CITATION: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287
COURT FILE NO.: CV-09-392962-00CP
DATE: 20110114

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
1250264 ONTARIO INC.	
Plaintiff/Moving Party	*Allan D.J. Dick and David Sterns*, for the Plaintiff/Moving Party
- and -	
PET VALU CANADA INC.	
Defendant/Respondent	*G.B. Shaw and C.M. Bartlett,* for the Defendant/Respondent
	HEARD: October 21 & 22, 2010

REASONS FOR JUDGMENT ON CERTIFICATION

G.R. Strathy J.:

[1] This is a motion by the plaintiff, a franchisee in the "Pet Valu" chain, to certify this proceeding as a class action against the franchisor, Pet Valu Canada Inc. ("Pet Valu", sometimes referred to as "PVCI"), pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*"). I will refer to the plaintiff by the name of its principal, Robert Rodger, as "Rodger."

[2] Rodger claims that Pet Valu franchisees have a right to receive the benefit of Pet Valu's substantial purchasing power by obtaining products at reduced cost and that they have a right to share all volume-based rebates, allowances and discounts given to Pet Valu by suppliers (which, for the sake of convenience, I will call "Volume Rebates"). He says that in breach of these rights, Pet Valu appropriates all Volume Rebates to itself and requires franchisees to buy inventory, including both its private label products and "name brand" products, at prices that make them unprofitable. He also says that Pet Valu levies excessive charges for distribution and delivery of products.

[3] Pet Valu says that this class action is really an attempt by Rodger to coerce it into buying his unprofitable franchise. It claims that the would-be class action has no support amongst its franchisees, that Rodger's poor management is the real source of his problems, and that the practices about which he complains are specifically authorized by his franchise agreement.

[4] For the reasons that follow, I have decided to certify this action as a class action. I will, however, limit the common issues to those involving Volume Rebates. There is some basis in fact for Rodger's core complaint that Pet Valu has a duty to share Volume Rebates with its franchisees, that it has failed to do so, and that this has caused damage or potential damage to every franchisee. Rodger has pleaded tenable causes of action, has indentified a suitable class and has proposed common issues of fact and law that arise from a common franchise agreement and from conduct of the defendant that is common to all franchisees. The resolution of these common issues in favour of the plaintiff would advance the claim of every class member. The resolution of these issues in favour of the defendant would end the litigation. I have concluded

that a class proceeding is a fair and efficient manner of resolving the common issues and that the plaintiff is a suitable representative of the class.

Background

[5] The Pet Valu chain consists of specialty retail stores selling pet food and supplies. It is the largest retail pet food and supply business in Canada, with sales in 2008 exceeding $220 million. Pet Valu is the franchisor of 155 "Pet Valu" stores, 145 of which are located in Ontario and 10 in Manitoba. In addition, Pet Valu operates 114 corporately-owned stores under the "Pet Valu" and "Pet Valu Better Pet Nutrition" names and approximately 100 retail stores under other trade names.

[6] Rodger carries on business as a Pet Valu franchisee in Aurora, Ontario. He acquired the business, which had been in operation for some years, in 2005. He executed a franchise agreement on April 4, 2005, which was effective up to June 15, 2008, with an option to renew for a further five year period ("the Franchise Agreement"). It was renewed for an additional period of one year, until June 15, 2009. Before that term had expired, Pet Valu agreed to extend the Franchise Agreement for an additional four years.

[7] A franchisee purchases the majority of its inventory of food and supplies from Pet Valu. Pet Valu purchases these products through its wholly-owned subsidiary, Peton Distributors ULC ("Peton"). Peton buys the products from third party manufacturers and sells them to Pet Valu, which in turn sells them to the franchisees. The goods include both "private label" products, marketed under a Pet Valu name or trademark, and "name brand" products, produced by other

manufacturers. For the purposes of this motion, Peton and Pet Valu can be treated as one entity and the defendant did not attempt to suggest otherwise.[1]

[8] Rodger swears that franchise agreements entered into between Pet Valu and its franchisees are identical in all material respects. Pet Valu did not challenge this assertion in its own responding affidavits, although it does so in a supplementary factum, complaining that Rodger does not provide a basis for his "belief" that the franchise agreements are identical. In the absence of evidence from Pet Valu that Rodger's agreement is not typical, it is a reasonable assumption that the Pet Valu "system" is based on common contractual arrangements with franchisees. Indeed, uniformity is one of the hallmarks of franchising. Had this been an issue, I would expect that it would have been front and centre in Pet Valu's submission that the claims of class members lack the necessary commonality.

[9] In 2010, Pet Valu established a new form of agreement, for use with new franchisees as well as for renewals with current franchisees, but as of the date of hearing it had declined to produce that agreement. It was produced after the hearing, unsupported by any affidavit evidence, as part of Pet Valu's submissions as to whether the class should include Pet Valu franchisees located in the Province of Manitoba. I will discuss that issue later in these reasons.

[10] The ongoing cost of participation in the Pet Valu franchise system is significant. Apart from the initial cost of the franchise, the franchisee is required to pay:

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[1] For example, the disclosure document provided to all franchisees states that Peton distributes pet food and supplies to all company-owned and franchised stores, and says that "[b]y virtue of its significant purchasing power [Peton] is able to take advantage of volume discounts offered by suppliers." On the other hand, section 22(f) of the franchise agreement indicates that these volume allowances are granted to Pet Valu based on its purchasing volume. The franchise agreement refers to Pet Valu, and not to Peton, as the supplier of products to franchisees.

(a) an annual franchise fee of $2,400 per year;

(b) a royalty, payable weekly, of 6% of gross sales or imputed gross sales;

(c) percentage rent, being the amount by which 10% of gross sales or imputed gross sales exceeds the minimum rent in the same fiscal year – Mr. Rodger's evidence is that at his current sales levels this resulted in a mark-up of his rent by over 95%;

(d) a fee for the point of sale system of approximately $160 per month;

(e) a surcharge of up to 10% on the price of private label products;

(f) a charge of up to 3% of gross sales on purchases of merchandise from suppliers other than PVCI, as well as royalties, percentage rent and promotion fund charges on such purchases;[2]

(g) a promotion fund charge of up to 3% of imputed gross sales; and

(h) a distribution charge of 5.14% of the imputed retail price on products purchased from Pet Valu.

[11] There is no question that the franchise relationship can bring significant benefits to Pet Valu franchisees. It enables them to operate a small business, under a recognized banner, and to have access to a centralized purchasing and delivery system that enables them to offer their customers a wide range of products and nationally-recognized brands, including Pet Valu's own private label brands. In theory, the arrangement allows small businesses to compete with "big box" pet stores, by offering an array of products at low prices and by providing the value-added service of an experienced and trained staff.

The Plaintiff's Complaints

[2] It is admitted that this 3% charge has not been levied historically and that, although Pet Valu is entitled to approve such purchases, no request has ever been denied.

[12] A common thread running through Rodger's case is that Pet Valu's huge purchasing power, as one of the largest buyers of pet food and supplies in Canada, gives it the ability to negotiate low prices and Volume Rebates with suppliers and that these must be shared with franchisees by providing them with products at discounted prices. Rodger says that without these low prices, franchisees will never be profitable, as they face high franchise charges and low margins driven by stiff competition.

[13] Rodger relies on certain recitals in the Franchise Agreement, which are expressed to set forth the relationship, understandings and expectations of the parties. The recitals refer to Pet Valu's substantial purchasing power and refer to an obligation on all franchisees to promote and enhance the "collective purchasing power and the business image of all Pet Valu stores."

[14] Rodger also relies on s. 27(a) of the Franchise Agreement, which provides, in part, as follows:

> The Franchisee Acknowledges that 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 is a fundamental component of the Pet Valu System.

[15] Section 27 imposes certain obligations on franchisees with respect to permitted purchases outside the Pet Valu system. This includes an undertaking not to purchase merchandise that is not authorized by Pet Valu or merchandise from a supplier other than Pet Valu, unless the price is lower than the price available from Pet Valu and Pet Valu has consented to the purchase.

[16] The statement of claim goes on to allege that Pet Valu has failed to pass on the benefits of its purchasing power to its franchisees and instead retains those benefits for itself. Rodger makes three specific complaints in this regard. He says that Pet Valu:

(a) fails to share Volume Rebates with franchisees;

(b) improperly marks up the price of private label products; and

(c) charges excessive amounts for delivery of inventory to franchisees.

[17] I will now review the applicable contractual provisions, and the evidence concerning these complaints. My review will include an examination of whether there is support for the existence of common issues of fact or law arising from these complaints.

(a) Failure to Share Volume Rebates

[18] Rodger's first complaint is that Pet Valu has retained Volume Rebates to itself. He pleads that Pet Valu is required to pass on these benefits to its franchisees.

[19] To understand this complaint, it is necessary to explain Pet Valu's method of calculating the price at which it sells products to franchisees. The following are the most important components:

- Peton begins with a "list price", which is taken from the vendor's price list or from prices determined between the vendor and Peton's buyer;

- freight, duty and other costs are added, in order to arrive at the landed cost of the goods in Peton's warehouse;

- any "volume discounts" offered by the product vendor as "rebates" or allowances are deducted – according to Pet Valu, these include discounts offered as a result of purchasing full truckloads of merchandise;

- other discounts, including "off invoice deals" are deducted – these include discounts that are negotiated for long periods of time by the Peton buyers and are not tied to any specific performance by Peton and its customers;

- these various additions and deductions result in the "realized cost", which is the starting point for pricing to Peton's customers;

- various additional charges are then added to the realized cost, to develop an invoice cost to the franchisee;

- one of these additional charges is the wholesale profit, which is the profit component added by Peton – the profit level appears to vary from product to product – in the examples provided by Pet Valu, the wholesale profit increased the price of some products by as much as 18%, 22% and 33%;

- other charges added include the private label surcharge (where applicable), the promotion fund charge and the distribution charge; and

- in some cases, where a franchisee's prices may be higher than a competitor's due to operating in a particular area or "price lane", (for example, near a "big box" discount store), Pet Valu may provide the franchisee with a subsidy.

[20] Pet Valu's evidence is that it takes Volume Rebates into account in determining its "realized cost" of any particular product. That is, rebates, discounts and allowances are deducted from the cost that Pet Valu has paid for the product, in order to determine Pet Valu's "realized cost" of that product. This cost then becomes the starting point for the determination of the price at which the product is sold to franchisees. To determine that price, Pet Valu adds certain additional costs, and its "wholesale profit." Pet Valu's evidence is that this amount "varies from item to item and is set so as to maximize Peton's profit while keeping the price below the market price from other wholesalers to the best of the information available to Peton." It says that in pricing the cost of products to its franchisees, it seeks to maximize its profit, while at the same

time endeavouring to "match or beat" the price that a franchisee would pay if it bought the product on its own from a competing supplier.

[21] This pricing methodology can be illustrated by one of the examples used by the president of Pet Valu to explain how Pet Value arrives at the invoice price it charges to the franchisee. He used examples of products actually sold to Rodger. I will take the case of a product described as SKU [stock-keeping unit] #11693:

The vendor's list price[3]		$59.88
Deductions		
Volume discount[4]	(5.69)	
E Discount[5]	(1.50)	
I Discount[6]	(12.00)	
Total discounts		(19.19)
Realized cost to Pet Valu[7]		40.69
Add Pet Valu's Wholesale Profit[8]		7.32
Store Cost[9]		48.01

[3] The vendor's list price is taken from the supplier/vendor's price list or results from communications between the vendor and Peton's buyer.
[4] These include volume discounts offered by the vendor as rebates or allowances.
[5] These discounts relate to amounts offered by vendors for maintaining particular products in a certain number of stores.
[6] These are described as "ongoing off-invoice deals" which are negotiated for long periods of time and not tied to performance by Peton or its customers.
[7] The realized cost is arrived at after making various additions and deductions from the vendor's list price, including the deductions referred to above.
[8] Peton then adds its wholesale profit. Pet Valu says that this amount varies from item to item "so as to maximize Peton's profit while keeping the prices below the market price from other wholesalers to the best of the information available to Peton."
[9] The store cost amount is shown on the invoice to the franchisee. Additional charges, including the promotion fund charge and the distribution charge, are added to arrive at the total invoice cost.

Promotion Fund charge[10]	1.44
Distribution charge[11]	3.85
Franchisee's invoice cost [12]	53.30

[22] It will be seen from this example that on an item with a list price of $59.88, Peton's actual cost, after deduction of rebates and allowances of $19.19, is only $40.69. The actual invoice cost charged to the franchisee is $53.30. The difference is attributable to Peton's profit of $7.32, the promotion fund charge ($1.44), and the distribution charge ($3.85), which the franchisee is contractually obliged to pay.

[23] The price paid for a product by a particular franchisee will depend on its location, both in terms of geography and in relation to key competitors. Pet Valu has four costs zones, charging the same price for a particular product to franchisees within the zone. The zones are:

(a) Southern Ontario (107 franchisees);

(b) Winnipeg (11 franchisees);

(c) Northern Ontario (5 franchisees); and

(d) Stores located near a Pet Smart (a competitor) store, regardless of the location (32 franchisees).

[24] In addition, Pet Valu divides franchisees into different "price lanes" depending on their location in relation to key competitors. The price lane in which a particular store is located may determine the suggested maximum retail price at which the store is permitted to sell particular products. As well, a store in a particular price lane may receive a subsidy on the price of a

[10] The promotion charge of 3%, set out in the franchise agreement, is added to the store cost.
[11] The 5.14% distribution charge is calculated on the total extended retail price and is added to the merchandise cost.
[12] The total is what the franchisee pays for the merchandise described on the invoice.

particular product, enabling that store to sell the product at a competitive price, given its location in relation to competitors.

[25] With this background, I return to Rodger's complaint that Pet Valu fails to share Volume Rebates with its franchisees. The sharing of rebates from suppliers is the subject of a disclosure requirement under Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*A.W.A.*"). Section 5 requires the franchisor to provide a prospective franchisee with a disclosure document, before the signing of the franchise agreement, containing disclosure of "all material facts, including material facts as prescribed."

[26] Ontario Regulation 581/00 under the *A.W.A.* requires that the disclosure document contain a description of the franchisor's policy with respect to rebates - specifically:

> 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.[13]

[27] The purpose of this provision is to prevent the franchisor from secretly profiting from purchases made by franchisees from suppliers designated by the franchisor. The statute does not prohibit the franchisor from receiving rebates, but it must disclose whether it receives them and, if so, whether it shares them.

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[13] O. Reg. 581/00, s. 6.8.

[28] The disclosure document provided to franchisees by Pet Valu, as required by the *A.W.A.*, refers to Pet Valu's significant purchasing power and its ability to effect volume purchases using its own warehousing and distribution system:

> PCVI'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.

[29] The document continues:

> 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.

[30] Under the heading "Volume Rebates", the following statements are made:

> PVCI does not provide volume rebates to its franchisees in respect of purchases of Merchandise, Equipment or Operating Supplies from PVCI. PVCI does, however, attempt to negotiate favourable prices for these items from its various suppliers.
>
> Neither PVCI nor any of its associates receives any rebates, commissions, payments or other benefits from suppliers as a result of purchases of goods and services made directly from such suppliers by Pet Valu franchisees.

[31] These statements are in technical compliance with s. 6.8 of O. Reg. 581/00, quoted above, since the second paragraph accurately states that Pet Valu receives no rebates from purchases made by franchisees. The fact is, however, that 95% of franchisees' purchases are made directly from Pet Valu, which in turn obtains the goods from Peton, which in turn does

receive "rebates, commissions, payments or other benefits" from the suppliers from which it purchases. Interestingly, while the first paragraph of this statement indicates that Pet Valu does not provide rebates to franchisees in respect of the franchisees' purchases from Pet Valu, it does not specifically mention that the prices negotiated by Peton with its suppliers include Volume Rebates that are provided by those suppliers.

[32] I referred earlier to certain provisions of the Franchise Agreement that speak of Pet Valu's substantial purchasing power. These include the following recital:

> AND WHEREAS PVCI has substantial purchasing power in relation to products for resale, equipment, services and operating supplies;

[33] As well, the definition of the "Pet Valu System" itself refers to "buying power and buying systems of PVCI which collectively and severally benefit the operation of Pet Valu stores."

[34] The Franchise Agreement holds out the promises that specific allowances and other benefits received by Pet Valu from suppliers as a result of its substantial purchasing power will be shared with franchisees. The plaintiff relies upon the following provisions of the Franchise Agreement, dealing with "promotional allowances", "volume allowances", and other "non-monetary benefits":

> 22(e) Promotional allowances granted to PVCI by a supplier or manufacturer shall be allocated as more particularly set forth in the Pet Valu Franchise Business System except if the Franchisee does not meet the performance requirements by PVCI or by a supplier or manufacturer to earn the promotional allowance.

> 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.
>
> . . .
>
> 23 (c) Any non-monetary benefits granted by a supplier or manufacturer to PVCI including but not limited to, premiums, consumer give-aways, advertising materials, contest opportunities, and posters, for distribution to or through Pet Valu stores, shall be allocated by PVCI among PVCI-owned and franchised Pet Valu stores on the basis of PVCI's reasonable estimate of need provided that the basis for allocation does not discriminate against franchised Pet Valu stores in favour of PVCI-owned Pet Valu stores. Allocation of such benefits may be limited by PVCI to a proportionate share of benefits based upon sales volume. [Emphasis added.]

[35] Paragraph 22(f) of the Franchise Agreement contains an acknowledgment that "volume allowances" may be given to Pet Valu by suppliers or manufacturers and contains a promise that they are to be "allocated" as set out in the Pet Valu Franchise Business System. The use of the term "allocated" implies that they will be distributed or used for a specific purpose.

[36] When one turns to the Pet Valu Franchise Business System, under the heading "Allowances", Pet Valu sets out the basis on which "certain allowances affecting the Franchisee's costs of Merchandise, Operating Supplies and promotional materials are calculated by [Pet Valu]." Paragraph c.3 provides:

> The Franchisee's invoice cost of Merchandise shall be subject to the inclusion or the exclusion of merchandising performance or volume allowances as follows:
>
> (a) Performance funds received by [Pet Valu] shall be allocated to the franchisee by means of a proportionate reduction in invoice cost, except where such performance funds are negotiated on the basis of performance by the Franchisee and the Franchisee fails to perform and

> such failure is not excused by [Pet Valu]. Such performance funds, whether provided to [Pet Valu] by way of a reduction in invoice price or by separate cheque, shall be passed on to the Franchisee for a period of time equal in length to the period of time in respect of which such funds were made available by the supplier to [Pet Valu]. [Emphasis added.]

[37] The next subsection, (b), deals with the allocation of listing allowances provided by suppliers in return for the display of new lines of merchandise in Pet Valu stores. Subsection (c) deals with special net prices provided by a supplier to Pet Valu, which are to be made available to franchisees. Subsection (e) provides for "promotional allowances" provided by a supplier to Pet Valu, which are to be passed on to franchisees as a reduction in invoice cost.

[38] Surprisingly, notwithstanding the promise made in s. 22(f) of the Franchise Agreement, and the language of para. c.3 of the Pet Valu Franchise Business System itself, there is no description of how "volume allowances" are to be allocated or whether the invoice cost of merchandise to franchisees is inclusive or exclusive of "volume allowances." Counsel for Pet Valu had no explanation for this omission – nor, apparently, did his client.

[39] The omission is troublesome in view of the clear evidence, contained in the affidavit of the President of Pet Valu and in a pricing example prepared by him, that Peton obtains such rebates and allowances from suppliers. These rebates and allowances have various descriptions, including "volume discounts offered by the vendor as rebates or allowances", "cooperative marketing allowances" or discounts offered by vendors, ongoing expense reimbursement discounts, and ongoing "off invoice deals." The latter are described as "negotiated for long periods of time by the Peton buyers that are not tied to any specific type of performance by Peton or its customers."

[40] I now return to Pet Valu's pricing structure described above. Volume Rebates are deducted from Pet Valu's cost of each particular product to determine its realized cost before Pet Valu adds its wholesale profit. The amount of this wholesale profit varies from item to item and is set so as to maximize Pet Valu's profit while keeping the price below the market price at which the same product is available from other wholesalers. The result, says Rodger, is that the Volume Rebates received by Pet Valu as a result of its massive purchasing power, fueled in large part by the purchasing needs of the franchisees, become phantom rebates. Rodger says they are gobbled up by Pet Valu in order to maximize its profits. He complains that the only constraint on the price charged to and paid by franchisees is the price charged by other suppliers to a single purchaser, who has none of Pet Valu's purchasing power and who does not have to pay the royalties and other charges imposed by Pet Valu on its franchisees for the privilege of participating in its franchise system.

[41] Pet Valu's answer on this motion is that the Volume Rebates are in fact shared with the franchisees because they reduce the cost of goods to Pet Valu and ultimately to the franchisee. Rodger's retort is that if Volume Rebates were really used to reduce the cost of goods, those costs would be consistently and substantially less than the price charged by other suppliers. In fact, the more significant factor in the pricing is not the desire to make the goods available to franchisees at the lowest possible cost, but rather the desire by Pet Valu to maximize its own profits without making the price uncompetitive. Since Pet Valu sets the price at which goods are sold to franchisees, it can determine whether all or any part of Volume Rebates are passed on to franchisees.

[42] Pet Valu franchisees face stiff competition on several quarters. Perhaps their toughest competition comes from large grocery chains that also purchase in volume and from "big box" pet food superstores that do the same. Pricing is undoubtedly competitive and margins are thin. It does not take an expert economist to know that with maximum retail prices fixed by Pet Valu and constrained by a competitive market, the cost of goods is a vital factor in the profitability of every franchisee. Considering that the franchisee has an obligation to make significant payments to Pet Valu before seeing any profits, the issue of the franchisee's entitlement to share in Volume Rebates is a factor that vitally affects its profitability.

[43] I have concluded that there is some basis under the Franchise Agreement, and some factual basis arising from Pet Valu's pricing methodology, for Rodger's complaint that Volume Rebates are not shared with franchisees and for the assertion that Pet Valu has a legal obligation to give franchisees the benefit of such rebates, allowances and discounts in its pricing of goods supplied to franchisees. There is certainly no express provision of either the Franchise Agreement or of the Pet Valu Business System that permits Pet Valu to appropriate all Volume Rebates to itself. Whether it is entitled to do so is an important issue that affects all class members. The resolution of the issue involves the interpretation of a franchise agreement that is common to all class members and arises out of conduct of Pet Valu that affects all class members in precisely the same way.

[44] I am not satisfied that there is a similar contractual or evidentiary basis relating to promotional allowances, performance funds or non-monetary benefits. While Pet Valu has contractual obligations relating to these items, there is no evidence that it has breached its

obligations. Nor is there any basis for the more general assertion that there is an obligation to supply products to franchisees at low cost.

(b) Improper Mark-up on Private Label Products

[45] Rodger's second complaint is that Pet Valu charges excessive and unauthorized mark-ups on its private label products sold to franchisees. He pleads that Pet Valu is not permitted to negate its fundamental obligation to use its purchasing power for the benefit of all Pet Valu stores by charging mark-ups on such products, directly or indirectly, without specific authorization. He pleads that section 22(c) of the Franchise Agreement permits Pet Valu to charge a 10% mark-up on private label products "above their net cost", and that any mark-up in excess of this percentage is impermissible.

[46] Section 22(c) provides:

> The Franchisee may purchase any Merchandise offered for sale by PVCI during the Term at prices and applicable fees and charges established by PVCI from time to time. Prices of Private Label Products shall include a surcharge of up to ten percent (10%) to defray PVCI's costs relating to the packaging and sale of Private Label Product including, but not limited to, subsidization of the costs of delivery to SAS accounts, all as more particularly set forth in the Pet Valu Franchise Business System as amended by PVCI from time to time. [Emphasis added.]

[47] Also relevant is Part C of the Pet Valu Business System, which deals with the basis upon which certain allowances affecting the franchisee's cost of merchandise are calculated. Section 2 of that part states that the franchisee's invoice cost for private label products shall include a surcharge of up to 10% of the franchisee's "invoice cost prior to the said surcharge." The proceeds of this charge are to be used for a "Private Label Development Fund", which is

intended to offset the costs of developing and marketing Pet Valu's private label products, among other things. The Pet Valu Business System states that the fund "shall not be a source of profit contribution to PVCI and shall be used by PVCI to promote Private Label Products." Moreover, it provides that any unused balance in the fund is to be transferred to the "Promotion Fund" or rebated to franchisees on a pro rata basis in proportion to their contribution to the total private label sales of all franchised and corporate Pet Valu stores.

[48] There is no basis for the allegation that the 10% surcharge on private label products is limited to the "net cost." A charge based on the invoice cost is specifically authorized by the Pet Valu Business System.

[49] Rodger also says that Pet Valu has no contractual right to charge any mark-up on "name brand" products that are sold to franchisees because it is required to give franchisees the full benefit of its purchasing power. There is no contractual or evidentiary basis to support a common issue based on this allegation.

[50] There is a basis for the proposition that, to the extent the price of private label products fails to deduct the franchisees' share of Volume Rebates, the franchisees may have been over-charged for their contributions to the fund since their 10% contribution would have been applied to an excessive price. The ability of a franchisee to recover its share of Volume Rebates should include instances where other charges made by Pet Valu have been artificially enhanced by the failure to give credit for the franchisee's share of allowances and rebates.

(c) Improper Delivery Charges

[51] Rodger's third complaint is that Pet Valu charges a 5.14% delivery charge to all franchisees on all purchases of products, which is based on the suggested retail price of such products, as opposed to the wholesale cost. He says that this charge is not permitted by, or disclosed in, the Franchise Agreement, nor was it disclosed to prospective franchisees in Ontario, as required by the *A.W.A.*

[52] The Franchise Agreement clearly authorizes Pet Valu to impose a delivery charge. Under the heading "Merchandise", the Franchise Agreement states in para. 22(c) that:

> The Franchisee may purchase any Merchandise offered for sale by PVCI during the Term at prices and applicable fees and charges established by PVCI from time to time.

[53] Section c. 4 of the Pet Valu Business System provides that the invoice cost for any merchandise ordered from Pet Valu is to be "subject to a distribution charge in such amount as PCVI may from time to time determine".

[54] The evidence is that Pet Valu has consistently imposed a delivery or distribution charge, initially pegged at 5% based on historical warehousing and delivery costs. It was increased in October 2005 to 5.14% by the addition of a fuel surcharge. Pet Valu's evidence is that this charge does not fully recover its costs of warehousing and delivery. The charge is fixed on a national level so as not to impose uncompetitive charges on franchisees in more remote locations. Rodger has adduced no evidence to establish that the distribution charge does not reflect Pet Valu's actual costs or that the charge is commercially unreasonable.

[55] I am unable to find any basis for the complaint with respect to the delivery charge, other than the possible flow through effect of the charge being levied on prices that do not reflect the franchisee's entitlement, if any, to Volume Rebates.

Evidentiary Issues

[56] Before applying the test for certification, I will briefly comment on some evidentiary objections that were made on both sides.

[57] In asserting that Rodger fails to meet the common issues test and that the action is otherwise unsuitable for certification, Pet Valu relies on the affidavit of an expert economist, Professor Roger Ware of Queen's University. Professor Ware gave expert evidence in *2038724 Ontario Ltd v. Quizno's Canada Restaurant Corp.* (2010), 100 O.R. (3d) 721, [2010] O.J. No. 2683 (C.A.), aff'g (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.), rev'g (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (S.C.J.) ("*Quizno*'s"). The gist of Professor Ware's evidence is that the terms of Pet Valu's agreement with its franchisees are perfectly rational and fair in the context of a franchisor-franchisee relationship. The franchisor, as the owner and innovator of the brand, the developer of the methodology and trade secrets, and the creator of the supply chain, is entitled to organize its arrangements with franchisees in order to maximize efficiency and the value of the franchise brand. The goal is to achieve profitable returns to both parties to the relationship, but there is no requirement that the returns be shared equally.

[58] Professor Ware adds that the plaintiff paints a distorted picture of the franchise relationship by describing it as little more than a buying group, to serve the interests of the

franchisees by obtaining volume discounts on supplies. He says that Pet Valu does obtain volume discounts, which are passed on to franchisees, but there is no requirement that this should occur in a mechanical, dollar for dollar, fashion. He expresses the opinion that franchisors regularly realize profits from the distribution of products to their franchisees in order to "reap the rewards of their innovation" and that it would be self-defeating to overcharge the franchisees because "to do so would diminish the brand and the reputation of the entire chain itself."

[59] The plaintiff attacks Professor Ware's qualifications, pointing out that he has no expertise in matters of franchising.

[60] I found the evidence of Professor Ware of little value in addressing the issues on this motion. His evidence was scarcely referred to in argument. The issue on this motion is not whether Pet Valu is entitled to act as a rational franchisor or to maximize its profits, including profits earned as a result of Volume Rebates given to it by suppliers. The issue is whether there is an evidentiary basis for common issues based on the pleading that appropriation of such profits for itself was a breach of contractual, statutory or common law duties owed by Pet Valu to its franchisees. Professor Ware's evidence is of no value in addressing this question.

[61] Pet Valu, for its part, challenged some aspects of the evidence of Rodger, including statements of information or belief that failed to disclose a source or were bald assertions, as well as allegedly inaccurate or irrelevant references to the evidence contained in the plaintiff's factum. Suffice to say that I have ignored statements made, either in the affidavit of Rodger or in the plaintiff's factum, that are not properly admissible including the results of a survey undertaken by the Canadian Franchise Council ("C.F.C."), a body representing Pet Valu

franchisees in their relationship with Pet Valu. The results of the survey are clearly hearsay. On the other hand, the minutes of the meetings of the C.F.C. executive are admissible as business records, either at common law or under the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, s. 35. Pet Valu itself refers to those minutes in its submissions.

[62] There is no evidence that the franchise agreement signed by Rodger was not common to the class and indeed the Manitoba franchise agreement dated January 2, 2001, produced by Pet Valu after the hearing is in substantially the same form as the agreement executed by Rodger. Nowhere in Pet Valu's responding material is it suggested that Rodger's Franchise Agreement is different in any relevant way from the franchise agreements of other members of the class. Nor is there any evidence that Rodger was treated any differently, in terms of his entitlement to Volume Rebates, than any other member of the class. It was simply Pet Valu's position that Volume Rebates were shared with the class because they were used to reduce Pet Valu's realized cost.

The Test for Certification

[63] The test for certification is set out in s. 5(1) of the *C.P.A.* The pleadings must disclose a cause of action. There must be an identifiable class of two or more persons whose claims raise common issues. A class proceeding must be the preferable procedure for the resolution of the common issues and there must be an appropriate representative plaintiff. It has been said that these requirements are linked: "[t]here must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification

of behaviour of wrongdoers": see *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14.

[64] The parties are in agreement with the principles applicable to certification motions, as summarized in *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears*, 2010 ONSC 4571, [2010] O.J. No. 3921 (S.C.J.) ("*McKee's v. Sears*") at para. 30:

> (a) The *C.P.A.* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the Ontario Law Reform Commission, *Report on Class Actions* . . . and by the Supreme Court of Canada are: judicial efficiency; improved access to the courts; and, behaviour modification, or the generation of "a sharper sense of obligation to the public by those whose actions affect large numbers of people."
>
> (b) The *C.P.A.* is entirely procedural. The certification stage is not meant to be a test of whether the plaintiff's claim will succeed. In the event that subsections (a) through (e) of s. 5(1) of the *C.P.A.* are satisfied, certification of the action by the court is mandatory.
>
> (c) The *C.P.A.* provides the courts with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and often-intertwined legal issues, some of which are common and some of which are not.
>
> (d) Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order, and it may be amended, varied or set aside at any time.
>
> (e) The court has no discretion to refuse to certify a proceeding as a class proceeding solely on the ground that one or more of the following are present: (i) the relief claimed would require individual damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; (iv) the number or identity of class members is not known; (v) the identified class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members.

> (f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical.
>
> (g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order". It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action.
>
> (h) *"Some basis in fact"* is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial. [References omitted.]

[65] I will review each of these requirements in s. 5(1) of the *C.P.A.*

(a) Cause of Action

[66] Pet Valu does not dispute that the claim meets the "cause of action" test in s. 5(1)(a) of the C.*P.A.* It admits that Rodger has properly pleaded causes of action for breach of contract, breach of the duty of fair dealing conferred by s. 3 of the *A.W.A.,* and unjust enrichment. Similar causes of action were pleaded and approved for certification in *Quizno's* and in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.), leave to appeal to Div. Ct. granted (2003), 64 O.R. (3d) 42, [2003] O.J. No. 1089 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.) ("*A. & P.*").

(b) Identifiable class

[67] Section 5(1)(b) of the *C.P.A.* requires that there be an identifiable class of two or more persons who will be represented by the proposed plaintiff. The class definition fulfills three

purposes: (a) it identifies the persons who have a potential claim for relief against the defendants; (b) it defines the parameters of the lawsuit so as to identify those persons who will be bound by the result; and (c) it describes the persons entitled to notice of certification: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 at para. 10 (Gen. Div.). The class definition must state objective criteria by which class members can be identified: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 S.C.J. No. 63 at para. 38; *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 17.

[68] The proposed class consists of all persons carrying on business as a franchisee under a franchise agreement with Pet Valu at any time on or after December 31, 2003.

[69] Claims on behalf of franchisees have frequently been found to fulfill the "identifiable class" requirement: *Quizno's; A. & P.*; *Rosedale Motors Inc. v. Petro-Canada Inc.*, [2001] O.J. No. 5368 (Div. Ct.), rev'g (1998), 42 O.R. (3d) 776, [1998] O.J. No. 5461 (Gen. Div.); *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada* (2000), 48 O.R. (3d) 753, [2000] O.J No. 1815 (Div. Ct.), rev'g [2000] O.J. No. 533 (S.C.J.); *McKee's v. Sears.*

[70] The proposed class meets this requirement. It is objective and not merits-based. There is a rational relationship between the class and the common issues, since it consists entirely of persons who have or have had a direct contractual relationship with Pet Valu. It identifies the persons who have a potential claim against the defendant and who will be bound by the court's judgment on the common issues. It establishes a class that is not unlimited. There is a clearly defined group who can be specifically identified. The commencement date of December 31, 2003 is the day before the *Limitations Act, 2002*, S.O. 2002, c. 24 sched. B came into effect.

[71] The defendant's real complaint is that, although a class can be objectively identified, there has been no demonstration by the plaintiff that there is a group of similarly-situated individuals who share his concerns and are seeking access to justice. The defendant says that the plaintiff is required to show that his claim is more than idiosyncratic: *Ducharme v. Solarium de Paris Inc.* (2007), 48 C.P.C. (6th) 194, [2007] O.J. No. 1659 (S.C.J.); *Zicherman v. Equitable Life Insurance Co. of Canada* (2000), 47 C.C.L.I. (3d) 39, [2000] O.J. No. 5144 (S.C.J.). The defendant relies upon the following statement in *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 at para. 33, [2004] O.J. No. 2242 (S.C.J.):

> [B]efore the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

[72] I do not agree with this submission on this issue. The plaintiff's evidence is that the cost of goods is of vital importance to franchisees, a proposition that could hardly be debated. The evidentiary record supports the conclusion that costs, margins and store profitability have been an ongoing concern for franchisees. Minutes of meetings of the executive committee of the C.F.C. demonstrate a concern that Pet Valu had not shared its profits with its franchisees, that the share of the "profit pie" had not reached the store level, and that store margins were unacceptably low.

[73] Pet Valu submits that the class should not include franchisees located in Manitoba because the governing law clause of the franchise agreements of Manitoba franchisees select Manitoba law as the governing law. The "old" form of agreement in Manitoba contained a

jurisdiction provision to the effect that "[t]he Franchisee hereby agrees to trial in the Regional Municipality of York in the Province of Ontario." The "new" form provides that the agreement is to be construed in accordance with the laws of the province where the store is located. The franchisee consents to the exclusive jurisdiction of the courts of the Province of Ontario.

[74] Pet Valu submits, again unsupported by evidence, that of the 15 franchisees who carried on business in Manitoba after December 31, 2003:

> (a) six continue to carry on business under franchise agreements entered into before February 2010 (presumably the date in which the "new" form of agreement came into effect);
>
> (b) five former franchisees who carried on business of some period on or after December 31, 2003, have since ceased to operate; and
>
> (c) four franchisees, who previously operated under the "old" form of franchise agreement, currently carry on business under "new" forms of franchise agreements that they entered into after February 2010.

[75] Pet Valu submits that the relief sought in this action and the common issues proposed by the plaintiff depend on the applicability of the *A.W.A.* and that in view of the choice of law provisions in the agreements executed by the Manitoba franchisees, Manitoba law, not Ontario law, plainly applies. Moreover, the scope of the *A.W.A.* itself is plainly limited to circumstances where "the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario" (s. 2(1)).

[76] I accept Pet Valu's submission that the *A.W.A.* is substantive law and cannot apply to an agreement expressly governed by the law of another province. There is no basis on which the

court could disregard the express choice of law by the Manitoba franchisees: see *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 at paras. 40-45, 322 D.L.R. (4th) 177.

[77] The question remains whether Manitoba franchisees should be included in the class. All the Manitoba franchisees have operated under the "old" form of franchise agreement which was in use in Ontario and is at issue in this action. All have signed agreements which accept the jurisdiction of the Ontario courts for the resolution of disputes under the agreement. If this action is certified, the Manitoba franchisees will be given notice of the decision and an opportunity to opt out. While the Manitoba franchisees do not have claims based on the *A.W.A.*, they do share claims with their Ontario colleagues based on common law rights, breach of contract and unjust enrichment.

[78] In *Quizno's*, claims for breach of contract and breach of a common law duty of good faith were certified on behalf of all franchisees in Canada. I see no reason why there should not be a sub-class of Manitoba franchisees, who will have an interest only in those common issues that do not depend on the *A.W.A.* for their resolution. They are entitled to assert claims for breach of contract, breach of the common law duty of good faith and unjust enrichment, none of which depend on the application of the *A.W.A.*

[79] I see no reason, at least at present, for a separate representative plaintiff for the Manitoba sub-class, as there will be no conflict with Ontario class members on the common issues in which Manitoba class members have an interest. If the need arises at a future date, the issue can be re-visited.

[80] The production of the "new" form of franchise agreement, at this late date, raises the issue of whether the class should include franchisees who signed the "new" form after February, 2010. I suggest that this issue, and any necessary amendment to the temporal description of the class, should be discussed at a case conference.

(c) The Common Issues

[81] Counsel agree with the principles concerning common issues set out in *McKee's v. Sears* at para. 43:

> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis.
>
> B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues . . . the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues.
>
> E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim.
>
> F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class.
>
> G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the

> successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.
>
> H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.
>
> I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis.
>
> J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient." [References omitted.]

[82] Looking at this case in overview, there are two important factual commonalities:

> (a) a common form of franchise agreement applicable to all franchisees; and
>
> (b) common behaviour of Pet Value under this franchise agreement in the treatment of Volume Rebates, pricing of products, and charges to franchisees that affects the franchisees in the same way, although its impact may vary from franchisee to franchisee.

[83] These commonalities give rise to two important legal issues:

> (a) common issues of interpretation arising out of the franchise agreement; and
>
> (c) common legal issues with respect to the duties of the franchisor under the franchise agreement, under the *A.W.A.* and at common law.

[84] The parties disagree about whether the issues that would move this class action forward are capable of resolution on a common basis. Rodger says that many of the issues can be resolved by looking at the Pet Valu "system", including the common franchise agreement, common business system and common accounting procedures and by taking a "top down"

analysis of the issues that focuses on the conduct of the defendant. Pet Valu, not surprisingly, says that in order to resolve the issues, it is necessary to undertake a "granular" analysis of individual franchisee behaviour and that the resolution of the common issues requires an examination of individual issues.

[85] As noted earlier, I have concluded that Rodger has met the minimum evidentiary burden of establishing the existence of common issues concerning Pet Valu's alleged duty to share Volume Rebates with franchisees. I have also concluded that he has failed to meet that burden with respect to the pricing of private label products and distribution charges. This substantially simplifies the common issues analysis in this case and does away with many of Pet Valu's arguments based on the "granularity" of the inquiry that would be necessary to address the common issues.

[86] I will begin by examining the common issues proposed by Rodger. I will suggest that the appropriate common issues can and should be simplified.

First Common Issue

[87] The proposed issue is as follows:

> Does Pet Valu have a duty under the franchise agreement to use the system-wide purchasing power of the Pet Valu system for the benefit of all Pet Valu stores? If so, has Pet Valu breached such duty at any time since December 31, 2003 (the "Class Period") by,
>
> (i) directly or indirectly, charging mark-ups on products, other than private label products, purchased by the franchisees from Pet Valu? and
>
> (ii) by charging a distribution fee to the franchisees without specific authorization under the franchise agreement?

[88] There is no basis for a common issue based on either of these complaints. As I observed earlier, mark-ups are permitted by s. 22(c) of the franchise agreement and nothing prohibits them. The distribution fee is authorized by the agreement and has not been shown to be unreasonable. The broad question at the opening of the issue, which asks whether Pet Valu has a duty to use its purchasing power for the benefit of all Pet Valu stores, is too general to be of any value in advancing the claims of the class.

Second Common Issue

> Has Pet Valu breached its contractual duties to the franchisees at any time during the Class Period by:
>
> (i) charging, directly or indirectly, a mark-up of greater than 10% on private label products in breach of Section 22 (c) of the franchise agreement?
>
> (ii)failing to allocate to the franchisees in the manner required by s. 22 (e) of the franchise agreement promotional allowances granted to it by a supplier or manufacturer?
>
> (iii) failing to allocate to the franchisees in the manner required by s. 22 (f) of the franchise agreement volume allowances granted to it by a supplier or manufacturer?
>
> (iv) failing to allocate to the franchisees in the manner required by s. 23(c) of the franchise agreement non-monetary benefits granted by a supplier or manufacturer to Pet Valu?

[89] There is no basis for a common issue based on mark-up of private label products (item (i)), except as regards the application of the 10% mark-up to prices that may be inflated if there is a duty to account for Volume Rebates. There is no basis for a complaint based on promotional allowances (item (ii)) or non-monetary benefits (item (iv)). I would allow a common issue relating to volume allowances based on s. 22(f) of the franchise agreement (item (iii)). My

conclusion in this regard substantially undermines the defendant's objections based on the extent of individual inquiries necessary to resolve the common issues relating to performance-based allowances which would require individual analysis of franchisee behaviour.

Third Common Issue

> Has Pet Valu improperly preferred its own interests, including those of its corporate stores, in the manner in which it allocates or retains promotional allowances, volume allowances or non-monetary benefits?

[90] As noted above, there is no basis for a claim relating to promotional allowances or non-monetary benefits. The issue with respect to volume allowances can be subsumed in common issue 2(iii), above.

Fourth Common Issue

> If Pet Valu is entitled to charge a distribution fee, is the distribution fee which is calculated based on 5.14% of the imputed retail price of such products fair and commercially reasonable?

[91] There is no basis for this common issue. The distribution fee is authorized by the franchise agreement.

Fifth Common Issue

> Are all franchisees entitled to the benefits and protection of sections 3 and 4 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("Wishart Act") by virtue of the choice of law provision in the franchise agreement?

[92] This is an appropriate common issue because the class includes franchisees who do not operate in Ontario. I have discussed this issue under the subject of identifiable class.

Sixth Common Issue

> Has Pet Valu breached the duty of fair dealing under s. 3 of the *Wishart Act* by any of the conduct described in common issues (a) to (d) above, if so found?

[93] This is an appropriate common issue in relation to Volume Rebates and with respect to those franchisees whose agreements are subject to Ontario law.

Seventh Common Issue

> If any of the conduct described in common issues (a) to (d) above did not constitute a breach of the franchise agreement, has Pet Valu been unjustly enriched by such conduct, if so found?

[94] Again, this is an appropriate common issue only in relation to Volume Rebates.

Eighth Common Issue

> The aggregate amount of damages for breaches of any of the duties in common issues (a) to (f) above, or the aggregate amount of compensation for unjust enrichment, if so found.

[95] This is an appropriate common issue in relation to Volume Rebates.

Ninth Common Issue

> Does Pet Valu have a duty at common law or under s. 3 of the *Wishart Act* to disclose the following information to the franchisees, or some of them, and if so, has it breached such duty:
>
> (i) Whether Pet Valu or its affiliates including Peton receives rebates, commissions, payments or other benefits ("supplier monies") from third party suppliers in respect of the purchases which are made by Pet Valu or its affiliates for wholesale to the franchisees.
>
> (ii) What is Pet Valu's policy in respect of the allocation of supplier monies to the franchisees and, in particular, how has Pet Valu complied with sections 22 (e) and (f) and 23 (c) of the Franchise Agreement?

> (iii) What amount of supplier monies has Pet Valu or its affiliates received during the Class Period?
>
> (iv) How much of those supplier monies did it retain, and how much, if any, did it pass onto the franchisees?
>
> (v) What criteria were used to determine how much of the supplier monies it retained and how much, if any, it passed onto the franchisees?
>
> (vi) Whether and to what extent Peton or Pet Valu mark-up products sold to franchisees.

[96] The statement of claim alleges that Pet Valu has breached its disclosure obligations under the *A.W.A.* and claims relief in substantially these terms. There are aspects of this common issue (particularly items (i) to (v)) that are appropriate for certification. I do not accept the term "supplier monies" as being appropriate in defining the scope of the common issue. There is no basis for a common issue based on the mark-up of products generally.

Tenth Common Issue

> If the answer to any of the common issues in [the ninth common issue] is yes, an order requiring Pet Valu to disclose such information forthwith, and damages for failure to disclose such information.

[97] This is an appropriate common issue. The decision of the Court of Appeal in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, [2010] O.J. No. 4336 establishes that a breach of s. 3 of the *A.W.A.* permits the court to award damages for breach of the duty of good faith which are independent of compensation for pecuniary losses. Section 7 gives the franchisee a right of action if it has suffered loss as a result of a misrepresentation or a failure to disclose material facts.

Summary on Common Issues

[98] As indicated earlier, I have concluded that there is a basis in fact for Rodger's complaint that Pet Valu has a duty to share Volume Rebates, as I have used the term, with its franchisees. This would include any direct or indirect discounts of the price at which Pet Valu purchases goods from suppliers, other than discounts tied to the performance of individual stores. There is also a basis in fact for the complaint that franchisees are entitled to a proportionate reduction of any charges imposed by Pet Valu (such as the 10% mark-up on private label products and the 5.14% percent distribution charge) which fail to give credit for the franchisee's portion of such discounts. These complaints give rise to common issues that meet the test set out earlier. They can be resolved by focusing entirely on the conduct of Pet Valu and without the need to examine the purchasing behaviour of any particular franchisee.

[99] These common issues also meet Pet Valu's complaint that there is no causal connection between the wrong alleged to have been perpetrated and the damage allegedly suffered. Pet Valu says that the losses suffered by Rodger are really attributable to his inefficiency, lack of experience and poor business practices. If, however, Pet Valu has consistently failed to give credit to Rodger and other franchisees for Volume Rebates that they should have received, it must have affected their margins and their underlying profitability.

[100] As a result of my observations, the common issues can be simplified. They may require some modification to reflect the issues that are applicable to the Manitoba sub-class. I suggest that the plaintiff revise the common issues to reflect these reasons and submit them to the defendant for comment. I encourage the parties to reach agreement on simple, clear and

neutrally-worded common issues, without prejudice to the right of either party in relation to this decision. I suggest that a case conference be scheduled before the end of January 2011, to review the revised common issues and to determine whether a further hearing is necessary.

(d) Preferable procedure

[101] Section 5(1)(d) of the *C.P.A.* requires the court to determine whether a class proceeding would be the preferable procedure for the resolution of the common issues. In *McKee's v. Sears*, I referred to the summary of the proper approach to this requirement by Rosenberg J.A. in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at paras. 69-70:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.
>
> As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

[102] In *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97, [2009] O.J. No. 2531 (S.C.J.), Lax J. stated, at para. 94:

> In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: *Hollick*, at para. 29. The preferability requirement can be met even where there are substantial individual issues, but a class proceeding will not satisfy the requirement that it is the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

[103] Rodger points out that a number of franchise claims have been found suitable for certification – see, for example: *Quizno's*; *A. & P.*; *McKee's v. Sears*; *Rosedale Motors Inc. v. Petro-Canada Inc.*, above; *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada*, above. Rodger also refers to the decision of the Court of Appeal in *Quizno's*, in which the court stated that a class proceeding in that case would satisfy the goals of judicial economy and access to justice and concluded, at para. 62, that "this case involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding."

[104] I agree with Pet Valu's submission that it is wrong to simply say that because this is a franchise claim it is appropriate for a class action. The lenses of judicial economy, access to justice and behaviour modification do not obviate the need for an inquiry into whether a class proceeding is a fair, efficient and manageable method of resolving the claim.

[105] Pet Valu's submission on this issue is that the need to determine individual issues, in order to address both liability and damages, would make a class proceeding unmanageable, inefficient and unfair. It says that its liability in relation to each particular class member would require an examination of the experience and purchasing history of that class member. It says that individual inquiries will be necessary to determine whether a particular franchisee suffered a

loss as a result of an improper mark-up or the failure to give the benefit of promotional allowances, volume allowances or other non-monetary benefits. It says that this is not a case in which an aggregate assessment of damages would be possible because liability cannot be determined on a class-wide basis and requires the examination of the circumstances of each franchisee.

[106] Proof of loss, Pet Valu says, would be a complex exercise because every franchisee would have a different product mix, different purchasing history, different history of compliance with promotional programs and a different need for non-monetary benefits. Moreover, the fairness of Pet Valu's delivery charges may depend on a particular franchise's distance from distribution centres.

[107] In my view, Pet Valu's objections are without substance, particularly as the common issues will be limited to the Volume Rebates issue. This substantially undermines Pet Valu's complaints about the need for individual analysis of franchisee circumstances. If Pet Valu has a contractual obligation to share these benefits with franchisees, a proposition for which there is at least some basis in fact, and if it has used those benefits to maximize its profits as opposed to reducing the cost its franchisees pay for goods, again for which there is some basis in fact, then every single franchisee was at risk of loss as a result of Pet Valu's conduct. It will not be anything more than an accounting task to establish the extent of such benefits obtained by Pet Valu, the extent, if any, to which they were shared with franchisees, and the corresponding gain obtained by Pet Valu. If the court were to conclude that Pet Valu had an obligation to allocate some or all of those benefits to the franchisees, it would not be beyond the capabilities of Pet

Valu's formidable accounting system to establish, with precision, the loss sustained by each franchisee. The resolution of this issue could be more complicated because there is no uniform price charged to all franchisees, who pay different prices for products depending on their geographic location or location in relation to specific competitors. This does not mean, however, that it would be either impossible or impractical to undertake the task.

[108] If, however, a common issues judge were to determine that the aggregate or part of Pet Valu's liability could be determined without individual proof of damages, then distribution based on an average or proportional basis may be appropriate. Pet Valu itself uses a proportional methodology to distribute any excess in the private label development fund based on a store's contribution to total private label sales. It also distributes non-monetary benefits based on a store's share of total sales volume.

[109] It also seems to me that the fair and expeditious determination of this proceeding may well lend itself to a process whereby, in the first instance, the analysis of Volume Rebates is confined to a representative group of suppliers, or a representative group of products, or both. If the plaintiff failed to establish an entitlement to share in rebates relating to those products, that might well be the end of the inquiry. If, on the contrary, entitlement was established, the result could well be applicable to all other rebates, subject only to an accounting.

[110] This is an issue that need not be resolved at present but can be left to future consideration as the action progresses.

[111] The benefits of a class action in this case, in terms of access to justice, are quite obvious. I do not accept Pet Valu's submission that Rodger is on a selfish mission of his own. His concerns about Pet Valu's failure to share the profit pie with franchisees are clearly reflected in the minutes of the C.F.C. executive. The difficulties facing franchisees in taking on the franchisor in cases of this kind have been well-stated in other authorities and do not require repetition. The class action process will bring about judicial economy and the court has tools at its disposal in that process to ensure that the proceeding moves forward efficiently and cost-effectively and in a way that is fair to both parties.

[112] Pet Valu has suggested that there is no need for behaviour modification in this case, because the C.F.C. provides a viable forum for the resolution of franchisee concerns. The short answer to this is that the evidence does not support the conclusion that the C.F.C. was able to effectively bring about changes in Pet Valu's method of sharing the profit pie. Indeed, the minutes of the C.F.C. executive suggest that Pet Valu had been holding out the promise of a new franchise agreement as a means of addressing franchisees' concerns that Pet Valu's high profits were inflating the cost of goods. It is not apparent to me that these concerns have been addressed by the "new" agreement produced by Pet Valu and in fact the agreement seems to reduce, not enhance, the franchisee's rights.

(e) Representative Plaintiff

[113] Section s. 5(1)(e) of the *C.P.A.* requires that there be a representative plaintiff who will fairly and adequately represent the class, does not have a conflict with the interests of other class members, and has a suitable plan for the prosecution of the litigation.

[114] Rodger refers to the observation of Chief Justice McLachlin in *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 41 concerning the qualifications of a representative plaintiff:

> Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.[References omitted.]

[115] Pet Valu attacks the suitability of Rodger as a representative plaintiff. First, it challenges his motives. It says that this litigation was commenced as a form of blackmail to frighten Pet Valu into buying his franchise. Related to this complaint is the suggestion that Rodger was "recruited" by plaintiff's counsel and that he is simply putty in their hands.

[116] I do not accept this submission. It is true that Rodger had attempted to negotiate with Pet Valu to have it buy his franchise and that those negotiations foundered because the parties could not agree on price. It is also true that he had a history of defaults in paying charges under the franchise agreement and that Pet Valu put him on notice on August 13, 2009, that if the breaches were not rectified it would pursue its remedies under the agreement. This appears to have prompted Rodger to retain counsel, who wrote to Pet Valu on November 4, 2009, raising many of the complaints that are set out in this action, as well as concerns about the profitability of the franchise. The letter requested answers to some of the questions raised in this action. The CEO of Pet Valu replied that efforts were being made to collect the necessary information to

respond to the letter. It is apparent that no real efforts were made, and certainly no response was forthcoming. This litigation ensued. There is no basis at all to conclude that this litigation was commenced with a view to promoting Rodger's interests as opposed to the interests of the class.

[117] Related to this complaint is Pet Valu's argument that Rodger has a conflict with the class. It says that Rodger's interests are in conflict with the proposed class because his claim requires compensation for all his business losses and his acquisition costs, in addition to claims for salary he alleges he would have made at another job. No such claims are made in the statement of claim. The fact that Rodger may believe that he has, or actually does have other claims against the defendant is not a bar to representing the class in this action. He has no conflict "on the common issues" with other members of the class (*C.P.A.* s. 5(1)(e)(iii)).

[118] Pet Valu also complains that if Rodger's business has been unprofitable, it is because he is a poor businessman who keeps incomplete and unprofessional records. It says that his business practices were sub-standard and that he was behind in his sales tax filings and had failed to pay employee source deductions to Revenue Canada. I am simply unable to conclude, on the evidence, that Rodger's difficulties are attributable to incompetence, as Pet Valu alleges, or to systemically low margins, as he claims.

[119] Pet Valu's litany of complaints about Rodger's suitability as a representative plaintiff have to be considered in the context of its own willingness to renew his franchise agreement for a further four years, to 2013, notwithstanding his historic difficulties as a franchisee. Pet Valu says that it accepted Rodger's assurance that he would mend his ways, but its agreement to continue the business relationship seriously diminishes the force of its arguments on this issue.

[120] Nor can I find that Rodger's motivations are tainted or that his difficulties as a Pet Valu franchisee make him an unsuitable representative of the class. On the contrary, he has had the initiative and the reason to pursue litigation and this is not a case in which he is a mere "benchwarmer" or a nominee of counsel. He is genuinely interested and involved in the proceeding. He has retained counsel with considerable experience and an excellent reputation in franchise litigation. I was informed that the litigation plan in this case was modeled on the plan ultimately crafted, with considerable input from Perell J., following the decision of the Court of Appeal in *Quizno's*. The defendant has made no serious criticism of the litigation plan. I am satisfied that the litigation plan is workable. It will be reviewed and modified, as required, from time to time during the case management process leading up to a common issues trial.

Conclusion

[121] For these reasons, subject only to the final wording of the common issues, this motion is granted and this action will be certified as a class proceeding under the *C.P.A.* Counsel for the plaintiff shall arrange a case conference before January 31, 2011, to settle the terms of the certification order. If costs cannot be resolved, written submissions shall be made pursuant to a schedule to be discussed at the case conference.

G.R. Strathy J.

Released: January 14, 2011

CITATION: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287
COURT FILE NO.: CV-09-392962-00CP
DATE: 20110114

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff/Moving Party

- and -

PET VALU CANADA INC.

Defendant/Respondent

REASONS FOR JUDGMENT ON
CERTICATION

G. R Strathy J.

Released: January 14, 2011