Court File No. C59956

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff
(Respondent)

- and -

PET VALU CANADA INC.

Defendant
(Appellant)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE APPELLANT, PET VALU CANADA INC.

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE BELOBABA DATED MARCH 6, 2015

March 18, 2015

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Geoffrey B. Shaw LSUC #: 26367J
Tel: 416.869.5982
Fax: 416.350.6916
gshaw@casselsbrock.com

Derek Ronde LSUC #: 46978W
Tel: 416.869.5428
Fax: 416.640.3063
dronde@casselsbrock.com

Eric Mayzel LSUC #: 58663P
Tel: 416.860.6448
Fax: 416.642.7144
emayzel@casselsbrock.com

Counsel for the Appellant, Pet Valu Canada Inc.

TO: **SOTOS LLP**
Barristers and Solicitors
180 Dundas Street West
Suite 1250
Toronto, ON
M5G 1Z8

Louis Sokolov
Jean-Marc Leclerc

Tel: 416.977.0007
Fax: 416.977.0717

Counsel for the Respondent, 1250264 Ontario Inc.

TABLE OF CONTENTS

Page No.

PART I - OVERVIEW

1. This is an appeal by the defendant to reverse the decision of Belobaba J. dated January 7, 2015 on the basis that he wrongly concluded that the duty of good faith under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "***Wishart Act***")[1] includes a duty of ongoing disclosure.

2. Belobaba J. (the "**Motion Judge**") determined that the defendant ("**Pet Valu**") owed a duty to its franchisees to disclose that it did not receive what he characterized as a "*significant*" amount of volume rebates from its suppliers. He went on to conclude that, by failing to make that disclosure, Pet Valu breached its duty of good faith and fair dealing to its franchisees. The Motion Judge reached this conclusion despite the fact that the franchise agreement does not require Pet Valu to make any such disclosure and despite the Supreme Court's express ruling in *Bhasin* that the duty of good faith "... *does not impose a duty of loyalty or of disclosure* ..." and that "... *[t]he duty of honest performance... should not be confused with a duty of disclosure...*"[2]

3. The core issue in this class action was whether Pet Valu had a contractual obligation to share volume rebates with its franchisees and if so, did it do so. The parties agreed to focus on the "**Top 100**" products purchased by the plaintiff from Pet Valu over the class period and the **"Top 10**" suppliers to Pet Valu as being a representative sampling of information. Pet Valu produced pricing spread-sheets detailing the Top 100 products and available supplier contracts for the Top 10 suppliers. The pricing spread-sheets disclosed, among other things, all of the volume discounts applied by Pet Valu to reduce the price of the Top 100 products.

4. The Motion Judge granted Pet Valu summary judgment on this core issue. The overwhelming evidence established that Pet Valu shared all of the volume rebates that it received

---

[1] *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c 3 (*"**Wishart Act***").

[2] *Bhasin v. Hrynew*, 2014 SCC 71 at paras 73 & 86, Pet Valu's Book of Authorities ("**PV BOA**") Tab 1 [*Bhasin*].

from its suppliers with its franchisees – nothing was held back. On top of that, Pet Valu passed on thousands of dollars of other discounts and rebates that also reduced the price of products bought by its franchisees, and provided a myriad of other tangible purchasing power benefits to its franchisees. Ultimately, franchisees benefited from prices that were 6 to 14 percent lower than what they could purchase elsewhere.

5. Further, Pet Valu franchisees were profitable. The representative plaintiff sold his franchise for a significant profit approximately 7 years after buying it and also generated millions of dollars of revenues during his years of operation. By passing on all discounts, Pet Valu has acted in good faith and in a commercially reasonable fashion towards the plaintiff and all franchisees. When franchisees receive lower prices and the ability to earn a profit, they are not being deprived of the essential benefits of their franchise agreement.

6. Regardless, the Motion Judge latched onto to an eleventh-hour shift in the focus of the case by the plaintiff from volume rebates to purchasing power.[3] In the result, he concluded that the amount of volume rebates passed on was meagre, even though Pet Valu passed on all volume rebates to its franchisees. He concluded that a statement in the franchise disclosure document about volume rebates emerging from the purchasing power of Pet Valu somehow merged with the franchise agreement to establish a "*promise*" in the franchise agreement that the amount of volume rebates would be "*significant*". He then inferred an expectation of each franchisee in this regard and concluded that the failure to disclose that the volume rebates were not significant somehow breached the duty of good faith. There is no evidence to support any such inference.

---

[3] Decision of Belobaba J. dated October 31, 2014 ("**First Judgment**") at para 38, Pet Valu's Appeal Book & Compendium ("**PV Compendium**"), Tab 5, p. 50.

7. The franchise agreement contains no obligation to disclose information concerning volume rebates to Pet Valu's franchisees. The duty of good faith must be grounded in the performance and enforcement of the franchise agreement, full stop. The Motion Judge has inferred a misrepresentation in the disclosure document about volume rebates (although no such misrepresentation was pleaded), and transformed it into a duty of good faith claim on the basis that the failure to tell the "*truth*" about the amount of volume rebates was somehow a breach of the duty of good faith. This is an error in law.

8. The bad faith finding has the air of a salve to the class members, who were unsuccessful on the core issue, particularly in light of the Motion Judge's comments that: (i) Pet Valu "*negotiated the best price it could obtain ...*,"[4] (ii) "*Pet Valu franchisees paid lower prices and enjoyed higher returns than smaller competitors*,"[5] and (iii) "*Pet Valu ... has bestowed a range of benefits upon its franchisees...*"[6] Splitting the difference is not the goal of good faith. *Bhasin* warns that good faith "*must be clear not to veer into a form of* ad hoc *judicial moralism or 'palm tree' justice*."[7]

9. There is also a significant policy issue in play as a result of this decision. The Motion Judge has created an ongoing duty of disclosure beyond the rigorous disclosure requirements set out in section 5 of the *Wishart Act* and its regulations.[8] The notion that franchisors are under a duty of continuous disclosure is a "*recipe for strife*."[9] It introduces an unmanageable degree of uncertainty into franchise operations: Not only must a franchisor fulfil all pre-contractual disclosure requirements in its disclosure document, as mandated by section 5, but it will also be under a

---

[4] First Judgment at para 27, PV Compendium, Tab 5, p. 48.

[5] First Judgment at para 28, PV Compendium, Tab 5, p. 48.

[6] Decision of Belobaba J. dated January 7, 2015 ("**Judgment**") at para 9(1), PV Compendium, Tab 4, p. 23.

[7] *Bhasin*, *supra* note 2, at para 70, PV BOA, Tab 1.

[8] *Wishart Act*, s. 5, Schedule "B"; General Regulations to the *Wishart Act*, O Reg 581/00, at s. 6(8), Schedule "B".

[9] *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563, at para 219, PV BOA, Tab 2 [*Spina*].

continuous obligation to disclose anything and everything it could imagine might be material to each and every franchisee, in real time.[10] This is an "*impossible*" task.[11]

10. There is significant complexity to the operation of franchise systems. On a minute-by-minute, day-to-day basis, franchisors have to act in accordance with their obligations under every franchise agreement in their system, operate and administer the franchise system, market their brand, and act in a commercially reasonable fashion. If a franchisor is obliged to make ongoing disclosure at every step of its operation, franchising operations will stagnate.

11. Parties can negotiate and contract ongoing disclosure obligations and enshrine them into their contracts. To superimpose them on franchise parties after the fact effectively rewrites the franchise agreement and amends the disclosure obligations set out in the *Wishart Act*. It results in franchisees becoming Monday-morning quarterbacks, with the benefit of hindsight to second-guess franchisor decision-making and allege bad faith when disclosure is subjectively deemed to be inadequate. This is unworkable in an ongoing commercial context. A franchisor will never know whether it has fulfilled this additional, ongoing obligation until the franchisee alleges, after the fact, that it considered something material. This is further complicated by the reality that "*...a fact that is important to one [franchisee] may be inconsequential to another.*"[12]

12. The Judgment is fraught with additional legal and factual errors and stands in contrast to the earlier decision, which was decided in Pet Valu's favour. As such, Pet Valu submits that the Judgment should be set aside thereby dismissing common issues 6(i), (iii) and (iv).

---

[10] Even though, as Justice Low has stated: "*...materiality is in part in the eye of the beholder,*" and, "*a fact that is important to one [franchisee] may be inconsequential to another in his/her decision making process.*" See: *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2011 ONSC 3939 at para 19, PV BOA, Tab 3 [*Trillium*].

[11] *Spina*, *supra* note 9 at para 219, PV BOA, Tab 2.

[12] *Trillium, supra* note 10, PV BOA, Tab 3.

PART II - SUMMARY OF FACTS

A. THE PARTIES

13. Pet Valu is a wholesaler and retailer of pet food, supplies, and related services. Its stores offer national and premium brand products, as well as lines of private label products. There are almost 300 franchised stores in Canada and almost 300 corporate stores in Canada and the U.S.[13]

14. Peton Distributors ULC is a distribution business that is a wholly-owned subsidiary of Pet Valu.[14] Peton selects, purchases, warehouses, and transports products for all of Pet Valu's franchisees, corporate stores, and other brands.[15]

15. The plaintiff is a former Pet Valu franchisee that operated a store in Aurora, Ontario until 2012. Robert Rodger is the principal and store operator of the plaintiff. He acquired the franchise in 2005 for $210,000 and sold it in 2012 for $320,000 – a profit of 52 percent in less than 7 years.[16] His Pet Valu store generated almost $7 million in sales over that time span.[17] Mr. Rodger opened an independent, competing pet food store after he sold his Pet Valu store, but that store was not profitable and closed within one year of operation.[18]

---

[13] First Judgment at para 3, PV Compendium, Tab 5, p. 43.

[14] First Judgment at para 4, PV Compendium, Tab 5, p. 43.

[15] Affidavit of Thomas McNeely sworn August 3, 2012 ("**First McNeely Affidavit**") at paras 14-19, PV Compendium, Tab 24, pp. 397-399.

[16] First Judgment at para 5, PV Compendium, Tab 5, p. 43.

[17] Supplementary McNeely Affidavit sworn September 20, 2013 ("**Supplementary McNeely Affidavit**"), at para 25, PV Compendium, Tab 25, p. 466.

[18] The plaintiff and Mr. Rodger acknowledged that "*the operation of [Mr. Rodger's independent store] The Hungry Pet was not profitable.*" See: Consent Order dated December 5, 2012, Exhibit "H" to the Supplementary McNeely Affidavit, PV Compendium, Tab 25-B, p. 492.

B. THE COMMON ISSUES

16. The Certifying Judge held that the "*only claim appropriate for certification was in relation to the volume rebates*".[19] Ultimately, 7 common issues focusing on this core issue were certified.[20] Common issues 1 through 5 focused primarily on the question of whether Pet Valu had a contractual duty to share volume rebates with franchisees, and if so, whether it breached that duty. Common issue 6 focused on whether Pet Valu had a good faith duty to disclose certain information regarding volume rebates to franchisees, and common issue 7 dealt with the appropriate remedy, if any, for a breach of such a duty.

17. The Certifying Judge defined "Volume Rebates" as:

> **"Volume Rebates" means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts tied to the performance of individual stores.**[21] (The "Certified Definition")

18. The franchise agreement does not contain the term "Volume Rebates" or the Certified Definition. Rather, it refers to volume allowances. The Certified Definition refers to allowances only as a subset of the definition of Volume Rebates.

19. Furthermore, the phrase at the end of the Certified Definition: "*includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system*" received no critical analysis from the Motion Judge. Pet Valu passed on to the plaintiff over $56,000.00 (over 5.2 % of the plaintiff's net sales) in additional discounts on the Top 100 products.[22] Pet Valu simply never attempted to have those discounts aggregated into Volume Rebates, as defined by the

---

[19] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3475 ("**Costs Endorsement on Certification**") at para 4, PV Compendium, Tab 15, p. 185.

[20] The common issues are set out at Schedule "C" to this factum.

[21] First Judgment at para 6, PV Compendium, Tab 5, p. 43.

[22] Judgment at para 12, PV Compendium, Tab 4, p. 24.

Certified Definition. However, there is no doubt that they are: "*...direct or indirect discounts of the price at which goods are supplied to the Pet Valu system*". They also accrued as a result of Pet Valu's purchasing power.[23] It was simply never argued that they were capable of being "Volume Rebates".

20. This divergence of terms exacerbates the Motion Judge's errors. If these additional discounts had been included, he might not have inferred that the volume rebates were "*meagre*" and would likely have concluded that the franchisees' imagined expectation about "*significant*" volume rebates had been satisfied. His findings about bad faith would have fallen by the wayside.

21. What the franchise agreement actually requires is that "volume allowances" be allocated as set out in the Pet Valu Franchise Business System, which in turn states that volume allowances may or may not be included in the landed price of products, at Pet Valu's discretion:

> **22.(f) Volume allowances granted to PVCI by a supplier or manufacturer based upon PVCI's annual purchasing volume shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System.**[24]
>
> **Pet Valu Business System**
>
> **Subject to the terms and conditions of respective franchise agreements, promotion, listing, special or volume allowances may be included or not included in the landed cost of specific products, pursuant to the discretion of the franchisor...**[25]

C. THE MOTION JUDGE FOUND THAT FRANCHISEES BENEFITED

22. Pet Valu moved for summary judgment dismissing all of the common issues. By judgment dated October 31, 2014 (the "**First Judgment**"),[26] the Motion Judge granted summary judgment in favour of Pet Valu on common issues 1 through 5. The Motion Judge held that Pet Valu met its

---

[23] Co-op and I&E Discounts are "*benefits enjoyed by the franchisees that result from the franchisor's purchasing power.*" Judgment at para 11, PV Compendium, Tab 4, p. 24.

[24] First Judgment at para 12, PV Compendium, Tab 5, p. 45; Franchise Agreement, PV Compendium, Tab 21, p. 297.

[25] First Judgment at para 14, PV Compendium, Tab 5, p. 45; Pet Valu Franchise Business System, PV Compendium, Tab 23, p. 378.

[26] First Judgment, PV Compendium, Tab 5. (See Tab 6 for the issued and entered Judgment).

contractual obligation because "*all of the Volume Rebates were passed on and shared with the franchisees; and ... the franchisor's mark-ups were not unreasonable.*[27]

23. The Motion Judge made critical evidentiary findings that franchisees received benefits:

(a) "*The evidence established that the class member franchisees were the beneficiaries of lower product pricing. Indeed, it is undisputed that PVCI prices for the Top 100 products were on average 6 to 14 percent lower than competitors' prices*";

(b) "*... average Pet Valu franchise cost [for products] was about 15 percent below outsider distributors' prices, after freight charges*"; and

(c) "*... franchisees were free to purchase from more than a dozen other distributors, and yet overwhelming[ly] they purchased product from PVCI.*"[28]

24. Interestingly, common issue 3 asked whether Pet Valu breached a duty of good faith in respect of its contractual obligation to share volume rebates.[29] The Motion Judge dismissed this common issue on the basis that Pet Valu had satisfied its contractual obligation.[30]

25. The Motion Judge reserved judgment on common issues 6 and 7 after opining that he was "*initially of the view that*" they should be answered "*No*" in Pet Valu's favour.[31] He reserved judgment due to an unpleaded issue that the plaintiff raised towards the end of the summary judgment motion. The issue concerned purported representations in Pet Valu's franchise disclosure document about purchasing power.[32] Specifically, the plaintiff attempted to "*shoe-horn*" the purchasing power representation issue into common issue 6.[33]

---

[27] First Judgment at para 29, PV Compendium, Tab 5, p. 48.

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

[29] Common issue 3, Schedule "C".

[30] First Judgment at para 31, PV Compendium, Tab 5, pp. 48-49.

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

[32] The Motion Judge found that Pet Valu had not made any inaccurate representations concerning purchasing power. See: Judgment at paras 13-15, 19-21, PV Compendium, Tab 4, pp. 25-26.

[33] First Judgment at para 41, PV Compendium, Tab 5, pp. 50-51.

26. Rather than dismissing this last-ditch effort to change common issue 6 on the fly, the Motion Judge, on his own initiative, "*suggested to both sides that they might consider a more direct approach – namely, amending the common issues by adding a new one dealing specifically with the purchasing power question.*"[34]

27. Pet Valu did not agree to this suggestion. However, the plaintiff followed the Motion Judge's unsolicited suggestion and moved to amend its statement of claim and add a new common issue on this allegation. Hence, common issues 6 and 7 were deferred.[35]

D. THE MOTION JUDGE REVERSES COURSE ON GOOD FAITH

28. In December 2014, the parties argued the plaintiff's motion to amend its pleadings and certify a new common issue (common issue 8). At the outset of this hearing, the Motion Judge provided an unsolicited draft of what he believed common issue 8 ought to be, stating as follows:

> **What I expected:**
>
> **8. Did the *disclosure document* contain a misrepresentation about the defendant's purchasing power or about its ability to receive volume discounts for the benefit of its franchisees? If so, did the class members suffer a loss? Are the class members entitled to damages under s. 7 of the AWA?**[36]

29. Pet Valu declined to accept this draft and continued to resist the plaintiff's motion. The Motion Judge reserved his decision on the amendment and the new common issue, subject to additional written submissions by the parties.

---

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

[35] First Judgment at para 36, PV Compendium, Tab 5, p. 49.

[36] Proposed wording for new common issue 8, provided by Belobaba J. , PV Compendium, Tab 31, p. 600.

30. Pet Valu filed additional written submissions, emphasizing that case management judges ought to exercise "*caution and restraint*" before permitting a last-minute amendment.[37] Given the oral proposal from the bench to amend the pleadings, and the unsolicited written draft from the Motion Judge as to what common issue 8 ought to be, Pet Valu emphasized that a case management judge ought to guard against entering into "*prohibited territory*" by "*descending 'into the arena'*" with the parties.[38] These submissions may have influenced the Motion Judge, who withdrew his proposed language for the new common issue and ultimately dismissed the motion to amend that he had invited.

31. Nonetheless, considering the Motion Judge's draft for the new common issue and the actual result of the Judgment under appeal, his dismissal of the amendment motion amounts to no more than a distinction without a difference. The result is effectively the same: common issue 6 became a misrepresentation claim disguised as a duty of good faith claim (as set out in further detail at paras. 54 to 57 below).

32. The Motion Judge then wrote to the parties and asked as follows: "*Can I ask if either side wishes to file any further submissions re Common Issues 6 and 7 or do I now have everything?*"[39] The next day, the Motion Judge advised the parties that:

> **I am writing to advise all counsel that 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...**[40]

---

[37] Submissions of Pet Valu dated December 11, 2014 at para 15, PV Compendium, Tab 32, p. 609, citing: *Brown v. Canada*, 2013 ONCA 18 at para 45, PV BOA Tab 4; *McCracken v. CNR*, 2012 ONCA 445 at para 144, PV BOA Tab 5; and *Caputo v. Imperial Tobacco Ltd.*, 2004 CanLII 24753 (ONSC) at para 41, PV BOA Tab 6.

[38] *Ibid.*

[39] Email from Belobaba J. dated December 18, 2014, PV Compendium, Tab 33, p. 610.

[40] Email from Belobaba J. dated December 19, 2014, PV Compendium, Tab 34, p. 612.

In response, on December 30, 2014, Pet Valu provided final submissions in respect of common issue 6 and 7.[41] The plaintiff replied on January 5, 2015.[42] Later that evening, the Motion Judge advised that he intended to release the Judgment on January 9, 2015.[43]

33. Pet Valu intended to reply to the plaintiff's submissions (as is normally a moving party's right), because they raised incorrect factual allegations. However, the next morning (January 6), the Motion Judge emailed the parties an unsigned copy of the Judgment on both the plaintiff's motion to amend its pleadings and add common issue 8 and Pet Valu's motion for summary judgment on common issue 6.[44]

34. That afternoon, counsel for Pet Valu wrote to the Motion Judge with brief reply submissions to the plaintiff's January 5, 2015 submissions on common issue 6.[45] The Motion Judge declined to consider Pet Valu's reply, commenting as follows:

> **Counsel - I generally circulate the unsigned copy the day before the formal release simply as a courtesy, and not as a 'draft' inviting counsel comments - the decision is being released tomorrow, unchanged - I can only add fyi, that none of the points in Mr. Shaw's letter re being "rebuffed" or "ignored" were in any way important to my analysis of the s. 3 questions - I am comfortable with my analysis and confident that the answers to Common Issue 6 and 7 can withstand further review - I thank both sides again for your continuing assistance and your courtesy - cheers.**[46]

35. Despite the fact that Pet Valu had brought the motion for summary judgment, the Motion Judge granted judgment to the plaintiff on the following subparagraphs of common issue 6:

(a) whether Pet Valu receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members (common issue 6(i));

---

[41] Email from Pet Valu's lawyers to Belobaba J. dated December 30, 2014, PV Compendium, Tab 35, p. 615.

[42] Email from class counsel to Belobaba J. dated January 5, 2015, PV Compendium, Tab 36, p. 616.

[43] Email from Belobaba J. dated January 5, 2015, PV Compendium, Tab 37, p. 618.

[44] Email from Belobaba J. dated January 6, 2015, PV Compendium, Tab 38, p. 620.

[45] Email from Pet Valu's lawyers to Belobaba J. dated January 6, 2014, PV Compendium, Tab 39, pp. 621-624 (and attachments at Tabs 39 A – E).

[46] Email from Belobaba J. dated January 6, 2015, PV Compendium, Tab 40, p. 647.

(b) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period (common issue 6(iii)); and

(c) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with the Class Members (common issue 6(iv)).[47]

PART III - ISSUES AND THE LAW

36. Pet Valu relies upon the following in support of its appeal. The Motion Judge erred by:

(a) finding that the duty of good faith contains an ongoing duty of disclosure;

(b) imposing a duty of good faith beyond the performance and enforcement of the franchise agreement;

(c) overriding the Legislature and imposing disclosure obligations beyond those imposed by the *Wishart Act* and its regulations;

(d) conflating a misrepresentation claim with a claim of bad faith;

(e) finding a breach of the duty of good faith, despite :

(i) the fact that franchisees benefited under the Pet Valu system; and

(ii) there being no evidence to support his inferences;

(f) unilaterally amending common issue 6; and

(g) committing other errors, namely:

(i) applying two different standards for the duty of good faith; and

(ii) making an arbitrary finding that the volume rebates received by franchisees were "*meagre*".

A. THE STANDARD OF REVIEW

37. The following standards of review and principles of interpretation apply:

(a) The standard of review on a question of law is correctness. This Court may replace the opinion of the Motion Judge with its own in respect of such issues;[48]

(b) Where a question of mixed fact and law may be attributable to the application of an incorrect standard, a failure to consider a required element of a legal test, or some other error in principle, the error is subject to the standard of correctness;[49]

---

[47] Judgment at para 61, PV Compendium, Tab 4, pp. 37-38.

[48] *Housen v. Nikolaisen*, 2002 SCC 33 at para 8, PV BOA, Tab 7 [*Housen*].

(c) Appellate intervention is warranted where an inference is not supported by any evidence and where an improper inference has a material effect on the outcome.[50]

(d) A factual finding that is not supported by the evidence constitutes an error of law.[51] Further, or in the alternative, it is a "*processing error of a most serious kind*,"[52] and is "*clearly wrong*", and "*entitle[s] an appellate court to intervene*".[53]

(e) Although the *Wishart Act* is remedial legislation, it ought to be interpreted in a way that balances the rights of both parties and is fair to both. The franchisor/franchisee relationship is a commercial one, and the statute should be interpreted in a commercially reasonable way.[54]

B. GOOD FAITH DOES NOT CONTAIN AN ONGOING DUTY OF DISCLOSURE

38. The Motion Judge erred in law by imposing an ongoing duty of disclosure into the duty of good faith and fair dealing.

39. In *Bhasin v. Hrynew*, the Supreme Court held that the common law duty of good faith and fair dealing "*does not impose a duty of loyalty or of disclosure*" and that "*[t]he duty of honest performance... should not be confused with a duty of disclosure...*"[55]

40. Similarly, *Spina v. Shoppers Drug Mart Inc.* concluded that s. 3 of the *Wishart Act* does not impose a continuous post-sale disclosure regime and there is no obligation on the part of the

---

[49] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para 53, PV BOA, Tab 8; *Housen v. Nikolaisen*, 2002 SCC 33 at paras 33-36, PV BOA, Tab 7.

[50] *Housen v. Nikolaisen*, 2002 SCC 33 at paras 22-23, PV BOA, Tab 7; *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 ("**Opt-Out Decision**") at para 69, PV Compendium, Tab 18, p. 235.

[51] *Berendsen v. Ontario*, 2009 ONCA 845 at para 72, PV BOA, Tab 9.

[52] *Waxman v. Waxman*, [2004] CarswellOnt 1715 (CA) at para 335, PV BOA, Tab 10 [*Waxman*]

[53] *Taylor Made Advertising Ltd. v. Atlific Inc*, 2012 ONCA 459 at para 26, PV BOA, Tab 11.

[54] *779975 Ontario Ltd. v. Mmmuffins Canada Corp*, [2009] O.J. No. 2357 (ONSC) at para 32, PV BOA, Tab 12 [*Mmmuffins*]; *4287975 Canada Inc. v. Imvescor Restaurants Inc.*, 2009 ONCA 308 at para 40, PV BOA, Tab 13 [*Imvescor*]

[55] *Bhasin, supra* note 2 at paras 73 and 86, PV BOA, Tab 1.

franchisor to provide ongoing disclosure.[56] In *Spina*, the class member franchisees alleged that Shoppers Drug Mart, as franchisor, had a duty under the common law and s.3 of the *Wishart Act* to disclose information about rebates and allowances, among other things.[57] These allegations are similar to common issue 6 in this class proceeding. Interestingly, in the First Judgment, the Motion Judge appeared to agree with the application of the *Spina* principle to common issue 6: "*I was initially of the view that given this court's decision in Spina, the answers to Common Issues 6 and 7 should be 'No.'*"[58] Pet Valu submits that this reasoning continues to apply and that the answer to common issue 6 ought to remain "no".

41. In addition, *Spina* cautions against the very policy issue raised by Pet Valu at the outset, namely that an ongoing disclosure obligation would be unworkable. In *Spina*, Perell J. warns that:

> **...The plaintiffs would require Shoppers to provide information to verify that it has not breached the Associates Agreements, with the Plaintiffs themselves defining what is or is not a breach of the Associates Agreement.**
>
> **Apart from the fact that complying with this pre-litigation-oriented duty of disclosure is likely impossible and a recipe for strife, it is not consistent with the relationship between franchisor and franchisee and rather turns over the design, supervision, and management of the franchise system to each franchisee, who gets to fish for grounds to sue the franchisor based on the franchisee's interpretation of the Associates Agreement.**[59]

C. THE DUTY OF GOOD FAITH MUST BE GROUNDED IN THE CONTRACT

42. The duty of good faith, as expressed in the *Wishart* Act, relates to the performance and enforcement of the franchise agreement.[60] It is imposed to secure the performance of the contract the parties have made. The duty is mutual. It is not intended to replace one contract with another or

---

[56] *Spina, supra* note 9 at paras 218-220, PV BOA, Tab 2.

[57] *Ibid* at para 216, PV BOA, Tab 2.

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

[59] *Spina, supra* note 9 at paras 218-220, PV BOA, Tab 2.

[60] *Wishart Act*, ss. 3(1), (2), Schedule "B".

to amend the contract by altering its express terms.[61] It does not create a stand-alone duty that trumps all other contractual provisions.

43. In this case, there cannot be a duty of good faith regarding the disclosure of volume rebate information, ongoing or otherwise, because of two key points. There is no express term of the franchise agreement that:

(a) requires Pet Valu to provide franchisees with disclosure of volume rebate information; or

(b) promises franchisees a "*significant*" or "*meaningful*" quantity of volume rebates.

44. The Motion Judge grounded his findings in an imagined promise made in the Pet Valu franchise disclosure document about the quantity of volume rebates, that is carried forward as a "*theme*" into the franchise agreement.[62] He focused on one phrase in the disclosure document, under the heading "Business Background of the Franchisor", which states that: "*...because of Pet Valu's substantial purchasing power, Peton (*Pet Valu's distributor) *is able to take advantage of volume discounts offered by suppliers.*"[63]

45. This language does not create a substantive obligation that franchisees would receive the benefit of a fixed amount of volume rebates, let alone a "*significant*" or "*meaningful*" level of them,[64] especially considering that the same disclosure document later states, under the heading "Volume Rebates", that:

---

[61] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at para 500, PV BOA, Tab 14 [*Fairview Donut*], aff'd by 2012 ONCA 867, leave to appeal to SCC refused, 2013 CarswellOnt 6050.

[62] Judgment at para 55, PV Compendium, Tab 4, p. 36.

[63] Judgment at para 26 citing the First Judgment at para 11, PV Compendium, Tab 4, p. 28; Pet Valu Disclosure Document, Exhibit "G" to the Affidavit of Robert Rodger sworn February 13, 2012 (the "**Rodger Affidavit**"), PV Compendium, Tab 22, p. 340.

[64] Judgment at paras 60, 61(i), PV Compendium, Tab 4, p. 37.

> **[Pet Valu] does not provide volume rebates to its franchisees in respect of purchases of Merchandise, Equipment or Operating Supplies from [Pet Valu]. [Pet Valu] does, however, attempt to negotiate favourable prices from its various suppliers.**[65]

46. Reading the foregoing, a franchisee could not have understood that he was promised or was going to receive volume rebates, let alone "*significant*" or "*meaningful*" ones. Furthermore, "*negotiat[ing] favourable prices from its various suppliers*" is precisely what Pet Valu did. The Motion Judge held that, "*[Pet Valu] used its purchasing power to negotiate the best prices it could and passed on the volume rebates to the franchisees by way of price reductions.*"[66]

47. There is no concomitant franchise agreement obligation that corresponds with the benign disclosure document statement that the Motion Judge focused on. Pet Valu satisfied its contractual obligations regarding volume allowances.[67] Accordingly, there can be no breach of the duty of good faith.

48. Establishing a duty of good faith requires more than a vague reference to a "*theme*"[68] carried forward from a disclosure document. This is especially true where other language in the disclosure document, specifically relating to volume rebates, contradicts the essence of that "*theme*". The court is not "*entitled to use the implication of a term to reconstruct the parties' contract based on its opinion of what would be equitable or of what the parties ought to have intended.*"[69] Further, "*a term will not be implied where there is evidence of a contrary intention on the part of either party.*"[70] The statement in the disclosure document that franchisees will not receive volume rebates is precisely such a contradictory term. Thus, the Motion Judge erred in law

---

[65] Disclosure Document at p. 17, Exhibit "G" to the Rodger Affidavit, PV Compendium, Tab 22, p. 352.

[66] Judgment at para 2, PV Compendium, Tab 4, p. 20.

[67] First Judgment at para 29, PV Compendium, Tab 5 p. 48; Judgment at paras 2 & 27, PV Compendium, Tab 4, pp. 20 & 28-29.

[68] Judgment para 55, PV Compendium, Tab 4, p. 36.

[69] *Fairview Donut*, *supra* note 61 at para 449, PV BOA, Tab 14.

[70] *Ibid* at para 460, PV BOA, Tab 14.

by developing the "*theme*" that franchisees were promised and expected a "*significant*" or "*meaningful*" level of volume rebates.

D. SECTION 5 OF THE *WISHART ACT* IS A COMPLETE CODE

49. 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.

50. Paragraph 6(8) of the regulations to the *Wishart Act* outlines what must be disclosed about volume rebates in a franchise disclosure document. It states:[71]

> **6 ...every disclosure document shall include [...]**
>
> **(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.**[72]

51. A leading text on franchise law from a noted author[73] in the area confirms that paragraph 6(8) of the regulations does not require disclosure of the quantity of volume rebates.

> **Note that, in reviewing this item [paragraph 6(8)] disclosure is simply required of the franchisor's policy regarding volume rebates and whether such rebates or other benefits are shared with franchisees. <u>There is no requirement to disclose the sources or amounts of such rebates or the projected percentage or absolute amount of rebates to be shared with franchisees</u>.**[74] (Emphasis added.)

---

[71] General Regulations to the *Wishart Act*, O Reg 581/00, at s. 6(8), Schedule "B".

[72] There is no issue that Pet Valu satisfied the disclosure obligations prescribed by the regulations. See: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, [2011] O.J. No. 1618 (ONSC) ("**Certification Decision**") at para 31, PV Compendium, Tab 12, p. 131.

[73] Mr. Zaid has been referred to by the Ontario Superior Court of Justice as someone who has "*more franchise law experience than perhaps anyone in the province.*" See: *Silininkas v. Purrestore Management Services, Inc. o/a Puroclean Canada* (September 26, 2014), Toronto, CV-14-510567, CV-504-344, CV-506122 (ONSC), PV BOA, Tab 15; Order of Sachs J. dated September 30, 2013, PV BOA, Tab 16; and *Fairview Donut*, *supra* note 61 at para 178, PV BOA, Tab 14.

[74] Frank Zaid, ed, *Canadian Franchise Guide* (Toronto: Carswell, 1992) (loose-leaf revision CFG 261, 2014), Vol. 1, at 2-142Z.41 – 2-142Z.43, PV BOA, Tab 19.

52. The Judgment therefore alters and expands the disclosure obligations set out in this regulation, thereby signalling that compliance with the statutory disclosure requirements – and not going beyond – constitutes bad faith. This is reviewable error.

53. Similarly, if the Legislature had intended for a franchisor to have post-contractual disclosure obligations, it would have expressly drafted legislation in that regard. For example, the Ontario *Securities Act* contains precise provisions to address ongoing disclosure obligations of a reporting issuer.[75] No such provision exists in the *Wishart Act*.

E. THE MOTION JUDGE CONFLATED MISREPRESENTATION WITH THE DUTY OF GOOD FAITH

54. Common issue 6 pertains only to the duty of good faith. However, the Motion Judge wrongly couched the elements of a misrepresentation claim, not a duty of good faith claim, in his analysis of that common issue. This is an error of law.

55. The Motion Judge's conflation of these two claims is evident in the following passage:

> **The point, however, is not that Pet Valu passed on all of the volume discounts, meagre as though they were, to the franchisees. The point is that Pet Valu, contrary to its representations in the disclosure document and franchise agreement, was never able to generate a meaningful amount as was promised and expected and never told its franchisees the truth.**[76]

56. Promises and expectations smack of misrepresentation, not a breach of the duty of good faith. Considering the wording of the Motion Judge's proposed new common issue (*Did the disclosure document contain a misrepresentation about the defendant's purchasing power or about its ability to receive volume discounts for the benefit of its franchisees? If so, did the class members suffer a loss? Are the class members entitled to damages under s. 7 of the AWA?*),[77] it is

---

[75] *Securities Act*, RSO 1990, c S.5, s.75, Schedule "B".

[76] Judgment at para 47, PV Compendium, Tab 4, p. 33.

[77] Proposed wording for new common issue 8, provided by Belobaba J., PV Compendium, Tab 31, p. 600.

understandable why the Motion Judge may have conflated these causes of action. However, good faith ought not to be used by the Court to dress-up, disguise or salvage a misrepresentation claim that was not pleaded and is not available to the plaintiff. Otherwise, it reverts to a "*form of* ad hoc *judicial moralism or 'palm tree' justice*," which the Supreme Court warned against in *Bhasin*.[78]

57. The Motion Judge's reference to "*material facts*", as defined by the *Wishart Act*,[79] further demonstrates that he disguised a misrepresentation claim within the duty of good faith. 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.[80]

F. THERE HAS BEEN NO BREACH OF THE DUTY OF GOOD FAITH

58. Even if the franchise agreement contains an obligation to disclose the amount of volume rebates, which is denied, non-disclosure of that information by Pet Valu was not a breach of the duty of good faith. Specifically:

(a) Bad faith conduct must be examined with an eye towards the entirety of the parties' relationship. The Motion Judge erred by failing to account for the fact that Pet Valu franchisees benefited significantly under the Pet Valu franchise system; and

(b) The Motion Judge based his bad faith conclusion on findings that are unsupported by evidence.

(a) Even if there is a disclosure obligation, there was no bad faith

59. Even if Pet Valu was contractually obliged to disclose the quantity of volume rebates, which is denied, the Motion Judge applied an incorrect test to conclude that Pet Valu breached the duty of good faith. In particular, the Motion Judge erred by finding bad faith in circumstances

---

[78] *Bhasin, supra* note 2 at para 70, PV BOA, Tab 1.

[79] Judgment at para 48, PV Compendium, Tab 4, p. 33; *Wishart Act*, s. 1(1), "material fact", Schedule "B".

[80] *Wishart Act*, ss. 5 & 7, Schedule "B".

where, overall, the franchisees benefited from the Pet Valu system and the objectives of the franchise agreement were not defeated or eviscerated.

60. Bad faith conduct must be examined with an eye towards the entirety of the parties' relationship. Whether or not a party has breached the duty will depend on all of the circumstances of that relationship. The duty does not require that every interaction between a franchisor and franchisee be subjected, in isolation, to a standard of commercial reasonableness.[81] It cannot possibly be addressed by analyzing one interaction or a series of interactions (i.e., the disclosure of volume rebate quantities) without considering the performance of the entire contract, including for example, the other monetary and non-monetary benefits received by franchisees.[82] Good faith requires a holistic, not a surgical, approach.

61. The duty of good faith therefore ensures that the parties do not act in such a way that eviscerates or defeats the objectives of the agreement that they have entered into. It prevents either party from substantially nullifying the bargained objective or benefit contracted for, contrary to the original purpose and expectation of the parties.[83] The duty must be applied in a balanced way that is fair to the rights of both parties, and it must reflect reasonable commercial standards.[84]

62. The plaintiff's allegations of bad faith therefore ought to have been viewed through the lens of the entirety of the parties' relationship. Pet Valu franchisees benefited from lower product pricing. They purchased products for 6 to 14 percent less than the price they would have paid elsewhere.[85] They earned 20 percent more in gross profits than franchisees of a smaller competitor

---

[81] *Fairview Donut*, *supra* note 61 at para 293, PV BOA, Tab 14.
[82] *Fairview Donut*, *supra* note 61 at para 294, PV BOA, Tab 14.
[83] *Fairview Donut*, *supra* note 61 at para 502, PV BOA, Tab 14.
[84] *Mmmuffins*, *supra* note 54 at para 32, PV BOA, Tab 12; *Imvescor, supra* note 54 at para 40, PV BOA, Tab 13.
[85] First Judgment at para 20, PV Compendium, Tab 5, p. 46.

on the sale of the same products.[86] The plaintiff received discounts of $217,380 on its purchases of products over the class period.[87] Franchisees also received non-monetary benefits, including a full-line distribution service and professional buying staff, a one-stop ordering and delivery system, the return of expired food products for reimbursement by Pet Valu, and the development of unique and exclusive private label products.[88] Therefore, the Pet Valu system "*translated into a range of pricing and non-pricing benefits for its franchisees.*"[89]

63. The plaintiff was also profitable. Its store increased in value by over 50 percent in 7 years, and generated millions of dollars of revenues.[90] Another franchisee, Peter Davis, was also successful. His sales exceeded or neared $1 million in each year that he operated a franchise.[91] In 2007, Mr. Davis projected that he would obtain profits of $1.1 million over the following 5 years.[92] Mr. Davis also described the level of profit margins obtained by the plaintiff as "*heroic.*"[93]

64. The foregoing is not indicia of bad faith conduct on the part of Pet Valu. Viewed holistically, Pet Valu franchisees suffered no harm, even if disclosure of the amount of volume rebates was required and not provided. The goals of the franchise agreement were not defeated or eviscerated. It is incongruous for the Motion Judge to find overall bad faith, yet in the same

---

[86] First Judgment at para 28, PV Compendium, Tab 5, p. 48.

[87] Judgment at para 12, PV Compendium, Tab 4, pp. 24-25.

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

[89] Judgment at para 13, PV Compendium, Tab 4, p. 25.

[90] Supplementary McNeely Affidavit at para 25, PV Compendium, Tab 25, pp. 466-467.

[91] Transcript of the cross-examination of Peter Davis held August 26, 2014 (the "**Davis Transcript**") at p. 54, ll. 5-22, PV Compendium, Tab 29, p.584.

[92] Davis Transcript at p. 84 ll. 18-25, PV Compendium, Tab 29, p. 585; Proposal to Pet Valu to repurchase Peter Davis' store dated July 2007, Exhibit 8 to the Davis Transcript, PV Compendium, Tab 29-A p. 590.

[93] *If we could look at actual results from some of the franchisees it would show that the margins are all less than 37% and if someone got 40% they would be a hero.*" See: Notes of Discussion between Errol Soriano and Peter Davis, Exhibit "3" to the Transcript of the cross-examination of Errol Soriano held September 18, 2014 (the "**Soriano Transcript**"), PV Compendium, Tab 30-A, p. 598; Soriano Transcript at p. 147 ll. 4-25, p. 148 ll. 1-9, PV Compendium, Tab 30, p. 596-597.

decision outline the myriad benefits enjoyed by franchisees in the Pet Valu system, and the success and profitability enjoyed by the plaintiff.

65. The Motion Judge also issued contradictory reasons regarding Pet Valu's obligation to disclose volume rebate information. In a motion by the plaintiff to have Pet Valu produce complete pricing spread-sheet data for all franchisees and corporate stores, including volume rebate information, the Motion Judge ruled that the disclosure of such information was not required:

> **Here again, I have not been persuaded that this information is needed or is relevant in any way for the common issues trial. The core issue is whether [Pet Valu] is contractually obliged to share Volume Rebates with its franchisees. What it does with its share of the Rebates (and whether it provides a larger share to its corporate stores) is not in issue and does not assist the court in the adjudication of the certified common issues.**[94] (Emphasis added.)

66. This stands in stark contrast to his conclusion in the Judgment that, "*Pet Valu decided for its own purposes to keep the volume discount information to itself.*"[95] Pet Valu cannot have acted in bad faith by not disclosing information regarding the volume rebates it receives when, just months earlier, the Motion Judge held that Pet Valu was not required to provide that information.

(b) The Motion Judge based his conclusion of bad faith on unsupported inferences

67. The cornerstone of the Motion Judge's conclusion that Pet Valu acted in bad faith is the finding that Pet Valu did not tell the "*truth*".[96] In order to arrive at that finding, he had to imagine that Pet Valu actively or consciously hid, withheld or refused to disclose the amount of volume rebates. Hence his use of the words "*rebuffed*", "*ignored*" and "*refused*" to describe Pet Valu's conduct. However, there is substantial evidence to belie those findings, which is described below.

---

[94] Reasons on production motion dated April 4, 2014 at pp. 3-4, para 3(3), PV Compendium, Tab 19, p. 243-244 .

[95] Judgment at para 51, PV Compendium, Tab 4, p. 34.

[96] Judgment at para 47, PV Compendium, Tab 4, p. 33.

i. Pet Valu did not "rebuff" a request for volume rebate information

68. The Judgment states that, "*[t]he plaintiff tried to obtain [volume rebate] information from Pet Valu in 2009 before commencing this lawsuit but was rebuffed*". This conclusion ignores Pet Valu's response to the plaintiff's request, which stated as follows:

> **In response to your letter to me of November 4, 2009 and your recent e-mail communication to Rich Greenstein, asking for information about Pet Valu, as you are aware, Pet Valu has recently changed ownership, and I have only recently become its CEO. Accordingly, we are in the process of becoming acclimated with the various internal systems within Pet Valu. Therefore, while we are acting reasonably in collecting the information, it is going to take additional time to prepare a response to your letter. Of course, while this effort continues, we are prepared to discuss any issues addressed in your letter and to continue to have a dialogue with you on an ongoing basis.**[97]

69. No conciliatory response came from the plaintiff. Rather, 8 days later, the plaintiff issued its $100 million class action, thereby rejecting the request to discuss the issues set out in its letter.[98]

70. This exchange of correspondence demonstrates that the plaintiff was not rebuffed or in any way treated in bad faith. Rather, by commencing its claim, the plaintiff signalled the commencement of an adversarial process, effectively dropping the gloves on the exchange of information. Good faith runs both ways under the *Wishart Act*.

ii. The Motion Judge's reference to the Release Motion is out of context

71. The Judgment also states that: "*When certain franchisees requested information about volume rebates before signing releases, they were again ignored.*"[99] At no time did any group of franchisees collectively or singularly request volume rebate information before signing releases.

---

[97] Letter from Pet Valu to counsel for the plaintiff dated December 1, 2009, Exhibit "U" to the Rodger Affidavit, PV Compendium, Tab 39-A p. 626.

[98] Statement of claim issued December 9, 2009, PV Compendium, Tab 8.

[99] Judgment at para 49, PV Compendium, Tab 4, p. 34.

72. Rather, as part of the ordinary course of business, Pet Valu assisted franchisees who were interested in leaving the system by agreeing to buy their franchise if a third party purchaser could not be found.[100] In these circumstances, Pet Valu was entitled to a release from the departing franchisee.[101] Once the class action was commenced, Pet Valu simply sought assurances that the release would cover the class action claim as well. Pet Valu wrote class counsel to advise and then applied to the Certifying Judge for directions (the "**Release Motion**").[102]

73. The Certifying Judge determined that Pet Valu's motives in requesting the release were not "*malevolent.*" He stated that the: "*...insistence of a release from the franchisee is a reasonable and acceptable commercial requirement*".[103] Considering that it was not malevolent, but a reasonable and acceptable commercial requirement, the "*refused*" passage quoted in the Judgment is completely out of context.

74. To put it in the proper context, it must be understood that the Release Motion took place at a nascent stage of the action. The certification order had not been issued, the notice to class had not been sent, Pet Valu had not even defended, and no documents had been exchanged by the parties. The plaintiff had not filed its motion for summary judgment and consequently no Top 10 or Top 100 representative sample had even been imagined. Leading up to the motion, the plaintiff had been using an over-reaching definition of volume rebates that included all monies received by Pet Valu regardless of source or characterization. At no time did any franchisee from whom Pet Valu

---

[100] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871 (the "**Release Motion Decision**") at para 8, PV Compendium, Tab 16, p. 189.

[101] Franchise Agreement, Exhibit "B" to the First McNeely Affidavit at s. 32(g)(ii)(C), PV Compendium, Tab 21, p. 312.

[102] Release Motion Decision, *supra* note 100, PV Compendium, Tab 16.

[103] Release Motion Decision, *supra* note 100 at para 16, PV Compendium, Tab 16, p. 192.

was seeking a release request volume rebate information. It was class counsel, in the currency of the motion, that highlighted the fact that the information had not yet been produced.[104]

75. Pet Valu attempted in good faith to clarify the enforceability of the releases in question, first on notice to class counsel, and then on motion to the court. This good faith attempt to clarify the enforceability of a contractually-required release should not be the basis of a finding of bad faith. To suggest otherwise would only promote franchisors to act unilaterally without informing counsel or seeking directions from the court. This is precisely the type of activity that Ontario courts have discouraged,[105] and that the policy behind the legislation proscribes.

iii. The Motion Judge said the "*rebuffed*" and "*ignored*" evidence was not "important to [his] analysis," but it was

76. The Motion concluded that Pet Valu acted in bad faith without hearing Pet Valu's evidence on the incorrect findings that Pet Valu "*rebuffed*" or "*ignored*" the plaintiff's requests.

77. When Pet Valu brought this evidence to the attention of the Motion Judge, he responded that none of the points about being "*'rebuffed' or 'ignored' were in any way important to my analysis ...*"[106] This cannot be the case. The "*rebuffed*" and "*ignored*" points are the only references that the Motion Judge made in his analysis. They form the crucial evidence referenced by the Motion Judge to explain that Pet Valu hid or did not tell the truth about the amount of volume rebates.[107] This contradictory reasoning impugns his conclusions.

---

[104] Correspondence between counsel demonstrates that the issue arose between counsel, not through rebuffing or ignoring franchisees. See: Letter from Pet Valu's lawyers dated March 24, 2011, PV Compendium, Tab 39-C, pp. 631; and Letter from class counsel dated April 1, 2011, PV Compendium, Tab 39-D, pp. 641-642.

[105] See, for example: Opt-Out Decision, *supra* note 50 at para 61-62 & 72, PV Compendium, Tab 18, pp. 230-231 & 236.

[106] Email from Belobaba J. dated January 6, 2015, PV Compendium, Tab 40, p. 647.

[107] Judgment at para 51, PV Compendium, Tab 40, p. 647.

78. The Motion Judge's finding that Pet Valu hid or refused to disclose the amount of volume rebates also flies in the face of the confidentiality order that he issued in this class action.[108] It also ignores Pet Valu's contractual confidentiality obligations to its suppliers.[109]

79. The confidentiality order seals Pet Valu's pricing model, supplier contracts, and price lists, all of which contain aspects of the volume rebate information in question. It is inconsistent for the Motion Judge to conclude, on the one hand, that Pet Valu ought to have disclosed volume rebate information, yet, on the other hand, to issue a confidentiality order recognizing the commercial sensitivity of aspects of this information.

iv. No evidence to support the inference of materiality

80. There is no evidence to support the Motion Judge's finding that the amount of volume rebates is material information to the plaintiff or any class member. Appellate intervention is warranted where an inference is not supported by any evidence and where an improper inference has a material effect on the outcome.[110]

81. Although the Motion Judge inferred that there is "*no dispute about the importance or materiality of this information*,"[111] the materiality of this information was not pleaded, no evidence was led or considered whatsoever, and the point simply was not raised until the plaintiff switched

---

[108] Confidentiality Order dated November 5, 2012, PV Compendium, Tab 17, p. 200.

[109] Supplier Agreement marked "*confidential*", Exhibit "H" to the McNeely Affidavit, Tab 24-B, pp. 451-459; Supplier Agreement at s.10.2 re: confidentiality, Exhibit "C" to the Supplementary McNeely Affidavit, Tab 25-A p.479; Confidentiality and Non-Disclosure Agreement, Exhibit "C" to the Second Supplementary Affidavit of Thomas McNeely sworn June 16, 2014 ("**Second Supplementary McNeely Affidavit**"), Tab 26-A, pp. 511-515; Private Label Purchasing Agreement marked "*confidential*", Exhibit "D" to the Second Supplementary McNeely Affidavit, Tab 26-B, pp. 517-526; Sample Confidential price lists from suppliers, Exhibit "H" to the Second Supplementary McNeely Affidavit, Schedule "A"(excerpts), PV Compendium, Tab 26-D, pp. 563-577.

[110] *Housen*, *supra* note 50 at paras 22-23, PV BOA, Tab 7; Opt Out Decision, *supra* note 50 at para 69, PV Compendium, Tab 18, p. 235.

[111] Judgment at para 48, PV Compendium, Tab 4, p. 33.

its focus late in the day to purchasing power. There is no evidence that any franchisee made any material decision specifically based on an expectation of a particular quantity of volume rebates.

82. The only evidence about any franchisee's expectations came from a former franchisee, Peter Davis. He asserted that he joined Pet Valu "*to benefit from the system's collective purchasing power*,"[112] not because of the expectation that there would be significant volume rebates. His expectations were met. The Motion Judge found that Pet Valu: (i) "*used its purchasing power to negotiate the best prices it could*",[113] (ii) "*possessed significant purchasing power that translated into a range of pricing and non-pricing benefits for its franchisees*,"[114] and (iii) "*bestowed a range of benefits upon its franchisees as a result of this significant purchasing power*."[115]

83. In this case, materiality is not a conclusion that can simply be inferred. Rather, materiality is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations. In the context of franchising, a finding of materiality must consider that, "*a fact that is important to one [franchisee] may be inconsequential to another in his/her decision making process*."[116] Materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality.

G. THE MOTION JUDGE ERRED BY AMENDING COMMON ISSUE 6

84. In the Judgment, the Motion Judge inserted the words "*a significant level of*" to the question of whether Pet Valu had a duty to disclose whether it received volume rebates in common

---

[112] Affidavit of Peter Davis sworn July 21, 2014 ("**Davis Affidavit**") at para 16, PV Compendium, Tab 27, p. 579; Supplementary Davis Affidavit sworn August 19, 2014 at para 5, PV Compendium, Tab 28, p. 581.

[113] Judgment at para 2, PV Compendium, Tab 4, p. 20 .

[114] Judgment at para 13, PV Compendium, Tab 4, p. 25.

[115] Judgment at para 9(1), PV Compendium, Tab 4, p. 23.

[116] *Trillium*, *supra* note 10, PV BOA, Tab 3.

issue 6.[117] By so doing, the Motion Judge effectively amended the certified common issue, without authority, to fit a refocused theory of the case. He then found in favour of the plaintiff based on the unilaterally-amended common issue. [118] This is contrary to section 8(3) of the *Class Proceedings Act*, which requires that any amendment must be made on a motion by one of the parties.[119] No such motion was before the court. This is a stark example of the Motion Judge "*descending 'into the arena.*'"

H. OTHER ERRORS BY THE MOTION JUDGE

85. The Motion Judge made other errors in respect of his analysis of the duty of good faith, which include the following:

(a) Two different standards for the duty of good faith

86. In both the Judgment and the First Decision, the Motion Judge opined that "*[i]t is generally accepted that section 3(1) [the duty of good faith under the Wishart Act] is a codification of the common law.*"[120] However, later in the Judgment, in a veiled attempt to distinguish *Bhasin*, the Motion Judge wrongly imposed a higher standard for the duty of good faith under the *Wishart Act* than under common law:

> **While it is true that the Supreme Court in *Bhasin* suggested that the common law duty of honesty in the performance of contractual agreements "does not impose a duty ... of disclosure" and that "[t]he duty of honest performance ... should not be confused with a duty of disclosure" one must remember that the Court was making this comment in the context of good faith in the common law and was not dealing with franchise relationships and the "special considerations" that arise under the statutory prescription set out in s. 3 of the Act.**[121] [Emphasis added.]

---

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

[118] Judgment at para 61(i), PV Compendium, Tab 4, pp. 37-38.

[119] *Class Proceedings Act*, 1992, SO 1992, c 6, s. 8(3), Schedule "B".

[120] Judgment at para 41, PV Compendium, Tab 4, p. 32; First Judgment at para 33, PV Compendium, Tab 5, p. 49.

[121] Judgment at para 58, PV Compendium, Tab 4, p. 36-37.

87. There are no "*special considerations*" that arise under section 3 of the *Wishart Act* in comparison to other good faith relationships. Good faith is good faith. The "*special considerations*" that the Motion Judge references from *Salah* address whether or not a commercial contract is subject to the duty of good faith at all.[122] It does not establish a *higher* version of good faith in franchise cases. In any event, *Salah* was decided before *TDL* and *Bhasin*, both of which make no distinction between the statutory and common law duty of good faith.[123]

(b) The arbitrary finding that volume rebates were "*meagre*"

88. The Motion Judge erred in characterizing the volume rebates received by the plaintiff as "*meagre*." He inferred without support that the $14,147 in volume discounts received by the plaintiff on the Top 100 products was meagre. The Motion Judge gave no indication of why this amount is insufficient, nor was there any evidence as to what a proper or acceptable quantity of volume rebates would be. The finding of meagreness is entirely arbitrary, which is jarring given that it was a crucial aspect of the Motion Judge's conclusion of bad faith.

89. The standard used by the Motion Judge to determine that the amount is meagre is entirely arbitrary. Innumerable other standards support an opposite conclusion. For instance, the $14,147 received represents approximately 6.7 percent of the plaintiff's capital contribution. A 6.7 percent return on investment is anything but meagre.

90. Importantly, the $14,147 only represented volume rebates on the Top 100 Products. The plaintiff received $217,380 in total discounts over the class period.[124] Viewed in this context, neither the $14,147 in volume rebates nor the $217,380 in total discounts received by the plaintiff

---

[122] *Salah v. Timothy's Coffees of the World Inc.*, 2009 CarswellOnt 6470 (SCJ) at para. 117, aff'd by 2010 ONCA 673 at para. 28, PV BOA, Tabs 17 and 18, respectively.

[123] *Fairview Donut*, *supra* note 61 at para 495, PV BOA, Tab 14; *Bhasin*, *supra* note 2, at para 46, PV BOA, Tab 1.

[124] Judgment at para 12, PV Compendium, Tab 4, pp. 24-25.

as part of the Pet Valu system were "*meagre*", and there is no evidence to the contrary. Accordingly, the Motion Judge's unsupported inference of meagreness represents a "*processing error of a most serious kind.*"[125]

PART IV - ORDER REQUESTED

91. Pet Valu requests that this Honourable Court set aside the Judgment of Belobaba J. dated March 6, 2015, and an order granting summary judgment to Pet Valu in respect of the entirety of common issue 6 with costs payable to Pet Valu.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March, 2015.

Geoffrey B. Shaw

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Geoffrey B. Shaw LSUC #: 26367J
Tel: 416.869.5982
Fax: 416.350.6916
gshaw@casselsbrock.com

Derek Ronde LSUC #: 46978W
Tel: 416.869.5428
Fax: 416.640.3063
dronde@casselsbrock.com

Eric Mayzel LSUC #: 58663P
Tel: 416.860.6448
Fax: 416.642.7144
emayzel@casselsbrock.com

Counsel for the defendant Pet Valu Canada Inc.

[125] *Waxman*, *supra* note 52 at para 335, PV BOA, Tab 10.

CERTIFICATE

I, Geoffrey B. Shaw, lawyer for the Appellant, Pet Valu Canada Inc., certify that:

i) An Order under Rule 61.09(2) to obtain the original record and exhibits is not required; and

ii) Five hours are estimated as required for the Appellant, Pet Valu Canada Inc.'s, oral submissions, not including reply.

March 18, 2015
Date

Geoffrey B. Shaw

SCHEDULE "A"
Jurisprudence

1. *4287975 Canada Inc. v. Imvescor Restaurants Inc.*, 2009 ONCA 308
2. *779975 Ontario Ltd. v. Mmmuffins Canada Corp*, [2009] O.J. No. 2357 (ONSC)
3. *Berendsen v. Ontario*, 2009 ONCA 845
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. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, aff'd by 2012 ONCA 867, leave to appeal to SCC refused, 2013 CarswellOnt 6050
8. *Housen v. Nikolaisen*, 2002 SCC 33
9. *McCracken v. CNR*, 2012 ONCA 445
10. *Salah v. Timothy's Coffees of the World Inc.*, 2009 CarswellOnt 6470 (SCJ)
11. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673
12. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
13. *Silininkas v. Purrestore Management Services, Inc. o/a Puroclean Canada* (September 26, 2014), Toronto, CV-14-510567, CV-504-344, CV-506122 (ONSC)
14. *Silininkas v. Purrestore Management Services Inc o/a Puroclean Canada* - Order of Sachs J. dated September 30, 2013
15. *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563
16. *Taylor Made Advertising Ltd. v. Atlific Inc*, 2012 ONCA 459
17. *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2011 ONSC 3939
18. *Waxman v. Waxman,* [2004] CarswellOnt 1715 (CA)

Secondary Sources

19. Frank Zaid, ed, *Canadian Franchise Guide* (Toronto: Carswell, 1992) (loose-leaf revision CFG 261, 2014)

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

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

Definitions

1.(1) In this Act,

"material fact" includes any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that 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; ("fait important")

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).

[...]

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).

Notice of rescission

(3)Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor's address for service or to any other person designated for that purpose in the franchise agreement. 2000, c. 3, s. 6 (3).

Effective date of rescission

(4)The notice of rescission is effective,

(a) on the day it is delivered personally;

(b) on the fifth day after it was mailed;

(c) on the day it is sent by fax, if sent before 5 p.m.;

(d) on the day after it was sent by fax, if sent at or after 5 p.m.;

(e) on the day determined in accordance with the regulations, if sent by a prescribed method of delivery. 2000, c. 3, s. 6 (4).

Same

(5)If the day described in clause (4) (b), (c) or (d) is a holiday, the notice of rescission is effective on the next day that is not a holiday. 2000, c. 3, s. 6 (5).

Franchisor's obligations on rescission

(6)The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,

(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;

(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and

(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c). 2000, c. 3, s. 6 (6).

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).

2. Regulation to the *Wishart Act* - General, O Reg 581/00

6. For the purposes of clause 5 (4) (a) of the Act, every disclosure document shall include the following presented together in one part of the document:

[...]

8. A description of the franchisor's policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor's associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly.

3. *Securities Act*, RSO 1990, c S.5

Publication of material change

75. (1) Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change. R.S.O. 1990, c. S.5, s. 75 (1); 1994, c. 11, s. 349.

Report of material change

(2) Subject to subsection (3), the reporting issuer shall file a report of such material change in accordance with the regulations as soon as practicable and in any event within ten days of the date on which the change occurs. R.S.O. 1990, c. S.5, s. 75 (2).

Exception

(3) A reporting issuer may, instead of complying with subsection (1), promptly file with the Commission the report required under subsection (2), marked as confidential, and its written reasons for doing so if,

(a) the reporting issuer reasonably believes that a disclosure required under subsections (1) and (2) would be unduly detrimental to its interests; or

(b) the material change consists of a decision made by the senior management of the reporting issuer to implement a change and the senior management,

(i) believes that confirmation by the board of directors of the decision to implement the change is probable, and

(ii) has no reason to believe that any person or company with knowledge of the material change has purchased or sold the reporting issuer's securities or traded a related derivative. 2010, c. 26, Sched. 18, s. 29 (1).

Idem

(4) Where a report has been filed with the Commission under subsection (3), the reporting issuer shall advise the Commission in writing where it believes the report should continue to remain confidential within ten days of the date of filing of the initial report and every ten days thereafter until the material change is generally disclosed in the manner referred to in subsection (1) or, if the material change consists of a decision of the type referred to in clause (3) (b), until that decision has been rejected by the board of directors of the issuer. R.S.O. 1990, c. S.5, s. 75 (4).

Requirement to disclose subsequently

(5) A reporting issuer that has filed a report under subsection (3) shall promptly disclose the material change in the manner referred to in subsection (1) if the reporting issuer becomes aware or has reasonable grounds to believe that a person or company having knowledge of the material change is purchasing or selling securities of the reporting issuer or trading a related derivative. 2010, c. 26, Sched. 18, s. 29 (2).

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

Amendment of certification order

8(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding. 1992, c. 6, s. 8 (3).

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)

and

PET VALU CANADA INC.
Defendant (Appellant)

Court File No. C55949

COURT OF APPEAL OF ONTARIO

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE APPELLANT, PET VALU CANADA INC.

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Geoffrey B. Shaw LSUC #: 26367J
gshaw@casselsbrock.com
Tel: 416.869.5982
Fax: 416.350.6916

Derek Ronde LSUC #: 46978W
dronde@casselsbrock.com
Tel: 416.869.5428
Fax: 416.640.3063

Eric Mayzel LSUC #: 58663P
Tel: 416.860.6448
Fax: 416.642.7144
emayzel@casselsbrock.com

Counsel for the appellant (defendant) Pet Valu Canada Inc.