

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**1250264 ONTARIO INC.**

Plaintiff (Respondent)

- and -

**PET VALU CANADA INC.**

Defendant (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

**NOTICE OF CROSS-APPEAL**

**THE RESPONDENT CROSS-APPEALS** in this appeal and asks that the judgment be varied as follows:

1. an Order granting leave to the plaintiff to amend the Statement of Claim in the form attached as Exhibit "B" to the affidavit of Shane Murphy, sworn November 18, 2014;
2. an Order certifying the following common issues:

Did the defendant have a duty at common law or pursuant to s. 3 or s. 5 of the *Arthur Wishart Act* to truthfully disclose to franchisees, in the disclosure document, the franchise agreement or otherwise during the course of the relationship with the parties, whether it possessed substantial or significant purchasing power and whether it received significant volume discounts offered by suppliers?

If yes, did it breach its duty or duties?

If yes, what damages are the class members entitled to, if any?

3. and such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

1. the plaintiff's motion to amend was brought in response to the court's decision dated October 31, 2014, in which the court suggested a common issue should be amended to added to directly address issues regarding purchasing power, as described at paragraphs 38-43 of the court's decision;

2. to these ends, the plaintiff sought to amend its claim to plead relevant facts regarding substantial purchasing power and volume rebates, as well as references to s. 3, s. 5, s. 6 and s. 7 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3;

3. the court dismissed the motion to amend the statement of claim on the basis of prejudice to the defendant, reasoning that the summary judgment would have been complete and the defendant would likely have prevailed on most of the common issues;

4. the court erred in its assessment of prejudice because the defendant obviously did not prevail on the common issues, with the court having found in its reasons that Pet Valu breached its duties under section 3 of the *Arthur Wishart Act*, and found against Pet Valu on common issues 6(i), 6(iii) and 6(iv);

5. the court also erred in its conclusion that Pet Valu's motion "should have been concluded in full without this court suggesting and encouraging this motion to amend the pleadings and add a new common issue"; a class action case management judge plays an important role in guiding the evolution of the proceedings and there was nothing improper with the court's suggestions;

6. the court erred in concluding that the claims under s. 5 and s. 6 of the Act were untenable because “there are no franchise agreements that can be rescinded” and “all of the class members are former franchisees”;
7. there is no evidence in the record that all of the class members are former franchisees, as included among the class are current franchisees with existing, active franchises;
8. in any event, the plaintiff pleads that section 6 of the Act is subject to the discoverability principle, an issue that was not addressed in the court’s reasons;
9. there are no timing or limitation period restrictions applicable to section 5 of the *Arthur Wishart Act*; and
10. such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE BASIS FOR THE APPELLATE COURT’S JURISDICTION IS:**

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b);
2. *Rules of Civil Procedure*, R. 61.07;
3. the judgment appealed from is final; and
4. leave to appeal is not required.

February 18, 2015

**SOTOS LLP**

Barristers and Solicitors  
180 Dundas Street West, Suite 1250  
Toronto, Ontario M5G 1Z8

Louis Sokolov (LSUC# 34483L)  
Jean-Marc Leclerc (LSUC# 43974F)

Tel: (416) 977-0007  
Fax: (416) 977-0717

Lawyers for the respondent

**TO: CASSELS BROCK & BLACKWELL LLP**

Scotia Plaza, Suite 2100  
40 King St. W.  
Toronto, ON M5H 3C2

Geoffrey B. Shaw (LSUC # 26367J)  
Tel: (416) 869-5982  
Fax: (416) 350-6916

Derek Ronde (LSUC # 46978W)  
Tel: (416) 869-5428  
Fax: (416) 640-3063

Lawyers for the appellant

**1250264 Ontario Inc.**  
Appellant/Plaintiff

**-and-**

**Pet Valu Canada Inc.**  
Respondent/Defendant

Court File No.

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PROCEEDING COMMENCED AT TORONTO

**NOTICE OF CROSS - APPEAL**

**SOTOS LLP**

Barristers and Solicitors  
180 Dundas Street West, Suite 1200  
Toronto, ON M5G 1Z8

**Louis Sokolov** LSUC#: 34483L  
**Jean-Marc Leclerc** LSUC#: 43974F  
Tel: (416) 977-0007  
Fax: (416) 977-0717

Lawyers for the Plaintiffs