COURT OF APPEAL FOR ONTARIO

CITATION: 1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279
DATE: 20130503
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Winkler C.J.O., Armstrong and Hoy JJ.A.

BETWEEN

1250264 Ontario Inc.

Plaintiff (Respondent)

and

Pet Valu Canada Inc.

Defendant (Appellant)

Geoffrey B. Shaw and Derek Ronde, for the appellant Pet Valu Canada Inc.

Lawrence G. Theall and Bevan Brooksbank, for the appellant franchisees

David Sterns and Jean-Marc Leclerc, for the respondent

Heard: February 26, 2013

On appeal from the order of Justice George R. Strathy of the Ontario Superior Court of Justice, dated July 27, 2012, with reasons reported at 2012 ONSC 4317, 112 O.R. (3d) 294, and on appeal from his costs order, dated September 11, 2012, with reasons reported at 2012 ONSC 5029.

Winkler C.J.O.:

A. OVERVIEW

[1] This is an appeal from an order made by a motion judge concerning the validity of the opt-out process in a class proceeding certified under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*").

[2] Section 9 of the *CPA* provides class members with the right to opt out of a class proceeding. The right to opt out must be exercised during a finite period which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action. Critical to the integrity of the opt-out process is the right of individual class members to make a fully informed and voluntary decision about whether to remain as a member of the class or to exercise the right to opt out.

[3] The disputed opt-out process in this case followed the certification of a class proceeding brought on behalf of franchisees against the appellant franchisor, Pet Valu Canada Inc. Towards the end of the opt-out period, a group of Pet Valu franchisees who opposed the class action and who called themselves "Concerned Pet Valu Franchisees" ("CPVF")[1] waged a concerted campaign to try to persuade class members to opt out. After the CPVF's campaign began, the

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[1] Twelve franchisees who were founding members of the CPVF were named as respondents in the plaintiff's amended notice of motion, dated February 13, 2012 (amended June 19, 2012).

number of returned opt-out notices increased dramatically. By the end of the opt-out period, more than half of the class had submitted opt-out notices.

[4] A considerable time after the opt-out period ended, Robert Rodger, the principal of the representative plaintiff, 1250264 Ontario Inc., moved for an order setting aside the received opt-out notices. The motion judge granted the motion in part and invalidated any opt-out notices received on or after the beginning of the CPVF's opt-out campaign. The motion judge provided for a new opt-out period to take place after the final disposition of the action on its merits.

[5] The motion judge's remedial order followed from his conclusion that there was a "reasonable probability" that many franchisees decided to opt out due to misleading information and unfair pressure amounting to intimidation resulting from the CPVF's campaign. The motion judge found there was no evidence that the defendant Pet Valu was responsible for, or connected to, this misleading information or unfair pressure. Rather, he exclusively attributed the impugned conduct to activities of the members of the CPVF.

[6] Both the defendant Pet Valu and 12 non-party franchisees who were members of the CPVF ("appellant franchisees") appeal from the motion judge's order. The motion judge based his decision that the conduct of the CPVF undermined the opt-out process on the following considerations: his analysis of the content of the CPVF's web site and its telephone campaign; his inference

that class members were coerced or intimidated by the conduct of the campaign; and his finding that the campaign resulted in misinformation due to its lack of objectivity.

[7] In my view, the motion judge erred in two material respects: drawing the inference in the absence of any direct evidence and holding the CPVF to a standard of objectivity. The information disseminated amounted to no more than opinion as to the advisability of the lawsuit from a business perspective. It did not purport to comment on the legal merits of the action. Information relating to the action was already available through neutral court approved notices. The communications here were simply acceptable intra-class debate. Therefore, the motion judge misapplied the fully informed and voluntary test enunciated in the jurisprudence. I would allow the appeal and set aside the order invalidating the opt-out notices. My reasons follow.

B. FACTUAL BACKGROUND

[8] The factual background is well-stated by the motion judge at paras. 5-55, and, for the most part, I simply repeat the relevant details from his reasons.

[9] The Pet Valu chain consists of specialty stores selling pet food and supplies. The certified class consists of 256 Pet Valu franchisees who operated stores in Ontario and Manitoba between December 31, 2003 and March 28, 2011. 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.

[10] The motion judge presided over a number of case conferences and several motions. Pet Valu has vigorously defended the action and the motion judge characterized the atmosphere on motions and case conferences as highly adversarial. The plaintiff has a pending motion for partial summary judgment. Pet Valu has indicated that it proposes to bring a motion to de-certify the class proceeding. It has also filed a competing motion for summary judgment.

[11] The motion judge certified the action in January 2011: see reasons reported at 2011 ONSC 287, 16 C.P.C. (7th) 52. The central common issue that was certified is whether Pet Valu breached its contractual duty to class members by failing to share with its franchisees certain volume discounts and rebates that it received from suppliers and manufacturers during the class period.

[12] Following certification, communication with class members was an extremely contentious subject. A case conference was held in February 2011, which included a discussion of communications with class members. The minutes of the conference state:

> 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.

[13] The formal certification order issued on June 29, 2011 incorporated a Plan of Proceeding. The Plan of Proceeding includes provisions dealing with communications with class members. There was a concern on both sides, which the motion judge shared, that communications with the class between certification and the end of the opt-out period should be carefully supervised.

[14] Pet Valu had to be able to communicate with franchisees due to their ongoing commercial relationship. However, 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 certification order and the Plan of Proceeding did not purport to curtail the right of other franchisees – including Pet Valu's franchisee association known as the Canadian Franchise Council ("CFC") – from communicating about the class action.

[16] Section 17(6)(b) of the *CPA* provides that the right to opt out of a class proceeding must be exercised during a finite period which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action. In the present case, the certification notice approved by the case management judge was distributed to class members on

July 15, 2011. The notice specified that the opt-out period would be a 60-day opt-out period, expiring on September 15, 2011.

(1) The Opt-Out Process

[17] At an annual general meeting of the CFC held in August 2011 (during the opt-out period), there was considerable discussion amongst franchisees about the merits of the class action. Some class members, including Mr. Rodger, spoke in favour of the action while others, including members of the Executive Committee of the CFC, voiced opposition.

[18] The Executive made a motion to authorize it to present its view of the class action to those attending the annual general meeting. The motion carried and the Executive read a statement indicating in strong terms its opposition to the lawsuit as being harmful to franchisees' businesses and profitability, and their financial futures. A motion to have the entire membership of the CFC vote on a resolution to support the Executive's unanimous statement was withdrawn.

[19] In early September 2011, 10 of the 11 members of the Executive Committee of the CFC, as well as a spouse of an Executive member and two other franchisees, became founding members of the CPVF. The sole purpose of the CPVF was to encourage other Pet Valu franchisees to opt out of the class action.

[20] The campaign mounted by the CPVF had two major fronts. First, beginning on the Labour Day weekend, the founding members did a telephone blitz, calling every franchisee to encourage them to opt out of the class action. The calls followed a standard script. CPVF members identified themselves and explained that they were calling to encourage the franchisee to opt out. The caller asked whether the franchisee had already opted out and also asked whether, if the franchisee was opting out, the CPVF could publish his/her name. The caller also directed the franchisee to the CPVF's website.

[21] Second, in conjunction with the telephone campaign, in early September 2011, the CPVF launched a website. The motion judge set out much of the content of the website at para. 53 of his reasons.

[22] The website included a tally of the number of franchisees who had opted out of the action and a list of the names and store locations of the franchisees who had declared their intention to opt out. In addition, it contained statements voicing strong opposition to the class action based on beliefs that it would: hurt profitability; damage the brand; divert time and resources away from building a stronger franchise; place walls between franchisees and the new management who were described as being committed to improving the brand; and would reduce growth by deterring prospective purchasers of the franchise: see motion judge's reasons, at para. 53. The website also stated that class members who opt out "still have the right to individually or collectively pursue [their] rights." It

continued: “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’.”

[23] By September 4, 2011, only 37 opt-out forms had been received from class members. After the start of the CPVF’s campaign, there was a noticeable spike in the delivery of opt-out forms. By the end of the opt-out period on September 15, 2011, a total of 140 forms were received, which amounted to about 65 percent of current franchisees and 10 percent of former franchisees.

(2) The Plaintiff’s Motion

[24] On November 16, 2011, two months after the end of the opt-out period, the plaintiff served a notice of motion, without any supporting affidavit or other material, requesting an order setting aside all the opt-out notices. On February 13, 2012, the plaintiff served a further notice of motion with the supporting affidavit of Mr. Rodger. The plaintiff filed an amended notice of motion in June 2012, almost a year after the certification order was made. The motion was heard on July 4, 2012.

[25] In cross-examination on his affidavit, Mr. Rodger acknowledged that he knew that the CPVF’s campaign was going on during the opt-out period, but he did not seek direction from the motion judge during the opt-out period.

C. REASONS OF THE MOTION JUDGE

[26] The motion judge observed that the question before him was whether the opt-out process was "so irreparably impaired as to justify the extraordinary measure of judicial intervention" (at para. 2).

[27] He attributed the dramatic increase in the number of opt-out notices that were received in the last two weeks of the opt-out period to "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" (at para. 24).

[28] The motion judge found that the CPVF's website contained statements that had no factual basis and that were exaggerated or misleading. He expressed nine specific concerns about the content of the CPVF's website, at para. 54, which are set out below, at para. 53 of my reasons. He concluded, at para. 55, that the CPVF's telephone campaign and website "were an unabashed attempt to destroy the class action", "made no attempt to provide [franchisees] with any information concerning the positive aspects of the class action", and gave franchisees "more misinformation and added to the confusion".

[29] Based on the conduct of the CPVF and the content of its website, the motion judge concluded that there was "a reasonable probability … that many franchisees decided to opt out as a result of misleading information and unfair

pressure amounting to intimidation" (at para. 75). He was not swayed by the affidavit evidence of some class members that they did not experience pressure.

[30] Significantly, however, the motion judge found there was no evidence indicating that Pet Valu was somehow controlling the members of the CFC or the CPVF, or that Pet Valu had exerted any form of pressure on class members to opt out: see paras. 27, 31, 65-66.

[31] Turning to the issue of remedy, the motion judge concluded that an extraordinary remedy was warranted by the need to protect the integrity of the court process and the rights of all class members to make an informed and voluntary choice about whether to opt out (at paras. 80-81). He declared invalid any opt-out notice received on or after September 5, 2011. He further declared that opt-out notices received prior to that date were presumptively valid, but were subject to the right of a franchisee to move to set aside his or her opt-out. Finally, he made an order for a new opt-out process that would occur following the release of the court's decision on the summary judgment motion, or other final disposition of the action on its merits.

[32] In fashioning this remedy, the motion judge dismissed the concern that his order would undo the *res judicata* effect of the *CPA* by permitting class members to wait and see if the action is successful before deciding whether to opt out, thereby giving them a "second kick at the can" either individually or collectively.

In his view, if the class action were dismissed on the merits, it would be highly unlikely that any subsequent action, individual or collective, would succeed (at para. 86).

[33] The motion judge acknowledged that the plaintiff may have delayed in bringing the motion and that Mr. Rodger may have engaged in unsanctioned communication. However, he did not find these concerns determinative, noting that this did not detract from his conclusion that the appellant franchisees' actions had impaired the opt-out process (at para. 87).

[34] Finally, the motion judge dismissed concerns that had been raised about franchisees' rights of association pursuant to s. 4(1) of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3 ("*Franchise Disclosure Act*"). He found that in the unique circumstances of this case the exercise of these rights had interfered with the rights conferred by the *CPA* such that relief was necessary (at para. 88).

[35] In separate reasons prepared after receiving written submissions on costs, the motion judge awarded $60,000 in costs to the plaintiff, payable jointly and severally by Pet Valu and the appellant franchisees: see reasons reported at 2012 ONSC 5029.

D. ISSUES

[36] The appellants allege that the motion judge made the following errors of law:

1) He failed to hold the plaintiff to the civil standard of proof.
2) He erred in requiring that communications by the appellant franchisees satisfy a legal standard of objectivity and impartiality, which applies to court-approved notices under ss. 17-20 of the *CPA*.
3) He erred in failing to accept the uncontroverted evidence of the appellant franchisees and independent affiants that franchisees were not intimidated or coerced by the CPVF's campaign.
4) He erred in disregarding the association rights of the appellant franchisees provided by s. 4(1) of the *Franchise Disclosure Act* and he failed to exercise his statutory authority in conformity with the right of association provided by s. 2(d) of the *Charter*.
5) He erred in granting equitable relief without giving any weight to the plaintiff's failure to pursue the motion expeditiously or the misconduct of the plaintiff in engaging in unsanctioned communication with class members during the opt-out period.

6) He erred in deferring the opt-out period until after the final determination of the case on its merits, thereby eviscerating the *res judicata* principles of the *CPA*.

7) He erred by ordering an extraordinary remedy where more appropriate alternative measures were available, such as the holding of a new opt-out period without delay.

[37] The appellants further argue that the motion judge committed palpable and overriding error in finding that class members were misled and pressured into opting out when there was no evidentiary basis capable of supporting this finding.

[38] No issue was taken with the appellant franchisees' standing on the motion or the appeal. As former class members who have opted out of the class proceeding, the appellant franchisees are not parties as of right. There was no judicial order conferring intervener status on them. The only order against them was the motion judge's costs order, which the appellant franchisees have not appealed and which, in any event, I would set aside. Accordingly, in my view, the appellant franchisees were not proper parties on the motion and are not proper appellants. However, nothing turns on this lack of standing for purposes of dealing with the merits of the appeal. In oral argument before this court, the appellant Pet Valu adopted the submissions of the appellant franchisees in their entirety.

[39] Only Pet Valu seeks leave to appeal the costs award. It argues that the plaintiff's notice of motion contained serious allegations of misconduct on the part of Pet Valu that were unsubstantiated and that deserved the sanction of costs.

E. ANALYSIS

(1) Section 12 of the *CPA* and the *A&P* Test

[40] The motion judge's order was an exercise of his "broad, discretionary jurisdiction" under s. 12 of the *CPA: Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767, at para. 42. A discretionary decision to safeguard the fairness of a class proceeding is entitled to receive significant deference from this court. It may only be set aside if it is based on an error of law, a palpable and overriding error of fact, the consideration of irrelevant factors or the omission of factors that ought to have been considered, or if the decision was unreasonable: *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FCA 390, 44 C.P.R. (4th) 326, at para. 4.

[41] In making his remedial order, the motion judge properly recognized the need to protect the interests of the absent class members in the opt-out process. He stated, correctly, that class members "ought to be free to exercise their right to participate in or abstain from the class action on an <u>informed</u>, <u>voluntary basis</u>, <u>free from undue influence</u>", citing *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), affirmed (2004), 70 O.R.

(3d) 182 (Div. Ct.), leave to appeal refused (May 11, 2004), Court File No. M31109 (Ont. C.A.), at para. 74 (emphasis added by the motion judge). As explained in *A&P*, at paras. 75-76:

> 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.
>
> Where … 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.

[42] The reason why the opt-out decision must be informed and voluntary is that the choice to opt out of a class proceeding involves a serious access to justice issue. Once a class member opts out of a class proceeding, that person is either left to pursue his or her rights individually, which may be an unrealistic possibility depending on the nature of the claim, or the class member must relinquish the right to participate in any remedy that may be obtained for the underlying conduct of the defendant.

[43] Where class members engage in conduct that amounts to misinformation, threats, intimidation, coercion or that reveals some other improper purpose in an attempt to undermine the opt-out process, the court may intervene to restrain and remediate the effect of such conduct. The court may do so based on the

jurisdiction under s. 12 of the *CPA* to protect the fair determination of the proceeding.

[44] Where the parties become aware that class members or former class members are engaging in tactics that may demand judicial scrutiny during the opt-out period, the representative plaintiff should promptly seek the intervention of the supervising judge. As well, the defendant may not sit idly by in the face of such conduct without running the risk that a court will invalidate opt-outs based on the application of the informed and voluntary test established in *A&P*.

(2) Application to the Present Case

[45] The purpose of the opt-out process is to provide class members with the opportunity to make an informed and voluntary decision as to whether they wish to remain as participants in the class action.

[46] The motion judge was rightly motivated by a concern for protecting the fairness of the opt-out process and by the goal of ensuring that opt-out decisions were not the product of misinformation or intimidation. He was deeply troubled that the "CPVF telephone campaign and website were an unabashed attempt to destroy the class action" (at para. 55). In his decision awarding the plaintiff its costs of the opt-out motion, the motion judge stated, at para. 20, that the "survival of the class action depended on the outcome of the [opt-out] motion."

[47] These comments reveal that the motion judge was proceeding on an erroneous principle, at least to the extent that his analysis was premised on the view that the survival of the class action depended on the outcome of the opt-out motion. The motion judge believed that because slightly more than half the class had opted out, the very survival of the class action was at stake on the plaintiff's motion. He did not explain exactly what he meant by "the survival of the class action". In his reasons on the opt-out motion, he mentioned, at para. 6, that the defendant had raised the prospect of bringing a decertification motion.

[48] If by the survival of the class action the motion judge was referring to the prospect of decertification, he did not explain why the number of class opt-outs could undermine the evidence satisfying the certification criteria. Indeed, other than perhaps in the most extreme cases, I fail to see any reason why the number of opt-outs would be a basis for decertification. Alternatively, if he meant the viability of the class action somehow depends on the number of remaining class members, there is no basis for this concern. A certified class proceeding will continue regardless of the diminished size of the class and the correspondingly diminished damages award or settlement amount that might follow therefrom.

[49] The motion judge evaluated the fairness of the opt-out process based on an incorrect belief that the viability of the class action was in peril. From that viewpoint, the CPVF's actions would have appeared more troubling than they actually were.

[50] The motion judge's view that the survival of the class action was at stake on the opt-out motion – although incorrect – reflected the CPVF's motivation for waging the opt-out campaign. They were at least in part trying to end the class action by encouraging class members to opt out.

[51] Given these misconceptions about the nature of the opt-out process, I think it is important to emphasize that the *CPA* does not contemplate the politicization of the opt-out process. The opt-out process is not analogous to the labour context where majority support or opposition is required to certify or decertify a union. Within the statutory framework of the *CPA*, there is no legitimate purpose that can be achieved by politicizing the opt-out process. As explained in *A&P*, at para. 32, certification motions are not determined through a referendum of the class members. Nor is the viability of the class action dependant on majority support. Just as the percentage of support amongst class members is not an element of certification, opting out cannot stop a class action. The number of opt-outs does not in itself provide a basis for decertifying a class action.

[52] In a class proceeding, a representative plaintiff seeks to obtain court approval through certification of the action to pursue a remedy for a group – the class – who have suffered a common wrong. Once the action is certified, as it was here, the representative plaintiff is obliged to pursue the action on behalf of the class, subject to receiving court approval to withdraw. The opt-out process is not a vote on whether the class action should go forward. It is simply a process

by which members of the class can individually elect not to have the representative plaintiff continue to act and pursue the claim on their behalf and in so doing, forego any right to share in the success of the lawsuit. Once a class member has opted out of the class proceeding, he or she is a stranger to the lawsuit and has no standing before the court. Thus, the person who has opted out has no say about how the action is conducted or whether or not it will continue to go forward.

[53] The motion judge was right to be attuned to the possibility that the CPVF was attempting to undermine the opt-out process by politicizing it. He was also right to analyze this possibility by applying the *A&P* test. However, he erred in his portrayal of the impact of the opt-out process. He also erred in imposing on the class members the obligation to communicate in an objective manner and in his interpretation of the campaign as a whole.

[54] The motion judge identified the following nine specific concerns about the misleading and intimidating nature of the language of the CPVF's website, at para. 54:

> (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."
>
> (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... 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 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] He went on to make the following findings about the CPVF's campaign, at para. 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] In the Plan of Proceeding, the motion judge had restricted communications by the plaintiff and the defendant. He did not impose restrictions on members of the class. I agree that in the present case there was a real risk that the CPVF's

opt-out campaign could cross the line of pressuring or intimidating class members into opting out on an uninformed or involuntary basis.

[57] Despite this risk, however, a finding that the CPVF's campaign crossed the line described in *A&P* was unavailable to the motion judge on the record before him. It is instructive to describe the nature of the evidence of the defendant's conduct in *A&P* and the representative plaintiffs' response to it, and to compare these circumstances to the present case.

[58] In *A&P*, the plaintiff franchisees brought a certification motion as well as a motion seeking an order restricting communications by the defendant franchisor with class members during the opt-out period. After granting the certification order, the court considered whether it was appropriate to grant the extraordinary relief requested by the plaintiffs on their additional motion.

[59] The plaintiffs in *A&P* introduced affidavit and *viva voce* evidence indicating that, prior to the certification motion, the defendant franchisor had "engaged in a course of conduct that is intimidating, threatening, and coercive, and in consideration of the information vacuum, sufficiently misleading to vitiate any notion that the franchisees executing releases are doing so on an informed basis" (at para. 80). The evidence showed that the defendant had monitored franchisees' legal services, imposed unlawful and unilateral rent increases on non-cooperative franchisees, and had arranged for franchisor executives to

personally visit franchisees to solicit releases of their claims. Based on this evidence, the court made an order restricting the franchisor's communications with franchisees and prohibiting it from circulating its new franchise agreements to, or entering into releases with, class members during the opt-out period.

[60] In the present case, both parties became well-aware of the CPVF's opt-out campaign soon after it began. Either party could have sought the motion judge's intervention to determine if the CPVF's telephone campaign and website were misleading, or if its tactics were threatening, intimidating or coercive. The motion judge had given the parties an open invitation to seek his direction regarding communications with class members. Yet neither side acted on this invitation during the opt-out period.

[61] Here, unlike the pre-emptive approach of the moving party in *A&P*, the plaintiff waited for two months after the expiry of the opt-out period to file a notice of motion questioning the fairness of the opt-out process. Supporting material for the motion was not delivered until three months later, in February 2012. The motion was not made returnable until July 4, 2012, almost ten months after the opt-out period had expired and more than a year after the certification of the action.

[62] This dilatory conduct by the representative plaintiff is very troubling. Post-certification, the representative plaintiff represented all class members up until

the time that they chose to opt out of the proceeding. Prior to that point, the representative plaintiff had a duty to protect their interests. In the present circumstances, this duty included a responsibility to alert the motion judge to any communications that appeared to coerce, intimidate or mislead class members into opting out. The purpose behind ensuring that the opt-out decision is made voluntarily and with full information is not to protect the size of the class for the benefit of the representative plaintiff or his counsel. If the representative plaintiff had concerns about the nature of the CPVF's communications during the opt-out period, it was incumbent upon the representative plaintiff to bring the issue to the attention of the motion judge as soon as possible.

[63] Also distinguishing this case from *A&P* is the lack of evidence adduced by the plaintiff capable of establishing that class members had been misled or intimidated. The plaintiff filed no direct evidence from any class member going to the issue of whether their opt-out decisions were voluntary and informed. Considering that the only issue on the plaintiff's motion was whether the opt-outs were involuntary or misinformed because of the CPVF's campaign, it is strange indeed that no evidence was adduced from a single opt-out to the effect that any one of them felt intimidated or misled into opting out.

[64] The only affidavit evidence filed in support of the motion consisted of Mr. Rodger's affidavit, which refers to unnamed franchisees allegedly having experienced pressure from members of the CPVF to opt out. The motion judge

did not rely on this evidence in coming to his conclusions (at para. 89). Thus, the motion judge's finding that the telephone campaign and the public disclosure on the CPVF's website of the names and store locations of opt-outs had a coercive effect on the rest of the class was not based on direct evidence from any class member.

[65] Instead, the motion judge's conclusion was based on an inference that class members were misled or pressured into opting out by the CPVF's campaign. His reasons, at paras. 68 and 70, illustrate this:

> The CPVF exploited this [vulnerability of the relationship between franchisor/franchisee] 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?"
>
> …
>
> 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.

[66] There can be no doubt that there was evidence that the CPVF were attempting to persuade and pressure the class members to opt out of the proceeding. The issue is whether this evidence is capable of supporting an

inference that the campaign was coercive. In relying on the posting of names of opt-outs as supporting the inference of coercion, the motion judge did not take into account the following evidence: that the CPVF's telephone callers asked class members for permission to publish their names; that the website listed the number of franchisees who had opted out but who preferred to remain anonymous; and that the certification order, posted on class counsel's website, required class counsel to serve on Pet Valu a list of the names of opt-outs. In short, the CPVF's website explicitly respected class members' anonymity and did not divulge any information about class members that Pet Valu was not otherwise entitled to receive pursuant to the certification order.

[67] There was no evidence that any class member perceived a threat that Pet Valu might take retaliatory action against them for remaining in the class. To the extent that the motion judge's inference that pressure to opt out took advantage of the vulnerability inherent in the franchisor/franchisee relationship, this is inconsistent with his finding that Pet Valu was not linked to the impugned conduct of the CPVF. The motion judge made multiple findings to this effect:

> I did 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 (at para. 27).
>
> ...
>
> 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 (at para. 31).
>
> ...
>
> 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 [the Chief Executive Officer] of Pet Valu. On the basis of that affidavit, which is 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 <u>directly</u> 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 (at para. 65). [Emphasis in original.]

[68] The motion judge's inference that class members were intimidated into opting out by the public disclosure of the names of opt-outs is also inconsistent with his acceptance of the evidence of Mr. McNeely, the CEO of Pet Valu, that: Pet Valu "had not taken and would not take repercussions against a franchisee as a result of his or her or its participation in the class action"; and he "consistently" told franchisees that whatever their decision on the class action, it would not affect their relationship with him or Pet Valu (at para. 66). The motion judge commented that while this attitude was "commendable", it is "inconsistent with the message delivered to franchisees by the CFC and the CPVF." However, the CPVF could not, and did not, speak on behalf of Pet Valu. Any inference to

the effect that it did is inconsistent with the motion judge's findings concerning the absence of involvement by Pet Valu in the campaign.

[69] Appellate intervention is warranted where an inference of fact is not supported by any evidence and where an improper inference has a material effect on the outcome: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23. The conclusion reached by the motion judge, at para. 75, that there is "a reasonable probability" that many franchisees decided to opt out due to "unfair pressure amounting to intimidation" is based on the inferences he drew. In my view, these inferences lack a valid evidentiary basis and, given their significance to the outcome of the motion, must be set aside.

[70] The motion judge also erred in law in holding the CPVF to a standard of objectivity in the circumstances. He concluded, at para. 54(d), that the CPVF's campaign rendered the opt-out process unfair because there was no attempt on the website "to provide any form of informational balance or to discuss the issues in the class action". He noted: "the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned."

[71] However, unlike the situation in *A&P*, the CPVF's campaign took place following certification. At the start of the opt-out period, the class members received a court-approved notice of certification describing the nature of the

proceeding and indicating that damages were being sought on their behalf. The notice describes the opt-out process and the consequences of opting out. In addition, the notice has a link to class counsel's website and advises class members that a copy of the statement of claim and the rulings by the court in the action are available on that site. Thus, the class members had readily-available information about the possible benefits of the class proceeding through the court-approved notice of certification and class counsel's website.

[72] Indeed, had the representative plaintiff brought his concerns before the motion judge in a timely fashion, the motion judge could have dealt with any problem of improper communications whether by relieving the plaintiff from the terms of the "gag order", by giving some form of direction to the parties, or by reminding the parties and the class members that objective information regarding the lawsuit was available through the sources just discussed. The motion judge was not afforded the opportunity to do so.

[73] When the motion judge was eventually asked to deal with the plaintiff's concerns, he should not have held the CPVF's communications to a standard of objectivity. These former class members had an unassailable right to speak out in opposition to the class proceeding in an attempt to convince other class members to opt out, subject only to the overriding principles set out in *A&P*.

[74] The CPVF's website to which the motion judge took exception, at para. 54, contains assertions of belief that the class action is not in the best interests of franchisees and that it is driven by lawyers with a large financial stake in the outcome. The comments amount to no more than the CPVF members expressing their opinion on the undesirability from a business perspective of pursuing the lawsuit, as opposed to denigrating the technical merits of the action. The opt-out provision is the appropriate mechanism for class members to voice these types of objections to the wisdom of a class action: see *Fairview Donut Inc. v. TDL Group Corp.*, (2008) CanLII 60983 (On. S.C.), at para. 11. Class members are able to consider such objections in the context of the other information made available to them in the notice of certification and on class counsel's website. Apart from attempting to persuade other class members to forego their legal recourse against a defendant in a class proceeding, this interaction has no effect on the lawsuit other than reducing the number of persons in the class.

[75] The motion judge's application of the fully informed and voluntary test from *A&P* was flawed in these circumstances where there was no evidence linking the defendant to the impugned conduct and where the communications amounted to the type of intra-class debate that is acceptable during the opt-out period.

F. CONCLUSION AND DISPOSITION

[76] For these reasons, despite the deference that is owed to a discretionary decision by the motion judge, I would allow the appeal and set aside the order at issue.

[77] It was within the purview of the motion judge to scrutinize the CPVF's campaign according to the fully informed and voluntary test as enunciated in *A&P*. In so doing, the motion judge found that the appellant Pet Valu was not implicated in the CPVF's campaign. Given the evidentiary record on the motion, the power imbalance inherent in the franchisor/franchisee relationship was not properly considered in assessing the effect of the CPVF's communications on class members.

[78] At the start of the opt-out period, the class members were provided with a court-approved notice of certification and had access to class counsel's website with full particulars regarding the action. In this manner and in accordance with the statutory scheme, they were afforded access to objective information regarding the legal proceeding.

[79] The CPVF's campaign only dealt with the opinion as to the advisability of the legal proceeding from the business perspective of the franchisees. The campaign had as its central theme the suggestion that the class members should give the franchisor's new management team a chance to deal with the complaint

underlying the primary common issue certified in the proceeding. The CPVF's campaign advocated as a matter of opinion that it was not in the interests of the class members to have an outstanding lawsuit between them and the franchisor because it would distract the franchisor from running the business, would harm the Pet Valu trademark and would devalue their assets. In other words, the campaign did not attempt to address the technical merits of the lawsuit.

[80] The motion judge ought not to have held the CPVF's campaign to a standard of objectivity but should only have considered if the conduct of the campaign constituted misinformation, threats, coercion, intimidation or was otherwise unlawful. As explained, there is no evidence to support a finding that the opt-outs by individual class members were not voluntary or fully informed.

[81] The representative plaintiff was aware of the campaign by the CPVF to encourage class members to opt out of the action during the opt-out period. Nonetheless, he took no action to bring the campaign to the motion judge's attention until months after the opt-out period had expired. When he finally argued his motion to invalidate the opt-out decisions, he was unable to tender evidence from a single other class member indicating that the CPVF's campaign improperly influenced the decision to opt out of the proceeding in the sense contemplated by the test established in *A&P*.

[82] I would therefore allow Pet Valu's appeal and set aside the order invalidating the opt-out notices. I would also set aside the motion judge's cost award against Pet Valu and the members of the CPVF.

[83] The appellant Pet Valu shall have its costs of the appeal fixed in the amount of $10,000, inclusive of disbursements and HST.

[84] As noted, the appellant franchisees had no standing on the motion or the appeal. As such, they are not entitled to their costs of the motion or the appeal.

Released: MAY 0 3 2013

CJO

I agree R.A. Blair J.A.

I agree Alexandra Hoy J.A.