

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1197785 B.C. Ltd. v. 1315949 B.C. Ltd.*,
2026 BCCA 310

Date: 20260724

Dockets: CA50935; CA50936; CA50937;
CA50939; CA50940

Docket: CA50935

Between:

1197785 B.C. Ltd.

Appellant
(Respondent)

And

1315949 B.C. Ltd.

Respondent
(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.,
and Stafflyn Retail Inc.**

Respondents
(Respondents)

– and –

Docket: CA50936

Between:

Philly Foods Inc.

Appellant
(Respondent)

And

1315949 B.C. Ltd.

Respondent
(Petitioner)

And

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

Respondents
(Respondents)

– and –

Docket: CA50937

Between:

Sobeys Capital Incorporated and 101296729 Saskatchewan Ltd.

Appellants
(Respondents)

And

1315949 B.C. Ltd.

Respondent
(Petitioner)

And

**British Columbia Labour Relations Board,
United Food and Commercial Workers International Union, Local 1518,
Philly Foods Inc., Stafflyn Retail Inc. and 1197785 B.C. Ltd.**

Respondents
(Respondents)

– and –

Docket: CA50939

Between:

Stafflyn Retail Inc.

Appellant
(Respondent)

And

1315949 B.C. Ltd.

Respondent
(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.,
and 1197785 B.C. Ltd.**

Respondents
(Respondents)

– and –

Docket: CA50940

Between:

1315949 B.C. Ltd.

Appellant
(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
(Respondents)

Before: The Honourable Madam Justice Fisher
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated
August 1, 2025 (*1315949 B.C. Ltd. v. British Columbia (Labour Relations Board)*),
2025 BCSC 1483, Vancouver Docket S245761).

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Place and Date of Hearing:

Vancouver, British Columbia
June 19, 2026

Place and Date of Judgment:

Vancouver, British Columbia
July 24, 2026

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Gomery

Summary:

These five appeals concern a common employer application under s. 38 of the Labour Relations Code (the Code) in respect of a franchise arrangement between Sobeys Capital Incorporated (Sobeys) and four franchisees. A reconsideration panel of the Labour Relations Board upheld a decision declaring Sobeys and its franchisees to be a common employer and an application for judicial review was dismissed.

The main issue is whether s. 38 requires a finding of common control or direction between all franchisees in addition to a finding of common control or direction by Sobeys over the franchisees before the Board may treat them as a common employer for the purposes of the Code. The appellants contend the Board failed to apply this statutory requirement and failed to address this critical issue, rendering its decision patently unreasonable.

Held: Appeal dismissed. There is nothing in the language of s. 38 that suggests only one reasonable interpretation and more particularly, that it requires a finding of common control or direction as between franchisees in addition to control by a franchisor over its franchisees. While the reconsideration panel did not directly address this issue in relation to the common control or direction requirement, the Reconsideration Decision was not patently unreasonable and the reviewing judge did not err in applying this highly deferential standard of review.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] These five appeals concern a common employer application under s. 38 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the *Code*), in respect of a franchise arrangement between Sobeys Capital Incorporated (Sobeys) and four franchisees. The appeals are from an order dismissing a petition for judicial review of the decision of a reconsideration panel of the Labour Relations Board (the Board), which upheld a decision of the Board declaring Sobeys and its franchisees to be a common employer.

[2] The appellants contend s. 38 requires a finding of common control or direction between all franchisees in addition to a finding of common control or direction by Sobeys over the franchisees before the Board may treat them as a common employer for the purposes of the *Code*. They say the Board failed to apply this statutory requirement and failed to address this critical issue, rendering its decision patently unreasonable.

The parties

[3] Sobeys owns and operates retail grocery stores in British Columbia under the trade banner “Safeway” and is the franchisor of discount stores operating under the trade banners “FreshCo” and “Chalo!”

[4] Sobeys and 101296729 Saskatchewan Ltd. are appellants in CA50937. The latter company is a wholly owned subsidiary of Sobeys that was incorporated to operate a Freshco/Chalo! store during a transition period.

[5] The appellants in the other appeals, 1315949 B.C. Ltd., 1197785 B.C. Ltd., Philly Foods Inc. and Stafflyn Retail Inc., are franchisees of Sobeys operating retail grocery stores under the FreshCo banner in British Columbia. Each of these appellants is also a respondent in the appeals brought by Sobeys and the other franchisees. I will refer to them collectively as the Franchisees.

[6] The respondent, United Food and Commercial Workers International Union, Local 1518 (the Union), represents the unionized employees of Sobeys and the Franchisees.

[7] The respondent, British Columbia Labour Relations Board, participated in this appeal for the limited purpose of addressing the statutory framework and standard of review.

Background

[8] In 2017, Sobeys sought to convert some of its Safeway stores to FreshCo stores. Sobeys and the Union then went into negotiations for a collective agreement for the FreshCo stores, which was eventually settled by arbitration in December 2018. At that time, no FreshCo stores existed in British Columbia.

[9] In 2019, Sobeys entered into franchise agreements with the Franchisees to operate discount grocery stores under the FreshCo banner. In May and September 2019, the Union applied to the Board for a declaration that Sobeys and the Franchisees were a common employer under s. 38 of the *Code*.

[10] Section 38 provides:

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.

[11] The Union sought as primary relief a single bargaining unit encompassing Sobeys and the Franchisees with a single collective agreement or alternatively, individual bargaining units with Sobeys and each Franchisee.

Proceedings before the Board and the court below

[12] The Union's application was first before the Board in September 2020, by way of written submissions but upon a reconsideration was sent back for a fresh determination after an oral hearing. That hearing took place over many weeks between October 2021, and September 2022. On July 6, 2023, the Board granted the Union's application and the primary relief sought. It found that Sobeys exercised substantial control over the Franchisees and the preferred bargaining structure was the maintenance of a single bargaining unit. Pursuant to s. 38, the Board declared Sobeys and the Franchisees to be a common employer for the purposes of the *Code*. I will refer to this as the Original Decision. The reasons are indexed as 2023 BCLRB 105.

[13] Sobeys and the Franchisees applied for a reconsideration of the Original Decision. That application was dismissed on June 26, 2024, by a panel of three members (the Reconsideration panel). It found no reviewable error by the Board in finding substantial control by Sobeys over the Franchisees and a valid labour relations purpose in preserving the pre-existing bargaining structure to warrant a common employer declaration. I will refer to this as the Reconsideration Decision. These reasons are indexed as 2024 BCLRB 89.

[14] Sobeys and the Franchisees then petitioned for judicial review of the Reconsideration Decision. They did not challenge the finding that Sobeys exerted

substantial control over each of the Franchisees but asserted that the Reconsideration panel failed to address the critical question of the degree of control between the Franchisees. In the absence of this analysis, they contended the Reconsideration Decision was patently unreasonable. The reviewing judge, Justice Marzari, found the Reconsideration Decision was not patently unreasonable and dismissed the petition. Her reasons are indexed as 2025 BCSC 1483.

[15] The judicial review was from the Reconsideration Decision but, as Marzari J. appreciated, the Original Decision formed part of the record before the Reconsideration panel. In the context of this appeal, some review of each decision in relation to the specific questions before us is necessary.

The Original Decision

[16] The Original Decision was grounded in a considerable amount of evidence and comprehensive arguments. The Board noted it had long recognized the following requirements for making a common employer declaration under s. 38:

- a) more than one entity is carrying on a business or activity;
- b) the entities are under common control or direction;
- c) the entities are engaged in associated or related activities or businesses; and
- d) there is a labour relations purpose for making the declaration.

[17] Two issues were raised before the Board: whether there was common control or direction and whether there was a labour relations purpose for a common employer declaration.

[18] The Board considered the factors for assessing common control or direction established in *Concerned Contractors Action Group*, BCLRB No. 32/1986 [CCAG]: (1) common ownership; (2) financial control; (3) contractual arrangements; (4) control of labour relations; (5) common management; (6) interrelationship or interdependence of operations; and (7) representation to the public as a single integrated employer or business. In the context of a franchise, the Board took

guidance from *KFCC/PepsiCo Holdings Ltd. v. C.A.W.-Canada, Local 3000*, BCLRB No. B283/2001, which stated:

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

[19] The Board reviewed the evidence in relation to each of the CCAG factors. Referring to *KFCC*, it recognized that common control or direction could be established where no one corporate entity has complete or exclusive control or direction, and in the context of a franchise, the degree of control by a franchisor over a franchisee must be substantial. Looking to the CCAG factors generally, the Board concluded Sobeys exercised substantial control over the Franchisees, based on these findings:

[467] ... 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.

[20] The Board went on to address the labour relations purpose. It considered three prior Board decisions that dealt with franchises, *White Spot Ltd. v. C.A.W.-Canada, Local 3000*, BLCRB No. B352/1996 (*White Spot #1*), *White Spot Ltd. v. C.A.W.-Canada, Local 3000*, BCLRB No. B207/1997 (*White Spot #2*) and *KFCC*.

[21] In *White Spot #1*, a common employer declaration was made in an application involving a franchisor and a single franchisee on the basis that maintenance of the parties' collective bargaining structure was consistent with preserving rights under s. 38 and with the goal of industrial stability. *White Spot #2* dealt with the same issue in respect of a franchisor and a group of franchisees, who

argued that a common employer declaration ought not be made because there was no common control or direction between the franchisees. However, they did not contest the issue of common control or direction and addressed this argument as an aspect of the labour relations purpose.

[22] In *White Spot #2*, the Board followed *White Spot #1*. It found that adding a number of other franchisees who are common employers with the franchisor did not create a new collective bargaining structure and concluded that the same labour relations purpose existed.

[23] The Board in *KFCC* viewed *White Spot #1* as illustrating that, where a franchise arrangement has not shifted the locus of power and economic control from the franchisor, preservation of the existing bargaining structure and collective agreement rights are valid labour relations purposes for a common employer declaration. It also noted the options available to the Board when considering the appropriate bargaining structure, stating that the case for maintaining the pre-existing bargaining structure weakens the further one moves away from the situation where the franchisor is clearly dominant.

[24] In this case, the Board found the arrangement between Sobeys and the Franchisees had not shifted real economic control from Sobeys to the Franchisees and was satisfied that preserving the pre-existing bargaining structure was the appropriate remedy.

[25] In its assessment of labour relations purpose, the Board noted the appellants paralleled the argument made by the respondents in *White Spot #2* that the declaration could not be made because there was no common control or direction between the Franchisees and the collective bargaining structure sought by the Union would not let them address their own concerns. It then noted that this argument had been rejected in *White Spot #2* because the addition of franchisees who were common employers with White Spot did not create a new bargaining structure: at paras. 472–473.

[26] In response to the argument that the Franchisees were not in any way linked and would not have a commonality in negotiation goals, the Board found this to be a matter best left to the parties to explore with respect to bargaining formats. It also addressed their reliance on *Shoppers Drug Mart Inc. v. U.F.C.W., Local 1518*, BCLRB No. B110/2006, the only Board decision that did not find common control and direction between a group of franchisees, each of which was under the common control or direction of the franchisor. The Board distinguished *Shoppers* on the basis that the panel there found that a common employer declaration would not have prevented the erosion of bargaining rights but would have altered the structure of collective bargaining. It considered the present case to mirror the circumstances in *White Spot #2*: at paras. 479–482.

[27] In the result, the Board found that Sobeys and the Franchisees constituted more than one entity carrying on a business or activity through the franchising and operation of the FreshCo stores, the entities were under common control or direction, and there was a labour relations purpose for making a common employer declaration under s. 38.

The Reconsideration Decision

[28] Sobeys and the Franchisees sought reconsideration of the Original Decision on a broader range of issues than those raised on judicial review and in this appeal. They challenged the Board's finding that Sobeys exercises substantial control or direction over the Franchisees as well as the finding of a valid labour relations purpose. They also raised the issue of common control or direction among the Franchisees, although not all of them argued this in relation to the required element of common control or direction. Some of them did so in relation to the labour relations purpose.

[29] The application for reconsideration was made under s. 141 of the *Code*, which gives the Board authority to reconsider a decision where it is satisfied that it is inconsistent with the principles expressed or implied in the *Code*. Before the

Reconsideration panel, the appellants were required to raise a serious question as to the correctness or fairness of the Original Decision.

[30] The Reconsideration panel found the Board did not take an approach to the question of common control or direction inconsistent with Board law and policy or Code principles:

[160] ... 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. 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).

[31] The panel then turned to the issue of labour relations purpose. It reviewed the competing arguments about preserving a pre-existing bargaining structure and found no error in the Board's assessment of this issue. In that context, it addressed the arguments about common control or direction among the Franchisees:

[162] ... 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.

...

[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).

[Emphasis added.]

[32] The Reconsideration panel found the remedy ordered by the Board to be consistent with the policy in *KFCC*. It found no error in the Board's finding that a broad-based bargaining structure pertaining to FreshCo stores had been imposed in the 2018 arbitration award, with the result that it was open to the Board to order a common employer declaration that preserved that bargaining unit structure.

[33] The Reconsideration panel was therefore not satisfied the appellants had raised a serious question as to the correctness or fairness of the Original Decision and dismissed the applications.

The judicial review

[34] Justice Marzari conducted a thorough review of both decisions.

[35] With respect to the Original Decision, the judge observed that the Board generally framed its analysis of common control in a franchise operation as an inquiry into the degree to which the franchisor controls each franchisee, not the amount of control each franchisee wields over its own business: at para. 30. She found it apparent from the reasons that the Board considered the arguments about control, or lack of control, between the Franchisees were most appropriately addressed under the labour relations purpose:

[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*.

[36] She also noted how the Board distinguished *Shoppers* and its finding that the circumstances in this case mirrored those in *White Spot #2*: at paras. 40–41.

[37] With respect to the Reconsideration Decision, the judge accepted that the argument raised about control as between the Franchisees had been raised before the Reconsideration panel and found it had been addressed, although not in a manner Sobeys and the Franchisees considered sufficient: at para. 49. She noted that the panel endorsed the Board's treatment of this argument as primarily related to whether there was a labour relations purpose for a common employer declaration in the context of the specific remedy regarding the bargaining structure: at para. 52. She also observed, as have I, that this issue was argued both as a matter of the common control element of s. 38 by some parties and as an aspect of the required labour relations purpose by others, or as related to a combination of these factors: at para. 57.

[38] The judge interpreted the Reconsideration panel's reasons at paras. 162–169 of the Decision (portions which are reproduced above) as endorsing the approach of the Board to the *Shoppers* decision:

[65] ... 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.

[39] There is no dispute that the judge referred to the correct standard of review as patently unreasonable under s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, and described the standard correctly. She accepted that reasons which fail to answer a question fundamental to the issue would be patently unreasonable but also that it is ultimately for the Board, not the parties, to define those questions and the Board is not required to address every argument put before it: at paras. 68, 75–78.

[40] The judge found the Reconsideration Decision overall “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”: at para. 81. Her reasons addressed submissions by Sobeys and the Franchisees that the Reconsideration panel failed to follow or properly distinguish *Shoppers*, failed to consider the relative control of the Franchisees as an essential element of the common control requirement in s. 38, and gave too much weight to the labour relations purpose of maintaining the *status quo* of the bargaining unit.

[41] With respect to *Shoppers*, the judge noted the following paragraphs on which Sobeys and the Franchisees relied:

[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.

[42] She also noted that the Board in *Shoppers* went on to find, in the event its conclusion on common control or direction was wrong, that a common employer declaration would not serve a labour relations purpose. This was because the *status quo* had not been one collective agreement, contrary to the circumstances in *White Spot #1* and *KFCC*, and granting the union's application would have altered the structure during collective bargaining: at para. 86.

[43] The judge rejected the argument that both the Board and the Reconsideration panel failed to grapple with the gravamen of *Shoppers*: that the common control element cannot be met without control being exercised as between franchisees. She considered this to 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. Nor did she consider the reasoning in *Shoppers* to modify Board policy set out in *White Spot #1* and *KFCC* to create a new factor related to control as between franchisees: at paras. 87–88. Based on submissions that also addressed this issue under labour relations purpose, the judge found the arguments did not lend themselves to “watertight analytical compartments” and findings on common control might be relevant to the labour relations purpose “and *vice versa*, within established Board policy and precedent”: at para. 89. She also found “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”: at para. 90.

[44] The judge acknowledged that the Board distinguished *Shoppers* primarily on the basis of a very different labour relations context:

[91] ... 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.

[45] She considered the development and application of Board policy to be within its exclusive jurisdiction, noting it is well established that the Board is free to change policy provided it is based on a supportable interpretation of the *Code*. More specifically, the judge found the Board was free to depart from the approach in *Shoppers* even if it reflected settled Board policy, for the reasons stated in both the Original Decision and the Reconsideration Decision: at paras. 92–94.

[46] The judge also rejected arguments that the Board failed to address the franchisee control issue at all and placed undue weight on the labour relations purpose of preserving a particular bargaining unit. She found nothing in s. 38 precluded the finding of common control or direction on the facts of this case and considered the Board’s finding that the franchising arrangement did not shift the centre of control from Sobeys to be relevant to the established purpose of s. 38,

which had a bearing on both the common control element and the labour relations purpose: at paras. 98, 109.

[47] Finally, the judge concluded that the Board's reasons in both the Original Decision and the Reconsideration Decision sufficiently addressed the specific issues raised by Sobeys and the Franchisees. She interpreted these decisions to say

[113] ... 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.

On appeal

[48] All appellants accept the Board's finding that Sobeys exerts sufficient control over each of the Franchisees to warrant a finding that Sobeys is a common employer with each of them. They submit that s. 38 of the *Code* requires *all* associated entities carrying on business to be under common control or direction vis-à-vis each other before the Board may treat them as a common employer. Some of the appellants focus narrowly on statutory interpretation and others on the lack of evidence of the necessary commonality as well as the lack of reasons supporting a s. 38 declaration.

[49] All appellants contend the Reconsideration panel failed to apply this statutory requirement and failed to address this critical issue, rendering the Reconsideration Decision patently unreasonable and the reviewing judge's analysis a misapplication of the standard of review.

[50] The Union submits s. 38 does not require this level of common control or direction, the Reconsideration panel considered but rejected this argument, and there is no basis for appellate intervention.

The standard of review

[51] There was no dispute before the reviewing judge or before this Court that the standard of review of the Reconsideration Decision on judicial review is patent unreasonableness as defined in s. 58(1) and (2) of the *Administrative Tribunals Act*:¹

- 58 (1) If the Act under which the application arises contains or incorporates a privative clause, 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.
- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) 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,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[52] This Court owes no deference to the reviewing judge, as our role is to determine whether she applied this standard of review correctly. We may step into her shoes and focus on the decision under review: *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328 at para. 12; *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10–12. However, the judge's reasons are relevant and may assist in the analysis: *Central Saanich (District) v. McHattie*, 2023 BCCA 461 at paras. 29–30.

[53] This highly deferential standard of patent unreasonableness continues to apply notwithstanding common law developments. Applying this standard requires the court to ask whether the decision as a whole provides any supporting rationale or tenable line of analysis that shows it is not “clearly irrational” or “so flawed that no amount of curial deference can justify letting it stand”. If this is not the case, the

¹ By virtue of ss. 115.1, 136–139 of the *Code*.

decision will not be patently unreasonable even if the reviewing court finds aspects of the reasoning to be flawed or unreasonable or disagrees with the conclusion: *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152 at paras. 29–30, citing *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109, aff'd 2009 BCCA 229; *Team Transport Services Ltd. v. Unifor Local No. VCTA*, 2021 BCCA 211 at para. 27.

[54] Numerous decisions in the BC Supreme Court have applied the “reasons first” approach discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65: see, for example, *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2020 BCSC 662 at para. 26, aff'd 2021 BCCA 121; *University of British Columbia Okanagan v. Hale*, 2021 BCSC 729 at para. 97; *Champ's Fresh Farms Inc. v. British Columbia (Employment Standards Tribunal)*, 2023 BCSC 1075 at para. 33. I consider this approach to be consistent with the jurisprudence prior to *Vavilov* that requires the reviewing court to begin with the tribunal's decision and its interpretation of the law or a statute, as discussed in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, and recognized by the reviewing judge at para. 76 of her reasons.

Analysis

[55] Despite different focuses in the arguments of each of the appellants, they all raise the same issues: (1) whether s. 38 of the *Code* requires a finding of common control or direction between all entities as a precondition to an assessment of the labour relations purpose to be served by treating multiple entities as a common employer, and (2) whether the Reconsideration panel failed to address whether, in light of Board jurisprudence, common control or direction requires control or direction as between franchisees in addition to control or direction as between a franchisor and a franchisee.

[56] I will refer to common control or direction as between franchisees as horizontal control and as between the franchisor and the franchisees as vertical control.

1. Interpretation of s. 38 of the Code

[57] The first issue raises a narrow question of statutory interpretation.

[58] On this question, the reviewing court is not to perform a *de novo* analysis or determine a “correct” interpretation. Rather the court starts with examining how the tribunal arrived at its interpretation, and, applying the ordinary rules of statutory interpretation, assessing whether it is consistent with the text, context and purpose of the provision and defensible in light of the constraints imposed by law: *Vavilov* at paras. 116, 120–124; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at paras. 40–42.

[59] Where the standard of review is patent unreasonableness, as here, this analysis requires consideration of the text of the law, how its internal provisions fit together, the consequences of interpreting a provision one way or the other, and the reality of how the statutory scheme operates on the ground. Justifications that are practical and intended to avoid impacts that would undermine the objects of the statute “may close the door to a conclusion that a particular interpretation ‘border[s] on the absurd’ or is ‘openly, clearly [and] evidently unreasonable’”: *West Fraser Mills* at para. 41.

[60] If this analysis results in a single reasonable interpretation that differs from that of the tribunal, the tribunal’s interpretation will be both unreasonable and patently unreasonable, as “no degree of deference can justify its acceptance”: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38; *Vavilov* at para. 124. Conversely, an interpretation that is not unreasonable is also not patently unreasonable: *Team Transport* at para. 29.

[61] Therefore, to establish that the Reconsideration Decision is patently unreasonable, the appellants must establish that their interpretation of s. 38 is the only reasonable interpretation of this provision.

[62] In neither the Original Decision nor the Reconsideration Decision did the Board expressly provide an interpretation of s. 38 in terms comparable to the

interpretation asserted by the appellants. Rather, the Board applied its long-established criteria for making a common employer declaration: more than one entity is carrying on business; the entities are under common control or direction; the entities are engaged in associated or related activities or businesses; and there is a labour relations purpose to be served by making the declaration. This is uncontroversial.

[63] As the appellants submit, the first three criteria are imposed by s. 38 and the last (labour relations purpose) has been imposed by the Board. Their assertion that a finding of common control or direction is a precondition to any assessment of the labour relations purpose that may support a common employer declaration is consistent with statements from this Court in *White Spot Ltd. v. British Columbia Labour Relations Board*, 1999 BCCA 93 at para. 39 [*White Spot BCCA*] as well as established Board jurisprudence and is not in dispute.

[64] In *KFCC*, the Board held that s. 38 is not available in the absence of common control or direction between the entities: at paras. 172, 215. It described s. 38 as generally applied in a two-step analysis:

[196] ... The Board first determines whether there is common control or direction. If there is, the Board then determines whether there is a valid labour relations purpose for making a common employer declaration.

[65] Similarly, in *Mac's Convenience Stores Inc. v. U.F.C.W., Local 1518*, BCLRB No. B166/2002, the Board stated that the validity of the labour relations purpose "depends on whether the two enterprises are under common control or direction": at para. 93. In *Tober Enterprises (1979) Ltd. v. U.F.C.W., Local 1518*, BCLRB No. B2/2005, the entities claimed they were not under common control or direction and there was no labour relations purpose for a declaration. The Board determined the matter under common control or direction, stating, "Only if [that] criterion is satisfied can there be a valid labour relations purpose": at para. 35.

[66] These principles were not set out in either the Original Decision or the Reconsideration Decision but the reasons in both demonstrate that the Board

applied them, as it was satisfied that the criterion of common control or direction had been met by the finding that Sobeys exercised substantial control over the Franchisees. In my view, the reasons demonstrate that the Board did not consider s. 38 to dictate precisely what is required to establish common control or direction between multiple franchisees. Rather, it treated the question as a fact-specific inquiry, guided by the factors established in *CCAG*, and did not consider horizontal control between franchisees to be a necessary indicator of common control or direction where there is substantial vertical control by the franchisor over its franchisees.

[67] What is really in dispute is whether this finding of vertical control complies with s. 38. The appellants contend the language of s. 38 requires more than vertical control where more than two entities are involved; it also requires horizontal control among all entities engaged in associated or related activities or businesses.

[68] I do not agree that the appellants' interpretation is the only reasonable interpretation of s. 38. The words "or a combination of them under common control or direction" do not dictate how that common control or direction is established. This Court has acknowledged that the language of s. 38 is broad and has been given a "full and liberal interpretation" by the Board: *CCAG* at paras. 49, 95; *White Spot BCCA* at para. 71; *Team Transport* at para. 44. The Board has treated the question of common control or direction as fact-specific and determined on the totality of the evidence in each case: *KFCC* at paras. 150, 174. The broad language of s. 38 provides the Board with considerable latitude in its interpretation of the requirement for common control or direction sufficient to justify treating two or more entities as "one employer for the purposes of this Code".

[69] The Union's submission that the issue of a franchisor's control or direction over a franchisee can relate to both the common control and direction requirement and the labour relations purpose is also consistent with Board jurisprudence. However, because these determinations are discrete steps, the Board must still conduct its analysis to first determine if the common control or direction criterion

under s. 38 has been satisfied, which, as I have said, does not necessarily require horizontal control.

[70] That said, these determinations are not watertight compartments because the type and degree of control is relevant to both. As the Board stated in *Mac's Convenience Stores*:

[93] ... It is important to understand that while the determination of common control or direction is a [discrete] step as is the determination of labour relations purpose, the two are nonetheless related, with the first informing the second.

[71] In *KFCC*, the Board explained this in some detail:

[175] We note that while consideration of the issue of common control or direction is the first step in the Section 38 analysis, the findings of common control or direction may be relevant to the second step in the Section 38 analysis, the issue of labour relations purpose. Consideration of the issue of labour relations purpose is fundamental to the Board's discretion to grant or deny a common employer declaration even where common control or direction exists.

[176] In deciding whether to exercise its discretion to grant the declaration, the Board must give careful consideration to the relationship between the type and degree of control being exercise by the respective parties to a franchised arrangement and the factors relevant to labour relations purpose. Understanding the relationship between the degree of control exercised by each entity in the franchise arrangement and the labour relations purpose, will assist the Board in deciding whether to grant the declaration, and the appropriate remedy to be fashioned in the event the declaration is granted...

[72] These comments in *KFCC* were prefaced by a comprehensive discussion about the nature of franchising and how issues of control manifest in these kinds of arrangements. Relying heavily on the analysis in *White Spot #1*, the Board acknowledged that common control or direction has to be found in the degree of control exercised by a franchisor over the franchisees through all the CCAG factors and confirmed that this degree of control must be substantial to warrant a finding of common control or direction: at paras. 158–159. Once that finding has been made, however, the Board's jurisprudence has addressed the nuances of the exercise of

common control or direction in the franchising context in relation to the labour relations purpose. For example, in *KFCC*, the Board observed:

[230] Where an application encompasses a number of franchises owned by different franchisees under the same franchise scheme, it is unlikely that any one franchisee will have control or direction over the operation of another franchise or its employees. As well, local conditions may vary and each franchisee may face a unique set of circumstances. Accordingly, absent dominant franchisor control or direction, the scope of the common employer declaration and the decision whether to place a number of the franchisees in a single bargaining structure needs careful consideration.

[73] Therefore, it was not patently unreasonable for the Board or the Reconsideration panel to address the appellants' argument about horizontal control in relation to the labour relations purpose. The common control criterion had been satisfied by the finding of substantial control by Sobeys, and the degree of control exercised by Sobeys over the Franchisees as well as the lack of control by one Franchisee over the operation of another was relevant to this issue.

[74] In my opinion, the broad language in s. 38 of the *Code* does not dictate precisely what is required to establish common control or direction among multiple entities. The Board's decisions in this case are consistent with its jurisprudence that treats the question of common control or direction as fact specific. Although neither the Board nor the Reconsideration panel clearly addressed the appellants' argument about the necessity for common control between all entities to ground a finding of common control or direction, the reasons in both the Original Decision and the Reconsideration Decision, when read as a whole, demonstrate that the Board considered substantial control by Sobeys over the Franchisees to be sufficient to ground this finding and relevant to the question of labour relations purpose. This interpretation was not patently unreasonable.

2. Failure to address common control or direction in accordance with Board jurisprudence

[75] The second issue is whether the Reconsideration panel failed to address the issue of common control or direction in accordance with Board jurisprudence. The appellants contend the panel failed to consider the evidence of the lack of control as

between the Franchisees and provided no analysis of the fundamental question of whether horizontal control was required for a finding of common control or direction. They also contend the panel failed to follow or properly distinguish *Shoppers*, the only decision from the Board that has done so.

[76] Given my conclusion on the first issue, none of these contentions can succeed.

[77] A tribunal is not required to address every issue or argument raised by the parties in its reasons, but a failure to answer a question fundamental to the issues may render a decision patently unreasonable: *Red Chris* at para. 32, citing *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association (No. 2)*, 2016 BCCA 273 at para. 70. As stated in *Vavilov*:

[98] ... Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

[78] A tribunal is also not bound by its previous decisions, but it must be concerned with the general consistency of its decisions. Where a tribunal departs from established internal authority, it has a "justificatory burden" to explain that departure in its reasons. If it does not satisfy this burden, the decision will be unreasonable: *Vavilov* at paras. 129, 131. It follows that where the departure is of critical importance to the case, the decision would also be patently unreasonable.

[79] In my view, the Reconsideration Decision cannot be said to be patently unreasonable for failing to answer a question fundamental to the issues before it. I agree with the reasoning of Marzari J. on this issue at paras. 95–101 of her reasons.

[80] It is true that the Reconsideration panel did not analyze the horizontal control argument in relation to the criterion of common control or direction. It addressed it, albeit briefly, in relation to the labour relations purpose, which it was entitled to do.

This was responsive to arguments made by the appellants that there was no labour relations purpose for declaring all Franchisees a common employer with Sobeys:

[162] ... 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.

[81] The panel went on to address the purpose of preserving pre-existing bargaining structures and noted that the Original Decision considered the argument that the Franchisees were “not in any way linked” and “will not have a commonality in negotiation goals during bargaining”: at para. 168.

[82] I do not read these reasons as manifesting a failure to consider evidence but rather an acceptance that the Franchisees lacked common control among themselves. In fact, it is difficult to conceive how these entities could exercise any such control or direction over each other in the franchise arrangement and the appellants provided no examples. As the Board in *KFCC* observed, it is unlikely that any one franchisee would have control or direction over the operation of another franchise. In this context, the finding of substantial control by Sobeys over each Franchisee is clearly what grounded the Board's conclusion, applying the *CCAG* factors, that common control or direction had been established on the evidence.

[83] With respect to the Board's treatment of *Shoppers* in either the Original Decision or the Reconsideration Decision, it is not disputed that the Board is not required to follow previous decisions. What is disputed is whether the Board was obliged to explain why it did not consider *Shoppers* to be of precedential value on the question of common control or direction among all entities as a required element under s. 38. In both decisions, *Shoppers* was distinguished based only on the labour relations purpose of protecting an existing bargaining structure. Yet, the labour relations purpose constituted the Board's alternative reason for dismissing the union's common employer application in *Shoppers*; its primary reasoning rested on

the conclusion that there was no common control or direction between the group of associates:

[267] In assessing the CCAG factors as a group, the common ownership, common management, and representation to the public as a single, integrated business lead to a conclusion that there is no common control or direction.

[268] Financial control and interdependence of operation demonstrate financial control.

[269] The evidence put before me about the actual dealings between the parties demonstrates that the Associate exercises labour relations control on a day-to-day basis. However, the agreement has a specific provision giving SDMI observer status and the ultimate control (i.e. termination of the Agreement).

[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.

[84] In the event this conclusion was wrong, the Board went on to consider whether there was a labour relations purpose.

[85] The Union submits that the appellants read too much into the *Shoppers* decision as little can be drawn from the brief reasoning using the wheel analogy given the absence of any textual analysis of s. 38 or how this conclusion flows from the CCAG factors.

[86] I agree it is difficult to assess the precedential value of *Shoppers* but the decision itself, which sets out a long history between the parties, provides some context for the conclusion on common control or direction.

[87] The application that resulted in the *Shoppers* decision was made by the union while the parties were in collective bargaining negotiations. The union sought a declaration that Shoppers Drug Mart Inc. (SDMI) was the true employer of 19 franchisees, referred to as Associates. It also sought a declaration that SDMI and the 19 Associates were a common employer, or alternatively that only the 19 Associates were a common employer. These applications had been preceded by a long history in which the Associates had been subject to separate certifications and had long been recognized as separate enterprises for the purposes of labour relations. The union had sought several times over the years to create a consolidated province-wide bargaining structure without success. It brought but subsequently withdrew two common employer applications focused largely on the Associates, and just prior to the application that proceeded, unsuccessfully sought a declaration that the bargaining unit for the purpose of the current round of collective bargaining was a single, multi-site unit encompassing the 19 Associates.

[88] The *Shoppers* decision addressed numerous issues, including complaints of unfair labour practices, whether SDMI was a true employer, and whether SDMI and the Associates, or just the Associates, were a common employer. The Board discussed at length the jurisprudence in *White Spot #1*, *KFCC*, *Mac's Convenience Stores*, and *Tober Enterprises* and applied the CCAG factors to the question of common control or direction. Like this case, the Board in *Shoppers* found common control or direction between SDMI and each Associate. However, the union did not seek a declaration to that effect. It is not clear if, or how, the union's long-standing focus on the Associates and their bargaining structure played a role in the Board's analogy of the spokes of a wheel.

[89] This is not intended to explain or distinguish *Shoppers*, as such matters are within the Board's expertise. Given the importance to the appellants of the question of horizontal control where a common employer application involves multiple entities, it is unfortunate that neither the Board nor the Reconsideration panel clearly addressed this aspect of their submissions. Other than *White Spot #2*, which did not address the question in relation to common control or direction, *Shoppers* was the

only Board decision referred to us that involved franchise arrangements with multiple franchisees.

[90] The Board has acknowledged, in both *White Spot #1* and *KFCC*, that it has relative inexperience with labour relations issues in the context of franchise arrangements and consequently has adopted a cautious approach to developing policy in this area. In *KFCC*, a reconsideration panel endorsed this cautious approach to the development of policy that considers the realities of the franchising environment: at para. 126; see also *White Spot #1* at para. 207.

[91] Despite the failure to clearly address the precedential value of *Shoppers* on the question of common control or direction, I am not convinced that the Reconsideration Decision is patently unreasonable or that the reviewing judge misapplied the standard of review. The cautious approach endorsed in *KFCC* is evident in the Original Decision, which provides a comprehensive analysis of the evidence in relation to the CCAG factors. It is also evident in the Reconsideration Decision, which carefully considered this analysis and found it to be consistent with *White Spot*, *KFCC* and *Code* principles. I agree with Marzari J.'s statement at para. 91 of her reasons that the Board considered *Shoppers* was best distinguished based on a different labour relations context, thereby suggesting that horizontal control between the Franchisees was not required in this case given the finding of substantial control by Sobeys over them.

Conclusion

[92] For these reasons, I have concluded that the Reconsideration Decision was not patently unreasonable and the reviewing judge did not err in her application of this highly deferential standard of review. I would dismiss the appeals.

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Gomery”