

Court of Appeal dismisses Pet Valu franchisee class action and clarifies scope of duty of fair dealing

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On January 14, 2016, the Ontario Court of Appeal overturned a judgment for the franchisee class in the *Pet Valu* franchise class action. This significant decision for franchisors resulted in the dismissal of the class action in its entirety. Notably, the Court of Appeal found any failure by the franchisor to disclose information in a disclosure document does not amount to a breach of section 3 (the duty of fair dealing) of the *Arthur Wishart Act* (the AWA). As well, the Court of Appeal implicitly endorsed the earlier decision in another franchise class action, *Spina v. Shoppers Drug Mart Inc.*, that held that franchisors do not have a duty to disclose information to franchisees so that franchisees can verify whether or not the franchisor is complying with the franchise agreement. While the *Pet Valu* decision highlights and provides important reasoning on certain class action procedural points – perhaps most importantly on the role of the case management judge in defining common issues – this Update focuses on the Court's decision on substantive issues of particular interest to franchisors.

The Pet Valu Proceedings

In January 2011, Justice Strathy certified a class action against Pet Valu by current and former Pet Valu franchisees based on allegations that Pet Valu failed to pass on the benefits of volume rebates granted by their suppliers to their franchisees (2011 ONSC 287). [Read our article in the February 2011 Osler Franchise Review](#) for our commentary on the certification decision.

Pet Valu subsequently moved for summary judgment. In October 2014, Justice Belobaba granted [summary judgment](#) in favour of Pet Valu on all but one issue (and the related common issue of damages) and deferred a decision on those issues.

In January 2015, Justice Belobaba granted judgment for the franchisees on the remaining issues. In doing so, he held that Pet Valu had breached its statutory duty of fair dealing by creating the expectation that it had "substantial purchasing power" that it would use to obtain volume discounts that could be passed along, at least in part, to its franchisees, which Justice Belobaba found was a misrepresentation that Pet Valu failed to correct. [Read our April 2015 Osler Update](#) for our commentary on Justice Belobaba's January 2015 decision.

Pet Valu appealed.

Court of Appeal Decision

The Court of Appeal allowed Pet Valu's appeal, finding that it had not breached section 3 of the AWA. Although the decision turns on the Court of Appeal's conclusion that Justice

Belobaba erred in considering the issue of whether Pet Valu had made a misrepresentation to its franchisees when that issue had not been certified, the Court of Appeal nonetheless commented on whether there could have been a breach of section 3 if such a misrepresentation had been made.

In doing so, the Court drew an important distinction between misrepresentations in a disclosure document and misrepresentations made in the course of the performance and enforcement of a franchise agreement. The Court stated that a misrepresentation in a disclosure document (or a failure to disclose material facts in a disclosure document) cannot amount to a breach of section 3 because that misrepresentation does not occur in the "performance and enforcement" of the franchise agreement as required by the clear wording of the AWA. The Court also noted that specific remedies for a franchisor's failure to comply with its disclosure obligation under section 5 of the AWA are provided for by sections 6 and 7 of the AWA. The practical implication for franchisors is that franchisees cannot rely upon section 3 to bring claims concerning misrepresentations during the disclosure period.

In addition, the Court relied on the lower court's decision in *Spina*, where the motion judge held that section 3 does not require franchisors to disclose information to franchisees so that franchisees can verify the franchisor's compliance with the franchise agreement. The Court also indicated that section 3 cannot be relied upon to require franchisors to disclose information so that franchisees can verify whether or not statements made to the franchisees are correct. As *Spina* was a lower court decision that was not appealed, the Court of Appeal's endorsement of its reasoning will give it greater authority in future cases.

The Court of Appeal's decisions in both *Pet Valu* and *Spina* underline its commitment to a straightforward interpretation of the clear wording of the AWA in determining the scope of the section 3 duty of fair dealing owed between parties to a franchise agreement.