

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**1250264 ONTARIO INC.**

**APPLICANT**

**PET VALU CANADA INC.**

**RESPONDENT**

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**APPLICATION FOR LEAVE TO APPEAL**

**(Filed by 1250264 Ontario Inc.)**

*(Pursuant to Rule 25 of the Rules of the Supreme Court of Canada)*

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**APPLICANT'S MEMORANDUM OF ARGUMENT**

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## PART I - OVERVIEW OF ISSUES AND STATEMENT OF FACTS

### A. Overview

1. This franchise class action dispute follows a full merits determination by the Superior Court of Justice on competing motions for summary judgment, and a reversing decision by the Ontario Court of Appeal.

2. After considering an extensive factual record, the motion judge, Justice Belobaba, made clear and damning findings of fact against the franchisor, Pet Valu. He found the franchisor “never told its franchisees the truth”<sup>1</sup> about issues that were “fundamental”<sup>2</sup> to the relationship. He found that the franchisor “decided for its own purposes to keep [...] information to itself and not tell its franchisees,”<sup>3</sup> mirroring a similar finding made by Justice Strathy (as he then was) when he case-managed this case in 2011.<sup>4</sup> On the basis of the franchisor’s dishonesty, the motion judge found that it had breached the duty of fair dealing in Ontario’s *Arthur Wishart Act (Franchise Disclosure) 2000* (the “Act”).<sup>5</sup>

3. The Court of Appeal did not disturb any of the motion judge’s findings of fact, including his findings of dishonesty. It nonetheless reversed his decision because it found that the duty of fair dealing did not obligate a franchisor to provide “ongoing disclosure” to its franchisees. The decision in this case was heralded by law firms as having “put a leash” on the duty of good faith and fair dealing in Ontario<sup>6</sup>; being “good news for Ontario franchisors”<sup>7</sup>; and a “significant decision for franchisors.”<sup>8</sup>

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<sup>1</sup> *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONSC 29 (“Disclosure summary judgment reasons”) at para. 47.

<sup>2</sup> *Ibid.*, para. 54.

<sup>3</sup> *Ibid.*, para. 51.

<sup>4</sup> See endorsement of Justice Strathy dated June 9, 2011 (*1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871), para. 18.

<sup>5</sup> S.O. 2000, c. 3.

<sup>6</sup> See online:

<[http://www.casselsbrock.com/CBNewsletter/Court\\_of\\_Appeal\\_Dismisses\\_Pet\\_Valu\\_Class\\_Action\\_and\\_Puts\\_a\\_Leash\\_on\\_the\\_Duty\\_of\\_Good\\_Faith\\_and\\_Fair\\_Dealing](http://www.casselsbrock.com/CBNewsletter/Court_of_Appeal_Dismisses_Pet_Valu_Class_Action_and_Puts_a_Leash_on_the_Duty_of_Good_Faith_and_Fair_Dealing)>

<sup>7</sup> See online: <<https://www.dlapiper.com/en/canada/insights/publications/2016/02/good-news-for-franchisors/>>

<sup>8</sup> See online: <<https://www.osler.com/en/resources/critical-situations/2016/court-of-appeal-dismisses-pet-valu-franchisee-clas>>

4. The decision stands in contrast to years of jurisprudence, including from the Ontario Court of Appeal, holding that non-disclosure of material information by a franchisor *is* a breach of the duty of fair dealing. The decision impacts the duty of fair dealing in Ontario as well as five other provinces which have similar franchise legislation.

5. The decision also has implications beyond franchise disputes. In *Bhasin v. Hrynew*,<sup>9</sup> this Court held that the duty of honesty that is included in good faith “means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.”<sup>10</sup> The Court of Appeal in this case, on the other hand, found that a franchisor that misleads its franchisees about facts that are crucial to their businesses does not contravene the duty of fair dealing which expressly includes the duty of good faith.<sup>11</sup> This is inconsistent with *Bhasin* and threatens the development of good faith throughout Canada.

6. The Court of Appeal correctly held in this case that the Act does not impose a duty of continuous disclosure akin to securities legislation. However, that is not what the franchisees asserted in this case. The franchisees never asserted that Pet Valu had a duty of continuous disclosure. The franchisees asserted, and the motion judge found, that Pet Valu deliberately concealed the fact that the substantial volume rebates that were promised to the franchisees in their franchise agreements and in their pre-contractual disclosure document never existed. They were not real.

7. Pet Valu concealed this fact when the plaintiff retained counsel before this lawsuit to request information from Pet Valu about whether it received the volume rebates referenced in the franchise agreement. It concealed this fact for years during this litigation when the franchisees brought and certified this class action against Pet Valu for failing to pass on volume rebates. And it concealed this fact in response to a direct question about volume rebates put to Pet Valu by

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<sup>9</sup> 2014 SCC 71 (“*Bhasin*”).

<sup>10</sup> *Ibid.*, para. 73.

<sup>11</sup> Subsection 3(3) of the Act states: “For the purposes of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.”

Justice Strathy on a prior motion. This lack of candour so surprised Justice Strathy that he remarked in his decision that Pet Valu's answer was "incredible."<sup>12</sup>

8. In the 16 years since the Act came into force, courts have repeatedly emphasized that the purpose of the Act is to redress information imbalances between a franchisor and its franchisees, and to allow franchisees to make informed decisions. Until this case, courts had given a broad and generous interpretation to this remedial legislation. The Court of Appeal's parsimonious approach to good faith and fair dealing in this case signals a reversal of this trend. This was recognized by the firms which practice in this area in their blogs commenting on the case. Indeed, Pet Valu's counsel announced that the decision puts the duty of fair dealing "on a leash."<sup>13</sup>

9. Franchise law now exists in six provinces. At the core of every franchise statute in Canada is a duty of fair dealing and good faith imposed on each party to the franchise agreement. The fair dealing duty is one of only a handful provisions in the Act that speak to the ongoing relationship between a franchisor and its franchisees during the course of a franchise agreement. It is vital that the duty continue to receive a "broad and generous" interpretation.<sup>14</sup> It must not be curtailed.

10. This Court has not heard a decision involving franchise law issues of any significance since 1975.<sup>15</sup> In the 41 years since, franchising has become ubiquitous throughout Canada. Individuals by the thousands invest their savings, their severance payments or their inheritances in franchises each year. Legislatures throughout Canada have adopted franchise statutes modeled on the Act aimed at curbing potential unfairness inherent in the franchise relationship.

11. This case presents clear and undisturbed factual findings by the motion judge. It presents substantial and conflicting legal reasoning by two levels of court, including that of the motion judge whose writings on the law of good faith were cited approvingly by this court in *Bhasin*.<sup>16</sup>

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<sup>12</sup> See endorsement of Justice Strathy dated June 9, 2011 (*1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871), para. 18.

<sup>13</sup> <[http://www.casselsbrock.com/CBNewsletter/Court\\_of\\_Appeal\\_Dismisses\\_Pet\\_Valu\\_Class\\_Action\\_and\\_Puts\\_a\\_Leash\\_on\\_the\\_Duty\\_of\\_Good\\_Faith\\_and\\_Fair\\_Dealing](http://www.casselsbrock.com/CBNewsletter/Court_of_Appeal_Dismisses_Pet_Valu_Class_Action_and_Puts_a_Leash_on_the_Duty_of_Good_Faith_and_Fair_Dealing)>

<sup>14</sup> *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para. 26 ("Salah")

<sup>15</sup> *Jirna Ltd. v. Mr. Donut of Canada Ltd.* [1975] 1 S.C.R. 2 ("Jirna").

<sup>16</sup> *Bhasin, supra* at paras. 36 & 42.

This is an appropriate case in which to consider important franchise law issues and to advance the law of good faith.

**B. Background facts and decisions below**

12. The claim was issued in 2009 and was certified as a class proceeding in 2011 by Justice Strathy (as he then was).<sup>17</sup> Pet Valu sought and was denied leave to appeal from certification.

13. The certified questions revolved around whether Pet Valu was obliged to share and if it appropriately shared with franchisees rebates that it represented it obtained from its suppliers.<sup>18</sup> There were questions regarding whether Pet Valu breached the franchise agreement which required such rebates to be shared with the franchisees, whether Pet Valu breached the statutory or common law duties of good faith by failing to disclose information about volume rebates, and the quantum of damages.<sup>19</sup>

14. After certification, a contested motion was heard by Justice Strathy in 2011 regarding the validity of releases Pet Valu sought to obtain from certain franchisees.<sup>20</sup> The plaintiff objected to the requested releases because they sought to require the franchisees to give up any entitlement to make a claim in the class action, without any disclosure of information about what they would be giving up by releasing their rights.<sup>21</sup>

15. Similar to the findings later made by Justice Belobaba in the summary judgment decision, Justice Strathy found that Pet Valu “will not disclose the quantum of Volume Rebates it has received from suppliers or the proportionate share to which the franchisees might be entitled, should this action succeed.”<sup>22</sup> Pet Valu stated it did not have “ready access” to the information,<sup>23</sup> which Justice Strathy found to be “incredible.”<sup>24</sup>

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<sup>17</sup> 2011 ONSC 287.

<sup>18</sup> See order of the Superior Court of Justice dated June 29, 2011.

<sup>19</sup> *Ibid.*

<sup>20</sup> See endorsement of Justice Strathy dated June 9, 2011 (2011 ONSC 3871).

<sup>21</sup> *Ibid.*, para. 18.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

16. In 2012, the parties debated a separate motion involving the class action opt-out process. Justice Strathy found that the opt-out process had been tainted by a partisan, third party website containing inaccurate information about the class action and ordered a new opt-out process to be held.<sup>25</sup> The Court of Appeal reversed.<sup>26</sup>

17. Following Justice Strathy's appointment to the Ontario Court of Appeal in 2012, Justice Belobaba became the designated class proceedings judge. Both parties brought summary judgment motions.

18. The summary judgment process was actively managed by Justice Belobaba. Before hearing the motions, Justice Belobaba presided over numerous case conferences, a production motion and a refusals motion.<sup>27</sup> Leading up to the summary judgment motions, Justice Belobaba analyzed the parties' pleadings, reviewed and considered a sampling of the representative evidence, decided the scope of relevant evidence and questions, and rendered decisions regarding the order in which the motions would proceed. In short, Justice Belobaba followed this Court's exhortations in *Hryniak v. Mauldin*<sup>28</sup> to use tools at his disposal to efficiently and fairly decide cases using summary judgment.

19. The motions for summary judgment were heard in two separate hearings in October 2014 and December 2014. In the first set of hearings, Justice Belobaba considered common issues involving breach of contract. The "core issue" was "whether the defendant breached its contractual duty to the class members at any time during the class period by failing to share Volume Rebates with them."<sup>29</sup> In 2012, Pet Valu disclosed for the first time in its summary judgment materials that it received virtually no volume rebates from suppliers.

20. His Honour found that the franchise agreements required Pet Valu to reasonably share volume rebates with the franchisees,<sup>30</sup> but concluded there was no breach of contract because the insignificant amounts of volume rebates that it did receive – a "meager 1.3 per cent of net store

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<sup>25</sup> *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2012 ONSC 4317.

<sup>26</sup> *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279.

<sup>27</sup> See e.g. endorsements of Belobaba J. dated April 4, 2014 and June 26, 2014 (production motion).

<sup>28</sup> 2014 SCC 7.

<sup>29</sup> *1250264 Ontario Inc. v. Pet Valu Canada*, 2014 ONSC 6056 ("Contract summary judgment reasons"), para. 8.

<sup>30</sup> *Ibid.*, para. 9.

costs”<sup>31</sup> – had been shared with franchisees.<sup>32</sup> The court answered the common issue of whether there was a breach of contract “no,” and adjourned the balance of the motions. Pet Valu did not object to the adjournment or seek to appeal.

21. In the breach of contract decision, His Honour interpreted the recitals in the franchise agreements to “strongly suggest that [Pet Valu] has significant purchasing power”<sup>33</sup> and that it is “able to take advantage of volume discounts offered by suppliers.”<sup>34</sup> None of these findings were appealed.

22. Justice Belobaba held a further two day hearing approximately one month after his contract summary judgment decision to consider the remaining common issues involving the withholding of information about volume rebates. Citing to his earlier contract decision, Justice Belobaba noted “this motion has a number of moving parts.”<sup>35</sup> His Honour found that the franchise agreements held out to the franchisees that they would enjoy “meaningful volume discounts”<sup>36</sup> based on “significant purchasing power”<sup>37</sup> in exchange for buying into the Pet Valu system. His Honour found that this was a “fundamental”<sup>38</sup> promise, but one which was not true. In fact, Justice Belobaba found that Pet Valu “never told its franchisees the truth,”<sup>39</sup> that the volume discounts were “insignificant on an absolute and relative basis,”<sup>40</sup> and that “Pet Valu decided for its own purposes to keep [...] information to itself and not tell its franchisees.”<sup>41</sup> Indeed, there was “no dispute about the fact that this essential piece of information was not disclosed until 2012, well into this litigation.”<sup>42</sup> Justice Belobaba concluded, on the basis of this dishonesty about a fundamental contractual promise, that there was a breach of the obligation of

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<sup>31</sup> *Ibid.*, para. 39.

<sup>32</sup> *Ibid.*, para. 17.

<sup>33</sup> *Ibid.*, para. 10.

<sup>34</sup> *Ibid.*, para. 11.

<sup>35</sup> Disclosure summary judgment reasons, para. 8.

<sup>36</sup> *Ibid.*, para. 25.

<sup>37</sup> *Ibid.*, para. 44.

<sup>38</sup> *Ibid.*, para. 54.

<sup>39</sup> *Ibid.*, para. 47.

<sup>40</sup> *Ibid.*, para. 23.

<sup>41</sup> *Ibid.*, para. 51.

<sup>42</sup> *Ibid.*, para. 49.



fair dealing under s. 3 of the Act that “could result in a significant damages award.”<sup>43</sup> He left the determination of damages to a further hearing. That hearing was stayed pending appeals.<sup>44</sup>

23. The Court of Appeal reversed Justice Belobaba’s granting of judgment in relation to the fair dealing common issues, and dismissed the class action in its entirety.<sup>45</sup> A considerable portion of the Court of Appeal’s reasons is devoted to critiquing Justice Belobaba’s addition of the word “significant” to one of the common issues under consideration.

24. The Court of Appeal also disagreed with Justice Belobaba’s approach to fair dealing under s. 3 of the Act, concluding it “cast the net of s. 3 too widely,”<sup>46</sup> leading to a vague “ongoing duty of disclosure.”<sup>47</sup> The Court of Appeal concluded that representations made by a franchisor in a franchise disclosure document were irrelevant to a breach of the duty of fair dealing, because fair dealing under s. 3 of the Act is limited to the “performance and enforcement” of a franchise agreement. If franchisees were misled by the disclosure document, the Court of Appeal reasoned, this is information “that should have been disclosed before the appellants became franchisees,”<sup>48</sup> which triggers different remedies under the Act.

## PART II - CONCISE STATEMENT OF QUESTIONS IN ISSUE

25. The proposed appeal gives rise to the following legal issues of public importance:

- When is a franchisor required to be honest and candid with its franchisee as part of the statutory duty of fair dealing and the common law duty of good faith?
- When does the duty of honesty include a duty not to mislead?
- Is the duty of fair dealing a codification of the common law or is it “*sui generis* legislation” as found by the Ontario Court of Appeal in *Salah v. Timothy’s Coffees of the World Inc.*<sup>49</sup>

<sup>43</sup> *Ibid.*, para. 51.

<sup>44</sup> Endorsement of Belobaba J., dated March 17, 2015.

<sup>45</sup> *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24 (“Court of Appeal reasons”).

<sup>46</sup> Court of Appeal reasons, para. 56.

<sup>47</sup> *Ibid.*, para. 59.

<sup>48</sup> *Ibid.* (emphasis in original).

<sup>49</sup> *Salah, supra* at para. 26.

**PART III - CONCISE STATEMENT OF ARGUMENT****A. The significance of franchise law in Canada**

26. The Act became law in Ontario in 2000, following consultations and study of the franchise industry going back to 1971.<sup>50</sup> On its introduction, the Government of Ontario stated that “franchising is an important economic activity in this province accounting for almost 40% of all retail sales.”<sup>51</sup> Recently, B.C. explained there was a need for franchise legislation in the province because “franchises are very prevalent in Canadian business. They are estimated to account for 40 per cent of Canadian retail sales and to employ one in every 22 inhabitants of Canada.”<sup>52</sup> Six provinces in Canada now have franchise legislation, including most recently B.C. in 2015.<sup>53</sup> Each contains a virtually-identical expression of a legislative duty of fair dealing, which includes the duty of good faith.<sup>54</sup>

**B. A consistent interpretation of franchise laws**

27. Courts have consistently found that “the purpose of the Act is to protect franchisees” and that “the provisions of the Act are to be interpreted in that light.”<sup>55</sup> The Act is “*sui generis* remedial legislation,” deserving of a “broad and generous interpretation.”<sup>56</sup>

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<sup>50</sup> The Ontario Court of Appeal in *TA&K Enterprises Inc. v. Suncor Energy Products Inc.*, 2011 ONCA 613 cited a 1971 report prepared by S.G.M. Grange, Q.C., entitled “Report of the Minister’s Committee on Franchising” in its decision, describing the report as “a seminal document underlying the Act [...]” (para. 27).

<sup>51</sup> P. Snell and L. Weinberg, eds., *Fundamentals of Franchising – Canada* (American Bar Association, 2005) at p. 162.

<sup>52</sup> See Consultation on a B.C. Franchise Act, available online: <[http://www.bcli.org/sites/default/files/franchise\\_act\\_consultation\\_paper\\_mar13.pdf](http://www.bcli.org/sites/default/files/franchise_act_consultation_paper_mar13.pdf)>.

<sup>53</sup> *Franchises Act*, R.S.A. 2000, c. F-23; *Franchises Act*, S.N.B. 2014, c. 111; *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1; *Franchises Act*, S.B.C. 2015, c. 35 (not yet in force); *The Franchises Act*, C.C.S.M. c. F156; and the Act.

<sup>54</sup> Ontario, s. 3 of the Act: “Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement”; Alberta, s. 7: “Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement”; New Brunswick, s. 3: “Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the franchise agreement”; PEI, s. 3: “Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in the exercise of a right under the agreement”; B.C., s. 3: “Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the franchise agreement, including in the exercise of a right under the franchise agreement”; Manitoba, s. 3: “Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement.”

<sup>55</sup> *405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478 at para. 10.

<sup>56</sup> *Salah, supra* at para. 26.

28. The Ontario Court of Appeal has frequently referred to two themes of the Act: recognition of a power imbalance between franchisors and franchisees, and the need for informed decision-making by franchisees. In *Salah v. Timothy's Coffees of the World*, the Court of Appeal held: "The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance."<sup>57</sup> In *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.*,<sup>58</sup> the Court of Appeal held that "one of the prime purposes of the Act is to obligate a franchisor to make full and accurate disclosure to a potential franchisee so that the latter can make a properly informed decision about whether or not to invest in a franchise."<sup>59</sup>

29. A frequently-cited decision of Justice Winkler (then of the Superior Court) holds that the duty of fair dealing "stems in part from the information imbalance"<sup>60</sup> between franchisors and franchisees.

30. Alberta's franchise legislation has similar purposes to Ontario's. In *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*,<sup>61</sup> the Alberta Court of Appeal held that "the *Franchises Act* goes far beyond franchisors who misstate facts. In particular, the Act devotes a great deal of effort to requiring franchisors to disclose many facts, and to giving remedies for failure to disclose those facts."<sup>62</sup>

### C. The result in this case is contrary to the *Fairview Donut* decision

31. The core issue in this case was simple. The plaintiff argued that Pet Valu was required to tell the truth to franchisees about the volume rebates that were promised in their franchise agreements and disclosure documents. Justice Belobaba found that Pet Valu was dishonest in failing to tell its franchisees the truth about the lack of volume rebates. His Honour found that volume rebates were fundamentally important and went to the core of the contract. This resulted in a finding that Pet Valu breached the duty of fair dealing and good faith.

<sup>57</sup> *Ibid.*

<sup>58</sup> (2005), 256 D.L.R. (4<sup>th</sup>) 451 (ONCA).

<sup>59</sup> *Ibid.*, para. 16.

<sup>60</sup> *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*, 2002 CanLII 6199 (ONSC) at para. 87, *per* Winkler J. (as he then was).

<sup>61</sup> 2008 ABCA 276.

<sup>62</sup> *Per* Côté J.A. (concurring), *ibid.*, para. 12.

32. Before the Court of Appeal's decision in this case, the leading decision on fair dealing was the decision in *Fairview Donut Inc. v. The TDL Group Corp.*<sup>63</sup>

33. In concluding there was no breach of fair dealing or good faith, the Court of Appeal in *Fairview Donut* held that the Superior Court's reasons "strongly documented the extent and fairness of Tim Horton's process."<sup>64</sup> The Superior Court's reasons referred to extensive discussions and consultations between the franchisor and franchisees<sup>65</sup> in concluding there was no breach of fair dealing and good faith. One case comment recommended that franchisors "disclose, consult and get input" to comply with the decision's guidance.<sup>66</sup>

34. *Fairview Donut* set a high bar for fair dealing consistent with the broad and generous principles of interpretation to protect franchisees. *Fairview Donut* is also consistent with the explanation in *Salah* that franchise relationships "give rise to special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties."<sup>67</sup>

35. Justice Belobaba made findings of dishonesty. It was not until after this case was vociferously litigated for several years that Pet Valu revealed – to the plaintiff's surprise – that the substantial volume rebates promised to the franchisees in the franchise agreement were illusory. The result in this case is contrary to basic principles of honest communication established in *Fairview Donut*. It will have the impact of reducing a franchisor's fair duty obligations, yet the Court of Appeal's reasons make no reference to the *Fairview Donut* decision.

#### **D. The result will impact the development of good faith post-*Bhasin***

36. The result in *Pet Valu* will have a negative impact on the development of the good faith doctrine. In *Bhasin*, this Court held that there was a general duty of honesty in contractual

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<sup>63</sup> 2012 ONCA 867 ("*Fairview Donut*").

<sup>64</sup> *Ibid.*, para. 6.

<sup>65</sup> *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at para. 675: "The evidentiary record also provides ample support for the conclusion that the franchisor engaged in extensive discussion and consultation with its franchisees before the Always Fresh Conversion and that the change was supported by the majority of franchisees."

<sup>66</sup> "Dealing with the Duty of Good Faith and Fair Dealing in Franchise Agreements", W. Brad Hanna & Robert E. Glass, McMillan LLP, October 2013 <<http://www.mcmillan.ca/dealing-with-the-duty-of-good-faith-and-fair-dealing-in-franchise-agreements>>.

<sup>67</sup> *Salah*, *supra* at para. 28.

performance, in which parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

37. In this case, Justice Belobaba found that Pet Valu acted contrary to representations in the disclosure document and franchise agreement and “never told its franchisees the truth.”<sup>68</sup> His Honour found “there can be no dispute about the importance or materiality of the information.”<sup>69</sup> The information was “material to the matters ultimately contracted for in the franchise agreement and was clearly related to the performance of the agreement.”<sup>70</sup> The “volume rebates were acknowledged to be a ‘fundamental component’ of the Pet Valu system.”<sup>71</sup> The result in this case cannot be reconciled with *Bhasin* and will stunt the growth of good faith.

38. *Bhasin* alluded to further development of good faith principles on a case by case basis.<sup>72</sup> *Bhasin* suggested that “the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange.”<sup>73</sup> The franchise relationship is such a contract.

39. English law recognizes that there may be situations of good faith requiring disclosure. In *Yam Seng v. International Trade Corporation Limited*,<sup>74</sup> the High Court of Justice held that “what good faith requires is sensitive to context. That includes the core value of honesty. In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue.”<sup>75</sup> Frequently, the requirements of honesty “go further,”<sup>76</sup> the court held. Similar to this Court’s analysis in *Bhasin*, the High Court in *Yam Seng* held that in some contractual contexts, “the relevant background expectations may extend further [...],” citing examples of “relational contracts” like franchise agreements and long term distributorship agreements.

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<sup>68</sup> Disclosure summary judgment reasons, para. 47.

<sup>69</sup> *Ibid.*, para. 48.

<sup>70</sup> *Ibid.*, para. 55.

<sup>71</sup> *Ibid.*, para. 55.

<sup>72</sup> *Bhasin*, *supra* at para. 66.

<sup>73</sup> *Ibid.*, para. 69.

<sup>74</sup> [2013] EWHC 111 (Q.B.).

<sup>75</sup> *Ibid.*, para. 141.

<sup>76</sup> *Ibid.*

40. The Court of Appeal in this case held that the failure to be honest did not involve fair dealing “in the performance and enforcement” of the franchise agreement for three reasons: (1) the information was information that should have been disclosed before class members became franchisees,<sup>77</sup> (2) there were no express contractual provisions requiring disclosure of the kind of information sought,<sup>78</sup> and (3) the complaints in this case were akin to vague requests for “ongoing disclosure” that were the subject of criticism by the Superior Court in *Spina v. Shoppers Drug Mart Inc.*<sup>79</sup>

41. Regarding (1), there is no evidentiary basis for the Court of Appeal’s finding regarding “timing.” The evidence does not reveal and the plaintiff does not know if Pet Valu’s promises about volume rebates were untrue when the plaintiff entered into its agreement or at some time thereafter. The “timing” of when Pet Valu took its decision is relevant to damages.

42. There is no principled reason to forbid a franchisee from relying on a pre-contractual disclosure document to support an allegation of a breach of fair dealing in the performance and enforcement of a franchise agreement. Another judge of the Superior Court agreed with Justice Belobaba’s analysis in this case, holding: “I agree with Belobaba J.’s proposition that s. 3 of the *Wishart Act* may give rise to an obligation to disclose important and material facts in some circumstances, and that the disclosure regime set out in s. 5 of the *Wishart Act* does not preclude the existence of such a duty.”<sup>80</sup> The *Spina* decision acknowledges that “the statute’s duty of good faith and fair dealing may arguably extend the franchisor’s disclosure obligations.”<sup>81</sup>

43. The Court in this case found that the dishonesty went to the core of the franchise agreement. It held that “[t]he material representation about Pet Valu’s significant purchasing power and ability to generate meaningful volume discounts is rooted in the disclosure document, but the volume purchasing/pricing benefits theme is continued in the franchise agreement where it is acknowledged to be a ‘fundamental component’ of the Pet Valu franchise system.”<sup>82</sup>

<sup>77</sup> Court of Appeal reasons, para. 59.

<sup>78</sup> *Ibid.*

<sup>79</sup> 2012 ONSC 5563 (“*Spina*”).

<sup>80</sup> *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 at para. 160.

<sup>81</sup> *Spina*, *supra* at para. 216.

<sup>82</sup> Disclosure summary judgment reasons, para. 55 (emphasis added).

44. There was undisputed evidence that cost of goods was a critical aspect of franchisees' profitability.<sup>83</sup> The certification judge (Strathy J.) found that "it does not take an expert economist to know that with maximum retail prices fixed by Pet Valu and constrained by a competitive market, the cost of goods is a vital factor in the profitability of every franchisee."<sup>84</sup>

45. In addition, the plaintiff's complaint arose when it wrote to Pet Valu pursuant to s. 41(b) of the franchise agreement, requesting information about volume rebates in 2009.<sup>85</sup> Justice Belobaba found that Pet Valu "rebuffed" the plaintiff's request until 2012, "well into this litigation."<sup>86</sup>

46. The Court of Appeal's conclusion that the conduct did not arise out of the "performance and enforcement" of the agreement cannot be reconciled with the facts as found by Justice Belobaba.

47. Regarding (2), there is no requirement for a good faith duty to be anchored in a breach of contract. In *Shelanu Inc. v. Print Three Franchising Corp.*,<sup>87</sup> the Ontario Court of Appeal held: "Moreover, the fact that contractual terms are ultimately complied with, does not mean that there has been no breach of the duty of good faith."<sup>88</sup>

48. There is an element of circularity in the Court of Appeal's reasoning that fair dealing requires proof of a contractual obligation. If fair dealing requires proof of a contractual breach, why would the franchisee not simply allege a breach of the contract? The fair dealing duty would be redundant.

49. According to the Court of Appeal's decision in this case, unless a franchisee requesting information is able to point to a provision in the agreement requiring the franchisor to answer, there will be no fair dealing or good faith requirement to provide one. The result would be contrary to numerous Ontario authorities that have found breaches of fair dealing under s. 3 of

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<sup>83</sup> See affidavit of P. Davis, sworn July 21, 2014, para. 10 (exhibits excluded).

<sup>84</sup> 2011 ONSC 287, para. 42.

<sup>85</sup> See letter dated November 4, 2009 and Pet Valu response dated Dec. 1, 2009.

<sup>86</sup> Disclosure summary judgment reasons, para. 49.

<sup>87</sup> (2003) CanLII 52151 (ONCA).

<sup>88</sup> *Ibid.*, para. 71.

the Act in circumstances requiring disclosure of information by franchisors to franchisees without proof of a contractual provision requiring disclosure. For example:

- In *Shelanu*, cited by this Court in *Bhasin*, the Ontario Court of Appeal held that the duty of good faith “requires the party under a duty of good faith to respond promptly to a request from the other party and to make a decision within a reasonable time of receiving that request.”<sup>89</sup>
- In *2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corporation*,<sup>90</sup> Justice Karakatsanis, then sitting as a judge of the Divisional Court, cited with approval the decision of Justice Winkler in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*,<sup>91</sup> explaining that the court in that case made findings of bad faith conduct after “the franchisees’ requests for information were rejected by A&P [...]”<sup>92</sup> The court cited “evidence that the franchisor has consistently failed to produce proper records to the franchisees despite repeated requests and its obligations to do so in accordance with its duty of utmost good faith as franchisor.”<sup>93</sup>
- In *Salah*, the conduct relied on for the breach of bad faith was that the franchisor “kept Mr. Salah in the dark about its intentions.”<sup>94</sup> The Court of Appeal found that the franchisor “deliberately withheld critical information and did not return phone calls.”<sup>95</sup>
- In *Sirianni v. Country Style*,<sup>96</sup> the court found that the franchisor kept critical lease information from franchisees, “actively leading them to believe the lease had been renewed” when it had not.<sup>97</sup>

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<sup>89</sup> *Shelanu*, *supra* at para. 78 (emphasis added).

<sup>90</sup> (2009), 96 O.R. (3d) 252 (Div. Ct.).

<sup>91</sup> (2002), 62 O.R. (3d) 535 (SCJ), *aff’d* [2004] O.J. No. 865 (Div. Ct.).

<sup>92</sup> *Ibid.*, para. 144.

<sup>93</sup> *Ibid.* (emphasis added).

<sup>94</sup> *Salah*, *supra* at para. 26.

<sup>95</sup> *Ibid.*, para. 22.

<sup>96</sup> 2012 ONSC 881.

<sup>97</sup> *Ibid.*, para. 129.



- The court in *Burnett v. Cuts* found a breach of s. 3 where the franchisor “failed to disclose the true state of affairs of the Cuts franchise system and, in particular, the fact that it was in a state of rapid decline.”<sup>98</sup>

50. In none of these cases was there a specific contractual provision requiring the franchisor to provide the relevant information to the franchisees. And yet, as one commentator has pointed out, as a result of the Court of Appeal’s decision in *Pet Valu*, “section 3 cannot be relied upon to require franchisors to disclose information so that franchisees can verify whether or not statements made to the franchisees are correct.”<sup>99</sup>

51. In *Bhasin*, the award was justified on the basis of the trial judge’s findings that the defendant had “equivocated” and “did not tell the truth” in response to Mr. Bhasin’s questions.<sup>100</sup> However, a prudent franchisor facing an inquisitive franchisee like Mr. Bhasin would be well advised to say nothing in response to a franchisee’s inquiries, relying on paragraph 59 of the Court of Appeal’s decision in this case. The impact would be a restriction on information provided to franchisees, which is precisely the opposite to the purpose of the Act and the purpose of fair dealing.

52. Regarding (3), the Court of Appeal held that the facts of this case were more akin to the “pre-litigation duty of disclosure” alleged in *Spina*, in which the franchisee sought to require the franchisor “to provide information to verify that it has not breached the [agreement], with the Plaintiffs themselves defining what is or is not a breach of the [agreement].”<sup>101</sup> The facts of this case are unlike *Spina*, in which the franchisee plaintiff asserted an ongoing right of disclosure of routine or non-material information. In this case, the franchisor suppressed information that the motion judge found “was highly material, indeed ‘fundamental’.”<sup>102</sup>

53. More broadly, the issue engages the question of “what information does a franchisor have to disclose to a franchisee in the context of fair dealing in the performance of the agreement?” The facts of this case give this Court the opportunity to provide its views on the issue.

<sup>98</sup> *Burnett v. Cuts*, 2012 ONSC 3358 at para. 58.

<sup>99</sup> <<https://www.osler.com/en/resources/critical-situations/2016/court-of-appeal-dismisses-pet-valu-franchisee-klas>>

<sup>100</sup> *Bhasin*, *supra* at para. 100.

<sup>101</sup> Court of Appeal reasons, para. 60.

<sup>102</sup> Disclosure summary judgment reasons, para. 54.

**E. Is fair dealing under the Act a codification of common law good faith or do special considerations arise in the franchise relationship?**

54. A further question of importance that arises in this case is whether or not the fair dealing requirement under s. 3 of the Act is a codification of the common law or something more. Justice Belobaba began his analysis by explaining that s. 3(1) is a codification of the common law,<sup>103</sup> but ultimately concluded that a franchisor's duty under s. 3 is broader than the common law duties of good faith articulated by the Court in *Bhasin*.<sup>104</sup> The Court of Appeal noted the debate but did not resolve it.<sup>105</sup>

55. The decision of the Superior Court in *Fairview Donut* concluded that "it is generally accepted that section 3(1) is a codification of the common law."<sup>106</sup> The Ontario Court of Appeal in *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*<sup>107</sup> stated without explanation or analysis that "[...] many [*Arthur Wishart Act*] rights are codifications of the common law [...]."<sup>108</sup>

56. However, in *Salah*, the Ontario Court of Appeal held that "special considerations" exist in "terms of the duties owed and the remedies that flow from a breach of those duties."<sup>109</sup> The issue has not been conclusively determined by the Ontario Court of Appeal or by other appellate courts dealing with franchise legislation. This case provides the opportunity for this Court to make this fundamental determination.

**F. Summary of issues of importance in this proposed appeal**

57. This decision leaves doubt about dialogue between franchisees and franchisors regarding important business issues. Franchisors should be required to answer sensible questions about their material obligations and to be honest about matters rooted in the franchise agreements that are crucial to a franchisee's business. The Court of Appeal's decision in this case imperils this basic principle of fairness. The record in this case, involving unaltered findings of fact by Justice

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<sup>103</sup> *Ibid.*, para. 41.

<sup>104</sup> *Ibid.*, para. 58.

<sup>105</sup> Court of Appeal reasons, para. 31.

<sup>106</sup> *Fairview Donut, supra* at para. 495.

<sup>107</sup> 2015 ONCA 152.

<sup>108</sup> *Ibid.*, para. 17.

<sup>109</sup> *Salah, supra* at para. 28 (emphasis added).

Belobaba, gives an appropriate basis for this Court to provide guidance on a framework for fair dealing in franchise legislation across Canada.

### G. Other issues in this appeal

58. In addition to its analysis of s. 3, the Court of Appeal held that Justice Belobaba erred by reading in words that had not been included in the certification order for common issue #6, which amounted to an unfair amendment of the common issue.

59. In his analysis of the wording of the common issue, Justice Belobaba held that common issue #6(i) “should be interpreted as [...] if ‘significant volume rebates’ were received by the franchisor.” This was “the more reasonable interpretation of Common Issue 6(i) in the context of this litigation,” His Honour held, because the issue was “whether Pet Valu received a meaningful or significant amount of volume discounts and not just whether they received *any* amount, however meager.”<sup>110</sup>

60. There was no error in Justice Belobaba’s analysis. His interpretation of the common issues did not involve an amendment. Even if an amendment was required, there is ample appellate authority for amendment of a common issue, even at the appeal stage of a proceeding.<sup>111</sup>

61. The Court of Appeal’s criticism of Justice Belobaba’s interpretation of the common issue occurred in the context of a motion for summary judgment in a class action. Justice Belobaba’s summary judgment decision is among the first in a class action to seek to implement this Court’s seminal decision in *Hryniak v. Mauldin*, which called for a “culture shift” requiring judges to “actively manage the [summary judgment] legal process in accordance with proportionality.”<sup>112</sup> The Court of Appeal did not cite *Hryniak* or its principles in its reasons.

62. In any event, even if Justice Belobaba’s analysis of the common issue involved an amendment error, this was an error that only occurred in connection with common issue #6(i). Justice Belobaba also ruled in favour of the plaintiff on common issues #6(iii) and (iv), neither of

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<sup>110</sup> Disclosure summary judgment reasons, para. 60.

<sup>111</sup> See e.g. *Bennett v. British Columbia*, 2012 BCCA 115.

<sup>112</sup> *Hryniak v. Mauldin*, *supra*, para. 32.

which involved any amendment. There is no analysis of this in the Court of Appeal's reasons, which only considered the alleged amendment to common issue #6(i).

#### **PART IV - SUBMISSIONS ON COSTS**

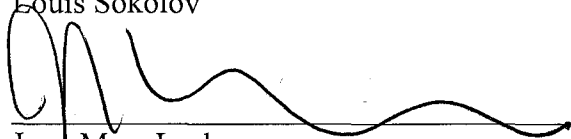
63. The applicant requests its costs.

#### **PART V - ORDERS SOUGHT**

64. The applicant requests that leave be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

March 10, 2016

  
\_\_\_\_\_  
Louis Sokolov  
\_\_\_\_\_  
Jean-Marc Leclerc

## PART VI - TABLE OF AUTHORITIES

<b>AUTHORITY</b>	<b>PARA REF</b>
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<i>Jirna Ltd. v. Mr. Donut of Canada Ltd.</i> [1975] 1 S.C.R. 2	10
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McMillan LLP, “ <i>Dealing with the Duty of Good Faith and Fair Dealing in Franchise Agreements</i> ”	33
Osler, “ <i>Court of Appeal Dismisses Pet Valu Franchisee Class Action and Clarifies Scope of Duty of Fair Dealing</i> ”	3, 49
P. Snell and L. Weinberg, eds., <i>Fundamentals of Franchising – Canada</i> (American Bar Association, 2005)	26

## PART VII - TABLE OF LEGISLATIVE PROVISIONS

### *Arthur Wishart Act (Franchise Disclosure)*

2000, S.O. 2000, c. 3

#### English

3(1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

#### Français

3(1) Le contrat de franchisage impose à chaque partie l'obligation d'agir équitablement dans le cadre de son exécution.

(2) Une partie à un contrat de franchisage a le droit d'intenter une action en dommages-intérêts contre une autre si celle-ci manque à l'obligation d'agir équitablement dans le cadre de l'exécution du contrat.

(3) Pour l'application du présent article, l'obligation d'agir équitablement s'entend notamment de l'obligation d'agir de bonne foi et conformément à des normes commerciales raisonnables.

### *Franchises Act, R.S.A. 2000, c. F-23*

#### English

7. Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement

#### Français

*Franchises Act*, S.N.B. 2014, c. 111

English

Français

3. Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the franchise agreement.

3. Le contrat de franchisage oblige chaque partie à agir équitablement dans le cadre de sa mise en oeuvre et de son exécution.

*Franchises Act*, R.S.P.E.I. 1988, c. F-14.1

English

Français

3. Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in the exercise of a right under the agreement.

*Franchises Act*, S.B.C. 2015, c. 35

English

Français

3. Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the franchise agreement, including in the exercise of a right under the franchise agreement



*The Franchises Act, C.C.S.M. c. F156*

English

3. Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement.

Français

3. Le contrat de franchisage impose à chaque partie l'obligation d'agir équitablement dans le cadre de son exécution.