CITATION: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871
COURT FILE NO.: CV-09-392962-00CP
DATE: 20110621

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **1250264 Ontario Inc.**, Plaintiff/Respondent

AND:

Pet Valu Canada Inc., Defendant/Moving Party

BEFORE: G.R. Strathy J.

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

Geoffrey B. Shaw and Derek Ronde, for the Defendant/Respondent

HEARD: June 9, 2011

ENDORSEMENT

[1] This motion raises an interesting question about the limits, if any, on the contractual relationship between a franchisor and a franchisee in the middle of a certified class action. A franchisee wants to get out of the business and the franchisor has offered to buy back its business, on condition that the franchisee signs a release of the claims made in this class action. The franchisor asks for a declaration that such release, and any past or future release, will be valid and binding on the class members.

[2] The motion is all the more interesting because it involves the intersection of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*A.W.A.*") and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*"). The *A.W.A.* is intended, among other things, to "level the playing field" between franchisors and franchisees, while the *C.P.A.* was designed to provide access to justice to those who lack the capacity to effectively and economically assert their legal rights. Both statutes have, as one of their purposes, the protection of the vulnerable.

[3] This could be regarded as a contest between two extreme positions. On the one hand, one could say that it would be over-zealous paternalism to deprive competent adults of their right to freely negotiate a conclusion to their relationship. On the other hand, one could argue that the class members in question are the most vulnerable of an already vulnerable group, and they require the court's protection from a franchisor who is able to extract concessions from them because of their difficult individual circumstances.

Background

[4] Pet Valu Canada Inc. ("Pet Valu") is in the pet food and supplies business. There are two main facets of its operations. It currently operates 104 corporately-owned stores in Canada under the names "Pet Valu" and "Pet Valu Better Pet Nutrition". The majority of these stores are in Ontario. It also runs a franchise business, under the "Pet Valu" name, and has 156 franchised stores in Canada, of which 140 are in Ontario.

[5] This action was certified as a class proceeding under the *C.P.A.* on January 14, 2011: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287. I concluded that the plaintiff met the requirements for certification set out in section 5 of the *C.P.A.* I certified a relatively narrow set of common issues based on the allegation that Pet Valu has a duty to share rebates it receives from suppliers with its franchisees.

[6] The terms of the certification order have not yet been finalized and notice of certification has been deferred, in part, because of the issue on this motion. I will briefly describe how the issue arises.

[7] From time to time, Pet Valu franchisees wish to sell their franchises. The reasons can include personal or family health issues, retirement, marital breakdown, death of the operator or their spouse, personal financial issues, the desire to move into another business or because the franchise has reached the end of its term. In those circumstances, the franchisee often looks to sell its business to a third party. Such sales are permitted by the franchise agreements, subject to the right of Pet Valu to approve the new franchisee. The evidence of Pet Valu is that this happens from time to time and that between 2004 and 2010, it has approved some 25 transfers from existing franchisees to new franchisees.

[8] A franchisee is sometimes unable to find a buyer for its franchise. This may happen for a variety of reasons, including the franchisee's desire to make a quick sale, lack of agreement on the selling price or the absence of a willing buyer. In such circumstances, the franchisee frequently asks Pet Valu to repurchase the assets of the franchise. Pet Valu's evidence is that in response to these requests, it will frequently negotiate a price for the assets and, if agreement can be reached, it will purchase those assets. This is typically referred to as a "Buyback Transaction". After the transaction has been completed, Pet Valu will usually continue to operate the location as a corporate store until an opportunity arises to sell the location as a franchise.

[9] As part of the Buyback Transaction, and as standard commercial practice, Pet Valu requires a release from the franchisee to ensure that it is not subject to legal claims after the transaction has been completed.

[10] Pet Valu's evidence is that over the years 2006 to 2010, there have been some 50 Buyback Transactions. It says that the number of transactions has declined since 2009 as a result of uncertainty caused by this proceeding and this, in turn, has led to a backlog of potential Buyback Transactions.

[11] The Buyback Transaction documentation includes an agreement of purchase and sale of the assets of the franchise and a release of all claims, including all claims in this class action. The

release currently in use allows the franchisee to obtain legal advice, from both its own counsel and from class counsel with respect to the class proceeding claims that are being waived. Pet Valu specifically recommends that franchisees consult legal counsel, including class counsel, and the franchisee must obtain the services of a lawyer to ensure compliance with bulk sales legislation. Attached to the release as schedules are copies of the statement of claim in this proceeding as well as the decision certifying this action as a class proceeding.

[12] Pet Valu is asking the court for a declaration that will operate both retrospectively and prospectively to affirm the validity of any releases given by franchisees in the context of Buyback Transactions in the past and during the currency of this class proceeding. The precise relief sought by Pet Valu on this motion is for:

(a) A declaration that the releases entered into by class member franchisees as part of transactions wherein Pet Valu purchases the assets of the franchisees are valid and enforceable, including such releases that have been entered into prior to the date of the motion and such releases that may be entered into subsequent to the date of the motion; and

(b) A declaration that the releases entered into with class member franchisees during the notice period, and releases entered into with class member franchisees subsequent to the expiry of the notice period in respect of class member franchisees who do not opt out of the class proceeding, are valid and enforceable.

[13] There have been four Buyback Transactions in 2011 involving the form of release in question. These transactions give a good cross-section of the circumstances that may motivate a franchisee to sell its assets to Pet Valu. It will assist to give a brief description of these cases:

- A franchisee of stores in Brantford and Woodstock, Ontario passed away in March 2010, due to cancer. His wife, who had played a secondary role in the business, found it overwhelming to continue the operation. She attempted to sell the store, without success. In the fall of 2010, she asked Pet Valu to buy her out. Pet Valu suggested that she continue her attempts and said that it would re-evaluate the situation in 2011. She was unable to sell the franchises and approached Pet Valu again in the New Year. An agreement was entered into to purchase the assets of both locations for $265,000. One transaction has closed and the other will close shortly.

- A franchisee of a store in Goderich, Ontario decided to retire, after nearly 20 years in the business, at the end of the franchise term in December 2011. She had been looking for a buyer for some time and had been unable to find one. Pet Valu's evidence is that there is a reduced demand for a franchise near the end of its term. The franchisee asked Pet Valu to purchase her assets and Pet Valu agreed to do so for a price of $85,000. The transaction has closed and Pet Valu continues to operate the location.

- A franchisee in Waterloo, Ontario had purchased the business in June 2010 from an existing franchisee, with the consent of Pet Valu, for $125,000. In November 2010, Pet Valu and the franchisee entered into an agreement for enlargement of the store and updating of the fixtures. The franchisee was unable to obtain financing for his portion of the renovation and Pet Valu offered to buy back the assets for what the franchisee had paid for them. The transaction closed on April 4, 2011.

- A franchisee purchased a store in Toronto, Ontario in June 2010. The franchisee soon began to experience financial difficulties and it asked Pet Valu for assistance. Pet Valu agreed to repurchase the store for the original purchase price. The transaction has closed and the franchisee continues to operate another franchise at another location

[14] In addition to these concluded agreements, Pet Valu anticipates entering into several other Buyback Transactions in 2011, subject to the court granting declaratory relief on this motion. The details of these proposed transactions are:

- A franchisee in Chatham, Ontario wishes to retire. One of the operators has had very serious health issues and her husband also has health problems. They do not wish to go through the process of trying to sell to a third party as they are afraid that it will take a long time, particularly in view of their health issues.

- A franchisee in Pickering, Ontario wishes to return to his native country and has been unable to find a purchaser for his franchise.

- A franchisee in Bramalea, Ontario is finding too much competitive pressure in its current location and wishes to relocate to a smaller community. Negotiations had broken down, as the franchisee was not prepared to sign the form of release as he believed that he would receive more in the class action that he is being offered by Pet Valu for the goodwill of the franchise. I was informed during the hearing of the motion that this issue has been resolved and the franchisee is prepared to sign a release.

- A franchisee in Windsor, Ontario has requested that Pet Valu purchase his assets as an alternative to investing in renovations at his location.

Pet Valu's Position

[15] Pet Valu has stated that it will not enter into these Buyback Transactions, or future transactions, unless it can be certain that the franchisees' releases will be enforceable. It says that it needs the certainty that will be provided by a declaration before it will enter into future transactions. Pet Valu's position is explained in the affidavit of Mr. Edward Casey, President of Pet Valu, in the following terms:

> Buyback Transactions are necessary for the health and well-being of the Pet Valu franchise system. Franchisees who no longer wish to be part of the Pet Valu system should be permitted to exit from the system and receive payment for their assets. It serves no one's interest to have franchisees who are experiencing health issues, reaching old age, nearing the end of their term or disinterested remain as franchise operators.
>
> Pet Valu is under no contractual obligation to purchase franchisees' assets. Pet Valu often forgoes future royalties due to the buyback of a franchise. Further, Pet Valu is usually obliged under the head lease to take on the responsibility of turning a franchise location into a corporate store upon the exit of the franchise. However, Pet Valu undertakes these transactions for the betterment of the entire franchise system. In consideration for its generous efforts to assist franchisees in transitioning out of the franchise system, Pet Valu simply wants the assurance that it will not be subject to future liability to such franchisees.
>
> The franchisees are free to enter into a Buyback Transaction but conversely are also free not to do so. They are also free to seek third-party purchasers of their assets as long as such transactions are within the parameters of their franchise agreements. However, Pet Valu also has similar freedom, namely the right not to enter into Buyback Transactions if they are not in Pet Valu's economic interest.

[16] While I do not agree that Pet Valu's motives are purely altruistic, neither are they malevolent. Each of Pet Valu and the franchisee is operating in its own reasonable economic self-interest. There is an advantage to Pet Valu in buying back the franchise. The insistence of a release from the franchisee is a reasonable and acceptable commercial requirement. No prudent business person would require anything less. From the perspective of the franchisee, who has been unable to sell the franchise in the open market, the opportunity to enter into a Buyback Transaction is a helpful parachute out of the relationship.

[17] There is no evidence that Pet Valu is undertaking Buyback Transactions as part of a strategy to whittle down the class or to render the class action ineffective.

[18] I cannot overlook the fact that Pet Valu's agreement to buy back the franchise requires the franchisee to release its right to share in the proceeds of this class action, should it be successful. Pet Valu has, however, refused to disclose information that would enable class members to make an informed decision about what they would be giving up by releasing their rights. It will not disclose the quantum of Volume Rebates it has received from suppliers or the proportionate share to which the franchisee might be entitled, should this action succeed. Counsel for Pet Valu took the position that the information is, or should be, within the knowledge of the franchisee and class counsel. His client says that it does not have ready access

to this information. Frankly, this strikes me as incredible. I leave for another day, should it become necessary, the determination of whether this information should be required as a condition of any order for declaratory or other relief.

[19] The inherent vulnerability of franchisees due to the power imbalance between the parties was one of the principal reasons for the enactment of the *A.W.A.* and it has been noted in several decisions of this court: see *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.) at para. 42, aff'd (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.); *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919 (C.A.) at paras. 58 and 63. The experiences of the franchisees who are being offered Buyback Transactions illustrate that many of them are, in fact, a vulnerable group in the middle of a vulnerable group – they want to get out, cannot find a buyer, and their only hope is a Buyback Transaction.

[20] Pet Valu says that there is ample consideration for the Buyback Transaction and the release, because it has no legal obligation to enter into the transaction. It says that the consideration cannot be dissected or divided – it must be regarded as applicable to all claims, including the entitlement to a share in the class action. Pet Valu says that the franchisees are protected because they have received independent legal counsel, full disclosure concerning the class proceeding and the opportunity to seek legal advice from class counsel. It says that if a franchisee, after receiving that advice, wishes to enter into a commercial transaction and release its rights in this action, it should be permitted to do so. It says that the court should not, in this procedural context, interfere with the parties' substantive right to contract and that the settlement of litigation is an important outcome of the Buyback Transactions.

[21] Pet Valu says that the case law is clear and that settlement with individual class members is permitted: *Lewis v. Shell Canada Limited* (2000), 48 O.R. (3d) 612, [2000] O.J. No. 1825 (S.C.J.) at para. 12; *Smith v. Crown Life Insurance Co.* (2002), 40 C.P.C. (6th) 371, [2002] O.J. No. 5539 (S.C.J.) at para. 17. It should be noted, however, that in both these cases the court qualified its statement by noting that it must be concerned as to "whether the individuals were possessed of sufficient information to properly exercise their rights": *Smith v. Crown Life Insurance Co.* at para. 17. Pet Valu says that the decision of my colleague Perell J. in *Berry v. Pulley*, 2011 ONSC 1378, [2011] O.J. No. 927 is either wrong or distinguishable and notes that a number of American decisions have permitted post-opt-out period settlements with class members: see *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1979 U.S. App. LEXIS 16642 at p. 27 (7th Cir.); *In re Winchell's Donut Houses*, L.P. Sec. Litig., No. CIV.A 9478, 1988 Del. Ch. LEXIS 159 at p. 2; *In re Shell Oil Refinery*, 152 F.R.D. 526, 1989 U.S. Dist. LEXIS 18427 at pp.. 9-10 (E.D. La.); Vince Morabito, "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States" (2003) 38 Tex. Int'l. L.J. 663.

The Position of the Plaintiff

[22] The plaintiff's primary point is that the court has no jurisdiction to grant the relief sought. I discuss this issue below.

[23] The plaintiff says that if I do have jurisdiction to grant the relief, I should decline to do so because the franchisees directly affected, namely those eight who have either signed Buyback Transactions or whose transactions are pending, are not parties to this action, have received no notice of the motion, and are not represented by class counsel insofar as their individual agreements with the franchisor are concerned. It says that those franchisees will be entitled to opt out if they wish, preserving their right to negotiate directly with the franchisor: see *1176560 Ontario Ltd. v. Great Atlantic and Pacific Co. of Canada*, [2004] O.J. No. 865 (Div. Ct.) at para. 33.

[24] Fundamentally, however, it is the plaintiff's position, relying on *Berry v. Pulley*, that once a class member has elected not to opt out of a class proceeding, it effectively surrenders its right to negotiate an individual settlement with the defendant.

Jurisdiction

[25] Pet Valu invokes two grounds of jurisdiction. It relies on section 12 of the *C.P.A.*, which gives the court broad jurisdiction to make orders for the "fair and expeditious determination" of a class proceeding. The precise language of the section is as follows:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[26] Class counsel argues that this section is confined to making orders relating to the fair and expeditious determination of the proceeding and that it "does not confer roving jurisdiction to grant substantive, declaratory relief affecting individual class members and their business relations."

[27] Pet Valu also invokes s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, which confers jurisdiction to make a declaratory order:

> The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

[28] A declaration is a "formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs": *Harrison v. Antonopoulos* (2002), 62 O.R. (3d) 463, [2002] O.J. No. 4890 (S.C.J.) at para. 27, referring to Lord Woolf and Jeremy Woolf, *The Declaratory Judgment*, 3rd ed. (London: Sweet & Maxwell, 2002) at para. 1.01. It is, essentially a request for an advance ruling: *Harrison v. Antonopoulos*, at para. 28.

[29] It is well-settled that the remedy of a declaratory judgment is equitable in its origins and that the award is in the discretion of the court: *Chippewas of Sarnia Band v. Canada (Attorney-General)* (2000), 51 O.R. (3d) 641, [2000] O.J. No. 4804 (C.A.) at para. 279; *1085459 Ontario*

Ltd. v. Prince Edward County (2005), 77 O.R. (3d) 114, [2005] O.J. No. 3471 (S.C.J.) at para. 27.

[30] Class counsel also makes the point that he has no authority to represent individual franchisees in respect of their business relations simply because the defendant states that it requires certainty with respect to its *ad hoc* business practices. The franchisees who have signed releases, or who are contemplating entering into Buyback Transactions are not before the court and it would be inappropriate to make an order declaratory of their rights in their absence.

Individual Settlements with Class Members

[31] The right of class members to enter into individual settlements with the defendant, thereby circumventing the representative plaintiff, and potentially undermining the efficacy of the class proceeding, has been a matter of some controversy.

[32] In his recent decision in *Berry v. Pulley*, above, Perell J. came down squarely in support of the responsibility and entitlement of the representative plaintiff to receive, evaluate and respond to settlement offers made to the class. He summarized his conclusions as follows, at paras. 7 and 8:

> By way of overview, in my opinion, other than for the individual issues trial in a class action, an individual litigant loses the right to settle the action when he or she is a class member in a class proceeding.
>
> It is for the representative plaintiff or the representative defendant to determine whether a settlement offer should be disclosed to class members. A class member has a right to oppose a settlement, but he or she does not have the right to receive settlement offers and to settle the claims in the class action. (A class member, however, has the right to receive settlement offers in the context of individual issues trials).

[33] He added, at paras. 48 and 49:

> It follows from this conclusion that if class members do not have the right to individually accept settlement offers during the communal stages of the action, they need not be given notice and be tantalized by a settlement offer that they cannot accept and which is opposed by their representative.
>
> I pause here to say that settlements [sic] offers made pre-certification to putative class members may require a different or modified analysis. However, for present purposes, I do not need to explore pre-certification settlement offers. See *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (S.C.J.). Although there are overlapping policy concerns about settlement offers pre or post-

> certification, in the case at bar, the problem just concerns a settlement offer purportedly made to individual class members after the class action has been certified and classes have been formed.

[34] At para. 63, Perell J. explained that part of the rationale for his conclusion was a concern for the potential erosion of the class proceeding:

> Thus, if class members do not opt-out, in my opinion, during the communal stages of the class action, they lose the right to accept settlement offers that are unacceptable to their representative plaintiff or representative defendant. There are good policy reasons for this regime. If parties could circumvent the representative plaintiff or representative defendant by making offers directly to class members, then they will have been given a tactical and strategic means to thwart class actions. It is no answer to say that the court would still have to approve the settlement under s. 29 of the Act because, practically speaking, the class action as a representative proceeding would no longer exist. If parties could circumvent the representative plaintiff or representative defendant by making offers directly to class members, it is unlikely that putative representative plaintiffs would have class counsel willing to prosecute the class action. Defendants could eviscerate the size of the class and diminish the recovery of the class counsel so as to make the risk of proceeding with the litigation unbearable and class counsel would be unwilling to take on the burden. Class size is a factor in encouraging class counsel to take on a class action. The importance of class size explains why the class definition criterion of the test of certification is often vigorously contested. The hidden agenda on the certification motion is that the defendant wishes a narrow definition and a small class to make the class members' claims economically unviable to pursue. Allowing defendants to make settlement offers directly to class members would impair the means chosen by the Legislature, the representative action, to carry out the Act's purposes of access to justice, behaviour modification, and judicial economy by discouraging the involvement of class counsel.

[35] This case is readily distinguishable from *Berry v. Pulley*. In that case, the offer was made directly to all members of two subclasses, excluding the class representatives. Moreover, the offer was to settle the claims made in the action. In this case, the offer is being made, at least at the present time, to a fraction of the class, it is an offer to settle all commercial issues between the franchisor and the particular franchisee, including the franchisee's entitlement to recovery in the class action. As I have said, on the present state of the record, there is no evidence that the offer is being made for the purposes of undermining the class action. On the contrary, it is being made for legitimate business reasons that benefit both parties.

[36] In *Berry v. Pulley*, Perell J. was not addressing the situation of a single class member who, for compelling personal or financial reasons that were unrelated to the class action, wanted to settle with the defendant and to waive his or her entitlement to participate in the class action.

[37] A case might be made, in such circumstances, that an individual class member should be permitted to settle individually with the opposing party, if the court is satisfied that there is no unfairness to the individual or to the class at large and no threat to the integrity of the class proceeding.

Discussion

[38] Assuming that I have discretionary jurisdiction to grant the relief sought on this motion, I am not prepared to do so on the record before me. There are several reasons.

[39] First, none of the eight franchisees who have either entered into Buyback Transactions or are contemplating such transactions are actually before me. There is no evidence that they have received notice of this motion or that they are aware that their rights may be affected by this motion. I have received no evidence from them concerning the circumstances of their transactions. The declaratory relief sought is very broad and extends to validity of the release as a contractual document, without regard to defences that might be available quite apart from the *A.W.A.* I decline to make a broad binding declaration of the contractual rights of individual class members, which are not part of the common issues in this action, in the absence of the class members directly affected.

[40] Second, since class members have not been notified of their opt-out rights, these eight franchisees will be entitled to opt out of the class action in due course. If they decide to do so, the issue will become moot. I decline to make a binding declaration with respect to an issue that may become moot.

[41] Third, even if some of the eight franchisees do not opt out of the class action, it is possible that the validity of their releases could be determined as an individual issue.

[42] Fourth, I am not prepared to make a binding declaration with respect to future transactions in the absence of a specific evidentiary record.

[43] Fifth, without wishing to bind myself or any other judge who may be required to consider this issue in the future, it seems to me that class proceedings can be sufficiently flexible to ensure that a franchisor and its franchisee can end their relationship in a mutually satisfactory fashion without being unduly fettered by a potential claim in the class action that the franchisee, with full knowledge of its rights, and in appropriate circumstances, wishes to renounce. One possibility would be to permit a franchisee wishing to enter into a Buyback Transaction in the future to apply to the court, on notice to the representative plaintiff and to the defendant, for leave to extend the opt-out period in light of changed personal circumstances after the expiry of the opt-out period.

[44] It is possible that, in the context of such a motion at the instance of the franchisee, the court could grant appropriate declaratory relief to give commercial certainty to both the

franchisor and the franchisee with respect to that particular transaction. As I noted earlier, such relief being discretionary, the degree of disclosure of material facts may have a bearing on the court's decision to exercise its discretion.

[45] As I noted in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889, there is at least some support for the concept that a franchisor's duty of fair dealing in the performance of the franchise agreement, under s. 3 of the *A.W.A.*, includes a duty to make full disclosure of all material facts at the time the agreement is being consensually terminated. In that case, the franchisor had made an offer to certain franchisees to wind down their franchise agreements. It was acknowledged that the plaintiff had properly pleaded a claim for breach of the duty of fair dealing under s. 3 and for breach of the right of association under s. 4. I held that the claim for breach of the s. 5 duty of disclosure met the "plain and obvious" test. I held, at para. 73:

> While an important purpose - arguably the dominant purpose - of the *A.W.A.* was to ensure full pre-contractual disclosure to would-be franchisees, it clearly was not the only purpose. The leveling of the playing field by imposing a reciprocal duty of fair dealing and a right of free association of franchisees was an important ancillary purpose. I cannot say that it is plain, obvious and beyond doubt that the plaintiff's interpretation of the franchise agreement is doomed to fail. Nor can I say that the policy of the statute runs contrary to imposing an obligation of disclosure when the franchisor proposes to make an important and unilateral amendment to the franchise agreement. One could certainly argue that an amendment that involves the franchisee divesting itself of its investment, and surrendering important rights under its franchise agreement is every bit as significant as its initial decision to invest in the first instance. To put this point in context, consider that Trillium and the other 239 franchisees who had been offered the WDA were essentially being told by GMCL, "if this offer is not accepted by every last one of you, there is a strong possibility that we will seek protection from our creditors and you may get nothing." It does not strike me as unreasonable, or inconsistent with the statutory purpose, to suggest that GMCL had an obligation to make full and fair disclosure of all material facts known to it that might reasonably affect the franchisees' decision. [Emphasis added].

[46] In the case at hand, one of the issues that the court may wish to consider on a future motion to extend the opt-out period is whether the franchisee has full knowledge of its rights, including what it is giving up by signing the release. This has been considered a relevant factor in other cases involving individual settlements with class members: see *Lewis v. Shell Canada Ltd.*, above; *Smith v. Crown Life Insurance Co*, above.

Disposition

[47] For these reasons, the motion is dismissed, with costs. If the parties cannot agree on costs, written submissions may be made.

[48] A case conference should be scheduled as soon as possible, subject to my availability, to finalize the terms of the certification order and notice.

G.R. Strathy J.

G.R. Strathy J.

Date: June 21, 2011

ONTARIO

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TOTAL PAGES (INCLUDING COVER PAGE): 13

MESSAGE:

RE: 1250264 Ontario Inc. v. Pet Valu Canada Inc.
Court file no. CV-09-392962-00CP

Please see attached Endorsement released by Mr. Justice Strathy today.