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ARTICLE

Outstanding Costs: Former Owner Of Class Representative Ordered To Pay \$1.7 Million

In *Pet Valu Canada Inc. v. Rodger*, Justice Nishikawa of the Ontario Superior Court of Justice granted summary judgment against the former owner of a franchisee in the amount of \$1.7 million. The judgment was for costs that were awarded against the franchisee in a prior, hard-fought proceeding that lasted nearly 7 years.

The judgment is the latest installment in a run of precedent-setting decisions arising out of the class action *1250264 Ontario Inc. v. Pet Valu Canada Inc.* That proceeding commenced in December 2009 and ended in October 2016, when the Supreme Court of Canada dismissed the franchisee's application for leave to appeal.

The franchisee, a numbered company that had been reduced to a shell with no assets, had stood as the representative plaintiff in the class action against Pet Valu Canada Inc. ("Pet Valu"). Following the Supreme Court's dismissal, Pet Valu commenced a new action against the individual who had owned the franchise and sold it in 2012, mid-way through the prior litigation. Its claim was based both on an indemnification provision in the franchise agreement and the terms of a personal guarantee signed by the owner.

The indemnification provision had the effect of requiring the franchisee, defined to include its shareholders, to indemnify Pet Valu for legal costs in any proceeding commenced by the franchisee against Pet Valu. Costs would be indemnified in an inverse proportion to the franchisee's recovery in the proceeding. For example, if the franchisee recovered the entire amount it claimed in the proceeding, then no legal costs would be indemnified. Here, where the franchisee had claimed \$100 million in the class action and recovered nothing, the provision required indemnification of 100% of Pet Valu's legal costs. Pet Valu strategically side-stepped questions of the reasonableness of the costs it had incurred by moving for judgment solely for costs awarded by the Court, and therefore already assessed as reasonable.

Justice Nishikawa found the individual owner to be bound by the franchise agreement and the indemnification provision therein, and would have held him liable under the personal guarantee in any event. She found no reason to distinguish class actions from any other proceeding to which the indemnification provision might apply. She further summarily dismissed the owner's arguments that the limitation period had expired and that the costs claim was released as part of a settlement of a separate proceeding.

The decision of the Superior Court may give serious pause to potential class representatives, particularly in the franchise context, where both indemnification provisions and personal guarantees may be common.

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