

CITATION: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941
COURT FILE NO.: CV-09-392962-00CP
DATE: 20110328

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **1250264 Ontario Inc.**, Plaintiff/Moving Party

AND:

Pet Valu Canada Inc., Defendant/Respondent

BEFORE: G.R. Strathy J.

COUNSEL: *Allan D.J. Dick and David Sterns*, for the Plaintiff/Moving Party

G.B. Shaw and D. Ronde, for the Defendant/Respondent

HEARD: March 8, 2011

ENDORSEMENT

(Common Issues)

[1] I released reasons certifying this action as a class proceeding on January 14, 2011: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287. I identified the common issues that, in my view, were appropriate for certification and invited the parties to reach agreement on appropriate language to express those issues.

[2] Draft common issues were discussed at a case conference and, when it became apparent that the parties were some distance apart, a hearing was scheduled. The parties have made some progress in the interim, but some issues remain. Having heard and considered the submissions of the parties, I will set out below the common issues that will be certified.

[3] My objective is to state common issues that fairly reflect the pleadings, the evidentiary record and the conclusions in my reasons. The common issues should be clear, neutrally-worded and fair to both parties. They should be phrased in such a way that their answers will advance the litigation.

[4] To serve these ends, the common issues should not be framed in overly broad terms. Nor should they be framed in overly narrow terms in a way that unreasonably constrains the ability of either party to prove or disprove the common issue.

Preliminary Matter

[5] As a preliminary matter, counsel for Pet Valu made submissions that:

(a) there was no basis in fact for a common issue concerning volume allowances; and

- (b) in light of the pleading in the statement of claim, there was no basis in fact for the existence of common issues concerning the franchisor's duty to disclose information to the franchisees.

[6] I advised counsel that I was not prepared to re-visit my conclusions on these issues and my analysis of the common issues proceeds on that basis.

The Common Issues

Definition of "Volume Rebates"

[7] The term "volume rebates" appears in the plaintiff's proposed common issues, whereas the defendant uses the term "annual volume allowances", based on what it says was the plaintiff's own terminology in its original common issues and in the statement of claim

[8] In my view, the term should be defined. I used the term "Volume Rebates" in my reasons, for convenience and for definitional purposes. I made findings, however, at paras. 20 and 21, based on Pet Valu's own documentation, that Pet Valu received rebates, allowances, discounts and other negotiated price reductions from suppliers. Based on my reasons, and the evidence, it seems to me that the following is an appropriate definition that includes those items which, on the evidence, were granted to the defendant by suppliers and manufacturers as a result of its volume purchasing:

"Volume Rebates" means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts tied to the performance of individual stores.

Breach of Contractual Duty

[9] At para. 89 of my reasons, I found that there was a basis in the evidence for a common issue as to whether Pet Valu breached contractual duties to class members by failing to allocate volume allowances based on s. 22(f) of the Franchise Agreement.

[10] The major difference between the parties on this issue is that the defendant wishes to tie this common issue to section 22(f) of the Franchise Agreement. The defendant would word the issue as follows:

Has Pet Valu Canada Inc. ("Pet Valu") breached its contractual duty to the franchisees at any time during the Class Period by failing to allocate annual volume allowances granted to it by suppliers or manufacturers to the franchisees in the manner required by Section 22(f) of the Franchise Agreement?

[11] As I said during submissions, in my view, it is not appropriate to limit this common issue by looking at one clause of the Franchise Agreement in isolation. In determining whether Pet

Valu had a duty to share volume rebates with class members, the court will be entitled to look at, among other things, all the terms of the contract. I found that there was a basis in fact arising out of section 22(f), but that does not preclude the plaintiff from asserting that other provisions of the contract support that interpretation any more than it precludes the defendant from asserting that other provisions negate that interpretation. Accordingly, I approve the following common issue:

1. Has 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?

[12] The plaintiff agreed that the word “share” was a reasonable substitute for its proposed term “allocate the benefit”.

Private Label Products and Distribution Charge

[13] At para. 98 of my reasons, I found that there was a basis for a common issue as to whether the prices paid by franchisees for private label products, and the distribution charge paid by franchisees, had been artificially enhanced by the failure to give credit for the franchisee’s share of Volume Rebates. I therefore approve the following common issues:

2. If the answer to common issue # 1 is yes, has the defendant breached its contractual duty to the Class Members at any time during the Class Period by:

- (a) charging a mark-up on private label products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?

- (b) imposing a distribution charge on the price of products without giving Class Members credit for their proportionate share of Volume rebates in respect of such products?

Choice of Law

[14] The parties acknowledge that it is appropriate to have a common issue dealing with the entitlement of franchisees outside Ontario to have the benefit of the provisions of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the *A.W.A.*). I dealt with this at para. 92 of my reasons. The language proposed by the parties is not materially different. I approve the following language:

3. Are all Class Members entitled to the benefits and protections of sections 3 and 4 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the “A.W.A.”) by virtue of the choice of law provision in the Franchise Agreement?

Duty of Fair Dealing

[15] At para. 93 of my reasons I found that it was appropriate to have a common issue dealing with the duty of fair dealing under the *A.W.A.* I approve the following common issue:

4. Has the defendant breached the duty of fair dealing under section 3 of the *A.W.A.* by any of the conduct described in common issues 1 and 2 above, if so found?

Unjust Enrichment

[16] At para. 94 of my reasons I approved a common issue as to unjust enrichment. There is no significant difference between the parties as to the proper wording of this issue. I approve the following:

5. If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has Pet Valu been unjustly enriched by such conduct, if so found?

Aggregate Damages and Compensation

[17] A common issue as to damages and compensation was approved at para. 95 of the reasons. Again, there is no real issue between the parties. I approve the following:

6. What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 4 above, or the aggregate amount of compensation for unjust enrichment, if so found?

Disclosure

[18] This common issue was identified as appropriate at para. 96 of my reasons. The parties are in substantial agreement concerning the wording. I approve the following:

7. Did the defendant have a duty at common law or under section 3 of the *A.W.A.* to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:
 - (i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;
 - (ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;

(iii) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period;

(iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;

(v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?

[19] An additional common issue was approved at para. 97 of my reasons. I propose to approve a common issue in the same language as set out in those reasons:

8. If the answer to common issue 7 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?

G.R. Strathy J.

Date: March 28, 2011