IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Champ's Fresh Farms Inc. v. British Columbia (Employment Standards Tribunal),* 2023 BCSC 1075

Date: 20230622
Docket: S224606
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Champ's Fresh Farms Inc.

Petitioner

And

Director of Employment Standards and Employment Standards Tribunal

Respondents

Before: The Honourable Justice Blake

On judicial review from: An order of the Reconsideration Panel of the Employment Standards Tribunal, dated April 8, 2022 (*Champ's Fresh Farms Inc. (Re),* 2022 BCEST 22).

Reasons for Judgment

Counsel for the Petitioner:	C. McHardy K. Macdonald D. Wang, Articled Student
Counsel for the Respondent, Director of Employment Standards:	L.M. Courtenay
Counsel for the Respondent, Employment Standards Tribunal:	E.F. Miller (February 13–14, 2023) J. O'Rourke (April 11, 2023)
Place and Date of Hearing:	Vancouver, B.C. February 13–14 and April 11, 2023
Place and Date of Judgment:	Vancouver, B.C. June 22, 2023

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I. INTRODUCTION

[1] This petition concerns a pay system in which the petitioner, Champ's Fresh Farms Inc. ("Champ's"), contractually guarantees to its mushroom picking employees that it will pay them the greater of (i) the legislated minimum piece rate for mushrooms, or (ii) the graded piece rates under its pay system (the "PR System"). There is no dispute that under this pay system Champ's pays at least minimum wage to all of its mushroom pickers and, in most cases, Champ's mushroom pickers earn more than the minimum wage.

[2] On April 8, 2022, a reconsideration panel (the "Panel") of the Employment Standards Tribunal (the "Tribunal") determined that Champ's pay system fails to comply with the *Employment Standards Act,* R.S.B.C. 1996, c. 113 ["*ESA*"] in *Champ's Fresh Farms Inc. (Re),* 2022 BCEST 22 (the "*Reconsideration Decision*").

[3] Champ's argues that in reaching the *Reconsideration Decision*, the Panel failed to respect the basic principles of natural justice and procedural fairness and also that the *Reconsideration Decision* was patently unreasonable.

[4] Champ's seeks an order quashing the *Reconsideration Decision* and restoring the decision of the appeal panel of the Tribunal (*Champ's Fresh Farms Inc. (Re)*, 2021 BCEST 103). In the alternative, they seek an order quashing the *Reconsideration Decision* and remitting this matter to be heard by a freshly constituted panel of the Tribunal.

[5] While Champ's initially sought their costs of this petition, counsel withdrew this request.

II. BACKGROUND

[6] Champ's is a mushroom producer based in Aldergrove, British Columbia. In paying its employees, it applies the PR System. Under this system, Champ's employees are paid the greater of (i) the minimum piece rate legislated under the *Employment Standards Regulation,* B.C. Reg. 396/95 [*Regulation*], which is currently set at $0.29 per pound; and (ii) the graded piece rates under the PR

System, which pays different piece rates for different quality grades of mushroom. Champ's argues that the PR System allows employees to earn more than $0.29 per pound.

[7] Under the PR System, low-grade mushrooms are rated at less than $0.29 per pound, while high grade mushrooms are rated at more than $0.29 per pound. If pickers pick a much greater number of low grade mushrooms, such that their notional wage would be less than $0.29 per pound, then Champ's pays those employees $0.29 per pound. Champ's argues that the PR System rewards employees for hard work and incentivizes them to balance yield and grade, gives their pickers greater independence and ownership of their work, and provides the ability to earn more than the minimum piece rate.

III. THE RELEVANT PROVISIONS OF THE *EMPLOYMENT STANDARDS ACT*

[8] To appreciate the context of the *Reconsideration Decision*, it is useful to set out briefly the applicable legislative scheme. Section 16(1) of the *ESA* provides that employers must pay employees at least the minimum wage, as prescribed in the *Regulation.*

[9] Section 18(1) of the *Regulation* sets out a scheme for the minimum wage for farm workers, and s. 18(1)(h) sets that minimum wage for the picking of mushrooms at $0.29 a pound. Finally, s. 18(2) of the *Regulation* provides:

> (2) Each employer of farm workers must display, in a location where they can be read by all employees, notices stating the following:
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> (a) the volume of each picking container being used;
>
> (b) the volume or weight of fruit, vegetables or berries required to fill each picking container;
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> (c) the resulting piece rate.

IV. THE RECORD AND THE DECISION

[10] An issue arose during the hearing as to the proper contents of the Record on this judicial review. The parties ultimately agreed the Record was comprised of the exhibits to the affidavit of Ms. Bellantoni, sworn on June 7, 2022. Notwithstanding

the parties agreed that s. 112(5) of the *ESA* requires the Director of Employment Standards (the "Director") to provide the Tribunal with a copy of the record that was before the Director, and that this record would have been before both the appeal panel and the Panel, they did not reproduce it for this proceeding as they agreed it was not necessary for my determination of the issues raised on this judicial review.

A. The Determination

[11] On March 11, 2021, a confidential complainant filed a complaint against Champ's pursuant to s. 74 of the *ESA*, and on April 21, 2021, the Director initiated an audit pursuant to s. 76(2) of the *ESA.*

[12] On July 7, 2021, a delegate of the Director of Employment Standards (the "Delegate") issued a Determination and Reasons for the Determination (collectively the "*Determination*") concluding that Champ's had contravened s. 18(1) of the *Regulation* by paying its employees below the minimum piece rate set out in the *Regulation* for picking mushrooms. In the *Determination* the Delegate noted that Champ's PR System failed to comply with the minimum wage rate for mushrooms of $0.29 per pound, which was set out in s. 18(1)(h) of the *Regulation*. The Delegate concluded the PR System did not comply with s. 18(1) of the *Regulation* as it is "not acceptable to assign a piece rate for lower grade mushrooms that is below the minimum piece rate for the crop": *Determination* at p. R5. The Delegate went on to note at pages R5-6:

> As the requirements of the Act and Regulation are minimum standards, it is acceptable for Champ's to assign higher than minimum piece rate to some grades of mushrooms. With that said, it is not acceptable to assign a piece rate for lower grade mushrooms that is below the minimum piece rate for the crop. As a matter of law, the Act identifies wages in the context of work performed by an employee. The minimum wage provision for farm workers employed on a piece work basis is very direct; it is a minimum wage based on a unit of volume or weight picked, which is expressed in the Regulation as bins/cubic meters, pounds/kilograms, or a bunch. A unit represents the performance of work for which the worker is entitled to a wage. A farm worker employed on a piece rate is entitled to the minimum wage for each unit completed. In the circumstances of this case and at the relevant time, the Regulation provides a minimum wage for piece rate employees picking mushrooms based on a "a pound"; in other words, each pound of mushrooms harvested represents a unit of work and entitles the employee to a piece rate

> that is at least equal to the minimum wage for that unit of work. The Act does not allow for the minimum wage for farm workers employed on a piece work basis to be calculated on a daily, weekly, or paid-period basis. Accordingly, when a worker harvests mushrooms at a base rate of, say, $0.23 per pound, they are actually working for less than the minimum wage as set out in section 18 of the Regulation. The fact the piece rate workers earned a higher-than-minimum piece rate for other grades of mushrooms does not negate the fact that workers still earned less than the minimum piece rate for some varieties of mushrooms. [Emphasis added].

B. The Appeal Decision

[13] On August 16, 2021, Champ's appealed the *Determination* pursuant to s. 112 of the *ESA,* arguing that the Delegate erred in concluding that the PR System failed to comply with the minimum pay rate set out in s. 18(1) of the *Regulation.* On November 9, 2021, the Director filed response submissions.

[14] On December 21, 2021, an appeal panel of the Tribunal (the "Appeal Panel") issued a decision granting Champ's appeal: *Champ's Fresh Farms Inc. (Re)*, 2021 BCEST 103 (the "*Appeal Decision*"). The Appeal Panel consisted of one member, Mr. Thornicroft, who determined that Champ's PR System complied with s. 18(1) of the *Regulation*, and set aside that aspect of the *Determination*. The Appeal Panel noted that Champ's argued that it tops up its employees' wages to ensure that, even if any workers "pick a much greater number of low grade mushrooms such that their notional wage would be less than $0.29 pp, then Champ's pays those employees $0.29 pp – which meets the minimum piece rate in the Regulation": *Appeal Decision* at para. 43.

[15] The Appeal Panel noted the Director did not dispute Champ's assertions as to how its PR System worked, and in particular did not dispute that if a worker's average per pound falls below $0.29 per pound, the Employer "then 'tops up' the average rate to the statutory minimum": *Appeal Decision* at para. 52. The Appeal Panel noted the Director relied on a previous Tribunal decision, *All Seasons Mushrooms Inc. (Re)*, 2018 BCEST 97 ("*All Seasons*"), to argue Champ's PR System was nonetheless non-compliant with s.18(1)(h) of the *Regulation: Appeal Decision* at para. 53.

However, the Appeal Panel was not persuaded by the Director's reliance on *All Seasons*, finding in part that it was factually distinguishable:

> [63] … in this case, the farm workers were provided with a statement regarding the various piece rates for different categories of mushrooms, and were also provided with a minimum wage guarantee, namely, an "average piece rate on poundage picked, which will not average below the minimum piece rate of $0.29c for a pound of Mushroom picked." So far as I can determine, the workers were not promised that they would be paid the higher "formula rates" regardless of their overall productivity. Rather, the workers were only promised that their pay would never fall below $0.29 per pound regardless of the classification of the mushrooms picked. Save for four employees (who were apparently paid less than $0.29 per pound in error, now corrected – see delegate's reasons, page R3), all of Champ's mushroom pickers were never paid less than $0.29 per pound, and about 80% of the time, the workers were paid more than $0.29 per pound.
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> [64] The delegate held, at page R5 of her reasons, that "there is no dispute Champ's records show some grades of mushrooms <u>are paid</u> at a piece rate less than the minimum piece rate permitted by the Regulation" (my <u>underlining</u>). In my view, this observation is inaccurate. The piece work payroll system did not guarantee that the farm workers would be paid the posted rates – and only the posted rates – for each class of mushrooms picked. Rather, the various rates were integral to a *formula* that would be used to derive the worker's earnings in each pay period. I agree with Champ's that these various rates were notional rates, set for purposes of determining the worker's actual earnings in a pay period. The only wage that was absolutely guaranteed (and paid) was a minimum rate of $0.29 per pound. And, of course, the workers could – and most apparently did – earn more than $0.29 per pound in each pay period.
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> [Emphasis in original]

[16] The Appeal Panel distinguished *All Seasons* and specifically noted that the Tribunal member who decided *All Seasons* "rested his decision, at least in part, on his interpretation and application of section 18(2) of the *Regulation*": *Appeal Decision* at para. 74. The Appeal Panel did so in the following manner:

> [74] In *All Seasons* the Member also rested his decision, at least in part, on his interpretation and application of section 18(2) of the *Regulation:*
>
> > 18 (2) Each employer of farm workers must display, in a location where they can be read by all employees, notices stating the following:
> >
> > (a) the volume of each picking container being used;
> > (b) the volume or weight of fruit, vegetables or berries required to fill each picking container;
> > (c) the resulting piece rate.

> The Member noted (at para. 47) that "the objection of [section 18(2)] is not achieved if the 'resulting piece rate' is uncertain because it can be affected by some undefined "averaging" calculation. In this case, the delegate did not find that Champ's contravened section 18(2) – monetary penalties were issued only with respect to section 27 of the *ESA* and section 18(1)(h) of the *Regulation*. Further, as noted above, the "averaging" formula used in this case was not undefined. There is no evidence that the mechanics of the formula was not clearly communicated to the workers; indeed, the evidence that is in the record suggests precisely the opposite (consistent with section 2(d) of the *ESA*).
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> [75] In my view, there are important differences between the facts in this case and those in *All Seasons* thereby justifying different outcomes. Even if one accepts that there are no material factual differences between these two cases, I am not bound by *All Seasons*, and I decline to apply it to this case since I am not persuaded by its underlying fundamental rationale.
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> [76] It may be that Champ's piece work system does not readily lend itself to the worker being able to readily calculate their final piece rate (other than a minimum $0.29 per pound) while the harvesting work is being undertaken. However, as previously noted, the delegate did not find that Champ's contravened section 18(2), and I consider sections 18(1)(h) and 18(2) to be independent obligations in the sense that the contravention of one provision does not inevitably lead to a conclusion that the other provision has been contravened.
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> [Emphasis added.]

C. The Reconsideration Decision

[17] On January 20, 2022, the Director applied to the Tribunal for reconsideration of the *Appeal Decision* under s. 116 of the *ESA* (the "*Reconsideration Application*"), arguing the *Appeal Decision* erred in finding Champ's PR System complies with s. 18(1) of the *Regulation*. On February 24, 2022, Champ's filed their response to the Reconsideration Application ("*Champ's Response*"), and on March 17, 2022, the Director filed her Reply Submissions (the "*Director's Reply*").

[18] On April 8, 2022, the Panel issued the *Reconsideration Decision* allowing the *Reconsideration Application*, cancelling the *Appeal Decision* and confirming the *Determination*. It is this *Reconsideration Decision* that Champ's seeks to be quashed.

[19] The Panel noted that s. 16(1) of the *Act* requires employers to "pay employees at least the minimum wage as prescribed in the *Regulation*", and that for workers who

pick mushrooms, the minimum wage is $0.29 per pound: *Reconsideration Decision* at para. 31.

[20] The Panel set out s. 18(2) of the *Regulation (Reconsideration Decision* at para. 32) and then stated:

> [33] The issue before us is whether the legislative regime allows an employer to calculate the minimum wage for farm workers employed on a piece work basis on a daily, weekly, or pay-period basis.
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> [34] It is the Panel's view that the Tribunal's reasoning in *All Seasons* most closely reflects the intention of the legislature; that is, the minimum wage provision for farm workers employed on a piece work basis is based on a unit of volume or weight picked (in this case, the unit is weight). That unit represents the performance of work for which the worker is entitled to a wage, and farm workers employed on a piece rate are entitled to the minimum wage for each unit completed. In our view, nothing in section 18(1) of the *Regulation* enables an employer to pay employees on a daily, weekly, or pay-period basis using a formula which deviates from the piece rate prescribed in section 18(1) of the *Regulation*.
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> [35] The Panel agrees that the methodology employed by Champ's, that is, the "averaging" of pounds picked based on a formula using "notional" values, does not meet the requirements of section 18(1)(h). As found by the Tribunal in *All Seasons*, "a daily 'averaging' of all piece rates logically requires the higher piece rate be reduced at the expense of ensuring the sub-minimum wage piece rate" and
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> > effectively undermines section 18(2) which requires an employer of farm workers employed on a piece work basis to display the volume of each picking container, the volume or weight required to fill each picking container, and the resulting piece rate. The objective of that provision is not achieved if the "resulting piece rate" is uncertain because it can be affected by some undefined "averaging" calculation.
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> [36] Member Thornicroft [the Appeal Panel] distinguished *All Seasons* in part because Member Stevenson [the *All Seasons* Panel] was [skeptical] that the workers in *All Seasons* were aware of the "averaging" formula (see [Appeal] Decision, para. 73). Member Thornicroft found that where the employment contact expressly referred to the averaging formula, it was both no longer opaque, but it was "sensible" since it enabled workers to "adjust their work habits in order to harvest the highest valued mushrooms".
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> [37] The Panel finds that Champ's contract averaging formula, whether or not the workers consented to it, does not comply with the requirements of section 18(2). It is impossible for an employer to comply with section 18(2) using this formula. An employer's obligations under subsection 18(2) are not just *conjunctive* but also *mandatory*; the employer "must display" this information in a location all employees can read. If premium mushrooms have a fluctuating rate based on "averaging", it matters not whether or not the

piece work system is opaque or transparent to workers, it is impossible for the employer to post the "piece rate" in accordance with subsection 18(2).

[38] Section 18(1) cannot be read independently of section 18(2). It is true that Champ's employees will never get less than the minimum of $0.29 a pound for any mushrooms they pick because, as Member Thornicroft pointed out:

> …the employment contract specifically states that the per pound rate is an 'average' (the average being calculated based on both higher and lower notional rates which vary depending on the class of mushroom harvested), and further states that workers will be paid at least the minimum rate of $0.29 'for a pound of Mushroom picked'.

[39] However, an employer's obligation under section 18(2) (c) is to provide employees advance notice of "the resulting piece rate" of any products they pick listed in section 18(1). The language of section 18(2)(c) does not enable employers to display notices setting out conditional or "notional rates" of the product to be picked that may be later adjusted up or down based on the quality of product they pick. To interpret this provision otherwise would render the requirements of section 18(2)(c) meaningless since the notional rate for the higher quality, higher notional rate product would never be accurate and would always fluctuate where the employee also picks lower quality, lower notional rate product. The employer would be able to adjust the higher notional rates down to mitigate the below-minimum rate of the lower quality product picked at any subsequent time.

[40] Champ's payment system simply does not allow any employee to know, in advance, the "resulting piece rate" they will get for any higher category mushrooms with higher notional rates if they also pick low quality mushrooms with below minimum notional rate.

[41] The Tribunal must apply the legislation as it is written, not as it may wish it to be, or what it believes might "make better sense". As a Reconsideration Panel of this Tribunal stated, "Principles of statutory interpretation are not licence for [a] Tribunal to ignore the plain meaning of the words of a statute and substitute its view of legislative intent based solely on that body's judgement about what is 'fair', 'logical' or 'rational', or what it 'should be.'" (*Re Mattson*, Reconsideration Decision BC EST #RD647/01).

[42] While Champ's piece rate system may be critical to its profitability or necessary for "incentivizing" and rewarding harvesting behavior among its employees, the Panel finds that this system does not comply with the mandatory requirements of the section 18(2) of the *Regulation*.

[43] Absent legislative amendments, an employer has no discretion or any flexibility to avoid this requirement, even if the employer effectively complies with the minimum piece rate payment under its averaging formula. If the legislature wanted to allow a flexible averaging system using notional values, in the Panel's view, the legislature would have done so expressly.

[44] While Champ's contracts of employment assure its employees that their wages will never be below the minimum wage prescribed in the *ESA*, the fact that the wage is conditional contravenes section 18(2)(c) of the *Regulation*.

[21] The Panel clearly found that the PR System breached s. 18(2)(c) of the *Regulation.*

[22] Champ's seeks to have the *Reconsideration Decision* quashed, and the *Appeal Decision* restored. In the alternative, they seek to have the *Reconsideration Decision* quashed, and the matter remitted to a freshly constituted reconsideration panel of the Tribunal.

V. STANDARD OF REVIEW

[23] There was no dispute that this judicial review was being brought from the *Reconsideration Decision*. The law is clear that where a party has taken advantage of a reconsideration process, judicial review must be of the final decision made by the administrative decision maker. *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para. 40 [*Yellow Cab*].

[24] The parties are in agreement that two standards of review apply on this judicial review:

a) in determining whether the Panel applied the common law rules of natural justice and procedural fairness appropriately, the *Reconsideration Decision* is reviewable on the standard of fairness; and

b) that the substance of the *Reconsideration Decision* is reviewable on the standard of patent unreasonableness.

[25] With respect to whether the Panel applied the common law rules of natural justice and procedural fairness appropriately, s. 58(2)(b) of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 [*ATA*] provides that "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly". Where "the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law": *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at

para. 35. See also *Dhanji v. The Owners, Strata Plan LMS 2472,* 2021 BCSC 284 at para. 28.

[26] No deference is owed to a tribunal on matters of procedural fairness and natural justice. Such matters are reviewed on the standard of fairness, which is equivalent or akin to a standard of correctness in its lack of deference: *Malagoli v. North Vancouver (City),* 2021 BCSC 520 at para. 37 [*Malagoli*]; *Sebastian v. Vancouver Coastal Health Authority,* 2019 BCCA 241 at paras. 29–30; *Technical Safety BC v. Simply Green Home Services (BC) Inc.,* 2020 BCSC 2157 at paras. 43–44. The task of the reviewing court is to assess whether the decision maker correctly applied the principles of natural justice and procedural fairness: *Malagoli* at para. 37.

[27] While Champ's initially advanced the argument that the standard of review for the substance of the *Reconsideration Decision* was reasonableness, they abandoned this position and the parties agree that the substance of the *Reconsideration Decision* is reviewable on the standard of patent unreasonableness. Section 110(1) of the *ESA* contains a strong privative clause, and gives the Tribunal the "exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13". Section 110(2) of the *ESA* provides that a "decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court".

[28] Section 103 of the *ESA* provides that s. 58 of *ATA* applies. Specifically, s. 58(1) of the *ATA* provides that on a judicial review proceeding from a tribunal with a privative clause, "the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction". Section 58(2)(a) provides that in such a judicial review proceeding "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable": see also *Cariboo Gur Sikh*

Temple Society (1979) v. British Columbia (Employment Standards Tribunal), 2019 BCCA 131 at paras. 22–23 [*Cariboo*].

[29] For the purpose of s. 58(2)(a), s. 58(3) provides that a discretionary decision is patently unreasonable if the discretion:

a) is exercised arbitrarily or in bad faith,
b) is exercised for an improper purpose,
c) is based entirely or predominantly on irrelevant factors, or
d) fails to take statutory requirements into account.

[30] This Court has consistently afforded a high degree of deference to the Tribunal's interpretation and application of the *ESA*: see, for example, *Kamloops Golf & Country Club v. BC (Director of Employment Standards) et al,* 2002 BCSC 1324 at para. 25. Questions involving the interpretation and application of the *ESA* are matters at "the heart of the jurisdiction" of the Tribunal: *Canwood International Inc. v. Bork*, 2012 BCSC 578 at para. 104.

[31] Patent unreasonableness is the most deferential standard of judicial review: *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review* Board, 2022 BCCA 10 at paras. 130 [*The College of Physicians and Surgeons*], leave to SCC ref'd, 40106 (24 November 2022); *Team Transport Services Ltd. v. Unifor*, *Local No. VCTA,* 2021 BCCA 211 at para. 28 [*Team Transport BCCA*]; *The Owners, Strata Plan VR 1120 v. Mitchinson*, 2022 BCSC 2054 at para. 47 [*Mitchinson*]. A decision is not patently unreasonable unless it is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand": *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147 at para. 17, leave to SCC ref'd, 40239 (9 February 2023) [*Beach Place Ventures*]; *Cariboo* at para. 24.

[32] In *Beach Place Ventures,* our Court of Appeal referred to and adopted the decision of Justice Saunders in *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152 [*Red Chris Development*] for an

explanation of the nature of the review undertaken pursuant to a judicial review based upon the patently unreasonable standard:

> [30] A useful explanation of patent unreasonableness is found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229):
>
> > [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan [Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.
> > The Court has been clear that the common law standard of reasonableness articulated in *Vavilov* has not impacted the meaning of "patent unreasonableness" for the purposes of s. 58 of the *ATA*: see *Beach Place Ventures* at para. 16; *The College of Physicians and Surgeons* at paras. 129–131; *Red Chris Development* at para. 29; *Mitchinson* at paras. 47–49; *Yellow Cab* at para. 35; *College of New Caledonia v. Faculty Association of the College of New Caledonia*, 2020 BCSC 384 at para. 33. The definition of the patently unreasonable standard has remained stable and was not altered by *Vavilov.*

[33] However, Champ's argues that notwithstanding the meaning of the standard was not impacted by *Vavilov,* I must nonetheless apply a reasons-first review when considering whether the *Reconsideration Decision* is patently unreasonable. I agree. While the function of the reviewing court applying the standard of review of patent unreasonableness is not to substitute its decision for that of a tribunal, the decision must nonetheless be subject to careful scrutiny: *Guevara v. Louie*, 2020 BCSC 380 at para. 47. The Court must evaluate the tribunal's reasoning, and determine whether the decision is defensible: *Team Transport Services Ltd. v. Unifor,* 2020 BCSC 91 at paras. 18–19 [*Team Transport* BCSC]; aff'd *Team Transport BCCA*.

The reasoning of the tribunal must demonstrate transparency, intelligibility, and the justification relied upon: *Provincial Health Services Authority v. Campbell*, 2021 BCSC 823 at para. 61. This Court has repeatedly concluded that when considering the tribunal's reasons, a reasons-first review is required: *Guevara* at para. 48; *University of British Columbia Okanagan v. Hale*, 2021 BCSC 729 at para. 97; *Team Transport BCSC* at paras. 18–19; *Connors v. Maclean*, 2022 BCSC 1990 at para. 19–20. Even on the standard of patent unreasonableness, the tribunal's reasons must "meaningfully account for the central issue and concerns raised by the parties": *Guevara* at para. 48. However, that does not mean that a decision maker must address every argument made to them, but rather, only the central questions and arguments that are understood to be the issue: *Beach Place Ventures* at para. 79; *Vavilov* at para. 91; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para. 16.

VI. ISSUES

[34] Champ's argues that there were numerous errors made by the Panel in the *Reconsideration Decision*, as follows:

a) the Panel failed to apply the common law rules of natural justice and procedural fairness, and breached the *audi alteram partem* principle, in considering and ultimately finding that Champ's breached s. 18(2) of the *Regulation*;

b) accordingly, the conclusion of the Panel regarding s. 18(2) of the *Regulation* was patently unreasonable, as it was neither lawfully, nor fairly, an issue;

c) the Panel misstated, and misapplied, the test for reconsideration;

d) the Panel failed to address or acknowledge what Champ's says were incorrect factual conclusions, as corrected by the *Appeal Decision* and as identified by Champ's, and so for that reason the *Reconsideration Decision* was patently unreasonable; and

e) the determination of the Panel, in both their conclusion and their analysis regarding s. 18(1) of the *Regulation,* as set out in the *Reconsideration Decision*, was patently unreasonable.

VII. ANALYSIS

[35] Champ's takes the position that the *Reconsideration Decision* is patently unreasonable and so should be set aside. They argue that the Panel failed to apply the common law rules of natural justice and procedural fairness, in basing the *Reconsideration Decision* upon an analysis of s. 18(2) of the *Regulation*, when that was not the basis for the *Determination* or the *Appeal Decision*. Champ's argues that "the Panel failed to adequately consider the purposes of the relevant statutory framework; relied on erroneous interpretations of relevant case law; failed to consider relevant facts and argument; failed to identify errors in the *Appeal Decision*; and demonstrated a closed mind".

[36] While Champ's acknowledges that the usual remedy for a breach of procedural fairness is a new hearing, Champ's says that in these circumstances it would be appropriate for me to use my discretion and reinstate the *Appeal Decision.* Champ's argues that the Panel was unable to find a breach of s. 18(1) of the *Regulation*, and as a result of that, the Panel fundamentally "moved the goal posts" and inappropriately introduced the new issue of compliance with s. 18(2) of the *Regulation*. Because of this, Champ's says, in all of the circumstances, it would be appropriate for me to refuse to remit this to a newly constituted reconsideration panel of the Tribunal. Rather, they ask me to exercise my discretion to conclude there is an inevitable result and accordingly reinstate the *Appeal Decision*.

A. Did the Panel fail to apply the common law rules of natural justice and procedural fairness, and breach the *audi alteram partem* principle

[37] The *audi alteram partem* principle requires that a party know or understand the case they have to meet, and have an opportunity to be heard and respond to the case before a decision is made: *Malagoli* at para. 38; *Patton v. British Columbia Farm Industry Review Board*, 2020 BCSC 553 at para. 63; *AB v. Alberta (Persons*

with Developmental Disabilities Central Region), 2018 ABQB 181 at paras. 147–149; *Marchant v. British Columbia (Workers' Compensation Appeal Tribunal),* 2014 BCSC 1194 at para. 57. As the Court of Appeal recently summarized, "[i]t is a fundamental principle of administrative law that a person must know the case they have to meet, and be provided with an opportunity to answer it": *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia,* 2022 BCCA 247 at para. 74 *("Nova-BioRubber").*

[38] Champ's argues that the Panel determined that Champ's breached s. 18(2) of the *Regulation,* and fundamentally based its determination on the finding of that breach, without notice to Champ's, and without providing Champ's with the opportunity to make submissions regarding s. 18(2). They say in doing so, the Panel failed to apply the common law rules of natural justice and procedural fairness. They reiterate that no deference is to be afforded to the Panel in this matter, and the necessary determination I must make is whether the Panel acted fairly in doing so.

[39] A careful review of the three decisions makes clear that neither the *Determination* nor the *Appeal Decision* found Champ's had breached s. 18(2) of the *Regulation,* nor dealt in any substantive manner with s. 18(2).

[40] The *Determination* neither referenced, nor referred to, s. 18(2) of the *Regulation*.

[41] Likewise, the *Appeal Decision* did not make any finding with respect to s. 18(2) of the *Regulation*; and in fact, specifically noted that the *Determination* "did not find that Champ's contravened section 18(2), and I consider sections 18(1)(h) and 18(2) to be independent obligations in the sense that the contravention of one provision does not inevitably lead to a conclusion that the other provision has been contravened": *Appeal Decision* at para. 76.

[42] Then, in the *Reconsideration Application*, the Director sought to have the Panel reconsider the *Appeal Decision*, and framed the issue as "[w]as the [Appeal Panel] correct in finding the Delegate erred in interpreting s. 18(1)(h) of the

Regulation?": *Reconsideration Application* at page 3. The Director set out s. 16(1) of the *ESA* and s. 18(1) of the *Regulation*, and concluded with the position that "The Director submits that the decision of the Appeal Panel in respect of s. 18(1) of the *Regulation* should be cancelled and the decision of the Delegate confirmed": *Reconsideration Application* at para. 25. While in the *Reconsideration Application* the Director did refer to portions of *All Seasons* in which it was held that the piece rate system in that case effectively undermined s. 18(2) of the *Regulation*, the Director did not advance the argument that Champ's PR System breached s. 18(2) of the *Regulation.* Rather, the Director argued:

> 22. In *All Seasons*, the panel reasoned that the policy goals of s. 18(2) would be undermined if All Seasons' arguments were accepted. The Same reasoning applies in this case. Section 18(2) requires employers such as Champ's to display notices indicating the volume of each picking container, the volume or weight required to fill each picking container, and the resulting piece rate. The objective of that provision is not achieved if the "resulting piece rate" is uncertain because it can be affected by an after the fact "averaging" calculation.
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> 23. The Appeal Panel asserted that this reasoning did not apply to Champ's situation because: "In this case, the delegate did not find that Champ's contravened section 18(2) – monetary penalties were issued only with respect to section 27 of the ESA and section 18(1)(h) of the *Regulation*" (Appeal Decision para. 74). However, that same argument was made in *All Seasons* and rejected by the panel:
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> > 49. While All Seasons says no contravention of section 18(2) was found, that does not prevent considering that provisions to test the correctness of the Director's approach to section 18(1) of the *Regulation*.

[43] I accept Champ's argument that neither the *Determination* nor the *Appeal Decision* made a finding that Champ's had breached s. 18(2) of the *Regulation*, nor engaged in any substantive discussion with respect to whether Champ's PR System breached s. 18(2). Further, I accept that nowhere in the *Reconsideration Application* did the Director raise a breach of s. 18(2) of the *Regulation* as a new issue. Likewise, the Director did not mention s. 18(2) of the *Regulation* in the *Director's Reply*.

[44] Further, I find that in *Champ's Response*, Champ's noted that the Director had identified s. 16(1) of the *ESA* and s. 18(1) of the *Regulation*, as being at issue in

the reconsideration. Champ's made no submissions to the Panel regarding s. 18(2) of the *Regulation.*

[45] The Tribunal admits that the Panel did not seek submissions on s. 18(2) of the *Regulation* from Champ's "on the question of whether its PR System was compliant with section 18(2) before issuing the Reconsideration Decision".

[46] The Director also admits that the Panel determined that Champ's was not compliant with s. 18(2) of the Regulation without seeking submissions from Champ's. However, the Director argues that in the *Reconsideration Application* the argument was advanced that s. 18(1) of the *Regulation* should be interpreted in light of s. 18(2). The Director stresses their position was that in *All Seasons*, the panel reasoned that the policy goals of s. 18(2) would be undermined if All Seasons' argument were accepted, and that the same reasoning should apply in this case. The Director argues that Champ's accordingly did have an opportunity to respond to the Director's argument that s. 18(1) of the *Regulation* must be interpreted and applied in light of s. 18(2). The Director accordingly says Champ's was not denied a fair opportunity to address the issues that were raised on reconsideration, including the question of whether s. 18(1) must be interpreted in light of s. 18(2) of the *Regulation.*

[47] The issue before me is not whether the Director was entitled to make such an argument, and Champ's correctly acknowledges this was an argument the Director was entitled to make. Rather, the issue is whether a breach of natural justice and procedural fairness arose in the Panel's decision to consider the issue of whether Champ's had breached s. 18(2) of the *Regulation,* and ultimately determine that such a breach had occurred, when that issue had not been previously raised before the earlier decision makers, and so was a new issue raised for the first time before the Panel. Champ's argues that the Panel went significantly beyond the Director's submissions regarding the purported relevance of s. 18(2) of the *Regulation* in interpreting s. 18(1). I agree, for the following reasons.

[48] The Supreme Court of Canada confirmed in *R. v. Mian*, 2014 SCC 54 [*Mian*] that an appellate body should only raise a new issue when failing to do so would risk an injustice: at paras. 41, 43–48. Then, if an appellate body finds it would not risk an injustice, they must then consider whether they have the jurisdiction to consider the issue and there is a sufficient basis in the record before them upon which to resolve the issue: *Mian* at paras. 50–51. They must also consider whether, in the circumstances, it is possible to raise the new issue without causing prejudice to either party, even with the aid of procedural safeguards: *Mian* at para. 52. If an appellate body determines it is appropriate to raise a new issue, then it must both advise the parties that it has identified a potential issue, and must ensure that they are sufficiently informed to prepare and respond to the issue: *Mian* at paras. 53–59. These principles are also applied outside the criminal context, and are applicable in the administrative context: see *Ching v. Canada (Citizenship and Immigration*), 2015 FC 725 at paras. 66, 71. Further, in *Vavilov*, the Supreme Court of Canada explained that where a duty of procedural fairness arises, "the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances": para. 77. While the approach in *Mian* was directed at appeal courts, the same concepts should be approached in a flexible and contextually appropriate manner to appeals and reconsiderations from administrative decision makers. The ultimate focus must be on ensuring procedural fairness to all of the parties.

[49] I am satisfied that in all of the circumstances, the Panel breached Champ's rights to procedural fairness and natural justice for the following reasons.

[50] First, the Panel failed to consider whether raising the new issue of a breach by Champ's of s. 18(2) of the *Regulation* could properly be considered by them in the manner in which they chose to proceed. I am satisfied that in reaching the conclusion that Champ's breached s. 18(2) of the *Regulation* the Panel was, in fact, considering a new issue which had not been raised in the *Determination*, nor considered in the *Appeal Decision*. Given neither the *Determination* nor the *Appeal Decision* found such a breach had occurred, I do not accept the Director's argument that the *Reconsideration Application* made clear their position that s. 18(1) of the

Regulation must be considered in light of s. 18(2), nor made clear to Champ's that the Director was advancing that as a new issue and a potential new breach of the *Regulation* by Champ's. While the *Reconsideration Application* did make clear that the Director's position was that *All Seasons* properly applied, and that the similar reasoning should apply, the Director did not seek leave to have a new issue determined by the Panel, nor clearly characterize any alleged breach of s. 18(2) of the *Regulation* as a new issue.

[51] Second, I find there is no evidence in the *Reconsideration Decision* that the Panel considered whether they could raise this as a new issue without risking an injustice, nor that they considered whether they had jurisdiction to do so, nor whether there was a sufficient basis in the record before them upon which to resolve that issue.

[52] Further, assuming for the sake of argument that the Panel did reach that decision without expressly addressing it and without setting out their reasons for reaching that conclusion, the Panel also failed to advise Champ's that it had identified a potential new issue, and failed to provide them with an opportunity to respond to that issue before they made their decision. In doing so, they breached the *audi alteram partem* principle.

[53] As the issue of whether Champ's breached s. 18(2) of the *Regulation* was not properly before the Panel in a manner in accordance with the rules of procedural fairness and natural justice, I likewise conclude that as a result, their substantive determination that the PR System was not in compliance with s. 18(2) was patently unreasonable in these circumstances.

B. Given my determination that the Panel breached Champ's right to procedural fairness, what is the appropriate remedy?

[54] The parties are in agreement that the usual remedy following a breach of procedural fairness is an order remitting the matter back to the administrative decision maker, unless there are exceptional circumstances: *Nova-BioRubber* at paras. 67–68; 82–83. *Vavilov* makes clear that the courts should respect the

legislature's intention to entrust the matter to the administrative decision maker but that it may be appropriate to decline to remit a matter to the decision maker if a particular outcome is inevitable, and remitting the case would serve no purpose: at para. 142; see also *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 51.

[55] While Champ's acknowledges that the usual remedy for a breach of procedural fairness is for an order to be made for a new hearing, they argue that the Panel's reasoning discloses that in effect, the Panel based its decision not upon a breach of s. 18(1), but rather of s. 18(2), of the *Regulation*, and they allege that this determination was made as the Panel was unable to find a breach of s. 18(1) of the *Regulation*. They argue that as a result, the Panel introduced s. 18(2) of the *Regulation* to justify overturning the *Appeal Decision*. Their position is that the decision of the Panel with respect to s. 18(2) of the *Regulation* was fatally flawed, as it was inappropriately raised as a new issue and so they say the result as set out in the *Appeal Decision* is inevitable, as the Panel could not find any way to overturn the *Appeal Decision* based upon the record as it was before them. Accordingly they seek a decision setting aside the *Reconsideration Decision* and restoring the *Appeal Decision,* as they say that the *Appeal Decision* clearly sets out the inevitable outcome.

[56] Notwithstanding my determination that the Panel raised the new issue of a breach of s. 18(2) of the *Regulation* in a manner that breached the rules of procedural fairness and natural justice, I am not satisfied that there are exceptional circumstances present which would justify my conclusion that only one outcome is legally permissible before a newly constituted reconsideration panel. I stress that any such panel must consider the *Reconsideration Application* in a manner that accords with the rules of procedural fairness and natural justice, particularly if they are going to consider the new issue of whether the PR System breaches s. 18(2) of the *Regulation.* That includes a contextually appropriate consideration of the factors identified by the Supreme Court of Canada in *Mian,* and a determination of whether:

a) the consideration of whether Champ's breached s. 18(2) of the *Regulation* would risk an injustice;

b) if not, whether the panel has the jurisdiction to consider the issue, and whether there is a sufficient basis in the record before them upon which to resolve the issue;

c) whether, in the circumstances, it is possible to raise the new issue without causing prejudice to either party, even with the aid of procedural safeguards; and

d) if they do decide to consider such a new issue, ensuring that all parties are sufficiently informed so that they may prepare and respond to the issue.

[57] However, I am satisfied that the outcome properly depends upon the analysis and findings of a new panel, which are matters which properly fall within the Tribunal's specialized expertise and exclusive jurisdiction under the *ESA.* Further, I am satisfied that *Champ's* argument that pursuant to the combined effect of ss. 112(1) and 116(1) of the *ESA*, the Panel was limited to reconsidering the *Appeal Decision* on the basis of alleged errors of law, and had no jurisdiction to consider any new issue (such as a breach of s. 18(2) of the *Regulation*), is an argument that should properly be made to, and determined by, a newly constituted reconsideration panel. It would be inappropriate in all of these circumstances for me to assume that a newly constituted panel would inevitably reach the same conclusion as set out in the *Appeal Decision*, and I decline to do so.

[58] Given this determination, I am persuaded by the Tribunal and the Director's arguments that it is not appropriate for me to consider the balance of Champ's arguments as to the other alleged deficiencies of the *Reconsideration Decision*. In these circumstances, I am satisfied it would serve no further purpose, and in fact it would be inappropriate of me to do so.

VIII. REMEDY AND DISPOSITION

[59] For the reasons already set out, I am satisfied that the *Reconsideration Decision* was made in a manner that was procedurally unfair, and so should be set aside. The *Reconsideration Application* filed by the Director is to be heard by a freshly constituted panel of the Tribunal. For clarity, the panel of the Tribunal is to consider the *Reconsideration Application* with the benefit of these reasons for judgment, and in particular, with reference to my comments about the necessity that their determination be made in a manner that is procedurally fair and accords with the rules of natural justice. No award is made as to the costs of this judicial review.

"Blake, J."