

## 1250264 Ontario Inc. v. Pet Valu Canada Inc.: In or Out? A Bold Re-Opening of the Opt-Out Period in a Franchise Class Action

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On July 27, 2012, Justice Strathy of the Ontario Superior Court of Justice released a decision in the *1250264 Ontario Inc. v. Pet Valu Canada Inc. (Pet Valu)*<sup>1</sup> franchise class action setting aside certain opt-out notices obtained from potential franchisee class members as a result of the “irreparable impairment” of the opt-out process (the Opt-Out Decision). Although the right of a class member to opt-out of a class action has been recognized by Ontario courts as fundamental, Justice Strathy found that the unique circumstances of this case warranted the “extraordinary measure” of judicial intervention in the opt-out process. The “irreparable impairment” in this case was found to be a campaign on behalf of an influential subgroup of franchisees intent on convincing other potential franchisee class members to opt-out of the class action. The Opt-Out Decision is particularly remarkable as the Court decided to intervene in circumstances where it found that neither party to the class action instigated or was directly involved in the actions giving rise to the “irreparable impairment.” The Opt-Out Decision also highlights the challenges that class action defendants, and specifically franchisors, face when they must maintain ongoing business relationships with class members and potential class members over the course of a protracted class action.

### **Background**

On January 14, 2011, Justice Strathy certified a class action against Pet Valu by current and former Pet Valu franchisees for a narrow set of claims relating to allegations that Pet Valu had failed to pass on the benefits of volume rebates granted by their suppliers to their franchisees.<sup>2</sup> The certification order, issued on June 29, 2011, approved notice to all class members and advised them that their window to opt-out of the action would run from July 15, 2011 to September 15, 2011. The relationship between parties to the class action was acrimonious, and both sides were concerned that potential class members could be exposed to unfair or misleading communications from their opponents throughout the opt-out process. To allay these concerns, the certification order incorporated a Plan of Proceeding which limited communications with potential class members before the end of the opt-out period to those approved by the court.

While concerns about the parties' communications with potential class members during the opt-out period are common to all class actions, these concerns present a greater challenge in the context of a franchise class action where, as in this instance, potential class members have an ongoing business relationship with the defendant. Restrictions under the Plan of Proceeding recognized that Pet Valu needed to be able to communicate effectively with its franchisees on an ongoing basis and permitted it to communicate with class members in the context of its ongoing commercial franchise relationship. The Plan of Proceeding did not, however, address or attempt to curtail the right of unnamed parties, specifically, other franchisees, to communicate concerning the class action.

For our commentary on Justice Strathy's certification decision in Pet Valu, please see [Osler Franchise Review of February 10, 2011](#).

### ***The Opt-Out Period***

By September 4, 2011 only 37 opt-out forms had been received. Beginning on September 5, 2011 however, a noticeable spike occurred with a final count of 140 forms received representing approximately fifty-five percent of all class members. Justice Strathy concluded the dramatic increase in opt-out forms was the result of an organized, systematic and highly effective campaign by an independent franchisee association, the Concerned Pet Valu Franchisees (the CPVF), created for the purpose of "dealing a death blow" to the class action.

The CPVF, established in early September 2011, was an autonomous and self-funded body whose stated purpose was to provide leadership and information to Pet Valu franchisees concerning the opt-out process. However, there was no dispute between the parties that the actual purpose of the CPVF was to encourage franchisees to opt-out of the class action. Its founding membership of thirteen consisted almost wholly of individuals who also acted on the executive of Pet Valu's independent franchise association, the Canadian Franchise Council (CFC), which had been vocal about its lack of support for the class action. To encourage other Pet Valu franchisees to opt-out of the class action the CPVF created a website that expressed their negative views on the class action and published names of franchisees who had opted out of the class action, and engaged in a telephone campaign throughout the tail end of the opt-out period.

Justice Strathy found that throughout the course of this campaign, the CPVF actively used its influence and opinion to advance what it perceived to be the interests of franchisees, which it aligned with the interests of the franchisor. Justice Strathy further held that some of the information propagated by the CPVF was misleading and/or inaccurate. Justice Strathy specifically acknowledged, however, that Pet Valu had not interfered with the integrity of the opt-out process or attempted to influence franchisees to opt-out of the class action. In fact, Strathy commended the franchisor for its consistent message to its franchisees that whatever their decision with regard to participating in the class action, it would not affect their relationship.

### ***Setting Aside the Opt-Out Notices***

The issue before Justice Strathy was whether the opt-out process had been so irreparably impaired by the CPVF's conduct as to justify judicial intervention. Justice Strathy found that the actions of the CPVF had so interfered with potential class members' right of access to justice that it had painted an irreversibly misleading picture of the consequences of the class

action, the legal rights of opt-outs, and potential limitations issues if a franchisee opted out of the class but did not pursue a timely individual action of its own.

Granting plaintiffs' counsel's request, Justice Strathy therefore set aside all opt-outs received after September 5, 2011, and postponed the opt-out process to a later point in the action following release of the court's decision on a forthcoming summary judgment motion, or other final disposition of the action on its merits.<sup>3</sup>

While the damage to the integrity of the opt-out process in this case was not perpetrated by any party to the certification order, Justice Strathy nevertheless decided that judicial intervention in the opt-out process was warranted. In doing so, Justice Strathy relied on a number of decisions, including Justice Winkler's decision in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Limited*<sup>4</sup>, the underlying decision of Justice Cumming in *Vitelli v. Villa Giardino Homes Ltd.*<sup>5</sup>, and that of Justice Hoy in *Smith v. National Money Mart Co.*<sup>6</sup> However, in each of those cases the Courts' decisions were tied closely to the fact that it was the actions of a party to the class action that were found to have disrupted the opt-out process. While Justice Strathy also relied on his 2010 decision in *Robinson v. Rochester Financial Ltd.*<sup>7</sup>, this case is distinguished from the situation at hand in that the court-approved form had not been used by those potential plaintiffs opting out, and there appeared to be some suspicion that the opt-outs were coordinated by a party directly related to the defendant and that the defendant may have been involved.

### ***Implications of the Decision for Franchisors***

#### **Extraordinary Relief for Extraordinary Circumstances— Turning Points in Justice Strathy's Reasoning**

As in any case, there are certain specific facts on which the Opt-Out Decision appears to turn. For example, Justice Strathy placed significant weight on the fact that the CPVF actively solicited and posted on its website the names of potential class members who opted out of the class action. Justice Strathy identified "anonymity of a class, without fear of the consequences" as one of the greatest strengths of a class action.

Justice Strathy also placed significant weight on the fact that the majority of members on the CPVF were elected executives on the CFC and would therefore have particular sway or influence over other franchisees in the Pet Valu system.

#### **Interplay Between the AWA "Right to Associate" & the CPA**

In his reasons Justice Strathy acknowledged the importance of franchisees' right of association in section 4 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*AWA*) (and their right to freely express themselves) but pointed out that the *AWA* is concerned with the relationship between franchisor and franchisee, as opposed to the rights of franchisees amongst themselves. The issue in this case was not whether or not the franchisee CPVF members have a right to associate (they clearly do) but whether the exercise of their individual rights to associate in effect interfered with the rights conferred on each class member by the *Class Proceedings Act, 1992* S.O. 1992 c. 6 (the *CPA*). In Justice Strathy's view, the exercise by the CPVF members of their section 4 rights had so significantly interfered with the *CPA* rights of potential class members that relief

was necessary. This decision turned on the impact of the communications on potential class members rather than on any behaviour of the parties to the litigation or the CPVF. Indeed, nothing in the decision prevents the franchisee members of the CPVF from associating, expressing their views, or communicating in any particular way. Nor does the decision punish the CPVF or the franchisor for the interference. The right to associate does not trump the right to be afforded protection under the *CPA*, nor does the right to be afforded protection under the *CPA* trump the right to associate. These two rights operated independently within the facts of this case.

Please contact [Jennifer Dolman](#) or [Gillian Scott](#) or a member of our [Franchise & Distribution](#) or [Class Action](#) Groups if you wish to discuss further.

See our [Osler Franchise Review February 2011](#) and [Osler Franchise Review October 2011](#) for further analysis and commentary on issues arising in the *Pet Valu* franchise class action.

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**1** 2012 ONSC 4317

**2** 2011 ONSC 287. Pet Valu has indicated its intent to bring a motion to de-certify the class action.

**3** The plaintiffs have brought a partial summary judgment motion against Pet Valu which, according to plaintiffs counsel's website, will likely be heard in December 2012.

**4** [2002] O.J. No. 4781

**5** [2001] O.J. No. 2971

**6** [2007] O.J. No. 1507

**7** [2010] O.J. No. 3912