

Court File No.

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**GIOVANNI SPINA, JOHN SPINA DRUGS LTD.,  
ROMEO VANDENBURG and ROMEO VANDENBURG DRUG COMPANY LTD.**

Plaintiffs  
(Appellants)

- and -

**SHOPPERS DRUG MART INC. and SHOPPERS DRUG MART (LONDON) LTD.**

Defendants  
(Respondents)

**PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992***

**NOTICE OF APPEAL**

**THE APPELLANTS APPEAL** to the Court of Appeal from the Judgment of Justice Perell of February 17, 2023 granting judgment on the certified common issues in this action.

**The APPELLANTS ASK** that the Judgment be varied as follows:

1. With respect to the Professional Allowances claims:
  - (a) Setting aside the portion of motions judge's Judgment that the respondents did not breach their contractual obligations under the 2010 Associate Agreement by retaining and not remitting Professional Allowances to the Professional Allowance Class Members;

- (b) Varying the answer to Professional Allowances common issue (a), by answering it in the affirmative with respect to the 2010 Associate Agreement;
- (c) Setting aside the portion of the motions judge's Judgment that the respondents were not unjustly enriched by retaining Professional Allowances and not remitting them to the Professional Allowance Class Members, and setting aside the answer to Professional Allowances common issue (b);
- (d) Answering Professional Allowances common issue (b) in the affirmative;
- (e) Varying the portion of the motions judge's Judgment answering Professional Allowances common issue (c) by substituting the finding that the respondents received \$955 million in Professional Allowances with a finding that the respondents received \$1.084 billion in Professional Allowances;
- (f) Setting aside the portion of the motions judge's Judgment that Professional Allowances claims are statute barred for claims arising prior to November 19, 2008, which forecloses claims for Professional Allowances for the year ends 2006 and 2007;

2. With respect to aggregate damages:

- (a) Setting aside the portion of the motions judge's Judgment that aggregate damages were not feasible because it is not possible to accurately assess

the quantum of damages on an aggregate basis and setting aside the portion of the motions judge's Judgment directing individual damages trials on the Professional Allowances claim under s. 25 of the *Class Proceedings Act, 1992* (the "CPA");

- (b) Awarding aggregate damages to the Professional Allowances Class Members on the Professional Allowances claim, to be calculated through the application of the aggregate damages model of Howard Rosen with appropriate adjustments for any statute barred portions of the Professional Allowance Class Period, and remitting the quantification to the motions judge;
- (c) In the alternative to 2(b) above, awarding aggregate damages to the Professional Allowances Class Members on the Professional Allowances claim and directing a reference to be conducted by the motions judge to quantify aggregate damages;
- (d) In the further alternative, certifying aggregate damages for the Professional Allowances claims as a common issue and remitting the determination of that common issue to the motions judge;

The Appellants also request:

- 3. Costs of the appeal; and
- 4. Such further and other relief as counsel may advise and this Court may permit.

**THE GROUNDS FOR THIS APPEAL** are as follows:

**The class action**

1. This is a franchise class action. The appellants represent a certified class of franchisees, called “Associates,” who entered into franchise agreements with the respondents / franchisors in order to operate retail pharmacy stores under the name Shoppers Drug Mart.
2. The respondents’ franchise relationship with the Class Members was governed by standard-form franchise agreements, known as “Associate Agreements”. Two versions are at issue in this proceeding: the 2002 Associate Agreement and the 2010 Associate Agreement.
3. The appellants alleged that the respondents breached the Associate Agreements, breached their duties to the Class, and took advantage of their superior position in the franchisee-franchisor relationship for their own benefit.
4. Ontario Associates between 2006 and 2013 (the “Professional Allowance Class”) alleged that the respondents wrongfully retained a type of statutorily-prescribed payment called “Professional Allowances” that existed between 2006 and 2013. The Professional Allowance Class claimed that the Professional Allowance payments made by generic drug manufacturers and received by the respondents in respect of and/or justified by direct patient care services provided by the Associates, were unlawfully retained by the respondents and should have been remitted to the Professional Allowance Class.

### **The motions judge's decision on summary judgment**

5. The parties brought cross-motions for summary judgment on the certified common issues before the case management judge, Justice Perell.

6. The appellants sought findings of liability against the respondents on all issues, including the claims of the Professional Allowance Class. The appellants requested an award of aggregate damages, and if necessary an order certifying aggregate damages as a common issue. The respondents asked that the action be dismissed and sought findings against the Class on all of the liability common issues.<sup>1</sup>

7. On February 17, 2023, the motions judge granted both parties' motions in part and dismissed them in part.

8. With respect to the Professional Allowances claims, the motions judge properly concluded that the respondents breached their obligations under the 2002 Associate Agreement by failing to remit to the Professional Allowance Class, Professional Allowances that related to and/or were justified by direct patient care services that were performed by the Professional Allowance Class Members.

9. However, the motions judge erroneously held that:

- (a) the respondents did not breach the 2010 Associate Agreements by retaining Professional Allowances that related to and/or were justified by

---

<sup>1</sup> The respondents did not move on common issues (c) and (d) in respect of Professional Allowances which address quantification. The Class did move on those issues, and they are answered in the Judgment.

direct patient care services that were performed by the Professional Allowance Class Members;

- (b) the respondents were not unjustly enriched by their retention of the Professional Allowances that related to and/or were justified by direct patient care services that were performed by the Professional Allowance Class Members;
- (c) the respondents received \$955 million in Professional Allowances when the evidence was that they, in fact, received \$1.084 billion in Professional Allowances;
- (d) Professional Allowances claims are statute barred for claims arising prior to November 19, 2008, which forecloses the claims for Professional Allowances for the year ends 2006 and 2007; and
- (e) aggregate damages should not be awarded to the Professional Allowance Class Members and instead damages should be assessed at individual issues trials pursuant to a protocol to be established under s. 25 of the *CPA*.

### **The motions judge erred**

10. The motions judge erred by failing to conclude that the respondents breached the 2010 Associate Agreement by retaining Professional Allowances that related to and/or were justified by direct patient care services that were performed by the Professional Allowance Class Members.

11. Among other things:

- (a) The motions judge erred by finding that the respondents were entitled to retain all the Professional Allowances in the absence of clear contractual language authorizing them to do so;
- (b) The motions judge erred by finding that the respondents were entitled to retain all the Professional Allowances in the absence of any disclosure to the Professional Allowance Class to that effect;
- (c) The motions judge erred by implicitly accepting that Professional Allowances were a “discount[], rebate[], advertising or other allowance[], concession[], or other similar advantage[] obtainable from any person by reason of the supply of merchandise” under Article 11.10 of the 2010 Associate Agreement, when Professional Allowances, as a statutory payment for direct patient care services, did not fall into any of those categories and were only “obtainable ... by reason of the” performance of direct patient care services by the Professional Allowance Class Members;
- (d) The motions judge erred by failing to interpret the 2010 Associate Agreement alongside the Professional Allowances statutory regime, which prohibited the payment and receipt of rebates in respect of generic drug purchases in Ontario, which included a prohibition on discounts on generic drug purchases in Ontario, and which prohibited Professional

Allowance funding to be used for “advertising or promotional materials”;  
and

- (e) The motions judge erred by allowing the surrounding circumstances of the 2010 Associate Agreement—namely, the mere existence of Professional Allowances at the time the contract was drafted—to overwhelm the words of the contract, which did not make any reference to Professional Allowances or anything like Professional Allowances.

12. The motions judge erred by finding that the respondents were entitled to retain Professional Allowances paid by generic drug manufacturers and received by the respondents in respect of and/or justified by direct patient care services provided by the Professional Allowance Class members in the absence of express contractual language and in the face of the Professional Allowance statutory and regulatory regime.

13. Additionally, or in the alternative, the motions judge erroneously concluded that the respondents were not unjustly enriched by retaining Professional Allowances that related to and/or were justified by direct patient care services that were performed by the Professional Allowance Class Members.

14. Among other things, the motions judge erred by holding that:

- (a) the Professional Allowance Class Members were not entitled to Professional Allowances under the statutory regime;



- (b) the Professional Allowance Class Members were not entitled to Professional Allowances because they did not have contracts with generic drug manufacturers;
- (c) the remedies for unjust enrichment and breach of contract would be the same; and
- (d) the respondents' private contractual relationships with generic drug manufacturers overrode the Professional Allowance statutory regime.

15. The motions judge erroneously held that the respondents received \$955 million in Professional Allowances. In fact, the respondents received \$1.084 billion in Professional Allowances.

16. The motions judge correctly held that the respondents allocated the money they received under national agreements disproportionately.

17. The motions judge correctly held that the respondents' unilateral allocation of the money they received from generic drug manufacturers understated the Professional Allowances the respondents received in Ontario and overstated the rebates the respondents received in the rest of Canada by a corresponding amount. The result was that the respondents recorded rebates in the rest of Canada often exceeding rates of 100%.

18. The motions judge correctly held that Shoppers "seemed to be cooking the books" in this regard.

19. Among other things, the motions judge erred by holding that the fact that the respondents “seemed to be cooking the books” was not pertinent to the litigation.

20. The motions judge erred by holding, among other things, that the respondents’ understatement of the Professional Allowances the respondents received was not pertinent to:

- (a) The answer to Professional Allowances common issue (c): what was the amount of Professional Allowances the respondents received; and
- (b) Whether the respondents were in compliance with the statutory regime.

#### Limitations

21. The motions judge erred in holding that any of the Professional Allowance claims were statute barred. Among other things, the respondents’ pattern of non-disclosure, lack of transparency, and providing misleading information to Professional Allowance Class Members meant that the Professional Allowances claims were not discoverable or discovered until 2009. Because the proceeding was commenced in 2010, none of the Professional Allowance claims are statute barred.

#### Aggregate damages

22. The appellants requested an award of aggregate damages to the Professional Allowance Class and, if necessary, an order certifying aggregate damages as a common issue. The motions judge erroneously did not award aggregate damages, and he did not address the request to certify aggregate damages as a common issue.

23. The motions judge relied on the aggregate damages modelling evidence adduced by the appellants to “guestimate” that damages owing to the Professional Allowance Class for breach of the 2002 Associate Agreement were approximately \$86 million. However, the motions judge erroneously held that damages should be assessed through individual issues trials pursuant to a protocol to be established under s. 25 of the *CPA*.

24. The motions judge erred by not certifying aggregate damages as a common issue and/or refusing to award aggregate damages to the Professional Allowance Class.

25. Among other things:

- (a) The motions judge erred by applying the wrong legal standard to the aggregate damages methodology proposed by the appellants, including by holding the aggregate damages methodology proposed by the appellants to the standard required outside of the class proceedings context, rather than the appropriate reasonableness standard;
- (b) The motions judge erred by directing individual damages trials when the evidence demonstrated that evidence required for individualized damages trials had been in the respondents’ power, possession, or control, and was no longer available;
- (c) The motions judge erred by failing to consider and/or apply the overarching goals of class proceedings, including in respect of an award of aggregate damages;

- (d) The motions judge erred by relying on matters not in evidence, including, among other things, by erroneously surmising as to what may or may not be in the Class Members' individual and corporate tax returns as a basis for denying aggregate damages and directing individual damages trials;
- (e) The motions judge erred in his analysis of the aggregate damages methodology proposed by the appellants and in his analysis of the expert evidence tendered by the parties;
- (f) The motions judge erred by ignoring or failing to give effect to the evidence, including, among other things, that:
  - (i) the respondents maintained, provided, and/or controlled a centralized bookkeeping and accounting service for the Class, which was mandatory for Class Members to use, and which the respondents provided through the respondents' centralized retail accounting department;
  - (ii) the Class Members were required under the Associate Agreements to appoint and retain the respondents to provide the Class Members with centralized bookkeeping and accounting service and the Class Members paid the respondents a fee for that service;
  - (iii) through the centralized bookkeeping and accounting service and the centralized accounting department, the respondents controlled the accounting records of Class Members and the respondents were

required to prepare and maintain accounting records of the Class Members;

- (iv) the respondents' own evidence that they have been unable to locate records and information from the respondents' centralized bookkeeping and accounting service, their centralized retail accounting service, their centralized retail accounting department, and/or other systems that the respondents assert are necessary to assess damages on an individual basis;
- (v) the respondents' own evidence that, despite the fact that this proceeding was commenced in 2010, the respondents failed to maintain information the respondents claim is necessary, and the motions judge suggested was necessary, for individual damages assessments for any year in the Professional Allowance Class Period;
- (vi) the records and/or information pertaining to the damages of the Professional Allowance Class Members were in the respondents' power, possession, and control;
- (vii) the Professional Allowance Class Members were contractually required to return information potentially relevant to individualized damages assessments to the respondents upon leaving the Shoppers Drug Mart franchise system; and

- (viii) the aggregate damages model adduced by the appellants' expert can be updated when the respondents produce additional information and erred in concluding the aggregate damages were not feasible in the face of this evidence;
- (g) The motions judge erred by finding the respondents' expert engaged in a store-by-store analysis of Professional Allowance damages when in fact the respondents' expert explicitly stated that he did not do so and that there was insufficient data for him to do so reliably;
- (h) The motions judge erred by holding that adding Professional Allowance revenues to Professional Allowance Class Members' stores would increase fees payable by Professional Allowance Class Members to the respondents when such fees were based on stores' "Gross Sales" and not stores' revenues;
- (i) The motions judge erred by failing to provide the parties the opportunity to adduce further evidence concerning the aggregate damages modelling and/or damages suffered by the Professional Allowance Class Members at a subsequent hearing, reference, or other procedure;
- (j) The motions judge erred by failing to consider how a distribution protocol for aggregate damages could address any concerns relating to the distribution of damages among the Professional Allowance Class Members; and

- (k) The motions judge erred by concluding that an aggregate damages model was not feasible.

### **Appeal Management**

26. The Class will seek directions from this Court regarding the conduct of this appeal.

### **Jurisdiction**

27. The decision under appeal is a judgment on the common issues in a certified class proceeding. Accordingly, this Court has jurisdiction over the appeal pursuant to subsection 30(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

28. Leave to appeal is not required.

March 20, 2023

**PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**

155 Wellington Street West, 35<sup>th</sup> Floor  
Toronto ON M5V 3H1  
Tel: 416.646.4300

**Ken Rosenberg** (LSO #21102H)  
Tel: 416.646.4304  
ken.rosenberg@paliareroland.com

**Linda Rothstein** (LSO #21838K)  
Tel: 416.646.4327  
linda.rothstein@paliareroland.com

**Odette Soriano** (LSO #37326J)  
Tel: 416.646.4306  
odette.soriano@paliareroland.com

**Paul Davis** (LSO #65471L)  
Tel: 416.646.6311  
paul.davis@paliareroland.com

**Douglas Montgomery** (LSO #78082M)  
Tel: 416.646.6313  
douglas.montgomery@paliareroland.com

**Evan Snyder** (LSO #82007E)  
Tel: 416.646.6320  
evan.snyder@paliareroland.com

Lawyers for the Appellants

TO: **OSLER, HOSKIN & HARCOURT LLP**

1 First Canadian Place  
100 King Street West, Suite 6100  
Toronto, ON M5X 1B8

**Mark A. Gelowitz** (LSO #31857J)  
Tel: 416.862.4743  
MGelowitz@osler.com

**Geoff Hunnisett** (LSO #57138G)  
Tel: 416.862.5657  
GHunnisett@osler.com

**Malcolm Aboud** (LSO #64298D)  
Tel: 416.862.4207  
maboud@osler.com



**Lipi Mishra** (LSO #72666U)

Tel: 416.862.4271

LMishra@osler.com

**Graham Buitenhuis** (LSO #74931E)

Tel: 416.862.4274

gbuitenhuis@osler.com

Lawyers for the Respondents

**GIOVANNI SPINA et al.**  
Appellants

-and-

**SHOPPERS DRUG MART INC. et al.**  
Respondents

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF APPEAL**

**PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**

155 Wellington Street West, 35<sup>th</sup> Floor  
Toronto ON M5V 3H1  
Tel: 416.646.4300

**Ken Rosenberg** (LSO #21102H)  
ken.rosenberg@paliareroland.com

**Linda Rothstein** (LSO #21838K)  
linda.rothstein@paliareroland.com

**Odette Soriano** (LSO #37326J)  
odette.soriano@paliareroland.com

**Paul Davis** (LSO #65471L)  
paul.davis@paliareroland.com

**Douglas Montgomery** (LSO #78082M)  
douglas.montgomery@paliareroland.com

**Evan Snyder** (LSO #82007E)  
evan.snyder@paliareroland.com

Lawyers for the Appellants