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*

FACTUM OF THE RESPONDENT
(Appellant by cross-appeal)

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PART I - OVERVIEW

1. The defendant Pet Valu Canada Inc. ("Pet Valu") appeals from the decision of the Honourable Justice Belobaba (the "Motion Judge"), who granted summary judgment to the class on common issues that asked whether Pet Valu breached its statutory duty of fair dealing to members of the class.

2. Pet Valu's appeal is without merit and should be dismissed. Its appeal is premised on a mischaracterization of the decision of the Motion Judge and a distortion of the evidentiary record on which his decision was based. Pet Valu claims that the Motion Judge imposed on franchisors a "continuous obligation to disclose anything and everything it could imagine might be material to each and every franchisee, in real time." The Motion Judge did nothing of the sort. To the

contrary, he made findings of fact, specific to the factual record in this case, that Pet Valu breached its duty of fair dealing because it misled franchisees about fundamental aspects of the business relationship. He determined this on the basis of evidence that Pet Valu told its franchisees that they would enjoy "meaningful volume discounts" based on "significant purchasing power," in exchange for buying into the Pet Valu system.

3. This was untrue. Years later, in 2012, three years after this lawsuit began, 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." Later, in 2014, he revealed that this was because Pet Valu had "little to no purchasing power with its major purchasers" and "little to no ability to influence the price at which it is supplied products."

4. The Motion Judge determined that Pet Valu had breached its duty of good faith and fair dealing after both parties moved for summary judgment and submitted a substantial volume of evidence. The record was amassed over two years. It evolved and was added to as the Motion Judge held case conferences and made interlocutory rulings in the class action. There can be no reasonable suggestion that the Motion Judge did not carefully consider this record. To the contrary, his reasons in his rulings show that he was intimately familiar with the details and nuances of this case.

5. The majority of Pet Valu's submissions are attacks on the judge's findings of fact, the inferences he drew, or arguments about questions of mixed fact and law. The Motion Judge's decision turned on his interpretation of the disclosure document, his interpretation of the contract and his analysis of good faith. Pet Valu can show no palpable and overriding error in the Motion

Judge's findings that there no significant volume rebates. His findings in this regard were based on the unequivocal sworn testimony of Pet Valu's CEO. These are all classic questions of fact or mixed fact and law.

6. There is no extricable error of law. The Motion Judge did not, as claimed by Pet Valu, impose a duty of ongoing disclosure on franchisors. Rather, he simply found that Pet Valu was not entitled to mislead its franchisees about a fundamental aspect of the franchise system. This was not a case like *Spina v. Shoppers Drug Mart Inc.*,[1] in which the franchisee plaintiff asserted an ongoing right of disclosure of "routine or non-material information."[2] This was a case where the franchisor suppressed information that the Motion Judge found "was highly material, indeed 'fundamental'".[3] The Motion Judge's decision was not only consistent with *Spina,*[4] but followed numerous other cases that have likewise recognized that a duty of good faith includes the duty not to suppress fundamental information from franchisees,[5] including this Court's decision in *Salah v. Timothy's Coffees of the World Inc.*[6]

7. The kind of "bait and switch" that occurred in this case is anathema to any notion of fair dealing and is precisely the kind of mischief that the *Arthur Wishart Act* was designed to prevent. Franchisors have a duty not to deceive franchisees about fundamental aspects of the system they are buying into. Franchisees have a right to be told the truth. The franchisees had a right to be told the truth about volume rebates and the right to make an informed decision about whether to buy or renew their business based on true information about a fundamental aspect of the

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1 2012 ONSC 5563.
2 Disclosure summary judgment reasons, para. 54.
3 *Ibid.*
4 See *Spina, supra*, para. 216 where the Court itself acknowledged there may indeed be cases where "the statute's duty of good faith and fair dealing may arguably extend the franchisor's disclosure obligations."
5 See summary of cases at disclosure summary judgment reasons, para. 52.
6 2010 ONCA 673, in which the Court found a breach of the duty of good faith and damages for the franchisor withholding "critical information" from a franchisee.

business. They were denied that right when Pet Valu lied to them at the outset and continued to be denied that right while it continued to suppress the truth.

8. Moreover, Pet Valu misses the point when it fixates on the "other benefits" that it asserts franchisees gained from the Pet Valu system. The Motion Judge was obviously aware and considered these benefits and will consider what weight to give to this evidence when he decides the common issue concerning damages.[7] However, that issue is not before this Court because Pet Valu successfully moved to stay the determination of the damages issue pending resolution of this appeal. Pet Valu's submission about other alleged benefits the franchisees received also ignores what franchisees lost: the basic right to choose whether to buy or renew a business contract based on correct information about a fundamental part of the business.

9. The plaintiff cross-appeals the Motion Judge's decision to refuse to allow amendments to the pleadings on the basis of alleged prejudice to Pet Valu. The Motion Judge concluded Pet Valu was prejudiced by the proposed amendments because it would otherwise have been able to obtain a dismissal of the class action. This is an error. There was no prejudice to Pet Valu arising out of the proposed amendments: the Motion Judge subsequently held in the same decision that the plaintiff succeeded in proving common issue #6. The amendment should have been allowed.

PART II - FACTS

(1) PROCEDURAL BACKGROUND

10. The proceeding was certified as a class proceeding by Justice Strathy (as he then was) on June 29, 2011. He certified seven common issues involving volume rebates alleged to have been

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7 See *e.g.* disclosure summary judgment reasons, para. 9, in which the Motion Judge found: "Pet Valu has significant purchasing power in some areas and has bestowed a range of benefits upon its franchisees as a result of this significant purchasing power."

wrongfully withheld from franchisees or wrongfully not disclosed by Pet Valu. In certifying these issues, Justice Strathy noted the importance of volume rebates to franchisees:

> The Franchise Agreement holds out the promises that specific allowances and other benefits received by Pet Valu from suppliers as a result of its substantial purchasing power will be shared with franchisees.[8]
>
> Pet Valu franchisees face stiff competition on several quarters. [...] Pricing is undoubtedly competitive and margins are thin. It does not take an expert economist to know that with maximum retail prices fixed by Pet Valu and constrained by a competitive market, the cost of goods is a vital factor in the profitability of every franchisee. 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.[9]
>
> 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 Rodger and other franchisees for Volume Rebates that they should have received, it must have affected their margins and their underlying profitability.[10]

11. Five common issues addressed whether Pet Valu breached contractual obligations to franchisees by failing to share volume rebates, or was unjustly enriched.[11] Two separate common issues dealt with whether Pet Valu had a duty at common law or under the *Arthur Wishart Act* to disclose information about volume rebates to franchisees, and damages for the breach of any such duty.[12]

12. After certification, Justice Strathy issued a further ruling clarifying the common issues.[13] Pet Valu then brought a further, and unsuccessful, motion seeking a ruling barring certain class members from taking part in the action on the basis that they had signed releases after selling their franchises back to Pet Valu.[14]

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8 Certification reasons, para. 34 (emphasis added)
9 *Ibid.*, para. 42 (emphasis added).
10 *Ibid.*, para. 99 (emphasis added).
11 Contract summary judgment reasons, Appendix – certified common issues #1, #2, #3.
12 Contract summary judgment reasons, Appendix – certified common issues #6 & #7.
13 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941.
14 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871. In addition, Justice Strathy determined a motion brought by the plaintiff to set aside opt-out notices as a result of alleged irregularities during the class

13. The Motion Judge replaced Justice Strathy as case-management judge in 2012 and heard summary judgment motions brought by both parties in late 2014. Prior to hearing the motions for summary judgment, the Motion Judge presided over numerous case conferences, a production motion and a refusals motion. Over the course of this process, he reviewed and analyzed the parties' pleadings, reviewed a sampling of the representative evidence, decided on the scope of relevant evidence and questions, and decided procedural questions involving the order of motions.[15] Unlike a typical motion for summary judgment, which is argued over the course of one or a few days, the summary judgment process was actively case-managed by the class proceedings judge who "lived through" the case.

(2) EVIDENCE ON THIS MOTION

14. The evidentiary record below was voluminous, consisting of over 3,000 pages of documents, affidavits and cross-examination. However, the key evidence that gave rise to the Motion Judge's findings that volume rebates were fundamental to the class consisted of two documents.

15. The first was the Disclosure Document dated February 7, 2005,[16] which was governed by the strict regulatory framework of the *Arthur Wishart Act.* Pet Valu was required to fairly disclose material facts regarding its operation so that prospective franchisees could make an informed choice about whether or not to buy into the Pet Valu system. As found by the Motion Judge, the Disclosure Document told "potential franchisees two things: one, that it has significant purchasing power that enables it to take advantage of volume discounts offered by

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notice period. While Justice Strathy granted the motion (2012 ONSC 4317), his decision was overturned by this Court (2013 ONCA 279).

15 See Endorsement on production motion dated April 4, 2014, Appeal Book and Compendium, Tab 19.

16 Franchise Disclosure Document dated February 7, 2005, Appeal Book and Compendium, Tab 22.

suppliers; and two, that this will translate into a meaningful benefit to the franchisee."[17] The Motion Judge's findings were amply supported by the plain wording of the Disclosure Document, which states in part:

> [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.[18] ...
>
> Pet shops and pet product superstores are primary competitors for the sale of pet supplies. PET VALU stores generally offer lower prices than pet shops. While, in most instances, PVCI [Pet Valu Canada Inc.] (through Peton Distributors Inc.) purchases in large volumes directly from manufacturers and distributes products though 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. [19]

16. The second document was the Franchise Agreement dated March 11, 2005,[20] which was closely related to the Disclosure Document. The Franchise Agreement was referred to in the very first paragraph and attached as the first appendix to the Disclosure Document. As a result, the Disclosure Document was an essential part of the factual matrix underlying the contractual agreement between the parties. As found by the Motion Judge, the Franchise Agreement reinforced "the reasonable expectation that Pet Valu's 'substantial purchasing power' would be used for the benefit of both the franchisor and the franchisees, and in particular that this purchasing power would be used to obtain pricing benefits that would be passed along, at least to some extent, to the franchisees."[21] The Motion Judge's interpretation of the franchise agreement was similarly supported by its plain wording:

> The following Recitals are understood and the truth thereof is recognized and Acknowledged by the Parties. These 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.

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17 Disclosure summary judgment reasons, para. 25
18 *Ibid,* p. 340 (emphasis added).
19 *Ibid,* p. 341 (emphasis added).
20 Franchise Agreement dated March 11, 2005, Appeal Book and Compendium, Tab 21.
21 Disclosure summary judgment reasons, para. 9.

> WHEREAS honesty is the basis of the relationship between the parties…[22]
>
> AND WHEREAS [Pet Valu] has substantial purchasing power in relation to products for resale, equipment, services, and operating supplies;
>
> 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...[23]
>
> (gg) "Pet Valu System" means the development, operation and promotion of Pet Valu stores in accordance with the Trademarks, Confidential Information, Systems, and Methods, Documentation, expertise, policies, programmes, aids, E.D.P. systems, accounting and inventory management systems, trucking and-warehouse operations, and buying power and buying systems of PVCI which collectively and severally benefit the operation of Pet Valu stores…[24]
>
> 22(f) Volume allowances granted to [Pet Valu] by a supplier or manufacturer based on [Pet Valu's] annual purchasing volume shall be allocated as more particularly set forth in the Pet Valu Franchise Business System…[25]
>
> 27(a) 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.[26]

17. On the basis of these documents, it was not surprising that the Motion Judge determined that Pet Valu represented to its franchisees that it had significant purchasing power that would give rise to *meaningful* volume rebates.[27] In any event, as discussed below, there can be no credible suggestion that the Motion Judge's contractual interpretation was based on palpable and overriding error.

(3) PET VALU'S FAILURE TO TELL THE TRUTH ABOUT VOLUME REBATES UNTIL 2012

18. More than three years into this litigation, after numerous motions and an appeal to this Court, Pet Valu began to tell a very different story about its purchasing power and resulting volume discounts. On August 3, 2012, Pet Valu delivered its notice of motion for summary judgment and listed as the second ground for its motion that "Pet Valu did not receive significant

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22 Franchise Agreement dated March 11, 2005, Appeal Book and Compendium, Tab 21, p. 257 (emphasis added).
23 *Ibid,* p. 258 (emphasis added).
24 *Ibid,* p. 263 (emphasis added).
25 *Ibid,* p. 297
26 *Ibid,* p. 300 (emphasis added).
27 Disclosure summary judgment reasons, para. 44.

volume-based benefits from its suppliers."[28] This fact had never been previously disclosed to franchisees. In his supporting affidavit,[29] Pet Valu's CEO swore to the following:

> 3. As I understand the common issues in this action, they simply boil down to the question of volume-related pricing, whether characterized as allowances, rebates or discounts allegedly received by Pet Valu from its suppliers. The Plaintiff alleges that franchisees were entitled to these volume-based benefits but did not receive them. Pet Valu disagrees for the following reasons:
>
> (a) Pet Valu had no contractual obligation to pass on volume-based benefits to franchisees; any franchisee entitlement to them was at the discretion of Pet Valu. This policy has been in place since before the Class Period began and well before the Plaintiff became a Pet Valu franchisee.
>
> (b) In any event, Pet Valu did not receive significant volume-based benefits from its suppliers.[30]
>
> 44. ....I believe that Pet Valu had full discretion regarding whether or not to share volume allowances with Pet Valu franchisees throughout the class period. In any event, these volume allowances are insignificant on an absolute and relative basis.[31]

19. Pet Valu's CEO pointed to only one example of a rebate from one supplier that qualified as a volume rebate, totaling $111,598.19 for all class members over the entire class period.[32] By contrast, Pet Valu's merchandise sales to Canadian franchisees in 2007 and 2008 alone was over $140 million,[33] meaning the volume rebates were a microscopic 0.07% of Pet Valu's sales to franchisees. The reality of Pet Valu's submission was that there simply were no volume rebates, even if the plaintiffs had a contractual right to them. While Pet Valu attacks the Motion Judge's finding that Pet Valu's volume rebates were "meager", it ignores the fact that this finding was based on the evidence that it had itself presented.

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28 Notice of Motion of Pet Valu, August 3, 2012, ground (f)(ii) (Appeal Book and Compendium, Tab 11).
29 Affidavit of Thomas McNeely sworn August 3, 2012, Appeal Book and Compendium, Tab 24.
30 *Ibid,* p. 393-394.
31 *Ibid,* p. 407.
32 *Ibid*, p. 413.
33 See references to merchandise sales of $71,642,000 for the 2008 fiscal year and $69,120,000 for the 2007 fiscal year (Pet Valu Inc. Annual Report 2008, Affidavit of Thomas McNeely sworn August 3, 2012, Exhibit "I", Respondent's Compendium, Tab 1, p. 1).

20. Moreover, Pet Valu reinforced the point with a further affidavit from its CEO in June 2014,[34] in which he sought to explain why the volume rebates were illusory:

> 3. Pet Valu has little to no purchasing power with its major suppliers. Pet Valu does not dictate the pricing offered by suppliers. This is the case now and it has been the case historically.[35]
>
> 5. ... Pet Valu, with less than one percent of the Canada/U.S. pet food and supply market, has little bargaining power when dealing with, this concentrated group of large suppliers.[36]
>
> 8. In summary, given: (a) Pet Valu's insignificant market share, (b) the concentration of supply among a handful of large, multinational manufacturers, and (c) its relatively minor market share compared to its dominant grocery store and pet superstore competitors, Pet Valu has little to no ability to influence the price at which it is supplied products.[37]

(4) PET VALU WITHHELD INFORMATION ABOUT VOLUME REBATES

21. The Motion Judge found that Pet Valu refused to provide information about volume rebates until it delivered its materials on summary judgment, even though plaintiff's counsel had requested this information before the action was commenced and after certification. The Motion Judge's findings were consistent with findings that Justice Strathy made on two occasions.

22. In his certification reasons, Justice Strathy referred to the plaintiff's efforts to obtain information about volume rebates before the litigation began. He explained that plaintiff's counsel:

> "wrote to Pet Valu on November 4, 2009, raising many of the complaints that are set out in this action, as well as concerns about the profitability of the franchise. The letter requested answers to some of the questions raised in this action. The CEO of Pet Valu replied that efforts were being made to collect the necessary information to respond to the letter. It is apparent that no real efforts were made, and certainly no response was forthcoming. This litigation ensued."[38]

23. In the summary judgment motion, the Motion Judge paraphrased Justice Strathy's earlier determination, stating that "the plaintiff tried to obtain this information from Pet Valu in 2009

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34 Affidavit of Thomas McNeely sworn June 16, 2014, Appeal Book and Compendium, Tab 26.
35 *Ibid,* p. 495
36 *Ibid.*
37 *Ibid,* p. 496
38 Certification reasons, para. 116 (emphasis added).

before commencing this lawsuit but was rebuffed."[39] Pet Valu attacks this finding, claiming that the Motion Judge "ignored Pet Valu's response." However, as Justice Strathy noted in his ruling, even though Pet Valu's CEO wrote that "efforts were being made to collect the necessary information to respond to the letter," in fact "no real efforts were made." When Pet Valu's CEO was cross-examined about the letter, he admitted that Pet Valu did not "do any investigation [...] of the issues that were raised in [counsel's] letter", and that, in his view, the letter "did not raise legitimate concerns."[40]

24. Even after this case was certified as a class proceeding, Pet Valu still refused to provide information about volume rebates to franchisees. In 2011, Pet Valu brought a motion to determine whether franchisees could sell their businesses and give enforceable releases to Pet Valu.[41] Pet Valu's motion was dismissed in part because Pet Valu refused to give information to franchisees about volume rebates. As Justice Strathy noted:

> I cannot overlook the fact that Pet Valu's agreement to buy back the franchise requires the franchisee to release its right to share in the proceeds of this class action, should it be successful. Pet Valu has, however, refused to disclose information that would enable class members to make an informed decision about what they would be giving up by releasing their rights. It will not disclose the quantum of Volume Rebates it has received from suppliers or the proportionate share to which the franchisee might be entitled, should this action succeed. Counsel for Pet Valu took the position that the information is, or should be, within the knowledge of the franchisee and class counsel. His client says that it does not have ready access to this information. Frankly, this strikes me as incredible."[42]

25. As it turned out, Pet Valu had little difficulty coming up with this information in 2012 for the summary judgment motion.

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39 Disclosure summary judgment reasons, para. 49.

40 Cross-examination of Thomas McNeely dated May 10, 2010, Exhibit L to the Affidavit of Robert Rodger sworn February 13, 2012, Respondent's Compendium, Tab 2, pp. 2 - 3, Q. 225 and 248.

41 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871.

42 *Ibid.*, para. 18.

26. Pet Valu argues that the Motion Judge took Justice Strathy's decision out of context because it took place at "a nascent stage of the class action" when no certification order had been issued and there was no agreement to use a representative sample of products.[43] The implication is that there was significant doubt at the time over what was meant or included by volume rebates, for which Pet Valu should not be faulted.

27. These implications are incorrect. The issue regarding volume rebates in the 2011 motion to determine the validity of releases arose some two years after the plaintiff first requested information about volume rebates in 2009. In addition, Pet Valu has relied on the same definition of volume rebates since certification. Justice Strathy's certification decision analyzed Pet Valu's method for calculating prices charged to franchisees. He explained that "Pet Valu's evidence is that it takes Volume Rebates into account in determining its 'realized cost' of any product."[44] Justice Strathy referred to a pricing example relied on by Pet Valu involving a product having a volume discount of $5.69.[45] After certification, Pet Valu's summary judgment material delivered in August 2012 contained the same product with its $5.69 volume discount,[46] together with pricing information for many other products.

28. Pet Valu was able to obtain information about volume rebates for the purposes of the certification motion, and was able to obtain the same information in the same format for the purposes of its summary judgment motion three years later. The Motion Judge's finding that "Pet

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43 Pet Valu factum, para. 74.

44 Certification reasons, para. 20 (emphasis added).

45 *Ibid.*, para. 21.

46 See reference to product 2009-42 having a $5.69 volume discount amount in Purchasing Records of the Plaintiff's business for 2004 to 2011, Affidavit of Thomas McNeeley sworn August 3, 2012, Exhibit "J", Respondent's Compendium, Respondent's Compendium, Tab 3, p. 4.

Valu decided for its own purposes to keep the volume discount information to itself and not tell its franchisees"[47] was supported by the record.

PART III - ISSUES

29. This factum considers the following issues:

(a) What is the appropriate standard of review?

(b) Analysis of the duty of good faith in section 3(1) of the *Arthur Wishart Act*:

i. the Motion Judge did not impose an ongoing duty of disclosure;

ii. breach of good faith may involve a failure to disclose;

iii. misrepresentations may be relevant to the analysis of good faith;

iv. breach of good faith does not require proof of breach of contract;

(c) The judge's findings of fact and of mixed fact and law are supported by the record and the purposes of the *Arthur Wishart Act* and should not be disturbed.

PART IV - ANALYSIS

(1) THE APPLICABLE STANDARD OF REVIEW FOR MOST OF PET VALU'S ARGUMENTS IS PALPABLE AND OVERRIDING ERROR

30. Pet Valu acknowledges the *Sattva*[48] standard of review jurisprudence in its factum. Although the facts of *Sattva* involved the standard of review applicable to questions of contractual interpretation, the Supreme Court's observations are equally applicable to the review of the Motion Judge's finding that there was a breach of good faith in this case. The Supreme Court in *Sattva* held that deference was owed to first-instance decision makers on issues of

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47 Disclosure summary judgment reasons, para. 51.

48 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

contractual interpretation, except for extricable errors of law.[49] Contractual interpretation involves mixed issues of fact and law, in which principles of contractual interpretation are applied to the words of the written contract and considered in light of the factual matrix.[50]

31. The Court in *Sattva* referred to judges considering the "surrounding circumstances" to interpret the contract and concluded that these issues also involved mixed questions of fact and law warranting deference unless there is an extricable error of law.[51] The Court held that "surrounding circumstances" include "objective evidence of the background facts."[52]

32. The "surrounding circumstances" considered in *Sattva* are analogous to the background facts considered by the Motion Judge in this case in his analysis of good faith. They are questions of mixed fact and law warranting deference. The Motion Judge considered objective evidence of the background facts, including finding that Pet Valu's substantial purchasing power translated into a range of pricing and non-pricing benefits for franchisees.[53] He considered the franchise disclosure document, the statutory purpose of which is to describe all "material facts" relevant to the background of the franchise,[54] and concluded that it "presented a very different picture about volume discounts"[55] that was untrue. While the disclosure document told franchisees that volume rebates would be "meaningful,"[56] Pet Valu "was unable to obtain a meaningful or significant measure of volume discounts from its suppliers, contrary to what was

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49 *Ibid.*, paras. 50-55. See also *McClatchie v. Rideau Lakes (Township)*, 2015 ONCA 233 at para. 42 ("As explained in Sattva, this is a question of mixed fact and law, and the standard of review of the trial judge's findings is thus palpable and overriding error, unless the appellant can point to an extricable error of law: Sattva, at paras. 50-55").

50 *Prystupa v. Desjardins Financial Security Life Assurance*, 2015 ONCA 298 at para. 15, citing *Sattva*.

51 *Sattva, supra* at para. 66.

52 *Ibid.*, para. 58.

53 Disclosure summary judgment reasons, para. 13.

54 *Arthur Wishart Act*, s. 5(4).

55 Disclosure summary judgment reasons, para. 24.

56 Disclosure summary judgment reasons, para. 25.

represented in the disclosure document."[57] These are mixed questions of fact and law entitled to deference.

33. Pet Valu's factum equally acknowledges the standard of review principles from *Housen v. Nikolaisen*[58] and *Waxman v. Waxman.*[59] These cases recognize a judge is permitted to make findings of fact based on logical inference,[60] and that inferences of fact are reviewed on a palpable and overriding standard of review.[61]

34. A strict standard of review is also justified by the joint agreement to use summary judgment to decide the common issues. In *Hryniak v. Mauldin*,[62] the Supreme Court held that summary judgment motion appeals are also entitled to deference, concluding that "where there is no extricable error in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error."[63]

35. As explained above, the Motion Judge, an experienced class actions judge, case managed these summary judgment motions over many months. He lived through the case in a way that an appeal court does not. In *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*,[64] this Court held that "the principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing,"[65] reasoning that "even on a written record, the trial judge 'lives through' the trial while a court of appeal reviews the record only through the lens of appellate review. Deference also preserves the integrity of the trial

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57 Disclosure summary judgment reasons, para. 28.
58 2002 SCC 33.
59 2004 CanLII 39040 (ONCA) ("*Waxman*").
60 *Waxman, ibid.* at para. 306.
61 *Housen, supra* at para. 22.
62 2014 SCC 7 ("*Hryniak*")
63 *Ibid.*, para. 81 (citing *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36).
64 2007 ONCA 425.
65 *Ibid.*, para. 46.

process, maintains the confidence of litigants in that process, reduces the number and length of appeals and therefore, the cost of litigation, and appropriately presumes that trial judges are just as competent as appellate judges to resolve disputes justly."[66] These principles apply equally in this case.

(2) ANALYSIS OF THE DUTY OF GOOD FAITH AND FAIR DEALING

36. Common issue #6 asked whether Pet Valu had a duty at common law or under s. 3 of the *Arthur Wishart Act* to disclose information about volume rebates to class members: whether Pet Valu receives volume rebates in respect of its purchases, its policy for allocating volume rebates to franchisees, the amount of volume rebates it received during the class period, the amount it retained for itself and the amount shared with franchisees, and the criteria used to determine the allocation of volume rebates.[67]

37. Subsection 3(1) of the *Arthur Wishart Act* states that "every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement." A right of action is granted by s. 3(2), which states that "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."[68]

38. This Court has held that a general interpretive principle applicable to the *Arthur Wishart Act* is that "the purpose of the Act is to protect franchisees. The provisions of the Act are to be interpreted in that light."[69]

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66 *Ibid.*, para. 46.
67 Disclosure summary judgment reasons, Appendix.
68 Emphasis added.
69 *405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478 at para. 10.

39. This Court has also said that the *Arthur Wishart Act* is "*sui generis* remedial legislation. It deserves a broad and generous interpretation. The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance."[70]

40. The leading decision on the interpretation and application of s. 3(1) and 3(2) is this Court's decision in *Salah v. Timothy's Coffees of the World Inc.*[71] In *Salah*, the plaintiff franchisee was given rights to renew its franchise agreement if the franchisor elected to enter into a new head lease. The franchisor entered into a new lease but offered it to another franchisee, and did not renew the plaintiff's franchise agreement.

41. While Pet Valu disputes the judge's reliance on Pet Valu's failure to disclose in his analysis of good faith, the court in *Salah* equally relied on a failure to disclose to conclude there had been a breach of bad faith. The conduct relied on for the breach of bad faith in *Salah* was that the franchisor "kept Mr. Salah in the dark about its intentions."[72] The trial judge in *Salah* "made further factual findings that Timothy's actively sought to keep the franchisee from finding out what was going on with the lease"[73] and "deliberately withheld critical information and did not return calls."[74] This Court concluded that "[t]hese findings of fact more than support the conclusion that there was a breach of the duty of good faith that franchisors owe franchisees under s. 3(1) of the *Wishart Act*."[75]

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70 *Salah, infra* at para. 26.
71 2010 ONCA 673 ("*Salah*").
72 *Ibid.*, para. 22.
73 *Ibid.*
74 *Ibid.*
75 *Ibid.*

42. Other decisions have also held that hiding information from franchisees can engage the duty of good faith and fair dealing. As the Motion Judge observed, in one decision,[76] the court found that the franchisor kept critical lease information from franchisees, "actively leading them to believe the lease had been renewed" when it had not.[77] The court rejected the franchisor's arguments that no damages should be awarded, holding: "the [focus of the] *Arthur Wishart Act* [...] is providing franchisees with disclosure that will allow them to make informed financial and business decisions."[78] In another case,[79] the court found that the franchisor "failed to disclose the true state of affairs of the Cuts franchise system and, in particular, the fact that it was in a state of rapid decline."[80]

43. The Court in *Salah* held that while courts have given limited recognition to the duty of good faith between contracting parties in general, the legislature's enactment of the *Arthur Wishart* Act, which "[...] addresses the particular relationship between franchisors and franchisees, [...] clearly indicate[s] that such relationships give rise to special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties."

44. Therefore, while Pet Valu argues the Motion Judge erred by finding a breach of bad faith when the Pet Valu franchise agreement does not require Pet Valu to make any such disclosure,[81] there is settled law to the contrary, requiring franchisors to tell franchisees the truth even though there is no equivalent contractual obligation stating an obligation to disclose.

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76 *1159607 Ontario Inc. v. Country Style Food Services Inc.*, [2012] O.J. No. 1241 (SCJ).
77 *Ibid.*, para. 129.
78 *Ibid.*, para. 130.
79 *Burnett Management Inc. v. Cuts Fitness for Men*, [2012] O.J. No. 2527 (SCJ).
80 *Ibid.*, para. 58.
81 Pet Valu factum, para. 2.

45. In any event, there are positive contractual obligations in the franchise agreement in this case, including recitals that expressly state: "honesty is the basis of the relationship between the parties."[82] As the Motion Judge noted in his contract summary judgment reasons, the recitals to the agreement "set forth the basis of the relationship between the parties," record their "fundamental understandings" and "are given considerable force" in the agreement.[83]

(3) THE SUPREME COURT OF CANADA'S DECISION IN *BHASIN*

46. The Motion Judge's decision is equally consistent with the Supreme Court of Canada's judgment in *Bhasin v. Hrynew*.[84] The Court in *Bhasin* held that "there is a general duty of honesty in contractual performance," which "means simply that the parties cannot lie or knowingly mislead each other about matters directly linked to the performance of the contract."[85] That is precisely what the Motion Judge found had occurred in this case.

47. Pet Valu submits the judge's decision in this case is inconsistent with the statement in *Bhasin* that the duty of honesty "should not be confused with a duty of disclosure or of fiduciary loyalty."[86] However, as the Motion Judge observed, *Bhasin* did not involve the *Arthur Wishart Act*.[87] As described above, numerous cases decided under the *Arthur Wishart Act* have described the relevance of failures to disclose with breaches of bad faith, including this Court's decision in *Salah*, which held the breach was justified because the franchisor "deliberately kept Mr. Salah in the dark about its intentions."[88] The Court in *Salah* also held that "special considerations, both in

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82 Franchise agreement dated March 11, 2005, Appeal Book and Compendium, Tab 21, p. 258.
83 Contract summary judgment reasons, para. 10.
84 2014 SCC 71 ("*Bhasin*").
85 *Bhasin, supra,* para. 73.
86 *Bhasin, supra* at para. 86.
87 Disclosure summary judgment reasons, para. 58.
88 Disclosure summary judgment reasons, para. 22.

terms of the duties owed and the remedies that flow from a breach of those duties"[89] are required in the analysis of good faith and fair dealing under the *Arthur Wishart Act*.

48. Morevover, there is not a bright line between a duty to be honest and a duty to disclose. The Supreme Court in *Bhasin* simply stated that the duty of good faith did not include a general duty to disclose in all circumstances. It did not suggest that the suppression or withholding of material information could not found a claim for breach of the duty of good faith. The Supreme Court in *Bhasin* explained the difference between different disclosure scenarios by referring to a U.S. decision involving no duty to disclose: "a tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do."[90] The Supreme Court held the decision "makes it clear there is no unilateral duty to disclose information [...]. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to the performance of the contract."[91]

49. The facts of this case do not fall within the "month-to-month" disclosure scenario. The Motion Judge found that Pet Valu represented to franchisees in the disclosure document that volume discounts would be "meaningful" and would in some way be of benefit to the franchisees.[92] In addition, the Motion Judge concluded in the contract summary judgment motion, now a matter of decided law, that Pet Valu is required under the contract to share

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89 *Salah, supra* at para. 28.
90 *Bhasin, supra* at para. 87.
91 *Bhasin, supra*, para. 87.
92 Disclosure summary judgment reasons, para. 44.

volume-based allowances with its franchisees "in a reasonable manner."[93] It emerged in the evidence in this case for the first time that Pet Valu obtains only a meager amount of volume rebates from its suppliers.

50. The problem becomes obvious. Having represented in the disclosure document that volume rebates would be material, combined with an obligation to share volume rebates reasonably, the franchisor's actions in allegedly complying with its obligations by allocating meager amounts of volume rebates with franchisees without telling them the truth about volume rebates is an actionable breach of the duty of good faith. The Motion Judge held that Pet Valu's actions "could result in a significant damages award."[94] He was right and his decision is entitled to deference.

(4) ARGUMENTS BY PET VALU ABOUT ONGOING DUTY OF DISCLOSURE

51. Pet Valu asserts that the Motion Judge created a franchise disclosure regime that will require an "ongoing duty of disclosure," which will result in uncertainty for franchisors. It goes so far as to presage a "continuous obligation to disclose anything and everything it could imagine might be material to each and every franchisee, in real time."

52. The Motion Judge made no finding of "ongoing disclosure." Rather, he found on the basis of the evidence specific to this case that Pet Valu hid or refused to disclose "information about the virtual non-existence of volume discounts – information that was "material to the matters ultimately contracted for"[95] and that this meant that Pet Valu did not deal fairly or in good faith with its franchisees. Whether another judge in another case makes a similar finding

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93 Contract summary judgment reasons, para. 16.
94 Disclosure summary judgment reasons, para. 51.
95 *Ibid.*, para. 56.

will depend entirely on whether the evidence supports a conclusion that material information was suppressed.

53. The Motion Judge equally distinguished the *Spina* decision, which originated the ongoing duty of disclosure concern, holding that the franchisees sought production of "routine or non-material information."[96] By contrast, the information in this case was "fundamental."[97]

(5) SECTION 5 "COMPLETE CODE" ARGUMENTS BY PET VALU ARE WRONG

54. Pet Valu argues that "section 5 of the *Wishart Act* is a complete code" and alleges the Motion Judge "erred by using the duty of good faith to impose greater disclosure obligations concerning volume rebates than those prescribed by the legislation."[98]

55. Section 5 of the *Arthur Wishart Act* prescribes disclosure document requirements. Paragraph 6(8) of the regulation to the Act states that every disclosure document must include "a description of the franchisor's policy, if any, regarding volume rebates [...]." Pet Valu argues "a leading text" confirms that the regulation "does not require disclosure of the quantity of volume rebates" and the judge's decision in this case violates this principle.

56. The decision in this case is fact-specific. The Act requires disclosure of "material facts." "Material facts" are specific to different franchise systems. If information about volume rebates was material to franchisees (as the Motion Judge found in this case), then disclosing the quantity of volume rebates was information requiring disclosure by Pet Valu. It was not in good faith for

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96 Disclosure summary judgment reasons, para. 54.
97 *Ibid.*
98 Pet Valu factum, pp. 17-18.

Pet Valu to remain silent when the true amount of volume rebates was meager. There is no basis to interfere with the Motion Judge's decision.[99]

57. In addition, Pet Valu's arguments about section 5 being a "complete code" about disclosure, thereby making disclosure irrelevant to the analysis of good faith under section 3 of the *Arthur Wishart Act*, are inconsistent with the basic principles of interpretation applicable to the Act described above. These principles require an interpretation that is "broad and generous", as well as one that is consistent with protecting franchisees. There is no valid legislative reason to restrict a court's ability to consider disclosure problems under an analysis of good faith under s. 3 based on the statute having "watertight compartments" between different sections of the Act for the purposes of good faith analysis.

58. The same conclusion applies to Pet Valu's argument that "the motion judge conflated misrepresentation with the duty of good faith."[100] Putting aside the difficulty of forensically separating facts as it proposes, Pet Valu cites no authority or rationale for the surprising proposition that misrepresentations made by a franchisor cannot and should not be considered in determining whether there has been a breach of good faith. What purpose to assist franchisees would be accomplished by this?

59. Similarly, Pet Valu submits that material facts "are only of concern in respect of statutory misrepresentation claims under sections 5 and 7 of the *Wishart Act*, not duty of good faith claims under section 3." The effect of the argument is that misleading information in a disclosure

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99 Pet Valu also submits the Motion Judge's decision to order disclosure of the amount of volume rebates is contrary to the fact that the information is commercially sensitive information that cannot be shared with franchisees. Pet Valu refers to the existence of a confidentiality order in this case. This is incorrect. There is nothing in the record to suggest that providing information about volume rebates on an aggregate basis to franchisees would breach confidentiality. Indeed, when Pet Valu was a publicly traded company, it reported information about vendor volume allowances in its publicly available annual reports.

100 Pet Valu factum, para. 54.

document would be legally irrelevant to a good faith and fair dealing claim. There is no authority for the proposition, which is incorrect and inconsistent with general principles of statutory interpretation applicable to the Act, including the principle from *Personal Service Coffee Corp. v. Baer*[101] that "any suggestion that these disclosure requirements or the penalties imposed for non-disclosure should be narrowly construed, must be met with skepticism."[102]

(6) NO ERROR IN MOTION JUDGE'S ANSWER TO THE COMMON ISSUE

60. Pet Valu submits the Motion Judge erred by "amending" the common issue when no such motion was brought.[103] The first question under common issue #6 asks whether Pet Valu "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." The Motion Judge concluded the question should be interpreted to ask if "significant volume discounts" were received by Pet Valu because "the more reasonable interpretation" of the common issue in the context of the litigation was whether or not Pet Valu received a material or significant amount of volume discounts, not just whether they received *any* amount, however meager. The Motion Judge answered "yes" to this question.[104]

61. There is nothing in error in the Motion Judge's analysis. He interpreted and answered the common issues; he did not amend them. Even Pet Valu did not argue that it should be entitled to succeed on common issue #6 simply by proving that it had provided insignificant amounts of volume rebates to franchisees. As the Motion Judge noted, Pet Valu submitted that the plaintiff's motion to amend and to propose a new common issue pertaining to "significant volume

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101 [2005] O.J. No. 3043 (CA).
102 *Ibid.*, para. 28.
103 Pet Valu factum, para. 84.
104 Disclosure summary judgment reasons, para. 60.

discounts" was duplicative of common issue #6, acknowledging the quantification exercise inherent in common issue #6.[105]

62. In any event, this Court has held that common issues may be amended, even at the appellate level, so long as there is no procedural unfairness.[106] Pet Valu does not argue any procedural unfairness in the Motion Judge's decision. There was none.

(7) BALANCE OF PET VALU'S SUBMISSIONS ARE QUESTIONS OF FACT OR PURE QUESTIONS OF MIXED FACT AND LAW WITH NO EXTRICABLE LEGAL QUESTION

63. Pet Valu's remaining submissions are questions of fact or pure questions of mixed fact and law with no extricable legal question that should not be reversed because they are entitled to deference. For example, Pet Valu disputes the Motion Judge's interpretation of the disclosure document. This is an example of a question of mixed fact and law that considers the "surrounding circumstances" of the parties, with no extricable legal question.

64. The Motion Judge's decision is entitled to deference. He considered the language of the disclosure document, together with several provisions of the preamble and body of the franchise agreement, which "reinforce[d]" the franchisees' reasonable expectations. The Motion Judge held the "material representation about Pet Valu's significant purchasing power and ability to generate meaningful volume discounts is rooted in the disclosure document, a theme that was continued in the franchise agreement, where it is acknowledged to be a fundamental component of the Pet Valu franchise system.[107]

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105 Disclosure summary judgment reasons, para. 60.
106 *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 24.
107 Disclosure summary judgment reasons, para. 55.

65. The Motion Judge found that "these pricing benefits, including information about the level of volume discounts were, to say the least, important to the franchisees."[108] By "hiding or refusing to disclose information about the virtual non-existence of volume discounts – information that was 'material to the matters ultimately contracted for' in the franchise agreement and was clearly related to the performance of this agreement – Pet Valu did not deal fairly or in good faith with its franchisees."[109]

66. A frequent argument in Pet Valu's factum refers to other alleged benefits received by franchisees. The Motion Judge relied on these facts to find no breach of contract in his summary judgment decision. While Pet Valu is critical of the different result between contract and good faith, there is nothing inconsistent in principle with finding no breach of contract while also finding a breach of good faith. Paragraph 71 of this Court's decision in *Shelanu Inc. v. Print Three Franchising Corp.*[110] is decisive: "Moreover, the fact that contractual terms are ultimately complied with, does not mean that there has been no breach of the duty of good faith."[111]

67. Pet Valu's submissions about other alleged benefits that franchisees received are equally inconsistent with the background facts. Justice Strathy found in his certification reasons that "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. [Canadian Franchise Council] demonstrate a concern that Pet Valu had not shared its

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108 *Ibid.*, para. 56.
109 *Ibid.*
110 (2003), 64 O.R. (3d) 533 (C.A.); 2003 CanLII 52151 (ONCA) ("*Shelanu*")
111 *Ibid.*, para. 71.

profits with franchisees, that the share of the 'profit pie' had not reached the store level, and that store margins were unacceptably low."[112]

68. The Motion Judge was obviously aware that franchisees received other alleged benefits. He stated in his good faith decision that "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."[113] Pet Valu's submissions simply disagree with the weight or inferences the Motion Judge took from the evidence, which is not reviewable error.[114]

69. Pet Valu's after-the-fact arguments about the other benefits the franchisees are alleged to have received ignores the more basic mischief that occurred in this case. Franchisees lost an important right to choose. The Motion Judge found that franchisees were misled about the nature and extent of volume rebates that Pet Valu would share with franchisees, which was "rooted in the disclosure document,"[115] a "theme" that continued through to the franchise agreement.[116] The fact that volume discounts were virtually non-existent was "highly material, indeed fundamental"[117] that the motion judge held would "reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise"[118] or "the decision to renew or terminate the franchise."[119]

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112 Certification reasons, para. 72. See sample of CFC minutes in the Respondent's Compendium, Tab 4, pp. 5 – 25.
113 Disclosure summary judgment reasons, para. 13.
114 *Housen v. Nikolaisen*, *supra*, para. 62.
115 Disclosure summary judgment reasons, para. 55.
116 *Ibid.*
117 *Ibid.*, para. 54.
118 *Ibid.*, para. 48.
119 *Ibid.*

70. In *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.*,[120] this Court 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."[121] This Court in *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*[122] held that "the franchisor has all the information and dictates the terms of the agreement"[123] and that "disclosure is intended to provide a prospective and often inexperienced franchisee with sufficient and readily accessible information to make informed decisions."[124] In *6792341 Canada Inc. v. Dollar It Ltd.*,[125] this Court held that "when key information is missing, a properly informed decision is not possible."[126] The missing information was "fundamental," akin to other information that this Court has held "would reasonably be expected to have a significant effect on a prospective franchisee's decision to purchase the franchise."[127]

71. Pet Valu's submissions about other alleged benefits that franchisees received ignores the fact that they lost a basic right to choose based on information that mattered to them. The Motion Judge found that "the case law is clear that keeping or hiding material information from franchisees could well be a violation of the s. 3 duty of good faith and fair dealing and could result in a significant damages award."[128] His finding was correct and should not be interfered with.

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120 (2005), 256 D.L.R. (4th) 451.
121 *Ibid.*, para. 16.
122 2011 ONCA 467.
123 *Ibid.*, para. 24.
124 *Ibid.*
125 2009 ONCA 385.
126 *Ibid.*, para. 17.
127 *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236 at para. 47.
128 Disclosure summary judgment reasons, para. 51.

(8) THE PLAINTIFF'S CROSS-*APPEAL*

72. The Motion Judge refused the plaintiff's motion to amend its pleadings. He concluded the plaintiff's pleading relating to volume rebates was appropriate, but refused the amendments on the basis of alleged prejudice. He concluded: "the plaintiff's motion to amend the pleadings has to be dismissed on the ground of prejudice or injustice to the defendant. 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. [...] 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."[129]

73. The Motion Judge's dismissal of the pleadings motion was in error. He ruled that if the plaintiff's motion to amend the pleadings had not been brought, Pet Valu would have obtained complete summary judgment on the existing common issues and a dismissal of the class action. This is obviously incorrect, as the Motion Judge ruled in the plaintiff's favour on existing common issue #6.

74. The Motion Judge also erred by suggesting the court should not have proposed changes to the common issues. He concluded that Pet Valu'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."[130]

75. This Court has held that class proceedings "evolve as they work their way through the certification and case management process and that the case management judge plays an

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129 Disclosure summary judgment reasons, para. 9 & 31.
130 Disclosure summary judgment reasons, para. 30.

important role in guiding the evolution of the proceeding."[131] A plaintiff may even reformulate the class definition and common issues on appeal, provided there is no procedural unfairness to a defendant.[132] There is no procedural unfairness to Pet Valu in the proposed amendments to the claim. In any event, "timing" of a motion to amend pleadings is not an example of prejudice warranting a refusal to amend.

76. The class does not cross-appeal the judge's refusal to allow pleading of claims under s. 6 of the *Arthur Wishart Act*.

PART V - ORDER REQUESTED

77. The plaintiff requests an order that the appeal be dismissed and that the cross-appeal be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

May 22, 2015

Louis Sokolov

Jean-Marc Leclerc

131 *Brown v. Canada (Attorney General)*, 2013 ONCA 18 at para. 45.
132 *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 30.

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*

CERTIFICATE

Counsel for the respondent certifies that:

(i) An order under subrule 61.09(2) (original record and exhibits) is not required.

(ii) Ninety minutes are estimated as required for the respondent's oral argument (appellant by cross-appeal), not including reply.

Date: May 22, 2015

Louis Sokolov (LSUC No.: 334483L)

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673
2. *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563
3. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941
4. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871
5. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
6. *McClatchie v. Rideau Lakes (Township)*, 2015 ONCA 233
7. *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, 2007 ONCA 425
8. *Prystupa v. Desjardins Financial Security Life Assurance*, 2015 ONCA 298
9. *Housen v. Nikolaisen*, 2002 SCC 33
10. *Hryniak v. Mauldin*, 2014 SCC 7
11. *Waxman v. Waxman*, 2004 CanLII 39040
12. *405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478
13. *1159607 Ontario Inc. v. Country Style Food Services Inc.*, [2012] O.J. No. 1241 (SCJ)
14. *Burnett Management Inc. v. Cuts Fitness for Men*, [2012] O.J. No. 2527 (SCJ)
15. *Bhasin v. Hrynew*, 2014 SCC 71
16. *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248
17. *Shelanu Inc. v. Print Three Franchising Corp.*, (2003), 64 O.R. (3d) 533 (C.A.); 2003 CanLII 52151 (ONCA)
18. *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.*, (2005), 256 D.L.R. (4^{th}) 451
19. *6792341 Canada Inc. v. Dollar It Ltd.*, 2009 ONCA 385
20. *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2011 ONCA 467
21. *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236
22. *Brown v. Canada (Attorney General)*, 2013 ONCA 18

SCHEDULE "B" – RELEVANT STATUTES

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 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).

Methods of delivery

(2)A disclosure document may be delivered personally, by registered mail or by any other prescribed method. 2000, c. 3, s. 5 (2).

Same

(3)A disclosure document must be one document, delivered as required under subsections (1) and (2) as one document at one time. 2000, c. 3, s. 5 (3).

Contents of disclosure document

(4)The disclosure document shall contain,

(a) all material facts, including material facts as prescribed;

(b) financial statements as prescribed;

(c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;

(d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and

(e) other information and copies of documents as prescribed. 2000, c. 3, s. 5 (4).

Rescission for late disclosure

6.(1)A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5 or if the contents of the disclosure document did not meet the requirements of section 5. 2000, c. 3, s. 6 (1).

Rescission for no disclosure

(2)A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document. 2000, c. 3, s. 6 (2).

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).

Deemed reliance on misrepresentation

(2)If a disclosure document or statement of material change contains a misrepresentation, a franchisee who acquired a franchise to which the disclosure document or statement of material change relates shall be deemed to have relied on the misrepresentation. 2000, c. 3, s. 7 (2).

Deemed reliance on disclosure document

(3)If a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired a franchise to which the material change relates shall be deemed to have relied on the information set out in the disclosure document. 2000, c. 3, s. 7 (3).

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

2. Every disclosure document shall include the following information: [...]

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.

1250264 Ontario Inc.
Respondent/Appellant by Cross-Appeal

-and-

Pet Valu Canada Inc.
Appellant/Respondent by Cross-Appeal

Court File No. C59956

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE RESPONDENT/APPELLANT BY CROSS-APPEAL

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