CITATION: *1250264 Ontario Inc. v. Pet Valu Canada Inc*., 2012 ONSC 4317
COURT FILE NO.: CV-09-392962-00CP
DATE: 20120727

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: *David Sterns and Jean-Marc Leclerc*, for the Plaintiff/Moving Party

Geoffrey B. Shaw and Derek Ronde, for the Defendant/Respondent**,** Pet Valu Canada Inc.

Lawrence G. Theall and Bevan Brooksbank, for the Respondent Franchisees

HEARD: July 4, 2012

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ENDORSEMENT

[1] The plaintiff moves for an order setting aside the opt-out notices received from class members in this certified class action, on the ground that the process has been compromised. A group calling itself "Concerned Pet Valu Franchisees" (CPVF) used a telephone campaign and established a web site to encourage class members to opt out of the action. In the result, some 140 Pet Valu franchisees, representing fifty-five percent of all class members, have opted out. The majority of those who opted out are current franchisees, as opposed to former franchisees, who no longer own stores.

[2] The question before me is whether the opt-out process has been so irreparably impaired as to justify the extraordinary measure of judicial intervention.

Procedural History – Certification, Notice and Limits on Communication

[3] The procedural history of this action is important because it provides the framework in which the issue arises.

[4] This is a class action on behalf of franchisees of the "Pet Valu" chain. The action was commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*C.P.A.*) on December 9, 2009.

[5] As I noted in my reasons on certification[1], the Pet Valu chain consists of specialty stores selling pet food and supplies. It is the largest retail pet food and supply chain in Canada and its 2008 sales exceeded $220 million. At the time of certification, there were 155 Pet Valu franchised stores, with 145 in Ontario and 10 in Manitoba. Pet Valu also operated a total of 214 corporate stores, about 144 of which were under the "Pet Valu" banner, with the remainder operating under other trade names.

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[6] I was appointed case management judge to hear all pre-certification motions and I have presided over a number of case conferences and several motions. The action has been vigorously defended by Pet Valu and the atmosphere on motions and case conferences has been highly adversarial. The plaintiff has a motion pending for partial summary judgment and Pet Valu has indicated that it proposes to bring a motion to de-certify the class proceeding.

[7] The certification motion was heard on October 21 and 22, 2010. The action was certified on January 14, 2011.

[8] The only common issue certified was the plaintiff's claim that Pet Valu has a duty to share with its franchisees the volume discounts and rebates that it received from suppliers. The foundation of the plaintiff's complaint is that Pet Valu has an obligation to share the fruits of its buying power with its franchisees, whose collective purchases give it the capability of negotiating those discounts and rebates. I concluded that there was a basis in fact for this complaint. I found that the issue of a franchisee's entitlement to share in volume rebates is "a factor that vitally affects its profitability" (at para. 42).

[9] In opposing the certification motion, Pet Valu argued that a class action was not the preferable procedure for the resolution of the issues. It characterized the plaintiff, through its principal, Robert Rodger (Rodger), as being on a selfish mission of its own. It said that there was an existing forum, the Canadian Franchise Council (CFC) to address franchisees' concerns. I did not accept this submission, noting at para. 112 that the CFC had been unable to resolve the issue in the past:

> Pet Valu has suggested that there is no need for behaviour modification in this case, because the C.F.C. provides a viable forum for the resolution of franchisee concerns. The short answer to this is that the evidence does not support the conclusion that the C.F.C. was able to effectively bring about changes in Pet Valu's method of sharing the profit pie. Indeed, the minutes of the C.F.C. executive suggest that Pet Valu had been holding out the promise of a new franchise agreement as a means of addressing franchisees' concerns that Pet Valu's high profits were inflating the cost of goods. It is not apparent to me that these concerns have been addressed by the "new" agreement produced by Pet Valu and in

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[1] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287, [2011] O.J. No. 1618.

fact the agreement seems to reduce, not enhance, the franchisee's rights.

[10] Communication with class members has been an extremely contentious subject since certification. On February 7, 2011, shortly after the release of the certification decision, a case conference was held, at which time there was a discussion of communications with class members. The Minutes of the conference noted, in part:

> His Honour expressed his general concern about communications to the class and advised that there was to be no communications to the class without court approval.

[11] I authorized an email to be sent to class members advising them of the certification decision, informing them that the reasons could be read on class counsel's website and that a formal notice of certification would be sent in due course.

[12] The following day, Rodger sent an email to the class, which contained a brief (and somewhat innocuous) comment that had been not expressly authorized by me. This led to a complaint by Pet Valu's counsel, causing me to advise counsel as follows:

> In case it was not clear at the case conference yesterday, I expect that all communications with the class members concerning this proceeding, from the release of the certification decision to the end of the opt-out period, will be approved by me. Please take the necessary steps to bring this direction to the attention of your clients. [emphasis added]

[13] The formal court order certifying the action, which reflected the input of both parties, was issued on June 29, 2011. It incorporated a Plan of Proceeding, which had specific provisions dealing with communication with the class. There was a concern on both sides, which I shared, that communications with the class between the time of certification and the end of the opt-out period would continue to be carefully supervised.

[14] This concern was a reflection of two realities. First, Pet Value had to be able to communicate with its franchisees due to their ongoing relationship. Second, each party was extremely distrustful of the other, and neither wanted the other to be able to sway class members' freedom to make their own decision about whether to opt out. The Plan of Proceeding therefore provided:

> Communications with the Class Members before the expiry of the opt-out period are subject to the direction of the class proceedings judge.

[15] The provision limiting communications before the end of the opt-out period to those approved by the court reflected the concern that the integrity of the opt-out process would be impaired if class members were subjected to unfair, misleading or oppressive communications by either party. That concern exists in all class proceedings, but it exists in particular in cases such as

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this one, where the class members have an ongoing relationship with the defendant. It also reflected the fact that the atmosphere had been heated and there was some risk that the fairness of the opt-out process would be undermined if the court did not exercise careful control.

[16] Recognizing that Pet Valu needed to be able to communicate with its franchisees on an ongoing basis, the Plan of Proceeding permitted it to communicate with class members in the context of its ongoing commercial franchise relationship with them. It provided that following the expiry of the opt-out period, the representative plaintiff would be entitled to communicate information to class members on a regular ongoing basis by means of periodic email and other communications. It also provided that "[L]imited and non-strategic information" would be communicated to class members by regular updates of the website of class counsel.

[17] The certification order and the Plan of Proceeding did not purport to curtail the right of other parties – specifically, other franchisees or the CFC – to communicate concerning the class action.

[18] As part of the certification order, notice to the class was approved. It provided that class members could opt out by delivering an opt-out coupon on or before September 15, 2011. Notices to the class were mailed on July 15, 2011. The opt-out period was between July 15 and September 15, 2011.

[19] I now turn to the opt-out process and the campaign by the CPVF.

<u>The Opt-Out Process</u>

[20] By September 4, 2011, there had been only 37 opt-out forms received from class members.

[21] Beginning September 5, 2011, there was a noticeable spike in the delivery of opt-out forms. By the end of the opt-out period, a total of 140 opt-outs had been received. Three more were received after the expiry of the period. About sixty-five percent of <u>current</u> franchisees opted out and about ten percent of <u>former</u> franchisees opted out.

[22] Pet Valu and the respondent franchisees, who are founding members of CPVF, submit that the result of the opt-out process demonstrates that there is no support for the class action amongst existing franchisees. They argue that:

> The results of the opt-out period demonstrate that most current franchisees have no interest in pursuing the class action against PV. It is these current franchisees who have ongoing commercial relationships with PV and who appreciate both the progress made by PV in addressing franchisee concerns and the impact the class action has on the entire franchise system.

[23] Pet Valu will no doubt use the results of the opt-out process in support of its motion to de-certify the class action.

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[24] It is now apparent that the dramatic increase in opt-outs near the end of the opt-out period was the result of a well-organized, systematic and highly effective campaign by the CPVF to deal a death blow to the class action by persuading other franchisees to opt out.

[25] In the next two sections, I will explain how this was accomplished. Again, some background will be necessary.

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The CFC

[26] Like many franchises, Pet Valu has a franchisee association, the CFC. The primary purpose of the CFC is to act as a means of communicating franchisees' concerns to Pet Valu. Every franchisee is a member of the CFC. The CFC has an Executive Committee (the Executive) consisting of ten regional representatives, elected by the franchisees in each region, and one member at large.

[27] I do not accept the plaintiff's submission that the CFC or the Executive is somehow under the control of Pet Valu. It receives some modest operational funding from Pet Valu, but it is otherwise independent.

[28] I do, however, accept the submission that the Executive has been vocal in its opposition to this action and has done its best to undermine support for it.

[29] At the Annual General Meeting of the CFC on August 17, 2011, after the certification of this action and during the opt-out period, there was considerable discussion of this class action. The atmosphere was described as "heated" and Rodger and others spoke in favour of the action, while others, including the Executive, were opposed. Concern was expressed that some franchisees had not received the opt-out package. A motion was passed that the parties be asked to extend the opt-out deadline due to difficulties encountered with the mailing of the opt-out materials.

[30] It is apparent that there was some concern at the meeting about the possibility that Pet Valu would take repercussions against anyone who did not opt out of the class action. A motion was moved, and carried, to the following effect:

> Canadian Franchise Counsel would hope that PV does not take any repercussions against those who opt in [sic] to the class action.

[31] There is no evidence that Pet Valu has taken any repercussions against any franchisee as a result of the class action. Indeed, Pet Valu's evidence is that it treated its franchisees equally and impartially, regardless of their support of the class action.

[32] A motion was put forward by the Executive at the meeting, asking whether those in attendance wanted to hear the Executive's position regarding the class action. The motion carried and the Executive read the following statement:

> The CFC Executive unanimously resolves that we believe that this lawsuit is bad for our collective business. We enjoy our

relationship with Pet Valu and fear that the loss of good will should the lawsuit proceed will do untold damage to our individual businesses.

> We are impressed with the improvements that have been made, the overall corporate direction and the commitment to franchisees that has been demonstrated by Pet Valu under Tom McNeely and Roark Capital Management. We do not want to jeopardize this relationship.
>
> If the suit were successful, it could seriously impair Pet Valu's ability to expand as a chain and seriously hamper their ability to share in the costs of renovations and programs designed to increase business. It would have a negative effect on our own profitability as well as the value of our stores and our ability to sell them should we choose to do so. Even if it is ultimately unsuccessful, the suit casts a bad light over the company and over our individual stores because of the implications of over-charging.
>
> The CFC Executive is very concerned about what this will do to our investments and our financial futures.

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[33] It is interesting to note that one of the main reasons the CFC opposed the class action was its perception that it would impair the franchisees' relationship with Pet Valu. I will return to this topic below.

[34] The Minutes report that a motion was made by the chair that the entire membership of the CFC vote on a resolution to support the Executive's unanimous statement. After discussion, the motion was withdrawn.

<u>The CPVF Campaign</u>

[35] About two weeks later, in early September 2011, the campaign to defeat the class action was commenced by the CPVF.

[36] This group had a core of some 13 "founding members", of whom ten were members of the CFC Executive. One of the other three was the spouse of an Executive member. Franchisees could reasonably perceive the CPVF to be the Executive wearing another hat, or at the very least, could conclude that the Executive was fully supportive of the CPVF.

[37] The sole purpose of the CPVF was to encourage other Pet Valu franchisees to opt out of the class action. This is described in the affidavit of Jason Malley, one of the founding members of the CPVF, and a member of the Executive, as follows:

> We formed the CPVF because we believed that franchisees should opt out of the class action, but did not think this should be done

> through the CFC as there had been no consensus reached at the August 2011 AGM on the class action.
>
> We were very concerned that franchisees were confused or misinformed, and we believed that if they considered the issue carefully they would choose to opt out. However, our objective was to encourage all franchisees to opt out, as it was and continues to be, our unanimous opinion that the class action is not good for our brand, or our collective interests as franchisees. We believed that the new management had demonstrated a positive and constructive approach and was actively taking steps to improve our business and profitability. [emphasis added]

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[38] As I will explain below, the fact that class members may have been "confused or misinformed" during the opt-out period is an important contextual factor in assessing whether judicial intervention is warranted in this case.

[39] The CPVF campaign had two major fronts. First, beginning on the Labour Day weekend, the founding members (i.e., most of the Executive) undertook a telephone blitz, calling every franchisee to encourage them to opt out of the class action.

[40] Affidavit evidence has been provided by every member of the CPVF. The evidence follows the same pattern and, in many cases, the content is identical. I will summarize the evidence of James Dale (Dale), who was the President of the Executive and one of the founding members of the CPVF.

[41] Dale views the role of the CFC as to facilitate the franchisor-franchisee relationship. He expresses the view that the interests of the franchisees can, in general, be best advanced by working cooperatively with the franchisor. He believes that what he describes as Rodger's adversarial approach is not in the interests of franchisees and that it will derail the efforts of the CFC to develop a better relationship with the new management of Pet Valu, which took over in the fall of 2009. He believes that the Executive has had an improved relationship with the new management of Pet Valu.

[42] Dale deposes that after the commencement of the class action, he received a steady stream of phone calls from franchisees asking about their rights. He called Mr. Sterns (Sterns), class counsel, on Friday July 22, 2011 and left a voicemail. When he had not received a response by the following Wednesday, he sent an email to Sterns on July 27, expressing his annoyance at being ignored. Sterns responded that morning.

[43] On July 31, 2011, Dale sent Sterns a further email, setting out various inquiries he had received from franchisees. He states in his affidavit:

> By this point in time, I was frustrated by the level of confusion and having to deal with the opt-out process when I thought the class action was a counter-productive process and was wasting the time

> and energy of our group that could be better spent on improving our operations and the overall brand.

[44] Having sent this email to class counsel, Dale sent a copy to Tom McNeely (McNeely), the CEO of Pet Valu, with the following comment:

> Well I may not be able to kick him in the bag [testicles] directly. But we sure can ask a lot of questions and I mean a lot of questions and cost him some money and frustration. LOL [Laugh out Loud]

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[45] Dale explained this crude remark in his affidavit, saying that he was "really just venting as I was frustrated and did not know how to answer the numerous questions and deal with the concerns being expressed to me by other franchisees."

[46] He stated:

> While I regret the particular language used in my email to McNeely, which was intemperate, I would say it reflects the frustration I was feeling in not knowing how to deal with an entirely foreign process that appeared to work against what I believed was in the interest of franchisees. It seemed to me that one disgruntled franchisee, with little support, was able to take over and undermine our collective efforts to move forward constructively with a new management team that was already making a positive impact for the system and for individual franchisees.

[47] Dale's email to McNeely suggests that his questions to class counsel were not the result of any *bona fide* interest in the answers. That aside, Dale's explanation for his comment to McNeely is disingenuous. Dale's email to McNeely appears to be an effort to ingratiate himself with the franchisor by showing that he is aligning himself with what he perceives to be the interests of the franchisor in undermining the efforts of class counsel and destroying the class action.

[48] Dale states that the CPVF was formed in late August 2011 and was intended to be an autonomous and self-funded body, independent of the Executive, to provide leadership and information to franchisees concerning the opt-out process.

[49] Members of the CPVF agreed to make calls to other franchisees over the course of the Labour Day weekend. Dale deposes that in these calls, he identified himself as a member of the CPVF and explained that he was calling to provide information concerning the franchisees' opt-out rights. He said that he often related his own personal views of the merits of Rodger's action, "which largely mirrored the points noted on the CPVF website". Franchisees to whom he spoke were asked whether their names could be posted on the website, but they were given the option of remaining anonymous.

[50] The calls to franchisees followed a standard script or checklist. The caller:

- identified himself/herself as a founding member of CPVF;
- said that he/she was calling to encourage the franchisee to opt out;
- asked whether the franchisee had received the notice of certification;
- asked whether the franchisee had already opted out;
- asked whether the franchisee would agree to a follow-up call before the opt-out deadline;
- asked whether the franchisee would like to be publicly listed as a member of the CPVF;
- asked whether, if the franchisee was opting out, the CPVF could publish his/her name;
- asked whether the franchisee would like to make a donation to the CPVF; and
- directed the franchisee to a CPVF website, discussed below.

[51] This telephone campaign asked the franchisee to do what they were not asked to do at the CFC meeting – to state publicly whether they agreed with the position taken by the Executive and whether they would support that position by opting out of the class action. In most cases, the question was being asked by a member of the Executive, albeit wearing a CPVF hat.

[52] The second aspect of the CPVF campaign was the website, with the address www.concernedpvfranchisees.com, which was launched in early September 2011.

[53] I will not quote the contents of the entire website, but I will provide some illustrations:

- It showed at the top of the first page the number of franchisees who had opted out, with a link to the names of those who had opted out. By the end of the opt-out period, the banner said: "141 Current Franchisees Opting out & *Counting*. Click here to see who has decided to opt out."

- Later, there was a summary of the opt-outs – for example, at one stage of the campaign it stated: "To date we have contacted 178 Current Franchisees. 141 (79%) have said they are opting out. Only 8 (5.5%) have said they are not opting out. Check back again as the list of those opting out is growing and we will update it often."

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- This summary was followed by a list of the names and store locations of the franchisees who had declared their intention to opt out.

- At the top of the first page, the following statement appeared: "We are Pet Valu franchisees who have opted out of the class action and urge you to do the same. We believe that the class action was motivated by a desire to punish the former owners, who no longer own the company, and will not care what happens in the class action."

- The statement continued: "We believe that this action will negatively affect our own profitability, the value of our stores, damage our brand and divert valuable time and resources that could be spent building a stronger franchise network. This is why we believe it is detrimental to our collective interests as Pet Valu franchisees."

- "In our opinion, it does not matter whether there is a valid complaint about how things operated in the past. The new owners and management have demonstrated a clear commitment to improve our relationship and invest in the business."

- "We should be focusing on this new direction and work with the McNeely team to build a stronger, more successful brand for the benefit of all franchisees. This will be achieved through open dialogue and constructive feedback, rather than having lawyers creating walls between us and the Pet Valu management team."

- "Our opinion is not swayed by the fact that the class action alleges ongoing misconduct, in relation to volume rebates. If we have concerns with respect to this, or any other issues, it is a matter we should collectively pursue in discussions with Pet Valu's new management through the CFC."

- "… the class action will continue forward until it is settled, tried or decertified. We believe that until the class action ends, it will hurt our profitability because Pet Valu will use its limited resources fighting the proceeding instead of focusing on business."

- "We also believe that the class action will impair the value of our business, largely as a result of reducing growth. How many prospective purchasers might walk away from the franchise when they are provided with a disclosure document that says Pet Valu is being sued in a class action by franchisees? How will this impact what they are willing to pay and invest?"

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- "We believe we have far more to gain through a positive constructive dialogue than anything that might be accomplished through lawyers who seek to assert claims focused upon allegations of past misconduct by the former owners of Pet Valu."

- The website suggested that class members who opt out "still have the right to individually or collectively pursue [your] rights." It continues, "This will not waive your rights or stop you from pressing forward with issues individually or through the CFC, although statutory time limits can prevent how far a court can 'look back'."

[54] I have a number of concerns about the language of the website:

(a) The identification of the names of opt-outs was clearly designed to put pressure on those who had not opted out – the message was, "get on the bandwagon, because almost everyone else has and you don't want to be one of the few left standing at the end."[2]

(b) The message of the website was that the CPVF had determined that the class action was bad for franchisees and the implication was that anyone who did not opt out (and who would be readily identifiable as a non-conformist) was damaging the business, harming other franchisees, and undermining the efforts of the CFC.

(c) The message that the class action would "create walls" between the franchisees and the franchisor was designed to enhance the position of the Executive as the sole voice of Pet Valu franchisees and to exploit franchisees' concerns about the power imbalance between themselves and the franchisor. It in fact runs contrary to McNeely's evidence, discussed below, that Pet Valu intended to treat all its franchisees fairly and equally, regardless of their participation in the class action.

(d) There was no attempt to provide any form of informational balance or to discuss the issues in the class action – the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned.

(e) The website disparaged class counsel – references were made to lawyers "creating walls", receiving "25% if not more" out of any settlement or judgment and referred to them as "lawyers who seek to

[2] The website was not password protected. It was open for anyone to see. The evidence is that on about September 8, 2011, Dale told McNeely of the existence of the website and suggested that he have a look at it. As a result, the franchisor would know the name of every franchisee who had indicated an intention to opt out.

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assert claims focused upon allegations of past misconduct." The message was: "This is all driven by class action lawyers trying to make money".

(f) The suggestion that the lawsuit was motivated by a "desire to punish" the former owners has no factual basis. The liability of Pet Valu in this action is a corporate liability, which is obviously distinct from the ownership of the corporation.

(g) The suggestion that the issue of volume rebates could be addressed by the CFC is contrary to the evidence on certification that the CFC had been either unable or unwilling to do so. There is no evidence at all that Pet Valu as a corporation, under new management or otherwise, is prepared to address this issue voluntarily and without being required to do so as a result of this action.

(h) The alleged consequences of the class action, including its impact on franchisee profitability, its effect on Pet Valu, and its effect on the brand, were exaggerated and lacked any factual or evidentiary foundation.

(i) The statement that opting out would not prevent franchisees from individually or collectively pursuing their rights was misleading. It failed to address the reality, to which I averted in my decision on certification at para. 111, that individual claims by franchisees would be impractical. Collective pursuit would almost certainly be ineffective without the clout of a class action, given that Pet Valu continues to vigorously contest the franchisees' rights to share in volume rebates.

[55] The CPVF telephone campaign and website were an unabashed attempt to destroy the class action. The campaign made no pretence of giving franchisees an opportunity to make a private, considered and informed decision. It made no attempt to provide them with any information concerning the positive aspects of the class action. While expressing concern about franchisees being "confused or misinformed", the CPVF gave them more misinformation and added to the confusion. In an environment in which communications to the class by the parties had been strictly curtailed at the request of the parties and with the court's approval, the CPVF was able to use its influence and its opinions to advance what it perceived to be the interests of franchisees, which it aligned with the interests of the franchisor.

[56] I now turn to the applicable principles.

Applicable Principles

[57] The *C.P.A.* contemplates that important notices to class members will be approved by the court. It requires that the representative plaintiff must give notice of certification to class members (s. 17). Section 19 provides that "[A]t any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding." Section 20 stipulates that such notices must be approved by the court.

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[58] The right of a party to opt out is fundamental to the court's jurisdiction over un-named class members. It is also fundamental to preserve the legal rights of those who wish to exercise those rights other than through the class action: see *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399, [2010] O.J. No. 3381; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (C.A.) at para. 28.

[59] This court has consistently spoken of the importance of a fair and informed opt-out process in which class members are protected from coercion and from misleading, incomplete, biased or otherwise inappropriate information: see *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Gen. Div.).

[60] Where necessary to uphold the integrity of the opt-out process, the court can and must intervene by imposing conditions on communications between the parties and class members or by taking such other measures as may be required:

> • *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at paras. 69-92, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.);
>
> • *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (S.C.J.) at para. 31: "If communication by a defendant to a class member during the opt-out period is inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process the court will, on the motion of a party or class member, intervene under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 to ensure the fair determination of the class proceeding";
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> • *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 5116, [2010] O.J. No. 3912: opt-out deadline extended as opt-out forms had been solicited not by the defendants but by someone who had a relationship with them and did not reflect informed decision by the person signing them;
>
> • *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308, 71 O.R. (3d) 664 (S.C.J.).

[61] In *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367, [1999] O.J. No. 1402 (Gen. Div.), Sharpe J. observed, at p. 377 O.R.:

> As these cases hold, the court must retain the power to sanction conduct that undermines its statutory mandate to ensure that class members are given appropriate information when required to make binding decisions in relation to their legal rights in a class proceeding.

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[62] In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), Winkler J. spoke, at para. 74 and following, of the duty of the court to ensure that the *C.P.A.* is administered in a manner that is fair not only to the parties, but most importantly to absent class members. He noted that the underlying presumption is that class members "ought to be free to exercise their right to participate in or abstain from the class action on an informed, voluntary basis, free from undue influence" [at para. 74, emphasis added]. He continued, at paras. 75 and 76:

> Although s. 17(6) addresses post-certification notice, it is relevant on this motion because of its purpose. Here, the class members are being asked to effectively "opt out" of the class proceeding by A&P prior to certification, through the execution of the releases, without the benefit of the information that would be provided in a certification notice. The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will. However, to ensure the integrity of the opt-out process, absent class members must be fully informed of the issues in the proceeding and the impact on them as individuals. Thus, s. 17(6) is intended to prevent piecemeal dissemination of information critical to the decision making process by one side or the other.
>
> Further, the purpose and content of s. 17(6) serve as a useful guide with respect to communications with the putative class members. In that respect, the CPA does not prohibit pre-certification communication with the putative class, nor does it require prior court approval for every communication. Where, however, a communication constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose aimed at undermining the process, the court must intervene. [Emphasis added].

[63] In making these observations, I do not overlook the fact that the opt-out process can also be a means for parties to express their disapproval of the class action or to pursue others means of resolving the issues: see *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* at para. 33; *Fairview Donut Inc. v. TDL Group Corp.*, [2008] O.J. No. 4720 (S.C.J.).

Discussion

[64] I accept that an order restricting communication is extraordinary: see *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (S.C.J.) at para. 31. This should be particularly so where the communications come from a third party and not from the plaintiff or the defendant.

[65] I also accept Pet Valu's assurances that it was not party to the activities of the CPVF. An extensive affidavit was sworn by McNeely of Pet Valu. On the basis of that affidavit, which is

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largely unchallenged, I conclude that Pet Valu itself did not interfere with the integrity of the opt-out process or attempt to influence franchisees to opt out of the class action. I also conclude that Pet Valu did not directly encourage the CFC or the CPVF to do so. That said, McNeely was clearly aware of what CPVF was up to and was content to let it continue unabated.

[66] I also accept McNeely's evidence that Pet Valu has not taken and would not take repercussions against a franchisee as a result of his or her or its participation in the class action. McNeely's evidence is that he has "consistently" told franchisees that whatever their decision on the class action, it would not affect their relationship with him or Pet Valu. This is commendable. Unfortunately, it is inconsistent with the message delivered to franchisees by the CFC and the CPVF.

[67] The CPVF was in large measure an initiative of the Executive of the CFC, which had publicly stated at the Annual Meeting its concern that the litigation would jeopardize the franchisees' relationship with the franchisor. There was a natural concern, expressed at that meeting, that franchisees who supported the class action would be subject to discriminatory measures (i.e., "repercussions") by the franchisor.

[68] One of the great strengths of a class action is that it permits class members to pursue their claims, in the relative anonymity of a class, without fear of the consequences, whether real or perceived. It recognizes that access to justice can be impaired, in many relationships, including employer/employee and franchisor/franchisee, because people in vulnerable positions are afraid of suing their more powerful superiors. The CPVF exploited this by asking for an electronic show of hands on the website – asking, in effect, "are you with us and your fellow franchisees or against us?"

[69] In my view, the opt-out process has been subverted by the actions of the CPVF. It has interfered with the class members' fundamental right of access to justice.

[70] The CFC, wearing the hat of the CPVF, mounted a campaign designed to kill the class action. It did so by putting subtle and not-so-subtle pressure on hold-outs by prominently listing the "growing" list of names of opt-outs. A franchisee who did not pledge allegiance to the CPVF and promise to opt out could reasonably conclude that he or she would be outed as part of an identified minority who were pursuing their own selfish interests, who were not team players, and who were indifferent to the concerns of the majority. They could also conclude that they would be easily identified by the franchisor and that their participation in the class action might prejudice them in the future.

[71] The campaign painted an exaggerated and misleading picture of the dire consequences of the class action. It made no attempt to identify, or to discuss, the potential financial benefits of the class action.

[72] The campaign also painted a misleading picture of the legal rights of opt-outs. It suggested that there was a possibility that franchisees could opt out yet still pursue their claims either collectively or individually when, as a practical matter, this was highly unlikely, as I found on the certification motion. It also gave an insufficient and simplistic explanation of the potential

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limitations issues if a franchisee opted out of the class action but did not pursue his or her own individual action in a timely way.

[73] The campaign demonized class counsel. It preyed on franchisees' scepticism of lawyers.

[74] That demonization continued on the motion, with Pet Valu submitting that this motion is really being driven by class counsel's interest in a large fee. Class counsel has been appointed by the court, having found that a class action serves the goals of the *C.P.A.* and that this action meets the test under s. 5(1) of that statute, including the requirement that the class representative has retained competent counsel. Class counsel has a responsibility to class members and the court to ensure that the opt-out process is fair. Unfair aspersions of this nature, which denigrate the discharge of class counsel's responsibility and challenge his integrity and professionalism, are entirely unwarranted. As Rosenberg J.A. observed in *R. v. Felderhof*, [2003] O.J. No. 4819, 68 O.R. (3d) 481 (C.A.), at para. 93, "[I]t is a very serious matter to make allegations of improper motives or bad faith against any counsel."

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[75] To conclude, there is a reasonable probability, in my view, that many franchisees decided to opt out as a result of misleading information and unfair pressure amounting to intimidation. The fact that some class members have sworn that they did not experience pressure and acted on their own volition does not alter my conclusion.

[76] The question is, what should be done to remedy this unfortunate situation?

The Appropriate Remedy

[77] The plaintiff asks for an order setting aside all opt-outs received and postponing the opt-out process until after the plaintiff's pending summary judgment motion has been finally determined. In the meantime, it asks that the court send an additional notice, explaining what has transpired and why.

[78] Pet Valu opposes this extraordinary relief. It objects to a process that would allow class members to "wait and see" whether the action is successful before they decide to participate. It points out that this is not how class actions are supposed to work. It argues that this would permit class members to avoid the *res judicata* effect of a class action by opting out of the class action if it is not successful, giving them a "second kick at the can", either individually or as part of a subsequent class. The *C.P.A.* contemplates that the judgment, "whether favourable or not", will bind the class: see *C.P.A.* s. 17(6)(f).

[79] CPVF says that I have no jurisdiction to make an order in relation to non-parties, including franchisees who have opted out and are not before the court.

[80] I agree that the relief is extraordinary. The circumstances are also extraordinary. The acrimonious relationship between the parties, the confusion and misinformation amongst class members, the judicial restriction on communication with the class, and the aggressive campaign by CPVF designed to "out" those who did not fall in line, all raise a reasonable apprehension that the results of the "vote" do not reflect the informed wishes of the class. The court's over-riding responsibility, in the context of this motion, is to the absent class members. It is not a matter of

exercising jurisdiction over non-parties. It is a matter of protecting the integrity of the court's process and protecting the rights of all class members.

[81] I am satisfied that class members have been unfairly pressured, singled out and misinformed by the actions of the respondents and that the opt-out process has been corrupted as a result. The damage has been done. Sending a new notice or "re-doing" the opt-out process at this time would not put the genie back in the bottle.

[82] I should add that I do not attach particular weight to either the statements of the affiants who say that they want nothing to do with the class action or to the hearsay statements by Rodger that certain unidentified class members felt pressured to opt out. The evidence as a whole satisfies me that results of the opt-out process cannot be relied upon as an informed and independent expression of the will of class members.

[83] I have decided that any opt-out on or after September 5, 2011 will be declared invalid. Any opt-out prior to that date will be presumptively valid, subject to the right of any franchisee who opted out prior to that date to move to set aside his or her opt-out. Following the release of the court's decision on the summary judgment motion, or other final disposition of the action on its merits, those class members whose opt-outs have been declared invalid will be given a further opportunity to opt out, on terms to be fixed at that time.

[84] A notice to the class will be prepared to the foregoing effect.

[85] I realize that this is an imperfect solution to a difficult problem. I also realize that it may aggravate some franchisees, including some deponents on this motion, who do not want the court to interfere with their free will. My decision does not interfere with that right. If they wish to opt out, they will be entitled to do so, with full knowledge of what they are giving up if they do so.

[86] I understand Pet Valu's concern that franchisees who have previously opted out should not have a "second kick at the can" if the action is unsuccessful. The issue in this action is a very narrow one. If the plaintiff's action is dismissed on the merits, it seems highly unlikely that any subsequent action, individual or collective, would be successful. The concern in this case is not a real and substantial one.

[87] In coming to these conclusions, I have not overlooked the fact that there may have been delay on the part of the plaintiff in bringing this motion or the fact that the plaintiff himself may have engaged in communication that was not sanctioned by the court. Neither of these concerns detracts from the point that the process itself has been impaired, not by the plaintiff's actions but by the actions of the CPVF and the respondent franchisees.

[88] Nor have I overlooked the importance of the franchisees' right of association, as confirmed by s. 4(1) of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*AWA*) or the right of franchisees to freely express themselves. The *AWA* is concerned with the relationship between franchisor and franchisee, as opposed to the rights of franchisees *inter se*. The issue here is not whether franchisees are entitled to associate or to express their views, it is whether, in the peculiar circumstances of this case, the exercise of those rights have interfered

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with the rights conferred by the *C.P.A.* For the reasons given, I have concluded that they have so significantly interfered with those rights that relief is necessary.

[89] I should also add that I do not find it necessary to address the submission of Pet Valu that Rodger's affidavit should be struck because it contains inadmissible hearsay from unnamed sources. I have not relied on any of this evidence in coming to my conclusions.

[90] An order will issue to the foregoing effect. A copy of these reasons shall be posted on class counsel's website. Counsel are to make best efforts to agree on a short form notice to be sent to all franchisees, informing them of the outcome of this motion. That notice is subject to my approval. It need not be particularly lengthy or elaborate and class members can be directed to these reasons for further information. If there is no agreement within fifteen days, each of the plaintiff and Pet Valu shall submit its proposed form of notice to me. Alternatively, and preferably, they may submit a single draft notice, blacklined to show the nature of their differences, with a letter explaining their positions on those differences.

[91] There were no submissions as to costs. The plaintiff shall deliver written submissions within fifteen days or such further time as the parties may agree. The respondents shall have the same amount of time within which to reply. Submissions shall be limited to five pages, excluding the costs outline.

G.R. Strathy J.

Date: July 27, 2012

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