

COURT OF APPEAL FOR ONTARIO

CITATION: 1250264 Ontario Inc. v. Pet Valu Canada Inc.,
2012 ONCA 901

DATE: 20121220

DOCKET: M41716 (C55889) and M41717 (C55949)

LaForme and Watt JJ.A. and Lederman J. (*ad hoc*)

BETWEEN

1250264 Ontario Inc.

Plaintiff (Respondent)

and

Pet Valu Canada Inc.

Defendant (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

Jean-Marc Leclerc, for the respondent

Lawrence Theall and Bevan Brooksbank, for the appellant franchisees

Geoff Shaw and Eric Mayzel, for appellant Pet Valu Canada Inc.

Heard and released orally: December 14, 2012

On appeal from the order Justice G.R. Strathy of the Superior Court of Justice,
dated July 27, 2012, reported at 2012 ONSC 4317.

ENDORSEMENT

[1] The plaintiff moves to have the appeals of Pet Valu and the non-party franchisees quashed on the basis that the order complained of is interlocutory.

[2] The test to be applied for deciding this issue is well settled and is the one described in *Ball v. Donais* [1993] O.J. No. 972 at para. 3:

While that order did not finally dispose of the rights of the parties to the litigation, it did subject to appeal therefrom finally dispose of the issue raised by that defence and thereby deprive the defendant of a substantive right which could be determinative of the entire action.

[3] The order being appealed includes the following (at para. 3 of the order):

This court orders that any person whose opt out coupon has been declared invalid pursuant to this order shall be given a further opportunity to opt out following the release of the court's decision on the plaintiff's summary judgment motion or other final disposition of the action on its merits on terms to be fixed at that time.

[4] We are of the view that the subject order is final as against Pet Valu for at least two reasons.

[5] First, for those class members whose opt outs have been invalidated, they obtain a further right to again opt out after "a final disposition of the action on its merits". This result eliminates the *res judicata* effect in that the order deprives Pet Valu of receiving a binding judgment against all putative class members.

[6] Second, because of the suspension of the limitation period under s. 28(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, Pet Valu is deprived of a limitations defence as against class members who opt out after the final disposition.

[7] For these reasons, the order in issue is final in respect of Pet Valu.

[8] As for the non-party franchisees, for purposes of expediency and to avoid inconsistent decisions, their appeal should be heard together with Pet Valu's.

[9] Accordingly, the motions to quash are dismissed. In addition, the two appeals are to be heard together.

Costs

[10] Pet Valu is awarded its costs fixed at \$3,000 and the non-party franchisees are awarded their costs fixed at \$2,000. Each award of costs is inclusive of disbursements and HST.

"H.S. LaForme J.A."

"David Watt J.A."

"S. Lederman J. (*ad hoc*)"