Court File No. CV-09-392962-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff

- and -

PET VALU CANADA INC.

Defendant

FACTUM OF THE PLAINTIFF
(MOTION FOR SUMMARY JUDGMENT)

February 28, 2014

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PART I - OVERVIEW

1. This factum is in support of the plaintiff's motion for summary judgment and is also responsive to Pet Valu's factum dated February 20, 2014.

2. The plaintiff's motion for summary judgment will help this class action progress fairly and efficiently.

3. The class members are current and former Pet Valu Canada Inc. ("Pet Valu") franchisees who allege their franchise agreement entitles them to be paid "volume allowances" that Pet Valu obtains from its suppliers, which they never received.

4. After the class action was certified, the plaintiff took up Justice Strathy's suggestion that the case might proceed efficiently on the basis of a sample set of supplier documents. The goal of the exercise was to use the sample documents to allow the Court to determine whether Pet Valu had failed to pay volume allowances. Findings from the sample set could then be applied to the balance of the claim.

5. For the sake of even more efficiency, the parties agreed they would not exchange full affidavits of documents prior to the summary judgment motions, believing instead that focused and targeted documentary production of the most critical supplier documents is all that would be needed. It was always understood that this was subject to being revisited, as Justice Strathy noted.

6. The parties exchanged their summary judgment records. It emerged in Pet Valu's material that it was of the view that very few suppliers paid volume allowances and that the value of any such volume rebates was only $122,403.21 for Pet Valu's "top 10" suppliers over the class period (in circumstances where Pet Valu has spent many more times this amount in legal fees alone

on post-certification motions). By contrast, the plaintiff's view is that under a proper interpretation of Pet Valu's obligations under the franchise agreement, information about other categories of supplier money and discounts should be produced in order to assist in determining if Pet Valu has passed on all amounts that it is required to under the franchise agreement. Indeed, Pet Valu's 2008 annual report states that in that year alone, it recorded over $1M in "vendor allowances."[1]

7. This is related to the second issue the plaintiff will ask the court to decide. Pet Valu denies that it is under any contractual obligation at law to pass on any volume allowances whatsoever. If Pet Valu succeeds with this argument, the class action should be dismissed because the claim is premised on a breach of contract. However, if the plaintiff's interpretation wins, an important contractual argument (embedded within many of the certified common issues) will be decided for the purposes of this class action.

8. The Supreme Court of Canada recently decided in *Hryniak v. Mauldin*[2] that summary judgment rules should be used to efficiently determine cases. The summary judgment process can particularly benefit class actions to help efficiently decide serious cases affecting a multitude of people. This is an example of a case in which the summary judgment rules can be used to advance the case in a sensible way. If the court accepts Pet Valu's argument that it has total discretion to do whatever it wants with the volume allowances, and it exercised its discretion in this manner, then there is no need for further debate about Pet Valu's productions because Pet Valu wins the contractual argument. On the other hand, if the court decides that Pet Valu is indeed required under the contract to pass on volume allowances and that it has not provided enough information

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[1] Plaintiff's motion record, p. 130.

[2] 2014 SCC 7.

about certain types of supplier money and discounts, then Pet Valu will be ordered to produce more information. The plaintiff and defendant are both prepared to join issue on this issue of contractual interpretation.

9. The contractual argument is straightforward. The franchise agreement is replete with references to Pet Valu's "substantial purchasing power" arising from the collective purchases of Pet Valu franchisees. Pet Valu states in the agreement that its power is intended to "collectively and severally benefit the operation of Pet Valu stores." Pet Valu promises to "allocate" volume allowances to franchisees. Pet Valu's only legal defence to these arguments is a section of the franchise business manual, which it says is determinative of the issue.

10. The plaintiff's response to Pet Valu's "manual" arguments is that the manual is legally ineffective at modifying Pet Valu's obligations under the agreement. Pet Valu's conclusion that the manual gives it total discretion to do whatever it wants with allowances goes far beyond the actual words used. The excerpt relied on by Pet Valu is described as "interim" and something that "may or may not" occur. That is not how a franchisor having an alleged unilateral and unfettered power to take away something would express an intention to remove class members' entitlement to something that is important to them.

11. Pet Valu has consistently taken a narrow view of the issues in this case. It does so again in its factum. This court should determine the contractual interpretation issue in favour of the plaintiff. The court's analysis of the threshold issue will provide practical guidance for the fair and efficient determination of the common issues, consistent with the Supreme Court's decision in *Hryniak*.

PART II - FACTS

12. The basic legal issue in this case involves a question of contractual interpretation. There is a lengthy and detailed factual background available to be discussed, but for the purposes of this motion, only a brief background is required to properly frame the significance of the motion in this class action.

13. The certified common issues are attached at Tab A. To the extent possible, the plaintiff ignores the submissions of Pet Valu that are not directed towards the common issues.

14. One refrain throughout Pet Valu's materials that deserves to be addressed involves evidence about the representative plaintiff's alleged poor store performance. This is then compared to Pet Valu franchisees as a whole, who are said to have fared very well (see *e.g.* the following pages of Pet Valu's factum: 7, 23-30 incl., etc.). Included within these paragraphs are matters of total unimportance to the certified common issues, mostly involving various attacks on the representative plaintiff. Six paragraphs of Pet Valu's factum even seek to dispute an affidavit the plaintiff swore four years ago on certification.[3]

15. All these arguments seeking to tar the representative plaintiff were rejected by Justice Strathy at paragraph 99 of his certification reasons: "Pet Valu says that the losses suffered by [the representative plaintiff] are really attributable to his inefficiency, lack of experience and poor business practices. If, however, Pet Valu has consistently failed to give credit to [the

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[3] Pet Valu factum, paras. 75-81.

representative plaintiff] and other franchisees for Volume Rebates that they should have received, it must have affected their margins and their underlying profitability."[4]

16. To the extent the background facts help to give context to the significance of "volume allowances," the reality about "how were franchisees doing?" was addressed in Justice Strathy's certification reasons. Pet Valu argued (as it does now) that the representative plaintiff's claim was "idiosyncratic" and that he had to prove that there was a group of like-minded persons who were willing to join him.

17. Justice Strathy rejected this argument outright:

> I do not agree with this submission on this issue. The plaintiff's evidence is that the cost of goods is of vital importance to franchisees, a proposition that could hardly be debated. The evidentiary record supports the conclusion that costs, margins and store profitability have been an ongoing concern for franchisees. Minutes of meetings of the executive committee of the C.F.C. demonstrate a concern that Pet Valu had not shared its profits with its franchisees, that the share of the "profit pie" had not reached the store level, and that store margins were unacceptably low.[5]

18. He also found that "considering that the franchisee has an obligation to make significant payments to Pet Valu before seeing any profits, the issue of the franchisee's entitlement to share in Volume Rebates is a factor that vitally affects its profitability."[6]

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4 Reasons of Justice Strathy dated January 14, 2011, para. 99. Pet Valu makes unfair inferences about the plaintiff throughout its material. By way of one example, they point to the plaintiff's closure of the "Hungry Pet" store within one year after it was opened, in which the plaintiff acknowledged that the store was not profitable, as evidence that the plaintiff is not credible: see *e.g.* para.84- 86 of Pet Valu's factum. What Pet Valu unfairly seeks to infer fails to take into account the broader facts arising from the settlement, including the existence of a "non-compete" clause and outstanding litigation claims seeking injunctive relief and costs.

5 Certification reasons, para. 72.

6 *Ibid.*, para. 42.

19. The important and unassailable point that is relevant to the issues on these motions is that the cost of goods "is of vital importance to franchisees," something that Justice Strathy found was a proposition that could hardly be debated. He also found that franchisees had ongoing concerns about costs, margins and profitability.

20. That is the important contextual background to frame the significance of the volume allowance contractual interpretation issue in this motion. Cost of goods is an issue that is of vital importance to the class members. The franchise agreement describes the amount that franchisees will be required to pay for merchandise from Pet Valu. In that very same section, a promise made to allocate volume allowances would seem to be a significant and meaningful offer to a franchisee having "cost of goods" as an issue of vital importance, particularly where the franchise agreement is replete in other sections with references to the collective benefits they will obtain arising from Pet Valu's substantial purchasing power.

21. Pet Valu has provided no evidence in its voluminous records to dispute Justice Strathy's basic findings in that respect. They should not be disturbed for the purposes of these motions.

PART III - ISSUES AND LAW

22. The first issue in this motion is whether the franchise agreement requires Pet Valu to share volume allowances with its franchisees pursuant to the franchise agreement. The plantiff argues Pet Valu is required to share volume allowances, while Pet Valu says it is not.

General principles of contractual interpretation

23. The applicable principles of contractual interpretation are well-settled. When interpreting the terms of a contract, "the aim is to determine the intentions of the parties viewed

objectively at the time they entered the contract."[7] The analysis "begins with an examination of the text of the written agreement. The aim is to determine the objective intentions of the parties from the words they have used."[8] In analyzing a contract, "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purpose and commercial context."[9]

24. Contracts are not analyzed in a vacuum. It is appropriate to examine the surrounding circumstances or factual matrix at the time of the negotiation and execution of the documents, as viewed objectively by a reasonable person.[10] In *Dumbrell v. Regional Group of Companies Inc.*,[11] Justice Doherty acknowledged that "there is some controversy as to how expansively context should be examined for the purposes of contractual interpretation,"[12] but clarified that "[i]nsofar as written agreements are concerned, the context, or as it is sometimes called 'the factual matrix', clearly extends to the genesis of the agreement, its purpose, and the commercial context in which it is made."[13]

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7 *Coventree v. Lloyds Syndicate 1221 (Millenium Syndicate),* 2012 ONCA 341 at para. 16.

8 *Ibid.*

9 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64.

10 *Ibid.*, para. 17, citing *Hill v. Nova Scotia (A.G.)*, [1997] 1 S.C.R. 69 at para. 20 ("it is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about") and *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust et al.*, 2007 ONCA 205.

11 2007 ONCA 59.

12 *Ibid.*, para. 55.

13 *Ibid.* These paragraphs were cited approvingly by the Court of Appeal in *Schneeberg v. Talon International Development Inc.*, 2011 ONCA 687.

25. Justice Strathy summarized the above principles of contractual interpretation in *Fairview Donut Inc. v. The TDL Group Corp.,*[14] holding that they are generally also applicable to franchise agreements.

26. In this case, applying the *Dumbrell* decision, the context in this case is that "cost of goods is of vital importance to franchisees," as described above. It is a reasonable and common-sense inference on the facts. "Cost of goods" issues have arisen in many franchise disputes, including ones involving companies as varied as A&P, Quizno's, Midas and Tim Hortons.

Principles of contractual interpretation specific to franchise agreements

27. There are additional principles of interpretation specific to franchise agreements, arising from the fact that they are unilateral contracts of adhesion. In *Fairview Donut*, Justice Strathy summarized these as follows: "Where there is ambiguity, they should be interpreted *contra proferentem*. Exclusionary clauses should be subjected to particular scrutiny: see *Shelanu Inc. v. Print Three Franchising Corporation* (2003), 64 O.R. (3d) 533 (C.A.) at para. 58."

Summary judgment principles

28. The plaintiff agrees with the basic legal principles of summary judgment, described at paragraphs 95-98 and paragraph 102 of Pet Valu's factum dated February 20, 2014. The plaintiff particularly agrees with a need to use "the new fact finding tools."

The Pet Valu franchise agreement

29. There is a common franchise agreement. The plaintiff's franchise agreement is dated March 11, 2005.

[14] 2012 ONSC 1252.

Recitals in the Pet Valu franchise agreement

30. The franchise agreement describes the recitals as particularly significant. The very first paragraph of the agreement states that the recitals "set forth the basis of the relationship between the Parties, record the fundamental understandings between the Parties, and document the anticipation and reliance of the Parties upon these understandings and truths."[15] These are not ordinary boilerplate recitals.

31. The recitals make not one but four separate references to Pet Valu's "purchasing power":

(a) "AND WHEREAS [Pet Valu] has substantial purchasing power in relation to products for resale, equipment, services, and operating supplies;"

(b) "AND WHEREAS the said purchasing power results from [Pet Valu's] ability to negotiate with suppliers promotional or other merchandising activities at and through all Pet Valu stores, to require and ensure that all Pet Valu stores stock and reorder specified inventory levels, and to impose restrictions upon such merchandising activites, including restrictions on the sale of specific Merchandise;"

(c) "AND WHEREAS the said purchasing power is diminished in the event that one or more Pet Valu franchisees either fails to co-operate with the commitments negotiated by [Pet Valu] with suppliers of products or services or attempts to negotiate directly with such suppliers;"

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[15] Plaintiff's motion record, p. 171.

(d) "AND WHEREAS there exists an obligation on the part of the Franchisee and all other franchisees of the Pet Valu System, to enhance the collective purchasing power and the business image of all Pet Valu stores;"[16]

32. The "purchasing power" in the recitals refers to the "collective" purchasing power of Pet Valu, arising from the purchases of "all Pet Valu stores." If all Pet Valu stores funnel their purchases through Pet Valu, this enhances Pet Valu's collective purchasing power. Franchisees are required to enhance Pet Valu's purchasing power.

33. Another recital says that that there is "an obligation on the part of the Franchisee and all other franchisees of the Pet Valu System, to ensure that such standards of cleanliness, convenience, courtesy, business practice, service and personal attention and uniformity of product are consistently maintained."[17] The recital concludes that "it is of fundamental importance, for the collective benefit of the Franchisee and all other franchisees of the Pet Valu System, that [Pet Valu] be able to strictly enforce the Franchisee's compliance with such standards."[18]

34. "Pet Valu System" is defined in the franchise agreement to include the "buying power and buying systems of [Pet Valu] which collectively and severally benefit the operation of Pet Valu stores."[19]

35. In summary: the recitals are described as intended to "the record the fundamental understandings between the parties." Pet Valu promises that it has substantial purchasing power. It

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[16] *Ibid.*, p. 172.

[17] *Ibid.*

[18] *Ibid.*, p. 173.

[19] *Ibid.*, p. 177.

requires all franchisees to assist to increase its purchasing power. Pet Valu's purchasing power is described as being "for the collective benefit of the Franchisee and all other franchisees of the Pet Valu system." Those representations will be significant when considering the context for Pet Valu's obligations to allocate volume allowances to class members.

36. Paragraphs 9 to 12 of Pet Valu's February 20, 2014 factum object to the plaintiff making any references to these recitals because it says "this is not the subject of the class proceeding. The plaintiff may not re-litigate allegations that the certifying judge refused to certify as common issues. Volume Rebates are the only issue in play in this class proceeding."[20]

37. That is exactly the opposite of what Justice Strathy held when this precise issue was brought before him when the parties could not agree on the wording of the common issues. Pet Valu sought to limit the wording of the contractual interpretation common issue to section 22(f) of the franchise agreement only. Justice Strathy rejected this argument, holding: "As I said during my submissions, in my view, it is not appropriate to limit this common issue by looking at one clause of the Franchise Agreement in isolation. In determining whether Pet Valu had a duty to share volume rebates with class members, the court will be entitled to look at, among other things, all the terms of the contract. I found that there was a basis in fact arising out of section 22(f), but that does not preclude the plaintiff from asserting that other provisions of the contract support that interpretation any more than it precludes the defendant from asserting that other provisions negate that interpretation."[21]

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[20] Pet Valu factum, para. 11.

[21] 2011 ONSC 1941, para. 11.

38. All of Pet Valu's submissions on this point are incorrect. The plaintiff is not limited in its ability to cite and rely on different sections of the contract.

Pet Valu's obligation to allocate volume allowances

39. Section 22 of the franchise agreement deals with the purchase of merchandise by franchisees. It is part of certified common issue #1: "Has the defendant breached its contractual duty to the Class Members at any time during the Class Period by failing to share Volume Rebates with them?"

40. Section 22 contains a number of standard and unexceptional requirements that are typical in many franchise relationships. For example, under section 22(a), the franchisee is required to display and maintain required inventory levels of merchandise specified by Pet Valu.[22] Section 22(b) gives Pet Valu the right to impose a maximum retail prices on merchandise sold by franchisees.[23]

41. Section 22(f) states that volume allowances granted by suppliers "shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System." Section 22(f) is reproduced below:

> Volume allowances granted to [Pet Valu] by a supplier or manufacturer based upon [Pet Valu's] annual purchasing volume shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System.

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22 Plaintiff's motion record, p. 210.

23 *Ibid.*, pp. 210-211.

42. In his certification reasons, Justice Strathy held that “the use of the term ‘allocated’ implies that they will be distributed or used for a specific purpose.”[24]

43. The franchise agreement does not define the expression “volume allowance.” The concept of an “allowance” includes the payment of money or a discount on price. *Collins English Dictionary* defines the two concepts as follows: “an amount of something, *esp.* money or food, given or allotted usually at regular intervals; a discount, as in consideration for something given in part exchange or to increase business; rebate.”

44. The concept of a “volume allowance” is tied to the representations made in the franchise agreement. Pet Valu has “substantial purchasing power” because it buys large volumes of products. If suppliers provide money or discounts to Pet Valu arising out of its voluminous purchases, Pet Valu promises to allocate this money to franchisees for the collective benefit of all franchisees. That is a summary of Pet Valu’s obligations under the franchise agreement when its obligations are understood “in harmony with the rest of the contract and in light of its purpose and commercial context,” as explained in the principles of contractual interpretation above.

45. Section 27(a) of the franchise agreement ties back to the recitals of the agreement too. Pet Valu promises that its collective purchasing activity is “to obtain lower prices for the benefit of all Pet Valu stores”:

> The Franchisee Acknowledges that the ability of [Pet Valu] to coordinate and consolidate buying activities and to obtain lower prices for the benefit of all Pet Valu stores by purchasing in larger quantities on a centralized basis is a fundamental component of the Pet Valu System.[25]

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[24] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287.

[25] Plaintiff’s motion record, p. 214.

Pet Valu's disclosure document

46. The *Arthur Wishart Act* requires a franchisor to provide a disclosure document to prospective franchisees. The purpose is to make sure that franchisees are provided a fair and honest description of the franchise they are about to purchase. In *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.*,[26] the Ontario Court of Appeal held that "one of the prime purposes of the Act is to obligate a franchisor to make full and accurate disclosure to a potential franchisee so that the latter can make a properly informed decision about whether or not to invest in a franchise."[27]

47. A disclosure document must include a description of the franchisor's policy regarding volume rebates, whether the franchisor receives rebates as a result of the franchisee's purchases, and whether rebates are shared with franchisees. The regulation requiring disclosure is reproduced below:

> 6. For the purposes of clause 5 (4) (a) of the Act, every disclosure document shall include the following presented together in one part of the document: [...]
>
> > 8. A description of the franchisor's policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor's associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly.

48. As described by Justice Strathy, "the statute does not prohibit the franchisor from receiving rebates, but it must disclose whether it receives them and, if so, whether it shares them."[28]

49. The disclosure document is not legally capable of changing obligations in a franchise agreement. It is nevertheless instructive in this case for two reasons: (i) to show that the legislature

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[26] (2005), D.L.R. (4th) 451.

[27] *Ibid.*, para. 16.

[28] Certification reasons, para. 27.

viewed the question of "volume rebates" to be an important issue for franchisees (consistent with Justice Strathy's views in this case about the importance of cost of goods to franchisees) and (ii) to consider how other franchisors discharged their obligations to disclose rebates by comparison to what Pet Valu did in this case.

50. For example, in *Fairview Donut v. The TDL Group Corp.*, the Tim Horton's policy regarding volume rebates was crystal clear in describing its policy with respect to volume rebates: Tim Horton's "receives rebates and other benefits from various suppliers as a result of the purchase of goods and services by the Licensor for its Licensees or for direct purchase by the Licensees from designated manufacturers. <u>Most rebates and other commissions or other benefits received by the Licensor are retained by it for its own benefit</u>."[29] The message is obvious: franchisees do not obtain most volume rebates.

51. By contrast, the Pet Valu disclosure document in this case describes whether franchisees are entitled to receive volume rebates arising from the volume of purchases they make with Pet Valu. The Pet Valu disclosure document states that they do not: "[Pet Valu] does not provide volume rebates to its franchisees in respect of purchases of Merchandise, Equipment or Operating Supplies from [Pet Valu]. [...]"[30]

52. Against the backdrop of the recitals to the franchise agreement (referring to Pet Valu's "collective purchasing power" for the "collective benefit" of all franchisees), Justice Strathy in his certification decision held that "interestingly, while the [sentence reproduced above] indicates that Pet Valu does not provide rebates to franchisees in respect of the franchisees' purchases from

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[29] *Fairview Donut*, *supra* at para. 479.

[30] Plaintiff's motion record, p. 266.

Pet Valu, it does not specifically mention that the prices negotiated by [Pet Valu] with its suppliers include Volume Rebates that are provided by those suppliers."[31] Pet Valu's disclosure document in this respect is totally unlike Tim Horton's.

53. At the same time, the disclosure document lauds the importance of Pet Valu's significant purchasing power, which enables it to obtain volume discounts from suppliers:

> [Pet Valu's wholly-owned subsidiary] Peton Distributors Inc. supplies the vast majority of the products sold by the Pet Valu franchised stores. By virtue of its significant purchasing power, Peton Distributors Inc. is able to take advantage of volume discounts offered by suppliers.[32]

54. This purchasing power is intended to give franchisees a competitive advantage over its competition:

> Pet shops and pet product superstores are primary competitors of PET VALU stores for the sale of pet supplies. PET VALU stores generally offer lower prices than pet shops. While, in most instances, [Pet Valu] (through Peton Distributors Inc.) purchases in large volumes directly from manufacturers and distributes products through its own warehousing and distribution system, pet shops generally purchase from distributors who charge higher prices than manufacturers to cover their sales and delivery costs.[33]

Pet Valu's defence to the breach of contract claim

55. Pet Valu denies in its statement of defence that it is required to share volume allowances with franchisees. Paragraph 24 of its defence states: "In any event, Pet Valu denies that it is under any contractual or statutory obligation to generally pass on the alleged benefits of [Pet Valu's] purchasing power to the plaintiff." Pet Valu's substantive discussion of the contractual interpretation issue is contained at pages 14-18 of its February 20, 2014 factum.

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[31] Certification reasons, para. 31.

[32] Plaintiff's motion record, p. 254 (emphasis added).

[33] Plaintiff's motion record, p. 256 (emphasis added).

56. Pet Valu's only argument on the issue is to point to an external franchise manual which it says gives it the power to do whatever it wants with volume allowances. Its argument is based on one section of the agreement (section 22(f)). It advances its interpretation in spite of express promises in the franchise agreement to use Pet Valu's collective purchasing power for the benefit of franchisees: persons for whom cost of goods issues were of "vital importance."

57. Section 22(f) is again reproduced below:

> 22(f) Volume allowances granted to [Pet Valu] by a supplier or manufacturer based upon [Pet Valu's] annual purchasing volume shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System.[34]

58. This is a summary of Pet Valu's interpretation: "This section makes reference to a manual when it says how volume allowances should be shared. The manual gives Pet Valu unlimited power to do whatever it wants with volume rebates. That is exactly the message that Pet Valu communicated in 2002."

59. First, the objective intent of the overall language used in section 22(f) expresses an intention to distribute volume allowances to franchisees, not to withhold them: "volume allowances […] <u>shall be allocated</u> all as more particularly set forth in the Pet Valu Franchise Business System."[35] The word "allocate" means "to distribute according to a plan; allot."[36] In his certification reasons, Justice Strathy held that "the use of the term 'allocated' implies that they will be distributed or used for a specific purpose."[37] Viewed objectively, the purpose of the language used is to convey

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[34] Plaintiff's motion record, p. 211.

[35] *Ibid.* (emphasis added).

[36] *American Heritage Dictionary of the English Language*, Houghton Mifflin Company, 4th ed. "allocate".

[37] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287.

the impression that volume allowances will be allocated to franchisees based on objective criteria: the franchisees' purchases, for example. That is certainly a reasonable interpretation of section 22(f).

60. However, if the goal of section 22(f) was to somehow express that Pet Valu had unlimited power to withdraw any allowances from franchisees at any moment, as Pet Valu now argues, this would have been plainly stated in the agreement. Tim Horton's was certainly able to clearly express this idea by stating "most rebates and other commissions or other benefits received by the Licensor are retained by it for its own benefit." Pet Valu clearly states its position too in its statement of defence. A franchisor having the luxury of drafting an adhesion contract should have clearly stated its unfettered discretion to deal with volume allowances as it saw fit if that is what it intended to do. Pet Valu did not do so here.

61. Second, Pet Valu's interpretation of section 22(f) also gives very little significance to Pet Valu promises to "to obtain lower prices for the benefit of all Pet Valu stores by purchasing in larger quantities," described as a "fundamental component" of the Pet Valu system. It would be strange if a significant promise like this could be taken away by an ambiguous reference to an external manual. In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*,[38] the Supreme Court of Canada held that it is a fundamental principle of contractual interpretation that a court should reject an interpretation of a contract that would render one of its terms ineffective.

62. Similarly, in *Fairview Donut*, Justice Strathy held that changes to the operating manual "are not permitted to amend the franchise agreement by taking away the franchisee's legal

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[38] [1993] 1 S.C.R. 12.

rights or imposing new legal obligations."[39] Here too, the Pet Valu manual cannot take away legal rights given pursuant to the franchise agreement.

63. Third, the critical passage in the manual relied on by Pet Valu does not come close to clearly explaining to franchisees that they are not entitled to volume allowances. Pet Valu highlights the following language from the manual:

> The operative addition to the Franchise Business System is being made herewith in relation to this interim step.
>
> Subject to the terms and conditions of respective franchise agreements, promotion, listing, special or volume allowances may be included or not included in the landed cost of specific products, pursuant to the discretion of the franchisor and any permitted upcharge or surcharge may be applied to specific products or groups of products, so as to yield target average franchisee zone margins.[40]

64. The manual itself says that the direction is "subject to the terms and conditions of respective franchise agreements."[41] Therefore, if this court concludes that the word "allocate" implies that the funds "will be distributed or used for a specific purpose," as Justice Strathy concluded in his certification reasons,[42] then Pet Valu's argument fails.

65. The language in the manual does not remove rights to volume allowances. The policy itself is described as only "interim."[43] It states that volume allowances "may or may not be included in the landing cost of specific products." The policy itself is completely ambiguous, as it leaves open the possibility that volume allowances will indeed be included in the "landing cost."

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[39] *Fairview Donut, supra* at para. 435.

[40] Pet Valu cross-motion record, volume 1, pp. 189-190.

[41] *Ibid.*, p. 190.

[42] Paragraph 35.

[43] *Ibid.*, para. 189.

Also, there is no description of the criteria or timing, or what "specific products" may be involved. At a bare minimum, the highlighted words relied on by Pet Valu are a very unusual way for a franchisor to tell franchisees that it has unlimited powers to do whatever it wants to do with volume allowances.

66. The manual does not give Pet Valu unlimited rights to do whatever it wants to do with volume rebates. This interpretation is inconsistent with (i) the overall purpose of section 22(f), (ii) Pet Valu's powers to clearly express this if that is what they had really sought to achieve, (iii) Pet Valu's other promises in the agreement, and (iv) the language of the manual itself.

Background to plaintiff's request for partial summary judgment

67. On the basis of the above submissions, the plaintiff requests a partial summary judgment declaration that Pet Valu is contractually required to allocate volume allowances to class members. Pet Valu's denial of having any contractual duty to share volume allowances with class members is invalid. Accordingly, the plaintiff requests a declaration that Pet Valu is required to share volume allowances with franchisees pursuant to the franchise agreement. This issue is an important component of the following common issues: 1-3, 6 and 7.

The difficulty that has arisen in this case

68. As described in the introduction, the parties agreed to take up an efficient way to resolve the class action, which Justice Strathy had suggested in his certification reasons. In the "preferable procedure" aspect of the certification analysis, having heard all the evidence, he stated:

> It also seems to me that the fair and expeditious determination of this proceeding may well lend itself to a process whereby, in the first instance, the analysis of Volume Rebates is confined to a representative group of suppliers, or a representative group of products, or both. If the plaintiff failed to establish an entitlement to

> share in rebates relating to those products, that might well be the end of the inquiry. If, on the contrary, entitlement was established, the result could well be applicable to all other rebates, subject only to an accounting.[44]

69. The parties sought to implement this process but an impasse has developed. The plaintiff says that Pet Valu needs to provide more information about some forms of supplier money it has ignored. Pet Valu says that it has provided more than enough information at this stage and that it is entitled to a complete dismissal of the entire class action without delay.

70. However, the background to this dispute involves basic fairness principles. Pet Valu is requesting summary judgment dismissing the claim. The Ontario Court of Appeal held that a person seeking to dismiss under summary judgment rules must first deliver an affidavit of documents.[45] The court's rationale was simple: "important evidence is often only in the possession of the party moving for summary judgment. If the responding party were denied the opportunity of reviewing relevant documents in the possession of an opposing party before examinations on affidavits to be used on a motion for summary judgment, he would be deprived of information to which he is entitled under the *Rules of Civil Procedure*."

71. The ordinary rule is that a person seeking to dismiss a claim using summary judgment must first deliver an affidavit of documents. This court undoubtedly has the power to vary that rule under section 12 of the *Class Proceedings Act*, as the court in *Fairview Donut Inc. v. The TDL Group Corp*.[46] did. However, Justice Strathy did so in that case because there was evidence the defendants had already produced 116,912 pages of documents and that there was evidence the

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[44] Certification reasons, para. 109 (emphasis added).

[45] *Bank of Montreal v. Negin et al.* (1996), 31 O.R. (3d) 321 (C.A.).

[46] 2010 ONSC 6688.

defendants were making "ongoing, substantial and good faith efforts to produce all relevant documents [...]."[47] By contrast, in this case, Pet Valu has produced 183 pages of supplier documents.[48]

72. The plaintiff is not asking for Pet Valu to produce a full affidavit of documents. But the plaintiff is entitled to documents relevant to the certified common issues that it fairly requests. The plaintiff has never waived any of its rights in this respect. No aspect of Pet Valu's record disputes any of this.

73. Indeed, even Justice Strathy acknowledged that the "supplier sample" exercise on which the parties engaged was subject to amendment at a later date, stating: "[...] For reasons that I can elaborate on if necessary, I have concluded that information concerning the top ten suppliers in each year would provide the plaintiff with a fair and representative sampling, <u>at least in the first instance</u>, for the purposes of the summary judgment motion. <u>If, having reviewed the information and any additional information provided by Pet Valu, the plaintiff can establish that the sampling provided is inadequate, I would be prepared to re-visit the issue</u>."[49]

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[47] *Ibid.*, para. 16.

[48] This is calculated by adding the pages contained in the confidential supplier agreement brief dated November 12, 2012 (102 pages) to the pages contained in the supplementary supplier agreement brief dated September 27, 2013 (81 pages).

[49] Pet Valu cross-motion record, volume 1, p. 221.

74. The difficulty that has emerged in this case involves Pet Valu's use of different categories to sort money received by Pet Valu. The example used by Justice Strathy beginning at paragraph 21 of his certification reasons illustrates the problem:

A	B	C	D	E	F	G	H	I	J	K
Vendor's list price	Volume discount	"E" discount[50]	"I" discount[51]	Total discounts	Realized cost to Pet Valu	Pet Valu wholesale profit	Store cost	Promotion fund charge	Distribution charge	Franchisee invoice cost
$59.88	($5.69)	($1.50)	($12.00)	($19.19)	$40.69	$7.32	$48.01	$1.44	$3.85	$53.30

75. Using the above example, a product having a "vendor list price" of $59.88 (column A) has a realized cost of $40.69 to Pet Valu (column F). Various charges are then added, resulting in an invoice cost to franchisees of $53.30 (column K).

76. The problem in brief is this. Pet Valu has produced information that it says establishes that there is only $122,403.21 in volume rebates (column B) (calculated using Pet Valu criteria alone) at issue for Pet Valu's "top 10" suppliers.[52] However, Pet Valu has refused to provide any information about other categories of money listed in this chart on the basis that this is not relevant to the common issues. By way of one example, if a product has a "list price" of $10 to Pet Valu but Pet Valu resells the item to the franchisee for a cost of $20.02,[53] Pet Valu has provided no

[50] "E" discounts are described in Justice Strathy's certification reasons as "discounts relat[ing] to amounts offered by vendors for maintaining particular products in a certain number of stores."

[51] "I" discounts are described in Justice Strathy's certification reasons as "ongoing off-invoice deals which are negotiated for long periods of time and not tied to performance by Peton or its customers."

[52] Pet Valu factum dated Feb. 20, 2014, para. 63 ("In total, Pet Valu received the sum of $122,403.21 in Volume Rebates from its Top Ten suppliers over the entire Class Period.").

[53] Justice Strathy described the "list price" amount as an amount that is "taken from the vendor's price list or from prices determined between the vendor and [Pet Valu's] buyer." (Certification reasons, para. 19).

information to explain the reason for this difference and how it may be attributable to volume allowances. Pet Valu has not provided information about any category of money other than column "B" even though Pet Valu records in its annual report that it takes in over $1M annually in volume allowances.

77. That was not the approach to certification in this case. As with many other issues, the parties could not agree on a definition of "volume rebates" for the common issues. Pet Valu wanted this to be defined as "annual volume allowances," while the plaintiff sought a broader definition. Justice Strathy was asked to decide. He preferred the broader version, stating: "I used the term 'volume rebates' in my reasons, for convenience and for definitional purposes. I made findings, however, at paras. 20 and 21, based on Pet Valu's own documentation, that Pet Valu received rebates, allowances, discounts and other negotiated price reductions from suppliers. Based on my reasons, and the evidence, it seems to me that the following is an appropriate definition that includes those items which, on the evidence, were granted to the defendant by suppliers and manufacturers as a result of its volume purchasing:

> "Volume Rebates" means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts ties to the performance of individual stores.[54]

78. The reasons reflect that the plaintiff would be entitled to a targeted yet fulsome debate over any and all kinds of money, discounts or rebates that Pet Valu received from suppliers. However, it is apparent that this has not been Pet Valu's approach to its productions in this case. For example, paragraphs 70 to 74 of to the affidavit of Pet Valu's CEO minutely dissects why he says a

[54] 2011 ONSC 1941 at para. 8.

form of supplier money known as "truckload discounts" are not "volume allowances"[55] even though Justice Strathy cited truckload discounts as an example of a volume discount.[56]

79. Even among the limited supplier documents provided by Pet Valu to date, there are various expressions used to describe different forms of money that are captured by the definition of "volume rebates" common issue, but where insufficient (or no) details are provided. For example, one supplier agreement for supplier "D" refers to a "margin enhancement allowance" of 6 percent.[57] There is no further description or analysis of this form of supplier money to enable the plaintiff to determine if this money falls within the definition of "volume rebate." Pet Valu also produced a strange list of agreements from this supplier: two agreements that predated the class period by over ten years (1987 and 1992),[58] and a third agreement which was entered into in 2008, some sixteen years later. There is no explanation for this time gap.

80. In addition, Pet Valu has produced several letters from suppliers which say they simply provide "bottom-line" best prices to Pet Valu, as opposed to volume rebates. For example:

(a) One supplier says it "has not offered a volume rebate program. The focus of our distribution agreement with Pet Valu Canada Inc. is <u>to offer all Pet Valu and banner outlets maximum margin to drive sales at the retail level</u>."[59]

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55 Pet Valu cross-motion record, volume 1, pp. 32-33.

56 Certification reasons, para. 19.

57 Pet Valu summary judgment record dated August 3, 2012, p. 275.

58 Pet Valu summary judgment record dated August 3, 2012, p. 254 (1987 agreement), p. 271 (1992 agreement), and p. 275 (2008 agreement).

59 Pet Valu summary judgment record dated September 25, 2013, p. 61 (emphasis added).

(b) Another supplier also says it simply offers "bottom-line" best prices to Pet Valu, saying their program "is a net program with no inside funds, advertising or co-op agreements."[60]

(c) Yet another supplier says that it is a "true Net Net vendor to Pet Valu Canada Inc. and we do not provide any volume rebates in either of our quarterly pricing, or standard pricing structures."[61]

81. Pet Valu has only produced the supplier responses to its inquiries. It has not produced the original inquiries from Pet Valu. There is nothing in the record to show that suppliers who replied to the letters were aware of the definition of "volume rebates" in the common issues.

82. Pet Valu's overall view of this issue appears to be that it should not be required to provide any information about favourable "net prices" or "list prices," for example, because (i) it has an unlimited right to mark up products and (ii) Justice Strathy refused to certify certain common issues relating to mark-ups (similar to its other narrow arguments seeking to invoke "watertight compartments" for various forms of rebates and discounts it receives).[62] It takes this position even though the Pet Valu manual says that "special net prices provided to [Pet Valu] by a supplier shall be made available to the Franchisee for a period of time equal in length to the period of time during which the said prices were made available to [Pet Valu] by the supplier"[63] and Pet Valu's description of volume rebates in its disclosure document says that Pet Valu "attempt[s] to negotiate

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[60] *Ibid.*, p. 64.

[61] *Ibid.*, p. 66.

[62] Justice Strathy also held, for example, that there was no basis "for the more general assertion [by the plaintiff] that there is an obligation to supply products to franchisees at low cost." See certification reasons, para. 44.

[63] Plaintiff's motion record, p. 312.

favourable prices for these items [Merchandise, Equipment or Operating Supplies] from its various suppliers."

83. The plaintiff does not dispute Pet Valu's right to mark up. However, Pet Valu cannot use its right to markup to wipe out a franchisee's right to be allocated volume allowances. The rights must be read in conjunction with each other. That is precisely what Justice Strathy held in connection with mark-ups of Pet Valu "private label" products, where Pet Valu has the right under the contract to mark up private label products up to 10%. He concluded that Pet Valu could indeed mark up the price but could not wipe out the volume allowance in the process: "There is a basis for the proposition that, to the extent the price of private label products fails to deduct the franchisees' share of Volume Rebates, the franchisees may have been overcharged for their contributions to the fund since their 10% would have been applied to an excessive price. The ability of a franchisee to recover its share of volume rebates should include instances where other charges made by Pet Valu have been artificially enhanced by the failure to give credit for the franchisee's share of allowances and rebates."[64] Pet Valu's right to mark up does not mean the plaintiffs have no entitlement to be paid volume allowances.

84. In summary: Justice Strathy contemplated targeted yet fulsome production of documents (involving any "rebates, allowances and discounts" or "any direct or indirect discounts of the price") to decide the common issues. This has not occurred.

85. What kind of additional information does the plaintiff need? One of the exercises may be to determine if Pet Valu was able to negotiate a better "Vendor's List Price" (Column A) compared to others having fewer purchases. If this proved true, and Pet Valu failed to allocate this

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[64] Certification reasons, para. 50 (emphasis added).

amount to class members, it would be liable. Determining if Pet Valu failed to allocate the amount could also require production of information about Pet Valu's annual comparative profit margins or other data, for example. Pet Valu has provided none of this. Similarly, Pet Valu's suppliers may have relevant information on these points that the plaintiff is entitled to pursue.

Conclusion on plaintiff's motion for summary judgment

86. The purpose of this partial motion for summary judgment is to proceed efficiently and proportionately, given the stakes at issue. Pet Valu's position at present is that franchisees have no legal entitlement whatsoever to volume allowances. The plaintiff is prepared to join issue with the defendant about this issue of contractual interpretation and asks to have this issue decided in its favour. If Pet Valu's interpretation succeeds, the claim should be dismissed. If the plaintiff's interpretation succeeds, it will have successfully advanced an important aspect of the common issues. It will also greatly assist to clarify Pet Valu's production obligations. At present, the parties not are *ad idem* on this fundamental point.

87. If the plaintiff is successful in the motion, it respectfully requests an opportunity to schedule a case conference to discuss the next appropriate steps following this court's decision. The goal will be to propose a methodology to obtain relevant further productions and to schedule third party examinations. At the end of that process, the goal will be for the parties to return to debate the remaining common issues, including whether Pet Valu has acted in accordance with its obligations of good faith and fair dealing under the franchise agreement.

Other issues raised in Pet Valu's factum: releases and limitation arguments

88. Pet Valu raises two other defences in its factum.

89. First, it submits that "a significant number of former Pet Valu franchisees have entered into releases with Pet Valu."[65] Generally, it says, "the former franchisees granted these releases in consideration of Pet Valu purchasing a store back from a franchisee, allowing the franchisee to exit the system, or pursuant to the assignment or renewal provisions of their franchise agreements."[66] The releases say that franchisees release Pet Valu from "any and all manner of actions, damages and costs, of any and every kind whatsoever relating to [their franchises] arising prior or existing up to the date" of the releases.[67]

90. Section 11 of the *Arthur Wishart Act* states that "any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void."

91. Pet Valu had earlier asked Justice Strathy to rule on its releases in 2011. He concluded the motion was premature.[68] Also, in light of section 11 of the Act, he stated:

> [...] Without wishing to bind myself or any other judge who may be required to consider this issue in the future, it seems to me that class proceedings can be sufficiently flexible to ensure that a franchisor and a franchisee can end their relationship in a mutually satisfactory fashion without being unduly fettered by a potential claim in the class action that the franchisee, **with full knowledge of its rights, and in appropriate circumstances**, wishes to renounce.[69]

92. First, there is no certified common issue pertaining to releases. The issue should not be decided on a common basis.

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65 Pet Valu factum, para. 89.

66 *Ibid.*

67 *Ibid.*, para. 90.

68 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871.

69 *Ibid.*, para. 43.

93. Second, Pet Valu's releases do not refer to the class action or to the franchisee's rights under section 11. It does not meet the "full knowledge" test, as described by Justice Strathy above.

94. Pet Valu's releases are akin to the releases at issue in *405341 Ontario Ltd. v. Midas Canada Inc.*[70] In that case, as here, releases were obtained in connection with proposed assignments of franchise agreements. The Court of Appeal held the releases were void, stating: "If you include a term in your franchise agreement that purports to be a waiver or release of any rights a franchisee has under the Act, it will be void."[71] The same conclusion should apply here.

95. Justice Matheson recently declared void sections of a franchise agreement that required a franchisee to provide a release in connection with an assignment.[72] The same conclusion should apply with respect to Pet Valu's releases in this case.

96. The second defence that Pet Valu argues pertains to limitations. Paragraphs 91-93 of Pet Valu's factum discusses this issue. Pet Valu submits that the representative plaintiff's claim is time-barred because its franchise agreement was signed in 2005 but no claim was started until 2009.

97. As with the "releases" issue, there is no certified common issue relating to limitations. Indeed, Pet Valu only now asks for the first time for its defence to be amended to plead limitation period defences.

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[70] 2010 ONCA 478.

[71] *Ibid.*, para. 26.

[72] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2014 ONSC 600.

98. In *Smith v. Inco*,[73] the Court of Appeal held: "Other certification decisions have recognized that discoverability is often an individual issue that will require individual adjudication after the common issues are determined. Indeed, when this court certified this action, Rosenberg J.A. referred to the possibility of individual limitation defences [...]. On the trial judge's findings, the applicability of the *Limitations Act* as he characterized its applicability was not a common issue."[74]

99. Justice Horkins recently dealt with a similar issue, holding: "If the defendants have a potential limitation period defence, they can plead it in the statement of defence. If the parties continue to disagree about whether there is a limitation period issue, then it may be possible to propose a further common issue to address this dispute. Of course this will depend on whether such an issue can be managed on a common basis. At this point it is premature to decide one way or the other."[75]

100. The limitation issue question that Pet Valu asks to be determined should be dismissed for the same reasons identified in *Smith v. Inco* and *MacDonald v. BMO Trust Co.*

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[73] 2011 ONCA 628.

[74] *Ibid*., para. 179.

[75] *MacDonald v. BMO Trust Co.*, 2012 ONSC 759 at para. 180.

PART IV - ORDER SOUGHT

101. The representative plaintiff requests a declaration that the Pet Valu franchise agreement requires Pet Valu to share volume allowances with class members. The plaintiff requests an opportunity to call a further case conference to discuss the expeditious production of additional documents from Pet Valu, with a view to the efficient determination of the remaining common issues.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Date: February 28, 2014

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Allan D.J. Dick

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David Sterns

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Jean-Marc Leclerc

Of counsel to the plaintiff

SCHEDULE A – CASES AND BOOKS CITED

1. *Hryniak v. Mauldin*, 2014 SCC 7

2. *Coventree v. Lloyds Syndicate 1221 (Millenium Syndicate),* 2012 ONCA 341

3. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4

4. *Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59

5. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252

6. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941

7. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287

8. *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.*, (2005), D.L.R. (4th) 451

9. *American Heritage Dictionary of the English Language*, Houghton Mifflin Company, 4th ed. “allocate”

10. *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12

11. *Bank of Montreal v. Negin et al.* (1996), 31 O.R. (3d) 321 (C.A.)

12. *Fairview Donut Inc. v. The TDL Group Corp*., 2010 ONSC 6688

13. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871

14. *405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478

15. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2014 ONSC 600

16. *Smith v. Inco*, 2011 ONCA 628

17. *MacDonald v. BMO Trust Co.*, 2012 ONSC 759

18. *Collins English Dictionary*, “allowance”.

SCHEDULE B – LEGISLATION

Arthur Wishart Act (Franchise Disclosure), *2000*, SO 2000, c. 3

> 11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void. 2000, c. 3, s. 11.

Arthur Wishart Act regulations (General), O. Reg. 581/00

> 6. For the purposes of clause 5 (4) (a) of the Act, every disclosure document shall include the following presented together in one part of the document:
>
> > 8. A description of the franchisor's policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor's associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly.