Court File No. C59956

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff
(Respondent,
Appellant by
cross-appeal)

- and -

PET VALU CANADA INC.

Defendant
(Appellant,
Respondent by
cross-appeal)

Proceeding under the *Class Proceedings Act, 1992*

RESPONDING FACTUM OF PET VALU CANADA INC. ON THE CROSS-APPEAL

June 22, 2015

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PART I - OVERVIEW

1. This factum is in response to the cross-appeal by the plaintiff of the decision of the Motion Judge to refuse the plaintiff's motion to amend its statement of claim. The proposed amendments arose out of intervention by the Motion Judge because of his misapprehension of the evidence. When the misapprehension was cleared up, the Motion Judge dismissed the motion to amend, as was appropriate in the circumstances.

2. The plaintiff's cross-appeal is without merit. The Motion Judge correctly held that the proposed amendments should not be permitted because they would cause non-compensable prejudice to Pet Valu. The plaintiff mischaracterized the evidence in order to promote the need for a last-minute amendment. The Motion Judge ultimately acknowledged his error in inviting the amendment motion based on that mischaracterization.

3. The proposed amendments advanced two new claims: one regarding Pet Valu's so-called significant purchasing power (the "**purchasing power amendments**"), and the other pertaining to Pet Valu's significant volume discounts (the "**significant volume discount amendments**").[1]

4. The amendment motion was properly dismissed because:

   (a) The amendments were prejudicial to Pet Valu. They were raised at the eleventh-hour to "cooper up" a case that was otherwise on its deathbed. Ontario courts have commonly treated last-minute attempts to amend in similar fashion; and

   (b) The purchasing power amendments were untenable, not worthy of a trial, and non-meritorious. The plaintiff has not challenged this finding in either its notice of cross-appeal or factum.

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[1] Decision of Belobaba J. dated January 7, 2015 ("**Judgment**") at para 6, Pet Valu's Appeal Book & Compendium ("**PV Compendium**"), Tab 4, p 22.

5. The significant volume discount amendments should also have been denied because they were statute-barred under the *Limitations Act*.[2] The plaintiff discovered the information giving rise to the amendments over two years prior to bringing its motion.

6. In general, the plaintiff has largely used its factum to cast aspersions on Pet Valu in an attempt to divert focus from the profitable relationship that franchisees had with Pet Valu. This Honourable Court ought not to be drawn in by the tactical mischaracterization of this relationship. These sideshow aspersions cannot distract from the finding that there was no liability on the core issues to which the common issues pertained, namely volume rebates and mark-ups.[3] Neither can they detract from the core benefits of the franchise relationship:

(a) Franchisees purchased products for 6 to 14% cheaper;[4]

(b) Pet Valu did not dictate to its franchisees that they must buy from it;[5]

(c) Pet Valu passed on all volume rebates that it received to its franchises;

(d) Pet Valu did not "claw back" volume rebates through mark-ups;[6]

(e) The plaintiff sold its franchise for "a substantial profit";[7] and

(f) Franchisees benefitted from a full-line distribution service and professional buying staff, a one-stop ordering and delivery system, the ability to return expired food products for reimbursement, and the development of private label products.[8]

7. In summary, the plaintiff's cross-appeal is without merit and ought to be denied. All as more particularly set out below.

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[2] *Limitations Act, 2002*, SO 2002, c 24, Sch B, s.4, Schedule "B" [*Limitations Act*].

[3] Decision of Belobaba J. dated October 31, 2014 ("**First Judgment**") at para 2, PV Compendium, Tab 5, p 20.

[4] First Judgment at para 20, PV Compendium, Tab 5, p 46.

[5] *Ibid* at para 20, PV Compendium, Tab 5, p 46.

[6] *Ibid* at para 29, PV Compendium, Tab 5, p 48.

[7] *Ibid* at para 5, PV Compendium, Tab 5, p 43.

[8] Judgment at para 11, PV Compendium, Tab 4, p 24.

PART II - SUMMARY OF FACTS ON THE CROSS-APPEAL

8. It is necessary to understand the following details leading up to the amendment motion in order to understand why the cross-appeal should not be allowed. The motion arose out of "unusual circumstances"[9] at the end of Pet Valu's summary judgment motion, as detailed below.

A. THE UNUSUAL CIRCUMSTANCES LEADING UP TO THE MOTION

1) The Plaintiff Took Pet Valu's Purchasing Power Evidence Out of Context

9. In March 2014, Pet Valu moved to return its summary judgment motion forthwith. At the time, the plaintiff cross-moved for partial summary judgment, but its cross-motion was dismissed outright.[10] The plaintiff then hurriedly fashioned a production motion, alleging for the first time that it needed standard list price information from pet food manufacturers who sold to Pet Valu. This then late-breaking request was based on the plaintiff's newfound notion that, if Pet Valu negotiated lower list prices in comparison to the list prices manufacturers gave to others, this might somehow be a volume rebate. On the basis of this theory, the Motion Judge ordered the production of a limited scope of list price information.[11] This otherwise-irrelevant history is important to the cross-appeal because it places in context the statements about purchasing power that Mr. McNeely made in response to the limited production order. The plaintiff seized upon these statements late in the process as the faulty basis for its amendment motion.

10. Specifically, in a June 2014 affidavit (the "**2014 McNeely affidavit**"), Mr. McNeely refuted the premise that Pet Valu could use its purchasing power to negotiate list prices with its suppliers that were lower than the list prices offered by those suppliers to others. He dispelled the plaintiff's supposition that Pet Valu could dictate what multinational conglomerates like Nestle

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[9] Judgment at para 32, PV Compendium, Tab 4, p 30

[10] Reasons on production motion dated April 4, 2014 at para 1, PV Compendium, Tab 19, p 241.

[11] *Ibid* at para 3(1), PV Compendium, Tab 19, p 242.

and Mars offered as list prices by explaining that Pet Valu had "little to no purchasing power" in relation to multinational suppliers (the "**purchasing power evidence**").[12] He was clear, nonetheless, that Pet Valu had significant purchasing power, which translated into many pricing and non-pricing benefits for franchisees.[13]

11. However, the plaintiff stripped all of this context from the statement that Pet Valu had "little to no purchasing power" and isolated the statement in order to fashion a last-minute allegation that Pet Valu had been misrepresenting the size of its purchasing power to franchisees.

2) The Motion Judge Invited an Amendment Motion Based on a Misapprehension of the Purchasing Power Evidence

12. Unfortunately, without understanding the proper context for the purchasing power evidence, the Motion Judge was at first blush taken with the plaintiff's last-minute allegation. His misapprehension was captured in the following portion from his reasons on summary judgment:

> **As the hearing of this summary judgment motion progressed, it became apparent that the plaintiff was shifting its focus from Volume Rebates to purchasing power. [...] The initial complaint, however, as set out in the statement of claim, focused on the defendant's alleged failure to share volume-related rebates. But in a supplementary affidavit filed this past summer (i.e. years after this action was commenced) Thomas McNeely, PVCI president, stated that PVCI in fact had "little to no purchasing power." [...]**
>
> **Counsel for the plaintiff was, to say the least, surprised by these statements...**[14]

13. Based on that misapprehension, the Motion Judge then invited the plaintiff to bring an eleventh-hour amendment motion:

> **Counsel for the plaintiff then tried to shoe-horn the "little to no purchasing power" revelation into the various sub-parts of Common Issue No. 6. It was not an easy fit. I suggested to both sides that they**

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[12] Judgment at para 18, PV Compendium, Tab 4, p 26.

[13] Judgment at para 19, PV Compendium, Tab 4, p 26.

[14] First Judgment at paras 38-39, PV Compendium, Tab 5, p 50.

> **might consider a more direct approach – namely, amending the common issues by adding a new one dealing specifically with the purchasing power question.**[15]

14. The "suggest[ion]" by the Motion Judge that "both sides... might consider... amending the common issues by adding a new one" inspired the plaintiff to bring the amendment motion. The notice of cross-appeal confirms this, stating that: "the plaintiff's motion to amend was brought in response to the court's decision... in which the court suggested a common issue should be amended ... to these ends, the plaintiff sought to amend its claim..."[16]

3) The Amendment Motion Then Went Beyond the Purchasing Power Issue

15. Although the Motion Judge invited the amendments based on the question of purchasing power, the plaintiff's motion went well beyond this. Specifically, the plaintiff also proposed, for the first time, amendments relating to a purported misrepresentation by Pet Valu that it receives "significant volume discounts." Thus, the amendment motion involved two components: (i) the invited purchasing power amendments;f and (ii) the uninvited significant volume discount amendments.[17]

4) The Motion Judge Then Suggested How the Plaintiff Might Frame its Motion

16. The Motion Judge then suggested in a follow-up email to class counsel how the plaintiff might frame the motion in a way that "makes the most sense" based on the expanded "coverage" of the proposed new common issue:

> **... would you clarify whether you are moving to REPLACE Common Issues 6 and 7 with the new proposed common issue 6 (as per your Notice of Motion) – or are you ADDING a new Common Issue 8? It seems to me, that if you prevail on your motion, the former makes the**

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[15] First Judgment at para 41, PV Compendium, Tab 5, p 50

[16] Notice of Cross-Appeal at paras 1-2, PV Compendium, Tab 2, p 11.

[17] Judgment at para 6, PV Compendium, Tab 4, p 22.

> **most sense, given the coverage in the new issue, but please clarify … thanks.**[18]

17. Class counsel responded by advising that the plaintiff would seek to add a new common issue.[19] The Motion Judge then laid out his intended procedure in a reply email as follows:

> **Okay – so you will be trying to add a new CI #8 – if so, in the SJ reasons I'm working on right now, (where I will answer CI #1 in favour of PVCI) I am going to "defer" a final decision on CI #6 and 7, until after the December motion – if Plaintiff succeeds in adding a new #8, I will deal with #8 directly (and probably answer #6 and 7 as currently worded in favour of PVCI) – but if Plaintiff does not succeed in adding a new #8, then, in fairness, I should still hear both sides' submissions re CI #6 and 7... (Emphasis added).**[20]

18. In furtherance of this unusual intervention by the Motion Judge, he then produced an unsolicited draft of what he believed the new Common Issue 8 ought to be at the outset of the amendment motion (i.e. after this email exchange).[21]

19. Thus, after inviting the motion in the first place, the Motion Judge descended further "into the arena"[22] by suggesting in an email exchange how the plaintiff ought to frame the motion, and authoring his own draft for the proposed new common issue.

5) Pet Valu Provided Proper Context for the Purchasing Power Evidence; The Purchasing Power Amendment Was Refused

20. Pet Valu opposed the purchasing power amendments by re-emphasizing to the Motion Judge the proper context for the purchasing power evidence. When the Motion Judge fully appreciated the proper context, he refused to allow any amendments regarding purchasing power:

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[18] Email from Belobaba J. dated October 20, 2014, Pet Valu's Responding Compendium ("**PV Responding Compendium**"), Tab 1, p 1.

[19] Email from Class Counsel dated October 20, 2014, PV Responding Compendium, Tab 1, p 1.

[20] Email from Belobaba J. dated October 20, 2014, PV Responding Compendium, Tab 1, p 1.

[21] Appeal Factum of Pet Valu dated March 18, 2015 ("**PV Appeal Factum**") at paras 28-29; Proposed wording for new common issue 8, provided by Belobaba J., PV Responding Compendium, Tab 4, p 25.

[22] See paragraph 53 below.

> **...it is highly unlikely that Mr. McNeely would have stated in this 2014 affidavit that Pet Valu had "little to no purchasing power." He must have meant something else. And indeed he did. [...]**
>
> **It is obvious from the context that the 2014 McNeely affidavit ... was saying no more than Pet Valu did not have enough purchasing power to affect or dictate the suppliers' list prices.**
>
> **I am now satisfied that the 2014 McNeely affidavit did not reveal "new evidence" that Pet Valu had little to no purchasing power. It simply confirmed that the vendors' list prices were true list prices and that in this one area Pet Valu did not have enough purchasing power to dictate these list prices.**[23]

21. Ultimately, the Motion Judge refused all of the proposed amendments (i.e. both the purchasing power amendments and the significant volume discount amendments) on the basis of prejudice. However, his conclusion on the purchasing power amendments was based on the sound underpinning that they were not "tenable, worthy of trial or prima facie meritorious:"

> **I am therefore satisfied on the evidence before me that Pet Valu possessed significant purchasing power that translated into a range of pricing and non-pricing benefits for its franchisees. [...]**
>
> ***(3) No basis for the purchasing power complaint***
>
> **I therefore have no difficulty concluding that there is no basis for the broad allegation that Pet Valu had "little to no purchasing power" full stop. I find that there is no basis for any of the proposed amendments or claims that relate to this broad allegation. None of these proposed amendments or claims about purchasing power *per se* are tenable, worthy of trial or prima facie meritorious.**[24]

22. Ironically, the purchasing power issue was the original and only reason why the Motion Judge suggested an amendment and adjourned the completion of the summary judgment hearing. From this perspective, and given that the Motion Judge was initially of the view that Common Issues 6 and 7 should be answered "no,"[25] that ought to have been the end of the piece.

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[23] Judgment at paras 9(2), 14 & 20, PV Compendium, Tab 4, pp 23, 25-26

[24] Judgment at paras 13 & 21, PV Compendium, Tab 4, pp 25-26.

[25] First Judgment at para 35, PV Compendium, Tab 5, p 49.

23. The plaintiff has not appealed the Motion Judge's conclusion that the purchasing power amendments were not tenable, worthy of trial, or *prima facie* meritorious. This finding is not raised as a ground of appeal in the notice of cross-appeal nor is it mentioned in the plaintiff's factum. As such, there is nothing before this Court that allows for this finding to be altered.

6) The Motion Judge Amended Common Issue 6 On His Own Accord Using The Language From the Rejected Amendments

24. Before closing the chapter on the unusual circumstances of the amendment motion, it is worthwhile to review critically the email exchange between the Motion Judge and class counsel that preceded the actual hearing of the amendment motion (paragraphs 16 and 17 above). In that exchange, the Motion Judge indicated that he would likely dismiss Common Issues 6 and 7 "as currently worded" if the amendment motion was dismissed. His use of the words "as currently worded" was unfortunately prescient. When the amendment motion failed, the Motion Judge did not deal with Common Issues 6 and 7 as then currently worded. Rather, he unilaterally altered Common Issue 6(i) and found Pet Valu to be liable under his new language.

25. Common issue 6(i), as certified, simply asked:

> **Did the defendant have a duty at common law ... or under section 3 of the [*Wishart Act*] ... to disclose the following information... and if so, did it breach such duty:**
>
> **(i) whether the defendant or its affiliates receives Volume Rebates ...**[26]

On his own initiative, after he had reserved judgement, the Motion Judge transformed this common issue by adding the words "significant level of" before "volume rebates". These words drastically altered the meaning of the common issue as certified because they add both: (1) an element of subjective materiality (i.e. what constitutes a "significant level" of volume rebates), and

[26] First Judgment, at Appendix, PV Compendium, Tab 5, p 52.

(2) a quantitative element (i.e. asking what quantity of volume rebates did Pet Valu receive, as opposed to the original question of whether Pet Valu received volume rebates, which was a simple yes/no question).

26. The final unusual circumstance is that the Motion Judge's unilateral addition parroted proposed Common Issue 8, which never saw the light of day because the amendments were rejected. The Motion Judge acknowledged this:

> **Strictly speaking, the question in 6(i) does not ask whether the franchisor "received significant volume discounts offered by suppliers" (the language in proposed Common Issue 8) but whether the franchisor "receives volume rebates." In my view, however, 6(i) should be interpreted as also asking if "significant volume discounts" were received by the franchisor.[27] (Emphasis added.)**

27. Pet Valu never had an opportunity to respond to the re-worded Common Issue 6. In an email exchange after the amendment motion was heard but before the reasons were delivered, the Motion Judge advised the parties that he was dismissing the motion. He then invited the parties to make further submissions on Common Issues 6 and 7 if they wished.

> **... I will be releasing my decision re the Motion to Amend/ add a new Common Issue in January - the decision will DISMISS the plaintiff's Motion to Amend - I would therefore invite both sides to make any further submissions re Common Issues 6 and 7 (if they wish to do so) within the next two weeks and no later than Monday January 5 - thank you and the best of the season to everyone.[28]**

28. However, the Motion Judge did not advise that he intended to alter Common Issue 6. As a result, Pet Valu's final submissions addressed Common Issue 6 as **originally worded**. Pet Valu had no way of knowing that the common issue it was making submissions about was going to be fundamentally altered by the Motion Judge through the course of his reasons. Even more troubling is the fact that the alteration parroted the rejected significant volume discount amendments that the

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[27] Judgment at para 60, PV Compendium, Tab 4, p 37.

[28] Email from Belobaba J. dated December 19, 2014, PV Responding Compendium, Tab 5, p 26.

Motion Judge confirmed were being dismissed and were therefore off the table. Pet Valu did not know the case it had to meet on Common Issue 6 until judgment had already been rendered.

29. This Honourable Court has held that a theory of liability which emerges for the first time in a judgment is inherently unreliable and a denial of procedural fairness. This principle equally applies to a revised common issue that emerges for the first time in a judgment. In *Labatt Brewing Company Limited v. NHL Enterprises Canada*, this Court stated that:

> **...it [is] both fundamentally unfair and inherently unreliable for a trial judge to make findings against a defendant on the basis of a theory of legal liability not advanced by the claimant. [...]**
>
> **... A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how [the trial judge's] ... theory would have held up had it been subject to the rigours of the adversarial process.**[29]

30. This closes the final chapter on the unusual circumstances leading up to, during and even after the amendment motion. They provide the background fabric necessary to understand why the cross-appeal should be denied and at least one reason why the main appeal should be allowed.

B. THE MOTION JUDGE HELD THAT THE PROPOSED AMENDMENTS CAUSED ACTUAL PREJUDICE TO PET VALU

31. Returning to the Motion Judge's ultimate decision on the amendment motion, he dismissed both components of the proposed amendments on the ground of prejudice to Pet Valu, acknowledging that:

> **The defendant's motion for summary judgment should have been concluded in full without this court suggesting and encouraging this motion to amend the pleadings and add a new common issue. Absent my judicial intervention, the summary judgment motion would have**

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[29] *Labatt Brewing Company Limited v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511 at para 6, Pet Valu's Responding Book of Authorities ("**PV Responding BOA**"), Tab 1, citing *Rodaro v Royal Bank of Canada* (2002), 59 OR (3d) 74, 2002 CarswellOnt 1047 (CA) at para 62, PV Responding BOA, Tab 2.

> **concluded and the defendant would likely have prevailed on most of the common issues.**[30]

32. The Motion Judge explored the actual prejudice that would be suffered by Pet Valu if the proposed amendments were permitted, namely that the litigation would have concluded but for the inappropriate roadblock raised by the proposed amendments:

> **Pet Valu was in a position to obtain complete summary judgment on the existing common issues as well as a probable cost award against the representative plaintiff. This would have ended the litigation. The representative plaintiff (a defunct corporation) likely has no assets that can satisfy a judgment. It was suggested that the plaintiff could simply commence another class action alleging the Common Issue 8 matters if the motion to amend did not proceed. But now I agree with Pet Valu that a new class proceeding was far from guaranteed. There were numerous hurdles, financial and procedural, that could well have discouraged a new class proceeding.**[31]

33. The Motion Judge confirmed that permitting a last-minute pleadings motion that would also add new common issues at the end of a summary judgment hearing "tilts the class proceeding in the plaintiff's favour... I am persuaded that this motion to amend pleadings in the unusual circumstances herein is prejudicial to the defendant and the nature of this prejudice is not compensable in costs."[32]

C. THE MOTION JUDGE DEFERRED RULING ON THE *LIMITATIONS ACT*

34. Pet Valu also contended that the significant volume discount amendments were statute-barred. The material facts giving rise to those amendments were statements made more than 2 years earlier, in Mr. McNeely's August 2012 affidavit (the "**2012 McNeely affidavit**"), that Pet Valu "did not receive significant volume-based benefits from its suppliers," and that, "volume

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[30] Judgment at para 30, PV Compendium, Tab 4, p 29.

[31] Judgment at para 31, PV Compendium, Tab 4, p 30.

[32] Judgment at para 32, PV Compendium, Tab 4, p 30.

allowances are insignificant on an absolute and relative basis.[33] Although the amendments were denied on the basis of prejudice, it was open to the Motion Judge to deny them on the basis that they were statute-barred under the *Limitations Act* as well.[34]

35. There is no dispute that the plaintiff learned this information in August 2012, more than two years before it moved to amend. The plaintiff acknowledged it and the Motion Judge confirmed it. For example:

(a) The draft amended statement of claim that was before the Court stated that: "Pet Valu "revealed for the first time in its summary judgment materials in this case that in fact, (i) Pet Valu did not receive significant volume-based benefits from suppliers, [and] (ii) these volume allowances were 'insignificant on an absolute and relative basis.'"[35] (Emphasis added.) These quotes came from the 2012 McNeely affidavit and nowhere else (see para. 34 immediately above);

(b) The plaintiff reiterates in its factum that, in the 2012 McNeely affidavit, "Pet Valu's CEO explained for the first time that Pet Valu "did not 'receive significant volume-based benefits from its suppliers,' and that those volume allowances that it did receive were 'insignificant on an absolute and relative basis;'"[36]

(c) The Motion Judge held that the "source" of the proposed amendments were the statements that were first "revealed" in the 2012 McNeely affidavit:

> **... I have concluded as follows [...] In his 2012 affidavit, Mr. McNeely revealed that Pet Valu "did not receive significant volume-based benefits from its suppliers" and that the amounts received were "insignificant on an absolute and relative basis. [...]**
>
> **In his August 3, 2012 affidavit, Mr. McNeely stated that 'Pet Valu did not receive significant volume-based benefits from**

[33] Judgment at para 9(4), PV Compendium, Tab 4, p 23.

[34] Judgment at para 37, PV Compendium, Tab 4, p 31.

[35] Draft Amended Statement of Claim at para 49, PV Responding Compendium, Tab 2, p 15.

[36] Responding Factum of the Plaintiff dated May 22, 2015 at para 3.

> **its suppliers.' And, further, that 'these volume allowances are insignificant on an absolute and relative basis'.**
>
> **...The source of the volume discount complaint is the 2012 McNeely affidavit.**[37]

36. The plaintiff's pleading and factum confirm, and the Motion Judge held, that the "source" of the significant volume discount amendments was first "revealed" in August 2012. Nothing can possibly take place in the balance of this proceeding to change the fact that the plaintiff discovered the information giving rise to its significant volume discount amendments in August 2012. The date of discovery is fixed, unassailable, and relied on by the plaintiff. This places the significant volume discount amendments beyond the limitation period.

D. THERE HAS BEEN NO FINDING REGARDING CERTIFICATION OF ANY ADDITIONAL COMMON ISSUE

37. The Motion Judge and the parties focused on the proposed amendments to the statement of claim, rather than the request to certify new common issues, because any proposed common issue must have a basis in the pleadings. That is why the amendment motion sought to first amend the statement of claim and then, "if the motion to amend succeed[ed], the plaintiff [would] ask that a new Common Issue 8 be certified."[38] In the result, the amendment motion failed. The Motion Judge did not address the test under section 5 of the *Class Proceedings Act, 1992* (the "***CPA***"), in any fashion whatsoever.[39] Even if the Motion Judge erred in refusing the amendments, which is denied, there is no basis for the certification of any new common issue under section 5 of the *CPA*.

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[37] Judgment at paras 9(4), 22 & 23, PV Compendium, Tab 4, pp 23 & 26.

[38] Judgment at para 6, PV Compendium, Tab 4, p 22.

[39] *Class Proceedings Act, 1992* , SO 1992, c 6, s.5, Schedule "B".

PART III - ISSUES AND THE LAW

38. Pet Valu raises the following issues in opposition to the cross-appeal:

(a) The standard of review applicable to the cross-appeal has not been identified by the plaintiff nor met in its argument. The Motion Judge's dismissal of the amendment motion is entitled to deference and should not be set aside absent a palpable and overriding error;

(b) The Motion Judge was correct to deny the amendments on the basis of prejudice;

(c) In any event, the significant volume discount amendments are statute-barred under the *Limitations Act*. Allowing a claim that is otherwise statute-barred by way of amendment constitutes actual prejudice;

(d) The plaintiff does not raise in this cross-appeal the finding that the purchasing power amendments were not "tenable, prima facie meritorious or worthy of a trial;" and

(e) Further, if the cross-appeal is allowed, which is denied, there is no basis for the certification of any new common issue under section 5 of the *CPA*.

A. THE STANDARD OF REVIEW

39. The plaintiff does not address the standards of review that apply to its cross-appeal. The following standards of review apply:

(a) The dismissal of the amendment motion on the ground of prejudice raises a question of mixed fact and law. The Motion Judge applied the correct test to the amendment motion and made factual findings of prejudice. The finding is therefore entitled to deference and should not be overturned absent a palpable and overriding error;[40]

(b) The finding that the purchasing power amendments were not tenable, *prima facie* meritorious, or worthy of trial raises a question of mixed fact and law. The finding is therefore entitled to deference and should not be overturned absent a palpable and overriding error;[41]

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[40] *Housen v. Nikolaisen*, 2002 SCC 33 at para 36, Pet Valu's Book of Authorities (in the main appeal) ("**PV BOA**"), Tab 7 [*Housen*].

[41] *Ibid* at para 36, PV BOA, Tab 7.

(c) Regarding the Motion Judge's deferral of the *Limitations Act* issue:

(i) Limitation periods are a question of law, to which the standard of correctness applies;[42]

(ii) Although discoverability is a question of fact,[43] there is no doubt that the information giving rise to the significant volume rebates amendments was first revealed more than two years before the plaintiff moved to amend;

(iii) The Motion Judge's determination that limitation periods should not be considered on an amendment motion[44] is pure error of law, or in the alternative, an extricable error of law or error in principle. In each case, the standard of correctness applies;[45] and

(iv) In the further alternative, if that determination is a question of mixed fact and law, which is denied, the Motion Judge nonetheless made a palpable and overriding error in deferring the *Limitations Act* issue, because the unassailable date of discovery was more than two years prior.

B. THE MOTION JUDGE WAS CORRECT TO DENY THE AMENDMENTS ON THE BASIS OF PREJUDICE

40. The Motion Judge correctly held that allowing the proposed amendments at the conclusion of the summary judgment motion would cause irremediable prejudice to Pet Valu. Such prejudice is a proper ground to refuse an amendment.[46]

1) Actual Prejudice Resulting from the "Unusual Circumstances" of the Process and the Involvement of the Motion Judge

41. The "unusual circumstances"[47] of the closing moments of Pet Valu's summary judgment motion and the Motion Judge's role in it provide a substantial foundation for the finding of prejudice. The peculiarities include:

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[42] *Toronto Standard Condominium Corporation No 1703 v. 1 King West Inc.*, 2010 ONSC 2129 at para 12, PV Responding BOA, Tab 3.

[43] *Ibid* at paras. 12 & 39, PV Responding BOA, Tab 3.

[44] Judgment at para 37, PV Compendium, Tab 4, p 31.

[45] *Housen, supra* note 40 at para 36, PV BOA, Tab 7, *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para 53, PV BOA, Tab 8.

[46] *Marks v. Ottawa (City)*, 2011 ONCA 248 at para 19, PV Responding BOA, Tab 4 [*Marks*].

[47] Judgment at para 32, PV Compendium, Tab 4, p 30.

(a) The amendment motion was brought at the last minute;

(b) The amendment motion was brought at the invitation of the Motion Judge, who then suggested how the plaintiff might frame that motion;

(c) The Court's invitation was based on its misapprehension of the purchasing power evidence in the 2014 McNeely affidavit;

(d) The Court ultimately held that the purchasing power evidence had been taken out of context: "I am now satisfied that the 2014 McNeely affidavit did not reveal 'new evidence' that Pet Valu had little to no purchasing power."[48] This leads to the inexorable conclusion: If that evidence had not been misapprehended in the first place, the Motion Judge would not have invited the amendment at all;[49] and

(e) Nonetheless, the plaintiff seized upon the initial misapprehension of the purchasing power evidence as an opportunity to bring an expanded amendment motion that included two components: (i) the invited purchasing power amendments, and (ii) the uninvited significant volume discount amendments.

42. The Motion Judge acknowledged the foregoing, noting in the two judgments that: "the plaintiff was shifting its focus..." [50] and "...[t]he defendant's motion for summary judgment should have been concluded in full without this court suggesting and encouraging this motion to amend the pleadings."[51]

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[48] Judgment at para 20, PV Compendium, Tab 4, p 26.

[49] Pet Valu notes that the full explanation for the proper context of the purchasing power evidence was filed with the Motion Judge in a factum during the currency of the October 8-10, 2014 hearing under the heading, "Mr. McNeely's Comments on List Prices and Purchasing Power Have Been Distorted by the Plaintiff." As such, the Motion Judge's appreciation of the true nature of Mr. McNeely's evidence ought to have occurred during the October 2014 hearing dates. See: Excerpt of Written Submissions of Pet Valu Regarding Common Issues Nos. 6 & 7 dated October 10, 2014 at paras 30-44, PV Responding Compendium, Tab 3, pp 20-24.

[50] First Judgment at para 38, PV Compendium, Tab 5, p 50.

[51] Judgment at para 30, PV Compendium, Tab 4, pp 29-30.

43. The process was unfair and abusive to Pet Valu. The successful conclusion of its summary judgment motion, in which Pet Valu had "prevailed substantially... and is entitled to costs,"[52] was derailed by an amendment motion that the Motion Judge invited based upon his misapprehension of evidence.

44. This Honourable Court has held that the doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a litigant or would in some other way bring the administration of justice into disrepute.[53] It is a broad, flexible, and discretionary doctrine, the application of which is not limited to any particular conditions or factors.[54]

2) Pet Valu Suffered Actual Prejudice Because the Summary Judgment Motion Should Have Concluded In Full

45. The amendment request arrived after Pet Valu made extensive efforts and incurred significant costs in defending the plaintiff's unsuccessful claims regarding volume rebates and mark-ups, which up until that time had been the sole focus of the action.

46. Pet Valu was in a position to obtain complete summary judgment on the existing common issues as well as a cost award against the representative plaintiff. This would have ended the litigation. The plaintiff is a defunct corporation. It has no assets that can satisfy a judgment.[55] While it was posited that the plaintiff could have brought another action down the road as a reason to entertain this amendment, there would have been serious and necessary obstacles to this occurring, such as: a) outstanding costs awards, including costs of the motion for summary

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[52] First Judgment at para 45, PV Compendium, Tab 5, p 51.

[53] *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26 at para 40, PV Responding BOA, Tab 5.

[54] *Ibid* at para 40, PV Responding BOA, Tab 5.

[55] Judgment at paras 30-31, PV Compendium, Tab 4, p 29-30.

judgment, where Pet Valu "prevailed substantially ... and is entitled to costs";[56] b) a security for costs motion in the new action; c) significant hurdles to certify a new class action, including the test under section 5 of the *CPA*; and d) myriad of franchisees had opted-out of the within class proceeding.

47. The amendment motion conveniently allowed the plaintiff to string out the existing litigation without having to face both the financial and procedural "hurdles" of starting a new case.[57] If allowed, it would have permitted the plaintiff to shelter its new claim under the largely unsuccessful class action that it pursued for five years, while denying Pet Valu its entitlement to finality and costs on the original claim.

48. These amendments, coming as they did at the absolute end of the summary judgment motion, tilt the class proceeding process unjustifiably in the plaintiff's favour. As was stated by Justice Perell in referring to another franchise class action: "...defendants, just as much as plaintiffs, are entitled to access to justice, and the court in exercising its discretion must be aware of the access to justice implications of its award to both plaintiffs and defendants."[58] Further, the "court should also be aware that the procedure of a class action is meant to level the playing field, not tip the field in the favour of plaintiffs."[59]

49. Access to justice means "a fair, efficient and manageable method of advancing the claim,"[60] not post-summary judgment amendments and new, last-gasp common issues. In the

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[56] First Judgment at para 45, PV Compendium, Tab 5, p 51.

[57] Judgment at para 31, PV Compendium, Tab 4, p 30.

[58] *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390 at para 17, PV Responding BOA, Tab 6 [*Quizno's*].

[59] *Ibid* at para 18, PV Responding BOA, Tab 6.

[60] *Hollick v. Toronto (City)*, 2001 SCC 68 at para 28, PV Responding BOA, Tab 7 [*Hollick*].

latter scenario, litigation never ends and access to justice (which includes its finality) is defeated by the sword of the intervening Motion Judge wading into the arena with the parties.

50. Ontario courts have held that proposed amendments made "late in the day" in order to "cooper up" a case cause irreparable prejudice to opposing parties, which is a sufficient ground to deny such amendments. For example, in *Pace v. Del Zotto*, the court stated:

> **In my view, it was simply too late in the day to permit the defendants to add these further grounds of defence...**
>
> **...amendments should not be allowed late in the day to withdraw admissions, substantially alter the case to be met, or to "cooper up" a case after a first run.**[61]

51. Similarly, in *Robinson v. Robinson*, Justice Reid denied proposed amendments on the ground of prejudice because they sought to "cooper up" a pleading at the eleventh-hour:

> **The discretion to permit amendments is wide but not indiscriminate. It is intended to facilitate fairness and therefore justice, not to obstruct them, and on that basis judges will refuse amendments... The inappropriateness of permitting parties to "cooper up" a case during trial after an unsatisfactory first run at it has been recognized by the Court of Appeal [at p. 20] in *Burns v. Pocklington* (1985), 5 C.P.C. (2d) 18 (Ont.). ... In my opinion, an amendment that would raise an entirely new issue after trial to shore up a failed defence would be palpably unjust.**[62]

52. More than once, this Honourable Court has emphasized the need for caution and restraint on the part of a class action judge dealing with amendments. This need is heightened when the parties have moved beyond the procedural stage and are at the end of a multi-million dollar class action trial on the merits.

> **There is no question that class proceedings evolve as they work their way through the certification and case management process and that the case management judge plays an important role in guiding the evolution of the proceeding. But, certifying a class action in the**

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[61] *Pace v. Del Zotto*, 1996 CarswellOnt 172 (Gen Div) at paras 7-9, PV Responding BOA, Tab 8.

[62] *Robinson v. Robinson* (1989), 70 OR (2d) 249, 1989 CarswellOnt 274 (HCJ) at paras. 17-18, PV Responding BOA, Tab 9.

> **absence of a statement of claim that discloses viable causes of action is not case management. Even the power to amend other aspects of the claim, such as the proposed common issues, should be exercised with caution and restraint. (Emphasis added.)** [63]

> **I also note that the motion judge fundamentally altered the plaintiff's proposed common issues. While this is a power that may be exercised by the motion judge, it should be exercised with caution and restraint and should be the exception rather than the norm. (Emphasis added.)**[64]

53. It is equally important that a judge not perform the role of class counsel, which Justice Winkler, as he then was, described as improperly descending "into the arena":

> **What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion. (Emphasis added.)**[65]

54. There is a key distinction in the cases that the plaintiff relies upon to support its argument that the Motion Judge was in a superior position to guide the process of the class action because he was also the case management judge.[66] The interpretation the plaintiff casts over these cases at paragraph 75 of its factum over-exaggerates the discretion that a case management judge has to manage the class action process. In each of those cases, the court exercised its discretion at the certifying stage, when the action was entirely procedural. Conversely, the present case is at the opposite end of the spectrum: the action had been dealt with on its merits. A class action that has been litigated for over five years and is at the end of the hearing on its merits is no place for a motion judge to hand out a mulligan to the plaintiff. This is particularly true where the perceived

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[63] *Brown v. Canada*, 2013 ONCA 18 at para 45, PV BOA Tab 4.

[64] *McCracken v. CNR*, 2012 ONCA 445 at para 144, PV BOA Tab 5.

[65] *Caputo v. Imperial Tobacco Ltd.*, 2004 CanLII 24753 (ONSC) at para 41, PV BOA Tab 6.

[66] The plaintiff relies upon *Brown v. Canada*, 2013 ONCA 18 at para 45 (PV BOA Tab 4), and *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para 30 (Plaintiff's Brief of Authorities, Tab 19).

claim at the root of the mulligan (i.e. purchasing power) was determined not to be "tenable, worthy of trial or prima facie meritorious."[67]

3) The Finding of Prejudice is Consistent with the Culture Shift Toward Affordable, Timely and Just Adjudication of Claims

55. The finding of prejudice on these grounds is consistent with the "culture shift" toward the "affordable, timely and just adjudication of claims,"[68] based upon the principles of fairness, efficiency, certainty, and finality. This is particularly true in the context of this class action.[69] Pet Valu should not be exposed to a new case against it at the end of the hearing on the merits. As Justice Myers has recently written, in denying an adjournment on the eve of trial:

> **This motion raises issues flowing from the "culture shift" mandated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII). It raises questions such as "What are the goals of the civil justice system?" and "When is enough, enough?"**
>
> **[...]**
>
> **... undue process and protracted trials with unnecessary expense and delay "can prevent the fair and just resolution of disputes". In para. 25 of Hryniak, supra, the Court held:**
>
> > **Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But when court costs and delays become too great, people look for alternatives or simply give up on justice.**
>
> **"... The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure".**[70]

56. The Motion Judge invited a "painstaking procedure" by suggesting this amendment motion when "Pet Valu was in a position to obtain complete summary judgment on the existing common issues... [which] would have ended the litigation."[71] In this case, enough was enough.

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[67] Judgment at para 21, PV Compendium, Tab 4, p 26.

[68] *Hryniak v. Mauldin*, 2014 SCC 7 at paras 2 & 5, PV Responding BOA, Tab 10.

[69] For instance, a majority of class members had opted out and the representative plaintiff is no longer a franchisee and sold his franchise for a profit.

[70] *Letang v. Hertz Canada Limited*, 2015 ONSC 72 at paras 9-12, PV Responding BOA, Tab 11.

C. THE PROPOSED SIGNIFICANT VOLUME DISCOUNT AMENDMENTS ARE STATUTE-BARRED

57. The *Limitations Act* prohibits the commencement of a claim after the second anniversary of the day on which the claim was discovered.[72] A claim is discovered on the earlier of the day on which the claimant knew, or reasonably ought to have known, the material facts giving rise to its claim.[73]

58. The motion to amend the statement of claim to add claims in respect of significant volume discounts ought to have been denied because these claims are statute-barred.

59. An amendment ought to be denied if it will result in non-compensable prejudice.[74] An amendment is prejudicial where it advances claims that are statute-barred. In *Frohlick v. Pinkerton Canada Limited,* this Honourable Court stated:

> **In my view, the proper interpretation of rule 26.01 is that the expiry of a limitation period gives rise to a presumption of prejudice.**[75]

60. It is therefore proper for a judge to address limitation period issues on a motion to amend – especially where the motion comes towards the end of the hearing on the merits.

61. The Motion Judge erred by deferring the issue of discoverability instead of ruling on it outright. The case that the Motion Judge relied on, *Beardsley v. Ontario*,[76] did not apply to the motion before him. Specifically, *Beardsley* dealt with a Rule 21 motion to strike a pleading (i.e. at

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[71] Judgment at para 31, PV Compendium, Tab 4, p 30.

[72] *Limitations Act, supra* note 2, Schedule "B".

[73] *Ibid*, s.5, Schedule "B".

[74] *Marks*, *supra* note 46 at para 19, PV Responding BOA, Tab 4.

[75] *Frohlick v. Pinkerton Canada Limited*, 2008 ONCA 3 at para 17, PV Responding BOA, Tab 12 [*Frohlick*]; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1764 at para 92, PV Responding BOA, Tab 13 [*Dugal*]; *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 at paras 12, 24 & 27 (a limitation period under the *Limitations Act* cannot be extended by the common law doctrine of special circumstances), PV Responding BOA, Tab 14.

[76] *Beardsley v. Ontario* (2001), 57 OR (3d) 1, 2001 CarswellOnt 4237 (CA), PV Responding BOA, Tab 15 [*Beardsley*]

the beginning of a claim) on the basis of a limitation period, where the only information before that Court was the allegations in the statement of claim. This case is at the opposite end of the spectrum: the evidentiary record was complete and overwhelmingly proved that the proposed amendments were statute-barred (see paragraph 35 above).

62. Ontario courts have denied amendments in similar circumstances. In *Dugal v. Manulife Financial Corporation*,[77] the court dismissed an amendment motion seeking to add claims that were statute-barred. In that case, the draft amended statement of claim stated, under a heading entitled "*The Truth is Revealed*", that the information giving rise to its claim was disclosed more than 180 days (being the applicable limitation period in that case) before the plaintiff moved to amend. That is identical to the present case, where the draft amended statement of claim pleads that Pet Valu revealed the facts giving rise to the proposed amendments in August 2012. In *Dugal*, Justice Strathy, as he then was, dismissed the amendment motion, finding that no additional facts could be asserted to modify the date of discovery

> **I am satisfied that it is appropriate to deal with a limitations issue on a pleadings amendment motion if it is plain and obvious from the pleading that no additional facts could be asserted to show that the limitation period has not expired: *Beardsley v. Ontario* (2001),2001 CanLII 8621 (ON CA), 57 O.R. (3d) 1, [2001] O.J. No. 4574 at para. 21 (C.A.).**[78]

63. In *Dugal*, the court re-emphasized the importance of limitation periods, which have the twin goals of certainty and finality, stating as follows:

> **In *Wellwood v. Ontario Provincial Police* (2010), 102 O.R. (3d) 555, [2010] O.J. No. 2225 (Ont. C.A.), the Court of Appeal recently noted, at para. 77, that that limitation periods have "the twin goals of finality**

[77] *Dugal*, *supra* note 75, PV Responding BOA, Tab 13.

[78] *Dugal*, *supra* note 75 at paras 38 & 59, PV Responding BOA, Tab 13.

> **and certainty in legal affairs" and that "the prevention of indefinite liability underlie the creation of limitation periods."**[79]

64. Rule 26.01 operates to prevent amendments that would result in non-compensable prejudice.[80] Pet Valu submits that the Motion Judge ought to have dismissed the proposed significant volume rebate amendments on the ground that they are statute-barred. The record before him, his conclusions as to the "source" of the proposed volume discount amendments, the policies underlying limitation periods, and the authority of *Dugal* provide ample support such a ruling.

D. THE PLAINTIFF HAS NOT APPEALED THE PURCHASING POWER AMENDMENTS

65. The Motion Judge expressly held that "none of the proposed amendments or claims about purchasing power per se are tenable, worth of trial or prima facie meritorious."[81]

66. Despite seeking an Order in this cross-appeal certifying a common issue on "substantial or significant purchasing power," the plaintiff has failed to raise a single ground of appeal in respect of the Motion Judge's denial of the purchasing power amendments. As such, there are no grounds to interfere with the Motion Judge's finding on this matter. Rule 61.08(2) of the *Rules of Civil Procedure* prohibits the plaintiff from arguing any issue not raised as a ground of appeal in its notice of cross-appeal, without leave.[82]

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[79] *Dugal*, *supra* note 75 at para 62, PV Responding BOA, Tab 13.

[80] *Rules of Civil Procedure*, RRO 1990, Rule 26.01, Schedule "B" [*Rules*]; *Marks*, *supra* note 46 at para 19, PV Responding BOA, Tab 4.

[81] Judgment at para 21, PV Compendium, Tab 4, p 26.

[82] *Rules, supra*, note 80, Rule 61.08(2), Schedule "B". See also: *Shoprite Stores v. Gardiner*, [1935] SCR 637, PV Responding BOA, Tab 16.

E. NO FINDING OR EVIDENCE REGARDING CERTIFICATION OF ANY ADDITIONAL COMMON ISSUE

67. The Motion Judge did not consider or make any determinations regarding the certification of the proposed additional common issues. This is because the amendment motion failed. In particular, the Motion Judge did not address any of the criteria for certification prescribed by section 5 of the *CPA*. Thus, even if the Motion Judge erred in refusing the amendments, which is denied, there are no grounds for the certification of any proposed common issues.

F. THE IMPACT OF *ADDISON v. GENERAL MOTORS* TO THE APPEAL

68. The Ontario Superior Court has recently released *Addison Chevrolet Buick GMC Limited et al. v General Motors of Canada Limited et al.*[83] This decision elucidates the points raised in paragraphs 42 to 48 of Pet Valu's appeal factum regarding the necessity of the obligation of good faith to be grounded in the contract. As such, Pet Valu brings it to the attention of this Honourable Court.

69. *Addison* was a pleading motion in which the plaintiff franchisee was relying on the duty of good faith as stated in *Bhasin v. Hrynew*,[84] and section 3 of the *Wishart Act* to assert otherwise unwritten contractual obligations against its franchisor. In response to these allegations, GM as the franchisor moved to strike the claim. Thus, the Court critically reviewed *Bhasin* and section 3 of the *Wishart Act* in the context of the "theme" or "promise" the franchisee was making in that case.

70. This is no different than the theme or promise imagined by the Motion Judge in the present case. The Ontario Court made restrictive findings on good faith. Specifically, the Court reviewed

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[83] *Addison Chevrolet Buick GMC Limited et al. v General Motors of Canada Limited et al.*, 2015 ONSC 3404, PV Responding BOA, Tab 17 [*Addison*]. This decision was released subsequent to the filing of Pet Valu's appeal factum. Pet Valu is bringing this decision to this Honourable Court's attention in accordance with the Practice Direction Concerning Civil Appeals in the Court of Appeal at para 13(3), Schedule "B".

[84] *Bhasin v. Hrynew*, 2014 SCC 71, PV BOA, Tab 1.

the concept of good faith as articulated in *Bhasin*, finding that its main purpose was to bring "coherence and predictability" to the performance of contracts. It reined in a run-away interpretation of the duty of good faith. It confirmed that good faith is not a licence "to invent obligations out of whole cloth divorced from the actual terms of the contract." Good faith is not "authority for unbridled creativity in the creation from whole cloth of obligations in a contractual context which the parties have not provided for or have addressed in a fashion which one party regrets in hindsight."[85] This passage applies to negate the Motion Judge's creation of a "theme" or "promise" in the Pet Valu franchise agreement.

71. *Addison* noted that "[i]t would be ironic indeed if [*Bhasin*] intended to bring coherence and predictability by underscoring the common sense minimum standards of honesty in the commercial context should be misconstrued as a pretext for injecting uncertainty and risk of arbitrary outcomes into the world of commercial agreements whose very raison d'être is the pursuit of predictability and certainty." [86]

72. Silence in a franchise agreement does not give rise to a good faith claim just because a franchisee makes "a visit to the judicial oracle."[87] The doctrine of good faith "is not the source of contractual obligations but a guide to the application of them."[88]

73. Pet Valu submits that the Motion Judge did precisely what *Addison* warned against. He divorced the duty of good faith from the terms of the contract, and created from whole cloth a "theme" and "promise" regarding the disclosure of significant volume rebates that is nowhere to

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[85] *Addison*, *supra* note 83 at paras 115-116, 119, PV Responding BOA, Tab 17.
[86] *Ibid* at para 115, PV Responding BOA, Tab 17.
[87] *Ibid* at para 111, PV Responding BOA, Tab 17.
[88] *Ibid* at para 112, PV Responding BOA, Tab 17.

be found in the franchise agreement.[89] This is reviewable error. This Honourable Court ought to be concerned that the Motion Judge has used good faith as a "source" of contractual obligations rather than a "guide" to the application of them.

PART IV - ORDER REQUESTED

74. Pet Valu requests an order that the cross-appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22 day of June, 2015.

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[89] See PV Appeal Factum at paras 42-48.

SCHEDULE "A"
JURISPRUDENCE

1. *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390
2. *Addison Chevrolet Buick GMC Limited et al. v General Motors of Canada Limited et al*, 2015 ONSC 3404
3. *Beardsley v. Ontario* (2001), 57 OR (3d) 1, 2001 CarswellOnt 4237 (CA)
4. *Bhasin v. Hrynew*, 2014 SCC 71
5. *Brown v. Canada (Attorney General)*, 2013 ONCA 18
6. *Caputo v. Imperial Tobacco Ltd.*, 2004 CanLII 24753 (ONSC)
7. *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1764
8. *Frohlick v. Pinkerton Canada Limited*, 2008 ONCA 3
9. *Hollick v. Toronto (City)*, 2001 SCC 68
10. *Housen v. Nikolaisen*, 2002 SCC 33
11. *Hryniak v. Mauldin*, 2014 SCC 7
12. *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469
13. *Labatt Brewing Company Limited v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511
14. *Letang v. Hertz Canada Limited*, 2015 ONSC 72
15. *Marks v. Ottawa (City)*, 2011 ONCA 248
16. *McCracken v. CNR*, 2012 ONCA 445
17. *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26
18. *Pace v. Del Zotto*, 1996 CarswellOnt 172 (Gen Div)
19. *Robinson v. Robinson* (1989), 70 OR (2d) 249, 1989 CarswellOnt 274 (HCJ)
20. *Rodaro v Royal Bank of Canada* (2002), 59 OR (3d) 74, 2002 CarswellOnt 1047 (CA)
21. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
22. *Shoprite Stores v. Gardiner*, [1935] SCR 637
23. *Toronto Standard Condominium Corporation No 1703 v. 1 King West Inc.*, 2010 ONSC 2129

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY - LAWS

I. *Limitations Act, 2002*, SO 2002, c 24, Sch B

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

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

Fair dealing

3.(1)Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

Right of action

(2)A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement. 2000, c. 3, s. 3 (2).

Interpretation

(3)For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. 2000, c. 3, s. 3 (3).

Franchisor's obligation to disclose

5.(1)A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise. 2000, c. 3, s. 5 (1).

Damages for misrepresentation, failure to disclose

7.(1)If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

(a) the franchisor;

(b) the franchisor's agent;

(c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

(d) the franchisor's associate; and

(e) every person who signed the disclosure document or statement of material change. 2000, c. 3, s. 7 (1).

III. *Rules of Civil Procedure*, RRO 1990, Reg 194

GENERAL POWER OF COURT

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 26.01.

WHEN AMENDMENTS MAY BE MADE

26.02 A party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or

(c) with leave of the court. R.R.O. 1990, Reg. 194, r. 26.02.

Supplementary Notice to be Served and Filed

61.08 (1) The notice of appeal or cross-appeal may be amended without leave, before the appeal is perfected, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 61F) and filing it with proof of service. R.R.O. 1990, Reg. 194, r. 61.08 (1).

Argument Limited to Grounds Stated

(2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.08 (2).

Relief Limited

(3) No relief other than that sought in the notice of appeal or cross-appeal or supplementary notice may be sought at the hearing, except with the leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.08 (3).

IV. *Class Proceedings Act, 1992*, SO 1992, c 6

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

V. Practice Direction Concerning Civil Appeals in the Court of Appeal (Updated Nov. 2008)

13. Post-Hearing Submissions

1. Counsel are expected to make their full argument with respect to all issues under appeal within the factum and in oral submissions at the hearing of the appeal. The court is concerned with the increasing frequency that counsel seek to supplement their written and oral argument after the hearing by attempting to provide written submissions, additional argument, additional cases or other material directly to members of the court.

2. From time to time, after the hearing of an appeal has been concluded, the court may wish to receive further submissions from counsel in respect of one or more issues. Counsel will be advised of the request by the Senior Legal Officer and will be given a timetable within which to serve and file material.

3. Occasionally counsel may become aware of a newly decided authority that may have an impact on the appeal. Counsel may file the authority, without submissions, to the attention of the Senior Legal Officer who will ensure that the material is transmitted to the panel that heard the appeal.

4. If counsel wish to make submissions as to the impact of such new authorities, they should include a request to do so in a covering letter addressed to the Senior Legal Officer and copied to other counsel. Counsel will be advised as to whether the court is prepared to entertain such submissions, and if so, will be advised as to a timetable within which to serve and file submissions

5. In exceptional circumstances, counsel may seek to make additional or new submissions to the court while an appeal is under reserve or after the decision has been released. The request, outlining the essentials of the argument and the reasons that it was not made at the hearing of the appeal, should be made in writing to the attention of the Senior Legal Officer. Opposing parties may respond, in writing, to the request. The Senior Legal Officer will consult with the court and advise counsel as to whether further submissions will be entertained.

6. This process is not to be viewed as a substitute for proper preparation of the factum and full argument at the hearing of the appeal.

SCHEDULE "C"
COMMON ISSUES

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?

2) If the answer to common issue # 1 is yes, has the defendant breached its contractual duty to the Class Members at any time during the Class Period by:

   a) charging a mark-up on private label products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products.

   b) imposing a distribution charge on the price of products without giving Class Members credit for their proportionate share of Volume rebates in respect of such products?

3) Has the defendant breached the duty of fair dealing to the Ontario Class Members under section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "AWA") by any of the conduct described in common issues 1 and 2 above, if so found?

4) If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has the defendant been unjustly enriched by such conduct, if so found?

5) What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 3 above, or the aggregate amount of compensation for unjust enrichment, if so found?

6) Did the defendant have a duty at common law to the Class Members or under section 3 of the AWA to the Ontario Class Members to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:

   i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;

   ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;

   iii) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period;

   iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;

   v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?

7) If the answer to common issue 6 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?

1250264 ONTARIO INC.
Plaintiff (Respondent, Appellant by Cross-Appeal)

and

PET VALU CANADA INC.
Defendant (Appellant, Respondent by Cross-Appeal)

Court File No. C55949

COURT OF APPEAL OF ONTARIO

Proceeding under the *Class Proceedings Act, 1992*

RESPONDING FACTUM OF PET VALU CANADA INC. ON THE CROSS-APPEAL

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