SUPERIOR COURT OF JUSTICE

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No. of Pages Including Cover Sheet: 24
Date: January 7, 2015

RE: 1250264 ONTARIO INC. v. PET VALU CANADA INC.
COURT FILE NO.: CV-09-392962-CP

Please contact Gladys Gabbidon at (416) 327-5052 if you do not receive all pages. Thank you.

CITATION: 1250264 Ontario Inc. v. Pet Valu Canada, 2015 ONSC 29
COURT FILE NO.: CV-09-392962-CP
DATE: 20150107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
1250264 Ontario Inc.	)	*Louis Sokolov, Jean-Marc Leclerc and Shane P. Murphy* for the Plaintiff / Moving Party
Plaintiff	)	
	)	
– and –	)	
	)	
Pet Valu Canada Inc.	)	*Geoffrey B. Shaw, Derek Ronde and Eric Mayzel* for the Defendant / Responding Party
Defendant	)	
	)	
	)	HEARD: December 3 and 4, 2014

Proceedings under the Class Proceedings Act, 1992

Motion to Amend Pleadings and Certify a New Common Issue

Belobaba J.:

[1] This class action began as a complaint by the class member franchisees that the defendant franchisor failed to share volume rebates (or volume discounts) as required under the franchise agreement. The action was certified as a class proceeding[1] with seven common issues, all relating to the defendant's alleged failure to share volume rebates.[2]

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[1] *1250264 Ontario Inc. v. Pet Valu Canada Inc.* 2011 ONSC 287 (Certification).
[2] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941 (Common Issues).

[2] Pet Valu Canada, the defendant franchisor, then brought a motion for summary judgment on the seven common issues.[3] The motion for summary judgment proved to be largely successful. In a decision released on October 31, 2014 I found that Pet Valu not only shared the volume rebates with its franchisees on a reasonable basis as contractually required, but went further and passed on all of the volume and non-volume rebates to its franchisees by way of price reductions.[4] I found that the prices paid by the class member franchisees for their pet food and related products were on average 6 to 14 percent lower than those paid by their competitors.[5] I also found no basis for the allegation that the initial price reductions were then "clawed back" with unreasonable mark-ups.[6] In short, I concluded that the defendant franchisor 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.[7]

[3] The first five common issues were summarily answered in favour of the defendant franchisor or not answered at all. I answered Common Issue 1, which asked the core question about the volume rebates, in favour of the defendant. I also answered Common Issue 4, which asked about unjust enrichment, in favour of the defendant because, given my other findings, there was no unjust enrichment. Common Issues 2, 3 and 5 did not have to be answered. Common Issues 6 and 7 (which are set out in the Appendix) were deferred for reasons that will be explained shortly.

The motion that is now before me

[4] Before I released my decision in the summary judgment motion, the plaintiff moved to amend its statement of claim and certify a new Common Issue 8 that focused on purchasing power rather than volume rebates. The reason why the plaintiff filed this motion to amend its pleadings and add a new common issue was explained in my summary judgment decision. I can do no better than set out the excerpt in full.[8] For the convenience of the reader, excerpts from my summary judgment decision are shaded in gray.

[5] As this excerpt reveals, I was under the impression that new evidence had indeed been presented in the 2014 McNeely affidavit. This explains my suggestions to counsel and the reason why this motion is now before me.

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[3] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2014 ONSC 6056 (Summary Judgment)
[4] *Ibid.*, at paras. 17, 23 and 29.
[5] *Ibid.*, at para. 20.
[6] *Ibid.*, at para. 24 and 29.
[7] *Ibid.*, at para. 27.
[8] *Ibid.*, at paras. 32-43.

The motion to add a new common issue dealing with purchasing power

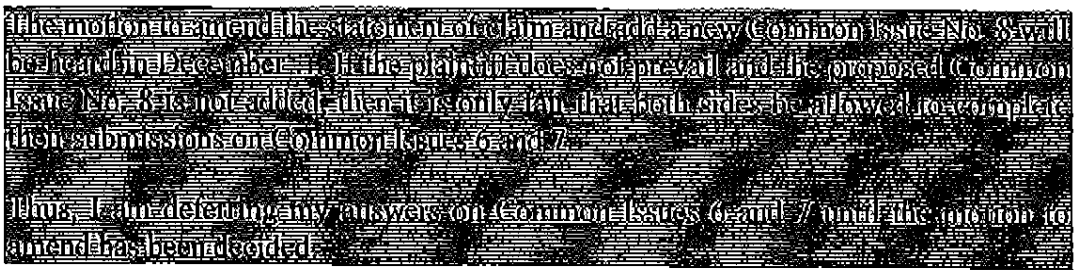
As the hearing of this summary judgment motion progressed, it became apparent that the plaintiff was shifting its focus from Volume Rebates to purchasing power. The plaintiff alleged repeatedly that many class members were facing declining margins and growing unprofitability. The initial complaint, however, as set out in the statement of claim, focused on the defendant's alleged failure to share volume related rebates. But in a supplementary affidavit filed this past summer (five years after this action was commenced), Thomas McNeely (Pet Value) president, stated that [Pet Value] in fact had "little to no purchasing power". Specifically, he said this:

> *Pet Value has little to no purchasing power with its major suppliers ... This is the case now and it has been the case historically ...*
>
> *Pet Value has less than a one percent share of the Canadian pet food and supply market. This market is estimated at $28 billion in 2008, based on the report by PMQ Capital Markets (the "PMQ Report"). Pet Value's system sales were approximately 7/10ths of 1 percent of this market last year. Pet Value, with less than one half of the Canadian pet food and supply market, has little bargaining power when dealing with this concentrated group of large suppliers ...*
>
> *Pet Value has little to no ability to influence the price at which it is supplied product ...*

Counsel for the plaintiff was, to say the least, surprised by these statements. But on further reflection, this new information about the defendant's overall lack of purchasing power may explain why the plaintiff could receive only $1,147 in volume discounts over the eight years of the class period, equivalent to a mere 1.3 per cent of net store costs.

The plaintiff argued that [Pet Value] falsely represented the nature and extent of its purchasing power and that these misrepresentations have caused enormous damage to the class members who relied on these representations when agreeing to become or continue on as franchisees.

Counsel for the plaintiff then tried to shoe-horn the little to no purchasing power revelation into the various sub-parts of Common Issue No. 6. It was not an easy fit. I suggested to both sides that they might consider a more direct approach – namely, amending the common issues by adding a new one dealing specifically with the purchasing power question. The plaintiff considered this suggestion and has now advised that it will be moving to amend the statement of claim and the common issues to add a new Common Issue No. 8 that will deal more directly with the purchasing power statement.



[6] The amended statement of claim now alleges that Pet Valu failed to disclose to its franchisees that it did not possess "substantial purchasing power" and that it did not receive "significant volume discounts" from suppliers. If the motion to amend succeeds, the plaintiff asks that a new Common Issue 8 be certified:

> Did the defendant have a duty at common law or pursuant to s. 3 or s. 5 of the *Arthur Wishart Act* to truthfully disclose to franchisees, in the disclosure document, the franchise agreement or otherwise during the course of the relationship of the parties, whether it possessed substantial or significant purchasing power and whether it received significant volume discounts offered by suppliers?
>
> If yes, did it breach its duty or duties?
>
> If yes, what damages or remedies are the class members entitled to, if any?

[7] The proposed amendments, set out primarily in paras. 42 to 54 of the amended statement of claim under the heading "non-disclosure of supplier rebates and benefits," plead breaches at common law and of ss. 3, 5, 6 and 7 of the *Arthur Wishart Act*.[9] The new Common Issue 8 captures these breaches and claims under the three sub-questions set out above. Note again that the focus is in two areas: purchasing power and volume discounts.

[8] The overall context for this motion is, to say the least, unusual. Almost all of the evidence about purchasing power and volume discounts has already been presented and considered in the summary judgment motion, and any "new evidence" such as the 2014 McNeely affidavit is inter-related with the evidence on the summary judgment motion. Put simply, this motion has a number of moving parts. I have therefore given much thought to the shape and content of these reasons for decision. I have concluded that it may make sense to first set out my decision in the form of findings and conclusions, and then provide my reasons for each of these findings or conclusions.

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[9] *Arthur Wishart Act* (Franchise Disclosure) 2000, S.O. 2000, c. 3.

Decision

[9] For the reasons that follow, I have concluded as follows:

(1) 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.

(2) In his 2014 affidavit, Mr. McNeely did not say that Pet Valu had "little to no purchasing power" full stop. It is obvious from the context that the 2014 McNeely affidavit was focused only on "vendors' list prices" and that Mr. McNeely's was saying no more than Pet Valu did not have enough purchasing power to affect or dictate the suppliers' list prices.

(3) It follows from this that there is no "new evidence" that Pet Valu does not have substantial or significant purchasing power. There is therefore no basis for the complaint about a generalized lack of purchasing power.

(4) In his 2012 affidavit, Mr. McNeely revealed that Pet Valu "did not receive significant volume-based benefits from its suppliers" and that the amounts received were "insignificant on an absolute and relative basis."

(5) However, in its disclosure document Pet Valu represented that it had "significant purchasing power" and was "able to take advantage of volume discounts offered by suppliers." On any fair reading of this statement, Pet Valu was telling potential franchisees that the volume discounts were meaningful and would in some way be of benefit to the franchisees.

(6) The reasonable expectation that Pet Valu was able to take advantage of volume discounts offered by suppliers and would, to some extent, share these discounts with its franchisees was reinforced by several provisions in the franchise agreement.

(7) There is therefore a basis for the complaint about the volume discounts. Pet Valu said one thing in the disclosure document – that "by virtue of its significant purchasing power" it was "able to take advantage of volume discounts" – and then failed to advise its franchisees that this was actually not the case.

(8) Nonetheless, 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.

(9) If I am wrong in finding said prejudice or injustice, then for the sake of completeness, I can advise the parties that I would have allowed the plaintiff to amend its pleadings but only with regard to the volume discount issue (not the "substantial or significant purchasing power" issue) and only with regard to the claims about the volume discount issue under ss. 3 and 7 of the *Arthur Wishart Act* (not ss. 5 or 6).

(10) Because the motion to amend is dismissed, I must decide the deferred Common Issues 6 and 7, which are limited to s. 3 of the *Arthur Wishart Act*. I answer Common Issue 6(i), 6(iii) and 6(iv) in favour of the plaintiff and I invite further submissions from the parties about what, if any, damages are payable by the defendant under Common Issue 7.

[10] I will now set out my reasons for each of these ten findings or conclusions.

Reasons

(1) Pet Valu has significant purchasing power in some areas

[11] Recall that this motion was prompted solely by the so-called revelation in the 2014 McNeely affidavit that Pet Valu has "little to no purchasing power." I find on the uncontroverted evidence before me that Pet Valu does have significant purchasing power. The evidence is clear that there are at least seven areas of benefits enjoyed by the franchisees that result from the franchisor's purchasing power:

- 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 franchisor;
- The development of unique and exclusive private label products;
- Co-op discounts (relating to promotion and merchandising);
- I&E discounts (relating to promotion and merchandising); and
- Volume discounts

[12] The evidence is clear that Pet Valu received a variety of rebates and allowances (and not just volume discounts) from suppliers and manufacturers, amounting to thousands of dollars, that reduced the net price paid by Pet Valu and were passed on to

the franchisees. Over the course of the class period, on the Top 100 products, the plaintiff received just under $50,000 in volume, Co-op and I&E discounts which amounted to 4.6% of net store costs. When temporary vendor discounts are included, the plaintiff received $56,119.72 in discounts, which amounted to 5.2% of net store costs. Over five years, from 2006 to 2010, the SMRP of the plaintiff's Top 100 products represented 30.1% of its total sales. Using this ratio, the total discounts for the five years for all of the plaintiff's purchases were approximately $144,920. Projected over the eight year class period, that amounts to about $217,380.

[13] 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.

[14] Given the purchasing power benefits enjoyed by the franchisees, it is highly unlikely that Mr. McNeely would have stated in his 2014 affidavit that Pet Valu had "little to no purchasing power." He must have meant something else. And indeed he did. I now turn to the 2014 affidavit.

(2) The 2014 McNeely affidavit

[15] On a fair reading of Mr. McNeely's 2014 affidavit, it is clear that he did not mean that Pet Valu had "little to no purchasing power" period. What he meant was that Pet Valu did not have the market power to dictate the list prices that suppliers were charging. The focus was on purchasing power that could affect these list prices, not on overall purchasing power. This becomes obvious when the 2014 affidavit is placed in the context of this litigation.

[16] Pet Valu was ready to proceed with its motion for summary judgment in March 2014. In response, the plaintiff cross-moved for summary judgment. When its cross-motion did not succeed, the plaintiff brought a motion for productions, alleging that it needed further documents – specifically vendor list price information. The plaintiff was alleging that the list prices provided by Pet Valu in its Pricing Model were not the true list prices. That, as a result of its significant purchasing power, Pet Valu was able to negotiate list prices that were lower than the list prices the suppliers gave to others – and that this differential was akin to a volume rebate or discount that should have been shared with the franchisees.

[17] In response to the production motion, I directed class counsel to submit a list of production questions about the "list price" issue and he did so. Thus, Pet Valu was obliged to confront the issue of whether its suppliers' list prices were true list prices or list prices that had been reduced by purchasing power.

[18] It is for this reason and in this context that Mr. McNeely provided the 2014 affidavit. In this affidavit, Mr. McNeely disputed the allegation that Pet Valu, because of its purchasing power, could negotiate list prices that were lower than the list prices offered to others. He explained that Pet Valu was not a large enough player in the North American pet food industry to dictate the list prices of multinational suppliers such as Nestle and Mars. It was in this context that Mr. McNeely stated that Pet Valu had "little to no purchasing power."

[19] There was no suggestion in the 2014 affidavit that Pet Valu had no purchasing power. Quite the contrary. Mr. McNeely described how Pet Valu was able to negotiate other kinds of discounts, allowances and rebates from suppliers – for example, promotional and merchandising allowances such as the Co-op and I&E discounts.

[20] I am now satisfied that the 2014 McNeely affidavit did not reveal "new evidence" that Pet Valu had little to no purchasing power. It simply confirmed that the vendors' list prices were true list prices and that in this one area Pet Valu did not have enough purchasing power to dictate these list prices.

(3) No basis for the purchasing power complaint

[21] I therefore have no difficulty concluding that there is no basis for the broad allegation that Pet Valu had "little to no purchasing power" full stop. I find that there is no basis for any of the proposed amendments or claims that relate to this broad allegation. None of these proposed amendments or claims about purchasing power *per se* are tenable, worthy of trial or prima facie meritorious.[10]

(4) The 2012 McNeely affidavit

[22] Recall that the proposed Common Issue 8 focuses attention on two complaints, purchasing power and volume discounts. The source of the purchasing power complaint is the 2014 McNeely affidavit as just discussed. The source of the volume discount complaint is the 2012 McNeely affidavit.

[23] In his August 3, 2012 affidavit, Mr. McNeely stated that "Pet Valu did not receive significant volume-based benefits from its suppliers." And, further, that "these volume allowances are insignificant on an absolute and relative basis." I noted in my summary judgment decision that over the eight years of the class period, the plaintiff itself received only $14,147 in volume discounts "equivalent to a meager 1.3 per cent of net store

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[10] *Marks v. Ottawa (City)* 2011 ONCA 248. I will return to the criteria set out in this decision later in these reasons.

costs."[11] There is no dispute about the fact that the volume discounts obtained by Pet Value were miniscule, indeed virtually non-existent.

(5) The disclosure document

[24] In its disclosure document, however, Pet Valu presented a very different picture about volume discounts. It advised potential franchisees that, through its subsidiary Peton Distributors, it purchased "large volumes directly from manufacturers" and that it had "significant purchasing power" and was "able to take advantage of volume discounts offered by suppliers."

> Pet shops and pet product superstores are primary competitors of Pet Valu stores for the sale of pet supplies. Pet Valu stores generally offer lower prices than pet shops. While in most instances PVCI (through Peton Distributors Inc.) *purchases in large volumes directly from manufacturers* and distributes products through its own warehousing and distribution system, pet shops generally purchase from distributors who charge higher prices than manufacturers to cover their sales and delivery costs.
>
> PVCI's wholly owned subsidiary, Peton Distributors Inc., distributes pet food and supplies to all company-owned and franchised stores. 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.* (Emphasis added.)

[25] Pet Valu argues that nothing was actually promised in these disclosure document statements and that, in any event, all of the volume discounts, meager though they were, were passed on to the franchisees. I do not agree with this submission. On any fair reading of the last sentence as italicized above, Pet Valu is telling potential franchisees two things: one, that it has significant purchasing power that enables it to take advantage of volume discounts offered by suppliers; and two, that this will translate into a meaningful benefit to the franchisee. Indeed, why would Pet Valu make this representation in the disclosure document if not to strongly signal some kind of meaningful pricing benefit to franchisees? And the fact that the (almost non-existent) volume discounts were all passed on to the franchisees does not preclude the latter from complaining about the powerful representation that was made in the disclosure document.

(6) The franchise agreement

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[11] *Supra*, note 3, at para. 39.

[26] Several provisions in the preamble and body of the franchise agreement reinforce 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. Here is how I described the relevant provisions in the franchise agreement in my summary judgment decision:[12]

> *The agreement*
>
> I begin with the recitals to the Agreement, which set forth the basis of the relationship between the parties and record their "fundamental understandings." The recitals make clear that PVCL had "substantial purchasing power" and that this purchasing power would be used for the benefit of both the franchisor and the franchisees. It is important to note that the recitals in this particular franchise agreement are given considerable force. Section 1(a) of the Agreement provides that the recitals "form a part of this Agreement and are acknowledged by the parties to be true in substance and in fact," and that the Agreement must be "interpreted and acted upon in accordance with the recitals hereof." Taken as a whole, the recitals strongly suggest that PVCL has significant purchasing power and this purchasing power will be used to obtain pricing benefits that will be passed along, at least to some extent, to the franchisees.
>
> The purchasing power/pricing benefits theme is continued in the body of the Agreement itself. In s. 27(a) of the Agreement, the franchisee acknowledges that "a fundamental component of the Pet Valu System" is "the ability of PVCL 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." This reflects and reinforces the franchisor's statement in the disclosure document that PVCL is wholly owned subsidiary, Peton Distributors, "supplies the vast majority of the products sold by the Pet Valu franchised stores," has "significant purchasing power" and therefore is "able to take advantage of volume discounts offered by suppliers."

[27] The franchise agreement also provides in s. 22(f) that "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." This provision reinforces the representation in the disclosure statement by noting that volume allowances granted by suppliers and based on Pet Valu's "annual purchasing power" can be expected and will be allocated or shared in some fashion with the franchisees. I concluded in my summary judgment decision that Pet Valu

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[12] *Supra*, note 3, at paras. 10-11.

was contractually obliged to share volume-based allowances with its franchisees "in a reasonable manner."[13] As it turned out, however, I found that Pet Valu passed along all of the volume allowances to its franchisees by way of pricing reductions.[14]

(7) There is a basis for the volume discounts complaint

[28] The point, however, is not that the miniscule amount of volume discounts received were passed on to the franchisees but that Pet Valu was unable to obtain a meaningful or significant measure of volume discounts from its suppliers, contrary to what was represented in the disclosure document. There is therefore a basis for the complaint that Pet Valu represented in the disclosure document that "by virtue of its significant purchasing power" it was "able to take advantage of volume discounts" and then failed to advise its franchisees that this was actually not the case.

(8) Nonetheless, the plaintiff's motion to amend the pleadings is dismissed

[29] The plaintiff's motion to amend its statement of claim (and add a new common issue) must be dismissed on the ground of prejudice to the defendant. The applicable law is not in dispute. As a general rule, pleading amendments are routinely approved. It is only in unusual situations that a proposed amendment to the statement of claim will be denied. As the Court of Appeal explained in *Marks v. Ottawa*:[15]

> Although the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings. The court has a residual right to deny amendments where appropriate ... [T]he proper factors to be considered ... can be summarized as follows:
>
> - An amendment should be allowed unless it would cause an injustice not compensable in costs;
> - The proposed amendment must be shown to be an issue worthy of trial and prima facie meritorious;
> - No amendment should be allowed which, if originally pleaded, would have been struck;
> - The proposed amendment must contain sufficient particulars.

[30] 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

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[13] *Ibid.*, at para. 16.
[14] *Ibid.*, at paras 17, 23 and 29.
[15] *Marks v. Ottawa, supra,* note 10, at para. 19.

add a new common issue. Absent my judicial intervention, the summary judgment motion would have concluded and the defendant would likely have prevailed on most of the common issues.

[31] I am therefore satisfied that there is actual prejudice to Pet Valu in respect of the proposed amendments and 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. The representative plaintiff (a defunct corporation) likely has no assets that can satisfy a judgment. It was suggested that the plaintiff could simply commence another class action alleging the Common Issue 8 matters if the motion to amend did not proceed. But I now agree with Pet Valu that a new class proceeding was far from guaranteed. There were numerous hurdles, financial and procedural, that could well have discouraged a new class proceeding.

[32] I am now satisfied that the last minute addition of a pleadings motion that adds a new common issue at the end of the summary judgment hearing tilts the class proceeding in the plaintiff's favour. As Perell J. noted: "...defendants, just as much as plaintiffs, are entitled to access to justice"[16] and that the "court should also be aware that the procedure of a class action is meant to level the playing field, not tip the field in the favour of plaintiffs."[17] I am persuaded that this motion to amend pleadings in the unusual circumstances herein is prejudicial to the defendant and the nature of this prejudice is not compensable in costs.

[33] The motion is therefore dismissed solely on the ground of prejudice.

(9) For the sake of completeness

[34] If I am wrong in dismissing this motion on the prejudice ground, then for the sake of completeness, I will set out what I would have decided. I would have allowed the plaintiff to amend its pleadings but only with regard to the volume discount issue (not the "substantial or significant purchasing power" issue) and only with regard to the claims about the volume discount issue under ss. 3 and 7 of the *Arthur Wishart Act* (not ss. 5 or 6).

[35] I will briefly explain.

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[16] *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390 at para. 17.

[17] *Ibid.*, at para. 18.

[36] ***Sections 5 and 6.*** The ss. 5 and 6 rescission claim is untenable for at least two reasons. First, there are no franchise agreements that can be rescinded. All of the class members are former franchisees. The current franchisees have opted out of this class proceeding. Rescission is therefore not a viable remedy. If the claim is damages for losing the opportunity to rescind had timely disclosure been made, then the appropriate remedial vehicles are ss. 7 or 3. Secondly, even if rescission was available, the 60-day and two-year limitation periods set out in s. 6(1) and (2) have long expired. In sum, the pleading amendments and claims relating to ss. 5 and 6 of the *Arthur Wishart Act* are neither worthy of trial nor prima facie meritorious.

[37] ***Section 7.*** If this motion was not being dismissed on the basis of prejudice, I would have found that the pleading amendments and damage claims relating to s. 7 (only with regard to the volume discounts issue and not the substantial purchasing power issue) were tenable and worthy of trial. It is certainly arguable that in its disclosure document Pet Valu misrepresented its ability to obtain a meaningful measure of volume discounts from its suppliers. Given that the information about the virtual non-existence of volume discounts was revealed more than two years ago, in August, 2012, the s. 7 damages claim may now be time-barred. However, the plaintiff argues otherwise and submits that limitation periods should be pleaded in a statement of defence and discoverability is not something that should be decided on a pleadings motion.[18] I am inclined to agree. To track the language of the Court of Appeal in *Beardsley v Ontario*,[19] I am unable to say that "it is plain and obvious form a review of the statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired."[20] Nor do I agree with the defendant's submissions that no "loss" has been established. The plaintiff alleges that it lost the opportunity to rescind and recover damages had timely (and truthful) disclosure been provided. In my view, the s. 7 claim is at least tenable and worthy of trial.

[38] ***Section 3.*** I will deal with the s. 3 claim in more detail when I answer Common Issue 6 later in these reasons. At this point, it is sufficient to note that if this motion was not being dismissed on the basis of prejudice, I would have found that the plaintiff's s. 3 claim was at least tenable and the related amendments would have been granted. Given the decisions in *Salah*,[21] *Country Style*,[22] *Cuts Fitness*,[23] and *Hyundai Auto*,[24] I find it at

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[18] *Andersen Consulting v Attorney General of Canada*, [2001] O.J. No. 3576 (C.A.) at para. 35.
[19] *Beardsley v Ontario*, [2001] O.J. No. 4574 (C.A.)
[20] *Ibid.*, at para. 29.
[21] *Salah v. Timothy's Coffees of the World Inc.* [2010] O.J. No 4336 (C.A.)
[22] *1159607 Ontario Inc. v. Country Style Food Services Inc.* [2012] O.J. No.1241 (S.C.J.)
[23] *Burnett Management Inc. v. Cuts Fitness for Men*, [2012] O.J. No. 2527 (S.C.J.)
[24] *1323257 Ontario Ltd. v Hyundai Auto Canada Corp.*, [2009] O.J. No. 95 (S.C.J.)

least arguable that there can be a post-contractual disclosure obligation under s. 3 of the *Arthur Wishart Act* with regard to material information that relates in some way to the performance of the contract.

(10) Common Issues 6 and 7

[39] Because the motion to amend pleadings has been dismissed, I must decide Common Issues 6 and 7 which were deferred in my summary judgment decision. They are attached in the Appendix for ease of reference.

[40] Because Common Issues 6 and 7 refer only to breaches of duties at common law and under s. 3 of the *Arthur Wishart Act* it may be helpful to begin with the reminder that:

> The *Arthur Wishart Act* is unquestionably remedial legislation, designed to address the power imbalance between franchisor and franchisee. As such, it is entitled to a generous interpretation to give effect to its purpose.[25]

[41] Sections 3(1) and (3) of the Act provide in combination that every franchise agreement imposes upon each party a duty of good faith and fair dealing "in its performance and enforcement." It is generally accepted that section 3(1) is a codification of the common law.[26] Section 3(2) provides a right to damages for breach of the duty of good faith and fair dealing that is "separate and in addition"[27] to compensation for pecuniary losses.

[42] The plaintiff says that Pet Valu breached the statutory duty of good faith and fair dealing by not telling its franchisees (until 2012, three years into this litigation) that it had no purchasing power when it came to volume allowances and was not able to obtain the meaningful level of volume discounts that it expected and promised in the franchise documentation.

[43] In my view, the plaintiff makes a compelling submission.

[44] Consider again what was represented in the disclosure document: that Pet Valu had "significant purchasing power" and was "able to take advantage of volume discounts offered by suppliers." On any fair reading of this statement, as I have already concluded,

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[25] *Fairview Donut Inc. v The TDL Group Corp.*, 2012 ONSC 1252 at para. 496.
[26] *Ibid.*, at para. 495.
[27] *Salah, supra*, note 21, at para. 29.

Pet Valu was telling potential franchisees that the volume discounts would be meaningful and would in some way be of benefit to the franchisees.

[45] I have also found that several provisions in the preamble and body of the franchise agreement reinforced the reasonable expectation that Pet Valu's "substantial purchasing power" would be used in part to obtain pricing benefits that would be passed along, at least to some extent, to the franchisees. In s. 27(a) of the franchise agreement, the franchisee was required to acknowledge that "a fundamental component of the Pet Valu System" is "the ability of PVCI 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."

[46] The franchise agreement also provided in s. 22(f) that "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." As I have already noted, this provision reinforced the representation in the disclosure statement by noting that volume allowances granted by suppliers and based on Pet Valu's "annual purchasing power" could indeed be expected and would be allocated or shared in some fashion with the franchisees. I concluded in my summary judgment decision that Pet Valu was contractually obliged to share volume-based allowances with its franchisees "in a reasonable manner."[28] As it turned out, Pet Valu passed on all of the volume allowances to its franchisees by way of pricing reductions.[29]

[47] The point, however, is not that Pet Valu passed on all of the volume discounts, meager 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.

[48] There can be no dispute about the importance or materiality of this information. The fact that volume discounts were virtually non-existent is a "material fact" as defined in the *Arthur Wishart Act*: information "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."[30] Or, I would add, the decision to renew or terminate the franchise.

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[28] *Supra*, note 3, at para. 16.
[29] *Ibid.*, at paras. 17, 23 and 29.
[30] *Supra*, note 7, s. 1(1).

[49] There is also no dispute about that the fact that this essential piece of information was not disclosed until 2012, well into this litigation. The plaintiff tried to obtain this information from Pet Valu in 2009 before commencing this lawsuit but was rebuffed. The plaintiff tried again after the action was certified as a class proceeding but was again refused. When certain franchisees requested information about volume rebates before signing releases, they were again ignored. Pet Valu's follow-up motion to validate the releases was dismissed by the certification judge. Strathy J. underscored the importance and materiality of the volume discount information and commented that Pet Valu's position that it did not have ready access to this information was "incredible":

> 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. I leave for another day, should it become necessary, the determination of whether this information should be required as a condition of any order for declaratory or other relief.[31]

[50] That day has come. The plaintiff now asks in Common Issues 6 and 7 that the court determine whether Pet Valu breached its obligations under s. 3 of the *Arthur Wishart Act* in failing to advise its franchisees about the non-existence of volume discounts.

[51] I find on the evidence before me that Pet Valu decided for its own purposes to keep the volume discount information to itself and not tell its franchisees. 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.

[52] In *Salah*,[32] the court found that the franchisor "actively sought to keep the franchisee from finding out what was going on with the lease"[33] and "deliberately withheld critical information."[34] In *Country Style*,[35] the court found that the franchisor

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[31] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871, at para. 18.
[32] *Supra*, note 21.
[33] *Ibid.*, at para. 22.
[34] *Ibid.*
[35] *Supra*, note 22.

kept critical lease information from franchisees, while "actively leading them to believe the lease had been renewed" when it had not.[36] 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."[37] In *Cuts Fitness*,[38] 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."[39]

[53] In each of these cases, the information being withheld was material information that if disclosed would have allowed the franchisee to make an informed business decision. In *Hyundai Auto Canada*,[40] another example of a franchisor hiding a material fact, Brown J., as he then was, put it this way:

> Courts of this province repeatedly have characterized franchise agreements as ones giving rise to a duty of utmost good faith ... Given that nature of a franchise agreement, it is certainly open on the law for [the franchisee] to advance an argument that its franchisor, was under a duty to it to disclose facts material to the matters ultimately contracted for in the Minutes ... A very arguable case exists that the parties to such franchise agreements operate subject to obligations to disclose material facts relating to issues involving such agreements.[41]

[54] This is not *Spina v. Shoppers Drug Mart*,[42] where Perell J. correctly concluded that s. 3 does not impose disclosure obligations for routine or non-material information. Here, however, the volume discount information at issue was highly material, indeed "fundamental." Recall that s. 27(a) of the franchise agreement provided that "a fundamental component of the Pet Valu System" is "the ability of PVCI 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." And, as I found in the summary judgment decision:

> This [provision] reflects and reinforces the franchisor's statement in the 'disclosure document' that PVCI's wholly-owned subsidiary, Peton Distributors, "supplies the vast majority of the products sold by the Pet

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[36] *Ibid.*, at para. 129.
[37] *Ibid.*, at para. 130.
[38] *Supra*, note 23.
[39] *Ibid.*, at para. 58.
[40] *Supra*, note 24.
[41] *Ibid.*, at paras. 80 and 86
[42] *Spina v Shoppers Drug Mart Inc.*, 2012 ONSC 5563.

> Valu franchised stores," has "significant purchasing power" and therefore is "able to take advantage of volume discounts offered by suppliers.[43]

[55] Pet Valu argues that it was not obliged under s. 3 of the *Arthur Wishart Act* to advise the franchisees about the non-existence of volume discounts, even if this constituted material information, because the disclosure of this information did not involve or relate to the "performance and enforcement" of the franchise agreement. I do not agree. The material representation about Pet Valu's significant purchasing power and ability to generate meaningful volume discounts is rooted in the disclosure document, but the volume purchasing power/pricing benefits theme is continued in the franchise agreement where it is acknowledged to be a "fundamental component" of the Pet Valu franchise system.

[56] In performing its contractual obligation to share volume discounts on a reasonable basis, Pet Valu had to track and record the volume discounts and share or pass them on to the franchisees by way of pricing reductions. These pricing benefits, including information about the level of volume discounts were, to say the least, important to the franchisees. 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"[44] 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.

[57] I therefore find that Pet Valu breached the duty of good faith and fair dealing under s. 3 of the *Arthur Wishart Act.* I agree with the plaintiff that it was the franchisee's fundamental right under the *Arthur Wishart Act* to decide whether to enter into, renew or terminate the agreement based on the disclosure of all material facts - particularly those, such as volume buying and lower pricing (via volume discounts) that are described in the franchise agreement as being a "fundamental component" of the franchise system.

[58] Two final comments before I turn to the deferred Common Issues 6 and 7. The first is that the franchisor's duty to disclose important and material facts that relate to the ongoing performance of the franchise agreement under s. 3 of the *Arthur Wishart Act* is not precluded by the existence of the comprehensive disclosure regime set out in s. 5 of the Act. As this court concluded in the *Salah, Country Style* and *Cuts Fitness* line of cases, there can indeed be situations where fair dealing requires that the franchisor tell the franchisee the truth about an important and material fact – particularly if the opposite was stated in the disclosure document and franchise agreement. Secondly, while it is true that

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[43] *Supra,* note 3 at para. 11.
[44] *Hyundai Auto, supra,* note 24, at para. 80.

the Supreme Court in *Bhasin*[45] suggested that the common law duty of honesty in the performance of contractual agreements "does not impose a duty ... of disclosure"[46] and that "[t]he duty of honest performance ... should not be confused with a duty of disclosure"[47] 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"[48] that arise under the statutory prescription set out in s. 3 of the Act. In any event, as I have already noted, in each of the cases discussed above – *Salah, Country Style, Cuts Fitness* and even *Hyundai Auto* – the breach of the duty of good faith and fair dealing was clearly and indisputably rooted in non-disclosure on the part of the franchisor.

[59] Turning now to Common Issues 6 and 7. As I have already noted, they are set out in full in the Appendix.

[60] Common Issue 6 asks whether the franchisor was obliged under s.3 to disclose certain information – for example, in 6(i) whether volume rebates were received. Strictly speaking, the question in 6(i) does not ask whether the franchisor "received significant volume discounts offered by suppliers" (the language in proposed Common Issue 8) but whether the franchisor "receives volume rebates." In my view, however, 6(i) should be interpreted as also asking if "significant volume discounts" were received by the franchisor. I say this for two reasons. First, counsel for Pet Valu have taken this position in their factum – that the question about "significant volume discounts" in Common Issue 8 "duplicates" existing Common Issues 6" and that "Pet Valu should not have to face repetitive common issues." Secondly, the more reasonable interpretation of Common Issue 6(i) in the context of this litigation is whether Pet Valu received a meaningful or significant measure of volume discounts and not just whether they received *any* amount, however meager.

[61] Here then are the answers to Common Issue 6. Did Pet Valu had a duty under s. 3 of the *Arthur Wishart Act* to disclose the following five items of information to class members and if so, did it breach such duty?

(i) Whether Pet Valu received (a significant level of) volume rebates.

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[45] *Bhasin v. Hrynew*, 2014 SCC 71.
[46] *Ibid.*, at paras. 74.
[47] *Ibid.*, at para. 86.
[48] *Salah, supra,* note 21, at para. 28.

Answer: *Yes. For the reasons set out in the body of this decision, Pet Valu had a duty under s. 3 of the Arthur Wishart Act to disclose this information to its franchisees and it breached this duty.*

(ii) Pet Valu's policy for allocating the volume rebates.

Answer: *No. Pet Valu set out its policy in s. 22(f) of the franchise agreement, which has already been interpreted as meaning "allocating or sharing on a reasonable basis." No further disclosure is needed. There was no breach of any duty under s. 3.*

(iii) The amount of volume rebates that Pet Valu received.

Answer: *Yes. For the reasons set out in the body of this decision, Pet Valu had a duty under s. 3 of the Arthur Wishart Act to disclose this information to its franchisees and it breached this duty. Questions 6(i), 6(iii) and 6(iv) are connected. In my view, Pet Valu should have advised its franchisees about the non-existence of volume discounts as found in 6(i) or, failing that, it should at least have provided information about the amounts received, retained and shared so that franchisees could draw their own conclusions and make further informed decisions.*

(iv) The amount of volume rebates retained or shared.

Answer: *Same as 6(iii).*

(v) The criteria for determining how much of the volume rebates were retained or shared.

Answer: *Same as 6(ii).*

[62] Common Issue 7 asks whether the plaintiff is 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? Given that the class members are former franchisees who have sold their franchises, there is no reason to order information disclosure at this point. The more appropriate remedy is damages under s. 3 of the *Arthur Wishart Act* for breach of the duty of good faith and fair dealing.

[63] As for "what damages, if any, is the defendant required to pay for the breach of such duty" I will require further submissions on the following points. Are s. 3 damages barred by any limitation period? Are they available on an aggregate basis? What amount, if any, should be awarded on the facts of this case? I invite counsel on both sides to arrange a case conference with me so that oral or written submissions on the s. 3 damages question can be scheduled.

Disposition

[64] The plaintiff's motion to amend pleadings and add a new Common Issue 8 is dismissed.

[65] Common Issues 6(i), 6(iii) and 6(iv) are answered in favour of the plaintiff. Common Issues 6(ii) and (v) are answered in favour of the defendant franchisor. Common Issue 7, asking what, if any, damages are payable by the defendant for breach of the s. 3 duties, will be answered after a case conference and the receipt of further submissions.

[66] My thanks to counsel for their assistance.

Belobaba J.

Date: January 7, 2015

Appendix – Deferred Common Issues 6 and 7

6. Did the defendant have a duty at common law to the Class Members or under section 3 of the A.W.A. 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?

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CITATION: 1250264 Ontario Inc. v. Pet Valu Canada, 2015 ONSC 29
COURT FILE NO.: CV-09-392962-CP
DATE: 20150107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff

– and –

PET VALU CANADA INC.

Defendant

REASONS FOR JUDGMENT

BELOBABA J.

Released: January 7, 2015