

Taking Control: Sobeys and Franchisees found to be a Common Employer

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The nature of franchising requires that franchisors exercise some degree of control over their franchisees. Certain controls exercised by franchisors in connection with their franchisees' operations establish and maintain the goodwill of the franchisor's trademarks. This is commonplace in all franchise relationships. Uniformity of operations and positive goodwill spawn the advantages of operating within a franchise system. However, a recent decision of British Columbia's Labour Relations Board (the Board) may be seen to impinge on certain of these advantages.

British Columbia's Labour Relations Code (the Code) provides the Board with the authority to treat associated or related businesses found to be under common control or direction as one employer. In *Sobeys et al v United Food and Commercial Workers International*, the Board did just that – declaring Sobeys and five of its grocery franchisees in British Columbia (collectively the Franchisees) to be a common employer for all purposes of the Code, including the establishment of a single collective bargaining unit that includes Sobeys and all the Franchisees.

As all Canadian jurisdictions have legislation that empowers their respective labour boards to deem a franchisor and franchisee to be a common employer, the potential implications of this decision are significant and far reaching.

Background

Sobeys operates a national wholesale and retail grocery business under several retail food formats, each with different "banners" (trade names) and different market focuses. For several decades Sobeys has entered into franchise agreements with franchisees to operate stores across Canada. Franchisees operate their own retail business under one of Sobeys' service formats and banners, while Sobeys operates a wholesale business supplying product and branding to the franchisees. The two banners relevant to the application in this case are "Safeway" and "FreshCo."

United Food and Commercial Workers International (the Union) and Safeway negotiated a collective agreement with a term of April 1, 2013 to March 31, 2023. The collective agreement contains a re-opener clause for mid-contract negotiations. It also contains an article stating that, when Sobeys decides to open stores operating under a new banner, Sobeys and the Union will enter into negotiations for a collective

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agreement appropriate for the type of business contemplated.

In October 2017, Sobeys gave the Union notice to commence negotiations under the re-opener clause, announcing that it intended to convert some of its existing Safeway stores to the FreshCo banner. A special officer was appointed pursuant to the Code and, in December 2018, the officer issued a report, setting out the terms of the collective agreement that would apply to FreshCo.

In January 2019, Sobeys provided the Union with notice that it was closing several Safeway locations, five of which would eventually become the FreshCo stores operated by the Franchisees. In each case, Sobeys sent letters to the Union, indicating that all matters (including labour relations) were to be directed to the Franchisees. Shortly thereafter, the Union applied to the Board to have Sobeys and the Franchisees declared a common employer for the purposes of the Code.

Parties' Positions

Sobeys is a shareholder of each of the Franchisees. The Union asserted that this fact made Sobeys' franchise arrangement with the Franchisees a novel structure that provided Sobeys with substantially more control over the franchises than in other cases examined by the Board.

Sobeys and the Franchisees (collectively, the Respondents) asserted that the form of business relationship they adopted is not a new concept, and the franchise relationship with which the Union took issue is not fundamentally different than other longstanding franchisee-franchisor arrangements in Canada.

The Findings

Importantly, the Board did not comment directly on whether the relationship between Sobeys and each of the Franchisees is a novel structure or whether the arrangement provides Sobeys with "substantially" more control over its franchisees than is typical. Instead, the Board confirmed and applied the "long held" requirements for making a common employer declaration pursuant to the Code, which are:

1. More than one entity is carrying on a business or activity
2. The entities are under common control or direction
3. The entities are engaged in associated or related activities or business
4. There is a labour relations purpose for making a common employer declaration

In this case, the parties and the Board focused on requirement 2 (common control and direction) and requirement 4 (labour relations purpose).

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Common Control and Direction

The Board conducted a comprehensive analysis of the seven factors relevant to the issue of whether there is common control or direction of the Respondents and found as follows:

1. Common Ownership. The Board acknowledged that common ownership is not a factor typically considered in cases involving franchisees as there typically is no common ownership between the franchisor and the franchisee. A distinguishing feature of Sobeys' franchising arrangement is that Sobeys has a single preferred share in each of the Franchisees. The Respondents did not call attention to any portion of the shareholder agreement or any ancillary agreement, specifying that Sobeys' interest in the Franchisees should not be considered a form of common ownership. As such, the Board found Sobeys' ownership interest in the Franchisees to be an indicia of a common employer relationship.

2. Financial Control. The Board found that both the shareholder agreement and the franchise operating agreement contained provisions that impacted the Franchisees' ability to make financial decisions. For example, paying dividends or entering into debt obligations required Sobeys' consent under the shareholder agreement and employee compensation was restricted under the operating agreement. The Board also found that Sobeys exercised financial control by: (a) acting as a wholesaler to the Franchisees through contracts it negotiates with suppliers; (b) requiring Franchisees to abide by certain pricing policies; and (c) having the ability under the franchise agreement to: (i) require franchisors to seek their consent before entering into contracts with third parties, (ii) dictate the Franchisees' hours of operation, and (iii) require franchisees to pay for maintenance, appearance, and changes to the franchise program. Notably, the Board found that the ability to control the Franchisees was sufficient irrespective of how the parties actually conduct themselves.

3. Contractual Arrangements. The Board found all of the following to be contractual arrangements that are indicia of a common employer relationship: (a) Sobeys' ability to set the upper limit on pricing; (b) Sobeys' ability to control advertising and marketing; (c) Sobeys' preparation of store planograms; (d) Sobeys' requirement that Franchisees use its payroll service and obtain the hardware and software used in its operations; and (e) Sobeys' ability to regulate the Franchisees' outside investment activity and sale or transfer of shares by virtue of its ownership of a preferred share.

4. Control over Labour Relations. The Board accepted that, besides some involvement from Sobeys during the initial opening stages, the Franchisees were solely responsible for labour relations including hiring, firing, discipline, budgeting, scheduling, and grievance management. Sobeys provides human resources support, but there was no obligation on the Franchisees to follow Sobeys' advice. Likewise, acting as a payroll service provider and supplying uniforms that the Franchisees' employees are not required to wear were factors in favour of the Respondents' position. However, Sobeys mandates certain training, and even though Sobeys distances itself from termination decisions of employees who fail the training, Sobeys acknowledged that the Franchisees' decision to retain such employees could place the franchise

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agreement in jeopardy, which the Board found notable example of control over labour relations.

5. Common Management. The Board focused on language in the franchise agreement, which gave Sobeys authority to create and bind the Franchisees to a manual (even though no manual existed) and found Sobeys' imposition of "extensive" and "comprehensive" mandatory policies concerning food safety, merchandising standards, unpacking, storage, sale, disposal, return and matters related to COVID-19 to be indicia of common management. The Board also found that it was irrelevant whether the Franchisees were actually following the mandatory policies.

6. Interrelationship and Interdependence of Operations. The Board found all of the following to be indicia of an interrelationship of operations: that the Franchisees benefited from having Sobeys create competitive pricing; manage the store conversions from Safeway stores to Fresco stores at its own expense; create the initial inventory; and turn over the operations through the franchising arrangement. The Board also found that the Franchisees benefited from Sobeys providing pharmacy and lottery services through the Franchisees, the profits of which are for the benefit of Sobeys. In addition, the Board found the shareholders agreement to be a relevant factor as, through its structure, Sobeys retained latitude to control the Franchisees.

7. Representations to the Public as a Single Employer or Business. The Board accepted that the Franchises provide notice to the public that their stores are owned and operated separately from Sobeys. However, the Board also acknowledged that the representation of a single, integrated business is to be expected in a franchise situation and stated this factor is less significant than the other factors.

The Board made clear that the above-stated factors are not applied as a checklist but rather are considered as a group. Significantly, "when considering the overall relationship," the Board concluded that Sobeys exercised substantial control over the Franchisees and went so far as to say that the indicia noted in the Board's analysis are sufficient for the Union to succeed "even if the Franchisees are exercising the level of latitude they claim."

Labour Relations Purpose

The Board went on to confirm the Union's duty to demonstrate a labour relations purpose for making a common employer declaration and confirmed that there are at least three labour relations purposes for such a declaration in a franchise situation:

1. To prevent erosion of bargaining rights
2. To remove roadblocks to viable structures of collective bargaining
3. To ensure that a union representing employees can deal directly with the person possessing real economic control over them (rather than someone who is the employer in name only)

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In considering these factors, the Board found that the franchising arrangement did not “shift the seat of real economic control” from Sobeys to the Franchisees. Given the “substantial control” the Board found Sobeys’ retained over the Franchisees, the Board determined that fragmenting the existing bargaining unit into a series of smaller, stand-alone units would create 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.

Further, the Board found that some of the franchising terms incidentally affected labour relations matters. For example, the imposition of mandatory training, control over wages and overall hours of operations, and Sobeys’ status as shareholder of the Franchisees were each identified as franchising terms that could impact labour relation. Accordingly, the Board found that these factors established a labour relations purposes for the common employer declaration and warranted Sobeys, the “party with real economic control”, being at the bargaining table.

Takeaways for Franchisors

This decision may signal an expansion of the reach of a common employer determination to cover situations where the putative third-party employer has enough control (either real control or the right to control) over the essential employment terms of employees to enable the objectives of the labour relation legislation (e.g., collective bargaining) to be fulfilled.

For all franchisors, there is a delicate balance to strike when placing controls on franchisees to protect their business interests. Franchisors would be well advised to consider the lessons emerging from this decision when evaluating their legal and business decisions moving forward.

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