

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff (Respondent)
(Appellant by cross-appeal)

- and -

PET VALU CANADA INC.

Defendant (Appellant)
(Respondent by cross-appeal)

Proceeding under the *Class Proceedings Act, 1992*

**REPLY FACTUM OF THE RESPONDENT
(Appellant by cross-appeal)**

August 5, 2015

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1. Pet Valu's responding factum to the plaintiff's cross-appeal cites a recent decision from the Superior Court of Justice that struck a claim for good faith and fair dealing brought under s. 3 of the *Arthur Wishart Act (Addison Chevrolet Buick GMC Limited et al. v. General Motors of Canada Limited et al., 2015 ONSC 3404)* ("*Addison*").

2. The *Addison* decision, which is under appeal, is of no assistance to Pet Valu in this case because it is wholly distinguishable on its facts.

3. *Addison* was brought by a group of dealers of GM automobiles in the Greater Toronto Area who alleged that government bailout monies in a new U.S. General Motors entity "should have been used in part to bail *them* out".¹ The Superior Court of Justice struck all claims against

¹ *Addison*, para. 4.

the GM U.S. entity (with whom the plaintiffs had no contractual relationship) and struck four paragraphs of the statement claim that alleged that GMCL (the Canadian GM corporate entity) misapplied the bailout funds.

4. The dealers in *Addison* made allegations under s. 3 of the *Arthur Wishart Act* that bore little relation to the claims made in this case, and, indeed, were unsupported by any of the cases that have interpreted s. 3. In summary they claimed that s. 3 implied an obligation “(i) not to put [GM’s] own interest in selling automobiles at a profit ahead of the plaintiff dealers’ interest in obtaining maximum volume or “throughput” of vehicles; (ii) to provide the plaintiffs with financial support similar to that provided to dealers in the United States [...] and (iii) to consider the dealers’ interests when requiring them to expend substantial funds renovating and updating their dealership locations under the “re-imaging” obligations agreed to by the plaintiffs in their franchise agreements.”² In short, their complaint was that GM preferred its own interest to that of its dealers.

5. Unlike this case, which was decided on an extensive summary judgment record, the decision in *Addison* was based on a pleadings motion, in which the judge held “the content of the statutory duty of fair dealing is not specified in the AWA and I am disinclined to attempt to delineate that duty exhaustively in a pleadings motion such as this.”³

6. The plaintiffs in *Addison* “declined every invitation to plead particulars of the source of extent of this claimed obligation and lean heavily if not exclusively on the doctrines of good faith

² *Ibid.*

³ *Ibid.*, para. 107.

to suggest that silence in their agreements on the subject of the claimed special subsidies and support may yet be supplied to a visit to the judicial oracle.⁴

7. By contrast, in this case, as explained in the plaintiff's appeal factum, Justice Belobaba findings were based upon multiple, overlapping provisions in the disclosure document and the franchise agreement that supported the plaintiff's s. 3 claim. For example, he held:

(a) "In the disclosure document, Pet Valu presented a very different picture about volume discounts";⁵

(b) "The volume discounts obtained by Pet Valu were minuscule, indeed virtually non-existent";⁶

(c) "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 franchisees [...]";⁷

(d) The franchise agreement "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."⁸

(e) "The material representations about Pet Valu's significant purchasing power and ability to generate meaningful volume rebates is rooted in the disclosure document, but

⁴ *Ibid.*, para. 111.

⁵ *Ibid.*, para. 24.

⁶ Summary judgment decision dated January 7, 2015, para. 23.

⁷ *Ibid.*, para. 26.

⁸ *Ibid.*, para. 27.

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.”⁹

8. These and other findings involving the interpretation of the franchise agreement and the disclosure document led Justice Belobaba to conclude 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.”¹⁰ As explained in the plaintiff’s factum submissions, his conclusion is entitled to deference.

9. In *Addison*, there were no factual particulars to support a breach of s. 3. In this case, the breach that the motion judge found was fully supported by the evidentiary record. There is no meaningful comparison that can be drawn from the two cases.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 5, 2015



Louis Sokolov



Jean-Marc Leclerc

⁹ *Ibid.*, para. 55.

¹⁰ *Ibid.*, para. 47.

SCHEDULE “A” – CASES

Addison v. General Motors of Canada Limited et al., 2015 ONSC 3404.

SCHEDULE "B" – STATUTES

Arthur Wishart Act (Franchise Disclosure), 2000 SO 2000 C 3.

Fair dealing

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

Right of action

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

Interpretation

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

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