



The parties are agreed that this Board has jurisdiction to determine this matter which involves the opening of four “Safeway Liquor” stores in the Province and the impact thereon of Article 1.02 of the Collective Agreement between Safeway and the UFCW.

#### FACTS:

The parties proceeded by way of an Agreed Statement of Facts (“ASF”). In 2015 and 2016, Sobeys’ West, doing business as Safeway, acquired four retail liquor licenses through the purchase of some or all of existing businesses that were operating as retail liquor stores.

In Dawson Creek (September 9, 2015) and Coquitlam (September 2, 2015) both locations had operated as “The Local” before being purchased by Safeway on those dates. These two stores were then relocated into newly constructed stores, and operated as “Safeway Liquor”. There was a hiatus of a few days for these relocations to occur.

The Dawson Creek liquor store is located a few blocks away from the Safeway store in that City. The Coquitlam store is located in an area more commonly referred to as Burquitlam. The Burquitlam Safeway Liquor store is part of the recent development of a new residential/commercial property at the Burquitlam Skytrain station (the “Property”). A company related to Sobeys, SDLP Snowcat limited, owned the Property. It subdivided the Property into three surface parcels and sold two of the parcels to Bosa Properties (Uptown) Inc. which constructed the two residential buildings. SDLP Snowcat Limited retained the third parcel which was also developed by Bosa and which contains the Safeway Extra store and Safeway Liquor store. As part of that development, Safeway originally considered creating a liquor store within the grocery store but later abandoned that idea. There are separate accesses to the stores in Burquitlam and there is no internal access from the Safeway grocery store to the Safeway Liquor store. There is also a barrier between the Burquitlam Safeway development and the adjacent mall that prevents vehicles from travelling directly between them.

The Kelowna (October 5, 2016) and Fort St. John (September 9, 2015) Safeway Liquor stores remain in the same location as they were when they were purchased. There

was no hiatus between those stores being operated by the prior owner and the stores being operated by Safeway. The Fort St. John Safeway Liquor store is located in the same mall (although in a separate building) as the Safeway grocery store and the Kelowna Liquor store operation is a few blocks away from the Safeway grocery store.

In each of the four stores, all of the employees on staff with the former owners were offered employment in the Safeway Liquor stores and most accepted. The employees at these Safeway Liquor stores wear a uniform that is similar to the clerk uniforms worn at Safeway grocery stores. Part of the uniform is an apron which has the “Safeway Liquor” logo/name on it and the employees also wear name badges which say “Safeway Liquor”. As well, shelf labels at the Safeway Liquor Stores are similar to those used in the Safeway grocery stores.

The Safeway Liquor stores are being operated as a Licensee Retail Store under the *Liquor Control and Licensing Act*. At those stores, Safeway sells a wide range of beer, wine, spirits, cider and other alcoholic beverages. Some of the merchandise is sold cold, with it being sold out of coolers. In addition to liquor, the Safeway Liquor stores also offer soft drinks, some limited food items as prescribed by the Liquor Control and Licensing Regulation (such as chips), and BC Lottery Corporation products.

The Safeway Liquor stores are also part of Safeway’s Air Miles system, meaning customers can collect air miles on their purchases just as they do at Safeway grocery stores. The tills at the stores say “Safeway” on their screen when not in use and the computer system at the stores is connected to the larger Safeway grocery computer system. Shelf labels from Safeway Liquor are similar to shelf brands used at Safeway grocery stores.

As well, Safeway maintains the “Safeway Liquor BC” website and at the bottom of the web pages is “Safeway” with links to the [www.safeway.ca](http://www.safeway.ca) website.

Following the purchase of these four stores by Safeway the Union filed the present grievance on July 26, 2016. With respect to the Fort St. John store the grievance states:

UFCW Local 1518 is grieving the recent purchase and conversion of the Onestop Liquor in Fort St. John to Safeway Wine and Spirits. It is the position of the Union that this constitutes a new banner and, therefore, under Section 1.02, a new Collective Agreement has to be entered into by the parties.

The Union expressly reserves all of its rights to file any applications pursuant to the Labour Code, as it deems necessary, in addition to this grievance.

Please contact the Union upon receipt of this letter to schedule a grievance meeting.

The grievance was rejected by the Employer on September 13, 2016 and the matter has now proceeded to arbitration.

The relevant section of the Collective Agreement is Section 1 – Contract Area, particularly Section 1.02:

Section 1 – CONTRACT AREA

1.01 Zones

Zone 1

The Employer recognizes the Union as the sole and exclusive Collective Bargaining Agency for all employees in the Zone 1 Contract Area for the present and future Safeway stores) owned and/or operated by the Employer in the Province of British Columbia, with respect to rates of pay, wages, hours and all other conditions of employment set out in this Agreement, save and except excluded personnel and employees under separate certificate. In future stores the Collective Agreement shall be binding on the parties effective the date of store opening.

Zone 2 (Remainder of the Province)

The Employer recognizes the Union as the sole and exclusive Collective Bargaining Agency for all employees in the Zone 2 Contract Area for the present and future Safeway stores owned and/or operated by the Employer in the Province of British Columbia, with respect to rates of pay, wages, hours and all other conditions of employment set out in this Agreement, save and except excluded personnel and employees under separate certificate. In future stores the Collective Agreement shall be binding on the parties effective the date of store opening.

As a result of change of terminology where the former “Bargaining Unit Seniority” will now be referred to as “Contract Area Seniority” the Union and the Employer confirm that there shall be no change in the method or manner of administering the Collective Agreement or the rights of members as a result of this change.

1.02 New Banners

In the event the Employer decides to open stores operating under a new banner, that are different in size or type of operation from its conventional stores, the Employer will enter into negotiations with the Union to develop a Collective Agreement that is appropriate for the type of business contemplated.

Should a dispute arise as to the terms of the Collective Bargaining Agreement, the items in dispute shall be referred to a final offer selection process.

1.03 First Right of Refusal

In the event the Employer permanently closes a store (i.e., no Replacement Store is opened), it is agreed that the Union shall have the first right of refusal to purchase the store and operate it as an enterprise of the Union or some kind of employee cooperative

provided products for sale in the store are purchased from the Employer's supply division.

The evidence is that the "new banner" language in Section 1.02 came into effect in the Safeway 1997 – 2003 Collective Agreement after identical language had been negotiated by the UFCW in the Overwaitea Food Group Collective Agreement. That situation will be more thoroughly canvassed below.

There were a number of other documents placed into evidence by the parties. For example, the Coquitlam Variance Permit Authorization with respect to the Burquitlam store states, in part:

Proposed Development

The applicant is proposing to relocate the existing private liquor store (Licensee Retail Store or LRS), operated by Rhino's Pub and Grill Liquor Store at 541 Clarke Road, to 580 Clarke Road. The liquor store operators wish to expand the size of their store, but are unable to do so at their current location. Consequently, they are seeking an alternative larger location within the same neighbourhood. The applicant is proposing to relocate the liquor store (the pub would continue operating in its current location) to a new commercial retail unit within the new Safeway building, currently under construction at the southeast corner of Clarke Road and Como Lake Avenue.

Recent changes to the Provincial Liquor Control and Licensing Branch (LCBC) regulations now permit liquor sales in grocery stores. This can be done either through a full service LRS store-within-a-store approach or the grocery store can sell 100% BC wine on the shelf within the general grocery store (however, they cannot do both at the same location). In this context, these changes allow the proposed liquor store to locate within the new Safeway grocery store. The liquor store will operate as a store-within-a-store and be located within the main entry lobby on the lower level of the building accessible from Clarke Road (Attachments 2 and 3). A new internal entry, in addition to the external entry to Clarke Road, will also be created between the liquor and grocery store to incorporate the liquor store into the overall grocery store plan/concept. If Council approves this DVP, and Safeway goes ahead with a store-within-a-store liquor store, Safeway would not be permitted to also sell wine on the shelf within the grocery store.

Staff also note that, consistent with the Provincial regulations, there are no other LRS stores within 1 km of this proposed location that would prevent the relocation of this LRS.

Staff are currently reviewing recent changes to the Provincial Liquor Control and Licensing Branch regulations and emerging trends in liquor manufacturing and retaining and will be reporting back to Council on this in the near future.

The Union also submitted a number of marketing items (website, brochures, flyers) which it asserts establish a link between Safeway Liquor and Safeway itself. For example, the Burquitlam website contains the following:

About Us

A proudly Canadian Company with more than 100 years in the food business, Sobeys' Inc. is a wholly-owned subsidiary of Empire Company Limited, headquartered in Stellarton, Nova Scotia. The Sobeys name is synonymous with quality and passion. Now we've brought it to liquor stores across Alberta and Saskatchewan. Here's how: in 1993, the Alberta Provincial Government announced the privatization of the liquor retail industry. Since then, we've grown steadily to over 80 locations across Alberta, Saskatchewan, and British Columbia under the Sobeys Liquor, Safeway Wine & Spirits, Thrifty Foods Liquor and the Local Liquor Store banners.

As well, a Sobeys' press release dated June 24, 2014 stated, in part:

Sobeys to Launch AIR MILES Reward Program at Additional Banners in Western Canada

LoyaltyOne Co. and Sobeys Sign New Cross-Canada, Long-Term Agreement; Includes Sobeys-Owned Banners in Atlantic Canada, Quebec and Western Canada

STELLARTON, NS June 24, 2014 – Sobeys and LoyaltyOne, Co., owner of the AIR MILES Reward Program, are expanding their relationship in British Columbia, Alberta, Saskatchewan and Manitoba. The long-term agreement announced today will bring the AIR MILES Reward Program to Sobeys, IGA, Thrifty Foods and Sobeys Liquor stores in Western Canada in the fall of 2014, and continues the partnership in Safeway and Safeway Wine and Spirits stores across the West and a small number of locations in Northwestern Ontario.

The AIR MILES Reward Program also continues in IGA, IGA Extra, Marche Bonichoix, Les Marches Tradition and Rachele-Bery in Quebec; and at Sobeys, Foodland and Lawtons Drugs in Atlantic Canada. Current loyalty programs in Sobeys' Western Canada stores and associated co-branded credit card products will transition to the AIR MILES Reward Program when it is launched in the fall of 2014.

“Over the years, we have seen how much value and excitement the AIR MILES Reward Program brings to our customers, and we are happy to continue and expand on that momentum to offer more shoppers in Western Canada an even more rewarding experience in our stores,” says Marc Poulin, president and chief executive officer, Empire Company Limited and Sobeys Inc.

Extending the breadth of Canada's leading coalition loyalty program to additional Sobeys' western locations creates even more opportunities for AIR MILES Collectors to earn AIR MILES reward miles for everyday purchases ....

Also of importance in the present situation are the regulations and documents dealing with the legal requirements for these types of grocery and liquor operations. The British Columbia *Liquor Control and Licensing Regulation* (B.C. Reg. 241/2016) includes the following:

**"grocery store"** means a store that

(a) is primarily engaged in retailing the following types of food and non-alcoholic beverages:

- (i) canned, dry and frozen food;
- (ii) fresh fruits and vegetables;
- (iii) fresh and prepared meats, fish and poultry;
- (iv) dairy products;
- (v) baked products;
- (vi) snack foods;
- (vii) juices, carbonated beverages and flavoured beverages, and

(b) has an area of at least 929 square metres;

...

#### **Division 8 — Licensee Retail Store Licences, Wine Store Licences and Special Wine Store Licences**

##### **Definitions**

**53** In this Division:

**"government liquor store"** means a liquor store as defined in section 1 of the Act, other than an agency store as defined in section 1 (1) of the *Liquor Distribution Act*;

**"proposed location of another store"** means

(a) the location for a licensee retail store that is proposed in an application to issue a licensee retail store licence,

(b) the new location of a licensee retail store that is proposed in an application referred to in section 17 of the Act to amend a licensee retail store licence, or

(c) the proposed location of a government liquor store about which the LDB general manager notifies the general manager;

**"store licence"** means a licensee retail store licence, wine store licence or special wine store licence.

##### **Authorized activities**

**54** (1) A licensee retail store licence authorizes

(a) a licensee

(i) to sell liquor in unopened containers in the service area under the licence to patrons, and

(ii) to sell or serve samples of liquor in the service area under the licence to patrons, and

(b) a patron to consume the samples in the service area.

(2) A wine store licence authorizes

(a) a licensee

(i) to sell wine in unopened containers in the service area under the licence to patrons, and

(ii) to sell or serve samples of wine in the service area under the licence to patrons, and

(b) a patron to consume the samples in the service area.

(3) A special wine store licence authorizes

(a) a licensee

(i) to sell BC wine in unopened containers in the service area under the licence to patrons, and

(ii) to sell or serve samples of BC wine in the service area under the licence to patrons, and

(b) a patron to consume the samples in the service area.

**Limit on number of stores selling liquor in grocery stores**

**55** (1) If a licensee retail store, wine store or special wine store is located in a grocery store, no additional licensee retail store, wine store or special wine store may be located in the grocery store.

(2) If a government liquor store is located in a grocery store, no licensee retail store, wine store or special wine store may be located in the grocery store.

(3) If the general manager receives more than one application to issue a store licence or to relocate a licensee retail store, wine store or special wine store in respect of the same grocery store, the order in which the applications are received determines their priority.

(4) If the LDB general manager notifies the general manager of a proposed location of a government liquor store in a grocery store before the general manager receives an application to issue a store licence in respect of the same grocery store or to relocate a licensee retail store, wine store or special wine

store to the same grocery store, the proposed government liquor store has priority.

#### **Sales revenue of grocery store**

**56** (1) This section applies to the following licences:

(a) a licensee retail store licence for a licensee retail store that is located in a grocery store;

(b) a wine store licence for a wine store that is located in a grocery store;

(c) a special wine store licence.

(2) It is a requirement of a licence referred to in subsection (1) that the sales revenue derived from the sale of food and non-liquor beverages at the grocery store in which the licensee retail store, wine store or special wine store is located

(a) total at least 70% of the total sales revenue of non-liquor products at the grocery store, and

(b) total more than 50% of the total sales revenue of liquor and non-liquor products at the grocery store.

(3) For the purposes of subsection (2), the sales revenue of a grocery store in which a licensee retail store, wine store or special wine store is located must be calculated based on the following periods:

(a) the 12-month period following

(i) the first time that the licensee retail store or wine store is relocated from an establishment that was not a grocery store to the grocery store, or

(ii) the issuance of the special wine store licence;

(b) after a 12-month period referred to in paragraph (a), every 12-month period preceding the renewal of the licence;

(c) if the licensee retail store, wine store or special wine store is relocated to a different grocery store, the 12-month period following the relocation of the store and, after that 12-month period, every 12-month period preceding the renewal of the licence.

(4) The licensee of a licence referred to in subsection (1) must, within 3 months after the applicable period referred to in subsection (3), provide proof to the general manager that the sales revenue requirement referred to in subsection (2) has been met.

#### **Moratorium on new licensee retail store licences**

**57** (1) No new licensee retail store licences may be issued.

(2) Subsection (1) does not affect an application to convert a wine store licence to a licensee retail store licence under section 66.

(3) This section is repealed on July 1, 2022.

#### **Location of licensee retail stores**

**58** (1) Subject to subsections (2) and (3), it is a requirement of a licensee retail store licence that the licensee retail store meet the following requirements:

(a) the licensee retail store must be located in

(i) a permanent, free-standing building that does not contain another business,

(ii) a building in which there are other businesses, but the licensee retail store has its own entrance and exit separate from any other business and a solid floor-to-ceiling wall between the licensee retail store and any other business, or

(iii) a grocery store, but the licensee retail store is physically separated from the rest of the grocery store in a manner satisfactory to the general manager;

(b) in the opinion of the general manager, the licensee retail store does not appear, through signs, the use of trademarks or any other means, to be associated with another business other than another licensee retail store or a business operated under a liquor primary licence.

(2) Subsection (1) (a) does not apply to a licensee retail store if the location of the store was approved by the general manager in accordance with the law that was in force when the approval was given.

(3) Subsection (1) (b) does not apply to a licensee retail store if

(a) the store is associated with another business, and the association was permitted by the law that was in force at the time the general manager approved the location of the store,

(b) the store is located in a building described in subsection (1) (a) (i) or (ii), the licensee who holds the licensee retail store licence also carries on a grocery business and the licensee retail store appears to be associated with the grocery business, or

(c) the store is located in a grocery store and the licensee retail store appears to be associated with the grocery store.

#### **Licensee retail stores licences — rules and requirements**

**59** The following rules and requirements apply to a licensee retail store licence:

(a) subject to limitation by the general manager, the hours of liquor service must start no earlier than 9 a.m. and end no later than 11 p.m.;

(b) non-liquor items must not be sold except for packaged snacks, liquor-related items and other items authorized by the general manager;

(c) entertainment and games are not allowed.

#### **Relocation of licensee retail stores**

**60** (1) Subject to subsection (2), an application to amend a licence in respect of a licensee retail store to relocate the store must not be approved unless the new location of the licensee retail store is at least 1 km from any other licensee retail store or government liquor store or any proposed location of another store.

(2) If an application to amend a licence in respect of a licensee retail store to relocate the store does not comply with subsection (1), the general manager may approve the application if any of the following circumstances apply:

(a) the proposed new location has the same permanent parcel identifier assigned under the *Land Title Act* as the current location;

(b) the proposed new location is not closer to the licensee retail store or government liquor store or proposed location of another store than the current location;

(c) the shortest travelling distance by road between the proposed new location and the licensee retail store or government liquor store or proposed location of another store is 1 km or more because of a watercourse or body of water;

(d) the relocation of the licensee retail store is necessary because the licensee retail store was substantially damaged by fire, flood or other event beyond the licensee's control.

There also exists a document titled “Licensee Retail Store: Terms and Conditions” which is produced by the Liquor Control Authority and sets out specific requirements for a Licensee Retail Store. It states, in part:

#### Minors

Minors (those under the age of 19) are allowed in a licensee retail store if accompanied by a parent or guardian. You may not employ minors to work in your store.

It is against the law to provide liquor to a minor. You and your staff must be proactive about meeting this objective. If you or an employee allows a minor to purchase liquor, your licensing privileges could be jeopardized and you risk prosecution.

#### Your Store Associations with Other Businesses

You may not be associated with another business, with the following exceptions. You are permitted to be associated with another licensee retail store, a liquor primary, a licensed hotel (including an associated food primary) or an eligible grocery store (see next section for more details on grocery store eligibility).

A grocery store may be associated with a licensee retail store (LRS) if:

- the owner of the grocery store and the LRS are legally affiliated and are either the same legal entity or wholly owned subsidiaries of the same legal entity, regardless of where the LRS is located; or
- the LRS is located within the grocery store, whether or not the two businesses are commonly owned.

If an association is permitted, you may use a common name and other visual identifiers of the associated business, and you may engage in joint advertising and promotions with the associated business. Associations with any business that is not a liquor primary, licensee retail store, a licenced hotel (including an associated food primary) or an eligible grocery store are prohibited and you may not:

- Use a name or other visual identifier of another business;
  - Sell the trademarked or brand-name non-liquor products of another business unless those products are also available for wholesale purchase by other licensees;
  - Jointly advertise with another business;
  - Offer discounts in your store based on purchases in another business;
- or
- Operate a customer loyalty or gift card program in association with another business.

If you are associated with another business and you apply to relocate your business, transfer your licence, sell shares in your business, or change the layout or size of your store, the nature of that association may also be required to change.

#### Liquor Store Within a Grocery Store

This chapter focuses on LRS stores located within an eligible grocery store.

#### What is an Eligible Grocery Store?

For an LRS to be located within a grocery store, a grocery store must have a minimum of 10,000 square feet of space, including storage space, and must be primarily engaged in retailing all types and brands of food. Convenience stores and multipurpose stores are not eligible to host liquor sales.

To maintain eligibility, the grocery store's sales revenue from food and non-liquor beverages:

- must total at least 70% of non-liquor sales, and
- must total at least 50% of all sales, including liquor sales from a retailer located in the grocery store.

Licensees must provide annual proof that the sales revenue requirements have been met.

#### Liquor Stores Within Grocery Stores Requirements

As will all other LRS relocations, the liquor store within the grocery store must be at least one kilometre away from another LRS or BC Liquor Store or proposed store.

Liquor stores within grocery stores must be physically separated from the rest of the grocery store with controlled access and separate cash tills within the liquor store area. The same shopping cart may move from the grocery store into the liquor store and grocery merchandise can be paid for at the liquor store tills.

The entire perimeter of the licensed area must be identifiable and the majority of the perimeter of the licensed area must be bounded by a fixed and immovable barrier. For the portion of the perimeter that is not fixed and immovable, the barrier must be sufficient to:

- monitor and control entrance to the licensed area;
- prevent unaccompanied minors from accessing the area;
- secure the retail area when required (i.e. when operating hours for the liquor retail area do not align with grocery store hours); and
- identify the main entrance (including what is considered to be the front door) to the licensed area.

#### Relocating Your Store

You may apply to relocate your store anywhere within the province, with the restriction that you cannot relocate within one kilometre of an existing or proposed LRS or BC Liquor Store (i.e. government liquor stores). BC Liquor Stores are now also required to abide by this rule. The one-kilometre distance is measured front door to front door, as the crow flies.

There are four exceptions to this rule that the Branch may consider:

- If the store is substantially damaged by a fire, flood or other event beyond the licensee's control;
- If the shortest travelling distance by road is more than one kilometre due to a watercourse or body of water;
- If the store is already within one kilometre of another liquor store and the new location is not closer than the current one; or
- If the new location has the same parcel identifier number as the current location

#### Relocating within a Grocery Store

For a liquor store to be located within a grocery store, the grocery store must have a minimum of 10,000 square feet of space (including storage space), and must be primarily engaged in retailing various types and brands of food.

Liquor stores within grocery stores must be physically separated from the rest of the grocery store with controlled access and separate tills within the liquor store area. The entire perimeter of the licensed area must be identifiable and the majority of the perimeter must be bounded by a fixed and immovable barrier.

For the portion of the perimeter that is not fixed and immovable, the barrier must be sufficient to monitor and control entrance to the licensed area, secure the licensed area when operating hours for the liquor store do not align with grocery store hours, and ensure the main entrance to the licensed area is identifiable.

The application for relocating can be found here:  
[http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation/licensing/forms/lclb092b\\_wine\\_store\\_transfer\\_of\\_location.pdf](http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation/licensing/forms/lclb092b_wine_store_transfer_of_location.pdf).

Where an LRS is currently adjacent to a grocery store, a structural change application may be all that is required to relocate into a grocery store (i.e. a change to put a door in an adjoining wall). The general manager will require confirmation that the proposed location complies with local zoning bylaws...

In this grievance, the Union seeks a Declaration that the Employer is in violation of Section 1.02 by refusing to enter into an appropriate collective agreement with the Union to cover the employees who are employed in the four Safeway Liquor stores.

#### DECISION:

The fundamental issue in this case involves a determination of whether the employees of the four Safeway Liquor stores are to be represented by the UFCW. In making that decision, it is critical that the principles expressed or implied in the British Columbia *Labour Relations Code* be applied. The parties have provided a number of authorities which address the scope of certification and the accreditation of the bargaining unit: *Vancouver Museum and Planetary Association*, [1990] B.C.L.R.B.D. No. 191; *Enterprise Rent a Car Canada Co.*, [2015] B.C.L.R.B.D. No. 211; *North Shore Neighbourhood House Society*, [1999] B.C.L.R.B.D. No. 361; *Overwaitea Food Group*, [1997] B.C.L.R.B.D. No. 169; *Compass Group Canada Ltd. (Crothall Services)*, B.C.L.R.B.D. No. 241/2015; *Diversified Transportation Ltd.*, B.C.L.R.B.D. No. B 382/2003; *Beverage Dispensers and Culinary Workers Union, Local 835 v. Terra Nova Motor Inn Ltd.*, (1974) 50 D.L.R. (3d) 253 (S.C.C.).

There is agreement between the parties that the Safeway employees are not covered under the terms of the original certifications obtained by the UFCW as there were no liquor stores in existence at the time of the certifications. Therefore, the nature of the original certifications is not at issue: *Vancouver Museum and Planetarium Association*, 10 C.L.R.B.R. (2d) 1.

However, bargaining rights can be obtained by other means. In *Vancouver Museum and Planetary Association, supra*, the Labour Relations Board described those alternative methods at paras. 21 – 23:

21 While the notion that the certificate is spent for all purposes is perhaps overstated, it is certainly spent in terms of the bargaining unit description. The parties are free from that point forward to adjust the scope of the bargaining unit as they see fit and as their relationship develops. This type of adjustment invariably begins almost immediately after certification and is embodied in successive collective agreements.

22 While the parties may from time to time adjust the scope of their bargaining unit by agreement, it is also trite law that employers are not obliged to agree to all proposed adjustments. The fact that the parties have agreed from time to time since the certification to adjust the scope of the bargaining unit neither obliges the parties to continue to agree for all time to adjust the scope of the bargaining unit, nor does it set in motion the expansion of the certification and infinitum to sweep in all other employees of the employer. If the employer refuses to agree to an expansion of the bargaining unit a union wishing to encompass other unrepresented employees may only do so in one of four ways: first, by organizing the unrepresented employees and applying for a new certificate under Section 39(1) of the Act; second, by organizing the unrepresented employees and applying for a variation pursuant to Section 36 based on the Olivetti principle; third, by convincing the appropriate labour relations tribunal that the parties have in fact agreed to include these employees in the bargaining unit; or finally, by convincing the appropriate labour relations tribunal that the existing certification as initially, granted already encompasses the unrepresented employees and that it has not been diminished by agreement.

23 If the evidence does not establish agreement to expand the scope of the bargaining unit, or the union does not undertake any organizing effort, then the last option is the only way additional employees may be included in the bargaining unit. Consideration of the last option begins with a determination of the scope of the bargaining unit when the certificate was initially granted. We recognize that the scope may change a moment after the certification issues because of the voluntary activity of the parties. Nothing, however, affects the scope which existed at the moment of certification. That is the moment of conception of the bargaining unit, as determined by the authority of the responsible labour relations tribunals. It is from this unique point in time that all else flows in a labour relations sense.

One must be cognizant in these types of cases that there is a tension between the goal of expanding collective bargaining rights and ensuring that employees can exercise their free will in determining whether to join a bargaining unit.

It is also clear that the parties are free of their own accord to negotiate an expansion of the bargaining unit and the principal issue here is whether they did so in these circumstances. The question is whether the employees at the Safeway Liquor stores

were intended by the parties to be members of the UFCW by virtue of the language in Article 1.02.

This dispute then is primarily centred on the meaning of the term “store” in Section 1.02 of the Collective Agreement. Once again, that provision states:

1.02 New Banners

In the event the Employer decides to open stores operating under a new banner, that are different in size or type of operation from its conventional stores, the Employer will enter into negotiations with the Union to develop a Collective Agreement that is appropriate for the type of business contemplated.

Should a dispute arise as to the terms of the Collective Bargaining Agreement, the items in dispute shall be referred to a final offer selection process.

In interpreting this Article, there are a number of principles to be applied, including those set out in *Pacific Press Ltd.* [1995] B.C.C.A.A.A. No. 637, Arbitrator Bird:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

Based on the submissions of the parties, the critical interpretative principles which are relevant to the present matter are the following:

- The object of interpretation is to discover the mutual intention of the parties and that the primary source is the collective agreement;

- Ordinary words in a collective agreement should be given their plain meaning;
- A very important promise is likely to be clearly and unequivocally expressed.

On that latter point, it should be noted there is no greater onus on the Union than there is on the Employer to establish that its interpretation is the correct one, particularly in situations such as the present one where the facts are not in dispute: *Catalyst Paper (Elk Falls Mill)*, May 3, 2012 (Hall); *School District No. 39 (Vancouver)*, 53 L.A.C. (4<sup>th</sup>) 33 (Hope); *Grey County Board of Education*, 12 L.A.C. (3d) 312 (Teplitsky); *CN/CP Telecommunications*, 18 L.A.C. (3d) 78 (Picher); *British Columbia Public School Employers Association*, [2000] B.C.C.A.A.A. No. 43 (Dorsey); *Sears Canada*, [2003] B.C.C.A.A.A. No. 276 (Kelleher).

It is trite law that the interpretation exercise is focused on giving force to the mutual intention of the parties when they negotiated the language in question. The primary source for arriving at that intent is the language used by the parties to convey their agreement. In that respect, one must take into consideration that, at the time in question here, Safeway did not employ any liquor store employees so it may be somewhat problematic to conclude that is what the parties were specifically contemplating under Article 1.02.

Fundamentally, in this grievance the Union submits that Article 1.02 applies to the “Safeway Liquor” stores because Article 1.02 does not limit its application to only grocery operations. The Union also notes that the provision requires that, in the event of a failure to bargain a new agreement, a Final Offer Selection process that would be appropriate to the new business would be put in place.

For its part, the Employer asserts that this provision does not refer to any “retail” store but simply to “store” and this Agreement was negotiated solely in the context of the grocery business. The inference that must be drawn is that it was only the “retail grocery business” that was intended by the parties to be covered by Article 1.02 and not any retail operation in general.

For our purposes, the key phrase in Article 1.02 is the reference to operating “order a new banner which is different in size or type of operation from its conventional stores”. The Board has been referred to the following definition of the term “banner”.

The Concise Oxford Dictionary (Ninth Edition) defines “banner as follows:

**1 a** a large rectangular sign bearing a slogan or design and usu. Carried on two side-poles or a crossbar in a demonstration or procession. **b** a long strip of cloth etc. hung across a street or along the front of a building etc. and bearing a slogan. **2** a slogan or phrase used to represent a belief or principle. **3** a flag on a pole used as the standard of a king, knight, etc., esp. in battle. **4** (attrib.) US excellent, outstanding (a banner year in sales) **join** (or **follow**) **the banner of** adhere to the cause of. Bannered adj. [Middle English via Anglo-French banere, Old French baniere from Ramonic, ultimately from Germanic]

The Shorter Oxford English Dictionary (Sixth Edition) offers the following:

Banner

A noun. **1** A piece of cloth attached by one side to the upper part of a pole, and used as the standard of a king, knight, army, etc; a national flag, esp, as inspiring emotional attachment; HEARDRY a flag displaying a persons’s arms. ME **b** The company ranged under a particular banner. Rare ME-E10 **c** A fringed flag hanging on a trumpet. Rare (Shakes.) **d** A flag awarded as a distinction. US M19

**follow the banner of ,join the banner of** fig adhere to the cause of red banner: see RED adjective. Star-Spangled Banner: see STAR noun & adjective.

**2** A flag or standard with a symbolic device as the emblem of a guild, company, or other group; a long strip of cloth bearing a slogan or design, carried in a demonstration or procession or hung in a public place. **b** fig. Something used as a symbol of principles. World Monitor Socialist, democratic, and liberal parties, unified under the banner of a ‘democratic Russia’.

**3** hist. Any of the principal divisions of the Manchu army, each with a distinguishing flag or banner. Also, a military subdivision of Mongolian tribes.

**4** An advertisement on a website in the form of bar, column, or box.....

“Safeway Liquor” is certainly a “new banner” in the retail industry through which the Company is attempting to extend its “goodwill” into a different type of retail operation. While it is apparent that Safeway has attempted to create a linkage in the public’s mind between its grocery and liquor operations (Air Miles, websites, uniforms, computer screens, shelf labels, aprons) that is really a marketing decision. The critical distinction here is, although this is clearly a new banner in the marketing sense, is it a “new banner” for labour relations purposes under Article 1.02.

The issue is how far within the “retail” industry that offers merchandise for sale does Article 1.02 extend. If Sobey’s entered into a new grocery operation entitled Sobey’s Bakeries, Article 1.02 would undoubtedly apply. However, if Sobey’s had

entered into a different business under the name Sobey's Liquor these operations would not be covered under Article 1.02. It is also agreed that the provision would not apply to a different type of business using the Safeway name, for example warehousing or distribution.

Therefore, it is clear that Article 1.02 is not focused on the fact that the new banner has the Safeway name attached but rather the nature of the operation. On its face Article 1.02 appears to be focussed on using a different name in the grocery business, not the same name in a different business. To put it another way, if the Company entered into a different retail operation called Safeway Shoe Sales, Safeway Dresses or a Safeway Used Car Dealership, would this provision have application? In my view, that would be a very broad scope to give to Article 1.02.

Another consideration is that it is clear that the Government distinguishes between retail grocery stores and liquor store operations, views them as different businesses and treats them very differently in terms of the rules and regulations which apply. There are extensive definitions included in the Regulations for grocery stores and a separate Division 8 for "Licensee Retail Store Licences, Wine Stores Licences and Special Wine Stores". The Index to Division 8 states:

Division 8 – Licensee Retail Store Licences, Wine Store Licences and  
Special Wine Store Licences

- 53 Definitions
- 54 Authorized activities
- 55 Limit on number of stores selling liquor in grocery stores
- 56 Sales revenue of grocery store
- 57 Moratorium on new licensee retail store licences
- 58 Locatin of Licensee retail stores
- 59 Licensee retail stores licences – rules and requirements
- 60 Relocation of licensee retail stores
- 61 Moratorium on new wine store licences
- 62 Requirements for wine stores
- 63 Converted wine store licences
- 64 Wine store licences – rules and requirements
- 65 Relocation of wine stores to grocery stores
- 66 Conversion of wine store licence to licensee retail store licence
- 67 Special wine store licence – application requirements
- 68 Special wine store licence – rules and requirements
- 69 Temporary off-site sale endorsement
- 70 Sampling

It is apparent from reading these provisions that considerable specific limitations (eg, hours of operation, serving minors) have been set for these different types of operations. Similarly, the “Licencee Retail Store Terms and Conditions” document goes on at great length to distinguish between grocery stores and liquor stores.

Another consideration is that under the Regulations, Safeway could sell liquor in its grocery stores but has decided not to do so in these four instances. In Burquitlam, it did open a liquor store adjacent to its grocery operation (without a common entrance) but the other stores involved in the present grievance are geographically separated from the Safeway grocery stores. As well, in my opinion the fact that these Safeway Liquor stores sell chips and snacks as an adjunct to its liquor sales is not sufficient to bring them within the rubric of a retail grocery store.

Therefore, when one takes into account all of the above factors, the more likely interpretation is that the “new banner” language in the Collective Agreement was intended by the parties to apply to new operations in the retail grocery business and not to any retail activity whatsoever. However, whatever uncertainty may exist in that respect is put to rest when one examines the historical context related to the negotiation of this “new banner” provision.

As indicated above, this language was first negotiated by the Overwaitea Food Group (“OFG”) and UFCW in their 1997 collective agreement. That provision (Letter of Understanding No. 17) in their agreement has been the subject of a number of Labour Relations Board decisions as well as arbitration awards: *Overwaitea Food Group*, [2000] B.C.C.A.A.A No. 222 (Ready); *Overwaitea Food Group*, [2000] B.C.C.A.A.A. No., 243 (Munroe); *Overwaitea Food Group*, [2000] B.C.L.R.B.D. No. 286 (BCLRB); *Overwaitea Food Group*, [2007] B.C.C.A.A.A. No. 254 (Munroe); *Overwaitea Food Group*, [2008] B.C.L.R.B.D. No. 48; *Overwaitea Food Group*, [2008] B.C.L.R.B.D. No. 117 9; *Overwaitea Food Group*, [2008] B.C.L.R.B.D. No. 175; *Overwaitea Food Group*, [2009] B.C.L.R.B.D. No. 222; *Overwaitea Food Group*, [2012] B.C.L.R.B.D. No. 23.

The first three of those cases involved the appointments of Arbitrators Ready and Munroe under Section 86 of the *Labour Relations Code* to adjudicate disputes pursuant to Letter of Understanding No. 17 which, as indicated, is the equivalent of Section 1.02 of the Safeway-UFCW Collective Agreement. Both arbitrators assumed jurisdiction in

those cases and those conclusions were subsequently upheld by the Labour Relations Board.

For our purposes, these cases contain extensive descriptions of the historical context in which this provision was negotiated. In his decision, [2007] B.C.C.A.A.A. No. 254, Arbitrator Munroe reviewed the history of the industry and, due to its importance, that will be set out at some length here. He stated the following:

#### Introduction

1. The Overwaitea Food Group (OFG) is one of British Columbia's major food retailers. It has a number of "banners" which it uses to compete in various market areas, niches or segments. OFG describes its present-day approach to the British Columbia marketplace as a multi-banner strategy.

2. OFG's longest-standing banners are Save-On-Foods and Overwaitea Foods (hereafter SOF and OWT, respectively). Those two banners are covered by the same collective agreement with the United Food and Commercial Workers Local 1518 (Local 1518). That collective agreement can be viewed, historically, as one of the "standard" collective agreements applicable to "conventional" supermarkets in this province (it is the same or similar in many respects, for example, to the collective agreement between Safeway and Local 1518).

3. The other four banners presently operated by OFG are PriceSmart Foods (PriceSmart); Urban Fare; Cooper's Foods (Cooper's); and Bulkley Valley Wholesale. For each of those four banners (sometimes described by the parties as alternate banners), there exists a collective agreement between OFT and Local 1518. Those four collective agreements are quite different from the SOF/OWT/Local 1518 collective agreement, as well as differing from each other. In the parlance of the parties, they are "lesser" collective agreements.

4. The dispute at hand under the SOF-OWT/Local 1518 collective agreement that was concluded in November 2003 for the period ending March 29, 2008, with a focus as well on the PriceSmart collective agreement between these parties that was concluded in November 2004 for the period ending March 31, 2015 (but with a re-opener provision effective March 31, 2010). Accordingly, while there will be occasional references in this award to other banners and their collective agreements, the SOF\_OWT/Local 1518 collective agreement (hereafter, for simplicity, the SOF collective agreement) and the PriceSmart/Local 1518 collective agreement (hereafter, for the same reason, the PriceSmart collective agreement) are at the forefront.

...

19 For some years until the late 1980's, the major food retailers in British Columbia were Safeway, Kelly Douglas (Super-Valu), IGA and OFG. The stores operated by the four supermarket chains were all of the "conventional" variety. For a period, the four chains engaged in common-front collective bargaining with Local 1518 (or its predecessors), but even in the years where that was not the case, the resulting collective agreements between the four chains and Local 1518 were essentially the same in terms of labour costs.

20 Things changed in the late 1980's when Ontario-based Loblaws re-entered the British Columbia marketplace by its introduction into this province, through its Westfair division, of the Royal Canadian Superstore (RCSS) banner, the Extra Foods banner, and the Royal Canadian Warehouse Club (RCWC) banner.

21 Loblaws is very large. Measured in terms of Canadian market share, today it is this country's largest food retailer. Through its operating divisions, it has a number of banners in various provinces. The RCSS banner signifies everyday deep-discount pricing – i.e., in relation to the pricing in conventional supermarkets. The same is true of Extra Foods. (For convenience, when we use the acronym RCSS, it includes the Extra Foods banner except where the context indicates otherwise). The RCWC is also a deep-discount operation, but it is a large-lot warehouse-style or member's-club style operation, while the format and style of the RCSS banner more closely approximates those found in conventional chains.

22 The RCSS entry into the British Columbia marketplace in the late 1980's was as a unionized operation, but in controversial circumstances. Briefly, it became notorious in the British Columbia labour relations community that Westfair, on behalf of RCSS/RCWC, was on the verge of signing a pre-opening voluntary-recognition collective agreement with representatives of a Teamster local; and more to the present point, a voluntary-recognition collective agreement containing much lower labour costs than the then-collective agreements between Safeway, IGA and OFG, on the one hand, and Local 1518 on the other.

23 In something of an institutionally-defensive move, the international union of which Local 1518 is one local, issued a direct charter to a new local – called Local 777 – which in turn beat the Teamster representatives to the punch by entering into a voluntary-recognition collective agreement with Westfair for its intended RCSS operations in British Columbia. That collective agreement effectively produced labour costs that were substantially lower than the labour costs associated with then-existing “standard” collective agreements in this province, including the then-existing collective agreement between OFG and Local 1518.

24 Local 1518 initiated internal constitutional challenges to the direct chartering of Local 777, but when the litigation dust finally settled some time later, Local 777's charter and its collective agreement covering RCSS employees were undisturbed.

25 The then-president of Local 1518, Brooke Sundin, testified as to the reason for the constitutional challenge. He said that, “We [Local 1518] were concerned that the collective agreement that 777 negotiated [with Westfair for RCSS] was unfair to our members because it would incite our employers [i.e. the employers who employed Local 1518 members] to demand concessions”. As Mr. Sundin further observed in evidence, that is exactly what happened commencing a few years later.

26 RCSS's entry into the British Columbia marketplace in the late 1980's was initially with five (or so) stores. But that number grew.

27 We have identified 1996 as something of a turning point, because in that year there was a particularly difficult labour dispute between OFG and Local 1518, including a lengthy work stoppage, for precisely the reason foreseen by Mr. Sundin as recounted above.

28 The 1996 dispute was finally resolved, with considerable bruising to the parties' relationship, by a two-year (1996-98) “roll-over” agreement.

29 But by late 1996, OFG was approaching Local 1518 for changes to the collective agreement (note that the only two banners operated by OFG at this time were SOF and OWT, both of which were conventional supermarket chains under the same [standard] collective agreement with Local 1518). The reason, from OFG's perspective, was twofold. First of all, OFG's market share was continuing to fall, while Loblaws market share, with its deep-discount RCSS, was continuing to rise. And secondly, OFG wanted to engage Local 1518 in early and ongoing discussions in the hope of avoiding another toxic labour dispute in 1998.

30 The result of this approach by OFG to Local 1518 might be described as a very early start to the negotiations for a post-1998 collective agreement, leading, as it happened, to the conclusion in July 1997 of a 1997 – 2003 collective agreement which effectively supplanted the 1996-98 collective agreement.

31 The 1997 negotiations represented a rapprochement between the parties. There was no denying what was termed the “competitive gap” which Loblaws (RCSS) enjoyed over OFG arising from the “lesser” collective agreement with Local 777. That being acknowledged by Local 1518 (if not to the full extent asserted by OFG), OFG sought with considerable success to repair the 1996 damage to the parties' relationship, and to engage Local 1518 in a more partner-like approach to the problem.

32 The resulting 1997 – 2003 collective agreement (which we will sometimes call the 1997 agreement) made a number of important changes to the predecessor collective agreement (i.e., the 1996 -98 SOF collective agreement); and represented the first reflection in the SOF collective agreement, by the inclusion of LOU #17 (reproduced above), of a potential multi-banner marketing strategy through alternate banners with their own distinct collective agreements.

33 A significant feature of the 1997 agreement was OFG's voluntary recognition of Local 1518 as the bargaining agent for all SOF and OWT stores in British Columbia that were then non-union (13 in number), and for all non-union departments (22 meat and deli departments) in what were otherwise unionized stores; and OFG's voluntary recognition of Local 1518 as the bargaining agent for all future SOF and OWT stores in the province.

34 A related and equally significant feature of the 1997 agreement was OFG's recognition of Local 1518 as the bargaining agent for any future “new banners” (the multi-banner strategy), as reflected in LOU #17.

35 Coupled with LOU #17 was an alteration to the general union recognition clause in the SOF collective agreement. In prior collective agreements, the union's bargaining agency was expressed generally in terms of stores owned or operated by OFG. However, in the 1997 agreement, that was amended such that the union recognition, as contained in the SOF collective agreement, would now be in respect of the SOF and OWT banners only.

36 The other significant features of the 1997 agreement were the introduction into the SOF collective agreement of the junior clerk classification with a lower-tiered wage structure and lesser benefits; a buy-out plan for existing employees, with the “bought” hours being worked by junior clerks from that point forward; and the introduction of a “watch list” for stores in financial trouble, with the potential for modifications to the SOF collective agreement as it applied to those stores individually.

37 There is one aspect of LOU #17 worth highlighting at this stage. It has to do with the phrase “...that are different in size or type of operation from its conventional stores ...” Initially, Local 1518 sought to limit the use of “new banners” to “small stores” (what it called the “Small Store Division”). However, that limitation was resisted by OFG and

was dropped by Local 1518. And, as ultimately worded by the parties, a “new banner” will qualify as such under LOU #17 if it is different either in size or type of operation from OFG’s conventional stores (i.e. SOF and OWT).

38 The first applications of LOU #17 were in relation to OFG’s acquisition in 1998 of the Cooper’s supermarket chain in the interior of the province; and to the development of the Urban Fare banner in the Yaletown area of downtown Vancouver.

39 The collective agreements between OFG and Local 1518 for Cooper’s and Urban Fare were (and are) markedly different from the SOF collective agreement. Those two collective agreements would be viewed from the employees’ perspective as “lesser” collective agreements, but apparently were seen by Local 1518 as well as by OFG to be appropriate for the particular niches/competitive environments in which the banners were respectively operating. The Coopers’ chain was (and largely remains” an “regional” chain with its own history and operating flavour, so to speak; the Urban Fare store is a high-end offering with exceptional service levels, competing mainly with stores in that niche that are non union.

40 In context of the present case, the Cooper’s collective agreement, negotiated between OFG and Local 1518 in 1998-99, is noteworthy as being the first collective agreement between those parties containing provisions contemplating and dealing with a “conversion” from one banner to another.

41 Those provisions are found in the Cooper’s agreement in Letters of Understanding Nos. 5 and 10.

42 LOU #5 is headed “Employment Security”. It provides as follows:

The parties agree that individuals employed under another banner of the Overwaitea Food Group have no rights to positions within the Cooper’s and Big Buy Foods stores. If such an employee wishes to be considered for a position with Cooper’s or Big Buy Foods, they would, if hired, become new employees.

If however, an Overwaitea Food Group store operating under another banner is converted to a Cooper’s or Big Buy Foods store, employees retained would have their current company seniority converted to Cooper’s or Big Buy Foods seniority and would be slotted into the appropriate pay grid consistent with the structure outlined in Letter of Understanding #4.

43 Thus, under LOU #5, were an SOF or OWT store to be “converted” to a Cooper’s, the affected employees would carry their seniority to the Cooper’s banner, but would otherwise be governed by the Cooper’s (lesser) collective agreement.

44 And the obverse, so to speak, is found in LOU #10 of the Cooper’s collective agreement:

It is not the intent of the Employer to adversely impact the employees by opening new stores that they own and operate under the Save-On-Foods or Overwaitea banner.

In the event that there is impact, the Employer and the Union will meet to determine what steps can be taken to assist the affected employees including such things as the transfer of employees between banners and the implementation of the process referred to in Letter of Understanding #3.

The general principle is that in the event that an employee moves to a store which the Employer owns and operates under the Save-On Foods or Overwaitea Foods banner, they will be covered by the collective agreement in place for that banner, subject to any terms agreed to by the Employer and the Union.

In the event that a Cooper's or Big Buy Foods is converted to an Overwaitea Foods or Save-On-Foods banner, it will be covered by the collective agreement in place for that banner.

45 We return to the 1997 SOF collective agreement. No doubt, the parties expected that that collective agreement would carry them through to its stated expiry in 2003. But such was not the case. OFG was continuing to lose market share to Westfair (principally RCSS), and was also now experiencing a lesser market share than Safeway. As well, Wal-Mart had made its first entry into the British Columbia marketplace through its acquisition of the Woolco stores.

46 As OFG saw matters, SOF, which had once had a "price perception" in the public's mind, had now lost that market perception to RCSS; and, because many of the SOF stores were now getting old and tired (with no real incentive to make capital investments given the evolving competitive environment and relative labour-cost structures), neither was SOF being viewed any longer by the public as providing a good-quality conventional shopping experience in full measure. In effect, the SOF stores, as the OFG team viewed the then-situation, was in "no-man's land" (as one of the OFG witnesses put it).

(The ultimate determination in that decision by Arbitrator Munroe was upheld on appeal by the Labour Relations Board in its decision at [2008], B.C.L.R.B.D. No. 48).

In his decision, Arbitrator Munroe clearly identified Overwaitea as a "major food retailer" and described how it was using a number of banners to "compete in various market areas, niches or segments". He identified the key players (Safeway, Kelly Douglas, IGA and Overwaitea) in the grocery industry prior to the late 1980's when Loblaws entered the retail grocery market under a number of "banners" (Royal Canadian Super Stores, Extra Foods).

As Arbitrator Munroe indicated, the entire negotiation exercise in 1997 was centered on the difference between standard collective agreements applicable to "conventional" supermarkets and those for discount grocery stores. He went onto discuss the concept of a "new banner" and noted the following at para. 37 of his decision:

37 There is one aspect of LOU #17 worth highlighting at this stage. It has to do with the phrase "...that are different in size or type of operation from its conventional stores..." Initially, Local 1518 sought to limit the use of "new banners" to "small stores" (what it called the "Small Store Division"). However, that limitation was resisted by OFG and was dropped by Local 1518. And, as ultimately worded by the parties, a "new banner" will qualify as such under LOU #17 if it is different either in size or type of operation from OFG's conventional stores (i.e. SOF and OWT).

It is clear from this commentary that the reference to “conventional stores” is referring to grocery stores and every one of the “banners” discussed in the decision referred to grocery store banners used by the various corporate entities. There is no indication that the parties had been contemplating during their negotiations that this language would apply to the opening of other types of retail outlets, e.g. Liquor Stores, by one of the companies. The term “store” in Letter of Understanding No. 17 appears only to have always been used within the context of the retail grocery business.

In a different case, the British Columbia Labour Relations Board dealt with a Union (Local 247) application regarding the Overwaitea Food Group’s conversion of a Save-On-Foods store to a PriceSmart store and the claim that Local 247 no longer represented its employees. That decision, by Vice Chair Matacheski, provides further historical context as follows:

## II. FACTS

3 The Employer operates grocery stores under six retail banners: Overwaitea, Save-On-Foods, Coopers Market, PriceSmart, Urban Fare and Bulkley Valley Wholesale. Save-On-Foods is the Employer's largest banner.

4 The Employer has certifications at various stores with Local 247 and Local 1518. The Employer employs approximately 8,300 members of Local 1518 and 550 members of Local 247.

5 Generally, Local 247 is certified to represent "employees engaged in the preparation for sale, handling and selling of fresh, frozen, cooked and smoked: meats, fish and poultry in [an identified store]" employed by the Employer. In some stores where Local 247 represents the meat and deli workers, Local 1518 represents the remainder of the employees. In some stores, Local 1518 has a wall-to-wall certification representing all employees.

6 Loblaws Inc. ("Loblaws") is the Employer's number one Canadian competitor. Sobeys Inc. ("Sobeys"), another Canadian competitor, which recently bought the Thrifty Foods stores chain, is the second or third largest grocery company in Canada. Both Loblaws and Sobeys are much bigger than the Employer, and they have substantial purchasing, supply, marketing, branding and administrative advantages as a result.

7 Currently, the international competitor with the biggest presence in Canada is Canada Safeway Limited ("Safeway"). The Employer is more concerned, however, about competition in the future from Wal-Mart Canada Corp. ("Wal-Mart"), which is the largest retailer in the world. Wal-Mart is now developing supercentres in Canada which combine a typical Wal-Mart store and a supermarket.

8 Since 1989, the Employer's market share has dropped from #1 to #3 in British Columbia, behind Safeway and Loblaws. Wal-Mart has claimed 8% of the market share in the Province so far, and when it opens its supercentres it will take a significantly

bigger share.

9 Another important development in the retail grocery business has been the development of the discount segment. Discount shoppers generally have incomes below \$50,000 per year and have multiple children and pets. The discount segment now accounts for 40% of grocery sales.

10 In 1997, the Employer started the development of a discount banner to compete in the discount segment of the market.

11 In 1997, the Employer negotiated a voluntary recognition wall-to-wall collective agreement with Local 1518 to apply to new discount banners. At this time, the Employer did not have any stores operating under discount banners. Local 247 was not approached by the Employer to enter into a voluntary recognition agreement for new discount banners. However, Local 247 was aware of the wall-to-wall collective agreement negotiated between the Employer and Local 1518.

12 In 2001, the Employer opened its first discount banner as a PriceSmart store in Queensborough, B.C. This version of PriceSmart failed and the store was closed.

13 The Employer continued developing a revitalized version of the PriceSmart banner. Senior management toured and met with higher experience discounters in the Eastern United States, and then worked on redesigning the banner.

14 The pricing image at PriceSmart is everyday low prices. Regular retail prices in the stores are permanently lower than the prices at conventional stores. The Employer promotes sales of products from the Western Family brand, which it owns, in PriceSmart stores because margins are higher on those sales and discount shoppers are more willing to purchase non-national brands.

...

33 The legal issues in this case require an interpretation of the scope clause in the Local 247 collective agreement and a determination of whether anti-union animus is established based on the circumstances surrounding the negotiation of the amended scope clause. The following are the facts concerning the bargaining history.

34 In 1989, United Food and Commercial Workers Union, Local No. 777 ("Local 777") was created with a charter to represent employees of Loblaws and Real Canadian Superstore ("RCSS"). Local 777 negotiated collective agreements with significant labour cost savings to some of the Employer's competitors, such as RCSS.

35 In 1996, the Employer and Safeway bargained collectively with Local 1518 and Local 247 in an effort to equalize the wage gap with their competitors certified to Local 777. There was a lengthy labour dispute which ended with a roll-over agreement for two years. The national director of United Food and Commercial Workers International Union was involved in the resolution of the dispute. The Employer was told by the then national director that he was committed to working towards a merger of Locals 777, 1518 and United Food and Commercial Workers Union, Local No. 2000 ("Local 2000").

36 In January 2001, Local 2000 and Local 777 merged to form Local 247. Leif Hansen was the President of the former Local 2000 and as part of the merger became the Executive Vice-President of Local 247. Hansen was the chief Union negotiator during the collective bargaining with the Employer. Gib Whitlock was the President of the former Local 777 and he became the President of Local 247 after the merger. (I have referred to Local 2000 as Local 247 throughout this decision even though some

events occurred before the merger.)

37 In June 1997, Local 1518 advised Local 247 that it had met with the Employer to commence negotiations for the 1998/2003 collective agreement. Local 247 was provided with a list of areas of discussion. Neither the Employer nor Local 1518 gave Local 247 any further details at that time. However, Local 247 agreed to coordinate the bargaining and July 9, 10 and 11, 1997 were scheduled for negotiations.

38 On July 9, 1997, Local 247 attended the negotiations but there were no direct discussions with the Employer except for one meeting where the Employer explained its proposal for the terms of the new collective agreement. On July 10, 2007, the Employer advised Local 247 that it was not prepared to continue meeting with Local 247 until it had an agreement with Local 1518. The plans to meet on July 11, 2007 were cancelled.

39 A rumour developed that Local 247 walked out of bargaining. Local 247 widely distributed a letter which explained that it had not walked out of bargaining.

40 Local 1518 and the Employer continued bargaining. They negotiated a voluntary recognition wall-to-wall agreement for all Overwaitea and Save-On-Foods stores that were presently non-union. They also negotiated a separate voluntary recognition collective agreement for new discount banner stores for an all-employee bargaining unit. Local 1518 and the Employer also negotiated the transition agreement in which the Employer agreed not to close or convert any existing certified stores to a new banner.

41 The Employer and Local 1518 concluded their negotiations in September 1997. The Employer then met with Local 247 to continue bargaining. They concluded the negotiation of their renewal collective agreement in early October 1997.

42 Local 247 was aware of the results of the negotiations between Local 1518 and the Employer. It felt that it had limited ability to expand its jurisdiction and therefore focused on job security for its existing members. It negotiated Letter of Understanding #20 ("LOU #20") to address the consequences of a new banner opening in close proximity to an existing store certified to Local 247. The Employer agreed to give 30 days notice of opening a store under any banner near a store covered by the collective agreement and if there was adverse effect on the bargaining unit members, the parties agreed to use language in a different letter of understanding to move employees out of the store. Without this agreement, the Employer could not transfer employees out of the store.

43 Local 247 also agreed to amend its scope clause in the collective agreement. It previously stated that Local 247 represented the employees "employed in the preparation for sale, handling and selling of fresh, frozen, cooked and smoked: meats, fish and poultry, in the present and future store(s) owned and/or operated by the Employer in the following areas:...". It was amended to state that Local 247 represented the employees "in the present and future Overwaitea and Save-On-Foods store(s) owned and/or operated by the Employer...". It also added the condition that "New or acquired stores shall be added to the existing bargaining units" and the clarification that the reference to "all employees" in Local 1518's recognition clause does not include employees covered by Local 247's recognition clause.

44 The Employer says that Local 247 agreed to the limitation of its jurisdiction to Overwaitea and Save-On-Foods stores in exchange for the accretion rights that any new or acquired Overwaitea or Save-On-Foods store in a geographical area listed in the collective agreement where the Union already had a certified bargaining unit would be voluntarily recognized and added to the existing bargaining unit. Local 247 says it

already had accretion language but this language only clarified that its jurisdiction was within Overwaitea and Save-On-Foods stores and that new stores would be automatically added to the bargaining unit. Local 247 does not dispute that it does not have any accretion or voluntary recognition rights to a PriceSmart store that is opened by the Employer by methods other than a conversion of a certified store.

45 Local 247 made a proposal which would have given it representation rights in stores opened by the Employer under new banners. However, it conceded this was a "poke in the eye" proposal, because Local 247 knew at the time that the Employer had already made a voluntary recognition agreement with Local 1518 for new banner stores. Local 247 eventually dropped the proposal without gaining any provision in exchange.

(For the record, although not critical for our purposes, that decision was appealed and a Reconsideration Panel [2008] B.C.L.R.B.D. No. 175 granted Local 247's application in part and referred the matter back to Vice Chair Matacheskie. In a subsequent decision, [2009] B.C.L.R.B.D. No. 222, she again denied Local 247's application. That decision was upheld on Reconsideration No. B60/2010 but it was subsequently submitted for judicial review. The Court allowed the Union's application and remitted the matter back again for Reconsideration. The Reconsideration Panel No. B163/2011 referred the matter back once again to Vice Chair Matacheskie who once more dismissed the Union's application: [2012] B.C.L.R.B.D. No. 23.)

Once again, from the history set out in this decision of the Labour Relations Board, it is clear that the bargain entered into in the late 1990's heralded a significant change in the retail grocery business in the Province. There were two-tier agreements put into place and one of the trade-offs for that was that the Union would be able to extend its representational rights and that was accomplished by inserting the "new banner" language into the collective agreements.

Just as was the case with Arbitrator Munroe, the Labour Relations Board considered that the term "banners" was used by the parties to refer to various "stores" in the grocery business – for example, Loblaws PriceSmart, Coopers, Urban Fare, Thrifty Foods, Royal Canadian Superstores, Super Value and Bulkley Valley Wholesale and Walmart Supermarkets. The Board identified that the context of the negotiations involved challenges within the grocery business and the ability of Overwaitea Food Group to compete with grocery "discounters" operating under the RCSS and Extra Foods banners owned by Loblaws. As well, the Overwaitea Food Group "banners" (Save On Foods and Overwaitea) referred to its own grocery stores and the concept of "multi

banners” was used to describe the various names under which Overwaitea sold groceries. There was also discussion that where an employee moved from Save On Foods or Overwaitea banner stores he/she “would be covered by the collective agreement in place for that banner”.

Moreover, there was also extensive discussion between the parties during this period about the “conversion” from one banner to another and that obviously is a reference to a change of a grocery store name rather than to the introduction of a store in a different type of retail operation.

Further, and very importantly, there was expressed concerns among the parties about the “market share” of the various banners and that focus only makes sense if it is limited to the context of the grocery business. For example, in the Labour Relations Board’s decision, Vice Chair Matacheskie stated the following, at paras. 9 – 13:

9 Another important development in the retail grocery business has been the development of the discount segment. Discount shoppers generally have incomes below \$50,000 per year and have multiple children and pets. The discount segment now accounts for 40% of grocery sales.

10 In 1997, the Employer started the development of a discount banner to compete in the discount segment of the market.

11 In 1997, the Employer negotiated a voluntary recognition wall-to-wall collective agreement with Local 1518 to apply to new discount banners. At this time, the Employer did not have any stores operating under discount banners. Local 247 was not approached by the Employer to enter into a voluntary recognition agreement for new discount banners. However, Local 247 was aware of the wall-to-wall collective agreement negotiated between the Employer and Local 1518.

12 In 2001, the Employer opened its first discount banner as a PriceSmart store in Queensborough, B.C. This version of PriceSmart failed and the store was closed.

13 The Employer continued developing a revitalized version of the PriceSmart banner. Senior management toured and met with higher experience discounters in the Eastern United States, and then worked on redesigning the banner.

Therefore, the parties attention to market share expressly related to “grocery stores” and what was central to that was how the companies would be able to compete in the “discount” segment of the grocery market. In that context, it is difficult to see how this market share concern in any way indicated the parties were also contemplating the introduction of a Liquor Store Banner which would have no effect on the market share of retail grocers.

In my view, it is apparent the entire focus in the industry at the time was with discount banners in the grocery business and not with retail competition in general. The focus of the UFCW was on job security for its existing members and to protect their jobs should a discount grocery retailer open a grocery store in close proximity to an existing unionized operation which could result in a reduction of market share. That can readily be seen in this excerpt from the Labour Relations Board decision in *Overwaitea, supra*, at para. 42:

42 Local 247 was aware of the results of the negotiations between Local 1518 and the Employer. It felt that it had limited ability to expand its jurisdiction and therefore focused on job security for its existing members. It negotiated Letter of Understanding #20 (“LOU #20”) to address the consequences of a new banner opening in close proximity to an existing store certified to Local 247. The Employer agreed to give 30 days notice of opening a store under any banner near a store covered by the collective agreement and if there was adverse effect on the bargaining unit members, the parties agreed to use language in a different letter of understanding to move employees out of the store. Without this agreement, the Employer could not transfer employees out of the store.

This entire exercise of negotiating the “new banner” language was to preserve jobs for UFCW employees in the existing grocery stores when there were competitive market forces at work whereby the conventional stores were being threatened by non-union grocery retailers or other grocery stores which had entered into “lesser” collective agreements with other trade unions.

Therefore, when one takes into account the historical context of the “new banner” language, it is readily apparent that the focus of the *Overwaitea* – UFCW Agreement was the retail grocery business and the contract language was developed in that spirit. The “new banner” language used by them in Letter of Understanding #17 for the *Overwaitea* Food Group and LOU #10 (Coopers Food Group) was then copied in the Safeway – UFCW Collective Agreement in Article 1.

In summary, any confusion about the potential meaning of Article 1.02 is settled by the historical context in which this provision was negotiated. There is no indication that the parties were ever intending to deal with anything other than the retail grocery business or that the parties had in their minds issues related to the opening of other types of retail operations such as liquor stores.

In this case, the grievance, if successful, would not be about protecting bargaining rights but rather extending union representation into a business that the Company has

never been in before. This is certainly a new business development on the part of Safeway (and there will possibly be more) and it is for these parties to directly address the implications for their labour relations during collective bargaining.

On that basis, the Union's grievance is unsuccessful and it is concluded that "new banners" in the context of Article 1.02 is limited to new banners in the retail grocery sector.

AWARD:

For all of the above reasons, this grievance is dismissed.

Dated this 20<sup>th</sup> day of December, 2017.

"David McPhillips"

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David C. McPhillips  
Arbitrator