COURT OF APPEAL FOR ONTARIO

CITATION: Spina v. Shoppers Drug Mart Inc., 2024 ONCA 642
DATE: 20240829
DOCKET: COA-23-CV-0329

Simmons, Paciocco and Thorburn JJ.A.

BETWEEN

Giovanni Spina, John Spina Drugs Ltd.,
Romeo Vandenburg and Romeo Vandenburg Drug Company Ltd.

Plaintiffs (Appellants/

Respondents by way of cross-appeal)

and

Shoppers Drug Mart Inc. and Shoppers Drug Mart (London) Ltd.

Defendants (Respondents/

Appellants by way of cross-appeal)

Linda Rothstein, Odette Soriano, Ken Rosenberg, Paul Davis, Douglas Montgomery and Evan Snyder, for the appellants/respondents by way of cross-appeal

Mark A. Gelowitz, Geoffrey Hunnisett, Malcolm Aboud, Lipi Mishra and Graham Buitenhuis, for the respondents/appellants by way of cross-appeal

Heard: February 14 and 15, 2024

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice, dated February 17, 2023, with reasons reported at 2023 ONSC 1086.

Thorburn J.A.:

A. OVERVIEW

[1] This is an appeal and cross-appeal of orders made on motions for summary judgment. At issue is the entitlement to and quantification of Professional Allowance payments for enumerated direct patient care services. This involves a review of the franchise agreements between the parties.

[2] A summary judgment motion was brought by members of two certified classes of Shoppers Drug Mart franchisees: a national class of franchisees, except those whose businesses were located in Québec, and an Ontario subclass of "[a]ll current and former Shoppers Drug Mart franchisees in Ontario who performed direct patient care services between October 1, 2006 and March 31, 2013" (the "Class Period"). I refer to the latter group as the "Ontario Class". This appeal and cross-appeal only relate to the claims of the Ontario Class.

[3] The appellants, Giovanni (John) Spina and Romeo Vandenburg, are licensed pharmacists and the representative plaintiffs. Through their companies, the corporate appellants, they are Shoppers Drug Mart franchisees referred to in the Agreements (defined below) as "Associates."

[4] Shoppers Drug Mart Inc. and Shoppers Drug Mart (London) Limited (together "Shoppers") operate a franchise system in which they grant licenses to operate full-service retail drug stores across Canada.

[5] The Associates entered into standard form agreements with Shoppers which governed their franchisee-franchisor relationship. Shoppers introduced the 2002 version of the standard form Associate agreement in December of 2002 (the "2002 Agreement"). In January 2010, Shoppers introduced an updated version of this agreement which it used for new Associates and for Associates whose 2002 Agreement expired (the "2010 Agreement"). The Ontario Class members are parties to either or both of the 2002 and 2010 Agreements (the "Agreements").

[6] In 2006, the Ontario government introduced amendments to the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10 and the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, and their associated regulations, O. Reg 201/96 (the "*ODBA Regulation*") and R.R.O. 1990, Reg. 935 (the "*DIDFA Regulation*"), collectively "the Legislation", to ban rebates for products from generic drug manufacturers, such as those that Shoppers had been collecting. The Legislation did, however, allow payment for "Professional Allowances".

[7] Professional Allowances were defined in the Legislation as "a benefit, in the form of currency, services or educational materials that are provided by a manufacturer … for the purposes of direct patient care [as set out in the subsection]": *ODBA Regulation*, at s. 1(8); *DIDFA Regulation*, at s. 2(1), as they

appeared October 1, 2006.[1] Attached as Appendix 1 to these reasons are the relevant excerpts from the statutory and regulatory framework as they appeared when they came into force on October 1, 2006.[2]

[8] For the purposes of this appeal and cross-appeal, the central issues on the motions were: how much Shoppers had received in Professional Allowances, whether there was a breach of contract and/or unjust enrichment in retaining those amounts, whether and to what extent any such claims were statute-barred, and whether aggregate damages were appropriate.

[9] The Ontario Class took the position that it was entitled to payments for Professional Allowances for direct patient care services because the Ontario Class members provided those services, Shoppers took the Professional Allowances, and Shoppers thereby breached both the 2002 and 2010 Agreements and/or was unjustly enriched at its expense. The Ontario Class sought aggregate damages.

[10] Shoppers submitted that it was entitled to the Professional Allowances under Article 11.04 of the 2002 Agreement and Article 11.10 of the 2010 Agreement and

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[1] This definition was subject to subsections addressing compliance with the *Code of Conduct*, discussed below, and subsections that came into place after July 1, 2010, that deemed amounts paid in excess of a cap to be rebates.

[2] The regulations were amended from time to time throughout the Class Period to change reporting requirements, modify the statutory cap and reflect other changes.

that the Ontario Class has no entitlement to Professional Allowances. Neither the 2002 nor the 2010 Agreement specifically referred to Professional Allowances.

[11] The motion judge considered the wording of Articles 7.01 and 11.04 in the 2002 Agreement and the wording of Article 11.10 in the 2010 Agreement. Those Articles read as follows:

2002 Agreement	2010 Agreement
7.01 All revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate and the Associate undertakes and agrees to deposit all monies received from each day's business not later than the following banking day in an account or accounts to be maintained specifically for such purpose with the Associate's bankers…	7.01 All revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate and the Associate undertakes and agrees to deposit all monies received from each day's business not later than the following banking day in an account or accounts to be maintained specifically for such purpose with the Associate's bankers…
11.04 … The Associate and Pharmacist acknowledge and agree that the Company shall be entitled to the benefit of any and all discounts, volume rebates, advertising allowances or other similar advantages that the Company or its Affiliates may obtain from any person, firm or corporation by reason of its supplying merchandise or services to the Associate or to associates of the Company or its Affiliates.	11.10 The Associate and the Pharmacist acknowledge and agree that the Company shall be entitled to the benefit of any and all discounts, rebates, advertising <u>or other allowances, concessions</u>, or other similar advantages obtainable from any person by reason of the supply of merchandise or services to the Company, the Associate or to Associates of the Company or its Affiliates. [Emphasis added.]

[12] The motion judge found Shoppers liable to the Ontario Class for breach of the 2002 Agreement although some claims were statute-barred. He did so on the basis that:

> Professional Allowances are not covered by Article 11.04 of the 2002 Associates Agreement but are revenue under Article 7.00 of the Associates Agreement. It follows that Shoppers breached the 2002 Associates Agreement by failing to remit the Professional Allowances to the [Ontario] Class Members governed by the 2002 Associates Agreement.

[13] He held however, that Shoppers did not breach the 2010 Agreement as Article 11.10 of the Agreement allows Shoppers to keep Professional Allowances.

[14] The motion judge held that there was no viable methodology to calculate aggregate damages, or a minimum base-line award of aggregate damages with more damages to follow at individual issues trials. He concluded that Professional Allowances claims that are not statute barred may be proven at individual issues trials pursuant to a protocol to be determined pursuant to s. 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").

[15] The Ontario Class claims the motion judge erred in: (i) dismissing its claim for breach of the 2010 Agreement or, in the alternative, the unjust enrichment claim for the entire Class Period; (ii) dismissing some claims under the 2002 Agreement on the basis that the limitation period had expired; (iii) quantifying the Professional

Allowances funding Shoppers received as $955 million when the evidence showed it received $1.084 billion; and (iv) denying its claim for aggregate damages.

[16] On its cross-appeal, Shoppers raises two main issues, namely that the motion judge erred in: (i) concluding that Shoppers was not entitled to keep the Professional Allowance monies under the 2002 Agreement as they were not "rebates", "discounts" or "other similar advantages" under Article 11.04 of the 2002 Agreement and that those amounts were revenue pursuant to Article 7.01 of the 2002 Agreement, and (ii) holding that the limitation period for recovery of Professional Allowance amounts rolled such that only claims arising prior to November 2008 were statute-barred.

[17] For the reasons that follow, I would allow the ground of appeal related to the motion judge's quantification of Professional Allowances, and hold that Shoppers in fact received $1.084 billion in Professional Allowances. I see no error in the motion judge's analysis of the other issues and would therefore dismiss the remainder of the appeal and cross-appeal.

B. BACKGROUND FACTS

[18] Before conducting my analysis of the issues, I will outline the relevant terms of the 2002 and 2010 Agreements, the parties' profit-sharing arrangement, the legislative changes, and the parties' conduct during the period in question.

(1) The Relevant Provisions in the Agreements

[19] Article 7.01 of both Agreements under the heading “Banking” provides that “[a]ll revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate” (emphasis added).

[20] Article 11.04 of the 2002 Agreement provides that Shoppers is “entitled to the benefit of any and all discounts, volume rebates, advertising allowances or other similar advantages that [Shoppers] or its Affiliates may obtain from any person, firm or corporation by reason of its supplying merchandise or services to the Associate or to associates of [Shoppers] or its Affiliates” (emphasis added).

[21] Article 11.10 of the 2010 Agreement provides that “[t]he Associate and the Pharmacist acknowledge and agree that [Shoppers] shall be entitled to the benefit of any and all discounts, rebates, advertising or other allowances, concessions, or other similar advantages obtainable from any person by reason of the supply of merchandise or services to [Shoppers], the Associate or to Associates of the Company or its Affiliates” (emphasis added).

[22] Article 6.03 of both Agreements provides that the Associates must pay Shoppers, or a service provider arranged by Shoppers, a fee for the provision of centralized bookkeeping and accounting services.

[23] Article 11.01 of both Agreements provides that the Associates must pay Shoppers a service fee based on the Associates' Gross Sales (and/or the profitability of the Franchised Business). The key provisions of the Agreements are set out in Appendix 2.

(2) The Profit-Sharing Arrangement in the New Financial Model

[24] The Associates were not paid a salary by Shoppers for the work they performed nor did they pay a one-time franchise fee. Instead, Shoppers and the Associates participated in a complex profit-sharing arrangement.

[25] In 2006, Shoppers introduced a New Financial Model (the "Model") which set out the profit-sharing arrangement between Shoppers and the Associates. Shoppers represented to the Associates that the Model was being implemented because the Associates had requested greater transparency, equity, and fairness, among other things. There is no dispute between the parties as to how this Model operated, which can be broadly described as follows:

- Shoppers and each Associate agreed on a "Common Year Plan", (the "Plan") which set a target for the store's planned profitability and corresponding planned Associate earnings.
- Each Associate was guaranteed minimum annual earnings (called the "Associate Guarantee") which increased over the Class Period and was

greater for Associates running 24-hour stores and for multi-store Associates. Between 1999 and 2011, the Associate Guarantee for single store Associates increased from $68,000 in 1999 to $120,000 in 2011. For 24-hour store Associates, it increased from $150,000 in 2006 to $170,000 in 2011. For multi-store Associates, it increased from $125,000 in 2006 to $155,000 in 2011.

- At the end of each year, the planned store profit would be compared to the actual store profit to determine the variance from the Plan. The Associate would be responsible for either 20% or 30% of a negative variance, subject to the Associate Guarantee, and would be entitled to share in either 20% or 30% of a positive variance. This adjustment was applied to the planned Associate earnings to calculate actual Associate earnings.
- Actual Associate earnings could not drop below the Associate Guarantee. This meant that if an Associate's actual earnings were less than their Associate Guarantee, Shoppers would bear 100% of the loss in topping that Associate up to their Associate Guarantee.
- The decision below also references a $50,000 cap for the additional earnings an Associate might earn in stores in a planned loss position. There is some controversy about whether Shoppers applied this cap consistently.

However, where this cap was applied, Shoppers would keep 100% of the additional profits over and above the $50,000 cap.

[26] After Associate earnings were calculated, Associates paid the remainder of store profits to Shoppers as a service fee pursuant to Article 11.01 of the Agreements, mentioned above.

[27] The operation of this profit-sharing arrangement is important for calculating damages. The result of this Model is that for each additional dollar of Professional Allowances that should have been attributed to an Associate's store revenue, that Associate could be entitled to 30 cents, 20 cents, or nothing, and Shoppers would be entitled to the remainder.[3] For profitable stores, Shoppers would receive the majority of profits but if a store was underperforming, or not profitable, Shoppers bore most or all of the shortfall.

[28] Associate earnings were a highly store-specific determination, given the idiosyncratic effects of certain variables and the Associate Guarantee. To determine exactly how much of the Professional Allowance monies each Associate would be entitled to under the Model if those monies were attributed to a store's

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[3] I make no comment on whether including Professional Allowances as revenue would have any "cascading effect" on the calculation of other fees charged by Shoppers, as the motion judge concluded. The parties dispute whether this finding was correct, and, as I explain below, it is not necessary to address it.

revenue, the following information would be required for each Associate, for each year the Associate was part of the Ontario Class:

- The total amount of Professional Allowances attributable to direct patient care services at a store location. This depended on store specific information such as:

    a) The quantity of generic drugs dispensed at that store during the year;

    b) How many prescriptions of generic drugs were paid under the Ontario Drug Benefit ("ODB") vs. non-ODB plan;[4] and

    c) Direct patient care expenses at the store.

- The rate at which each additional dollar of store revenue (e.g. each dollar of Professional Allowances attributable to each Associate) was split between Shoppers and the Associate (30%, 20%, or 0%, as set out above). This depended on:

    a) Planned store profits for each Associate;

[4] This is because for most of the first four years of the class period, Professional Allowances were permitted for both the purchase of Ontario Drug Benefit ("ODB") plan drugs and non-ODB drugs (i.e. the private payor drug system). Beginning July 1, 2010, Professional Allowances were permitted for non-ODB plan drugs only and were subject to a percentage that capped the amount of Professional Allowances available and there was no reporting requirement.

b) The variance between the Associate's planned profits and actual profits at the end of the year;

c) The Associate's percentage share of excess profits or unplanned losses (20% or 30%);

d) That Associate's Guarantee, and in particular whether the additional store revenue increased that Associate's earnings above their Guarantee (as Shoppers retains 100% of each additional dollar of revenue until the Associate's earnings are greater than their Guarantee); and

e) Whether that Associate would have been subject to a $50,000 cap in the amount of excess profit to which they were entitled (in which case Shoppers would retain 100% of profits in excess of that cap).

[29] The figures necessary to calculate each Associate's damages at the individual store level were not provided to the motion judge and the Ontario Class claims this information does not exist at the individual store level, referring to Shoppers' evidence that there are gaps in the data it collected from the Associates.

(3) Changes to the Legislation

[30] Prior to October 1, 2006, Shoppers was permitted to receive rebates for merchandise purchased from generic drug manufacturers. On October 1, 2006, the Ontario government introduced amendments to the Legislation, which created what I will refer to as the "Professional Allowance Regime". The Legislation was amended periodically throughout the Class Period but the Professional Allowance Regime remained in force until March 31, 2013.

[31] As of October 1, 2006, the Legislation was amended to provide that "[a] manufacturer shall not provide a rebate to wholesalers, operators of pharmacies, or companies that own, operate or franchise pharmacies". The Legislation prohibited rebates in order to stop the inflationary effect on generic drug prices: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),* 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 11. Shoppers and others lobbied against this policy change, arguing that the ban on rebates would reduce the level of patient care provided by pharmacies. Ultimately, the amendments to the Legislation terminated one major source of revenue for pharmacies and replaced it with a type of reimbursement for specifically enumerated direct patient care services: Professional Allowances: *Katz,* at paras. 12-13.

[32] "Professional allowance" was defined in the regulations as "a benefit, in the form of currency, services or educational materials that are provided by a manufacturer to [wholesalers, operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents] for the purposes of direct patient care": *ODBA Regulation*, at s. 1(8); *DIDFA Regulation*, at s. 2(1), as they appeared October 1, 2006.

[33] The Legislation also contained a *Code of Conduct* which was "intended to establish system-wide guidance governing the use of professional allowances to be paid by manufacturers to operators of pharmacies, or companies that own,

operate or franchise pharmacies". *ODBA Regulation*, at Schedule 3; *DIDFA Regulation*, at Schedule 1, as they appeared October 1, 2006.

[34] These regulations provided that "[a] benefit is not a professional allowance if the contents of the Code of Conduct … are not complied with": *ODBA Regulation*, at s. 1(10); *DIDFA Regulation*, at s. 2(2), as they appeared October 1, 2006. The *Code of Conduct* provided that "professional allowance[s] must be used only for any or all of the activities" set out in the definition of "professional allowance" which included direct patient care services in the form of education programs, clinic days provided by pharmacists to disseminate disease or drug-related information, and private counselling areas within a pharmacy. All payments were subject to audit by the Ministry or a third party.

[35] The key provisions of the *ODBA Regulation* and the within *Code of Conduct* as it appeared on October 1, 2006, are set out below:

> 1(8) For the purposes of section 11.5 of the Act,
>
> "professional allowance", in the definition of "rebate", means, subject to subsections (9) and (10), a benefit, in the form of currency, services or educational materials that are provided by a manufacturer to persons listed in subsection 11.5 (1) of the Act for the purposes of direct patient care as set out in paragraphs 1 to 8 of this subsection:
>
> > 1. Continuing education programs that enhance the scientific knowledge or professional skills of pharmacists, if held in Ontario.

2. Continuing education programs for specialized pharmacy services or specialized certifications, if held in North America.

3. Clinic days provided by pharmacists to disseminate disease or drug-related information targeted to the general public including flu shot clinics, asthma clinics, diabetes management clinics, and similar clinics. For this purpose, a “clinic day” includes any additional staff to support the clinic day or the regular pharmacy business while the pharmacist is hosting a clinic day, during that day.

4. Education days provided by pharmacists that are targeted to the general public for health protection and promotion activities. Such education days must be held in the pharmacy, or a school, long-term care home, community centre, place of worship, shopping mall, or a place that is generally similar to any of these. For this purpose, an “education day” includes any additional staff to support the education day or the regular pharmacy business while the pharmacist is hosting an education day, during that day.

5. Compliance packaging that assists their patients with complicated medication regimes.

6. Disease management and prevention initiatives such as patient information material and services, blood pressure monitoring, blood glucose meter training, asthma management and smoking cessation, used in their pharmacy. For this purpose, “disease management and prevention initiatives” includes any additional staff required to support these initiatives or the regular pharmacy business while the pharmacist is hosting a disease management and prevention initiative, during the time it is being held.

7. Private counselling areas within their pharmacy.

8. Hospital in-patient or long-term care home resident clinical pharmacy services, such as medication reconciliation initiatives or other hospital or long-term care home-identified clinical pharmacy priorities. For this purpose, “clinical pharmacy services” includes the costs of any additional staff required to

support these services or the regular pharmacy business while the pharmacist is hosting a clinical pharmacy service, during the time it is being held.

…

(10) A benefit is not a professional allowance if the contents of the Code of Conduct established under subsection 11.5 (15) of the Act, and as set out in Schedule 3, are not complied with.

…

CODE OF CONDUCT

…

Fundamental Principles

1. Payments from manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, in the form of a professional allowance must be used only for any or all of the activities set out in the definition of “professional allowance” in subsection 1 (8) of the regulation.

2. All persons involved in the drug distribution system must operate transparently. To act transparently, manufacturers, operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents must make the executive officer and other stakeholders knowledgeable of, and fully understand, the flow of funds in the drug products supply chain. This includes recording and reporting all such payments as required by the executive officer, and being subject to audit by the Ministry or a third party.

3. All suppliers of drug products as well as operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, must commit to abide by this Code of Conduct. Any breach of the Code will be subject to enforcement as set out in

> the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*.
>
> …
>
> Professional allowances are to be calculated based on the following criteria:
>
> 1. Reasonable costs to provide direct patient care as set out in paragraphs 1 to 8 of the definition of "professional allowance" in subsection 1 (8) of the regulation.
>
> 2. Reasonable frequency of providing direct patient care as set out in paragraphs 1 to 8 of the definition of "professional allowance" in subsection 1 (8) of the regulation.
>
> 3. A reasonable number of patients per pharmacy.

[36] The *DIDFA Regulation* contained substantially identical provisions as of October 1, 2006, the only differences being the section numbers. All key provisions in the Legislation are set out in Appendix 1.

[37] At times there were legislated caps on Professional Allowance amounts and any excess amounts were deemed rebates, not Professional Allowances.

(4) The Parties' Conduct During the Period in Question

[38] Before 2006, Shoppers bought drugs in bulk from generic drug manufacturers and received rebates on the cost of those drugs. The drugs were then resold to the Associates. The direct patient care services were traditionally provided without direct compensation, so there was no "revenue" to either Shoppers or the pharmacies for the provision of direct patient care services.

[39] Shoppers did not amend the 2002 Agreement when the Legislation was amended in 2006 to account for the existence of Professional Allowances. The 2002 Agreement continued to be used until January 1, 2010, following which the 2010 Agreement was used for new Associates and for Associates whose contracts had expired. The 2010 Agreement did not expressly refer to Professional Allowances.

[40] Throughout the Class Period, Shoppers continued to receive funds from generic drug manufacturers pursuant to its national agreements.

[41] The amount of Professional Allowances Shoppers could claim was tied to the amount of generic drugs purchased and the amount of direct patient care services provided. Within these limits, Shoppers could have accepted $1.084 billion in Professional Allowances during the Class Period. The motion judge found that it in fact accepted only $955 million.

[42] Shoppers was required to provide reports to the Ontario government for some of the Class Period concerning the Professional Allowances it received. In these reports, Shoppers was required to certify: (a) the total amount of Professional Allowances received, and (b) the corresponding total amount of direct patient care expenditures for which the Professional Allowances had been used or were to be used.

[43] Shoppers represented that its reports were submitted “on behalf of the Associate[s]” listed in an appendix to its reports, and certified that the Professional Allowance monies were not expended on any of the prohibited uses described in the Legislation and were used for the purpose of public and private direct patient care initiatives. The appendix indicated that “head office receives Professional Allowances directly on behalf of all or more than one of its store locations. Therefore, head office will need to consolidate the individual store data in the reporting of the Professional Allowance information”.[5]

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[5] The entire relevant portion of the preamble in the appendix reads as follows:
“Note - Pharmacies that own or operate more than one Pharmacy location are required to complete this form (Appendix A). If you are reporting on behalf of multiple Pharmacies, please select the "Consolidated" option under Reporting Method. Any Pharmacies that are listed in Appendix A that are not identified as being part of the "Consolidated" reporting will be required to complete and submit a separate reporting package.
Pharmacies with multiple locations have the following three methods in which they can report the receipt and usage of Professional Allowances. The reporting method will be determined based upon the receipt/recipient of the Professional Allowances:
1. **Consolidated Reporting** - Head office receives Professional Allowances directly on behalf of all or more than one of its store locations. Therefore, head office will need to consolidate the individual store data in the reporting of the Professional Allowance information,
2. **Individual Store Reporting Directly** - The Individual store location will separately file a reporting package directly to the Ministry if it receives Professional Allowances directly from the drug Manufacturer.
3. **Dual Reporting** - Both head office and the individual Pharmacy receive Professional Allowances directly from the drug Manufacturer on behalf of the individual Pharmacy. For dual reporting, both the head office and the individual Pharmacy will file a reporting package with the Ministry based upon the pro-rata level of Professional Allowances that it receives.”

[44] Shoppers invoiced the drug manufacturers for Professional Allowances. The invoices for Professional Allowances were paid by deduction or credit on generic purchase invoices, by cheque, or by electronic funds transfer.

[45] Drug manufacturers who paid Professional Allowances had a statutory obligation to report the amount of Professional Allowances they paid.

[46] Approximately ninety-five percent of the direct patient care services were performed by the Associates (valued at $1.44 billion) and five percent of direct patient care services were performed by Shoppers (valued at $77.2 million). Shoppers kept all funds received for Professional Allowances from drug manufacturers.

C. ISSUES

[47] I will now proceed with my review of the motion judge's reasons and analysis of the issues in the following order:

1. The appropriate standard of review for the interpretation of the Agreements;
2. Whether the motion judge erred in concluding that there was a breach of the 2002 Agreement or, in the alternative, whether the motion judge erred in dismissing the claim for unjust enrichment;

3. Whether the motion judge erred in concluding that there was no breach of the 2010 Agreement or, in the alternative that there was no claim for unjust enrichment;
4. Whether the motion judge erred in finding that the Professional Allowance claims for 2006 and 2007 were statute-barred and in finding that a rolling limitation period applies to the Professional Allowance claims;
5. Whether the motion judge erred in holding that Shoppers received $955 million in Professional Allowances over the Class Period; and
6. Whether the motion judge erred in refusing to award aggregate damages.

D. ANALYSIS

(1) Standard of Review of the Interpretation of the Agreements

[48] The parties disagree about what standard of review applies to the interpretation of the Agreements.

[49] The Ontario Class submits that a correctness standard applies to the motion judge's interpretation of the Agreements. It submits that this court has applied a correctness standard of review to contracts of adhesion used within a single

organization. The Ontario Class claims however, that on either a correctness or a deferential standard, the errors the motion judge made are reversible.

[50] Shoppers submits that the standard of review is palpable and overriding error. It submits that there is a significant factual matrix specific to the parties and there is no precedential value to this contractual interpretation. Shoppers contends that the motion judge's interpretation of the Agreements was not limited to the words on the page, but was informed by "extensive consideration of a voluminous factual record regarding the commercial relationships respectively between the Associates, Shoppers and generic drug manufacturers, as well as the statutory regime governing professional allowances."

[51] The line between questions of law, which are reviewed on a correctness standard, and those where the issue involves the application of the law to a specific and distinct set of facts which attract a deferential standard of review, is not always clear.

[52] The Supreme Court has said that "in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 49.

[53] Contract interpretation is therefore generally a question of mixed fact and law subject to a deferential standard of review unless there is an extricable question of law identified or "the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 21, 46.

[54] In *Ledcor* at para. 39, Wagner J., as he then was, explained why some standard form contracts are subject to review on the standard of correctness and not on a deferential standard of review citing Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis, 2016):

> [T]he interpretation of the standard form contract could affect many people, because "precedent is more likely to be controlling" in the interpretation of such contracts … It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — "ensuring the consistency of the law" (*Sattva*, at para. 51) — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness. [Emphasis added, citation omitted.]

[55] Because consistency in the law is important, "[a]ppellate courts should consider whether 'the dispute is over a general proposition' or 'a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the

future'": *Ledcor,* at para. 48, quoting *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37.

[56] This court has also held that the absence of one of the three *Ledcor* factors, outlined above at para. 52, should not automatically lead to the imposition of a deferential standard of review. In *Bridging Finance,* for example, this court applied a correctness standard to a standard form contract that had no relevant factual matrix that informed the motion judge's contractual analysis, but also no precedential value because there was unlikely to be litigation about the contract in the future: *Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONCA 769, 169 O.R. (3d) 109, at paras. 8-14.

[57] On the other hand, in *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205 ("*Fontaine (SCC)*"), the Supreme Court held that the interpretation of the Indian Residential Schools Settlement Agreement (the "IRSSA"), a comprehensive settlement of a class action involving thousands of survivors of residential schools, was reviewable on a deferential standard of palpable and overriding error, as there was a distinct factual matrix and no significant precedential value.

[58] The settlement agreement involved two forms of financial compensation available to former students of residential schools: one based on the amount of

time spent at a residential school, and another in which former students who were survivors of abuse could bring claims for compensation through a specifically designed Independent Assessment Process ("IAP"). The Supreme Court held that at para. 35 that,

> While the IRSSA undoubtedly has "very significant implications for Canada and our aboriginal peoples" (C.A. reasons, at para. 294), it is at root a contract, the meaning of which depends on the objective intentions of the parties. As the majority at the Court of Appeal observed, the question of impact is distinct from precedential value. While the supervising judge's interpretation of the IRSSA will impact thousands of IAP claimants, it will have no significant precedential value outside of the IAP due to the IRSSA's sui generis nature. And, as shall become apparent below, the factual matrix looms large in ascertaining the meaning of this particular contract.

[59] This court's reasons as referred to in the above passage with approval, address the difference between impact on the many persons involved in the litigation and the precedential value of the decision itself.

[60] Strathy C.J.O., for the majority in *Fontaine v. Canada (Attorney General),* 2016 ONCA 241, 149 O.R. (3d) 703, recognized at paras. 95 and 96 that:

> The question is not whether the decision will impact many people, but whether it will have precedential value, in the sense that it provides guidance to adjudicators or resolves an issue that could arise in future litigation. The fact that the outcome of the interpretation of the agreement will affect many – indeed many thousands – of claimants, is not, of itself, a reason to elevate the standard of review to correctness.

> …There will be no future cases like this one. This is a once-and-for-all determination of the rights of all parties relating to these issues under the IRSSA. [Emphasis added.]

[61] While this court and the Supreme Court considered the fact that the agreement would affect many, a deferential standard of review was applied as the factual matrix was significant in the interpretation of the agreement and there was little precedential value. As such, the need to provide guidance to others beyond the scope of the litigation at play was not significant.

[62] In this case, the Agreements are standard form contracts that govern the franchise relationship between Shoppers and the Associates across Canada, excluding Québec. While the IRSSA was not a standard form contract, in that it was "the product of extensive negotiations" among the parties (*Fontaine (SCC)*, at para. 5), I find the directions from the Supreme Court on the meaning of precedential value relevant.

[63] I now consider the *Ledcor* factors as they apply in this case. First, there is no doubt that the Agreements are standard form contracts.

[64] Second, with respect to precedential value, the Agreements are not industry-wide contracts: they only govern the franchise relationship between Shoppers and the Associates, and the issues raised in this appeal regarding Professional Allowances will apply only to the Ontario Class as the Legislation applies only in

Ontario. The Ontario Class did not argue that there would be any significant precedential value to the questions of contractual interpretation at issue in this appeal. I conclude that the interpretation of these provisions in this class action will not likely arise again in cases involving other parties and the precedential value is therefore not significant.

[65] Third, there is a factual matrix specific to these parties that is relevant to the interpretation of these Agreements. The 2002 Agreement was drafted by Shoppers before the Professional Allowance Regime came into existence. It was signed by Associates at various times from 2002 until the next iteration of the Agreement was drafted in or around 2010. As such, the Agreement was signed with Associates before and after the legislative changes were made. The changing legislative landscape and Shoppers' past practices are relevant to the interpretation of the Agreements.

[66] In sum, although the Agreements are standard form contracts, there is a distinct factual matrix and no significant precedential importance, such that the analysis is not a question of law alone but rather, a question of mixed fact and law, reviewable on a palpable and overriding error standard of review.

[67] I note however, that even if I had applied the correctness standard, my conclusions in respect of the allegations of breach of the Agreements would remain

unchanged as I see no error in the motion judge's analysis or his conclusion in respect of the interpretation of the 2002 and 2010 Agreements.

(2) Principles of Contractual Interpretation

[68] Before turning to the analysis of the breach of contract claims, I review some of the general principles of contractual interpretation.

[69] The goal of contract interpretation is to determine the objective intentions of the parties. The contract must be read as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva*, at para. 47.

[70] The surrounding circumstances, while relied on in the interpretative process, "must never be allowed to overwhelm the words of the agreement": *Sattva*, at para. 57 (citations omitted). The surrounding circumstances should only consist of "objective evidence of the background facts at the time of execution of the contract": *Sattva*, at para. 58 (citation omitted).

[71] Subject to these requirements and the parole evidence rule, the surrounding circumstances include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]" at the time the agreement was entered into: *Sattva,* at para 58, quoting

from *Investors Compensation Scheme Ltd. v. West Bromwich Building Society,* [1998] 1 All E.R. 98 (H.L.), at p. 114.

(3) Did Shoppers Breach the 2002 Agreement or, in the Alternative, was Shoppers Unjustly Enriched?

[72] In its cross-appeal, Shoppers argues that the motion judge made three errors in finding that Shoppers breached the 2002 Agreement. First, Shoppers claims the motion judge erred in finding that Shoppers was not entitled to the Professional Allowances. He found they were not a discount, rebate, advertising allowance or other similar advantage under Article 11.04 of the 2002 Agreement. Second, Shoppers claims the motion judge erred in finding that Professional Allowances were "revenue" within the meaning of Article 7.01 of the 2002 Agreement. Third, and in the alternative, Shoppers argues that the motion judge erred in determining that the Ontario Class was entitled to receive payments under the 2002 Agreements that were entered into or renewed after the Professional Allowance Regime was enacted in October 2006 by failing to interpret those agreements as at the time of contracting.

[73] For the reasons that follow, I see no error in the motion judge's determination that Shoppers breached the 2002 Agreement.

(a) Professional Allowances are not rebates, discounts, or other similar advantages

[74] Shoppers claims the motion judge erred in holding that Professional Allowances are not "discounts, volume rebates, advertising allowances or other similar advantages" from "any person, firm or corporation by reason of its supplying merchandise or services to the Associate or to associates of the Company or its Affiliates" under Article 11.04 of the 2002 Agreement. I do not accept this submission.

[75] As noted above, Professional Allowances are defined in the Legislation as "a benefit in the form of currency, services, or educational materials that are provided by a manufacturer …for the purposes of direct patient care": *ODBA Regulation*, at s. 1(8); *DIDFA Regulation*, at s. 2(1), as they appeared October 1, 2006. The *Code of Conduct* provides that Professional Allowances were "to be calculated based on … [r]easonable costs to provide direct patient care," "[r]easonable frequency of providing direct patient care," and "a reasonable number of patients." In other words, Professional Allowances are directly tied to direct patient care services, which were largely provided by the Associates at store-level. They are not just a percentage discount on the price of drugs to be negotiated between Shoppers and generic drug manufacturers.

[76] In contrast, Article 11.04 refers to “volume rebates”, “discounts” and “other similar advantages”. The plain meaning of the word “rebate” found in Article 11.04 of the Agreement, as defined in the *Concise Oxford English Dictionary*, 12th ed. (New York: Oxford University Press, 2011) is “a deduction or discount on a sum due” (at p. 1198). Similarly, a “discount” is a “deduction from the usual cost of something”: *Concise Oxford English Dictionary*, at p. 409.

[77] Article 11.04 makes no mention of Professional Allowances as the legislative amendments providing for Professional Allowances were not enacted until 2006. This is so despite the fact that some Associates did not enter into their 2002 Agreements until after 2006.

[78] The motion judge held that unlike the traditional rebates that Shoppers had retained under the 2002 Agreement prior to the enactment of the Legislation, Professional Allowance monies had to be *earned* by those providing direct patient care services. He explained that:

> [829] The typical *quid pro quo* for a rebate is for the purchaser to agree to buy and pay for the merchandise from the vendor for which the vendor will receive a rebate or discount or allowance etc. Professional allowances are not typical; the *quid pro quo* for the Professional Allowance was that the purchaser of the generic drugs had to provide services to third party beneficiaries – the direct care patients. It is not a similar feature to a rebate to have to earn it by providing services to third party beneficiaries. In the case of Professional Allowances …

> there is the oddity that those patients likely did not receive patient care that was connected to the generic drug manufacturer's merchandise for which the Professional Allowance was paid. It is untypical that a contract benefit appears to be a statutory benefit for a third party. Although rebates are a benefit of a contract bargain, it is a not similar feature to a rebate that a Professional Allowance was considered to be a statutory benefit for the third parties and not the contracting party. And there is the further peculiarity that Professional Allowances are connected to a *Code of Conduct*, which obviously is not a similar feature to a rebate. [Emphasis added.]

[79] As such, he held that Professional Allowances are neither "rebates", "discounts" nor "other similar advantages" within the meaning of the 2002 Agreement, nor any of the other items listed in Article 11.04. Rather, they were a "new remunerative thing" that was not objectively contemplated as falling within any of the terms in Article 11.04. I agree with the motion judge's reasoning. Put simply, the Professional Allowances provided for in the Legislation are materially different than "rebates" "discounts" or "other similar advantages."

(b) Professional Allowances are revenue

[80] Second, Shoppers argues that the motion judge erred by assuming that if Shoppers was not expressly entitled to keep the Professional Allowances under Article 11.04, then Professional Allowances were "revenue". Associates were entitled to share in revenue pursuant to Article 7.01 of the 2002 Agreement.

[81] Shoppers claims that Professional Allowances are not revenue because they are not “derived by the Associate from the Franchised Business”. Rather, they are derived by Shoppers by entering into agreements with generic drug manufacturers. Shoppers also argues that Article 7.01, which is under the heading “Banking”, does not create any entitlement for the Associates but merely describes the obligation of the Associate to deposit revenue into the store’s bank account. Shoppers says it therefore has no contractual obligation to split the Professional Allowances with the Ontario Class. I disagree.

[82] For ease of reference I reproduce the relevant portion of Article 7.01 of the 2002 Agreement, in a section entitled “Banking”, below:

> All revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate and the Associate undertakes and agrees to deposit all monies received from each day's business not later than the following banking day in an account or accounts to be maintained specifically for such purpose with the Associate's bankers. …

[83] Revenue is defined in the *Canadian Oxford Dictionary*, 2nd ed. (Don Mills, ON: Oxford University Press, 2004), at p. 1322, as “income, esp. of a large amount, from any source" and in *Black's Law Dictionary*, 11th ed. (Saint Paul: Thomson Reuters, 2019), at p. 1577, as "A source of income".

[84] Before 2006, Associates provided direct patient care services without direct compensation.

[85] In 2006, the Professional Allowance Regime allowed generic drug manufacturers to pay for specifically enumerated direct patient care services. Those services were provided in large measure, by the Associates and their pharmacies. This, in my view, is revenue earned from providing direct patient care services.

[86] Shoppers reported to the government on behalf of the Associate store locations and confirmed that:

> 1. "The Pharmacy named above certifies, to the best of its knowledge and ability, that: … (ii) the Professional Allowance monies were not expended on any of the prohibited uses as described in the ODBA and DIDFA Codes of Conduct and have been used for the purposes of public and private direct patient care initiatives." [Emphasis added.]
>
> 2. Appendix A to the report provides that Shoppers': "Head office receives Professional Allowances directly on behalf of all or more than one of its store locations. Therefore, head office will need to consolidate the individual store data in the reporting of the Professional Allowance information." [Emphasis added.]

[87] For these reasons, while the motion judge did not lay out his reasoning, in my view, there is no error in his conclusion that Professional Allowances are revenue earned by providing direct patient care services within the meaning of Article 7.01. The *Code of Conduct* required Professional Allowances be calculated based on the reasonable costs and frequency of providing direct patient care, and

such services were largely provided by the Associates. The Legislation makes it clear that Professional Allowances “must be used only for” funding specifically enumerated direct patient care services such that, in my view, the Professional Allowances should be attributed to those who provided the specifically enumerated direct patient care services to be considered revenue pursuant to Article 7.01.

[88] Professional Allowance monies earned for providing direct patient care should therefore be considered as part of the profit-sharing arrangement, provided for in the Model.

[89] Moreover, if Shoppers were permitted to keep all of the Professional Allowance monies for services they did not provide, and are not otherwise provided for in the 2002 Agreement, Shoppers would receive an unfair windfall. This would be inconsistent with the parties’ agreement to share unexpected gains and losses in accordance with a prescribed formula.

[90] For these reasons, I see no error in the motion judge’s conclusion that Shoppers breached the 2002 Agreement.

(c) The analysis is the same for 2002 Agreements executed before and after October 2006

[91] In the alternative, Shoppers argues that the motion judge’s decision fails to consider that although the 2002 Agreement was drafted in or prior to 2002, some

Ontario Class members executed the 2002 Agreement for the first time or renewed their 2002 Agreement after Professional Allowances were introduced in 2006, and would therefore have known of and considered the Professional Allowances when they signed their 2002 Agreement. Therefore, Shoppers says it did not breach any 2002 Agreements entered into on or after October 1, 2006.

[92] The Ontario Class notes that Shoppers did not advance this argument before the motion judge. In any event, I would reject this argument also.

[93] Accepting this argument would mean that a standard form contract executed on September 30, 2006, would have a different meaning than an identical contract executed (either for the first time or renewed) on October 1, 2006. The motion judge's conclusion rested on more than just the timing of the legislative change in 2006. He also considered the text of the Agreements. This alternative argument advanced by Shoppers runs contrary to the guidance in *Sattva*, at para. 57, that the surrounding circumstances must never be allowed to overwhelm the words of an agreement. The surrounding circumstances are only an aide to understanding the words of the 2002 Agreement: *Sattva*, at para. 60. Those words remained consistent through to 2010.

[94] For these reasons, I agree with the motion judge's conclusion that Professional Allowances are revenue, and that Shoppers took this revenue that

should have been subject to the Model for sharing profits, thereby breaching the 2002 Agreement.

(d) The unjust enrichment claim

[95] On appeal, the Ontario Class advances its claim for unjust enrichment in respect of the 2002 Agreement, but only if the motion judge's finding that Professional Allowances are properly "revenues" under the 2002 Agreement is overturned. As I would not overturn the motion judge's decision that Shoppers breached the terms of the 2002 Agreement, it is not necessary to address the unjust enrichment claim in respect of the 2002 Agreement.

[96] I would therefore dismiss Shoppers' appeal of the motion judge's finding that Shoppers breached the 2002 Agreement, and I would also dismiss the Ontario Class's alternative ground of appeal challenging the motion judge's rejection of its claim for unjust enrichment.

(4) Did Shoppers Breach the 2010 Agreement or, in the Alternative, was Shoppers Unjustly Enriched?

[97] The next issue is whether the motion judge erred in holding that Shoppers was entitled to retain Professional Allowance monies pursuant to Article 11.10 of the 2010 Agreement.

[98] Article 11.10 of the 2010 Agreement provides that Shoppers is entitled to:

> [T]he benefit of any and all discounts, rebates, advertising or other allowances, concessions, or other similar advantages obtainable from any person by reason of the supply of merchandise or services to the Company, the Associate or to Associates of the Company or its Affiliates. [Emphasis added.]

(a) The motion judge's reasons

[99] The motion judge held that Shoppers could keep the Professional Allowances pursuant to Article 11.10 of the 2010 Agreement. He stated that in interpreting the 2010 Agreement there were two fundamentally important interpretative factors that differed from the interpretative situation of the 2002 Agreement.

[100] First, he noted that the language of Article 11.10 of the 2010 Agreement differed from the language of Article 11.04 of the 2002 Agreement: "The 2010 Associate Agreement added 'concessions' to the list of payments between 'advertising allowances' and 'other similar advantages,' so that the Article read: 'any and all discounts, rebates, advertising or other allowances, concessions, or other similar advantages'" (emphasis in original).

[101] Second, the motion judge explained that,

> [T]he far more significant interpretive factor than this slight change of wording - the Professional Allowance Regime was a part of the factual nexus of the 2010 Associates Agreement at the time at which it came into existence to replace the 2002 Associates Agreement,

> which came into existence while the notion of Professional Allowances as a rebate or as an exception to rebates was not even a twinkle in the eye of the Legislators.

[102] He noted that at the time of the introduction of the 2010 Agreement, Ontario Class members:

> [W]ould have been aware that Shoppers was continuing its supply chain practices of negotiating discounts, rebates, etc., when it was entering into agreements with the generic drug manufacturers. When Shoppers amended the language of Article 11.04 into the language of Article 11.10, the [Ontario Class members] knew that Shoppers was not remitting rebates or Professional Allowances and that it was calculating the Professional Allowance entitlements based on the Associates direct patient care services.

[103] As such he held that Shoppers was entitled to keep Professional Allowance monies pursuant to Article 11.10 of the 2010 Agreement.

(b) The Ontario Class's submissions

[104] First, the Ontario Class claims the motion judge erred in his treatment of the circumstances surrounding the 2010 Agreement as "the fact that Professional Allowances existed in 2010 does not, standing alone, trigger a fundamentally different interpretation of virtually identical contractual terms." The Ontario Class argues that more is required to waive a statutory benefit through contract. According to the Ontario Class, the motion judge also failed to consider the significance of the statutory prohibition of rebates in the industry in Ontario.

[105] Second, the Ontario Class submits that the motion judge erred in his interpretation of the words of the 2010 Agreement. Neither the words "concessions" and "other allowances" in Article 11.10, nor any of the other words in that article, refer to Professional Allowances. While the motion judge underlined the word "concessions" in his reasons, he offered no analysis of the significance of that word.

[106] Third, the Ontario Class claims that any ambiguities in these contracts of adhesion, drafted by Shoppers, must be resolved in favour of the Ontario Class. They submit that where there are two possible interpretations of a contract, a lawful interpretation should be preferred over an unlawful one.

[107] The Ontario Class also made other submissions in oral argument, including that the motion judge (1) failed to give effect to the circumscribing language in Article 11.10 ("obtainable from any person by reason of the supply of merchandise or services to the Company, the Associate or to Associates of the Company or its Affiliates"), and (2) failed to give effect to various contextual factors such as the nature of the franchisor-franchisee relationship between the parties.

(c) Analysis of the breach of the 2010 Agreement claim

[108] In assessing whether the motion judge erred in holding that Shoppers did not breach the 2010 Agreement, the issue is whether the motion judge erred in

holding that the words in Article 11.10, when viewed in the context of the circumstances surrounding the 2010 Agreement, reflect an agreement to allow Professional Allowances to be retained by Shoppers. The 2010 Agreement must be read in accordance with the legislative amendments enacted in 2006, the clear meaning of the words in Article 11.10, including “concessions” and “other allowances”, and the objective knowledge and intention of the parties at the time of the formation of the contract.

[109] First, although the motion judge offered no interpretation of the words “concessions” and “other allowances” in Article 11.10 of the 2010 Agreement, given their ordinary and grammatical meaning, they clearly include Professional Allowances.

[110] The word “concession” as defined in the *Concise Oxford English Dictionary*, at p. 297, includes “a preferential allowance, rate, or price, especially for a particular category of person”. The words “other allowances” are broad and, on their ordinary and grammatical meaning would include “Professional Allowances”. Moreover, the words “other allowances” are preceded by the word “advertising or” (emphasis added) which suggests that the intention is to include all allowances, even if they are not advertising allowances.

[111] As such, although Article 11.10 of the 2010 Agreement does not refer explicitly to “Professional Allowances”, the plain meaning of the words “concessions” and “other allowances” is meant to include allowances payable to Shoppers, and thus encompasses “Professional Allowances”.

[112] Second, the factual matrix confirms this interpretation. The words “other allowances” and “concessions” were added into the 2010 Agreement several years after the Professional Allowance Regime was introduced and were within the objective knowledge of both parties. As noted by the motion judge, “[T]he Professional Allowance Regime was a part of the factual nexus of the [2010 Agreement]” as the legislative amendments allowing Professional Allowances and prohibiting rebates were enacted in 2006.

[113] When the parties signed the 2010 Agreement, they were aware that the contract was drafted in a world where Professional Allowances existed. The clear wording that includes “other allowances” and “concessions”, together with the fact that Professional Allowances had been allowed by legislative amendment for over three years when the 2010 Agreement was introduced, and the parties’ mutual and objective knowledge of the Professional Allowance Regime at the time the 2010 Agreement was both drafted and executed, make it clear that the objective intention of the parties in signing the 2010 Agreement was to allow Shoppers to retain Professional Allowance monies.

[114] The various contextual factors referred to by the Ontario Class do not yield a different interpretation. As explained above, the words of the contract are clear and the factual matrix as a whole supports the motion judge's interpretation.

[115] Moreover, I disagree with the Ontario Class that the words "obtainable from any person by reason of the supply of merchandise or services to the Company, the Associate or to Associates of the Company or its Affiliates" in Article 11.10 are inconsistent with a Professional Allowance.

[116] The Legislation defined "Professional Allowance" to include "a benefit, in the form of currency, … provided by a manufacturer to [companies that own, operate or franchise pharmacies] for the purposes of direct patient care": *ODBA Regulation*, at s. 1(8); *DIDFA Regulation*, at s. 2(1), as they appeared October 1, 2006.

[117] The Legislation thereby envisaged that Professional Allowance money will be paid by drug manufacturers to Shoppers for Professional Allowances. For several years during the Class Period, Shoppers prepared reports that were submitted to the Ontario government about monies received for Professional Allowances from manufacturers.

[118] The motion judge noted that "Professional Allowances were a new breed or genus of payment from a vendor of merchandise to a wholesaler or a retail

purchaser of merchandise". In describing the difference between rebates and Professional Allowances the motion judge also stated that "patients [who received direct patient care] likely did not receive patient care that was connected to the generic drug manufacturer's merchandise for which the Professional Allowance was paid".

[119] Therefore, I disagree that the concluding language in Article 11.10 excludes Professional Allowances and I see no error in the motion judge's conclusion that Shoppers did not breach the 2010 Agreement.

[120] The words of the contract are clear, and the factual matrix as a whole supports the motion judge's interpretation. As the words and objective intention of the parties are in my view clear, there is no need to resort to *contra proferentem*. This concept only comes into play if there is ambiguity in the contract, even after other principles of contractual interpretation are applied, and here there is no ambiguity: *Ledcor*, at para. 51; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Toronto: LexisNexis Canada, 2020), at pp. 101-103. Moreover, the submission that where there are two possible interpretations the lawful interpretation should be preferred to the unlawful interpretation has no application here because the contract does not have two possible interpretations, and the interpretation is not unlawful.

(d) The unjust enrichment claim

[121] Nor do I see any error in the motion judge's dismissal of the unjust enrichment claim. The Ontario Class concedes there is no room for unjust enrichment if the claim falls under the contract, which it does.

[122] I would therefore dismiss the grounds of appeal relating to the 2010 Agreement.

(5) Limitation Period Issues

[123] The Ontario Class submits that the motion judge erred by holding that the Professional Allowance claims for 2006 and 2007 were statute-barred. It claims that it was unaware of the breach of contract during that period because Shoppers exhibited a pattern of non-disclosure, lack of transparency, and provided misleading information to the Ontario Class. It claims that the evidence demonstrates that it was not until 2009 that the Associates knew that: (i) Shoppers was relying on the direct patient care services performed by Associates to accept Professional Allowances, (ii) no new "patient care and disease management related programs" had materialized in the pharmacies of the Associates, and (iii) Shoppers was not providing any Professional Allowance funding directly to the Associates (a fact revealed in their 2008 settlement memoranda, a standard document sent to Associates at the end of the fiscal year which communicated the

Associate earnings). Therefore the Ontario Class argues that none of its claims should have been statute barred.

[124] However, Shoppers argues that the motion judge did not err in finding that the Ontario Class had the requisite knowledge to trigger the limitation period in 2006 and 2007, but cross-appeals, arguing that the entire claim should have been statute barred. Specifically, Shoppers argues that the motion judge erred in finding that there was a rolling limitation period instead of a single limitation period that had expired.

[125] Shoppers concedes that the motion judge correctly articulated that a rolling limitation period may apply to claims for periodic payments where the issue is whether the payment has been made rather than whether it was to be paid in the first place, citing *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518, leave to appeal refused, [2022] S.C.C.A. No. 353, and *Richards v. Sun Life Assurance Company of Canada*, 2016 ONSC 5492. Shoppers also agrees with the motion judge's description of two circumstances in which a limitation period will not roll because it has been triggered by a single event, namely where (i) there is a "categorical refusal to pay a benefit due under a contract", or (ii) there is a repudiation of the contract.

[126] Shoppers therefore takes no issue with the motion judge's comments that:

[558] In a breach of contract case, where there is a continuing breach of an ongoing obligation to make period[ic] payments, the limitation period may sometimes roll, which is to say it may commence anew with each successive breach of the contract.

[559] Where a breach of contract involves a failure to perform an obligation scheduled to be performed periodically … a failure to perform any such obligation gives rise to a breach and give[s] rise to a claim as from the date of each individual breach.

…

[561] Thus, where there is a continuing breach of a contract to perform an obligation scheduled to be performed periodically, the limitation period applies on a rolling basis and the period commences each day as a fresh cause of action accrues and runs two years from that date.

…

[563] However, if there is a categorical refusal to pay a benefit due under a contract or a repudiation of the contract, the running of the limitation period will be triggered by the single event provided that the termination was clear and unequivocal. Where there is a breach of a continuing contractual promise and the innocent party accepts the breach as grounds to terminate the contract, the limitation period begins to run from the date of the termination of the contract.

[564] A rolling limitation period may apply to claims for periodic payments, in cases where the issue is whether certain payments to which the plaintiff is entitled have been made as opposed to cases where the issue is whether the plaintiff was entitled to the periodic payments in the first place. [Citations omitted.]

[127] As noted by this court in *Pickering Square Inc. v. Trillium College Inc.,* 2016 ONCA 179, 395 D.L.R. (4th) 679, at para. 24, where a "breach of contract involves a failure to perform an obligation scheduled to be performed periodically… [a] failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach" (citation omitted). Similarly, in *Marvelous Mario's Inc. v. St. Paul Fire and Marine Insurance Co*., 2019 ONCA 635, 147 O.R. (3d) 186, at para. 35, leave to appeal refused, [2019] S.C.C.A. No. 392, this court stated that "[i]n cases where there have been multiple breaches of ongoing obligations, it is equitable to impose a rolling limitation period."

[128] Shoppers claims however, that if there was a breach in its failure to remit Professional Allowances to its Associates, that breach arose from a "categorical refusal to pay a benefit due under a contract", which would trigger a single limitation period. It submits that the question has always been whether the Ontario Class was entitled to Professional Allowances, in the face of Shoppers' refusal to pay such amounts, yet the motion judge failed to consider this.

[129] In the alternative, Shoppers claims that even if rolling limitation period applied, the motion judge erred in finding that any claims for Professional Allowances remittable to the Ontario Class between January 1, 2008, and November 19, 2008, were not statute-barred. In Shoppers view, all of the 2008 claims up until November 19, 2008, were out of time. Shoppers submits that the

evidence on the motion was that the service fee, through which Shoppers took its share of store profits, was not paid at year end, but rather each four-week period. Accordingly, to the extent that there were rolling breaches of the 2002 Agreement, each time Shoppers failed to include Professional Allowances in the Associates' share of profitability in 2008, such breaches "crystallized" every four weeks, not at year end.

[130] Shoppers submits that it is not clear whether claims between January 1, 2008, and November 19, 2008, are foreclosed, as the motion judge held, at para. 629, that "the claims of the Associates for Professional Allowances would be statute barred for claims arising before November 19, 2008. Practically speaking that would foreclose claims for Professional [Allowances] for the year ends 2006 and 2007" (emphasis added). At para. 843 of the motion judge's reasons he goes on to say that:

> Shoppers does have a partial limitation period defence to the [Ontario Class's] breach of contract claim. Claims before November 19, 2008 are statute barred. Given that revenues were reconciled by the contracting parties at year end, the claims for 2006 and 2007 but not 2008, 2009, or 2010 would be statute barred. [Emphasis added.]

[131] For the reasons that follow, I would dismiss both the appeal of the motion judge's finding that the 2006 and 2007 claims are statute-barred and the cross-appeal respecting the rolling breaches.

[132] First, the motion judge did not err in finding that the Ontario Class had sufficient knowledge to trigger the limitation periods applicable to the 2006 and 2007 claims. The motion judge found as a fact that the Professional Allowance Regime was "notorious" in the retail pharmacy sector. He held that the Associates knew or ought to have known, from the outset of the Professional Allowance Regime, that they were suffering damages at the hands of Shoppers and had claims for unjust enrichment or breach of contract. Accordingly, the limitation period began to run when the Legislation was enacted. The Ontario Class commenced its action on November 19, 2010, and any claims arising before November 19, 2008, were statute-barred.

[133] The motion judge did not accept the Ontario Class's submission that Shoppers lied about using the Professional Allowances "to the development and implementation of a wide variety of patient care and disease management related programs in [the Associate's] pharmacy." He stated:

> [622] I find that there was no lie here. What there was, was the difference of perspective, that lies at the heart of the [Ontario] Class [m]embers' claim. Shoppers believed that it was entitled to keep the Professional Allowances - as rebates. The Associates believe that Shoppers belief is mistaken because the Professional Allowances were a new remunerative thing that was not a rebate … and was theirs to claim.
>
> [623] The Associates would have actually had or they ought to have had the belief that the Professional

Allowances belonged to them as of the implementation of the Professional Allowances Regime, which was notorious in the retail pharmacy sector of the economy. … [T]here was a way for the Associates to draw a plausible inference that Shoppers was liable based on the material facts that the Associates actually or constructively knew.

[624] The Associates expected or they ought to have expected receiving the Professional Allowances from the outset of the Professional Allowances Regime. In other words, when the Associates did not begin receiving the Professional Allowances from Shoppers, they knew or ought to have known that they were suffering damages and they knew or ought to have known that they had claims for unjust enrichment or breach of contract against Shoppers.

[625] In still other words, the limitation period for the Professional Allowances Claim presumptively began to run from the outset of the Professional Allowance Regime and the Associates have not rebutted the presumption. … [It] follows that with the Plaintiffs' action having been commenced on November 19, 2010 that the Professional Allowance Claims are statute barred for the period before November 19, 2008.

…

[627] … [T]he Associates know or ought to have known about their claims from the outset of Shoppers's alleged breach of contract. By the year end when the Associate, who would have ordered and received generic drugs, met to settle the Associates Earning and Shoppers's Service Fee, the Associate would have expected to receive the Professional Allowances for the generic drugs that he or she had ordered and for which he or she had performed direct patient care services. By the end of that year, the Associate would have known that he or she had not been receiving the Professional Allowances.

…

> [629] Without any assumption and consistent with my finding that only the Associates governed by the 2002 Associates Agreement have Professional Allowance Claims, the claims of the Associates for Professional Allowances would be statute barred for claims arising before November 19, 2008. Practically speaking that would foreclose claims for Professional Alliances for the year ends 2006 and 2007. The Associates with Professional Allowance Claims would have claims (to be determined at individual issues trials) for 2008, 2009, 2010, 2011 and circa 2011 at the latest for any Associate who in 2009, signed a 2002 Associates Agreement, which had two automatic one year renewals. In my opinion, the claims for Professional Allowance would roll. The failure of Shoppers' to pay the Professional Allowances was not a repudiation of the Associates Agreements and the contracts continued with rolling breaches of contract when Shoppers did not remit the Professional Allowances so they became part of the revenue of the stores, the profits of which Shoppers would share with the Associates. [Emphasis added.]

[134] The motion judge therefore held that Professional Allowance claims were subject to a rolling limitation period because Shoppers' retention of the Professional Allowances constituted rolling breaches of the 2002 Agreement. He held however that claims arising before November 19, 2008, two years before the Ontario Class commenced its action, are statute-barred.

[135] The question of whether a limitation period expired prior to the commencement of an action is a question of mixed fact and law, subject to a standard of "palpable and overriding error": *Crombie Property Holdings Limited v.*

McColl-Frontenac Inc. (Texaco Canada Limited), 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 31, leave to appeal refused, [2017] S.C.C.A. No. 85; *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38.

[136] In my view, when the reasons are read as a whole, and given the motion judge's finding that the Associates expected or ought to have expected receiving the Professional Allowances from the outset of the Professional Allowance Regime and his acceptance of the evidence that revenues were reconciled by the contracting parties at year end, I see no error in the motion judge's conclusion that the claims for 2006 and 2007 were statute-barred, but not the claims for 2008 and after.

[137] With respect to the cross-appeal, there was no "categorical refusal to pay a benefit under a contract" as submitted by Shoppers. On the contrary, Shoppers represented in its report to the government that "[h]ead office receives Professional Allowances directly on behalf of all or more than one of its store locations. Therefore, head office will need to consolidate the individual store data in the reporting of the Professional Allowance information" (emphasis added). Unlike *Richards*, Shoppers never advised the Associates that it was refusing to pay them for Professional Allowance services rendered; it simply did not pay them to the Ontario Class. This was a case of multiple breaches of the obligation to share

Professional Allowances, as revenue, with the Ontario Class pursuant to Article 7.01.

[138] Finally, the motion judge did not misapprehend the evidence in concluding that the Ontario Class could make claims for Professional Allowances received by Shoppers between January 1, 2008 and November 19, 2008. Shoppers reconciled revenues at the end of each year and the motion judge held that rolling breaches of contract happened when "Shoppers did not remit the Professional Allowances so they became part of the revenue of the stores, the profits of which Shoppers would share with the Associates." It follows that Shoppers' breaches crystallized when profits were reconciled at year-end.

[139] As such I would uphold the motion judge's decision on this point.

(6) Whether Shoppers Received $955 million or $1.084 billion in Professional Allowances

(a) The submissions of the parties

[140] The Ontario Class claims the motion judge understated the amount of Professional Allowances received by Shoppers by roughly $129 million. The Ontario Class claims that this $129 million was received by Shoppers from generic drug companies for drugs purchased for Ontario but was attributed by Shoppers to other provinces that permitted rebates. In this way, Shoppers increased its profit

by removing those funds from the more restrictive Professional Allowance Regime operating in Ontario. The motion judge found that Shoppers "seemed to be cooking the books" but concluded that this conduct was "not pertinent to the litigation". The Ontario Class claims that the motion judge erred, because this conduct breached Shoppers' contractual obligation to act in good faith by reducing the pool eligible for Professional Allowances that Shoppers would have to pay to its Associates.

[141] Specifically, the Ontario Class claims the motion judge erred in finding that although "Shoppers *could have* accepted $1.084 billion in Professional Allowances … Shoppers was entitled to act in its own self-interest to allocate between Professional Allowances and rebates" and allocate only $955 million in Professional Allowances from drug manufacturers (emphasis added by Ontario Class). Rather, the Ontario Class says that Shoppers *in fact* received $1.084 billion in Professional Allowances.

[142] As indicated, the Ontario Class claims that Shoppers had a duty of good faith and honest performance in respect of the Agreements that required it to account for the funds received from generic drug manufacturers honestly and transparently, and that the statutory regime did not afford Shoppers the discretion to understate the amounts it received in respect of drugs dispensed in Ontario and overstate the amounts received in respect of drugs dispensed in the rest of

Canada, in order to maximize its profits by minimizing the payments that would be caught by the Professional Allowance Regime in Ontario.

[143] The Ontario Class claims that by unilaterally reallocating funds without the knowledge or consent of the Associates who performed most of the enumerated direct patient services for which Professional Allowances were permitted, Shoppers circumvented the prescriptive statutory regime, and breached its contractual and common law duties of good faith to the Associates. They argue this deprived the Ontario Class of their entitlement to share in revenue from Professional Allowances for store-level direct patient care services that they provided.

[144] Shoppers responds that the motion judge found as a fact that these amounts were received by Shoppers outside of Ontario pursuant to its commercial agreements with drug manufacturers. Further, Shoppers says these payments cannot be Professional Allowances because, having not been reported to the Ministry during a period when such reporting was required, they were deemed under the Legislation to be “rebates”. Shoppers says the Ontario Class is attempting to circumvent the certified common issues by recharacterizing amounts that were paid as money received as rebates outside of Ontario, as Professional Allowances.

[145] For the reasons that follow, I would allow this ground of appeal. As such, $1.084 billion, (that is both the $955 million and the $129 million) must be considered as eligible for distribution to members of the Ontario Class, as Professional Allowances according to the terms of the 2002 Agreement.

(b) The motion judge's reasons

[146] The motion judge found that the drug manufacturers were "not involved in how Shoppers allocated the funds to be remitted to Shoppers" and that Shoppers "allocated the money it received under national agreements disproportionately" such that "Ontario Professional Allowances were understated and rebates in the rest of Canada were overstated by a corresponding amount."

[147] He held that:

> Shoppers purchased a quantity of generic drugs that given the direct patient care services that it and its Associates had provided would have qualified Shoppers to accept $1.084 billion in Professional Allowances. Shoppers, however, invoiced the generic drug manufacturers for $955 million, and, as noted above, Shoppers treated the balance of the payments from the generic drug manufacturers as rebates.

[148] The motion judge decided that $955 million was the appropriate amount for the following reasons:

> [475] I arrive at $876.8 million in the following way. **There was nothing improper** in Shoppers's invoicing the generic manufacturers for $955 million in Professional

> Allowances in Ontario and in its allocating $126 million to rebates for the rest of Canada. The Associates had agreed in both the 2002 Associates Agreement and the 2010 Associates Agreement that **Shoppers was entitled to rebates**. At the certification motion, I determined that the Associates did not have a breach of contract claim based on Shoppers taking rebates. **Shoppers was entitled to act in its own self interest** to allocate between Professional Allowances and rebates. This was a matter of indifference to the generic drug manufacturers provided that Shoppers qualified (or was overqualified) for the Professional Allowances, which was the situation in the case at bar.
>
> [476] **The generic drug manufacturers paid Shoppers $955 million in Professional Allowances**, none of which was remitted to the Associates. Assuming that Shoppers should have remitted Professional Allowances to the Associates governed by the 2002 Associates Agreement and or the 2010 Associates Agreement, it would have not been a breach of contract for Shoppers to hold back $77.2 million on account of the direct patient care services provided by Shoppers itself. Thus, the maximum amount for which there could be liability for breach of contract is $876.8 million. [Underlining in original; bold added.]

[149] The motion judge acknowledged that Shoppers' unilateral allocation often resulted in rebate rates in the rest of Canada in excess of 100% of the price of the drugs in the rest of Canada.

[150] However, he rejected the Ontario Class's submission that Shoppers received $1.084 billion in Professional Allowances in Ontario, and concluded that Shoppers only received $955 million in Professional Allowances as Shoppers allocated $126 million as rebates outside of Ontario and that it was open to

Shoppers to do so.[6] As such, he concluded that the Ontario Class was only entitled to its share of the $955 million[7] in Professional Allowances not its share of the maximum allowable amount of $1.084 billion.

(c) Analysis

[151] For the reasons that follow, I disagree with the motion judge's conclusion that the Ontario Class was only entitled to its share of the $955 million in Professional Allowances and not its share of the maximum allowable amount of $1.084 billion.[8]

[152] I will outline (a) the relevant provisions of the 2002 Agreement, (b) the process followed in respect of Professional Allowances, (c) the legal tests for a finding of breach of various duties related to good faith, and (d) how in my view, Shoppers' actions breached these duties.

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[6] In so doing, the motion judge made an arithmetic error in calculating that $126 million (not $129 million) was allocated as rebates outside Ontario instead of being submitted to the Ontario government as Professional Allowances. The difference between $1.084 billion and $955 million is $129 million.

[7] As outlined in the portion of the motion judge's reasons quoted at para. 148, the motion judge found that it would not have been a breach of contract for Shoppers to hold back $77.2 million from the $955 he found it received on account of direct patient care services provided by Shoppers itself. Nothing in these reasons is intended to detract from that finding.

[8] The motion judge arrived at these figures before addressing whether Shoppers breached either the 2002 Agreement or the 2010 Agreement. As he concluded that Shoppers breached only the 2002 Agreement, the maximum allowable amount will necessarily have to be adjusted to take that finding into account. Nothing in these reasons is intended to detract from this principle.

[153] Article 7.01 of the 2002 Agreement provides that, "All revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate" (emphasis added).

[154] In 2006, the Legislation was amended to prohibit rebates but allow Professional Allowances. Rebates continued to be allowed in many other provinces and territories in Canada.

[155] Shoppers was prohibited from collecting rebates from generic drug manufacturers in Ontario due to the inflationary effect on the price of generic drugs: *Katz*, at para. 11. However, Professional Allowances were introduced after Shoppers and others lobbied Ontario legislators, submitting that without rebates, direct patient care services provided by pharmacies would become unsustainable and patient care would suffer.

[156] As I concluded above, Professional Allowances were revenue generated for providing the enumerated direct patient care services. As such, the Associates' right to share in all revenue from the franchised business includes the right to their share of this new revenue in the form of Professional Allowances for providing enumerated direct patient services.

[157] During the period when reporting was required, Shoppers reported the Professional Allowances it received to the Ontario government on behalf of the Associates.

[158] The *Code of Conduct* provided “guidance governing the use of professional allowances to be paid by manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents.”

[159] For part of the Class Period, the *Code of Conduct* provided a reporting process to enable the Ontario government to verify and confirm the amount of Professional Allowances that operators of pharmacies, or companies that own, operate or franchise pharmacies, received from drug manufacturers in as much detail as required by the executive officer.

[160] In accordance with the *Code of Conduct*, Shoppers collected and reported the Professional Allowances received from drug manufacturers, and the monies spent on enumerated direct patient care services.

[161] After Shoppers collected the monies from manufacturers, it submitted the accounting report to the Ontario government. Shoppers was required to certify: (a) the total amount of Professional Allowances received, and (b) the corresponding total amount of direct patient care expenditures for which the Professional

Allowances had been used or were to be used. Shoppers represented that the reports consisted of “all costs and expenses for eligible activities for patient care initiatives” incurred during the relevant period. The total store-level direct patient care services provided was $1.44 billion. However, taking into account the legislated caps, the maximum allowable amount of Professional Allowances Shoppers could have accepted under the Legislation was $1.084 billion.

[162] Shoppers confirmed that its reports were submitted “on behalf of the Associate[s]”. However, there was no suggestion that the Associates knew Shoppers had decided not to ask for the full allowable amount of Professional Allowances for enumerated direct patient services in Ontario, that is $1.084 billion.

[163] Instead, Shoppers allocated only $955 million into Professional Allowances and treated the balance ($129 million) as rebates in the rest of Canada, even though Shoppers could have allocated the full $1.084 billion as Professional Allowances. Shoppers offered no explanation to this court for why $129 million was attributed as rebates in other provinces and not Professional Allowances in Ontario.

[164] The issue is whether these actions constituted a breach of Shoppers’ duties related to good faith, which it owed to the Associates.

[165] Our courts have recognized obligations of good faith in contract. In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the Supreme Court recognized an organizing principle of good faith performance in contract and specific duties derived from this organizing principle. The law has recognized the importance of respecting the intention of the parties as embodied in their agreement and the role of the obligation of good faith.

[166] In *Bhasin*, the Supreme Court held that there is a duty of honesty in contractual performance applicable to all contracts. This duty means that parties must refrain from lying or otherwise knowingly misleading one another about matters directly related to the performance of the contract: *Bhasin*, at para. 73. "Knowingly misleading" another is not confined to direct lies – it can also include "half-truths, omissions, and even silence, depending on the circumstances": *C.M. Callow Inc. v. Zollinger,* 2020 SCC 45, [2020] 3 S.C.R. 908, at para. 91. The court in *Bhasin* also held that, "[i]n carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner." This requires that a party not seek to undermine those interests in bad faith. However, unlike higher obligations of a fiduciary, good faith performance does not require the other contracting party to put the interests of the other contracting party first: *Bhasin,* at para. 65.

[167] The Supreme Court in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7, [2021] 1 S.C.R. 32, confirmed that there is also a duty to exercise contractual discretion in good faith. Discretion creates a set of possible choices consistent with the terms of the contract. Discretionary power, even if unfettered, is constrained by good faith": *Wastech,* at para. 62.

[168] To be clear, this does not prevent a party to a contract from pursuing its own self interest, nor does it require a party to a contract to prioritize the other party's interests over its own – the duty to exercise contractual discretion in good faith is not a fiduciary duty: *Wastech,* at paras. 52, 73-74. It simply means that a party to a contract must exercise its discretion in a manner "consonant with" the purpose for which the discretion was conferred in the contract: *Wastech*, at paras. 69-71.

[169] Whether a party to a contract exercises its discretion in a manner not connected to the underlying purposes of the discretion granted by the contract, such that it is in breach of the duty to exercise contractual discretionary powers in good faith, is a matter of contractual interpretation: *Wastech,* at paras. 76, 88. Where the contract is not explicit about the parties' intentions, the purpose for which the discretion was granted can only be understood in the context of the contract as a whole: *Wastech,* at paras. 72, 76.

[170] Professor John McCamus states that, “Although the cases typically deal with expressly conferred discretionary powers, presumably ‘[d]iscretion also may arise, with similar effect … from the lack of clarity or an omission in the express contract”: John D. McCamus, *The Law of Contracts*, 3rd ed. (Toronto: Irwin Law, 2020), at p. 932, footnote 115, quoting Steven J. Burton & Eric G. Andersen, *Contractual Good Faith: Formation, Performance, Breach, Enforcement* (Boston: Little, Brown and Co, 1995), at p. 46.

[171] A breach of the duty to exercise contractual discretion in good faith is a breach of contract: *Wastech,* at para. 62. As with any breach of contract, the aggrieved party will ordinarily be awarded “expectation damages” that place the plaintiff in the same position it would have been in had the duty been performed: *Callow,* at paras. 106-7.

[172] The 2002 Agreement is also subject to s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O., 2000, c. 3, which sets out a statutory duty of fair dealing and good faith in the performance and enforcement of franchise agreements. While the Act was referred to, the Associates did not rely on this statutory duty of good faith in their argument before this court, and it is not necessary to my conclusion. I would reach the same result relying only on the common law good faith duties discussed above.

[173] In this case, the motion judge erred in quantifying the Professional Allowances received by Shoppers at $955 million. My reasons are as follows:

[174] Shoppers had statutory and common law duties of good faith in the performance of the 2002 Agreement.

[175] First, it had a special statutory duty to deal fairly and in good faith in the performance and enforcement of this franchise agreement and a similar common law duty of honest performance of the 2002 Agreement with the Associates to refrain from knowingly misleading the Associates about matters linked to its performance of the 2002 Agreement.

[176] Second, Shoppers had the authority pursuant to the Agreement and the Legislation, to collect and report monies received on behalf of the Associates and had the discretion pursuant to its authority to collect and report, to allocate Professional Allowances. The 2002 Agreement does not explicitly confer Shoppers with the discretion to allocate between rebates and Professional Allowances in its invoices to direct drug manufacturers and its reporting to the Ontario government. The 2002 Agreement was drafted by Shoppers before the Professional Allowance Regime came into effect in 2006, and not updated until 2010. Rather, this discretion fell to Shoppers because it invoiced and received payments from generic drug manufacturers, and because Shoppers assumed responsibility to report

these payments and the direct patient care services provided by the Associates to the Ontario government during the period when reporting was required.

[177] Shoppers had an obligation to exercise its contractual discretion to allocate those monies in good faith, that is, in a manner consistent with the purpose for which the discretion was granted, as opposed to “capriciously or arbitrarily”: *Wastech*, at paras. 69-71, 86. Shoppers was free to maximize its own profit but had to do so in a way that did not breach these statutory and contractual obligations.

[178] Instead, while purporting to act on behalf of the Associates, Shoppers unilaterally allocated funds it received from drug manufacturers as between Professional Allowances for Ontario and rebates for the rest of Canada. In doing so, it allocated revenue obtained because of purchases it had made for generic drugs in Ontario, as attributable to purchases it made for non-Ontario stores. This resulted in the removal of the payment from revenue it had to share with Associates, enabling Shoppers to keep the entire payment of $129 million as rebates in the rest of Canada.

[179] As the Supreme Court held in *Wastech*, “[s]ometimes, the text of the discretionary clause will make the parties’ contractual purpose clear. In other circumstances, purpose can only be understood by reading the clause in the

context of the contract as a whole": at para. 72. In this case, the purpose of a conferral of discretion is not explicit and can only be understood in the context of the contract as a whole. Looking at the 2002 Agreement as a whole, having regard to the objective intentions of the parties, and given my conclusion that Professional Allowances are "revenue" which the parties agreed to share, I conclude that that the 2002 Agreement cannot be interpreted as giving Shoppers discretion to label as "rebates" funds that were eligible to be claimed as Professional allowances.

[180] Shoppers has provided no explanation or justification for this allocation and has not referred this court to any evidence that this allocation was done on a rational basis, such as to reflect the size or profitability of the two markets.

[181] The allocation of Ontario Professional Allowances was limited by the Ontario legislated constraints which created a cap, but this was not what determined the actual allocation of $129 million less than the cap.

[182] In allocating $129 million as rebates in other parts of Canada where rebates were allowed, Shoppers diverted revenue from Ontario, while purporting to act on behalf of the Associates. The effect of this was that Shoppers did not share these payments with any of the Associates, keeping the entire amount to itself. Shoppers thereby diverted revenue otherwise eligible as Professional Allowances to enrich itself at the Associates' expense.

[183] Far from being based on an allocation consistent with the intention of the parties to the Agreement, this often resulted in more than 100% of the cost of the drugs in other parts of Canada being allocated as a rebate received outside of Ontario.

[184] This was not fair dealing in accordance with the *Arthur Wishart Act* or honest performance of the Agreement under common law. Shoppers' unilateral action undermined the terms of the Agreement that entitled the Associates to share in all revenue from the franchise business in accordance with the profit-sharing arrangement.

[185] Nor was this an exercise of power or discretion made in good faith, pursuant to the 2002 Agreement. Shoppers had the right and obligation to collect and report monies received and expended as Professional Allowances. But in exercising that right, Shoppers was required to do so in a manner that was consistent with the purpose for which the discretion was granted, as opposed to arbitrarily.

[186] Shoppers led no evidence to suggest the allocation was done for any reason other than Shoppers' desire to divert funds otherwise payable to the Associates to itself, and thereby undermine the Associates' right to all revenue under the Agreement. But for Shoppers' arbitrary unilateral action, there is no reason to believe the roughly $129 million of eligible direct patient care expenses would not

have been accepted or recorded by the Ontario government as Professional Allowances and included in revenue for the purpose of profit sharing pursuant to the 2002 Agreement.

[187] The failure of the motion judge to consider what he called the effect of Shoppers "cooking [of] the books" constitutes a palpable and overriding error in the motion judge's decision. While the 2002 Agreement permitted Shoppers to retain volume rebates, and while Shoppers labelled the $129 million as rebates in the rest of Canada in its invoices to generic drug manufacturers, a "rebate" in excess of 100% of the cost of a product is not really a rebate, and labelling it as such is not honest or transparent. Had Shoppers performed the contract honestly and exercised its discretion to allocate between rebates and Professional Allowances in its invoices to generic drug manufacturers reasonably, it would have treated the $129 million as Professional Allowances in its reporting to the Ontario government and in its invoices to generic drug manufacturers.

[188] Shoppers' actions are relevant to three common issues in the Class action, which I paraphrase as follows:[9]

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[9] I have included the full certified common issues for the Ontario Class in Appendix 3 to these reasons.

1. Did Shoppers breach its contractual obligations under the 2002 Agreement, or statutory and/or common law duty of good faith by retaining Professional Allowances?
2. Was Shoppers unjustly enriched by retaining the Professional Allowances it received that relate to the direct patient care services?
3. If the answer to 1 or 2 is yes, what is the amount that Shoppers received for Professional Allowances?

[189] I would therefore allow this ground of appeal. The motion judge understated the amount of Professional Allowances Shoppers received by roughly $129 million. Shoppers in fact received $1.084 billion in Professional Allowances.

(7) Whether Aggregate Damages are Appropriate

[190] The motion judge held that aggregate damages were not appropriate. As I will explain, I see no error in his conclusion.

(a) The Ontario Class's submissions re aggregate damages

[191] The Ontario Class claims the motion judge erred in refusing to award aggregate damages. First, it claims that at para. 635 of his reasons, he identified the wrong standard for assessing aggregate damages, holding that aggregate damages needed to produce a result "equal to" the damages that would be awarded after individual assessments. It submits that this error was repeated at

para. 657 of the motion judge's reasons. As such, it claims no deference is owed to his assessment, however, even on a palpable and overriding error standard the appeal should be allowed on this ground.

[192] Second, the Ontario Class claims that the motion judge erred in rejecting the model proposed by its expert, Howard Rosen (the "Rosen Model"), because this standard of precision tainted his assessment of Mr. Rosen's evidence. Rather, it says the Rosen Model was a reasonable aggregate damages model and should be invoked to assess aggregate damages.

[193] The Ontario Class claims there was no material risk that the Rosen Model overstated Shoppers' total liability for its breach of contract and Shoppers' own evidence is that adequate data does not exist for an individual claims process. As such, aggregate damages for breach of contract should be awarded as quantified by Mr. Rosen and in the alternative, aggregate damages should be certified as a common issue and remitted to the Superior Court for determination.

[194] For the reasons that follow, I would not interfere with the motion judge's conclusion that aggregate damages cannot reasonably be determined and are indeed "an inherent impossibility in the circumstances of the immediate case" as the Professional Allowance amount attributable to each Associate depends heavily on store-specific information and is idiosyncratic, which makes it impossible to

accurately assess damages on an aggregate basis. For this reason I would also reject the Ontario Class's alternative argument that aggregate damages should be certified as a common issue and remitted to the Superior Court for determination. Moreover, I find that s. 25 of the *CPA* provides the presiding court wide latitude to simplify and expedite the individual issues trials such that the access to justice issues can be addressed.

[195] I begin with an outline of the test for aggregate damages followed by the motion judge's reasons for rejecting aggregate damages.

(b) The test to allow aggregate damages: the ability to reasonably determine damages without proof by individual class members and access to justice considerations

[196] The test to allow aggregate damages is set out in s. 24(1) of the *CPA*:

> **24** (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. [Emphasis added.]

[197] Section 24(1)(c) contemplates a “top down” global damages assessment, as opposed to a “bottom up” aggregation of individual claims: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at para. 126, leave to appeal refused, [2012] S.C.C.A. No. 326.

[198] In *Ramdath v. George Brown College,* 2014 ONSC 3066, 375 D.L.R. (4th) 488 (“*Ramdath (ONSC)*”), additional reasons reported at 2014 ONSC 4215, rev’d on other grounds, 2015 ONCA 921, 392 D.L.R. (4th) 490 (“*Ramdath (ONCA)*”), leave to appeal requested but application for leave discontinued, [2016] S.C.C.A. No. 79, Belobaba J. stated, at para. 1, that “[a]ggregate damage awards should be more the norm, than the exception” because otherwise “the potential of the class action for enhancing access to justice will not be realized.” At para. 47, he outlined the criteria for determining whether a defendant’s monetary liability can be reasonably determined without proof by individual class members:

> [T]he reliability of the non-individualized evidence that is being presented by the plaintiff; whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant’s liability); and whether the denial of an aggregate approach will result in “a wrong eluding an effective remedy” and thus a denial of access to justice. [Footnotes omitted.]

[199] The use of these criteria was affirmed by this court in *Ramdath (ONCA)*, at para. 76, and there is no dispute that *Ramdath* is the governing law.

[200] As noted by Winkler C.J.O. in *Fulawka*, at para. 118, quoting from the *Report of the Attorney General's Advisory Committee on Class Action Reform*, (Toronto: Ministry of the Attorney General of Ontario, 1990) (Chair: Michael G. Cochrane), it may be impractical "to require thousands of class members to individually prove their claims as they would in an ordinary proceeding." He noted, at para. 126, that the provision in s. 24(1)(c) that states that:

> [T]he aggregate of the defendant's liability "can reasonably be determined without proof by individual class members"… is directed at those situations where the monetary liability to some or all of the class is ascertainable on a global basis, and is not contingent on proof from individual class members as to the quantum of monetary relief owed to them. In other words, it is a figure arrived at through an aggregate assessment of global damages, as opposed to through an aggregation of individual claims requiring proof from individual class members. I would describe the latter calculation as a "bottom-up" approach, whereas the statute envisages that the assessment under s. 24(1) be "top down". [Emphasis added.]

[201] In *Ramdath (ONSC),* Belobaba J. concluded that aggregate damages were available for certain categories of "direct costs" or "out-of-pocket" expenses borne by a class of students, two-thirds of whom where foreign students, arising from misrepresentations by George Brown College about the qualifications graduates would receive. He refused however, to award aggregate damages for foregone income lost while attending the eight-month program and income lost as a result

of delayed entry into the workforce because the methodology proposed by the plaintiff's expert was not sufficiently reliable and was predicated on flawed assumptions. For example, the model put forward by the plaintiffs' expert assumed that the average student who applied to the program was a 25-year-old with a Canadian-recognized bachelor-level university degree. In fact, only about one-third of the domestic students had bachelor's degrees. Belobaba J. refused to award aggregate damages for these categories of losses, holding that these categories of loss could not be reasonably determined without individualized evidence: at paras. 60-66.

(c) Analysis of the motion judge's reasons for refusing aggregate damages

[202] The Ontario Class claims that the motion judge applied the wrong test by suggesting that the aggregate damages model must produce a result "equal to" the damages that would be awarded after individual assessments. It points to his remark at para. 635 of his reasons:

> [635] The *Class Proceedings Act*, 1992 is a procedural statute, and it does not create a new type of damages known as aggregate damages. All that s. 24 (1) of the *Class Proceedings Act* does is that it recognizes that in certain circumstances depending upon the nature of the Class Members' claims, it may be possible to avoid individual assessments of damages and arrive at a calculation of damages equal to what the defendant

> would have to pay if there were individual assessments. [Emphasis added.]

[203] The Ontario Class also points to a comment at para. 657 of the motion judge's reasons:

> [657] Fairness and reasonability is not possible in the immediate case because the [Ontario Class] have not proven a fair and reasonable global top-down methodology that would be a surrogate or equivalence for what would undoubtedly be a fair and reasonable outcome if a bottom-up methodology were utilized. [Emphasis added.]

[204] When read in the context of his reasons as a whole, I do not agree with the Ontario Class's submission that the motion judge applied the wrong legal test by requiring a standard that would require aggregate damage calculations to be equal to what individual damage assessments would be.

[205] The motion judge correctly found that under s. 24(1) of the *CPA* he needed to determine whether "the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members." He stated that:

> [637] In *Ramdath v. George Brown College*, the Ontario Court of Appeal recognized three factors to guide the fairness and reasonableness of an aggregate damages award. The factors were: (a) whether the global evidence presented by the plaintiff was sufficiently reliable; (b) whether use of the evidence would result in unfairness or injustice to the defendant; and (c) whether denial of an

> aggregate approach would result in a wrong eluding an effective remedy and a denial of access to justice.
>
> [638] Aggregate damages cannot be ordered where "individual questions of fact relating to the determination of each class member's damages remain to be determined", or where there is no available data to determine what individual class members were owed. Aggregate damages are not appropriate where the use of non-individualized evidence is not sufficiently reliable, or where the use of that evidence will result in unfairness or injustice to the defendant, such as overstatement of its liability for damages. [Footnotes omitted.]

[206] The motion judge then explained at length, why in his view the non-individualized evidence was not sufficiently reliable to hold that aggregate damages were appropriate.

[207] He held that Mr. Rosen's methodology for calculating aggregate damages contained several significant methodological errors. In particular, the Rosen Model incorrectly:

- applied planned and actual store profitability equally across the Associates for each year, when planned and actual store profitability depends on several factors that change depending on the type of store;
- assumed that if additional revenues were applied, Associates receiving the Associate Guarantee would collectively enter an overage position when in reality some might continue to receive only the Associate Guarantee; and

- assumed that the Associates would share in overages at 25%, although it is not clear how many of the stores in a particular year received 20%, how many received 30%, and how many were subject to the $50,000 cap applicable to certain Associates.

[208] In other words, the motion judge concluded that the margin of error implicit in Mr. Rosen's assumptions suggests that the Rosen Model is not a means to reasonably determine Shoppers' monetary liability. Given that the motion judge instructed himself on the correct test his conclusion that the Rosen Model did not meet this standard is entitled to deference: *Ramdath ONCA,* at paras. 101, 104.

[209] To determine the damages to which each eligible member of the Ontario Class is entitled, the trier of fact must have the total amount of Professional Allowances attributable to each store location per year under the 2002 Agreement beginning in 2008. This depends on (i) the quantity of drugs dispensed at an individual store location in a given year; (ii) the prescriptions and whether they were ODB or non-ODB plan; and (iii) direct patient care store expenses. Once the amount of Professional Allowances attributable to a store in a given eligible year is determined, and other applicable charges that may vary based on store revenue applied (if any), then the trier of fact would have to determine the different percentage rates at which the Professional Allowances attributable to each Associate would be split as between Shoppers and the Associate (30%, 20%, or

0%, as set out above in these reasons). This in turn depends on planned store profits, actual store profits, percentage share of excess profits or unplanned losses, whether the additional store revenue increased the Associate's earnings above their Guarantee, and whether the Associate was in a planned loss position and subject to a $50,000 cap in the amount of excess profit (in which case Shoppers would retain 100% of profits in excess of that cap).

[210] While Mr. Rosen made efforts to account for these variations, his ability to do so was limited by the fact that only aggregate data was available to him. Where the damage incurred by each class member necessarily depends on idiosyncratic factors specific to them that are impossible to generalize or extrapolate in a reliable way across the entire class, a top-down aggregate damages assessment has been held to be inappropriate: see e.g. *Ramdath ONSC*, at paras. 60-66. I agree with the motion judge that the Rosen Model does not satisfy the test set out in s. 24(1) of the *CPA* because on these facts, the assessment of damages is inherently idiosyncratic. The result is that the Rosen Model cannot satisfy the first two criteria from *Ramdath (ONSC).*

[211] Nor is it clear that the third criteria from *Ramdath* is satisfied – that the denial of an aggregate approach would mean a denial of access to justice. This is not a case where there are a "vast number of accounts to be reviewed and [a] small potential award in each case" such that there would be serious access to justice

concerns if aggregate damages were not allowed: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal refused, [2007] S.C.C.A. No. 346*,* at para. 42.

[212] Here, counsel estimates there are 500 to 800 members of the Ontario Class. Given the size of the class and the amount of money at issue, this is not a case like *Ramdath* where the disputed amounts (i.e. $400 for textbooks, travel expenses, etc.) are clearly disproportionate to the cost of recovery.

[213] The Ontario Class also alleges that the motion judge misapprehended the evidence of Shoppers' expert, Sid Jaishankar, and that he made five other discrete legal or evidentiary errors, including an error about whether increased revenues would have a "cascading effect" on other fees charged by Shoppers. It is not necessary to address these other errors because they are not material to the motion judge's conclusion and could not have affected the result in light of his three main criticisms of the Rosen Model, identified above. In particular, the motion judge specifically notes that even if he were mistaken about the soundness of Mr. Jaishankar's analysis, he would still have rejected the Rosen Model.

[214] For these reasons, on the evidence adduced, aggregate damages are inappropriate and there is no evidence that individual damage assessments would jeopardize the goals of access to justice.

(d) Certifying aggregate damages as a common issue

[215] The Ontario Class's alternative position is that aggregate damages should be certified as a common issue and remitted to the Superior Court to be determined at a subsequent hearing, presumably on the basis of further expert evidence proposing a variation of the Rosen Model or a different model altogether. This alternative position was only addressed briefly by the Ontario Class in written and oral argument before this court, and it was not addressed directly by the motion judge, though he noted that "[t]he Class members, however, now submit that… they are entitled to seek aggregate damages at a common issues trial or on a summary judgment motion" (emphasis added). However, as I will explain, the motion judge's reasons for rejecting the Rosen Model provide a full answer to this alternative argument.

[216] In *Fresco v. Canadian Imperial Bank of Commerce,* 2022 ONCA 115, 160 O.R. (3d) 173, this court, quoting *Shah v. LG Chem Ltd*., 2018 ONCA 819, 142 O.R. (3d) 721, at para. 104, leave to appeal refused, [2018] S.C.C.A. No. 520, stated, at para. 67, that:

> The test for certifying aggregate damages as a common question is whether there is "a 'reasonable likelihood' that the conditions required in s. 24 of the *CPA* for determining aggregate damages would be satisfied if the [appellants are] otherwise successful at the common issues trial". [Footnote omitted.]

[217] If so, this court could certify aggregate damages as a common issue and remit the matter to the Superior Court to assess a revised version of the Rosen Model, or other proposed methodologies based on further expert evidence.

[218] I would decline to certify aggregate damages as a common issue for two reasons.

[219] First, because of the idiosyncratic effects of the profit-sharing arrangement, individual damage assessments under s. 25 of the *CPA* are more appropriate than an aggregate damage assessment under s. 24.

[220] The damages of the Ontario Class in this case are not the type of harm that can be reasonably determined in aggregate because of the idiosyncratic nature of the Model profit-sharing arrangement. I therefore agree with the motion judge that "an aggregate assessment is not possible in the immediate case."

[221] Second, s. 24(1)(c) requires that the defendant's liability to some or all class members can "reasonably be determined without proof by individual class members." In this case, the proof would likely have to come from Shoppers and it is not clear that Shoppers has the data needed to calculate damages with significantly greater precision than the Rosen Model.

[222] The Ontario Class claims that Shoppers had control of all accounting records for the stores throughout the Class Period as the Associates were required

to use Shoppers' bookkeeping and accounting services and had to return pharmacy-related data upon leaving the franchise. However, it appears to be common ground that Shoppers' records are not complete and that some of the information that would be needed to calculate damages at the individual store level is missing. The Ontario Class relies on Shoppers' own evidence that it does not have the data to calculate individual claims.

[223] It may be true that Shoppers should have collected or retained more complete data because it provided bookkeeping services to the Ontario Class and submitted reports to the Ontario government on behalf of individual stores. But this does not change the test under s. 24(1)(c) that the defendant's liability must be reasonably determined "without proof by individual class members."

[224] This point is illustrated by *Fulawka*. In *Fulawka*, one of the certified common issues was the propriety of how the defendant bank kept records of hours worked – in other words, the defendant was allegedly at fault for not keeping better records of the information that would be needed to calculate the damages of the plaintiff class. Nonetheless, Winkler C.J.O. refused to certify aggregate damages as a common issue because the statutory prerequisite in s. 24(1)(c) was not met. He held "it is simply not open to the court to attempt to fashion a remedy that would run afoul of an essential element of the statutory language", irrespective of the

propriety of the defendant's record keeping practices: at paras. 141-142. In my view, the same is true here.

[225] For these reasons, I am not persuaded that there is a reasonable likelihood that the conditions in s. 24 of the *CPA* would be satisfied and I would not certify aggregate damages as a common issue.

(e) The appropriate solution

[226] I see no error in the motion judge's proposed solution to order individual damage assessments. As noted above, on the evidence adduced, aggregate damages are not appropriate. Moreover, individual damage assessments under s. 25 of the *CPA* need not necessarily involve individual trials if a more procedurally efficient process can be designed under an individual issues protocol.

[227] Section 25 gives the presiding judge considerable latitude in crafting efficient procedures and dispensing with unnecessary formalities to assess individual damages in the most cost-effective way possible. As noted in *Brazeau v. Canada (Attorney General),* 2020 ONSC 7229, 472 C.R.R. (2d) 127, at para. 83, "[c]reativity and the principles of proportionality have a role to play in designing the individual issues stage of a class action." Section 25 provides that:

> Individual issues
>
> 25 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is

> required to determine individual issues, other than those that may be determined under section 24, the court may,
>
> > (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
> >
> > (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
> >
> > (c) with the consent of the parties, direct that the issues be determined in any other manner.
>
> Directions as to procedure
>
> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> Idem
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> > (a) dispense with any procedural step that it considers unnecessary; and
> >
> > (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. [Emphasis added.]

[228] While the analysis under s. 24 does not explicitly involve a comparison with s. 25, the third prong of the *Ramdath* test (whether the denial of aggregate damages will result in a wrong without a remedy and a denial of access to justice)

effectively brings into the s. 24 analysis some contemplation of the viability of individual damage assessments under s. 25: see *Fulawka,* at para. 143.

[229] Individual damage assessments under s. 25 of the *CPA* need not consist of individual trials. The powers under s. 25(1) include the power to "(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and (c) with the consent of the parties, direct that the issues be determined in any other manner." Counsel may design and seek court approval of a more summary adjudication process, consistent with the Supreme Court of Canada's observations in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 23-34.

[230] Moreover, under s. 25(3), in assessing damages in the most expeditious and least expensive way that is consistent with justice to the class members and the parties, the court may:

> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

[231] Accordingly, while the design of the individual issues stage must include procedural and evidentiary terms that are consistent with justice to class members and the defendants (*Lundy v. VIA Rail Canada Inc*., 2015 ONSC 7063, at

para. 15), there is considerable flexibility available to craft a fair and efficient process.

[232] In *Fulawka,* Winkler C.J.O. held that s. 25(3)(b) gives the presiding judge "wide latitude" including "the option of considering if statistical information derived from random sampling, or other methods, would be of assistance in calculating the quantum of individual class members' entitlement to monetary relief": at para. 144. He later emphasized that "[t]he effect of these provisions [ss. 25(1)(b) and (c)] is that the court may direct that individual claims to unpaid overtime be determined through procedures other than individual trials": at para. 158.

[233] The motion judge adverted to this possibility by stating, at paras. 671 and 861, that:

> [671] I pause to say that in the immediate case the non-availability of an aggregate assessment does not deny the Class Members access to justice. They shall have the resort to individual issues trials pursuant to a protocol provided by s. 25 of the [*CPA*] that will simplify the assessment of damages.
>
> …
>
> [861] [I]t may be possible to use the resources of s. 25 of the [*CPA*] to simplify or expediate the individual issues trials.

[234] In my view, the possibility of designing efficient procedures to assess individual claims under s. 25(1) helps assuage the Ontario Class's access to justice concerns.

[235] As such, on the evidence before us, I would dismiss the Ontario Class's claim for aggregate damages.

E. DISPOSITION

[236] For the above reasons, I would allow the appeal of the motion judge's decision that Shoppers received only $955 million in Professional Allowances during the Class Period, and substitute a finding that, in response to common issue (c), Shoppers in fact received $1.084 billion in Professional Allowances. The appeal and cross appeal are otherwise dismissed.

[237] Costs of the appeal will be addressed in writing. Counsel advised that the Class Proceedings Fund has provided funding to the Ontario Class. The parties, and the Class Proceedings Fund, may serve and file submissions of no more than seven pages each within thirty days of the release of these reasons.

Released: August 29, 2024 "J.S."

"Thorburn J.A."
"I agree. Janet Simmons J.A."
"I agree. David M. Paciocco J.A."

Appendix 1 - Relevant Statutory and Regulatory Provisions

Ontario Drug Benefit Act, R.S.O 1990, c. O.10

[as it appeared October 1, 2006]

Rebates, etc.

11.5. (1) A manufacturer shall not provide a rebate to wholesalers, operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents,

(a) for any listed drug product or listed substance; or

(b) for any drug in respect of which the manufacturer has made an application to the executive officer for designation as a listed drug product, while that application is being considered.

…

May not accept rebate

(3) No wholesaler, operator, company, director, officer, employee or agent mentioned in subsection (1) shall accept a rebate that is mentioned in subsection (1), either directly or indirectly.

…

Definition

(18) In this section,
"rebate", subject to the regulations, includes, without being limited to, currency, a discount, refund, trip, free goods or any other prescribed benefit, but does not include,

(a) a discount for prompt payment offered in the ordinary course of business, or

(b) a professional allowance.

O. Reg. 201/96 (under *Ontario Drug Benefit Act*)

[as it appeared October 1, 2006]

Definitions

1. (8) For the purposes of section 11.5 of the Act,
"professional allowance", in the definition of "rebate", means, subject to subsections (9) and (10), a benefit, in the form of currency, services or educational materials that are provided by a manufacturer to persons listed in subsection 11.5 (1) of the Act for the purposes of direct patient care as set out in paragraphs 1 to 8 of this subsection:

1. Continuing education programs that enhance the scientific knowledge or professional skills of pharmacists, if held in Ontario.

2. Continuing education programs for specialized pharmacy services or specialized certifications, if held in North America.

3. Clinic days provided by pharmacists to disseminate disease or drug-related information targeted to the general public including flu shot clinics, asthma clinics, diabetes management clinics, and similar clinics. For this purpose, a "clinic day" includes any additional staff to support the clinic day or the regular pharmacy business while the pharmacist is hosting a clinic day, during that day.

4. Education days provided by pharmacists that are targeted to the general public for health protection and promotion activities. Such education days must be held in the pharmacy, or a school, long-term care home, community centre, place of worship, shopping mall, or a place that is generally similar to any of these. For this purpose, an "education day" includes any additional staff to support the education day or the regular pharmacy business while the pharmacist is hosting an education day, during that day.

5. Compliance packaging that assists their patients with complicated medication regimes.

6. Disease management and prevention initiatives such as patient information material and services, blood pressure monitoring, blood glucose meter training, asthma management and smoking cessation, used in their pharmacy. For this purpose, “disease management and prevention initiatives” includes any additional staff required to support these initiatives or the regular pharmacy business while the pharmacist is hosting a disease management and prevention initiative, during the time it is being held.

7. Private counselling areas within their pharmacy.

8. Hospital in-patient or long-term care home resident clinical pharmacy services, such as medication reconciliation initiatives or other hospital or long-term care home-identified clinical pharmacy priorities. For this purpose, “clinical pharmacy services” includes the costs of any additional staff required to support these services or the regular pharmacy business while the pharmacist is hosting a clinical pharmacy service, during the time it is being held.

(9) Where the value of all of the benefits provided for in subsection (8) exceeds, with respect to all of a manufacturer’s listed drug products or listed substances, the value of X in the formula below, then the benefits that are in excess of X are a rebate and not a professional allowance:

$$X = 20\% \text{ of } (P - V)$$

where,

“X” is the total dollar amount of professional allowances that may be provided by a manufacturer to persons listed in subsection 11.5 (1) of the Act,

“P” is the total dollar amount of a manufacturer’s drug products reimbursed under the Act based on the number of units reimbursed at each product’s drug benefit price,

“V” is the total dollar value of any volume discount or any other amount of payment that was made to the Minister of Finance under an agreement entered into under this Regulation or Regulation 935 of the Revised Regulation of Ontario, 1990 (General) made under the *Drug Interchangeability and Dispensing Fee Act* for those products reflected in P.

(10) A benefit is not a professional allowance if the contents of the Code of Conduct established under subsection 11.5 (15) of the Act, and as set out in Schedule 3, are not complied with.

…

Schedule 3 to O. Reg. 201/96

CODE OF CONDUCT

The Code of Conduct is intended to establish system-wide guidance governing the use of professional allowances to be paid by manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents.

[…]

Fundamental Principles

1. Payments from manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, in the form of a professional allowance must be used only for any or all of the activities set out in paragraphs 1 to 8 of the definition of "professional allowance" in subsection 1 (8) of the regulation.

2. All persons involved in the drug distribution system must operate transparently. To act transparently, manufacturers, operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents must make the executive officer and other stakeholders knowledgeable of, and fully understand, the flow of funds in the drug products supply chain. This includes recording and reporting all such payments as required by the executive officer, and being subject to audit by the Ministry or a third party.

3. All suppliers of drug products as well as operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors,

officers, employees or agents, must commit to abide by this Code of Conduct. Any breach of the Code will be subject to enforcement as set out in the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*

Use of Professional Allowances

Operators of pharmacies or companies that own, operate or franchise pharmacies may use professional allowances. Programs and information contained in educational materials must be full, factual and without intent to mislead.

Professional allowances may never be used for:

1. Advertising or promotional materials, such as store flyers, except in association with clinic days or education days mentioned in paragraphs 3 and 4 of the definition of “professional allowance” in subsection 1 (8) of the regulation.

2. Entertainment, social and sporting events.

3. Meals and travel not directly associated with a program referred to in paragraphs 1 to 4 of the definition of “professional allowance” in subsection 1 (8) of the regulation.

4. Convention displays.

5. Personal gifts provided to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents.

6. Staff wages and benefits, except as provided for in paragraphs 3 and 4 of the definition of “professional allowance” in subsection 1 (8) of the regulation.

7. Packaging costs and delivery services in respect of a prescription and dispensing fees.

8. Taxes.

9. Inventory costs.

10. Fees or penalties for inventory adjustments.

11. Purchases of sales and prescription-related data.

12. Fees for listing products in inventory.

13. Renovations, leasehold improvements and similar matters.

14. Store fixtures.

15. Real estate purchases or sales, encumbrances, leases or rent.

Professional allowances are to be calculated based on the following criteria:

1. Reasonable costs to provide direct patient care as set out in paragraphs 1 to 8 of the definition of “professional allowance” in subsection 1 (8) of the regulation.

2. Reasonable frequency of providing direct patient care as set out in paragraphs 1 to 8 of the definition of “professional allowance” in subsection 1 (8) of the regulation.

3. A reasonable number of patients per pharmacy.

…

Reporting

Manufacturers will report to the executive officer the amount of professional allowance paid to each operator of a pharmacy, or company that owns, operates or franchises pharmacies, including their directors, officers, employees or agents, in as much detail as is required by the executive officer and at times required by the executive officer. The report must be signed by two officers of the manufacturer or by the manufacturer’s auditors, as may be required by the executive officer.

Operators of pharmacies, or companies that own, operate or franchise pharmacies will report to the executive officer the amount of professional allowance received from each manufacturer in as much detail as is required by the executive officer and at times required by the executive officer. The report must be signed by two officers of the operator of the pharmacy, or company that owns, operates or franchises pharmacies, or by their auditors, as may be required by the executive officer.

Drug Interchangeability and Dispensing Fee Act, R.S.O. 1990, c. P.23

[as it appeared October 1, 2006]

Rebate, etc.

12.1 (1) A manufacturer shall not provide a rebate to wholesalers, operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents,

(a) for any interchangeable product; or

(b) for any product in respect of which the manufacturer has made an application to the executive officer for designation as an interchangeable product, while that application is being considered.

…

May not accept rebate

(3) No wholesaler, operator, company, director, officer, employee or agent mentioned in subsection (1) shall accept a rebate that is mentioned in subsection (1), either directly or indirectly.

…

Definitions

(14) In this section …

"rebate", subject to the regulations, includes, without being limited to, currency, a discount, refund, trip, free goods or any other prescribed benefit, but does not include,

(a) a discount for prompt payment offered in the ordinary course of business, or

(b) a professional allowance. ("rabais")

R.R.O. 1990, Reg. 935 (under *Drug Interchangeability and Dispensing Fee Act*)

[as it appeared October 1, 2006]

2. (1) For the purposes of section 12.1 of the Act,
"professional allowance", in the definition of "rebate", means, subject to subsection (2), a benefit, in the form of currency, services or educational materials that are provided by a manufacturer to persons listed in subsection 12.1 (1) of the Act for the purposes of direct patient care as set out in paragraphs 1 to 8 of this subsection:

1. Continuing education programs that enhance the scientific knowledge or professional skills of pharmacists, if held in Ontario.

2. Continuing education programs for specialized pharmacy services or specialized certifications, if held in North America.

3. Clinic days provided by pharmacists to disseminate disease or drug-related information targeted to the general public including flu shot clinics, asthma clinics, diabetes management clinics, and similar clinics. For this purpose, a "clinic day" includes any additional staff to support the clinic day or the regular pharmacy business while the pharmacist is hosting a clinic day, during that day.

4. Education days provided by pharmacists that are targeted to the general public for health protection and promotion activities. Such education days must be held in the pharmacy, or a school, long-term care home, community centre, place of worship, shopping mall, or a place that is generally similar to any of these. For this purpose, an "education day" includes any additional staff to support the education day or the regular pharmacy business while the pharmacist is hosting an education day, during that day.

5. Compliance packaging that assists their patients with complicated medication regimes.

6. Disease management and prevention initiatives such as patient information material and services, blood pressure monitoring, blood glucose meter training, asthma management and smoking cessation, used in their pharmacy. For this purpose, “disease management and prevention initiatives” includes any additional staff required to support these initiatives or the regular pharmacy business while the pharmacist is hosting a disease management and prevention initiative, during the time it is being held.

7. Private counselling areas within their pharmacy.

8. Hospital in-patient or long-term care home resident clinical pharmacy services, such as medication reconciliation initiatives or other hospital or long-term care home-identified clinical pharmacy priorities. For this purpose, “clinical pharmacy services” includes the costs of any additional staff required to support these services or the regular pharmacy business while the pharmacist is hosting a clinical pharmacy service, during the time it is being held.

(2) A benefit is not a professional allowance if the contents of the Code of Conduct established under subsection 11.5 (15) of the *Ontario Drug Benefit Act*, and as set out in Schedule 1, are not complied with.

…

Schedule 1 to R.R.O. 1990, Reg. 935

CODE OF CONDUCT

The Code of Conduct is intended to establish system-wide guidance governing the use of professional allowances to be paid by manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents.

…

Fundamental Principles

1. Payments from manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, in the form of a professional allowance must be used only for any or all of the activities set out in the definition of “professional allowance” in subsection 2 (1) of the regulation.

2. All persons involved in the drug distribution system must operate transparently. To act transparently, manufacturers, operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents must make the executive officer and other stakeholders knowledgeable of, and fully understand, the flow of funds in the drug products supply chain. This includes recording and reporting all such payments as required by the executive officer, and being subject to audit by the Ministry or a third party.

3. All suppliers of drug products as well as operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, must commit to abide by this Code of Conduct. Any breach of the Code will be subject to enforcement as set out in the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act.*

Use of Professional Allowances

Operators of pharmacies or companies that own, operate or franchise pharmacies may use professional allowances. Programs and information contained in educational materials must be full, factual and without intent to mislead.

Professional allowances may never be used for:

1. Advertising or promotional materials, such as store flyers, except in association with clinic days or education days mentioned in paragraphs 3 and 4 of the definition of “professional allowance” in subsection 2 (1) of the regulation.

2. Entertainment, social and sporting events.

3. Meals and travel not directly associated with a program referred to in paragraphs 1 to 4 of the definition of “professional allowance” in subsection 2 (1) of the regulation.

4. Convention displays.

5. Personal gifts provided to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents.

6. Staff wages and benefits, except as provided for in paragraphs 3 and 4 of the definition of “professional allowance” in subsection 2 (1) of the regulation.

7. Packaging costs and delivery services in respect of a prescription and dispensing fees.

8. Taxes.

9. Inventory costs.

10. Fees or penalties for inventory adjustments.

11. Purchases of sales and prescription-related data.

12. Fees for listing products in inventory.

13. Renovations, leasehold improvements and similar matters.

14. Store fixtures.

15. Real estate purchases or sales, encumbrances, leases or rent.

Professional allowances are to be calculated based on the following criteria:

1. Reasonable costs to provide direct patient care as set out in paragraphs 1 to 8 of the definition of “professional allowance” in subsection 2 (1) of the regulation.

2. Reasonable frequency of providing direct patient care as set out in paragraphs 1 to 8 of the definition of “professional allowance” in subsection 2 (1) of the regulation.

3. A reasonable number of patients per pharmacy.

…

Reporting

Manufacturers will report to the executive officer the amount of professional allowance paid to each operator of a pharmacy, or company that owns, operates or franchises pharmacies, including their directors, officers, employees or agents, in as much detail as is required by the executive officer and at times required by the executive officer. The report must be signed by two officers of the manufacturer or by the manufacturer's auditors, as may be required by the executive officer.

Operators of pharmacies, or companies that own, operate or franchise pharmacies will report to the executive officer the amount of professional allowance received from each manufacturer in as much detail as is required by the executive officer and at times required by the executive officer. The report must be signed by two officers of the operator of the pharmacy, or company that owns, operates or franchises pharmacies, or by their auditors, as may be required by the executive officer.

Appendix 2 – Relevant Excerpts from the 2002 and 2010 Agreements

2002 Agreement	2010 Agreement
Article 6.00 - Associate's and Pharmacist's Covenants 6.03 At such time as the Company provides a centralized bookkeeping and accounting service to the Associate and other associates of the Company, the Associate agrees to appoint the Company to act as its agent to provide such bookkeeping and accounting services and to cooperate with the Company in the implementation and use of such centralized bookkeeping and accounting services. The Associate will pay to the Company such fee as may be determined by the Company from time to time in respect of the centralized bookkeeping and accounting services, and will be released from its obligation to itself prepare and furnish reports, books, records, accounts and statements as provided for in Sections 6.01(k) and (l). The Associate acknowledges that the centralized bookkeeping and accounting services will be comprehensive and may include supervision of banking, payment of accounts payable, the collection of accounts receivable and the preparation of statements, balance sheets and other reports of the financial status of the Associate. The Associate and the Pharmacist will cooperate fully with the Company and provide to it all information required by the Company in order to perform the centralized bookkeeping and accounting service.	*Article 6.00 - Associate's and Pharmacist's Covenants* 6.03 So long as the Company provides or arranges to provide a centralized bookkeeping and accounting service to the Associate and other Associates of the Company, the Associate agrees to and does hereby retain the Company to provide or arrange to provide such bookkeeping and accounting services and to cooperate with the Company in the implementation and use of such centralized bookkeeping and accounting services. The Associate will pay to the Company or the service provider (the “Service Provider”) such fee as may be determined by the Company from time to time in respect of the centralized bookkeeping and accounting services, and will be released from its obligation to itself prepare and furnish reports, books, records, accounts and statements as provided for in Sections 6.01(k) and (l). The Associate acknowledges that the centralized bookkeeping and accounting services will be comprehensive and may include supervision of banking, payment of accounts payable, the collection of accounts receivable and the preparation of statements, balance sheets and other reports of the financial status of the Associate. The

The services provided as part of the centralized bookkeeping and accounting service to the Associate will be as outlined in the bookkeeping and accounting manual to be provided by the Company to the Associate and the Associate agrees to comply with all of the policies and operating procedures prescribed from time to time by the Company in the bookkeeping manual or otherwise communicated to the Associate in writing. The fee or fees to be charged to the Associate for the provision of a centralized bookkeeping and accounting service shall be such amount or amounts as the Company shall, in the good faith exercise of its judgment, determine, and shall be charged on a basis consistent with the basis on which such fees are determined for other Associates in the Shoppers Drug Mart system.	Associate and the Pharmacist will cooperate fully with the Company or the Service Provider and provide to it all information required by the Company in order to perform the centralized bookkeeping and accounting service. The services provided as part of the centralized bookkeeping and accounting service to the Associate will be as outlined in the Manual and the Associate agrees to comply with all of the policies and procedures prescribed from time to time by the Company in the Manual or otherwise communicated to the Associate in writing. The fee or fees to be charged to the Associate for the provision of a centralized bookkeeping and accounting service shall be such amount or amounts as the Company shall, in the good faith exercise of its judgment, determine, and shall be charged on a basis consistent with the basis on which such fees are determined for other Associates of the Company.
Article 7.00 - Banking 7.01 All revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate and the Associate undertakes and agrees to deposit all monies received from each day's business not later than the following banking day in an account or accounts to be maintained specifically for such	*Article 7.00 - Banking* 7.01 All revenues and income derived by the Associate from the Franchised Business shall be monies belonging to the Associate and the Associate undertakes and agrees to deposit all monies received from each day's business not later than the following banking day in an account or accounts to be maintained specifically for such

purpose with the Associate's bankers. In order to permit the Company to verify financial information from time to time provided by the Associate, the Associate shall advise the Company of the name of the bank and the branch thereof where such account or accounts are being maintained and shall instruct the said bank to provide the Company upon demand with all such information relating to such account or accounts, or any loan accounts, including all bank statements, cancelled cheques, loan amounts, bills of exchange and documents of withdrawal as the Company may request.	purpose with the Associate's bankers. In order to permit the Company to verify financial information from time to time provided by the Associate, the Associate shall advise the Company of the name of the bank and the branch thereof where such account or accounts are being maintained and shall instruct the said bank to provide the Company upon demand with all such information relating to such account or accounts, or any loan accounts, including all bank statements, cancelled cheques, loan amounts, bills of exchange and documents of withdrawal as the Company may request, including electronic versions of same.
Article 11.00 – Payment by Associate 11.01 In return for the rights and privileges granted to the Associate under this agreement, the Associate agrees to pay to the Company throughout the term of this agreement a service fee (the "fee") based on Gross Sales established as hereinafter set forth. Within a reasonable period of time after the commencement of each twelve (12) month period ending on the anniversary of the date hereof, the Company shall fix the fee payable by the Associate for such period and subject to the provisions of Sections 11.02 and 11.03 hereof such fee shall remain unchanged throughout the ensuing twelve (12) month period, unless the parties shall otherwise mutually agree in writing.	*Article 11.00 – Payments by Associate* 11.01 In return for the rights and privileges granted to the Associate under this Agreement, the Associate agrees to pay to the Company throughout the Term of this Agreement a service fee (the “Fee”) established as hereinafter set forth based on Gross Sales collected by the Associate (and/or the profitability of the Franchised Business). Prior to or within a reasonable period of time after the commencement of each Fiscal Year, the Company shall by means of the Manual or otherwise fix the Fee payable by the Associate for such period and the times for payment of the Fee. Subject to the Provisions of Sections 11.03 and 11.04 hereof, the Fee and the times for payment shall remain unchanged throughout the

	ensuing Fiscal Year, unless the parties shall otherwise mutually agree in writing.
11.04 In addition to the compensation provided for in Section 11.01 hereof and to contribute to the Company's cost of providing national and/or regional advertising and/or promotion and/or merchandising, and the development and marketing of house brand products, the Associate shall pay to the Company an additional amount as determined by the Company's marketing department not to exceed in any year two percent (2%) of Gross Sales. The Company reserves the right to place and develop advertising as agent for and on behalf of the Associate. The Associate and Pharmacist acknowledge and agree that the Company shall be entitled to the benefit of any and all discounts, volume rebates, advertising allowances or other similar advantages that the Company or its Affiliates may obtain from any person, firm or corporation by reason of its supplying merchandise or services to the Associate or to associates of the Company or its Affiliates.	11.10 The Associate and the Pharmacist acknowledge and agree that the Company shall be entitled to the benefit of any and all discounts, rebates, advertising or other allowances, concessions, or other similar advantages obtainable from any person by reason of the supply of merchandise or services to the Company, the Associate or to Associates of the Company or its Affiliates.

Appendix 3 – Common Issues for the Ontario Class

a) Did the Defendants, or either of them, breach their contractual obligations under the 2002 and 2010 Associate Agreements, their statutory obligations under section 3 of the AWA and/or their common law duty of good faith to the Professional Allowance Class Members by retaining Professional Allowances and failing to remit Professional Allowances that relate to direct patient care services (as defined in both the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, R.R.O. 1990, Reg. 935, s. 2(1) and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8)) that were performed by the Professional Allowance Class Members to the Professional Allowance Class Members?

b) Were the Defendants, or either of them, unjustly enriched by retaining the Professional Allowances they received that relate to the direct patient care services (as defined in both the *Drug Interchangeability and Dispensing Fee Act,* R.S.O. 1990, c. P.23, R.R.O. 1990, Reg. 935, s. 2(1) and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8)) that were performed by the Professional Allowance Class Members?

c) If the answer to (a) or (b) is yes, what is the amount that the Defendants received for professional allowances?

d) If the answer to (a) or (b) is yes, what is the amount that the Defendants expended at the central office level for direct patient care?