patent unreasonableness.

[78] Nevertheless, it is ultimately for the Board, not the parties themselves, to define the questions fundamental to deciding the issues before it. While the parties may raise issues, a decision-maker is not required to expressly address every argument or line of possible analysis, or to make an explicit finding on each intermediate finding leading to its conclusion: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 at para. 3 [*Construction Labour*]; and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16

[79] For the reviewing court, the issue is whether the decision as a whole is patently unreasonable: *Pereira v. British Columbia (Labour Relations Board)*, 2023 BCCA 165 at para. 85; and *Ma v. British Columbia (Employment Standards Tribunal)*, 2016 BCSC 2097 at para. 35, citing *Construction Labour* at para. 3.

[80] Fortunately, in this case I need not reconcile the "reasons first" approach in *Vavilov* expressing the common law standard of review, and our Court of Appeal's expression of the patently unreasonable standard under the *ATA* in *Red Chris* and *Team Transport* any further in this case. I am in no position, lacking the extensive expertise and experience of the Board, to consider other rational or tenable lines of analysis commensurate with the labour relations purposes of s. 38 of the *Code* that might also support the Board's decision. Nor have I found any significant gaps in the reasoning of the Reconsideration Panel on central issues raised by the statute or the parties that I might be tempted to fill with my own analysis.

[81] Overall, I found the Reconsideration Decision to be clear and comprehensive, setting out a rationale for its decision on the fundamental question of common control of the various corporate entities involved, and for finding that there is a labour relations purpose for making a common employer declaration resulting in the maintenance of a single bargaining unit structure, that I did not have difficulty following.

ISSUES

[82] I have come to this conclusion even with the benefit of the searching arguments of the Franchisees and Sobeys highlighting and pinpointing various alleged failures in the reasoning of Reconsideration Decision. Although these arguments were expressed in various ways by the various parties seeking to overturn the Decision on judicial review, many of them overlapping, I will address them thematically as follows:

a) The failure to address the requirement set out in *Shoppers* that the Franchisees also exert control over each other before finding them to be a common employer with each other and Sobeys;

b) The failure to consider the relative control of the Franchisees at all, as an essential element of the common control requirement under s. 38 of the *Code*; and

c) The Board gave too much weight to the labour relations purpose of maintaining the status quo of the bargaining unit.

ANALYSIS

Failure to Follow or Properly Distinguish *Shoppers*

[83] In arguing that control as between the Franchisees is an essential element of any s. 38 analysis, and one that the Board was required to consider and squarely rule upon, the Franchisees and Sobeys rely on paras. 270–273 of *Shoppers*. They argue that *Shoppers* is the only decision of the Board directly on point, and that the Board should therefore have engaged the same analysis and come to the same conclusion as it did there.

[84] In *Shoppers*, the Board analogized the control structure in that case to a wheel with a hub and 19 spokes and found that there was not sufficient common control as between the spokes of the wheel to warrant the single common employer declaration sought in that case. The Board in *Shoppers* also rejected the application for a common employer declaration because the bargaining structure sought by the union in that case, supported by the degree of common control the Board found, would serve no labour relations purpose in that case.

[85] Specifically, Sobeys and the Franchisees rely on the following paras. of *Shoppers*:

> [270] In considering all of the *CCAG* factors I conclude that there is common control and direction between an Associate and SDMI, but not the group of Associates.
>
> [271] I use the analogy of a wheel. SDMI is the hub. The relationship between SDMI and each Associate are the spokes of the wheel. I conclude that there is common control or direction between SDMI and each Associate. However, to complete the wheel, there would need to be common control or direction between the Associates to create the rim. There is no evidence of any control or direction between the Associates.
>
> [272] The Union does not seek a common employer declaration for SDMI and each individual Associate. Such a request would not fit within the scope of what the Union asserts is the labour relations purpose of maintaining the status quo of group bargaining leading to one collective agreement, not nineteen mirror collective agreements.
>
> [273] Accordingly, I dismiss the Union's common employer application.

[86] The Board in *Shoppers* went on to find that—in addition to the lack of evidence as to common control and direction—there was also no labour relations purpose to a common employer declaration:

> [274] In the event I am wrong with respect to common control or direction as it relates to the group of Associates, I will consider whether there is a labour relations purpose. There is a major difference in this case compared to White Spot and KFCC. In both those cases the franchisees were at one time corporate stores in one certification and under one collective agreement. The labour relations purpose in both cases was to maintain the established structure so that employees maintained the same rights and privileges gained under the initial structure.
>
> […]
>
> [288] Because the structure is informal, I conclude that from a legal perspective you revert by default to the certification structure. Furthermore, on the overall evidence I am not satisfied that there is one collective agreement. Therefore, the status quo is not one Collective Agreement. Accordingly, there is no labour relations purpose to declare a common employer. Granting the Union's application would not maintain the status quo but would alter the structure during collective bargaining.

[87] Sobeys and the Franchisees argue that the Reconsideration Decision does not sufficiently engage with their argument before both the Original Panel and the Reconsideration Panel based on *Shoppers*. They say that both the Original Decision and Reconsideration Decision treat the issue as only relating to whether there was a labour relations purpose to make an order giving rise to a different bargaining structure (a single province-wide structure as opposed to individual franchisee bargaining units). Sobeys and the Franchisees argue that the Board, in both the Original Decision and Reconsideration Decision, failed to grapple with what they say is the gravamen of *Shoppers*: that the common control element cannot be met without control being exercised as between Franchisees. They argue that, to the extent that the Original Decision and Reconsideration Decision distinguish *Shoppers*, the reasoning is flawed because *Shoppers* is distinguished from this case only on the different labour relations purpose considerations, and not on the common control or direction element of s. 38.

[88] In my view, the arguments advanced by Sobeys and the Franchisees overstate *Shoppers* as turning solely on the absence of common control or direction and not at all on the absence of a labour relations purpose for the particular remedy sought by the union in that case. Nor does the reasoning in

Shoppers purport to modify Board policy set out in *White Spot #1* and *KFCC* to create a new factor related to control as between franchisees.

[89] Even in their submissions before me (and certainly in their various submissions to the Board) the question of the Union's alternative position that there should be common employer designations as between Sobeys and each Franchisee, as opposed to a single common employer declaration and bargaining unit, was advanced as relating to the appropriate remedy and its labour relations purpose. Based on these submissions, and the Board's own analyses, I find these arguments do not lend themselves to watertight analytical compartments, and that findings on common control may be relevant to the labour relations purpose, and *vice versa,* within established Board policy and precedent.

[90] Furthermore, contrary to some of the submissions I heard, I find there is nothing necessary about the wheel analogy in *Shoppers* in the language of the *Code*. One can easily imagine other analogies for corporate structures that might give rise to a finding of common control or direction, including binary stars or a wheel with a hub so large that the spokes are incidental to its movement. Such analogies are not reflective of *Code* requirements, and there is nothing in the language of s. 38 that requires the Board, as a matter of statutory interpretation, to consider the ability of franchisees to control one another or to be interconnected like the spokes of a wheel.

[91] In any event, I need not consider how best to understand *Shoppers* or whether aspects of that decision should still be followed, whether it is distinguishable from the present case, or on what grounds. I need not consider these questions because the Board did consider those questions, and concluded that *Shoppers* is distinguishable from this case, primarily on the basis of the very different labour relations context of that franchise arrangement and this one. The Board did not consider that franchisee control as between themselves was critical to the issue of common control or direction and instead considered that substantial control by Sobeys over the Franchisees alone was sufficient in this case. This determination was very much within the special expertise of the Board, and the parsing of the Board's analysis sought by the Franchisees and Sobeys, in my view, goes beyond the appropriate role of judicial review on the patently unreasonable standard.

[92] The development and application of Board policy is a matter within its exclusive jurisdiction. On judicial review, courts should not "engage in an analysis of Board policy, to determine whether there has been compliance with Board jurisprudence, and to dip into an interpretation of... the *Code*", because "that is subject matter assigned exclusively to the Labour Relations Board, and engages its considerable expertise" (emphasis in original): *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc*., 2013 BCCA 497 at para. 55; see also *McDonald v. United Association of Journeymen*, 2008 BCSC 1212 at paras. 73–75; and *Canadian Office and Professional Employees Union, Local 378 v. Lantic Inc.*, 2011 BCSC 969 at paras. 33–37.

[93] Sobeys and the Franchisees concede that it was open to the Board to disregard its analysis in *Shoppers* altogether. *Stare decisis* does not apply to Board decisions, and it is well established that the Board is free to change its labour relations policy. As our Court of Appeal has held, the Board can have one policy one day and a different policy the next day as long as it is based upon a supportable interpretation of the *Code*: *H.S.A.B.C. v. Versa Services* (1992), 91 D.L.R. (4th) 582 at 597, 1992 CanLII 373 (B.C.C.A.).

[94] Even if *Shoppers* was considered to reflect settled Board policy (and I have no evidence to indicate that it is), I find the Board was free to depart from its approach in that case, and it was free to do so for the reasons it stated in both the Original Decision and the Reconsideration Decision.

Failure to Address Relative Franchisee Control at All

[95] I also reject the arguments of several Franchisees that the Board failed to address their arguments regarding franchisee control at all and its reasoning is patently unreasonable on that basis.

[96] This argument was raised both as a failure to address a central issue that was raised in argument, and as a failure to address a critical requirement of the statutory language of s. 38 of the *Code*. Both rely on the branch of the patently unreasonable standard of review requiring that the Board consider and answer questions that are fundamental to the issues before it, and relate to the argument that control by the individual Franchisees over each other is a requirement of common control or direction under Board policy and s. 38 of the *Code*.

[97] I disagree that this issue was not addressed by the Board in both Decisions. I find that both the Original Decision and the Reconsideration Decision determine this issue in the negative, and furthermore that this was an interpretation of s. 38 that was open to the Board.

[98] Despite some of the arguments to the contrary before me on judicial review, I find that there is nothing in the language of s. 38 that precludes the finding that the requirement of common control or direction cannot be made on the factual circumstances of this case. Substantial control by Sobeys of its Franchisees was found on the evidence of this case (and is unchallenged on this judicial review). Nothing in the wording of s. 38 (which the Board has expertise and jurisdiction to interpret) precludes such a finding.

[99] I also find that the objections of some Franchisees that the Board did not consider the evidence adduced that they do not control other Franchisees does not render the decision patently unreasonable.

[100] My reading of the Reconsideration Decision, which in turn reviews the Original Decision, indicates that the evidence of these parties was considered. This evidence was weighed against the control that Sobeys exercised over other aspects of the Franchisees' business. The significance of the evidence, its weighing, and whether the evidence as a whole establishes common control or direction for the purposes of the Board considering whether to make a common employer declaration is so deeply within the special expertise of the Board and entitled to a high degree of deference. This Court only interferes with such decisions where the reasoning or result borders on the absurd.

[101] The same is true of some of the Franchisees' arguments that the labour relations purposes of the *Code* would be better served if there were multiple common employer designations between Sobeys and each Franchisee, instead of a single common employer declaration and collective bargaining unit. That determination was also entirely within the expertise of the Board, who addressed that issue directly in its Original Decision and Reconsideration Decision, albeit not in the way the Franchisees would have preferred.

Labour Relations Purpose

[102] Sobeys and some of the Franchisees argued that the reconsideration panel reasoned backward from the labour board purpose and allowed the desirability of maintaining the Ready Award to overwhelm the requirement that there also be a finding of common control or direction. They suggest the Board "reverse-engineered" the result.

[103] They argue that the "discretionary" element of s. 38—as to whether such a declaration would serve a labour relations purpose—is not articulated in s. 38, whereas the requirement for common control or direction is explicit in the statutory language of that section. They rely on the Court of Appeal's decision in *White Spot Ltd. v. British Columbia Labour Relations Board*, 1999 BCCA 93 at para. 39 [*White Spot BCCA*], where the Court of Appeal notes that this requirement was one added by the Board itself.

[104] Some of the Franchisees' arguments seem to suggest that the Board's statutory interpretation exercise with respect to the meaning of common control or direction for the purposes of s. 38 is more open to interference by this Court than the discretionary aspects of s. 38. However, for the purposes of judicial review, it makes little difference whether the decision being reviewed engages the Board's exercise of discretion—in relation to considering whether a labour relations purpose is served by the sought common employer declaration—or its expert interpretation of the *Code* relating to the requirement of "common control or direction"; both are reviewed on a standard of patent unreasonableness.

[105] Nor do I think it is accurate to suggest that the Board's determination of whether there is a labour relations purpose is not grounded in the statute, or that this determination is less worthy of deference in this Court. The language of s. 38 encompasses this aspect of the test to the extent that it requires the Board to reach an "opinion" as to whether it should treat related businesses under common control or direction as constituting one employer "for the purposes of the *Code"* which it "may" (or may not) do. The Board has decided, through its established policy, that this exercise of its discretion should engage a consideration of the labour relations purpose of the requested remedy.

[106] I also do not think it is for this Court to tell the Board on judicial review how much weight it should give to the four factors it has identified in its analysis of s. 38 of the *Code*, including how to weigh the degree of common control or direction and the significance of a particular labour relations purpose, relative to one other.

[107] In *White Spot BCCA*, the Court of Appeal adopted the Board's articulation of the purpose of section 38 in *CCAG* as follows

> [71] In addition, the purposes of sections 35 and 38 are important. The Board explained them well in *C.C.A.G.* (supra) at p. 16:
>
> > …the primary purpose behind the inclusion of Sections 37 and 53 [now ss. 35 and 38] in the Labour Code is to protect the rights secured by trade unions and the employees they represent through the certification process and the collective bargaining process, in circumstances where they would likely be prejudicially affected by corporate changes on the employer side. Consistent with the purpose of these sections, the Board has given both sections a full and liberal interpretation.

[108] The Court in *White Spot BCCA* held that the Board had jurisdiction to use s. 38 to restore the pre-transfer *status quo*: paras. 53–54. Further, the Court held that even if the order did expand bargaining rights, the Board is not prevented from changing its jurisprudence to do so: para. 56.

[109] On my reading of the Reconsideration Decision, the Board has not reasoned backward or placed undue weight on the labour relations purpose of preserving a particular collective bargaining structure in this case. The Board's finding that the franchising arrangement in this case did not shift the centre of control from Sobeys to the Franchisees is a finding that is relevant to the established purpose of s. 38 and has a bearing on both the common control element and the labour relations purpose of the Board's role in considering these types of applications.

CONCLUSION

[110] In conclusion, I find that the Reconsideration Decision is not patently unreasonable.

[111] The Board's reasons address many issues, including the issues that are central to its own stated policy and decisions such as *CCAG*, *White Spot #1* and

KFCC relating to determinations of whether to treat a group of related entities as a common employer.

[112] The Board's reasons also address the specific issues raised by Sobeys and the Franchisees, including their ancillary arguments regarding relative control as between the Franchisees and whether and to what extent this factor is relevant to the making of a common employer designation. While the Board does not consider this issue in the precise manner sought by Sobeys and the Franchisees, I find that the issue is sufficiently addressed in both the Original Decision and the Reconsideration Decision.

[113] In this regard, it is clear from a full reading of both the Original Decision and Reconsideration Decision that the Board finds that control by a franchisor of its franchisees, where it is substantial, may be sufficient to meet the statutory requirement of common control or direction for the purposes of a s. 38 common employer declaration. It is plain from the Board's reasoning, both in the Original Decision and the Reconsideration Decision, that control of individual franchisees over each other in the franchise context is not a necessary indicator of common control or direction.

[114] The Board also reasonably considered the arguments regarding the links (or lack thereof) between the individual Franchisees to primarily engage the question of what was the appropriate bargaining structure for the parties in light of the labour relations purposes of the *Code*. I find that the Reconsideration Decision sets out and resolves those arguments in a cogent and coherent way.

[115] I would dismiss the judicial review application, with costs to the Union to be paid by Sobeys and the Franchisees.

"Marzari J."