CITATION: Spina v. Shoppers Drug Mart Inc. 2023 ONSC 1086
COURT FILE NO.: CV-10-414774-00CP
DATE: 2023/02/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
GIOVANNI SPINA, JOHN SPINA DRUGS LTD., ROMEO VANDENBURG and ROMEO VANDENBURG DRUG COMPANY LTD. Plaintiffs	*Ken Rosenberg, Linda Rothstein, Odette Soriano, Paul Davis, Douglas Montgomery,* and *Evan Snyder* for the Plaintiffs
- and –	
SHOPPERS DRUG MART INC. and SHOPPERS DRUG MART (LONDON) LTD. Defendants	*Mark A. Gelowitz, Geoff Hunnisett, Malcolm Aboud, Lipi Mishra and Graham Buitenhuis* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: December 15, 16, 19, 20, 21, 22, and 23, 2022

Contents

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this certified class action under the *Class Proceedings Act, 1992*,[1] the Plaintiffs, Giovani (John) Spina, John Spina Drugs Ltd., Romeo Vandenburg, and Romeo Vandenburg Drug Company Ltd. sue Shoppers Drug Inc. and Shoppers Drug Mart (London) Ltd. (collectively "Shoppers").

[2] The Plaintiffs' action is brought on behalf of the following Class Members and Subclass Members:

> All current and former Shoppers Drug Mart franchisees, except those whose businesses were located in Québec, who entered into the standard-form franchise agreement with Shoppers between January 1, 2002 and July 9, 2013 (the "Class Members" and "Class Period")
>
> All current and former Shoppers Drug Mart franchisees in Ontario who performed direct patient care services between October 1, 2006 and March 31, 2013 (the "PA Class Members" and the "PA Class Period"). ("Professional Allowance Class Members" or "PA Class Members").

[3] The Class Period is 12 years and 7 months. The PA Class Period is five-and-a half years.

[4] The Plaintiffs seek a summary judgment for **$54 million** for the Optimum Fee for the Class Members who signed the 2002 Associates Agreement ("the Optimum Fee Claims").

[5] The Plaintiffs seek a summary judgment for **$21.9 million** for the overpayment of "Shoppers Charges" ("the Shoppers Charges Claims"). The Shoppers Charges for which claims are advanced are: (a) the Loss Prevention Fee, (b) the Academy Fee, (c) the Retail Accounting Fee, and (d) the Equipment Rental Fee.

[6] The Plaintiffs seek a declaration and an accounting for Shoppers's having breached its statutory or common law duties of good faith and fair dealing with respect to distribution centre practices (the "Distribution Centre Claims"). It is alleged that Shoppers breached its duties of good faith by: (a) requiring Associates to purchase unordered products in shipments called MOGs ("Mass-Order Generated Goods"); and (b) implementing unfair and improper inventory practices about mistakes in the delivery of products.

[7] The Plaintiffs seek a **$1.084 billion** summary judgment for "Professional Allowances" (the "Professional Allowances Claim"). This is an unjust enrichment claim made on behalf of the PA Class Members. Professional Allowances were paid by generic drug manufacturers for direct patient care services performed by the PA Class Members, all of whom are from Ontario. The

[1] S.O. 1992, c. 6.

generic drug manufacturers paid Shoppers; however, Shoppers did not remit the Professional Allowances to the PA Class Members who performed the services.

[8] As an alternative to the unjust enrichment claim for the Professional Allowances Claim for the PA Class Members, the Plaintiffs seek a summary judgment for **$256 million** for Shoppers's breach of contract in failing to remit the Professional Allowances to the PA Class Members. ("alternative Professional Allowances claim").

[9] There is a cross-motion. Shoppers seeks a summary judgment dismissing the Plaintiffs' action.

[10] In its cross-motion for summary judgment, Shoppers advances a two-branched defence. First, Shoppers submits that there is no substantive merit to each of the Class Members' and the PA Class Members' claims. Second, Shoppers submits that all the claims are statute barred under the two-year or the six-year limitation period statutes from across the country.[2]

[11] For the reasons that follow, the Plaintiffs' and the Defendant's motions should be granted in part and dismissed in part.

[12] For the Alternative Professional Allowance Claims, the Plaintiffs shall have individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992*. The purpose of the individual issues trials is to quantify the damages from Shoppers's breach of the 2002 Associates Agreement by failing to remit Professional Allowances. For PA Class Members, the claims before November 19, 2008 are statute barred. The evidence of the summary judgment motions shows that individual damages assessments are possible and that on an individual basis, there may be claims worth pursuing. My guestimate is that there may be individual claims worth approximately **$86 million**. An aggregate damages award is not feasible, but there is adequate data for individual calculations. It may be possible to use the resources of s. 25 of the *Class Proceedings Act* to simplify or expediate the individual issues trials.

[13] For the Distribution Centre Claims, the Plaintiffs shall have a summary judgment for individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992*. The purpose of the individual issues trials is to determine whether Shoppers breached its statutory or common law duty of good faith by unilaterally imposing procurement and inventory policies. For Class Members from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador, the claims before November 19, 2008 are statute barred. For Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut the claims before November 19 2004 are statute barred. It may be possible to use the resources of s. 25 of the *Class Proceedings Act* to simplify or expediate the individual issues trials.

[14] Save as aforesaid, the Plaintiffs' summary judgment motion should be dismissed.

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[2] *Limitation Act,* S.B.C. 2012, c. 13 (2 years); *Limitations Act,* R.S.A. 2000, c. L-12 (2 years); *The Limitations Act,* S.S. 2004, c. L-16.1 (2 years); *The Limitation Act*, C.C.S.M. c. L150 (2 years); *Limitations Act, 2002*, *Limitation of Actions Act,* S.N.B. 2009, c. L-8.5 (2 years); *Limitation of Actions Act,* S.N.S. 2014, c. 35 (2 years); S.O. 2002, c. 24, Sched. B (2 years); *Statute of Limitations,* R.S.P.E.I. 1988, c. S-7 (6 years); *Limitations Act,* S.N.L. 1995, c. L-16.1 (2 years); (Northwest Territories and Nunavut), *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8 (6 years); *Limitation of Actions Act,* R.S.Y. 2002, c. 139 (6 years).

[15] Save as aforesaid, Shoppers's summary judgment motion should be granted in part and dismissed in part.

[16] With this very divided success, there shall be no Order as to costs of the summary judgment motion or the action.

B. Synopsis: Answers to the Common Issues

[17] In their summary judgment motions, both parties move for answers to the certified common issues. By way of a synopsis, the answers to the common issues for the Class Members are as follows.

1. Optimum Fee Claims

[18] The answers to the common issues about the Optimum Fee Claims are as follows.

[19] Shoppers did not breach (a) Article 11.05 of the 2002 Associate Agreement or (b) its duties of good faith and fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure),* ("AWA")[3] or under comparable provincial franchise legislation (Alberta, Manitoba, New Brunswick, Prince Edward Island),[4] by charging an Optimum Fee.

[20] If there had been a breach with respect to the Optimum Fee, the period of the breach would have been from December 28, 2002 (when the 2002 Associates Agreement was introduced) to the end of term of the 2002 Associates Agreements, *circa* 2011 at the latest for an Associate who in 2009, signed a 2002 Associates Agreement, which had two automatic one year renewals.

[21] If there had been a breach, none of the Optimum Fee Claims would be statute barred.

[22] There is no viable aggregate damages methodology for the Optimum Fee Claims.

[23] If there had been a breach, the assessment of damages for any Optimum Fee Claims would have been a matter for individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992*.

2. Shoppers Charges Claims

[24] The answers to the common issues about the Shoppers Charges Claims are as follows.

[25] Shoppers did not breach the Associate Agreements by charging fees in excess of the actual costs it incurred for the services enumerated in (a) Article 11.05(i) - (iv) of the 2002 Associate Agreement, and/or (b) Article 11.07(i) - (v) of the 2010 Associate Agreement, and/or (c) Article 6.03 of the Associate Agreements.

[26] Shoppers did not breach its statutory duty of fair dealing under s. 3 of the AWA (or under comparable provincial franchise legislation), or its common law duty of good faith by charging

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[3] S. O. 2000, c. 3.

[4] *Franchises Act*, R.S.A. 2000, c. F-23; *Franchises Act*, S.M., 2010, c. 13; (e) *Franchises Act*, S.N.B. 2007, c. F-23.5; *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1.

fees in excess of the actual costs it incurred for the services and programs enumerated in (a) Article 11.05(i) - (iv) of the 2002 Associate Agreement, and/or (b) Article 11.07(i) - (v) of the 2010 Associate Agreement, and/or (c) Article 6.03 of the Associate Agreements

[27] Shoppers did not breach its statutory duty of fair dealing under s. 3 of the AWA (or under comparable provincial franchise legislation), or its common law duty of good faith or by charging fees in excess of commercially reasonable rates for these services and programs.

[28] Shoppers was not unjustly enriched by charging fees in excess of its actual costs incurred in providing the services and programs to Class Members pursuant to (a) Article 11.05(i) - (iv) of the 2002 Associate Agreement; and (b) Article 11.07(i) - (v) of the 2010 Associate Agreement, and/or (c) Article 6.03 of the Associate Agreements.

[29] With respect to the fees charged to Class Members for equipment rental, Shoppers did not breach its contractual obligations under the Associate Agreements, its statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the Class Members by: (a) unilaterally imposing equipment leasing fees on Class Members without regard to its obligation under Article 5.01(b) of the Associate Agreements to lease equipment to the Class Members on "terms and conditions to be mutually agreed upon between the Associate and [Shoppers]"; (b) charging equipment leasing fees at a commercially unreasonable rate; or (c) profiting from the equipment leasing fees, rather than setting the equipment leasing fees at a cost recovery rate.

[30] If there had been a breach, none of the Shoppers Charges Claims would be statute barred.

[31] There is no viable aggregate damages methodology for the Shoppers Charges Claims.

[32] If there had been a breach, the assessment of damages for any Shoppers Charges Claims would have been a matter for individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992*.

3. Distribution Centre Claims

[33] The answers to the common issues about the Distribution Centre Claims are as follows.

[34] Shoppers was not unjustly enriched through the imposition of the procurement and inventory policies for the distribution centres.

[35] If Shoppers had been unjustly enriched, the Distribution Centre Claims of the Class Members from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador would have been statute barred for the period before November 19, 2008.

[36] If Shoppers had been unjustly enriched, the Distribution Centre Claims of the Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut would have been statute barred for the period before November 19, 2004.

[37] Shoppers may have breached its statutory duty of fair dealing under the AWA (or under the comparable provincial franchise legislation) and/or its common law duty of good faith to individual Class Members by unilaterally imposing procurement and inventory policies upon that Class Member ("Distribution Centre Claims"), that: (a) require Class Members to accept and pay for mass-order generated goods ("MOGs") that they do not order; (b) deny Class Members the right to make certain inventory adjustment claims; and/or (c) direct Class Members not to receive inventory on an itemized basis.

[38] The Distribution Centre Claims are entirely idiosyncratic; there is no class-wide breach.

[39] Any Distribution Centre Claims of Class Members from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador are statute barred for the period before November 19, 2008.

[40] Any Distribution Centre Claims of Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut are statute barred for the period before November 19, 2004.

[41] The determination of liability and assessment of damages for any Distribution Centre claims is a matter for individual issues trials pursuant to a protocol to be determined pursuant to s.25 of the *Class Proceedings Act, 1992*.

4. Professional Allowance Claims

[42] The answers to the common issues about the Professional Allowance Claims are as follows.

[43] Generic drug manufacturers paid and Shoppers received $955 million for Professional Allowances.

[44] Shoppers expended $77.2 million at the central office level for direct patient care.

[45] Shoppers was not unjustly enriched by retaining the Professional Allowances it received that relate to the direct patient care services that were performed by the PA Class Members.

[46] Under the 2002 Associates Agreement Shoppers breached its contractual obligations, its statutory obligations under s. 3 of the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the PA Class Members by failing to remit Professional Allowances that relate to direct patient care services that were performed by the PA Class Members.

[47] The period of the breach of the 2002 Associates Agreement begins with the introduction of the Professional Allowance Regime in 2006 to the end of term of the 2002 Associates Agreements *circa* 2011 for an Associate who signed in 2009 the 2002 Associates Agreement, which had two automatic one year renewals.

[48] The Professional Allowance Claims of PA Class Members before November 19, 2008 are statute barred.

[49] Under the 2010 Associates Agreement, Shoppers did not breach its contractual obligations, its statutory obligations under s. 3 of the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the PA Class Members by retaining Professional Allowances and failing to remit Professional Allowances that relate to direct patient care services that were performed by the PA Class Members to the PA Class Members.

[50] If Shoppers had breached its obligations with respect to Professional Allowances under the 2010 Associates Agreement, the Professional Allowance Claims of the PA Class Members would not be statute barred.

[51] There is no viable aggregate damages methodology for the Professional Allowance Claims.

[52] If Shoppers had breached its obligations with respect to Professional Allowances under the 2010 Associates Agreement, the assessment of damages is a matter for individual issues trials pursuant to a protocol to be determined pursuant to s. 25 of the *Class Proceedings Act, 1992*.

C. Synopsis of the Rationales for the Answers to the Common Issues

[53] Synopses for the reasons for the above answers to the common issues for the Class Members are as follows.

1. Optimum Fee Claims

[54] The rationale for the conclusion that Shoppers did not breach the 2002 Associate Agreement and its duties of good faith and fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure)*, ("AWA") (or under comparable provincial franchise legislation) by charging an Optimum Fee is as follows.

[55] Article 11.05 of the 2002 Associate Agreement provides that the Associate agrees that the payments required for certain defined services and for "other services […] rendered by the Company to the Associate that are not included in the services furnished by [Shoppers] to Associates generally at the present time, shall be in addition to the fees payable by the Associate." This language had been in the Associates Agreements since 1992.

[56] Shoppers introduced the Optimum Program in 2000. The Associates signing the 2002 Associates Agreement, which was introduced on December 28, 2002, would know about the Optimum Program, and they would know that Associates had historically shared some of the expense of the Optimum Program.

[57] Thus, having regard to what the parties would have understood at the time of the contracting as affecting their understanding of the language of their contract, the Optimum Program was a service included in the services furnished by Shoppers at the time of the introduction of the 2002 Associates Agreement for which it could charge (and was charging) at the time of the introduction of the 2002 Associates Agreement. Therefore, Shoppers did not breach Article 11.05 of the 2002 Associates Agreement by charging an Optimum Fee.

[58] Moreover, the Associates are estopped from alleging that there was a breach of the 2002 Associates Agreement. This is an estoppel by a representation that was relied upon to Shoppers's detriment. It is not a promissory estoppel nor an issue estoppel.

[59] If there had been a breach of Article 11.05 of the 2002 Associates Agreement, the period of the breach would have been from December 28, 2002 (when the 2002 Associates Agreement was introduced) to the end of term of those Agreements *circa* 2011 for an Associate who in 2009 signed his or her 2002 Associates Agreement with its two automatic rights of one-year renewals.

[60] If there had been a breach of Article 11.05 of the 2002 Associates Agreement, the Optimum Fee Claims would not be statute barred. The claims would not have been discoverable until January 2010 when Shoppers introduced the 2010 Associate Agreement, which specifically provided for a fee for "loyalty programs".

[61] If there had been a breach of Article 11.05 of the 2002 Associates Agreement, a methodology to assess Shopper's liability with respect to the Optimum Fee on an aggregate basis has not been proven.

[62] If there had been a breach of the Article 11.05 of the 2002 Associates Agreement, the assessment of damages for the Shoppers's breach of contract would have been a matter for individual issues trials pursuant to a protocol to be determined pursuant to s. 25 of the *Class Proceedings Act*.

2. Shoppers Charges Claims

[63] The rationales for the conclusions that Shoppers did not breach its contractual obligations and did not breach its duties of good faith with respect to the (a) the Loss Prevention Fee, (b) the Academy Fee, (c) the Retail Accounting Fee, and (d) the Equipment Rental Fee are as follows.

[64] It is alleged that Shoppers was unjustly enriched or that it breached the Associate Agreements or that it breached its common law or statutory duty of fair dealing under s. 3 of the AWA (or under comparable provincial franchise legislation) by charging a fee that was in excess of the costs it incurred for: (a) the Loss Prevention Fee, (b) the Academy Fee, (c) the Retail Accounting Fee, and (d) the Equipment Rental Fee.

[65] All these claims fail because properly interpreted, Shoppers was not precluded from charging a fee in excess of the costs it incurred for the: (a) the Loss Prevention Fee, (b) the Academy Fee, (c) the Retail Accounting Fee, and (d) the Equipment Rental Fee.

[66] Properly interpreted, under the Associates Agreements, Shoppers was empowered to charge fees "in the good faith exercise of its judgment […] on a basis consistent with the basis on which such fees are determined for other Associates in the [Shoppers] system." In the circumstances of the immediate case, charging fees in excess of the costs it incurred was not a breach of contract or an act of bad faith performance of either the 2002 Associates Agreement or the 2010 Associates Agreement.

[67] Further, the Class Members failed to prove that Shoppers charged fees in excess of commercial reasonable rates for the: (a) the Loss Prevention Fee, (b) the Academy Fee, (c) the Retail Accounting Fee, and (d) the Equipment Rental Fee.

[68] Further, with respect to the Equipment Rental Fee, the Plaintiffs failed to prove that Shoppers charged a fee in excess of the actual costs it incurred for the service it provided.

[69] Further, with respect to the Equipment Rental Fee, Shoppers did not unilaterally impose fees without regard to its obligation under Article 5.01(b) of the Associate Agreements to lease Equipment to the Class Members on "terms and conditions to be mutually agreed upon between the Associate and [Shoppers]."

[70] If there had been a breach, none of the Shoppers Charges Claims would be statute barred. There never was a time when on a class wide basis, the Class Members knew or ought to have known about the Shoppers Charges Claims.

[71] If there had been a breach, there is no viable aggregate damages methodology for the Shoppers Charges Claims.

[72] If there had been a breach, the assessment of damages for any Shoppers Charges Claims would have been a matter for individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992*.

3. Distribution Centre Claims

[73] The rationale for the conclusions about the Distribution Centre Claims is as follows.

[74] The Plaintiffs allege that Shoppers breached its statutory duty of fair dealing under the AWA (or under the comparable provincial franchise legislation) and/or its common law duty of good faith to individual Class Members by its distribution centre practices (the "Distribution Centre Claims").

[75] The evidence on the summary judgment motion reveals that the Distribution Centre Claims are entirely idiosyncratic.

[76] The distribution centre policies and the use of MOGs were very sophisticated, and on a class-wide basis, the distribution policies and the MOGs were highly beneficial to the Associates. The occasional misadventures with product deliveries and with the MOGs, which Class Counsel described metaphorically as pebbles in the shoe, were suffered on an individual basis.

[77] In any event, while there may be individual claims, Shoppers was not unjustly enriched through the imposition of the procurement and inventory policies for the distribution centres.

[78] There is no class wide breach and any individual Distribution Centre Claims by Class Members from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador would be statute barred for the period before November 19, 2008.

[79] Any individual Distribution Centre Claims by Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut would be statue barred for the period before November 19, 2004.

[80] The appropriate Order is that the Distribution Centre Claims should be determined pursuant to s. 25 of the *Class Proceedings Act, 1992*, at individual issues trials.

4. Professional Allowance Claims

[81] The rationales for the conclusions that Shoppers committed no wrongdoing under the 2010 Associates Agreements with respect to Professional Allowances but did so with respect to the 2002 Associates Agreement are as follows.

[82] The government of Ontario introduced its Professional Allowance Regime in 2006 - **after** the 2002 Associates Agreement came into existence - and **before** the 2010 Associates Agreement came into existence. Thus, Professional Allowances were not a part of the factual nexus for the 2002 Associates Agreement, which was introduced on December 28, 2002, but Professional Allowances were part of the factual nexus for the 2010 Associates Agreement.

[83] Construing the words of the 2002 Associates Agreement in their contractual nexus produces the result 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 PA Class Members governed by the 2002 Associates Agreement. The PA Class Members governed by the 2002 Associates Agreement have a breach of contract claim, but they do not have an unjust enrichment claim.

[84] Construing the words of the 2010 Associates Agreement in their contractual nexus produces the result that Professional Allowances are encompassed by Article 11.10 of the Agreement. These words of the 2010 Associates Agreement interpreted in the factual nexus for that Agreement mean that Shoppers did not breach its contractual obligations under the 2010 Associate Agreements, its statutory obligations under s.3 of the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the PA Class Members by failing to remit Professional Allowances that relate to direct patient care services that were performed by the PA Class Members governed by the 2010 Associates Agreement.

[85] The PA Class Members are wrong in asserting that they have a $256 million claim for aggregate damages. A methodology to assess Shopper's liability with respect to the Professional Allowances on an aggregate basis has not been proven.

[86] What the PA Class Members have is individual claims for Professional Allowances for the period after November 19, 2008 to the end of the terms of their respective 2002 Associates Agreements *circa* 2011 for the PA Class Members who signed their 2002 Associates Agreement in 2009. The claims before November 19, 2008 are statute barred.

[87] The Professional Allowance 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*.

D. Issues and Methodology

[88] With both parties moving for summary judgment, there was no dispute that the case is an appropriate one to decide summarily.

[89] Had the point been contested, I would have concluded that there was a more than adequate evidentiary record to fairly and justly decide the case by summary judgment. (The nature and extent of the evidentiary record is described below.)

[90] When all the passionate rhetoric in this battle between labour and capital is removed, the Representative Plaintiffs' action is a breach of contract action. The factual and forensic background is extraordinarily complex, and a fortune of money is involved, but the essence of the Plaintiffs' action is the allegation that Shoppers has perpetrated seven counts of breach of contract and breaches of Shoppers's common law or statutory obligations to perform its standard form franchise contracts with the Class Members in good faith. The Class Members are franchisees of Shoppers pursuant to franchise agreements. They are known as "Associates" under the agreements. Two franchise agreements, the 2002 Associates Agreement, which was introduced at the end of 2002 and the 2010 Associates Agreement, which was introduced at the end of 2009 for January 2010, are the subject matter of the class action. The Plaintiffs allege that Shoppers has breached the Associate Agreements, and its common law and statutory duties of good faith and fair dealing. There are seven allegations of breach of contract.

[91] First there is the Optimum Fee breach of contract allegation, which concerns only the 2002 Associates Agreement. This counts for a $54 million claim (the Optimum Fee Claims).

[92] The Plaintiffs' allegation that Shoppers overcharged for four Shoppers Charges counts for four more breaches of contract with a value of $21.9 million. (the Shoppers Charges Claims).

[93] The sixth breach of contract claim, for which the Plaintiffs seek an accounting of the consequent damages, is connected to Shoppers's statutory or common law obligations of good faith and fair dealing with respect to Shoppers's distribution centre practices (the "Distribution Centre Claim").

[94] The seventh breach of contract claim, the PA Class Members' claim for more than a billion dollars, relates to "Professional Allowances," which are a concept introduced in Ontario in 2006 by the Ontario government (the Professional Allowances Claim). This is the largest claim, and it concerns the interpretation of the 2002 Associates Agreement and the 2010 Associates Agreement for the PA Class Members who operated Shoppers's stores in Ontario.

[95] The Plaintiffs allege that Shoppers breached the Associate Agreements or its duty of good faith and fair dealing, or has been unjustly enriched, by retaining Professional Allowances relating to direct patient care services that were performed by the PA Class Members and by failing to remit these payments to the PA Class Members. The Plaintiffs submit that the Professional Allowances were not governed by the Associate Agreement and that Shoppers was unjustly enriched at their expense. The Plaintiffs claim $1.084 billion. Alternatively, they claim damages of $256 million for Shoppers's breach of contract and breach of its statutory and common law duties of good faith and fair dealing with respect to the Professional Allowances.

[96] Thus, what emerges from the Plaintiffs claims are seven counts of breach of contract connected to: (1) the Optimum Fee; (2) the Loss Prevention Fee (3) the Academy Fee; (4) the Retail Accounting Fee; (5) the Equipment Rental Fee (6) distribution centre practices; and (7) Professional Allowances. What also emerges is that Shoppers makes seven denials of breach of contract, and it submits that each and every of the alleged breaches is not actionable because the Class Members' claims are untimely and therefore are statute barred.

[97] The alleged breach of contract with respect to the Professional Allowances for which the PA Class Members claim $1.084 billion for unjust enrichment or $256 million for breach of contract has additional and unique issues to resolve because Professional Allowances, which are a human abstraction that does not exist in nature, did not exist even as abstractions until after the 2002 Associates Agreement was negotiated and signed.

[98] The Ontario government invented Professional Allowances after the 2002 Associates Agreement was signed by PA Class Members. Professional Allowances were invented by the Ontario government as a part of its procurement law for drugs for its health care system. However, as will emerge from the description of the law and the facts below, it is Shoppers's position that Professional Allowances are rebates already governed by the 2002 Associates Agreement and under the 2010 Associates Agreement.

[99] Although there are seven complex claims being advanced, all of which are defended and all of which are alleged to be statute-barred, what is required to decide the summary judgment motions is that I must, in each of the seven instances of alleged breaches of contract perform five main tasks (and a countless number of ancillary tasks); namely: (a) interpret the Associates Agreements; (b) determine whether Shoppers breached the Agreements; (c) determine whether Shoppers breached its statutory or common law duties of good faith; (d) determine whether the claims are statute-barred as untimely in whole or in part; and (e) quantify the damages for any claims that are not statute barred.

[100] My methodology for the seven instances of contract interpretation, analysis of contract performance, analysis of the running of limitation periods, and quantification of damages also involves describing the law of unjust enrichment, contract interpretation, statutory and common law duties of good faith, limitation periods, contract damages assessment, and the availability of aggregate damages under the *Class Proceedings Act, 1992*.

[101] My methodology for these Reasons for Decision also involves describing the procedural background to the summary judgment motions and the evidentiary background to the summary judgment motions. And the methodology involves making findings of fact about: (a) the factual nexus of the 2002 Associates Agreement; (b) the factual nexus of the 2010 Associates Agreement; and (c) the performance of the Associates under the Associates Agreements, which includes analyzing the business model as amongst Shoppers and the Associates and the day-to-day, year-to-year operation of a typical Shoppers store.

[102] I also must make findings about the operation of Shoppers's merchandise supply chain and how Shoppers went about purchasing and distributing merchandize. Moreover, I must analyze and making findings about the Ontario government's Professional Allowance Regime and its impact

on Shoppers's relationship with its Associates under the 2002 Associates Agreement and the 2010 Associates Agreement.

[103] An outline and ordering of my methodology to address the numerous factual issues and also the law may be found by reviewing the Table of Contents to these Reasons for Decision.

E. Procedural Background and Chronology

[104] On **November 19, 2010**, the Plaintiffs commence a proposed class action by Notice of Action.

[105] On **December 20, 2010**, the Plaintiffs deliver a Statement of Claim.

[106] On **December 7, 2011**, Angelo Mariano of Shoppers is cross-examined for the purposes of the certification motion, Mr. Mariano is and was a senior executive at Shoppers.

[107] On **February 28, 2012**, the Plaintiffs deliver an amended Statement of Claim.

[108] In **August 2012**, the Plaintiffs move for certification, and Shoppers brings a cross-motion under Rule 21 to strike certain causes of action.

[109] On **October 3, 2012,** I grant Shoppers's Rule 21 motion, in part, but I conclude that there are causes of action that satisfy the cause of action criterion. I adjourn the balance of the certification motion for additional evidence to be filed.[5]

[110] On **March 15, 2013**, the Plaintiffs deliver a Fresh as Amended Statement of Claim.

[111] On **April 17, 2013**, Mr. Mariano of Shoppers is cross-examined again.

[112] On **July 9, 2013**, I certify the action as a class proceeding.[6] The Plaintiffs' causes of action are: (a) unjust enrichment; (b) breach of contract; (c) breach of a common law duty of good faith; and (d) breach of statutory duties of good faith and fair dealing under the *Arthur Wishart Act (Franchise Disclosure), 2000*, and comparable provincial franchise legislation.

[113] On **April 30, 2014**, Shoppers delivers its Statement of Defence.

[114] On **May 29, 2014**, the Plaintiffs deliver a Request to Inspect Documents.

[115] On **June 20, 2014**, Shoppers delivers a Response to the Demand for Particulars and Request to Inspect.

[116] On **June 25, 2014**, Shoppers responds to the Plaintiffs' Request to Inspect.

[117] On **July 21, 2014**, the Plaintiffs respond to Shoppers's Requests.

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[5] *Spina v. Shoppers Drug Mart Inc*. 2012 ONSC 5563.
[6] *Spina v. Shoppers Drug Mart Inc*. 2013 ONSC 4675.

[118] On **December 1, 2014**, there is a Discovery Plan motion.[7]

[119] On **January 15, 2015**, the Discovery Plan is finalized.

[120] On **April 18, 19, 2017**, Jeff Léger of Shoppers is examined for discovery. During the Class Period, Mr. Léger was a senior executive at Shoppers. He is now the President of Shoppers.

[121] On **May 23, 24, 26, 2017**, Mr. Mariano of Shoppers is examined for discovery.

[122] On **June 5, 6, 8, 2017**, Mr. Spina is examined for discovery.

[123] On **June 13, 14, 2017**, Mr. Vandenburg is examined for discovery.

[124] On **June 20, 22, 28, 2017**, Mr. Mariano's examination for discovery continues but it is not completed.

[125] On **May 23, 24 2019**, Robert Baker of Shoppers is examined for discovery. Mr. Baker is Senior Director of Pharmacy Finance. Previously, he had been Director of Pharmacy Finance and Director of Distribution Accounting. Before that, he was Manager of Distribution Accounting for Shoppers.

[126] On **July 19, 22 2019**, Mr. Mariano's examination for discovery is completed.

[127] On **July 22, 2019,** the parties consent to an Order amending the common issues set out in the Certification Order and the Plaintiffs amend the Second Fresh as Amended Statement of Claim.

[128] For the purposes of the summary judgment motions, the common issues for the Entire Class are as follows:

1. Did the Defendants, or either of them, breach the Associate Agreements with the Class by charging the Class Cost Recovery Fees in excess of the actual costs they incurred for the services and programs enumerated in Article 11.05(i) - (iv) of the 2002 Associate Agreement and/or Article 11.07(i) - (v) of the 2010 Associate Agreement and/or Article 6.03 of the Associate Agreements?

2. Did the Defendants, or either of them, breach their statutory duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S. O. 2000, c. 3 ("AWA") (or under comparable provincial franchise legislation), or their common law duty of good faith by charging the Class Cost Recovery Fees in excess of the actual costs they incurred for the services and programs enumerated in Article 11.05(i) - (iv) of the 2002 Associate Agreement and/or Article 11.07(i) - (v) of the 2010 Associate Agreement and/ or Article 6.03 of the Associate Agreements or by charging Cost Recovery Fees in excess of commercially reasonable rates for these services and programs?

3. Have the Defendants, or either of them, been unjustly enriched by charging Cost Recovery Fees in excess of their actual costs incurred in providing the services and

[7] *Spina v. Shoppers Drug Mart Inc*., 2014 ONSC 6943.

programs to Class Members pursuant to Article 11.05(i) - (iv) of the 2002 Associate Agreement and Article 11.07(i) - (v) of the 2010 Associate Agreement and/or Article 6.03 of the Associate Agreements?

4. Have the Defendants, or either of them, breached Article 11.05 of the 2002 Associate Agreement or their duty of good faith and duty of fair dealing under the AWA (or under comparable provincial franchise legislation), by charging the 2002 Agreement Class an Optimum Fee?

5. With respect to the fees charged to Class Members for Equipment rental, did the Defendants, or either of them, breach their contractual obligations under the Associate Agreements, their statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or their common law duty of good faith to the Class Members by:

    a. unilaterally imposing Equipment leasing fees on Class Members without regard to their obligation under Article 5.01(b) of the Associate Agreements to lease Equipment to the Class Members on "terms and conditions to be mutually agreed upon between the Associate and [Shoppers]"?

    b. charging Equipment leasing fees at a commercially unreasonable rate?

    c. profiting from the Equipment leasing fees, rather than setting the Equipment leasing fees at a cost recovery rate?

6. Did the Defendants, or either of them, breach their statutory duty of fair dealing under the AWA (or under the comparable provincial franchise legislation) and/or their common law duty of good faith to the Class Members by unilaterally imposing procurement and inventory policies upon the Class, that:

    a. require Class Members to accept and pay for mass-order generated goods ("MOGs") that they do not order;

    b. deny Class Members the right to make certain inventory adjustment claims; and/or

    c. direct Class Members not to receive inventory on an itemized basis?

7. If so, have the Defendants, or either of them, been unjustly enriched through the imposition of the procurement and inventory policies?

[129] The common issues for the PA Class Members are:

1. Did the Defendants, or either of them, breach their contractual obligations under the 2002 and 2010 Associate Agreements, their statutory obligations under s. 3 of the AWA (or under comparable provincial franchise legislation) 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*,[8] and the *Ontario Drug Benefit Act*,[9] that were performed by the Professional Allowance Class Members to the Professional Allowance Class Members?

2. 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*,[10] and the *Ontario Drug Benefit Act*,[11] that were performed by the Professional Allowance Class Members?

3. If the answer to 1 or 2 is yes, what is the amount that the Defendants received for Professional Allowances?

4. If the answer to 1 or 2 is yes, what is the amount that the Defendants expended at the central office level for direct patient care?

[130] There was one common issue that the Plaintiffs' abandoned in their factum for the summary judgment motion. Shoppers, however, had contested this common issue in its summary judgement motion. Given the abandonment of this one common issue, I am all for decertifying it as a common issue, discontinuing it, treating it as moot, and or dismissing it on technical grounds. I shall not make any finding on the substantive merits of this question. The simplest thing to do is to decertify it, which is what I proposed to do; order accordingly.

[131] The moribund common issue is as follows:

With respect to the fees charged to Class Members on account of the lease of their franchise premises, did the Defendants, or either of them, breach the Associate Agreements, their statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or their common law duty of good faith to the Class Members by:

a. failing to provide copies of lease agreements with third party landlords to the Class Members?

b. failing to disclose the existence and amount of all third party landlord inducements to Class Members?

c. failing to adjust the amount of lease payments charged to Class Members to include the benefit of the landlord inducements?

d. charging Class Members a leasing fee in excess of the lease obligations incurred by the Defendants for the franchised premises, or in excess of a commercially reasonable rate for those franchised premises that are owned by the Defendants?

[8] R.S.O. 1990, c. P.23, R.R.O. 1990, Reg. 935, s. 2(1).
[9] R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8))
[10] R.S.O. 1990, c. P.23, R.R.O. 1990, Reg. 935, s. 2(1)
[11] R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8))

[132] On **August 19, 2019**, the Plaintiffs deliver the Amended Second Fresh as Amended Statement of Claim.

[133] On **June 27, 2020**, I release my decision on a refusals motion and documentary production motion brought by the Plaintiffs.[12]

[134] On **July 26, 2021**, the Plaintiffs deliver their twenty volume (10,910 pages) Summary Judgment Motion Record and Shoppers delivers its Summary Judgment Motion Record (3,746 pages)

[135] On **December 2, 2021**, the Plaintiffs deliver their Responding Summary Judgment Motion Record (68 pages).

[136] On **December 3, 2021**, Shoppers delivered its Responding Summary Judgment Motion Record (3,886 pages).

[137] On **February 9, 2022**, the Plaintiffs delivered their Reply Summary Judgment Motion Record (248 pages) and Shoppers delivers its Reply Summary Judgment Motion Record (53 pages).

[138] On **February 28, 2022**, Mr. Vandenburg is cross-examined.

[139] On **March 1, 2022**, Mr. Spina is cross-examined.

[140] On **March 3, 2022**, Patrick Dean of Shoppers and Mr. Daniel D'Ercole of Shoppers are cross-examined. Messrs. Dean and D'Ercole are and were senior executives at Shoppers.

[141] On **March 8, 2022**, Harpal Randhawa is cross-examined. Mr. Randhawa is a senior executive at Shoppers.

[142] On **March 10, 2022**, Paul Grootendorst is cross-examined. Dr. Grootendorst is an Associate Professor at the Leslie Dan Faculty of Pharmacy at the University of Toronto. He was retained by the Plaintiffs to testify about Professional Allowances.

[143] On **March 11, 2022**, Brent Fraser and Chris Potter are cross-examined. Mr. Fraser is a witness for Shoppers who testified about Ontario's Professional Allowance Regime. Mr. Potter is a senior executive at Shoppers.

[144] On **March 14, 2022**, Vilangadu G. Narayanan is cross-examined. Dr. Narayanan is an expert retained by the Plaintiffs to provide accounting and damages assessment evidence.

[145] On **March 15, 2022**, Eltjo (Ed) Schoonveld and Kevin Whibbs are cross-examined. Mr. Schoonveld is an economist retained to testify about the marketing of drugs. Mr. Whibbs was a senior executive at Shoppers, whose responsibilities included the operation of its distribution centres.

[12] *Spina v. Shoppers Drug Mart Inc*. 2020 ONSC 4000.

[146] On **March 9, 2022**, Mr. Mariano is cross-examined.

[147] On **April 21, 2022**, the Plaintiffs deliver their Supplementary Summary Judgment Motion Record (36 pages).

[148] On **April 27, 2022**, Mr. Mariano is cross-examined.

[149] On **April 29, 2022**, Scott Davidson is cross-examined. Mr. Davidson is an expert retained by Shoppers to provide damages assessment evidence.

[150] On **May 3, 2022**, Howard Rosen is cross-examined. Mr. Rosen is a professional business valuator and damages quantification expert, who was retained by the Plaintiffs.

[151] On **May 10, 2022**, Sid Jaishankar is cross-examined. Mr. Jaishankar is a professional business valuator and damages quantification expert, who was retained by Shoppers.

[152] On **December 15, 16, 19-23, 2022**, the summary judgment motion was argued. The Motion Records comprised 21,080 pages. The Joint Brief of Transcripts, Answers to Undertakings, and Exhibits comprised 2,133 pages. The Plaintiffs' Moving Factum (109 pages) had hyperlinks to 42 authorities. Shoppers's Moving Factum (137 pages) had hyperlinks to 53 authorities. The Plaintiffs' Reply Factum (89 pages) had hyperlinks to 56 authorities. Shoppers's Reply Factum (100 pages) had hyperlinks to 64 authorities. During the course of the summary judgment hearing, compendia were delivered. The Plaintiffs delivered the following compendia: (a) Optimum and Cost Recovery Fees (283 pages); (b) Professional Allowances (710 pages); (c) Remedies Vol. 1 (283 pages) and (d) Remedies Vol. 2 (254 pages). Shoppers delivered the following compendia: (a) Optimum Fee (405 pages); (b) Store Charges (633 pages); (c) Equipment Rental Fee (73 pages); (d) Inventory Policies (243 pages); (e) Professional Allowances (580 pages); (f) Aggregate Damages Vol. 1 (472 pages) and Aggregate Damages, Vol. 2 (254 pages)

[153] During the course of the hearing of the summary judgment motion, I asked Class Counsel to obtain a supplementary report from Mr. Rosen, calculating the PA Class Members' claim for damages: (a) based on the imputed sum of $1.084 billion less the $77.9 million of direct patient care services provided by Shoppers; (b) based on the $955 million invoiced by Shoppers to generic manufacturers for Professional Allowances; and (c) based on the $955 million invoiced by Shoppers to generic manufacturers for Professional Allowances less the 77.9 million of direct patient care services provided by Shoppers.

[154] On **December 23, 2022**, notwithstanding Shoppers objection to the admission of the evidence on the basis that the Plaintiffs should be held to their tactical decision as to how to calculate their claim, I admitted Mr. Rosen's supplementary report (17 pages). There was no merit to Shoppers's objection. The supplementary report was relevant. It was not prejudicial to Shoppers, and it reduced its alleged liability for breach of contract from $256 million to $204 million.

F. Evidence for the Summary Judgment Motion

1. The Plaintiffs' Evidence

[155] In addition to relying on evidence from the examinations for discovery of Shoppers's representatives, the Plaintiffs supported their summary judgment motion and resisted Shoppers's motion with the following witnesses, all of whom delivered affidavits and all of whom were cross-examined.

[156] **Brent Fraser** is a licensed pharmacist and a member of the Ontario College of Pharmacists. For eighteen years, he was a public servant at the Ontario government's Ministry of Health and Long Term Care ("MOHLTC" or "the Ministry"). He is currently the Vice-President of Pharmaceutical Reviews at the Canadian Agency for Drugs and Technologies in Health. While with the Ontario government, Mr. Fraser was involved in developing the Professional Allowances Regime, which was implemented in 2006 through amendments to the *Ontario Drug Benefit Act* ("ODBA")[13] and the *Drug Interchangeability and Dispensing Fee Act* ("DIDFA")[14] and their regulations. He was directly involved in extensive consultation processes between his Ministry and the drug manufacturers and pharmacies, including Shoppers.

[157] **Dr. Paul Grootendorst** is an Associate Professor at the Leslie Dan Faculty of Pharmacy at the University of Toronto. He obtained an Honours Bachelor's degree in economics from the University of Victoria in 1988, a MA in economics from Queen's University in 1990, and a PhD in economics from McMaster University in 1995. He completed post-doctoral work at St. Joseph's Hospital in Hamilton, and then was employed as an Assistant Professor at the Department of Clinical Epidemiology and Biostatistics at McMaster University from 1996 until 2002. Since 2002, he has been at the Faculty of Pharmacy at the University of Toronto. Dr. Grootendorst's research includes studying the pharmaceutical sector with a focus on policy issues. He has acted as a consultant for pharmaceutical companies, health economics groups, global health initiatives, pharmacist associations, and funding agencies. He was retained by the Plaintiffs to provide expert testimony on the question "What are Professional Allowances, and do they differ from rebates?"

[158] **Suzan Mitchell-Scott** is a law clerk at Paliare Roland Rosenberg Rothstein LLP, Class Counsel.

[159] **Dr. Vilangadu G. Narayanan** is the Thomas D. Casserly, Jr. Professor of Business Administration at Harvard Business School in Boston, Massachusetts. In 1988, he obtained a B. Comm. from the University of Madras in India, and he became a chartered accountant. In 1990, he obtained an MBA from the Indian Institute of Management Ahmedabad. He moved to the United States where he obtained an MSc in statistics in 1993, an MA in economics in 1994, and a PhD in business in 1995, all from Stanford University in California. Since September 1994, he has been a professor at Harvard Business School, where his research focuses on management accounting. He was retained to answer four questions about Shoppers Charges from an accounting perspective.

[13] R.S.O. 1990, c. O.10
[14] R.S.O. 1990, c. P.23,

[160] **Howard Rosen** of Toronto Ontario is a valuator and damages quantification expert at Secretariat Advisors LLC. His education background is: BBA (1979), Chartered Accountant (1981), Chartered Business Valuator (1984), Accredited Senior Appraiser (1988), and Certified Fraud Examiner (1992). Since 1981, he has been engaged in business valuation, damages quantification and corporate finance related matters. He has been qualified as an expert witness in over two hundred valuation matters in courts in Canada and the United States, and in international arbitration hearings in Canada, the United States, Europe, the Middle East, and Asia. He has been a court appointed administrator, monitor, and inspector and has been an arbitrator.

[161] **Eltjo (Ed) Schoonveld** is the Managing Principal at ZS Associates, a global management consulting firm, where he specializes in drug market access and pricing, health economics and outcomes research. He has a Master's Degree in Engineering from the Delft Technical University in the Netherlands and an MBA (1998) from the UCLA Anderson School of Management. Between 1988 and 2009, he worked at various pharmaceutical companies in executive positions. In 2009, he joined ZS Associates. He is the author of *The Price of Global Health,* now in its 3rd edition. The topics of the book are global drug pricing and market access issues, including the role of governments and public policy in setting drug prices and the impact of government intervention on the competitive environment.

[162] **John Spina** is one of the Representative Plaintiffs. Mr. Spina's individual case is discussed later in these Reasons for Decision.

[163] **Romeo Vandenburg** is one of the Representative Plaintiffs. Mr. Vanderburg's individual case is discussed later in these Reasons for Decision.

2. Shoppers's Evidence

[164] In addition to relying on evidence from the examinations for discovery of the Representative Plaintiffs, Shoppers supported its motion for a summary judgment and resisted the Plaintiffs' motion with the following witnesses, all of whom delivered affidavits and all of whom were cross-examined.

[165] **Scott Davidson** is a Managing Director in the Toronto office of Duff & Phelps, where he leads the disputes, investigations, and valuation services practice. He is a graduate of the Ivey School of Business, University of Western Ontario, a Chartered Professional Accountant, a Chartered Business Valuator, and a past director of the CICA Investigative and Forensic Accounting Alliance. He joined Duff & Philips in 2010. He has thirty years of experience in business valuation, financial advisory services, and he has provided expert testimony at courts and arbitrations in the disciplines of economics and quantum of damages.

[166] **Daniel D'Ercole** is a Senior Director Finance, Pharmaceutical Partnerships & Medical Cannabis at Shoppers. He joined Shoppers in 2003 as a Financial Analyst, Design & Construction. In 2004, he became Manager Accounting Services. In January 2012, he became Senior Manager Real Estate and Accounting Services. In 2016, he became Director Real Estate Finance. In February 2018, he became Senior Director Finance, Merchandising, Distribution, and Real Estate. In 2021, he assumed his current position. Between 2004 and 2013, his responsibilities included

accounting for all fixed assets including the equipment in the stores, and he was responsible for the Shoppers's Equipment Rental Fee.

[167] **Patrick Dean** is the Senior VP Front Store & Category Management at Shoppers. He joined Shoppers in 1996 as Manager of Marketing Projects. In 1997, he became Director Category Management Development. In 1998, he became VP Category Management Development. In 2000, he became VP Corporate Brands. In 2002, he became VP Merchandising. In 2010, he became Senior VP Category Management. He assumed his current position in 2016. His responsibilities included implementing the Optimum Program in 2000. He was responsible for Shoppers's use of MOGs ("Mass-Order Generated Goods") between 2002 and 2013.

[168] **Sid Jaishankar** is a Managing Director in the Toronto office of Duff & Phelps, and he practices in disputes, investigations, and valuation advisory services. He specializes in business and securities valuation and damages quantification. He is a Chartered Professional Accountant and a member of the CFA Institute and the CBV Institute. He obtained his Bachelor of Mathematics and Master of Accounting degree at the University of Waterloo.

[169] **Angelo Mariano** is the VP Finance, Pharmacy & Healthcare Businesses at Shoppers. In 1995, he joined Shoppers's predecessor, Imasco Retail Inc., as Director, Retail Accounting. In 1997, he became Director, Corporate Accounting. In 1999, he left Imasco to return to Shoppers as VP, Retail Accounting. In 2010, he assumed his current position.

[170] **Chris Potter** is the Senior VP, Healthcare Businesses at Shoppers. Before he joined Shoppers, in 2009, as the Director of Generics, he worked at Apotex, a generic drug manufacturer, in various marketing roles. In 2012, he became Senior Director, Generics at Shoppers. From 2013 to 2016, he was VP Pharmaceutical Partnerships. In 2016, he became VP Pharmaceutical Partnerships & Specialty Health at Shoppers and in 2018, VP Specialty Health & Wellness. In 2019, he assumed his current position.

[171] **Harpal Randhawa** is the VP Finance, Financial Planning & Analysis at Loblaw Companies Limited, which owns Shoppers. He joined Shoppers in 2005 as Manager, Accounting Policy. By 2015, he had become VP Finance, and in 2017, he joined Loblaw as Vice-President Finance, Market Division. Between 2009 and 2013, his responsibilities included the setting and the review of Shoppers Charges under the Associates Agreements.

[172] **Mirella Ricci** is a legal assistant with the law firm of Osler, Hoskin & Harcourt LLP, the lawyers for Shoppers in this class proceeding. She proffered an affidavit attaching transcripts, exhibits, and answers to undertakings from the examinations for discovery of Mr. Spina and Mr. Vanderburg.

[173] **Kevin Whibbs** is the Senior VP, Supply Chain at Loblaw and Shoppers. He assumed that role in 2001 at Shoppers and in 2016 at Loblaw. His responsibilities included managing Shoppers' supply chain including, among other things, shipping and receiving procedures at Shoppers' distribution centres.

G. Misuse of Evidence

[174] As already mentioned, several times, and to be repeated many more times, the immediate case is a dispute about contract interpretation and performance. It also is a dispute about the interpretation and the application of the legislation that imposed the Ontario government's Professional Allowance Regime.

[175] With respect to contract interpretation, it is necessary to understand the factual circumstances of the negotiation and drafting of the Associates Agreements at the time it was introduced to be signed by the Associates.

[176] With respect to contract interpretation and also with respect to the calculation of damages for breach of contract, it is necessary to understand commercial practices in the franchise sector of the economy and also generally accepted accounting principles for profit aspiring enterprises.

[177] With respect to statutory interpretation, it is necessary to understand the factual circumstances that prompted legislative action.

[178] Given what it is necessary to understand, the parties in the immediate case quite properly called witnesses, including expert witness, who knew about and testified about the factual circumstances surrounding the contracting, business and accounting practices, or the legislating of Professional Allowances. However, there are limits to the use of this factual circumstances evidence, and in the immediate case both parties made arguments that went outside the boundaries of what is permissible, particularly in the area of expert evidence.

[179] In the immediate case, frequently the experts from either side did not stay in their evidentiary lanes. The major misuse of evidence that both parties perpetrated was relying on testimony about the witnesses' personal opinion about the intention of the contracting parties or about the intention of the legislator. Some experts went so far as to interpret the testimony of other witnesses and made findings of fact of their own about the practices of the Associates or of Shoppers. Some experts interpreted the meaning and the application of the Associates Agreements.

[180] Findings of fact are the providence of the court. The interpretation of contracts and the interpretation of statues are the providence of the court. The interpretation of contracts and the interpretation of statutes is an objective determination to be made by the court based on the principles of contractual interpretation and statutory interpretation, and it is not a determination based on the subjective views, opinions, or admissions of the litigants or their experts about the meaning of the words of the contract or of the statute.

[181] In *Fairview Donut Inc v. The TDL Group Corp.*,[15] perhaps the leading class action decision in the area of franchise litigation, discussed further below, Justice Strathy, as he then was, gave an expert witness's testimony very little weight because the expert's opinion was:

> prolix in the extreme, largely because he does not confine himself to expressions of opinion based on assumed facts or facts clearly established by other evidence. Instead, he undertakes his own fact-finding mission, relying on facts that have not

[15] 2012 ONSC 1252 at para. 153, aff'd 2012 ONCA 867.

> been proven. His affidavit also includes improper legal analysis and contract interpretation and improper advocacy.

[182] In the immediate case, I have a similar response to some of the evidence and expert's reports. There were many examples where one or the other or both of the parties proffered inadmissible evidence or misused the evidence.

[183] For example, it was a misuse of evidence by the Plaintiffs to rely on evidence about a witness's personal opinion about whether a Professional Allowance was a new concept under the Professional Allowance Regime that was outside Article 11.04 of the 2002 Associates Agreement and Article 11.10 of the 2010 Associates Agreement.

[184] While Mr. Fraser, Dr. Grootendorst, and Mr. Schoonveld contributed admissible and valuable evidence about the Professional Alliances Regime, they went outside their evidentiary lanes by opining about how to interpret the intent of the Legislators or the meaning of the legislation or the interpretation of the Associates Agreements.

[185] For example, it was a misuse of evidence by the Plaintiffs to rely on Mr. Fraser's evidence that Professional Allowances were intended to reimburse or compensate pharmacies and pharmacists for direct patient care services. Mr. Fraser's evidence as to the intention of the legislation is inadmissible for that purpose, although his evidence may be useful for other purposes, which, however, would not include interpreting the private law contracting of the parties.

[186] For example, and correspondingly for the same reasons to those just mentioned, Shoppers was wrong in relying on the evidence it extracted from Dr. Grootendorst's cross-examination about whether Professional Allowances was a new concept under the Professional Allowances Regime that differed from rebates as they were understood as a matter of private law contracting.

[187] For example, it was a misuse of evidence by Shoppers to rely on acknowledgements or admissions by the witness secured during cross-examination that undermined their personal opinion about the meaning of the legislation and of the Associates Agreement. To be more specific, Dr. Grootendorst's evidence was helpful with respect to the problems, and the mischief, that the provincial government was attempting to address when it enacted its Professional Allowance Regime. However, his evidence was useless, in the sense that it could not be used, to interpret the intent of the Legislators, and it was even more useless in interpreting whether Professional Allowances were within the coverage of Article 11.04 of the 2002 Associates Agreement or Article 11.10 of the 2010 Associates Agreement.

[188] For example, it was a misuse of evidence by the Plaintiffs to rely on Dr. Narayanan's opinion evidence that "it is counterintuitive from an accounting and business perspective to have the franchisor have a second source of profits embedded in other fees that are not shared with the franchisee." To my mind, if there is anything counterintuitive, it is to think that a contracting party would not seek as many sources of profit as it could embed into a contract. After all, that is what bargaining is all about, as each party competes for the better bargain. In any event, Dr. Narayanan conceded in cross-examination that he was not opining that Shoppers was precluded from adding additional profit elements to its bargain with the Associates. In any event, Dr. Narayanan's opinion

while useful for some purposes is useless for the purpose of interpretating what the parties intended and agreed to under the Associates Agreements.

[189] Finally for example, it was a misuse of Dr. Narayanan's evidence by the Plaintiffs to rely on his findings of fact about Shoppers Charges. It was Dr. Narayan's opinion that there was no evidence that Shoppers actually used a holistic approach, which approach would have balanced the overall surpluses and deficits of Shoppers Charges so that overall, the services were provided without an element of profit. Dr. Narayanan went outside his evidentiary lanes in fact finding about whether it was true or not that Shoppers actually used a holistic approach. This was help that the court did not need.

H. The Certification Motion and Evidentiary Issue Estoppels

[190] On the summary judgment motions, on several issues, Shoppers made counterarguments that asserted that the Plaintiffs were estopped from making their argument on the issue because of "issue estoppels" arising from the certification motion.

[191] As noted above, the certification motion in this action proceeded in two phases. Phase I determined Shopper's Rule 21 motion and the cause of action criterion for certification (s. 5 (1)(a) of the *Class Proceedings Act, 1992*). Phase II determined the remaining four certification criteria (s. 5 (1)(b)(c)(d)(e) of the *Class Proceedings Act, 1992*).

[192] On the Rule 21 Motion, during Phase I of the certification motion, I struck out claims in respect of: (a) alleged interference with Associates' right to associate; (b) alleged breaches of fiduciary duty; (c) alleged breaches of Shoppers's duty of disclosure to Associates; and (d) alleged breaches with respect to rebates paid by generic manufacturers to Shoppers in respect of drugs dispensed in provinces other than Ontario or in Ontario before the introduction of the Professional Allowances Regime. In Phase II, I did not certify the Plaintiffs' claim for aggregate damages as a common issue.

[193] The certification motion is an interlocutory motion, and the law is complex about the extent to which an interlocutory motion will create issues estoppel that would be preclude re-litigation.

[194] If a decision made on an interlocutory motion definitely decides a matter on the merits and no appeal is taken, then the decision is binding for that proceeding and in subsequent proceedings between the same parties or their privies.[16] There are, however, difficulties in applying the law of *res judicata* to interlocutory motions and decisions because given the interlocutory nature of the motion, it may be difficult to determine what was being decided and whether the decision was meant to preclude further litigation should the circumstances change.

[195] For example, an order dismissing a motion for summary judgment determines only that there is a genuine issue requiring a trial and the issue or issues will not have been finally resolved

[16] *Earley-Kendall v. Sirard*, 2007 ONCA 468; *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 35 O.R. (3d) 273 (Gen. Div.); *Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc*. (1994), 18 O.R. (3d) 766 (Gen. Div.); *Ward v. Dana G. Colson Management Ltd.*, [1994] O.J. No. 533 (Gen. Div.), aff'd [1994] O.J. No. 2792 (C.A.); *Fidelitas Shipping Co. v. V/O Exportchleb*, [1965] 2 All E.R. 4 (C.A.); *Diamond v. Western Realty Co.*, [1924] S.C.R. 308.

for that action or others,[17] unless: (a) the judge on the summary judgment motion expressly indicates that he or she is making a binding determination of law or fact; and (b) the determination is expressed in the court's formal order.[18]

[196] There is the further complication that where the order made on the interlocutory motion is "interlocutory" in a procedural sense, *i.e.*, not a final order in a procedural sense, any apparent findings of fact made in the reasons do not support a *res judicata* or *issue estoppel*. [19]

[197] Apart from the cause of action criterion, a certification motion is essentially a procedural motion and not a hearing on the substantive merits, and, therefore, in the immediate case, which is undoubtedly a hearing on the merits of the Plaintiffs' claims and Shoppers's defences, I shall not preclude the parties from rearguing any issues.

[198] Although I may refer to the certification motion, I shall decide all the factual issues on their merits based on the evidence proffered for the summary judgment motions.

I. Factual Background: Size of the Class

[199] The number of Shoppers Drug Mart and Pharmaprix stores across Canada ranged from 870 in 2003 to 1,315 in 2013, with approximately 50% of the stores located in Ontario.

[200] As of September 2, 2011, excluding the Pharmaprix stores in Québec, there were 1,099 Shoppers Stores across Canada. There were four Ontario regions, and regions in British Columbia, the Prairies, and the Atlantic regions. There were 629 Ontario stores.

[201] As of March 27, 2014, there were 1,309 Shoppers Drug Mart and Pharmaprix stores across Canada. There were 734 Ontario stores.

[202] During the 12 years and 7 months of the Class Period, 559 Associates departed the Shoppers System. There were 421 resignations, 69 retirements, 37 terminations; 9 joined central office; 4 long-term disabilities, 8 store closures; 8 other; 2 deaths, and 1 leave of absence.

[203] This churning of incoming, transferring, and outgoing Associates shall be a factor to consider in the analysis later about whether an aggregate damages award is feasible in the immediate case.

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[17] *Leone v. University of Toronto Outing Club*, 2007 ONCA 323 at para. 2; *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.* (1998), 42 O.R. (3d) 618 (C.A.).
[18] *2441472 Ontario Inc. v. Collicutt Energy Services*, 2017 ONCA 452; *Ashak v. Ontario (Director, Family Responsibility Office)*, 2013 ONCA 375; *S.(R.) v. H.(R.)* (2000), 52 O.R. (3d) 152 at para. 21 (C.A.).
[19] *Peleshok Estate v. Peleshok*, 2011 ONSC 3156 at paras. 83–86; *Smith Estate v. National Money Mart Co.*, 2008 ONCA 746 at para. 30; *Leone v. University of Toronto Outing Club*, 2007 ONCA 323.

J. Factual Background: The Representative Plaintiffs

1. Giovanni (John) Spina and John Spina Drugs Ltd.

[204] In **1988**, Mr. Spina graduated from the University of Manitoba with a Bachelor of Science degree in pharmacy, and he became a member of the Ontario College of Pharmacists.

[205] In **1989**, Mr. Spina took up employment as a pharmacy manager at a Shoppers's store in the Bowmanville Mall.

[206] In **1992**, he and his wife incorporated John Spina Drugs Ltd. Mr. Spina became the Associate franchisee for Shoppers's store #690 in Whitby, Ontario.

[207] Ten years later in **2002**, Mr. Spina and Spina Drugs switched to store #1224 in Ajax, Ontario. He worked and continues to work at this store full time as an Associate and as a dispensing pharmacist. Store #1224 is one of the original large store format prototypes that Shoppers launched in Canada.

[208] Mr. Spina is a signatory of several 2002 Associates Agreements and several 2010 Associates Agreements.

[209] When Mr. Spina first joined Shoppers as an Associate, the Associates had far more independence and autonomy than is the case under the 2002 Associates Agreement and the 2010 Associates Agreement, which are described in considerable detail below.

[210] In the years before the 2002 and 2010 Associate Agreements, an Associate operated his or her store and was responsible for its management, administration, purchasing, and accounting etc. There was an informal, idiosyncratic practice in which on annual basis, the Associate and Shopper's split the profits of the store with approximately 20% to the Associate and 80% to Shoppers.

[211] In 1994, Shoppers introduced system-wide compulsory practices that reduced the autonomy of the Associates. Shoppers opened distribution centres and the stores were required to purchase merchandise exclusively from Shoppers from its distribution centres. The management and operation of the stores, including training programs, became subject to stringent and comprehensive policies and procedures that were to be followed in all the Shoppers's stores across the country. Shoppers's district managers meet frequently with the Associates and compliance with Shoppers's numerous operating standards was audited. Shoppers introduced uniform policies and procedures for the distribution centres that made it extremely difficult for Associates to identify and remedy shipping errors or damaged goods in the delivery of merchandise.

[212] As the autonomy of the Associates diminished, Shoppers took over the daily bookkeeping and accounting responsibilities of the Associate for his or her store. These responsibilities were assigned to Shoppers's Retail Accounting Department ("RAD"), and the Associate was charged a fee for this service.

[213] In **2006,** radical changes were made to the informal idiosyncratic profit sharing model that had existed between the Associates and Shoppers. In 2006, Shoppers introduced the New Financial

Model. Under the New Financial Model, a budget was set for each year based on prior years' performance and economic factors. Performance targets were established in the budget. A draft Common Year Plan (annual store plan) for the next year was prepared by Shoppers's RAD. After discussions between the Associate and a Shoppers's representative the Common Year Plan for the store was settled. Targets were set that would affect the metrics of a guaranteed income for the Associate, the Associates Earnings and Shoppers's "Service Fee," which was the means that Shoppers extracted its split of the store's profits.

[214] During the course of the business year, a store's revenues were deposited into a bank account that was managed by the RAD, which used the funds to pay suppliers. The RAD sent the Associate monthly Profit & Loss reports. At the end of the year, the RAD would have sent thirteen such statements. The RAD provided the Associate with the information he or she needed to file corporate tax returns. The RAD prepared reports pursuant to which the amount of the Associates Earnings and the amount of Shoppers's "Service Fee" would be determined. As will be explained in more detail below, the computation of Associates Earnings and the Service Fee was the means by which profits (but not losses) were shared between the Associate and Shoppers.

[215] Under the New Financial Model, Shoppers charges Associates fees for services and programs periodically. As noted above, Shoppers's divides the year into thirteen 28-day periods. Under the Associates Agreements, the Associate has no choice but to participate in the programs and pay for the services that were being charged periodically with a reconciliation of fees and profits made at the end of the year.

[216] Beginning in **June 2010**, Mr. Spina's relationship with Shoppers began to deteriorate. He attended a meeting of PEERS, a franchisee association that acted as a liaison between the Associates and Shoppers. At the PEERS meeting, Mr. Spina raised a concern about a proposed increase in the minimum number of hours an Associate was required to work in the pharmacy. Shoppers's response was to direct Mr. Spina to meet with two Shoppers's vice-presidents. The VP's reprimanded him for raising his concerns publicly and they threatened him with repercussions, alluding to terminating his franchise.

[217] After this souring experience, Mr. Spina spoke to other Associates. He learned that they had similar experiences when they had voiced concerns with Shoppers's role as franchisor. Mr. Spina learned that he and other Associates' earnings had stagnated while Shoppers's profits were increasing. He believed that Shoppers was not being transparent about the fees it was charging for the mandatory services it was providing because it did not disclose the details of the costs of the services it provided. He began to suspect that Shoppers was profiting from the fees it was charging instead of providing services at an at-cost basis, which was his understanding when he became an Associate. He deposes that because Shoppers was not forthcoming in addressing his and the others concerns about their earnings, he commenced this class action.

[218] After the litigation was commenced, Mr. Spina learned the details of how Shoppers charged for the Optimum Fee and for the Shoppers Charges. He learned the details of Shoppers's alleged failure to remit Professional Allowances.

[219] With respect to the Professional Allowances claim of the PA Class Members, Mr. Spina deposed he recalls that in **2006,** there was considerable discussion in the pharmacy industry about

the Ontario government's plans to ban rebates on the purchase of generic drugs. However, he did not appreciate how Shoppers was addressing this matter. He knew that by **2008**, Shoppers was demanding that the Associates account and provide information about the direct patient care services that were being provided by the pharmacists in the Shoppers's stores. Mr. Spina says that he understood that the reports required by Shoppers had to do with Professional Allowances, but he was told little more. In his affidavit for the summary judgment motion, he deposed:

> 92. I do not recall any discussion or communication from [Shoppers], whether through memoranda or through PEERS, as to the details or mechanics of what [Shoppers] did with this. Ontario Associates were being pressured to complete the reports and given the environment where threats of reprisal and repercussions were common (including nonrenewal of Associate Agreements), Associates were afraid to push back on [Shoppers's] demands and were afraid to ask questions.

2. Romeo Vanderburg and Romeo Vandenburg Drug Company Ltd.

[220] In **1988**, Mr. Vanderburg graduated from the school of pharmacy at the University of Nagpur in India. In 1991, he moved to Canada and took employment at a Shoppers's store at Cedarbrae Mall in Toronto.

[221] In **1992**, Mr. Vanderburg became a member of the Ontario College of Pharmacists, and he worked as a pharmacist in a Shoppers's store in the Midtown Mall, in Oshawa, and then in **1993**, he returned to the Cedarbrae Mall store as a pharmacy manager.

[222] In **1994**, Mr. Vanderburg and his wife incorporated Romeo Vanderburg Drug Company, and he became an Associate for Shoppers's store #962, which was located in Whitby, Ontario.

[223] In **1999**, Mr. Vanderburg took over a second Shoppers's store in Ajax, Ontario. He operated two stores until **2000**, when Shoppers asked him to take over a third store located in Whitby, Ontario.

[224] In **2003**, he changed from operating the three stores to operating Shoppers's store #862, which is located in the east end of Toronto.

[225] Mr. Vanderburg is a signatory of several 2002 Associates Agreements and several 2010 Associates Agreements.

[226] In his affidavit for the summary judgment motion, Mr. Vanderburg voiced his grievances with Shoppers's distribution centre policies and procedures. He felt that Shoppers was using MOGs as a way to deal with "left over" merchandise, and he felt that Shoppers was forcing the Associates to incur the financial losses with respect to these excess goods.

[227] In his affidavit for the summary judgment motion, Mr. Vanderburg deposed that as a result of information disclosed through the litigation, he learned that Shoppers generated profits at the expense of Associates during the Class Period by charging inflated amounts in respect of: (a) the Loss Prevention Fee; (b) the Academy Fee; (c) the Retail Accounting Fee; and (d) the Equipment Rental Fee.

[228] Mr. Vanderburg said that before he started the lawsuit, Shoppers disclosed the overall rate of its Shoppers Charges but that it did not disclose how those fees were set. He says that Shoppers did not disclose how rates were set. He said that when he became an Associate, he believed that Shoppers was setting rates for its services so that the fees would not generate a profit at the expense of the Associates.

[229] Mr. Vanderburg agreed with Mr. Spina's evidence about Shoppers's objectionable policies and procedures with respect to the delivery of goods and the obstacles to dealing with damaged goods and with mistakes in the delivery of merchandise. He described incidences of misadventures and problems associated with the delivery of MOGs.

[230] About the Professional Allowances, Mr. Vanderburg deposed as follows:

> 38. While I had a general understanding that these reports had to do with Professional Allowances recently introduced by the Ontario Government, [Shoppers] disclosed no information to Associates about what SDM was doing with Associates' reports. [Shoppers] provided very little information about Professional Allowances to Associates. It was a stressful time to be an Associate and, […] at this time, there was a culture of intimidation by [Shoppers]. Associates were vulnerable, given the termination provisions in the Associate Agreements. Like many Associates, I was concerned about reprisals from [Shoppers] if I asked questions about the patient care reports.
>
> 39. Since I started this lawsuit, I have learned much more about Professional Allowances that I did not know during the 2006-2013 period. Until this litigation, [Shoppers] did not disclose to me (or, as far as I know, the other Ontario Associates): (a) the content of reports submitted on behalf of Associates to the Ministry of Health and Long-Term Care between 2007 and 2010; (b) the total amount of professional allowances collected throughout the 2006- 2013 period in respect of drugs dispensed by Ontario Associates; (c) [Shoppers] relied on the information Ontario Associates provided in response to [Shoppers's] mandatory surveys in order for [Shoppers] to receive Professional Allowances, which it did not share with Associates; (d) the total value of direct patient care services which were provided or incurred at Associate stores throughout the 2006-2013 period, eligible for Professional Allowances payments; or (e) any information about the manner in which it charged or invoiced Professional Allowances to generic drug manufacturers along with vendor income.

K. Factual Background: The Business of Shoppers and the Associates

1. Overview: The Franchise Business of Shoppers

[231] To decide the competing summary judgment motion, the devil or the angel truly lies in the details of Shoppers's franchise enterprise. The details will follow, but in this part of my Reasons for Decision, I will provide an overview of the franchise business of Shoppers, the franchisor. In the next section, I will provide an overview of the franchise business from the perspective of the

franchisees, the Associates. The granular details will be the subject matter of other sections of these Reasons for Decision.

[232] The Defendant Shoppers Drug Mart Inc. is a wholly owned subsidiary of Shoppers Drug Mart Corporation, which is a public corporation trading on the Toronto Stock Exchange. 911979 Alberta Inc. is an affiliated corporation that owns the trademarks of the franchised retail pharmacy stores operated by Shoppers under the name Pharmaprix in Québec and Shoppers Drug Mart across the rest of Canada.

[233] Shoppers' business was owned at one time by Imasco, and on March 28, 2014, the business was acquired by Loblaw Companies Limited, where it operates Shoppers as a wholly owned subsidiary of Loblaws.

[234] Shoppers's and its Associates' story begins in 1941, when Murray Koffler succeeded his father, and he operated two Koffler's drug stores in Toronto, Ontario.

[235] In 1992, Mr. Koffler founded Shoppers Drug Mart when he opened a drug store at the Shoppers World Plaza in Toronto. Shoppers grew to become one of the oldest franchise systems in Canada.

[236] As a franchise system, Shoppers role was to design and standardize and oversee a merchandizing system for a chain of retail stores that sell pharmaceuticals and general merchandize to consumers in accordance with a very strictly supervised business model. The franchisees are pharmacists who have passed Shoppers's training program. The pharmacists own the corporations through which the retail business is operated. The pharmacists along with their personal private corporation are the franchisees. The franchisees are known as Associates.

[237] Shoppers designed and oversaw the franchise system, and it had a role to play in the business of the stores of the system and it took the lion's share of the net profits of the store's business.

[238] Shoppers took its share of the profits by what the Associates Agreement label a "Service Fee." Shoppers – not the Associates - absorbed any losses. Shoppers guaranteed a minimum earning for the Associates even if the store was unprofitable. Shoppers incurred expenses of its own for its role in the operation of the store's businesses and some of these expenses were recovered by fees it charged to the Associates in accordance with the Associates Agreements ("Shoppers Charges").

[239] A major role for Shoppers was to purchase merchandise for the stores. Shoppers acted as a wholesaler to the Shoppers stores. Shoppers warehoused and then distributed the pharmaceuticals and merchandise from distribution centres it owned in Calgary, Alberta, Mississauga, Ontario, Cornwall, Ontario, and Moncton, New Brunswick, and from leased facilities in Richmond, British Columbia, Toronto, Ontario, and Moncton, New Brunswick.

[240] Shoppers exercised its massive purchasing power and resold the merchandize to the stores without mark up, but the Associates Agreements entitled Shoppers to keep any rebates or discounts etc. paid by the vendors of the merchandize.

[241] The rebates or discounts were a major profit centre for Shoppers that it did not share with the Associates. There is nothing in the Associate Agreements that imposes an obligation to share, account for, or to disclose to the Associates the source, nature, or amount of rebates, discounts, etc. that Shoppers received. The Associates Agreement provides that Shoppers may keep for itself the rebates and allowances it obtains as the wholesaler of merchandize.

[242] The Associates are not employees or partners of Shoppers. They are independent contractors who have business of their own with employees to accept deliveries, stock the shelves, dispense the drugs, sell the merchandize, clean the stores, etc. The stores are outfitted in accordance with Shoppers's standards and Shoppers provides the store premises, which are leased or subleased to the Associate's business. Shoppers provides the equipment for the stores and leases it to the business. As independent businesspersons, the Associates are rigorously managed by Shoppers. Shoppers controls the supply chain of merchandise and the Associate's business must buy its merchandize from Shoppers. Thus, Shoppers acts as a wholesaler, and it also sets the retail price of the goods to be sold by the Associate's business.

[243] The business undoubtedly benefits by Shoppers purchasing power to obtain the goods at prices that make the retail price of goods attractive to purchasers. Shoppers provides the advertising for the chain and the Associate's business must pay for a portion of the advertising costs. Shoppers operates a marketing program known as the Optimum Program. The Associates are obliged to pay a portion of the costs to the Optimum Program, but Shoppers heavily subsidizes the Optimum Program.

[244] The Associates must partake of a long list of services, "Shoppers Charges," which are provided by Shoppers and for which services Shoppers charges a fee.

[245] Another mandatory charge that the Associate must pay is the "Service Fee." Through the Service Fee, Shoppers shares in the net revenues, the profits, of the business. The Service Fee is measured against the net revenues of the store and the Associates Earnings and thus the profits of the store, if any, are shared between the Associates and Shoppers.

[246] Shoppers takes the lion's share of the net revenues through the Service Fee. Although Shoppers takes the lions' share of the profits, if any, the Associates are spared from being responsible for any losses. And the Associates are guaranteed a specified income even if their business is unprofitable or underperforming expectations.

2. Overview: The Franchise Business of the Associates

[247] Under the Associate Agreements, Shoppers grants a license to an Associate to operate one or more franchised stores. The stores are full-service retail drug stores that also sell a large selection of general merchandise, including greeting cards, lottery tickets, cosmetics, confections, beverages, groceries, etc.

[248] Under the Associate Agreements and under Shoppers's franchise system, Associates are required: (a) to operate under a common form of Associate Agreement and Operations Manual; (b) to sell common goods; (c) to purchase goods only from a distribution centre owned and operated by Shoppers or from specific preferred suppliers; (d) to share common advertising expense; (e) to participate in the Optimum Program, a customer loyalty program; (f) to use

Shoppers' accounting and bookkeeping services: and (g) to acquire common equipment, including computer equipment as directed by Shoppers. Associates are subject to rigorous uniform standards and controls that apply across the national chain of Shoppers's stores.

[249] Shoppers provides services to the Associates. Shoppers charges for the services and they are paid by the Associate as an expense to the operation of the store. The fees are known as "Shoppers Charges." These charges or expenses are charged against the gross revenues of the business in the calculation of profits or losses.

[250] Shoppers acquires or leases the store's premises, and then Shoppers licenses the use of the premises to the Associate. The occupancy charge is charged to the store's cost of doing business. Under the Associate Agreement, the payment of all rent and other occupancy costs under the lease is a cost of the business, and Shoppers charges a fee (the "Occupancy Charge") to each Associate for the amount of rent, common area maintenance and realty tax payable under the applicable lease for the store. Shoppers purchases and installs the equipment for the store and then rents the equipment to the Associate. Shoppers charges an Equipment Rental Fee.

[251] Under the Associate Agreement, the store is required to pay the Store Charges to Shoppers on account of the services and programs that Shoppers provides to the stores. The Store Charges include: (a) the Loss Prevention Fee, for loss prevention services; (b) the Academy Fee, for training courses; (c) the Retail Accounting Fee, for bookkeeping and accounting services; (d) the Equipment Rental Fee; (e) the Insurance Fee, for an insurance program obtained by Shoppers; (f) IT Support Fee, for computer system technical support; (g) Dataline Communications Fee, for a technology communication system; and (h) PIN Pad Fee, for the PIN pads used to process debit and credit card transactions.

[252] Shoppers charges the Associates for the Optimum Program, which is a loyalty program to encourage consumer spending at the Shoppers's stores. It shall be important to note that the Optimum Fee is expressly referred to in the 2010 Associates Agreement but not in the 2002 Associates Agreement.

[253] The Associate agrees to devote his or her full time and attention to the operation and management of the Store and to conduct the store's business in accordance with all specifications, standards, policies, and operating procedures prescribed by Shoppers. The store must participate in the advertising programs prescribed from time to time by Shoppers. The Associate agrees to pay an Advertising Contribution.

[254] As noted above, the Shoppers Store must deal only in products specified by Shoppers, and the store must purchase all products directly from Shoppers or from suppliers specified by Shoppers. The products are supplied from Shoppers distribution centers, which are located across the country.

[255] Throughout the Class Period, Associates were required to purchase generic drugs solely from Shoppers, subject to limited exceptions. Shoppers acted as a mass purchasing wholesaler; it purchased the generic drugs from generic manufacturers. Associates paid Shoppers the same invoice price that was paid by Shoppers to the generic manufacturers. As explained above, there

was no wholesalers' markup, but Shoppers retained rebates, discounts, allowances, etc. paid by the generic drug manufacturer.

[256] During the course of a business year, which was divided into thirteen four-week periods (52 weeks), the Associate would receive Profit & Loss Statements about the performance of his or her store from Shoppers's Retail Accounting Department (RAD).

[257] These reports are relevant to a variety of issues including the running of limitation periods, the availability of aggregate damages, and calculation of individual damages. As an example, Mr. Vanderburg's Profit & Loss Statement for Period 13 Ended January 1, 2005 is attached as Schedule "C" to these Reasons for Decision.

[258] During the course of a business year there was also a forward planning process that involved the preparation and settling of Common Year Plans (annual store plans) for the future year. This process, which is described below, also involved the preparation of a variety of reports from RAD that were reviewed with the Associate. At the end of the business year, there was a process to settle the "Associate Earnings," which was the Associates' share of the store's profits, if any. A variety of financial documents and spreadsheets were prepared by RAD to settle Associate Earnings and the Service Fee, which as noted above was how Shoppers extracted the lion's share of the store's profits, if any.

[259] During the Class Period, the Associates belonged to a franchisee association called the PEERs Committee.

[260] PEERs was organized regionally, with each region having its own constitution, its own elected executive committee, and its own bank account. PEERs representatives were elected by the Associates to represent the Associates' interests.

3. The Formation of the Relationship between Shoppers and the Associates.

[261] Shoppers's relationship with the Associates is subject to Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*,[20] and the similar provincial statutes of Alberta, Manitoba, New Brunswick and Prince Edward Island.[21] In these provinces, before entering into a franchise agreement and before entering into any renewal agreement, Shoppers provides franchise disclosure documents to the Associate. As franchisor, Shoppers owes Associates statutory and common law duties of good faith and fair dealing.

[262] For a variety of issues, most particularly the issues associated with Shoppers's limitation period defence and the Plaintiffs' breach of good faith claims, the disclosure made by Shoppers to the Associates pursuant to the franchise disclosure statutes is pertinent to the resolution of the summary judgment motions.

[263] In the immediate case, the Class Period begins on January 1, 2002 and it ends on July 9, 2013 (twelve years, seven months). On the commencement of the Class Period, there would have

[20] S.O. 2000, c. 3.
[21] *Franchises Act*, R.S.A. 2000, c. F-23; *The Franchises Act*, S.M., 2010, c. 13; (e) s. 3 of the *Franchises Act*, S.N.B. 2007, c. F-23.5; *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1.

been some Associates who were franchisees of Shoppers pursuant to disclosure statements provided at the time of their contracting with Shoppers, which may have occurred before January 1, 2002 and before they signed the 2002 Associates Agreement, for which they would have received another disclosure statement.

[264] For present purposes, the following disclosures from the Disclosure Statements before January 1, 2002 are pertinent. The example is from a 2001 Disclosure Statement, which was Exhibit "9" to Mr. Spina's affidavit dated July 23, 2021. This is an example of a Disclosure Statement for Associates that signed with Shoppers before the 2002 Associates Agreement. Associates, like Mr. Spina, might go on to renew their franchise and then they would receive an associated Disclosure Statement.

SHOPPERS DRUG MART INC.

DISCLOSURE DOCUMENT

Pursuant to the *Arthur Wishart Act (Franchise Disclosure), 2000*

[…]

Franchise Fee and Other Fees

(a) Franchise Fee (Service Fee)

The franchise fee, also referred to as the "service fee", is determined by the Franchisor from time to time. The service fee cannot exceed the net profit from the franchised business before provision for the service fee and income taxes, and after provision for remuneration to the operator of the franchised business.

[…]

(b) Other Fees

In addition to the service fee the franchisee currently pays the following other fees:

(1) the franchisee contributes an amount not in excess of 2% of its gross non-tobacco sales (currently at 1.35% of gross non-tobacco sales) to a advertising fund which is disbursed ·by the Franchisor on account of advertising and marketing expenses on behalf of all the franchisees;

.(2) the franchisee pays to the Franchisor a charge of .025% of gross non-tobacco sales for training that covers the costs of courses for franchisees, prospective franchisees and for the franchisees' employees;

(3) the Franchisor supplies bookkeeping and accounting services to the franchisee and levies a charge for such services, which is related to the sales volume of the franchised business. The charge ranges from $8,000 per annum for franchised

businesses with gross sales of $2,800,000 or less to $21,500 per annum for franchised businesses with gross sales of $7,900,000 or more;

[…]

(5) the Franchisor provides loss prevention services for a charge of .16% of gross nontobacco sales;

[…]

Fixtures and Equipment

Fixtures and equipment (including leasehold improvements) required by the franchisee are leased from the Franchisor, and the franchisee is required to pay rental to the Franchisor for the lease of such fixtures and equipment. The rental is generally based upon the useful life of the fixtures and equipment and is calculated as follows:

- a 3 year asset has a lease rate of 39.29% of the cost of the asset per annum;
- a 5 year asset has a lease rate of 26.09% of the cost of the asset per annum; and
- a 10 year asset has a lease rate of 16.54% of the cost of the asset per annum.

Following expiry of the 3, 5 or 10 year lease term as described above, the lease continues upon payment of an annual rental payment equal to one month's rent calculated as aforesaid until the fixture or equipment is replaced.

6. (1) 5. - TRAINING

Before a prospective franchisee will be considered for a franchise he or she should have successfully completed the Franchisor's Associate Development Program. […]

Once a franchisee is appointed, there are a number of programs that a franchisee is required to take through the Franchisor's internal training and development program known as Koffler Academy. A fee is charged for providing training to prospective franchisees, franchisees and the franchisees' employees. This fee is used to offset the cost of the training programs such as: tuition for the Seneca College of Applied Arts and Technology courses, hotel rooms, meals, material costs, reimbursement for wages for attending training (in the case of a store employee). The fee is .025% of gross non-tobacco sales (as set out as item 2 of the Other Fees section above).

[…]

6. (1) 8. - REBATES OR OTHER BENEFITS TO THE FRANCHISOR

The Franchisor receives rebates and other benefits as a result of the purchase of goods and services by the franchisees from third parties. In its sole discretion, the Franchisor may share some rebates with its franchisees.

[265] The 2002 Associates Agreement was introduced on December 28, 2002. Beginning on January 1, 2003 and continuing until the introduction of the 2010 Associates Agreement, new Associates and Associates extending their franchises would receive disclosure statements about the 2002 Associates Agreement.

[266] For present purposes, the following disclosures for the 2010 Associates Agreement are pertinent. The example is from a 2007 Disclosure Statement, which was Exhibit "11" to Mr. Spina's affidavit dated July 23, 2021.

SHOPPERS DRUG MART INC.

DISCLOSURE DOCUMENT

Pursuant to the *Arthur Wishart Act (Franchise Disclosure), 2000*

[…]

Franchise Fee and Other Fees

(a) Franchise Fee (Service Fee)

The franchise fee, also referred to as the "service fee", is determined by the Franchisor from time to time. The service fee cannot exceed the net profit from the franchised business before provision for the service fee and income taxes, and after provision for remuneration to the operator of the franchised business.

[…]

(b) Other Fees

In addition to the service fee the franchisee currently pays the following other fees:

(1) the franchisee contributes an amount not in excess of 2% of its gross non-tobacco nonemployee sales (currently at 1.35% of gross non-tobacco non-employee sales) to an advertising fund which is disbursed by the Franchisor on account of advertising and marketing expenses on behalf of all the franchisees;

(2) the franchisee pays to the Franchisor a charge of .028% of gross non-tobacco nonemployee sales for training that covers the costs of courses for franchisees, prospective franchisees and for the franchisees' employees;

(3) the Franchisor supplies bookkeeping and accounting services to the franchisee and levies a charge for such services, which is related to the sales volume of the

franchised business. The charge ranges from $6,080 per annum for franchised businesses with gross sales of $4,100,000 or less to $18,905 per annum for franchised businesses with gross sales of $11,400,000 or more;

[…]

(5) the Franchisor provides loss prevention services for a charge of .07% of gross non-Shoppers tobacco non-employee sales;

[…]

Fixtures and Equipment

Fixtures and equipment (including leasehold improvements) required by the franchisee are leased from the Franchisor, and the franchisee is required to pay rental to the Franchisor for the lease of such fixtures and equipment. The rental is generally based upon the useful life of the fixtures and equipment and is calculated as follows:

- a 2 year asset has a lease rate of 55.91 % of the cost of the asset per annum;
- a 3 year asset has a lease rate of 39.27% of the cost of the asset per annum;
- a 5 year asset has a lease rate of 26.08% of the cost of the asset per annum;
- a 7 year asset hs a lease rate of 20.54% of the cost of the asset per annum;
- a 10 year asset has a lease rate of 16.53% of the cost of the asset per annum; and
- a 15 year asset has a lease rate of 13.64% of the cost of the asset per annum.

[…]

6. (1) 5. - TRAINING

Before a prospective franchisee will be considered for a franchise he or she should have successfully completed the Franchisor's Associate Development Program ("LEAD"). […] Once a franchise is awarded, there are a number of programs that a franchisee is required to support to ensure its employees get the recommended internal training and development programs for example, programs, such as the Pharmacy Technician Web Based Training program, the Cashier "Quick Start" training program etc. A fee is charged for providing training to prospective franchisees, franchisees and the franchisees' employees. This fee is used to offset the cost of the training programs suet, as: course development, delivery of training, material costs, web based technology support, reimbursement for wages for attending the LEAD training program (in the case of a franct1isee's employee). The

fee is .028% of gross non-tobacco non-employee sales (as set out as item 2 of the Other Fees section above).

[…]

6. (1) 8. - REBATES OR OTHER BENEFITS TO THE FRANCHISOR

The Franchisor receives rebates and other benefits as a result of the purchase of goods and services by the franchisees from third parties. In its sole discretion, the Franchisor may share some rebates with its franchisees.

[267] Beginning in 2010 and continuing to the end of the Class Period, new Associates and Associates extending their franchises would receive disclosure statements about the 2010 Associates Agreement.

[268] For present purposes, the following disclosures from the Disclosure Statements for the 2010 Associates Agreement are pertinent. The example is from a 2011 Disclosure Statement, that was Exhibit "12" to Mr. Spina's affidavit dated July 23, 2021.

SHOPPERS DRUG MART INC.

DISCLOSURE DOCUMENT

Pursuant to the *Arthur Wishart Act (Franchise Disclosure), 2000*

[…]

Franchise Fee and Other Fees

(a) Franchise Fee (Service Fee)

The franchise fee, also referred to as the "service fee", is determined by the Franchisor from time to time. The service fee cannot exceed the net profit from the franchised business before provision for the service fee and income taxes, and after provision for remuneration to the operator of the franchised business.

(b) Other Fees

In addition to the service fee the franchisee currently pays the following other fees:

(2) the franchisee pays to the Franchisor a charge of .028% of gross non-employee sales for training that covers the costs of courses for franchisees, prospective franchisees and for the franchisees' employees;

(3) the Franchisor supplies bookkeeping and accounting services to the franchisee and levies a charge for such services, which is related to the sales volume of the franchised business. The charge ranges from $6,080 per annum for franchised businesses with gross sales of $4,251,000 or less to $18,905 per annum for franchised businesses with gross sales of $11,662,000 or more;

[…]

(5) the Franchisor provides loss prevention services for a charge of .07% of gross non-employee sales;

[…]

Fixtures and Equipment

Fixtures and equipment (including leasehold improvements) required by the franchisee are leased from the Franchisor, and the franchisee is required to pay rental to the Franchisor for the lease of such fixtures and equipment. The rental is generally based upon the useful life of the fixtures and equipment and is calculated as follows:

- a 2 year asset has a lease rate of 55.91 % of the cost of the asset per annum;
- a 3 year asset has a lease rate of 39.27% of the cost of the asset per annum;
- a 5 year asset has a lease rate of 26.08% of the cost of the asset per annum;
- a 7 year asset has a lease rate of 20.54% of the cost of the asset per annum;
- a 10 year asset has a lease rate of 16.53% of the cost of the asset per annum; and
- a 15 year asset has a lease rate of 13.64 % of the cost of the asset per annum.

[…]

6.5 Training

The franchisee selection process is rigorous and opportunities are available only to licensed pharmacists who share the Franchisor's strong focus on providing the best in health care services to the franchisee's customers. Potential franchisees participate in the Company's Leadership Excellence and Development (LEAD) Foundations training program. […] Once a franchise is awarded, there are a number of learning programs that a franchisee is required to support to ensure its employees get the recommended development. […] A fee is charged for providing training to prospective franchisees, franchisees and the franchisees' employees. This fee is used to offset the cost of the training programs such as: course development, delivery of training, material costs, technology support, reimbursement for wages for attending the LEAD learning program (in the case of a franchisee's employee). The fee is .028% of gross non-employee sales (as set out as item 2 of the Other Fees section above).

[…]

6.8 Rebates or Other Benefits to the Franchisor

The Franchisor receives rebates and other benefits as a result of the purchase of goods and services by the franchisees from third parties. In its sole discretion, the Franchisor may share some rebates with its franchisees.

[269] It should be noted that pursuant to Article 17.12 of both the 2002 Associates Agreement and the 2010 Associates Agreement, the Associate and the Pharmacist each acknowledged that (a) they had an opportunity to be advised by professional advisors regarding all pertinent aspects of the Associate Agreement and the relationship created by the Agreement; (b) they had conducted an independent investigation of the business venture; (c) they recognized there were business risks; (d) they understood that success was largely dependent on their ability as independent businesspersons; and (e) they had been given enough time to read the Agreement and understand its provisions.

[270] In the Orientation Manual for the franchise relationship, Shoppers recommends that Associates review the Associate Agreement with their legal advisors to ensure that the Associate understands the Agreement and all of its provisions.

4. The Associates Agreements

[271] The franchisees, who are called “Associates” sign a franchise agreement, known as the "Associate Agreement." Under the franchise scheme, the pharmacists operate the Shoppers Store, through a corporation. Both the Associate and his or her corporation sign the Associate Agreement. Each Class Member was an Associate of Shoppers during the Class Period. Associates are businessowners and professionals licensed to practice pharmacy in the province in which their respective stores are located.

[272] The Associate Agreement is a standard form document. The dispute between the parties concerns the 2002 Associate Agreement and the 2010 Associate Agreement. The 2002 Associate Agreement remained in use until January 1, 2010, after which the 2010 Agreement was used for new Associates and for Associates whose 2002 Associate Agreement including its renewals had expired. The two Agreements are generally similar, but there are some differences that for a variety of reasons are relevant to the multifarious arguments of the opposing parties.

[273] Set out in Schedule “A” to these Reasons for Decision is a summary of the contract terms. The summary comes from the 2010 Associates Agreement. There is a similar summary in the 2002 Associates Agreement.

[274] Along with the above overview of the franchise business, the summary set out in Schedule “A” from the 2010 Agreement is useful as a means towards detailing the nature of the complicated relationship between the Associates and Shoppers. (While not necessary, a reader of these Reasons for Decision may be assisted by reading the summary before moving on.)

[275] Schedule “B” to these Reasons for Decision is a chart containing the provisions of the 2002 Associates Agreement and of the 2010 Associates Agreement that are most pertinent to the summary judgment motions before the court.

[276] It should be noted that Shoppers provided advanced notice to the Associates when revising the form of Associate Agreement. Before the 2010 Associate Agreement was implemented, Shoppers representatives reviewed a draft with PEERS, the consultative body of Associates from across the country.

[277] The review process was consultive, but the Associates Agreements are contracts of adhesion. The Associates essentially had to make a-take-it-or-leave-it decision about signing the Associates Agreement, and there was no individual negation of contract terms.

5. Associates Earnings

[278] Notwithstanding that Shoppers budgeted mandatory hours of work for Associates in addition to their responsibilities as franchisee-owner of their stores, Associates did not earn a salary for their labours as pharmacists, managers, and staff in their own stores. Associates were not paid wages for any of this work; rather, they shared in the profits, if any, of the store, with a guarantee of minimum earnings.

[279] Under the 2002 Associates Agreements and under the 2010 Associates Agreements, Associates were entitled to a portion of their store's net profits, known as "Associate Earnings." Under the 2002 Associates Agreements and under the 2010 Associates Agreements, Shoppers was entitled to a portion of the store's net profits known as the "Service Fee."

[280] Understanding the methodology of the calculation of Associate Earnings and of the Service Fee is critical to determining the quantification of the Class Members' breach of contract claims and to determining whether there can be an aggregate assessment of the damages suffered by the Class Members.

[281] Associates and Shoppers shared in the profitability of the Stores in accordance with a complex model that established a relationship amongst a store's anticipated annual financial performance (profits or losses), a store's actual annual financial performance, Shoppers Charges for its services, Associate Earnings, and the Service Fee.

[282] A simple, straightforward model would be just to determine what was a store's net profits and divide that profit. The profit sharing model under the Associates Agreement was anything but simple. It involved a complex financial algorithm where a change in one component or input factor would have cascading effects on the outputs.

[283] At the start of each year, a planned profit was targeted for each store in a Common Year Plan (annual store plan). Each Associate's plan, which was presented as a spread sheet, had line items for the Shoppers Charges, including, among other things, equipment rent, accounting expense, security expense, and Optimum expense. The plan was discussed with the Associate's District Manager before it was finalized.

[284] At the end of the year, Shoppers performed a reconciliation to determine how actual profit varied from the Common Year Plan. The amount by which a store exceeded planned profit was known as "overage," and the amount by which a store fell below planned profit was "underage".

[285] If the store exceeded its planned revenue target, the Associate received a percentage proportion of the overage. If the store fell short of its target, the Associate's earnings were reduced by percentage proportion of the underage. Associate earnings were accounted for in a Settlement Memoranda sent to Associates at the end of the fiscal year by Shoppers's Retail Accounting Department ("RAD").

[286] By way of one illustration, in 2011, Mr. Vandenburg had planned store profits of $422,479 and planned Associate Earnings of $146,437. At year end, after payment of all store expenses, the store's actual profits were $260,717, resulting in an underage of $145,772. Mr. Vandenburg was responsible for 20% of the underage, or $29,154, which was subtracted from his planned Associate earnings, yielding earnings of $117,282. Since his Associate Guarantee was $120,000, the Service Fee was reduced by $2,718 to bring Mr. Vandenburg's earnings to $120,000. Thus, the $422,479 profit was shared 28:72 ($120,000:$302,479), with the lion's share going to Shoppers.

[287] As noted above, before 2006, Associate Earnings was a simpler calculation of profit sharing. Before 2006, the amount received by an Associate from a store's profits was negotiated on an individual basis between an Associates and a regional or district manager. From 2006 onwards, Associate Earnings were determined using this complex model referred to as the "New Financial Model."

[288] When the New Financial Model was introduced, Shoppers represented to the Associates that it was doing so because the Associates had requested greater transparency, equity, and fairness and wished greater entrepreneurial opportunity and motivation.

[289] Under the New Financial Model Shoppers' share of the profits was paid to Shoppers as the Service Fee under Article 11.01 of the Associate Agreements. The Associate Earnings were the portion of the Store's profits retained by the Associate after paying the Service Fee.

[290] To address the circumstances that a store might not have a profit or might not have a sufficient profit to provide meaningful earnings for the Associate Shoppers absorbed the store's losses, which losses were not carried forward, and Shoppers guaranteed the Associate a minimum earning, known as the "Associate Guarantee".

[291] If a store was profitable, the Associate could earn more than the Associate Guarantee, but there was a complicated formula for determining how those profits would be shared and the formula involved all of the budgeting of anticipated profits or losses, an incentive scheme calculation, the covering of the Associate Guarantee, and the calculation of the Service Fee.

[292] Under the New Financial Model, Shoppers calculated the amount each Associate was projected to receive that year as Associate Earnings ("Planned Associate Earnings") through a defined formula (the "Associate Earnings Formula"). The Associate Earnings Formula used the planned profitability of the Store (as set out in the Common Year Plan) to then calculate Planned Associate Earnings. Planned Associate Earnings consisted of two parts: (a) $100,000 in base earnings; plus (b) a percentage of the Store's planned profit based on "bands" of profitability, on a declining scale. This calculation was also subject to the Associate Guarantee, such that if it resulted in a figure less than the Associate Guarantee, the Planned Associate Earnings would be an amount equal to the Associate Guarantee.

[293] In implementation of the New Financial Model, in the late summer of each year, Shopper's Retail Accounting Department ("RAD") would prepare the Common Year Plan (annual store plan) based on trends for the prior year, with region-specific assumptions and national assumptions about store wages, sales and margins, pharmacy wages, pharmacy sales and margins and all expenses. The plan included line items for the Store Charges specific to the Associate's Store for the upcoming year. Shoppers provided the plans as spreadsheets, so that Associates could see the underlying formula and discuss the Shoppers Charges with their District Managers before the plan was finalized.

[294] In accordance with the New Financial Model, the Common Year Plan would plan a profit for the store with a corresponding planned Associate Earning for that profit. The model had a scheme for the planned store profit and the planned Associate Earnings. The chart below is the scheme for 2011.

Planned Store Profit	Planned Associate Earning
$0	$100,000
$100,000	$100,00
$500,000	$157,600
$1,000,000	$221,100
$1,500,000	$274,600
$2,000,000	$328,100
$2,500,000	$373,100

[295] The Common Year Plan would be reviewed internally at Shoppers, and then in the autumn of the year, the plan would be sent to the Associate and his or her District Managers for discussion and revision. The Common Year Plan would be sent back to the accounting department for finalization.

[296] While the Common Year Plan was being settled for the upcoming year, the outcome of the plan for the immediate year would be resolved in accordance with the New Financial Model and the actual performance for the immediate year. At year end, the Associate would be provided with a Profit & Loss Statement and a statement setting out the calculation of the Associate Earnings and the Service Fee with all its interrelated cascading calculations.

[297] Every Associate's annual Profit & Loss statement had line items for Shopper Charges. At the end of the year, every Associate could see the actual amounts of each charge, compare those amounts to the planned amounts and discuss the variance with his or her District Manager.

[298] To determine the portion of store profits actually received by the Associate ("Actual Associate Earnings") following year end, each Associate's Planned Associate Earnings were adjusted, based on the actual profitability of the Store for that year.

[299] Under the New Financial Model, any variance between the Store's actual profit and the planned profit was split based on pre-determined overage and underage percentages that were also set out in the model. Where a Store had higher or lower profitability than projected in the Store's Common Year Plan, that variance from planned profitability ("Variance from Plan") was split based on pre-determined percentages, with the Associate sharing in any over- or under-achievement in the Store by either 20% or 30%, depending on the overall level of profitability of the Store. This adjustment was applied to the Associate's Planned Earnings to calculate their Actual Associate Earnings for that year. Regardless of this calculation, Associates still could not earn less than the Associate Guarantee.

[300] It should be appreciated that for a profitable store, the outcome of the New Financial Model was that the profits of the store would be divided so that the Associate received Associate Earnings and Shoppers received a Service Fee. For a profitable store, the outcome of the New Financial Model was that Shoppers would receive the lion's share of the profits of the store. For underperforming stores and for unprofitable stores, Shoppers would eat the losses and honour the Associates Guarantee.

[301] The Associate Guarantee increased over time. Between 1999 and 2011, the Associate Guarantee for Single Store Associates increased from $68,000 in 1999 to $120,000 in 2011. Between 2006 and 2011, the Associate Guarantee for 24-Hour Store Associates increased from $150,000 in 2006 to $170,000 in 2011. Between 2006 and 2011, the Associate Guarantee for Multi-Store Associates increased from $125,000 in 2006 to $155,000 in 2011.

[302] To foreshadow the discussion and the analysis below about the quantification of damages and the availability of an aggregate assessment, it should be appreciated that there is no straightforward or simple way to calculate what the financial position of an Associate would have been had the contract been performed and not breached.

[303] Visualize, for example, if some portion of the Professional Allowances were to be input into the New Financial Model's algorithm (and the portion to be allocated to the Associate on a store-by-store basis has complications of its own), it might increase the particular stores revenues, which would affect the Shoppers Charges, some of which are measured against gross revenues, which in turn would affect the stores net profits or losses, which in turn would affect the calculation of the Variance from Plans and or the Associates Guarantee, which in turn would affect the calculation of the Associate Earnings and the Service Fee.

[304] Thus, for this example, in a store that was operating at a loss, the infusion of Professional Allowances into the algorithm could have the effect of just reducing the store's losses with the result that the Associate's financial position of relying on the Associate Guarantee would be unchanged. In a store that was operating at a profit, the infusion of Professional Allowances could have a range of effects with the only certainty being that the greater proportion of the Professional Allowances would be taken by Shoppers as a Service Fee.

L. Factual Background: Optimum Fee Claims

[305] After testing it in 1999 in several Ontario test markets, in 2000, Shoppers introduced the "Optimum Program" nationwide. It replaced other loyalty programs that were phased out. The Optimum Program replaced the "Cosmetics Club," the "Crusader Program," and the "Seniors Club", which operated in the late 1990s.

[306] The Optimum Program is a loyalty program that was designed to promote customer traffic to the stores. Under the Optimum Program, Optimum Points were issued to customers based on purchases in-store. Points could then be redeemed by customers for discounts on product purchases. Customers earned 10 Optimum Points for every one pre-tax dollar they spent in at store. Points earned in this manner were "Base Points". The value of the Optimum Points changed from time to time, but the value of a Base Point was around $0.001. By way of illustration, in 2003, Shoppers increased the charge for a Base Point to $0.00122 from the then current charge of $0.00104 that had been used in 2001 and 2002.

[307] Customers could also earn additional Points through certain promotions such as "20x" events or promotions related to specific products. Points earned in this manner were "Bonus Points." Customers could also earn points from product vendors who subsidized the sale of their product. Points earned in this manner were "Partner Points".

[308] When Points were redeemed at a store, they were treated as a form of tender, like cash. When Points were redeemed, Shoppers would credit the store on its balance sheet for the value of the purchase. The value of the Points as tender changed over time. For example, in 2008, $10 required 7,000 Points; in 2010, $10 required 8,000 Points.

[309] Associates were informed about the Optimum Program in the Associates Orientation Manual. For example, the 2006 Orientation Manual stated:

> *Shoppers Optimum Program*
>
> The Shoppers Optimum Program builds customer loyalty and increases sales at a time when we face growing competition. We use the program to distinguish our products and services and to give customers even more reasons to choose Shoppers over other stores. The main benefit of Shoppers Optimum for customers is accumulated points, which can be redeemed for discounts. Special promotions such as Bonus Points give customers extra points on items, some of which are not usually discounted (e.g., prestige cosmetics). […] The Shoppers Optimum Program is a regular opportunity to increase every customer's basket of purchases. The average cardholder uses their card every ten days, and cardholder baskets are 50% larger than non-cardholders. One in two adult Canadian females has a Shoppers Optimum card. Having access to sales information concerning our customers gives us a unique competitive advantage that can be felt all over the store, from the pharmacy to the front store. Because we capture and track data about our customers' purchase behaviour, we can tailor special customer-specific offers to meet our customers' needs. For example, we can channel specials on particular items such as prestige cosmetics or baby items to market segments such as seniors or moms. A healthy

> Shoppers Optimum Program has a bottom-line impact, particularly in the cosmetics area (80% of members are female). Your store should work to increase enrollment and encourage card usage. A Shoppers Optimum Program that is not fully supported in your store is a missed opportunity for your store and for Shoppers.

[310] Pursuant to Article 11.05 (iv) of the 2002 Associates Agreement and Article 11.05 (iv) of the 2010 Associates Agreement, Shoppers charged the Associates the "Optimum Fee" for the Base Points. The fee consisted of a set cost per Base Point issued in-store, exclusive of Points issued in connection with certain promotional events. The Optimum Fee was the total number of Base Points issued at the Associate's store's point of sale multiplied by the Associate Cost per point.

[311] Thus, the Optimum Fee charged to each Associate depended on the volume of Base Points issued at each Associate-operated store. Associates were not charged for Bonus Points or Partners Points. Shoppers absorbed the cost of Points issued via promotional events and also funded the cost of Optimum cards, marketing expenses, and employee salaries in respect of the Optimum Program.

[312] The costs of the Optimum Program exceeded the amount collected in the Optimum Fee, and Shoppers subsidized the Optimum Program over the almost thirteen years of the Class Period.

[313] During the period of the 2002 Agreement, Shoppers charged Associates $355.2 million for the Optimum Program. Relying on Mr. Rosen's damages model, discussed below, the Plaintiffs claim $54 million in aggregate relief for breach of the 2002 Associate Agreement with respect to the Optimum Fee.

[314] The Optimum Program was a very successful promotional vehicle for both Shoppers and the Associates. It increased customer traffic to the stores, and it encouraged costumers to purchase more products, i.e., each customer's basket of purchases was more than it would have been in the absence of the Optimum Program. The result was substantially increased gross revenues for the store.

M. Factual Background: Shoppers Charges Claims

1. Shopper's Approach to Determining the Fee for Shoppers Charges

[315] Under the Associates Agreements, Shoppers was entitled to charge fees for the Shoppers Charges, which were for the enumerated services Shoppers provided to the Associates. Under the Associates Agreements, Shoppers was entitled to charge for the Shoppers Charges in "such amount or amounts as [Shoppers] shall, in the good faith exercise of its judgment, determine."

[316] It is the Plaintiffs' contention that Shoppers good faith exercise entailed that the fee for each of Shoppers Charges should be at the cost for the particular service. It is the Plaintiffs' contention that Shoppers breached the Associates Agreements and its common law and statutory duties of good faith by charging fees for the Shoppers Charges that included a profit element.

[317] Shoppers disputed this contention, and its evidence was that it set Store Charge fees so that - as a whole – the fees should be at the cost of the services. Mr. Mariano's and Mr. Randhawa's

evidence was that in actualization, Shoppers did not recover the total costs of all the services it provided, for which it charged the fees of the Shoppers Charges.

[318] In particular, it was their evidence that the Optimum Fee and the Associates' contribution to advertising were insufficient to reimburse Shoppers for the costs of these services and the shortfall exceeded any surplus in the collection of other Store Charges. In other words, Shoppers did not generate a profit by charging Store Charges, and – overall – Shoppers often lost money from providing services to the Associates.

[319] Shoppers did go through an elaborate exercise of setting each of the Shoppers Charges and from time to time it would do an overall assessment and adjust the Store Charges. Each charge was analyzed discretely, and from an accounting perspective, the charges for the Shoppers Charges were attributed to different profit and loss centres.

[320] Mr. Randhawa of Shoppers testified that, in addition to information regarding any surplus or deficit in respect of each fee as compared to the cost of providing the Services, Shoppers took into account business considerations, such as Associates' interests and the stability of the Shoppers's franchise system. He testified that looking at the Shoppers Charges as a whole allowed Shoppers to provide certainty and predictability to the Associates as to the rates and amounts paid each year. Mr. Davidson, who gave opinion evidence for Shoppers stated that in his opinion, this approach was reasonable from a business and financial perspective.

[321] Mr. Davidson, a witness called by Shoppers, calculated the surplus or deficit of each fee against the cost of providing the services and found that the costs incurred by Shoppers over the Class Period exceeded the total of the amounts charged by Shoppers to the Associates for the Store Charges. Over the almost thirteen years of the Class Period, he opined that Shoppers expended $454.4 million more on the services than it collected in Store Charges. In particular, Shoppers lost: (a) $10.9 million in respect of the IT Support Fee; (b) $52.8 million in respect of the Advertising Contribution; and (c) $469.1 million in respect of the Optimum Fee, over the almost thirteen years of the Class Period (an average of $35 million each year). The costs of providing advertising and the costs of the Optimum Program were consistently substantially higher than the amounts charged for these services.

[322] I find as a fact that Shoppers's approach aimed at recovering Shoppers Charges across the whole franchise system that were commensurate with the amount expended by Shoppers in providing Services to Associate across the whole system. Shoppers sometimes was not successful in achieving this aim. In realization, the Store Charge Fees achieved surpluses on some charges, but overall, the deficits on other charges overtopped the surpluses. For example, in Shoppers's Fee Summary for 2012: (a) Loss Prevention had a $2.2 million surplus; (b) Training & Development had a $716,000 surplus; (c) Insurance had a $3.0 million surplus; and (d) Advertising had a $24 million deficit.

[323] I pause here and hasten to add, as I shall discuss further in the legal analysis later in these Reasons for Decision, that the fact that Shoppers's approach aimed at making the Shoppers Charges at cost is no answer to the Plaintiffs' claim that Shoppers breached its contractual obligations and its duties of good faith by charging the Loss Prevention Fee, the Academy Fee, the Retail Accounting Fee, and the Equipment Rental Fee at amounts that exceeded the costs of those

services. As the discussion below will reveal, as a factual matter, with the exception of the Equipment Rental Fee, Shoppers did charge these fees at above the costs of providing the service. However, as I shall explain later, as a matter of contract interpretation and contract performance, Shoppers was entitled to charge as it did during the duration of the Class Period.

[324] Returning to the factual background for the Shoppers Charges Claims, Shoppers's Finance Group performed the analyses and the reviews and senior management made the ultimate decision about whether any particular Shoppers Charge should be varied.

[325] Mr. Randhawa's evidence, which I believe, was that Shoppers tried to avoid unnecessary increases or decreases in fees for the sake of stability, by adjusting rates. There were increases and decreases. For example in 2002, the Academy Fee was increased from .025% of Gross Sales to .028% and in 2004, the Loss Prevention Fee was reduced from 0.11% of Gross Sales to 0.09%.

[326] Up until 2006, Shoppers sent memos to all Associates on an annual basis identifying any changes to the Store Charges and, where changes were made, the memo explained what and why the change was made. After 2006, the changes were explained as part of the process, described above, of reviewing the Common Year Plan (annual store plan) with the Associate.

[327] Each year, an Associate received that year's Profit & Loss Statement. The statement had line items for the Store Charges.

[328] As a matter of fact finding, I find as a fact that the uncontested evidence is that Associates would have had to pay more for the services in the open market. Thus, in any event, Shoppers did not charge commercially unreasonable rates for its services.

[329] In the next several sections of my Reasons for Decision, I have comments about the factual background to each of the contested Shoppers Charges.

2. The Loss Prevention Fee

[330] The Loss Prevention Fee was charged pursuant to Article 11.05 of the 2002 Associate Agreement and Article 11.07 of the 2010 Associate Agreement.

[331] Shoppers provided loss prevention services to Associate stores through a group of loss prevention coordinators who assisted Associates to minimize losses due to theft and errors.

[332] The costs of the loss prevention service for Shoppers included payroll costs for two departments, office costs, auto and travel expense, consulting fees for outside services, and an occupancy expense proportionate to the use of Shoppers's premises and infrastructure.

[333] The Loss Prevention Fee charged to each Associate was calculated during the class period as a percentage of Gross Non-Employee Sales by the Associate: 0.11% of sales in 2002, 0.09% from December 2002 until 2003, and 0.07% from 2004 to 2013.

[334] As discussed below, Mr. Rosen, the Plaintiffs' damages expert calculated that Shoppers overcharged Associates for the Loss Prevention Fee by $23.5 million over the almost thirteen years of the Class Period.

[335] I shall return to this matter later in these Reasons for Decision, but as foreshadowed by the synopses above, ultimately nothing turns on whether there was a $23.5 million overcharge or surplus over the almost thirteen years of the Class Period because with respect to the Loss Prevention Fee, Shoppers did not breach the Associates Agreement or act in bad faith in setting the amount of the Loss Prevention Fee.

3. The Academy Fee

[336] The Academy Fee was charged pursuant to Article 11.05 of the 2002 Associate Agreement and Article 11.07 of the 2010 Associate Agreement.

[337] Associates paid Shoppers an Academy Fee for the training programs provided to Associates and their employees.

[338] Each Associate paid to Shoppers a charge calculated as a percentage of Gross Non-Employee Sales for training purposes. The Academy Fee was set at 0.025% of Gross Sales until the end of 2002, and at 0.028% for the remainder of the class period.

[339] The costs of the training programs and courses provided by Shoppers included the costs of payroll, travel and auto, office expenses, occupancy and consulting, and outside services (i.e., any services from an external consultant).

[340] As discussed below, Mr. Rosen, the Plaintiffs' damages expert calculated that Shoppers overcharged Associates for the Academy Fee by $4.3 million over the almost thirteen years of the Class Period.

[341] I shall return to this matter later in these Reasons for Decision, but as foreshadowed by the synopses above, ultimately nothing turns on whether there was a $4.3 million overcharge or surplus over the almost thirteen years of the Class Period because with respect to the Academy Fee, Shoppers did not breach the Associates Agreement or act in bad faith in setting the amount of the Retail Accounting Fee.

4. The Retail Accounting Fee

[342] The Retail Accounting Fee was charged pursuant to Article 6.03 of the 2002 and 2010 Associate Agreements.

[343] Shoppers charged Associates a Retail Accounting Fee to cover the cost of its Retail Accounting Department's (RAD's) services.

[344] The RAD, which employed a staff of eighty persons, provided accounting support, finalized monthly and year-end accounting reports, prepared tax returns, and Common Year Plans (annual store plans), and paid suppliers on behalf of Associates. The costs of the RAD included the salaries and systems for eighty employees, rental expense, and an overhead charge based on a proportion of Shoppers's infrastructure expense.

[345] Shoppers set the Retail Accounting Fee based on each store's Gross Sales in tiers.

[346] As discussed below, Mr. Rosen, the Plaintiffs' damages expert, calculated that Shoppers overcharged Associates for the Retail Accounting Fee by $37.7 million over the almost thirteen years of the Class Period. Mr. Davidson, one of Shoppers's damages experts, calculated that Shoppers's surplus for the Accounting Fee was $26.3 million over the Class Period.

[347] I shall return to this matter later in these Reasons for Decision, but as foreshadowed by the synopses above, ultimately nothing turns on whether there was a $37.7 million or a $26.3 million overcharge or surplus over the almost thirteen years of the Class Period because with respect to the Retail Accounting Fee, Shoppers did not breach the Associates Agreement or act in bad faith in setting the amount of the Retail Accounting Fee.

5. The Equipment Rental Fee

[348] Shoppers purchased and installed fixtures, leasehold improvements, and equipment (collectively, "equipment") in each Associate's store. Shoppers owned the equipment and rented it to the Associates. Associates were required to lease all equipment from Shoppers and pay an Equipment Rental Fee. The fee was based on the costs connected to purchasing the equipment and on the useful life of the equipment.

[349] Under the Associate Agreements, the equipment was to be leased to Associates on terms and conditions to be mutually agreed upon, Shoppers imposed lease terms, and based on its view of the useful life of the equipment, Shoppers assigned the equipment into one of six categories, ranging from 2-year to 15-year assets with varying lease rates. The categories and rates were set out in the statutory disclosure documents.

[350] Equipment was leased for a fixed number of years based on the useful life of the asset determined by accounting standards under GAAP ("Generally Accepted Accounting Principles"). Where equipment was still useable beyond its designated useful life, Associates continued using the equipment, but they no longer had to pay rent on it.

[351] Shoppers included in the Equipment Rental Fee: (a) the cost of the equipment; (b) the cost of third-party labour in delivering and installing the equipment; (c) an IT project management fee relating to the costs of deploying and implementing information technology systems; (d) a Store Planning Charge, which capitalized its expenses connected to the management of store renovations, expansions, and relocations; and (e) a 11% rate of return per annum on the Equipment Rental Fee. The 11% rate of return was on a per annum basis on a declining balance, amortized over the useful life of the equipment. The 11% rate of return included an "enterprise cost" of 8%, plus a 3% risk premium for the risk Shoppers took on in place of the Associate purchasing the equipment.

[352] The 11% rate did not appear in the Associate Agreements. It is not in the franchise disclosure documents, nor is it in the equipment rent reports. Shoppers's position was that the 11% rate of return was comprised of an 8% "enterprise cost" representing Shoppers's cost of capital, plus a 3% "risk premium". Shoppers's expert Mr. Davidson opined that the 11% rate of return on the cost of equipment, which was based on Shoppers's weighted average cost of capital ("WACC"), along with the other factors that comprised the Equipment Rental Fee produced a fee

that was reasonable to the Associates. In effect, Mr. Davidson's opinion was that the Equipment Rental Fee was appropriately at cost.

[353] As discussed below, Mr. Rosen, the Plaintiffs' damages expert, calculated that Shoppers overcharged Associates for the Equipment Rental Fee by either $80.1 million or $48.4 million over the almost thirteen years of the Class Period. Mr. Rosen and Dr. Narayanan opined that the 11% charged by Shoppers was unreasonable because it exceeded the cost of debt and had a profit element. In their opinion, the cost of capital charged by Shoppers included both the cost of debt capital and the cost of equity capital, but the cost of equity capital is a profit from an accounting perspective.

[354] I shall return to this matter later in these Reasons for Decision, but as foreshadowed by the synopses above, ultimately nothing turns on whether there was a $80.1 million or a $48.4 million overcharge or surplus over the almost thirteen years of the Class Period because with respect to the Equipment Rental Fee, Shoppers did not breach the Associates Agreement or act in bad faith in setting the amount of the Rental Equipment Fee.

N. Factual Background: Distribution Centre Claims

1. Distribution Centre Practices

[355] Shoppers required Associates to purchase products from Shoppers's centralized distribution centres. Shoppers established uniform policies and practices governing the ordering and receiving of products from its distribution centres. Shoppers developed policies and practices about the return of products and about dealing with problems about the delivery of merchandise.

[356] Shoppers consulted with the Associates in developing its policies and practices and considered their complaints and their suggestions for improvement, but as noted above, the Associates Agreements are contracts of adhesion and Shoppers may have listened, but it did not necessarily agree with the Associates' suggestions for improvements to the Distribution Centre Practices.

[357] In 2008, Shoppers introduced the Logistics Committee to address feedback from Associates, but Shoppers made its own decisions and set policies and practices as its own prerogative and privilege under the Associates Agreement. It was the boss so to speak of the distribution centre practices, which it regarded as a critical ingredient of its franchise system.

[358] For example, in the early 2000s, Shoppers extended the time limit for submitting inventory adjustment claims, discussed below, from 24 hours to 48 hours, but one gathers from Mr. Spina's and Mr. Vanderburg's evidence that this extension was inadequate, and that Associates were not provided enough time to unpack the plastic wrapped sleds of merchandise, check for mistakes in the deliveries, shelve the merchandise, and lodge claims with Shoppers.

[359] Associates ordered products from the distribution centres through the Merchandise Management System ("MMS"). The MMS automatically generated suggested orders for each store, accounting for factors such as minimum inventory requirements, and product sales history. Associates modified the automated orders by applying their own judgment to account for factors

such as the size of their store and the local market. Associates ordered products from the Distribution Centres on a scheduled ordering cycle. Orders were placed through the MMS.

[360] Once an order was placed, the Distribution Centre assembled the ordered products and shipped them to the store in an assigned delivery window. Shoppers would then issue an invoice to the Associate for the order.

[361] Shoppers's policy regarding inventory adjustment claims was described in a booklet entitled "Distribution Centre Claims and Receiving Policies and Procedures" The claims policy available to Associates on the In-Store Web and was summarized in a document entitled "DC Claims Summary".

[362] Sometimes the distribution centre shipped the incorrect product (known as a "mispick"). Sometimes the distribution centre delivered fewer items than what was invoiced. Sometimes, the distribution centre delivered damaged goods or goods that were otherwise unusable. When errors were discovered, the Associate was required to submit an inventory adjustment claim to address the error. Shoppers required that the inventory adjustment claim must be submitted within 48 hours. Shoppers automatically denied claims valued below specified monetary thresholds (e.g., $50 minimum claim for damaged goods).

[363] The reason for the 48-hour period was that Shoppers would investigate the adjustment claim by sending an analyst working at the distribution centres to the location of the goods at the centre and he or she would reconcile the distribution centre inventory to determine if a shipping error had been made. If the supply in the centre did not accord with what was expected, the claim would be accepted. If the supply reconciled, the claim was rejected.

[364] As Mr. Spina's and Mr. Vanderburg's testimony suggests, meeting the 48-hour period was sometimes not feasible. Shoppers's evidence was that on a case-by-case basis, an area or district manager could grant extensions for the submission of claims.

[365] Mr. Whibbs, the Shoppers's executive responsible for the distribution centres, acknowledged that there were ongoing problems with the distribution centre's performance. He summarized the issues with inventory processes and his personal conclusion was that Shoppers had "stood behind an audit process that is fraudulent;" he stated:

> [Shoppers has] spent significantly on automation with the promise of near perfect orders. I have stood in front of Associates and our CEO and promoted that fact and challenged their concerns with quality. We have denied claims[.] We have stood behind an audit process that is fraudulent[.] We have blindly and arrogantly believed in ourselves, rather than giving any credibility to what the [Associates were] telling us.

[366] Based on the evidence proffered by both sides on the summary judgment motions, I cannot and do not find any systemic or class-wide breach of the duty of good faith with respect to the adoption or the administration of Shoppers's policies and practices with respect to its distribution centres.

[367] What I do find is that on an idiosyncratic case-by-case basis, there may have been breaches of good faith in administering the policies and practices of the distribution centres. Mr. Whibbs' acknowledgement is evidence of case-by-case breaches, but his acknowledgement and the evidence of Mr. Spina and Mr. Vanderburg does not prove a systemic breach of contract or of Shoppers' duties of fair dealing or good faith in the performance of the Associates Agreements.

[368] The distribution centre's policies and procedures are central to Shoppers' franchise model, where Shoppers acted as a wholesaler that controlled the supply chain of merchandise to its stores. It is evident that Shoppers undertook very sophisticated and extensive marketing research and its contribution to the success of the franchise went far beyond just having considerable mass buying leverage and extended to the marketing practices of the distribution centre. The distribution centre policies and procedures were part of Shoppers franchise system, and it appears that its marketing plans were profitable for both it and the Associates.

[369] That all said, the evidence on this motion reveals that subject to what I have to say below about limitation periods, there may be claims by individual Associates that they experienced a breach of Shoppers's duties of good faith in the performance of the Associate Agreements with respect to the distribution centre practices and procedures. These claims are entirely idiosyncratic and did not occur class wide.

2. MOGs

[370] Much the same thing can be said about the role of MOGs (Mass Order Generations) in Shoppers's franchise system.

[371] In addition to orders placed and possibly varied under the Merchandise Management System, Shoppers imposed Mass Order Generations (MOGs"). "MOGs" were a mass delivery of product to large groupings of stores. MOGs were used to support the mass marketing of products, for the weekly advertising flyer, and to facilitate the merchandizing of seasonal products and special occasion products; visualize goods for Halloween, Christmas, Valentine's Day, Easter, Mothers' Day etc.

[372] There were different types of MOGs; visualize: (a) "Flyer MOGs" to supply product advertised in weekly flyers; (b) "Seasonal Program MOGs" to supply seasonal and holiday products; (c) "Cosmetic Launch MOGs" for new products, which would be marketed with retail discounts to encourage take up; (d) "Planogram Item MOGs" to launch other new products; (e) "Service Level MOGs," to buffer store inventory for high demand periods; and (f) "Auto-Replenishment MOGs," by which certain products were automatically sent to stores based on an automatic replenishment model.

[373] The determination of the MOGs was a very sophisticated scheme that was overseen by Shopper's Merchandise Group, its Category Group, and its Business Analytics Group. The determination of MOGs was system-wide and also on a store-by-store basis, or group of stores bases depending on the MOG.

[374] Which stores received MOGs was dependent on the marketing analytics and such factors as store size, and physical constraints, market forces, and store performance. Quantities of items for seasonal and flyer MOGs were determined by Shoppers's Business Analytics group, which

performed analysis to determine the quantity of each individual product (referred to as a "stock-keeping unit", or "SKU") that should be included as a MOG for each store. This included forecasting demand by looking at the sales history of the SKUs, adjusted for factors such as promotions and seasonality, and projecting inventory based on factors such as current inventory on-hand, average weekly selling volume, average weekly replenishment, and advertisements or interim MOGs. Stores were assigned classifications based on volume to determine optimal purchases. There were ten different classifications for stores that were used to determine the purchase targets and the volume targets. Stores were classified based on the past volumes for particular programs at each store.

[375] Notwithstanding the beliefs of the Plaintiffs, the evidence did not show that MOGs were used to offload unwanted or stale products onto the Associates.

[376] Mr. Dean's evidence reveals that Shoppers undertook analyses that showed that MOGs increased store sales and store margins on the sales of products. This was also true for the replenishment MOGS where the Associate's own order was topped up with additional inventory for the stores. Mr. Dean's evidence reveals that Shoppers undertook cost-benefit analyses of the MOGS system and that the MOGS were beneficial to both Shoppers and to the Associates.

[377] Once again, there is no evidence of a systemic breach of contract or a systemic breach of Shoppers's duties of good faith in its imposition of MOGs. Once again, on a case-by case basis there may have been the occasional breach of a good faith with respect to the delivery of MOGs to an Associate, who would have preferred not to receive the merchandise. The evidence on this motion reveals that subject to what I have to say below about limitation periods, there may be claims by individual Associates that they experienced a breach of Shoppers's duties of good faith in the performance of the Associates Agreements with respect to the MOGS.

O. Factual Background: Professional Allowance Claims

[378] In this section of my Reasons for Decision, I shall describe the factual background for the Ontario PA Class Members" claims with respect to "Professional Allowances." They claim $1.084 billion based on unjust enrichment or alternatively $256 million for damages for breach of contract.

[379] The PA Class Members assert that Shoppers could not lawfully keep more in Professional Allowances than Shoppers itself provided at the central office, which was calculated to be $77.2 million, and it was the PA Class Members who were the only persons entitled to accept the Professional Allowances that related to the direct patient care that they provided. The PA Class Members assert that detached from their direct patient care, Shoppers was retaining a rebate in Ontario, which it was prohibited by law from doing.

[380] The description of the factual background to the Professional Allowances claim, will, naturally enough, also involve describing the factual background to Shoppers' two-branched defence to the PA Class Members' claim. Shoppers' defences are that: first, Shoppers was entitled to keep the Professional Allowances pursuant to the terms of the 2002 Associates Agreement and the 2010 Associates Agreement; and second, the PA Class Members' claims are statute barred.

[381] At the centre of the debate between the Associates and Shoppers is Shoppers' assertion that it is entitled to keep the Professional Allowances pursuant to the terms of the Associates Agreements.

[382] In its defence, it is Shoppers' position that pursuant to the 2002 Associates Agreement it was entitled to keep the Professional Allowances pursuant to Article 11.04, which states:

> 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.

[383] In its defence, it is Shoppers' position that pursuant to the 2010 Associates Agreement it was entitled to keep the Professional Allowances pursuant to Article 11.10, which states:

> 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.

[384] The PA Class Members' claims for Professional Allowances and Shoppers' defences concern Shoppers' activities during the five-and-a-half years between October 1, 2006 and March 31, 2013.

[385] On October 1, 2006, the Ontario government introduced the Professional Allowances Regime. Under this Regime, generic drug manufacturers were prohibited from paying "rebates", but the generic drug manufacturer was permitted to pay "Professional Allowances." The Professional Allowance Regime ended on March 31, 2013. After that date, both rebates and Professional Allowances were forbidden in Ontario.

[386] More precisely:

a. Between October 1, 2006 and June 30, 2010, Professional Allowances were permitted for the purchase of generic drugs both for: (a) the public payor drug system, i.e., the Ontario Drug Benefit Plan (the "ODB Plan"); and also, (b) the private payor drug system, i.e., the "non-ODB Drug System".

b. On July 1, 2010 Professional Allowances were no longer permitted for the ODB Plan, and it was no longer necessary for the recipient of Professional Allowances to report to the Ministry of Health and Long-Term Care ("MOHLTC" or the "Ministry") about the Professional Allowances.

c. After July 1, 2010, Professional Allowances continued for the non-ODB Drug System subject to a percentage that capped the amount of the Professional Allowances and there was no reporting requirement.

d. On April 1, 2013, Professional Allowances were no longer permitted for the non-ODB Drug System. The Professional Allowance Regime was done.

[387] Describing the factual background of the PA Class Members' claim for Professional Allowances and Shoppers's defences involves seven topics.

1. The first topic is describing the operation of the supply chain for generic drugs by which Shoppers purchased the generic drugs and supplied them to the Associates' stores before the Ontario government created its Professional Allowances Regime.

2. The second topic is describing the circumstances that led the Ontario government in 2006 to introduce a Professional Allowance Regime that prohibited general drug manufacturers from paying "rebates" but that permitted drug manufacturers to pay "Professional Allowances" that were connected to the formulary price for the generic drug. (The background history to the Professional Allowance Regime is described and explained by Justice Abella in her decision for the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care.*[22])

3. The third topic is a detailed analysis of the Professional Allowances Regime.

4. The fourth topic is a description of how Shoppers negotiated with generic drug manufacturers and how it received Professional Allowances under the Professional Allowance Regime that applied in Ontario.

5. The fifth topic is a description of the expense and performance of direct patient care services by Shoppers and by the Associates.

6. The sixth topic is Shoppers' reporting of Professional Allowances to the Ontario Government.

7. The seventh topic is the tabulation of the amounts of Professional Allowances that might be claimed by the Associates for unjust enrichment or for breach of contract.

1. The Supply Chain: Purchase and Distribution of Generic Drugs before the Professional Allowances Regime

[388] There are four participants in the supply chain for generic drugs in Ontario.

[389] First, there are the fabricators. Fabricators make the generic drugs, which are equivalent to brand name drugs that are no longer protected by patent. Fabricators are regulated by the Federal Government. Fabricators are licensed under the federal *Food and Drug Regulations.*[23]

[390] Second, there are generic drug manufacturers. They too are federally regulated. Manufacturers are licensed under the federal *Food and Drug Regulations* to sell generic drugs under their own name. Manufacturers must have their generic drug approved by Health Canada

[22] 2013 SCC 64.
[23] C.R.C., c. 870.

and have their drug designated as interchangeable and listed in what is known as the "Formulary." A manufacturer can also be a fabricator or can buy the generic drug from a fabricator. The price at which manufacturers sell the drugs is regulated in Ontario.

[391] Third, there are wholesalers. They too are regulated under the federal *Food and Drug Regulations*. They may buy drugs from manufacturers to distribute them to pharmacies. The price at which wholesalers buy and sell drugs is regulated in Ontario.

[392] Fourth, there are pharmacies. The pharmacies buy drugs from wholesalers or manufacturers and dispense them to their customers. The price at which pharmacies buy drugs and dispense them to customers is regulated in Ontario.

[393] In 1985, Ontario introduced the *Ontario Drug Benefit Act*[24] ("ODBA") and the *Drug Interchangeability and Dispensing Fee Act*,[25] ("DIDFA") to regulate the sale and the pricing of generic drugs in both the public sector market and also in the private sector market.

[394] The *Ontario Drug Benefit Act* governs the Ontario Drug Benefit Plan (the "ODB Plan"). Through the ODB Plan, the Ontario government is the largest purchaser of drugs in Ontario. Under the ODB Plan, eligible persons (primarily seniors and persons on social assistance) receive from pharmacies certain drugs that are listed in the Formulary at no charge. The provincial government reimburses i.e., pays the pharmacies for the drugs that are dispensed under the ODB Plan at the Formulary price. The Formulary specifies the price for the generic drug that the government will pay to reimburse the pharmacy.

[395] The Executive Officer of the of the Ministry of Health and Long-Term Care is responsible for listing drugs in the Formulary and for setting their price by agreement with the manufacturer. When a pharmacy dispenses a listed drug to an eligible person, the *Ontario Drug Benefit Act* requires Ontario to reimburse the pharmacy for an amount based on the Formulary price of the drug plus a prescribed mark-up and prescribed dispensing fee.

[396] The *Drug Interchangeability and Dispensing Fee Act* directs that patients in Ontario receive generic drugs from pharmacies rather than equivalent but more expensive brand-name drugs. The *Act* empowers the Executive Officer of the Ministry to designate a generic drug as "interchangeable" with a brand-name drug. Pharmacists must dispense the cheaper interchangeable generic to customers unless the prescribing physician specifies "no substitution" or the customer or the customer's private health plan insurer agrees to pay the extra cost of the brand-name. The *Act* also limits the dispensing fees that pharmacies can charge private payor customers.

[397] Shoppers' main place in the supply chain was as a wholesaler, although through its subsidiary Sanis Health Inc., it also was a manufacturer of some own-label generic drugs. For present purposes, Shoppers' role as a wholesaler is what is pertinent. Before the introduction of the Professional Allowances Regime, as a wholesaler, Shoppers submitted a Purchase Order to the generic drug manufacture.

[24] R.S.O. 1990, c. O.10.
[25] R.S.O. 1990, c. P.23.

[398] Before the introduction of the Professional Allowances regime, the generic drug manufacturer would ship the drugs to Shoppers' distribution centres and it would invoice Shoppers for payment based on the unit price of the generic drugs, referred to as "standard cost" or "manufacturer list price".

[399] Shoppers maintained a pay-on-receipt system in which payment was made to the generic drug manufacturer based on the product shipped to the Distribution Centres. Some but not all shipments of generic drugs were accompanied by an invoice; any invoices received were sent to a third-party accounts payable company, which audited the invoices and ensured that the prices matched. If there were any discrepancies, Shoppers claimed back against the drug manufacturer/vendor.

[400] After delivery to the distribution centres and based on orders from Associates through Shoppers' inventory systems, Shoppers resold the generic drugs to Associates. The price paid was the same price that was paid by Shoppers to the generic manufacturer. Shoppers did not charge Associates a distribution mark-up on generic drugs.

[401] Before the Professional Allowances Regime, pursuant to the Associates Agreements, Shoppers was entitled to keep any rebates or discounts offered by the generic drug manufacturer for the drugs that Shoppers passed on to its Associates at standard cost or manufacturer list price.

2. Banning Rebates and the Professional Allowance Regime

[402] As apparent from the above description of the supply chain, before the introduction of the Professional Allowances Regimes, pharmacies including Shoppers' stores, would buy drugs from manufacturers at the Formulary price, and dispense them to customers at the Formulary price, plus regulated mark-ups and dispensing fees.

[403] Before the introduction of the Professional Alliances Regime, the government of Ontario had hoped that compelling the use of generic drugs, which were listed in the Formulary at effectively 63% of the price of the brand-name drug, would reduce the costs of the generic drugs. However, this hope proved illusory. To be competitive, manufacturers would give pharmacies a substantial rebate so that they would buy their products. In *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care*,[26] an administrative law case about the legality of one of the regulations, Justice Abella, who wrote the judgment of the Supreme Court of Canada, noted that rebates were up to $600-800 million annually and accounted for 40% of the price manufacturers charged for drugs.

[404] The use of rebates to maintain high drug prices for patients and their insurers was not unique to Ontario. Mr. Schoonveld stated that the rebating creating substantial differentials between formal list and actual net pricing was pervasive globally. Pharmaceutical economist and professor Dr. Grootendorst noted that this practice of "spread pricing," was a problem that the Ontario government had been grappling with for decades.

[405] The Ontario government directed its policy developers to respond to the problem of the inflationary effect of rebates on drug prices. Brent Fraser was an employee of MOHLTC. He was

[26] 2013 SCC 64.

a member of the three-person Drug System Secretariat that researched, drafted, and made recommendations to the government to address the problem of rebates inflating the expense of generic drugs.

[406] Mr. Fraser testified that when during the policy development stage, Ontario proposed to prohibit drug manufacturers from paying rebates, the pharmaceutical industry lobbied against the policy move. Shoppers was one of the major chains that lobbied against the no rebates policy. The Ontario Pharmacists Association ("OPA") lobbied to narrow the definition of "rebate" and expand the definition of "professional allowance." (Deb Saltmarche, of Shoppers' Professional Affairs team, was the VP, Policy of the OPA.) The pharmacies submitted that, without rebates important direct patient care services provided by pharmacies to the public would become unsustainable and patient care would suffer.

[407] However, the definitions of rebate and professional allowance were not changed from how they appeared in the draft legislation, and the Ontario Legislature adopted the recommendations of the Drug System Secretariat. On October 1, 2006, the Ontario government banned pharmacies in Ontario from receiving rebates from drug manufacturers and introduced the Professional Allowance Regime.

[408] In what would ultimately turn out to be a failed attempt to stop the inflationary effect of rebates on generic drug prices, in 2006, the *Ontario Drug Benefit Act*, the *Drug Interchangeability and Dispensing Fee Act*, and their regulations prohibited rebates. The amendments were introduced as the *Transparent Drug System for Patients Act*.[27] The legislature terminated one major source of revenue for pharmacies - payments from drug manufacturers - and replaced it with a source of funding for providing direct patient care services.

[409] Mr. Fraser testified that Professional Allowances "were not a replacement for rebates nor were they intended to constitute a price reduction on the cost of generic drugs for pharmacy companies." Rather, he testified that Professional Allowances were a new concept introduced to reimburse or compensate pharmacies and pharmacists for specific front-line direct patient care services as specified in the regulations. He said that banning rebates and regulating reimbursement of various specifically defined activities and services, as was done in Ontario, was a common government policy response to concerns of about inflated drug prices due to rebates. On this point, Mr. Schoonveld stated: "[I]t appears to me that the Ontario provincial government was acting in a similar manner to other global governments in trying to address concerns of over-payment for prescription drugs by prohibiting the use of rebates and separately introducing payment for professional services through Professional Allowances."

[410] Alas, the policy aspirations of the Ontario government again were not successful. The expected savings in the costs of drugs did not occur and manufacturers continued to charge high prices for generic drugs. Eventually, the permission to pay and to accept Professional Allowances was identified as yet another inflationary loophole. At paragraphs 15 and 61 of the Supreme Court's judgment in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care*, Justice Abella reported the result:

[27] 2006, S.O. 2006, c. 14.

> 15. In addition, instead of the rebates, manufacturers were now paying pharmacies $800 million annually in professional allowances. As a result, the professional allowance exception was identified as yet another inflationary loophole. Audits of 206 pharmacies showed that all of them were in violation of the rules pertaining to professional allowances, and 70% of the funds provided by manufacturers on this basis went towards higher salaries and store profits, instead of being used for patient care. The then Minister of Health, the Hon. Deborah Matthews, concluded that the continuing payments by drug manufacturers to pharmacies were the major reason Ontario still had inflated generic drug prices relative to comparable countries. […]

[411] I pause here to foreshadow that Shoppers was fully compliant with the Professional Allowance Regime and did not violate the rules pertaining to Professional Allowances. For their part, the Associates performed direct patient care services that would have qualified for the receipt of Professional Allowances.

[412] In 2010, the Ontario government responded to its failing policy initiative with more amendments to the *Ontario Drug Benefit Act*, the *Drug Interchangeability and Dispensing Fee Act*, and to their regulations. On July 1, 2010 Professional Allowances were no longer permitted for the ODB Plan, and it was no longer necessary for the recipient of Professional Allowances to report to the Ministry about the Professional Allowances.

[413] However, after July 1, 2010 until March 31, 2013, Professional Allowances continued for the non-ODB Drug System, subject to a percentage that capped the amount of the Professional Allowances and there was no reporting requirement for the non-ODB Drug System.

[414] On April 1, 2013, Professional Allowances were no longer permitted for the non-ODB Drug System. The Professional Allowance Regime was done.

3. The Professional Allowances Regime: Statutory and Regulatory Background

[415] In this section of my Reasons for Decision, I shall describe in much more detail the statutory and regulatory background to the Professional Allowances Regime.

[416] On October 1, 2006, the Ontario government introduced the Professional Allowances Regime. The government enacted the *Transparent Drug System for Patients Act, 2006*,[28] which amended the *Ontario Drug Benefit Act* ("ODBA")[29] and the *Drug Interchangeability and Dispensing Fee Act* ("DIDFA") [30]

[417] The amended legislation among other things, prohibited drug manufacturers from paying, and wholesalers, franchisees, pharmacy operators, and pharmacists from receiving, "rebates", as that term was defined under the legislation, on generic drugs. For present purposes, the relevant provisions of the scheme are set out in Schedule "D" to these Reasons for Decision.

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[28] S.O. 2006, c. 14.
[29] R.S.O. 1990, c. O.10
[30] R.S.O. 1990, c. P.23,

[418] The Professional Allowance Scheme can be summarized as follows.

1. A manufacturer is prohibited from providing a "rebate" to operators of pharmacies or to their employees.

2. An operator of a pharmacy and its employees may not accept a rebate.

3. "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.

4. "Professional Allowance", in the definition of "rebate", means a benefit, in the form of currency, services or educational materials that are provided for the purposes of direct patient care for:

    1. Continuing education programs that […].

    2. Continuing education programs for […].

    3. Clinic days provided by pharmacists to […].

    4. Education days provided by pharmacists that […].

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

    6. Disease management and prevention initiatives such as: […]

    7. Private counselling areas within their pharmacy.

    8. Hospital in-patient or long-term care home resident clinical pharmacy services, such as: […].

5. 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."

6. The *Code of Conduct*, which was part of the Professional Allowance Regime, stipulated a non-exhaustive list of 15 prohibited uses of Professional Allowances.

7. Professional Allowances are to be calculated based on: (a) reasonable costs to provide direct patient care; (b) reasonable frequency of providing direct patient care; and (c) a reasonable number of patients per pharmacy.

8. The Ontario government [executive officer *Ontario Drug Benefit Act*] shall establish a *Code of Conduct* respecting Professional Allowances in consultation with the pharmacy and drug manufacturing industries and shall update the *Code of Conduct* from time to time in consultation with those industries.

9. A benefit is not a Professional Allowance if the *Code of Conduct* is not complied with.

10. Where the value of all of the benefits provided exceeds, with respect to all of a manufacturer's listed drug products or listed substances, the value of X in a defined formula, then the benefits that are in excess of X are a rebate and not a professional allowance.

11. All persons involved in the drug distribution system must operate transparently and be knowledgeable of, and fully understand, the flow of funds in the drug products supply chain, including recording and reporting all such payments and being subject to audit by the Ministry or a third party.

12. There is a statutory obligation on recipients of Professional Allowances to make "stakeholders" knowledgeable of the flow of funds in the drug products supply chain.

13. Operators of 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.

14. Pharmacies must not make procurement and purchasing decisions based solely on the provision of Professional Allowances.

15. For drugs dispensed under the ODB Plan, drug manufacturers could pay Professional Allowances up to a maximum of 20% of the Formulary price for the generic drug.

16. For drugs purchased outside to the ODB Plan, from October 1, 2006 until July 1, 2010, a drug manufacturer could pay Professional Allowances without a cap. After July 1, 2010, a 50% cap was introduced.

17. The maximum amount that drug manufacturers could pay as Professional Allowances for drugs outside of the ODP Plan was adjusted over the years as follows: (a) 50 % of the formulary price for the generic drug during the period July 1, 2010 – March 31, 2011; (b) 35% of the formulary price for the generic drug during the period April 1, 2011 – March 31, 2012; and (c) 25% of the formulary price for the generic drug during the period April 1, 2012.

[419] In *1671183 Ontario Inc. o/a Pharma Stop v. Ontario (Ministry of Health and Long-Term Care)*,[31] the Executive Officer imposed a financial penalty on a wholesaler for receiving Professional Allowance payments that did not comply with the Professional Alliances Regime. Since the wholesaler did not use the payments for direct patient care, they were ordered forfeited.

[31] 2015 ONSC 6779 (Div. Ct.).

4. Shoppers's Purchases from Generic Drug Manufacturers during the Professional Allowances Regime

[420] Between October 1, 2006 and April 30, 2013, Shoppers received Professional Allowances from generic drug manufacturers for drugs dispensed for the private payor non-ODB Drug System.

[421] For the shorter period between October 1, 2006 and July 1, 2010, Shoppers received Professional Allowances for drugs dispensed for the ODB Plan. All Professional Allowances were payments to Shoppers by generic drug manufacturers.

[422] Virginia Cirocco and Esther Law were the Shoppers representatives that negotiated and were responsible for generic drug purchases from 2002 until 2010. After 2010, Mr. Léger of Shoppers led the negotiations and Mr. Potter of Shoppers began his work in this area in 2011.

[423] Before and after the introduction of the Professional Allowance Regime in Ontario, there was very little formality - in the sense of documentation – in Shoppers' negotiations of purchasers from generic drug manufacturers. The Shoppers' representatives spoke with the representatives of the generic manufacturer, and they reached an agreement about how many drugs would be purchased, at what price, and how much the generic drug manufacturer would remit to Shoppers.

[424] Shoppers negotiated for national purchases. The negotiations determined what Shoppers Associates should pay for the drugs, and the negotiations determined how much of the price of the drugs would be remitted to Shoppers by the generic drug manufacturer.

[425] For its part, in terms of its negotiations with the generic drug manufacturers, Shoppers did not distinguish between rebates and Professional Allowances. Instead, Shoppers and the generic drug manufacturers negotiated and agreed to a rate that blended rebates and Professional Allowances. This approach was sometimes referred to as "national blended rates", which were negotiated until 2010. This approach was sometimes referred to as "national dead net pricing' of drugs, and that term was used for the negotiations from 2010 to 2013.

[426] A dead net price was a negotiated price for a particular drug that was less than the list price and thus implicitly included a blended rebate and Professional Allowance rate. Mr. Potter stated that both national blended rates and dead net price rates were negotiated on a national basis and were agreed upon orally. In other words, the breakdown between Professional Allowances for Ontario and rebates for the rest of Canada did not form part of any agreement between Shoppers and generic manufacturers, except to the extent that the generic drug manufacturer understood that the amounts invoiced by Shoppers must comply with provincial legislation.

[427] For the period after the introduction of the Professional Allowances Regime, Shoppers' evidence was that its discussions with the generic drug manufacture did not specifically allude to Professional Allowances. Shoppers's evidence was that they treated Professional Allowances as rebates. This evidence is not credible, but not much turns on it, because the existence of the Professional Allowance Regime was notorious, and it was at least implicit that the money to be remitted by the generic drug manufacturer would have to comply with Ontario's Professional Allowance Regime. Moreover, in practice, after the amount that would be remitted from the generic manufacturer was settled, Shoppers would invoice the manufacturer for the Professional Allowances payable in Ontario and for rebates payable outside of Ontario.

[428] After Professional Allowances were introduced, the Shoppers's representatives had the details of any generic drug purchase entered into the Shoppers's accounting system's spreadsheets and Shoppers would calculate the Professional Allowances. The Professional Allowances were billed (invoiced) to the generic drug manufacturer. Based on the information input into the system and the statutory caps on Professional Allowances, Shoppers calculated the Professional Allowances.

[429] After October 1, 2006, Shoppers disclosed to generic drug manufacturers, on the invoices that Shoppers sent to them for Professional Allowances, the amount of Professional Allowances received in Ontario attributable to the ODB Plan and the amount attributable to private payors, i.e., non-ODB Plan payors. so that the manufacturers could report those amounts to the Ministry in accordance with the manufacturers' legislative obligations.

[430] Shoppers invoiced the generic drug manufacturers and, when applicable, reported Professional Allowances to the Ontario government on the basis of Shoppers's unilateral regional allocations. When Professional Allowances had to be reported to the provincial Ministry, Shoppers determined its own Professional Allowances figures and later sent generic drug manufacturers supplementary invoices to correspond to Shoppers' own calculations.

[431] The invoices to the generic drug manufacturer were paid by way of deduction or credit on generic purchase invoices, by cheque, or by way of electronic funds transfer.

[432] Shoppers did not remit the Professional Allowances to Associates.

[433] On these summary judgment motions, the only written expressions of how the generic manufacturer regarded the matter of rebates and Professional Allowances are the cheques for Professional Allowance payments issued in 2007 by Sandoz Canada Inc., a generic drug manufacturer. Sandoz's cheques bore the following notation that confirms that the notorious Professional Allowance Regime was in the mind of Shoppers and the generic drug manufacturer during the negotiations about the price of the drug and about how much the generic manufacturer would remit to Shoppers:

> By cashing the attached cheque, Customer understands and agrees (i) that this is a payment for Professional Allowances ("PA") made pursuant to the information received from the Customer which accurately reflects its total sales of Sandoz products listed on the Ontario Drug Benefit formulary in the relevant time period, and (ii) that the said PA will be or has been used for direct patient care as set out in *Ontario Regulation* 201/96 under the *Ontario Drug Benefit Act* ("ODBA") and Regulation 935 under the *Drug Interchangeability and Dispensing Fee Act* ("DIDFA") and (iii) to hold Sandoz harmless against any particular liability or penalty resulting from any breach of the representations and warranties set out herein, and in particular agrees to indemnify and hold Sandoz harmless in respect to any order of the executive officer under section 12.1(4) of DIDFA or section 11.5(a) of the ODBA.

[434] The evidence establishes, and I find as a fact that Shoppers and the generic drug manufacturers, practically speaking, did not much change and rather modestly modified the

business practice that was followed before the introduction of the Professional Allowances Regime. From a negotiating perspective, Shoppers and the generic manufacturers did not distinguish between rebates and Professional Allowances insofar as setting the price for the drugs or in setting the amount of money that the generic manufacturer would remit to Shoppers.

[435] The generic drug manufacturer did not fuss itself about the breakdown of the Professional Allowances amongst drugs purchased for the ODB-Plan, drugs purchased for Ontario outside of the ODB Plan, the non-ODB drugs purchased for Ontario, and drugs purchased for Shoppers' stores outside of Ontario. The manufacturer simply understood that the mounts invoiced by Shoppers would comply with the Professional Allowance Regime as permissible payments.

[436] Shoppers understood that the generic manufacturers were concerned that payments of Professional Allowances were compliant with provincial legislation, including confirming that Shoppers as an enterprise performed more in direct patient care services than it received in Professional Allowances. The generic drug manufacturers did not second-guess the allocations made by Shoppers.

[437] According to Mr. Rosen's investigation and analysis, Shoppers reported or invoiced the following amounts of Professional Allowances:

2006	$50.1 million
2007	$130.8 million
2008	$173.3 million
2009	$190.7 million
2010	$209.3 million
2011	$109.5 million
2012	$73.8 million
2013	$17.1 million

[438] Having made no distinction between rebates and Professional Allowances in its oral agreements with generic drug manufacturers, Shoppers unilaterally decided how much it would categorize, account, and invoice the drug companies for as Professional Allowances in Ontario and rebates in the rest of Canada. In other words, Shoppers unilaterally chose how it categorized and accounted for the funds it received from the generic drug manufacturers: as rebates or Professional Allowances. The generic drug manufacturer was not involved in how Shoppers' allocated the funds to be remitted to Shoppers.

[439] Shoppers allocated the money it received under national agreements disproportionately, so as to understate the payments Shoppers received from generic drug manufacturers in respect of drugs dispensed in Ontario for Professional Allowances. Ontario Professional Allowances were

understated and rebates in the rest of Canada were overstated by a corresponding amount. Shoppers applied the maximum allowable rates for ODB PAs and unilaterally fixed a rate for non-ODB PAs until the period when non-ODB PA caps were introduced.

[440] As already noted above, generic drug manufacturers who paid the funds to Shoppers nationally were not involved in setting those non-ODB PA rates and did not agree to the resulting rest of Canada rebate rates which, detailed below, were often in excess of 100% of the price of the drugs. The high rebate rates in the rest of Canada are illustrated in the following table from Mr. Rosen's report:

Summary of ROC Vendor Income Rates for All Vendors from [Shoppers's] ODB Invoice Spreadsheets "Summary" Tabs, 2007 to 2013

Year	1	2	3	4	5	6	7	8	9	10	11	12	13	average
2007	114%	103%	107%	105%	104%	102%	103%	94%	94%	100%	95%	108%	103%	102%
2008	109%	112%	128%	110%	114%	109%	109%	104%	113%	108%	107%	104%	107%	110%
2009	114%	112%	110%	111%	114%	117%	106%	96%	104%	114%	112%	106%	122%	111%
2010	109%	101%	109%	103%	106%	112%	94%	122%	122%	125%	110%	113%	116%	111%
2011	106%	117%	102%	88%	95%	99%	94%	105%	93%	99%	91%	95%	85%	98%
2012	177%	100%	91%	78%	-26%	-18%	-27%	-11%	-15%	-19%	-17%	-20%	-18%	21%
2013	-24%	-27%	-28%	-11%	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	-8%

[441] The national combined rate for rebates and professional allowances during the Class Period was: 2002: 29.2%; 2003: 50.6%; 2004: 55.1%; 2005: 59.1%; 2006: 63.6%; 2007: 64.6%; 2008: 64.9%; 2009: 66.9%; 2010: 61.8%; 2011: 51.5%; 2012: 47.5%; 2013: 40.5%.

[442] Shoppers' separate allocation of Professional Allowances and rebates meant that, outside of Ontario, the drug companies notionally appeared to be giving Shoppers the drugs for free outside of Ontario. Dr. Grootendorst disagreed with Shoppers's unilateral allocation method. Dr. Grootendorst opined that "the appropriate way" to account for the payments regionally is to apply the negotiated national rate to the value of drugs purchased by Ontario Associates for dispensing in Ontario. It was Mr. Rosen's opinion that Shoppers was allocating income in respect of Ontario and Québec to the rest of Canada, thereby calculating unreasonably high rebate rates from a commercial and financial perspective for the rest of Canada.

[443] Ultimately not much turns on Mr. Rosen's evidence about how Shopper's allocated in its nation-wide purchases of generic drugs, the Professional Allowances, for Ontario, where rebates were prohibited, or the rebates for the rest of Canada. Mr. Rosen's evidence had bad optics for Shoppers, which seemed to be cooking the books, but the bad optics were on analysis not pertinent to the litigation and Shoppers was fully compliant with its responsibilities under the Professional Allowance Regime as were the generic drug manufacturers with which Shoppers negotiated national drug purchases.

[444] What is pertinent in the immediate case is that: (a) Shoppers entered into contracts with generic drug manufacturers that had a national scope; (b) under these national contracts, Shoppers was entitled to receive rebates outside of Ontario and Professional Allowances but not rebates in Ontario; (c) Shoppers lawfully invoiced the generic drug manufacturers for $955 million for Professional Allowances in Ontario and allocated the balance of the remits from the generic drug manufacturer to rebates outside of Ontario; (d) as discussed below, Shoppers itself provided direct patient care services with a Professional Allowance value of $77.2 million; (e) as discussed below, the Associates provided direct patient care services with a Professional Allowance value of $1.44 billion; and (f) Shoppers did not share the $955 million it received in payments from the generic drug manufacturers with the Associates.

[445] This litigation is not about the optical illusion that the generic drug manufacturers were selling their goods for free outside of Ontario. This litigation is about Shoppers's lawfully receiving Professional Allowances of $955 million and not sharing them with the Associates that performed the bulk of direct patient care services.

5. The Expense and Performance of Direct Patient Care Services

[446] Pursuant to the Associates Agreements, Associates were responsible for dispensing drugs and providing direct care to patients. Shoppers's internal records reveal that, year-over-year, for each reporting period: (a) store-level direct patient care services accounted for approximately 95% of the total direct patient care expenses while (b) corporate-level direct patient care services accounted for 5% of the total.

[447] There was a heated debate between the parties about who actually paid for the expenses of providing direct patient care services at the Shoppers' stores.

[448] As foreshadowed by the Introduction and the synopsis parts of these Reason for Decision, ultimately not much turns on who picked up the tab for the expenses of qualifying for Professional Allowances, but the evidence is relevant to: understanding the relationship between the parties; to understanding the PA Class Members' unjust enrichment claim; and to understanding the damages assessment and the Plaintiffs' request for aggregate damages.

[449] The discussion of this topic may begin by noting that pharmacists have always provided direct patient care services. Before the introduction of Ontario's Professional Allowance regime, dispensing fees aside, these services were provided without charge to the patient. During the Professional Allowances Regime, these services continued to be provided without charge to the patient. After the termination of the Professional Allowances Regime, direct patient care services are still provided without charge.[32]

[450] At the Shoppers's stores, before, during, and after the Professional Allowances Regime, the expenses for providing these free direct patient care services were part of the overhead of the store for labour and connected expenses. There was no expense line item with respect to this work in the stores' financial records.

[32] At the time of writing these Reasons for Decision, the Ontario Government expanded the prescriptions of drugs that could be dispensed by a pharmacist with a script from a physician.

[451] At the Shoppers' stores, under their normal business practices, the direct patient care services were not evaluated on the basis of: (a) reasonable costs to provide direct patient care; (b) reasonable frequency of providing direct patient care; and (c) a reasonable number of patients, which was how Professional Allowances were measured under the Professional Allowance Regime.

[452] After the introduction of that scheme from one perspective nothing changed and direct care expenses remained an unevaluated part of the overhead expense of the store. From another perspective, there was the change that Professional Allowances needed to be identified, measured, and valued in order for them to be accepted as part of the Professional Allowances Regime, and there was the oddity that the identification and measurement of Professional Allowances was in accordance with the regulations of the Professional Allowance Regime and was not in accordance with treating Professional Allowances as an overhead expense, which they continued to be. The Ministry established standardized wage rates for all of Ontario to quantify permitted funding for wages and labour of pharmacists and pharmacist technicians in providing direct patient care services that qualified for Professional Allowances.

[453] If the Professional Allowances are treated as overhead, then it is true as I determined at the certification motion and as I determine again based on the evidence on these summary judgment motions, that the expenses would be at the store level and would reduce the store's profitability. Of that reduction, 20% (or less) would be borne as a reduction in Associate Earnings, while the remaining 80% (or more) would be borne by Shoppers as a reduction in the Service Fee. Thus, through the operation of the New Financial Model, it is true that Shoppers absorbed most of every dollar of expenses incurred at store level, including the expenses of providing direct patient care.

[454] In addition, it is also true that - outside of the New Financial Model - and in accordance with the system of measurement of the Professional Allowance Regime, Shoppers incurred expenses in delivering direct patient care services at the central office level. During the Professional Allowances Regimes, Shoppers expended $77.2 million on direct patient care services at the central office level. This $77.2 was calculated in accordance with the metrics established by the Professional Allowance Regime.

[455] There is no doubt that Shoppers invoiced for Professional Allowances and did not remit them to the PA Class Members.

[456] Since as foreshadowed above and as elucidated below, there is no unjust enrichment claim but there is a breach of the 2002 Associates Agreement, ultimately nothing turns on who bore the expenses in order to qualify for the Professional Allowances. The evidence establishes that there was compliance with the system of measurement of the Professional Allowances Regime.

[457] Because of the amount of generic drugs purchased, the legislated caps on Professional Allowances, and the amount of direct patient care services provided by Shoppers and the Associates, Shoppers could have accepted $1.084 billion in Professional Allowances. It accepted $955 million.

6. Shoppers's Reporting of Professional Allowances

[458] Recipients and payors of Professional Allowances had to report to the Ministry from July 1, 2007 to July 1, 2010. All obligations to report to the Ministry ceased on July 1, 2010, when rebates and Professional Allowances were prohibited for the ODB Plan.

[459] An objective of the reporting requirements was to ensure that all Professional Allowances were spent by pharmacies in accordance with the *Code of Conduct*. Mr. Fraser explained:

> "The Ministry wanted to ensure that professional allowance dollars were used to fund the specific and largely front-line patient care activities set out in the regulation and required reporting to certify that this was the case."

[460] In their reports, recipients of Professional Allowances were 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. Drug manufacturers who paid Professional Allowances had a statutory obligation to report the amount of Professional Allowances they paid.

[461] Every pharmacy in Ontario was required to report Professional Allowances. Shoppers gathered information from each of its Ontario stores and filed reports to the Ministry on a consolidated basis, on behalf of all Ontario Associates. The reports listed the Associate store locations in an appendix to the report.

[462] Each cover letter that Shoppers sent to the Ministry said: "This report is a consolidated report and is being submitted by Shoppers on behalf of the Associate store locations listed in Appendix A". The appendix indicated that for consolidated reporting, the head office receives Professional Allowances directly on behalf of all or more than one of its store locations and consolidated the individual store data for the reporting of the Professional Allowance information.

[463] Shoppers certified and declared to the Ontario government that the payments it received from generic drug manufacturers were "Professional Allowances" received "directly on behalf of" the Associates. Shoppers also certified its compliance with the legislation.

[464] Shoppers maintained a file entitled "Professional Allowance Report Background," which contained the data for Shoppers reports to the Ministry. These files included a section entitled "Store Level (Labour and Direct Expenses)." This section detailed the labour and expenses paid for by the Associates in providing direct patient care services (i.e., the store-level direct patient care services). These files included a section entitled "Corporate (Labour and Direct Expenses). That section detailed the funds expended for labour and expenses paid for by Shoppers itself.

[465] Shoppers gathered the information for the consolidate report from the PA Class Members. By January 2008, but not before that date, Shoppers instructed Associates to start documenting the services that they performed in the pharmacy and to provide Shoppers with that data each month. Shoppers told Associates that it would "collect and report these activities on each Associate's behalf. Shoppers wrote to the Associates that pharmacies were required:

> to report professional allowances received from drug manufacturers and relate this funding directly to patient care activities. Shoppers Drug Mart receives this funding corporately and applies it to the development and implementation of a wide variety of patient care and disease state management related programs in your pharmacy.

[466] During the mandatory reporting period (July 1, 2007 to July 1, 2010), Shoppers certified to the Ministry that it was reporting Professional Allowances on a "consolidated basis on behalf of the Associate store locations" in Ontario.

[467] Shoppers admits that each Ontario Associate on whose behalf it reported Professional Allowances dispensed pharmaceutical drugs, performed store-level direct patient care services, and incurred expenditures in providing direct patient care services which expenditures.

[468] Shoppers admits it received $955 million in Professional Allowances of which the total value of direct patient care activities at the central office level was $77.2 million and the value of the direct patient care services at the Associates' store level was $877.2 million.

[469] In its reports to the Ministry, Shoppers relied on over $1.44 billion in store-level direct patient care services as the basis for receiving Professional Allowance monies. Based on Mr. Rosen's evidence, in which he assumes that Shoppers received the maximum legally allowable what?, the Plaintiffs submit that Shoppers received $1.084 billion in Professional Allowances.

[470] Mr. Rosen's analysis also revealed that, year-over-year, the store-level direct patient care expenditures accounted for 95% of the total direct patient care expenditures. The total store-level direct patient care services were $1.44 billion and since this amount exceeds the total amount of Professional Allowances received by Shoppers, the PA Class Members claims that they are entitled to the full amount of Professional Allowances received.

7. The Quantification of Professional Allowances

[471] As may be taken from the above description of the negotiations with the generic drug manufacturers 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.

[472] In this action, the Plaintiffs claim that Shoppers was unjustly enriched not only to the amount of $955 million that it took in Professional Allowances but to the amount of $1.084 billion, which is the amount of Professional Allowances, Shoppers could have accepted had it attributed less to rebates in the rest of Canada.

[473] Although nothing ultimately turns on this quantification of the Plaintiffs' unjust enrichment claim - because as foreshadowed above and as explained below, there is no viable claim for an unjust enrichment in the immediate case, it remains for the purposes of the Plaintiffs' breach of contract claims to calculate what is the amount of Professional Allowances that ought to have been remitted as revenue of the Shoppers's stores pursuant to the 2002 Associates Agreement and the 2010 Associates Agreement. This revenue would have been shared between the Associates and

Shoppers, and the Associates claim to damages is their share of the additional profits generated by the Professional Allowances.

[474] In my opinion, the maximum quantification of the Professional Allowances that are the subject to a breach of contract claim is $876.8 million.

[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.

P. Legal Background: Damages for Breach of Contract

[477] When a contract is breached because of the default of one of the parties, the other party's expectations will have been disappointed. In contract law, an award of damages addresses the disappointment in expectations and compensates by using money to put the innocent party in the same economic position in which he or she would have been had the contract been performed.[33] This goal for damages for breach of contract is refined and qualified by requirements that, to be recoverable: (1) the damages must be reasonably foreseeable (the remoteness principle)[34]; (2) they must be unavoidable in the sense that the innocent party is treated as if had an obligation to take reasonable steps to avoid loss; that is, to mitigate (the mitigation principle);[35] and (3) the damages must be proved with some certainty (the certainty principle).[36]

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[33] *Bank of America Canada v. Mutual Trust Co*., 2002 SCC 43 at para. 26; *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707 at para. 29; *Baud Corp., N.V. v. Brook*, [1979] 1 S.C.R. 633 at para. 18.

[34] *Koufos v. C. Czarnikow Ltd. (The Heron II)*, [1967] 3 All E.R. 686 (H.L.); *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 1 All E.R. 997 (C.A.); *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145;

[35] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, affg. 2010 ONCA 310, revg. [2010] O.J. No. 1772 (S.C.J.); *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38 at para. 176; *Wertheim v. Chicoutimi Pulp Co*., [1991] A.C. 301 (P.C.); *Robinson v. Harrison v. Harman* (1848), 1 Exch. 850; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 32.

[36] *Penvidic Contr. Co. v. Int. Nickel Co. of Canada* (1975), 53 D.L.R. (3d) 748 (S.C.C.); *T.T.C. v. Aqua Taxi Ltd.*, (1957), 6 D.L.R. 721 (Ont. H.C.J.); *Haauk v. Martin*, [1927] S.C.R. 413; *Chaplin v. Hicks* [1911] 2 K.B. 786 (K.B.).

[478] The aim of the award of damages for breach of contract is to place the innocent party, so far as money can do it, in the position in which it would have been had the contract been performed and not a better position but for the breach of contract.[37]

[479] To be recoverable, damages for breach of contract must be reasonably foreseeable and not remote, which is to say that the damages must be in the reasonable contemplation of the parties at the time of contract formation.[38] The innocent party to a breach of contract may be compensated for: (1) losses that may reasonably be supposed to have been contemplated by the parties at the time when they made the contract because such losses arise naturally or normally from the breach; and (2) losses that were contemplated by the parties at the time when they made the contract because the prospect or circumstances of these special losses were made known at that time.[39] This is the famous rule from *Hadley v. Baxendale*.[40]

[480] Remoteness is a limiting principle based on principles of fairness; it requires the court informed by the nature and culture of the business in question and the particular contractual relationship between the contracting parties to ask what was in the reasonable contemplation of the parties at the time of contract formation as to the extent of risk assumed by the promissor when he or she makes a promise.[41]

[481] The plaintiff bears the onus of proving their claimed loss and the quantum of damages on a reasonable preponderance of credible evidence.[42] The onus of proof is on the plaintiff to prove that it suffered a loss with some certainty.[43] However, if the innocent party to a breach of contract proves it suffered a loss, then difficulties in quantifying that loss will not disqualify the innocent party from compensation, and the court will make the best estimate possible based on the evidence provided to it.[44]

[482] When, in a particular case, damages are inherently difficult to assess, the court must do the best it can in the circumstances even to the point of resorting to guess work where the damages are substantial but where the evidence makes it impossible to assess damages, the litigant is entitled

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[37] *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30; *Keneric Tractor Sales Ltd v Langille*, [1987] 2 S.C.R. 440; *Asamera Oil Corp Ltd. v. Sea Oil & General Corp*., [1979] S.C.R. 633, varied [1979] 1 S.C.R. 677; *Haack v. Martin*, [1927] S.C.R. 413 at p. 416; Sally *Wertheim v. Chicoutimi Pulp Co*., [1911] A.C. 301 (P.C.); *Robinson v. Harman* (1848), 1 Exch. 850.

[38] *Fidler v. Sun Life Assurance Co. Of Canada*, 2006 SCC 30; *Hadley v. Baxendale*, (1854), 9 Exch. 341, 145 (Ex. Ct.).

[39] *Koufos v. C. Czarnikow Ltd. (The Heron II)*, [1967] 3 All E.R. 686 (H.L.); *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 1 All E.R. 997 (C.A.); *Hadley v. Baxendale* (1854), 9 Exch. 341 (Ex. Ct.).

[40] (1854), 9 Exch. 341, 145 (Ex. Ct.).

[41] *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc*., 2008 SCC 54 at paras. 63-64; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 54; *1298417 Ontario Ltd. v. Lakeshore (Town*), 2014, ONCA 802 at para. 138-40.

[42] *TMS Lighting Ltd*. *v. KJS Transport Inc*., 2014 ONCA 1 at para 61.

[43] *100 Main Street Ltd. v. W.B. Sullivan* (1978), 20 O.R. (2d) 401 (C.A.), leave to appeal to the S.C.C. refused O.R. *loc cit*; *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1967] S.C.R. 267.

[44] *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675 (C.A.), leave to appeal to the S.C.C. refused (1993), 15 O.R. (3d) xvi; *Houweling Nurseries Ltd. v. Fisons Western Corp*. (1988), 49 D.L.R. (4th) 205 (B.C.C.A.) at p. 207; *Webb & Knapp (Canada) Ltd. v. Edmonton (City)*, [1970] S.C.R. 588; *TTC v. Aqua Taxi Ltd.* (1957), 6 D.L.R. (2d) 721 (Ont. H.C.); *Whitehead v. R. B. Cameron Ltd.* (1967), 63 D.L.R. (2d) 180 (N.S.S.C. App. Div.).

to nominal damages. Nominal damages are not compensatory but acknowledge that the innocent party's legal rights have been infringed.[45]

Q. Factual Background: The Plaintiffs' Quantification of Damages for Breach of Contract and for Unjust Enrichment

[483] The Plaintiffs retained Howard Rosen of Secretariat Advisors LLC to provide an expert opinion, among other things, to quantify the Class Members' and the PA Class Members' damages for their breach of contract claims for: (a) Optimum Fee, (b) Loss Prevention Fee, (c) Academy Fee, (d) Retail Accounting Fee, (e) Equipment Rental Fee, and (f) Professional Allowances, and (g) for damages for an unjust enrichment, which involved calculating the amount of Professional Allowances that were available to the PA Class Members. Mr. Rosen was also retained to prepare and use a methodology to determine all of these claims in the aggregate.

[484] Although as noted in the introduction to these Reasons for Decision, it is my conclusion that Shoppers is liable only for individual breach of contract damages assessments for (a) Distribution Centre Claims, and (b) Professional Allowance Claims for PA Class Members governed by the 2002 Associates Agreement, nevertheless it is important for many reasons to discuss the factual basis of the Plaintiffs' quantification of damages for breach of contract and for unjust enrichment. That discussion is the purpose of this part of my Reasons for Decision, where I discuss the evidence of Mr. Rosen and some of the evidence of Mr. Davidson and Mr. Jaishankar, who provided experts' reports to rebut or challenge Mr. Rosen's opinion evidence.

[485] On the assumption that Shoppers is liable to the Class Members for their breach of contract claims and that Shoppers is liable for unjust enrichment for the PA Class Members' Professional Allowance Claims, I shall discuss Mr. Rosen's evidence in this part of my Reasons for Decision. I shall, however, not complete the discussion or the analysis, and I will largely confine myself to the factual background to the Plaintiffs' quantification of damages. I will return several times to the calculation of damages in the balance of my Reasons for Decision. In particular, I shall have much more to say later about Mr. Rosen's methodology to calculate aggregate damages, which I foreshadow again to say is not feasible in the circumstances of the immediate case.

1. Damages: Optimum Fee Claims

[486] The Plaintiffs submit that Shoppers breached the 2002 Associates Agreement by charging the Optimum Fee. Since the 2002 Associates Agreement was introduced at the very end of 2002 and some Associates would have still been operating under the 2002 Agreement in 2010, in order to calculate the damages for the Optimum Fee, Mr Rosen reviewed the financial and accounting records of Shoppers for 2003-2010 period.

[487] Mr. Rosen opined that for 2003-2010 , Shoppers charged approximately $355.2 million for the Optimum Fee under the 2002 Associates Agreement. To arrive at this sum, he reviewed Shoppers's White Books, which were management's internal reports that set out financial results for its corporate operations as regional results for the Associates' stores. He extracted the

[45] *TMS Lighting Ltd. v. KJS Transport Inc*., 2014 ONCA 1; *Martin v. Goldfarb*, [1998] O.J. No. 3403 at para. 75 (S.C.J.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 516; *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675 (C.A.); *Sommerfeldt v. Petrovitch*, [1949] 4 D.L.R. 825 (Sask. C.A.).

"Optimum Expense" for the years 2003 to 2010. He adjusted the 2010 Optimum Expense (by $21 million) on the assumption that one out of every three Associates would have shifted from the 2002 Associate Agreement to the 2010 Associate Agreement in 2010.

[488] Mr. Rosen developed a methodology for calculating on an aggregate basis what would be the damages suffered by the Class Members for being charged $355.2 million that was not authorized under the 2002 Associates Agreement. I shall discuss this methodology in more detail later in these Reasons for Decision, but for present purposes, the essence of the model was to use Shoppers's financial and accounting data and to determine what the overall effect would be on Associates Earnings and Shoppers's Service Fee by it charging $355.2 million for the Optimum Fee that it ought not to have charged under the 2002 Associates Agreement.

[489] Using this top-down analysis from Shoppers's financial and accounting records, Mr. Rosen opined that the Class Members suffered aggregate damages of approximately $54.0 million from being charged the Optimum Fee under the 2002 Associates Agreement.

2. Damages: Shoppers Charges Claims

[490] Assuming that Shoppers was liable for breaching the Associate Agreements with respect to the Shoppers Charges, Mr. Rosen quantified the damages claim of the Associates.

[491] For Mr. Rosen, this quantification of damages required two steps.

[492] The first step was to calculate the extent to which Shoppers overcharged for the each of the Loss Prevention Fee, the Academy Fee, the Retail Accounting Fee, and the Equipment Rental Fee. Overcharging was the breach of contract, and the initial measure of the harm suffered by the Associates.

[493] The second step was to determine how these overcharges would have affected the calculation of Associate Earnings and Shoppers's Service Fee. Mr. Rosen designed a methodology to measure the affect of the overcharges on a class wide basis. In other words, for the second step he developed a top-down measure using Shoppers's financial records to determine the quantum of the Class Members' damages for breach of contract.

(a) Loss Prevention Fee Overcharge

[494] With respect to the Loss Prevention Fee, the period for the alleged breach of contract associated with the Shoppers Charges is from 2003 (the first operative year of the 2002 Associates Agreement) to the end of the terms of the 2010 Associates Agreement, and Mr. Rosen reviewed Shoppers' financial records and calculated damages to the end of the Class Period in July 2013.

[495] It is the Plaintiffs' submission that Shoppers could only charge for the actual costs of the loss prevention service.

[496] Mr. Rosen opined that Shoppers charged excess fees of approximately $23.5 million for the Loss Prevention Fee over the almost thirteen years of the Class Period.

[497] Shoppers' submission was that it was entitled to charge what it charged for the Loss Prevention Fee, but it did not dispute Mr. Rosen's calculation of $23.5 million of allegedly excess fees for the Loss Prevention Fee.

(b) Academy Fee Overcharge

[498] With respect to the Academy Fee, the period for the alleged breach of contract associated with the Shoppers Charges is from 2003 (the first operative year of the 2002 Associates Agreement) to the end of the terms of the 2010 Associates Agreement, and Mr. Rosen reviewed Shoppers's financial records and calculated damages to the end of the Class Period in July 2013.

[499] It is the Plaintiffs' submission that Shoppers could only charge for the actual costs of the academy fee.

[500] Mr. Rosen opined that Shoppers charged excess fees of approximately $4.3 million for the Academy Fee over the almost thirteen years of the Class Period.

[501] Shoppers's submission was that it was entitled to charge what it charged for the Academy Fee, but it is did not dispute Mr. Rosen's calculation of approximately $4.3 million for the allegedly excess fees for the Academy Fee.

(c) Retail Accounting Fee Overcharge

[502] With respect to the Retail Accounting Fee, the period for the alleged breach of contract associated with the Shoppers Charges is from 2003 (the first operative year of the 2002 Associates Agreement) to the end of the terms of the 2010 Associates Agreement, and Mr. Rosen reviewed Shoppers's financial records and calculated damages to the end of the Class Period in July 2013.

[503] It is the Plaintiffs' submission that Shoppers could only charge for the actual costs of the accounting services provided to the Associates.

[504] Mr. Rosen opined that Shoppers charged excess fees of approximately $37.7 million for the Retail Accounting Fee over the almost thirteen years of the Class Period.

[505] Shoppers' submission was that it was entitled to charge what it charged for the Retail Accounting Fee and Shoppers challenged Mr. Rosen's calculation of an alleged excess fee of approximately $37.7 million. Mr. Davidson, one of Shoppers's damages experts, calculated that Shoppers's surplus for the Accounting Fee was $26.3 million over the Class Period.

[506] The discrepancy between the experts was that Mr. Davidson excluded sundry income from his computation of the costs of the RAD. Dr. Narayanan, who testified for the Associates, said that it was wrong to exclude sundry income because doing so violated the matching principle of accounting principles. Matching requires that all the costs that went into earning sundry income should be matched against sundry income.

[507] In my opinion, Mr. Davidson was correct to exclude sundry income in the immediate case. The sundry income related largely to credit card and debit card services at point-of-sale and is thus

unrelated to the bookkeeping and accounting services in respect for which the Accounting Fee was charged.

[508] The allegation then is that Shoppers charged an excess $27.3 million for the Retail Accounting Fee.

(d) Equipment Rental Fee Overcharge

[509] With respect to the Equipment Rental Fee, the period for the alleged breach of contract associated with the Shoppers Charges is from 2003 (the first operative year of the 2002 Associates Agreement) to the end of the terms of the 2010 Associates Agreement, and Mr. Rosen reviewed Shopper's financial records and calculated damages to the end of the Class Period in July 2013.

[510] It is the Plaintiffs' submission that Shoppers could only charge for the actual costs of providing the equipment rental service.

[511] Shoppers calculated the cost of the equipment rental service as the cost of equipment plus a 11% rate of return. The rate of return was comprised of an "enterprise cost" of 8% for the cost of capital and a "risk premium" of 3%.

[512] Mr. Rosen opined that in determining the costs of providing the Associates with the equipment for their stores, Shoppers's actual costs were the cost of the equipment plus the cost of capital expressed as the weighted average cost of capital ("WACC"). He said that the cost of capital, i.e., the WACC would already include a risk premium and that WACC would not remain constant over the more than a decade that Shoppers was providing equipment to its Associates.

[513] Mr. Rosen's opinion was that Shoppers fixed 8% rate for its cost of capital was excessive and not supported by the evidence. He said that the rate of return was overstated and that adding a 3% risk premium was unwarranted and duplicative. He opined that the risk of default, on which Shoppers relied to justify the 3% risk premium, should be assessed using "the historical default rate rather than assuming] a hypothetical rate without justification.

[514] Proceeding on the basis that WACC was a relevant measure in the Equipment Rental Fee and that the additional risk premium was not a relevant measure, Mr. Rosen quantified the Equipment Rental Fee overcharge using Shoppers's actual WACC, which fluctuated over the Class Period (and was always less than 8%) as $80.1 million.

[515] Under Mr. Rosen's alternative scenario, he applied Shoppers fixed 8% rate, with the 3% risk premium representing the overcharge. Under this scenario, the overcharge is $48.4 million over the almost thirteen years of the Class Period.

[516] Mr. Rosen opined that Shoppers charged "excess fees," i.e., he opined that Shoppers charged for its equipment rental fee more than the actual costs of providing the service. Mr. Rosen assessed Shoppers actual costs under two factual scenarios.

[517] In the first scenario, he used the actual costs of the equipment and then applied the WACC that would or ought to have been charged. Under Scenario 1, the excess fees charged to Associates was $80.1 million.

[518] In the second scenario, Mr. Rosen used the actual costs of the equipment and Shoppers's 8% enterprise cost – but not the 3% premium. Under Scenario 2, the excess fees charged to Associates was $48.4 million.

[519] It is Shoppers's position that it was entitled to charge what it charged for the Equipment Rental Fee but, in any event, there was no overcharge because the 11% enterprise cost was a genuine cost for providing the equipment for the Shoppers's stores and renting the equipment to the Associates.

(e) Damages for the Shoppers Charges

[520] As noted above, Mr. Rosen calculated aggregate damages of $54.0 million with respect to the Optimum Fee. Mr. Rosen used the same methodology that he used for the Optimum Fee to calculate aggregate damages for the Shoppers Charges' breach of contract. Since Mr. Rosen had posited two scenarios for the Equipment Rental Fee, there were two scenarios for his aggregate damages assessment that quantified the breach of contract damages for the Shoppers Charges.

[521] Under Mr. Rosen's first scenario for the Shoppers Charges, there was approximately $145.6 million in excess fees (visualize: $23.5 million for Loss Prevention Fee plus $4.3 million for Academy Fee plus $37.7 million for Retail Accounting Fee plus $80.1 million for Equipment Rental Fee). Using his aggregate damages methodology, the Class Members' damages claim is approximately $21.9 million.

[522] Under Mr. Rosen's second scenario for the Shoppers Charges, there was approximately $113.9 in excess fees (visualize: $23.5 million for Loss Prevention plus $4.3 million for Academy Fee plus $37.7 million for Retail Accounting Fee plus $48.4 million for Equipment Rental Fee million). Using his aggregate damages methodology, the Class Members' damages claim is approximately $17.4 million.

3. Quantification: Unjust Enrichment and Damages for Professional Allowances

[523] Professional Allowances were paid by generic drug manufacturers to Shoppers from the commencement of the Professional Allowance Regime on October 1, 2006 to its termination on March 31, 2013.

[524] On the assumption that Professional Allowances were outside the Associate Agreements and should have been paid directly to the Associates, Mr. Rosen concluded that the Associates should have received $1.084 billion. The basis of this calculation is explained above, but the essence of it was that based on the amount of generic drugs purchased, the rules of the Professional Allowance Regime, and the direct patient services provided by the Associates, Shoppers should have allocated $1.084 billion to Professional Allowances and remitted that sum directly to the Associates.

[525] Thus, the Plaintiffs claim that Shoppers was unjustly enriched not only to the amount of $955 million that it took in Professional Allowances from the generic drug manufacturers but to the amount of $1.084 billion, which is the amount of Professional Allowances it could have accepted had it attributed less to rebates in the rest of Canada.

[526] The damages for the PA Class Members' unjust enrichment claim did not require an aggregate damages methodology. The PA Class Members unjust enrichment claim is $1.084 billion on the assumption that Shoppers should have directly paid the Professional Allowances to the Associates.

[527] If the PA Class Members did not have an unjust enrichment claim, Mr. Rosen used the same methodology that he used for the Optimum Fee to calculate the aggregate damage for the Professional Allowances assuming that the $1.084 billion of Professional Allowances were revenue that should have been shared between Associate Earnings and Shoppers's Service Fee under the 2002 Associates Agreement and the 2010 Associates Agreement. On this basis, he assessed the aggregate damages of the PA Class Members as approximately $256.0 million.

[528] As noted above, during the course of the hearing, I asked the Plaintiffs to have Mr. Rosen prepare calculations based on somewhat different assumptions than those that he used for his aggregate damages methodology. Based on the assumptions that (a) Shoppers received $955 million from generic manufacturers and (b) Shoppers was entitled to keep the $77.9 million of direct patient care services that it provided, then the aggregate damages for the PA Class Members would be approximately $210 million.

R. Legal and Factual Background and Analysis: Discovery of Claims

[529] The Plaintiffs advance unjust enrichment claims and seven breach of contract claims.

[530] As foreshadowed above and to be discussed below, of these claims, the Class Members with 2002 Associates Agreements or with 2010 Associates Agreements may have Distribution Centre Claims to be determined at individual issues trials.

[531] As foreshadowed above and to be discussed below, of these claims, the PA Class Members with 2002 Associates Agreement may have breach of contract claims with respect to Shoppers' failure to remit Professional Allowances, with the claims to be determined at individual issues trials.

[532] Shoppers, however, argues on the summary judgment motions that the Distribution Centre Claims and the PA Class Members' Professional Allowance Claims are statute barred. In this section of my Reasons for Decision, I shall analyze the merits of Shoppers's limitation period defence to these two claims.

[533] To foreshadow my conclusion, I find that the Distribution Centre Claims are: (a) statute barred for Class Members in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador for claims before November 19, 2008; and (b) statute barred for the Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut for the claims before November 19 2004.

[534] To foreshadow my conclusion, I find that the Professional Allowance Claims of the Class Members with 2002 Associates Agreements are statute barred for claims before November 19, 2008.

[535] As foreshadowed at the outset of these Reasons for Decision, the balance of the Plaintiffs' claims fail on their merits. Juridically speaking, the dismissal of the claims on their merits makes Shoppers's limitation period defence to those claims moot. However, given that the limitation period defence was comprehensively argued and given the likelihood of an appeal, I shall analyze the merits of Shoppers's limitation period defence to the balance of the Plaintiffs' claims.

[536] To foreshadow my conclusions, the Plaintiffs', and by extension the Class Members' with 2002 Associates Agreements and with an Optimum Fee Claim have timely claims, i.e., their claims for the Optimum Fee are not statute barred because the claims would not have been discoverable until January 2010 when Shoppers introduced the 2010 Associate Agreement, which specifically provided for a fee for "loyalty programs".

[537] To foreshadow my conclusions, the Plaintiffs' claims, and by extension the Class Members', claims with respect to the four impugned Shoppers Charges are not statute barred because there never was a time when on a class wide basis, the Class Members knew or ought to have known about the Shoppers Charges Claims.

[538] The discussion and analyses in this part of my Reasons for Decision will have three parts. First, I shall describe the law associated with Shoppers's limitation period defence. Second, I shall set out the parties' arguments. Third, having regard to the arguments of the parties, I shall apply the law to the facts of the immediate case.

1. Legal Background: The Limitation Period Defence

(a) Limitation Periods and the Discovery of Claims

[539] The relevant provisions of the *Limitations Act, 2002* are sections 1, 4, and 5, which are set out below:

> *Definitions*
>
> 1. In this Act,
>
> […]
>
> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; ….
>
> BASIC LIMITATION PERIOD
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[540] Prior to the enactment of s. 5(1)(a)(iv) of the *Limitations Act, 2002*, the judge-made discoverability principle governed the commencement of a limitation period. The discoverability principle stipulated that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief.[46] The discoverability principle conforms with the idea of a cause of action being the fact or facts which give a person a right to judicial redress or relief against another.[47]

[541] Subject to the adjustment made by s. 5(1)(a)(iv), which adds the factor that a proceeding is an "appropriate" means to seek a remedy, under the *Limitations Act, 2002*, a claim is "discovered" on the earlier of the date the plaintiff knew (a subjective criterion) or ought to have known, i.e., had the means of knowing (a modified objective criterion) about the claim.[48] The basic limitation period for discovering a claim is two years in Ontario.

[542] Under the discoverability principle, the limitation period commences to run when the plaintiff subjectively discovers the underlying material facts or, alternatively, when the plaintiff

[46] *Kamloops v. Nielson* (1984), 10 D.L.R. (4th) 641 (S.C.C.); *Central Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549.
[47] *Lawless v. Anderson*, 2011 ONCA 102 at para. 22; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 at p. 170 (C.A.).
[48] *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 at paras. 33 and 70.

ought to have discovered those facts by the exercise of reasonable diligence.[49] In other words, when a reasonable person with the abilities and in the circumstances of the plaintiff should have acquired facts to become knowledgeable about his or her claim, the limitation period runs, or, put conversely, the limitation period does not stop running, if the plaintiff ought to have taken steps but took no steps to investigate whether he or she has a claim.[50]

[543] The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case; it is a fact-based analysis.[51] What a reasonable person in the same or similar circumstances of the plaintiff knew or ought to have known is a question of fact.[52]

[544] The modified objective test applies only if a plaintiff does not have actual subjective knowledge of the claim.[53] If the plaintiff has subjective knowledge of his or her claim, the limitation period is running subject to s. 5(1)(a)(iv) of the *Limitations Act, 2002*, which adds the element that a proceeding is an "appropriate" means to seek a remedy.

[545] Pursuant to s. 5(2) of the *Limitations Act, 2002*, unless the contrary is proven, it is presumed that a plaintiff will know of the matters of his or her claim on the day that the act or omission took place. When a limitation period defence is raised, - the onus is on the plaintiff - to provide evidence to show that its claim is not statute-barred and that he or she behaved as a reasonable person in the same or similar circumstances using reasonable diligence in discovering the facts relating to the limitation issue.[54]

[546] Discovery means knowledge of the facts that may give rise to the claim, and the knowledge required to start the limitation period is more than suspicion and less than perfect knowledge.[55] If the plaintiff does know "enough facts", which means knowing the material facts, the claim is discovered, and the limitation period begins to run.[56]

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[49] *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at p. 224.
[50] *Murphy v. S.P. Hart Home Inspections*, 2018 ONSC 1648; *Wong v. Salivan Landscape Ltd.*, 2016 ONSC 4183 (Master); *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, aff'g 2015 ONSC 6177; *Fennell v. Deol*, 2016 ONCA 249; *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526.
[51] *Madden v. Holy Cross Catholic Secondary School*, 2015 ONSC 1773 at para. 17; *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165; *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 at para. 71; *Lawless v. Anderson*, 2011 ONCA 102 at para. 22; *Zapfe v. Barnes* (2003), 66 O.R. (3d) 397 (C.A.); *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger* (2001), 53 O.R. (3d) 208, at para. 19 (S.C.J.); *Smyth v. Waterfall* (2000), 50 O.R. (3d) 481 at para. 8 (C.A.).
[52] *Arcari v. Dawson*, 2016 ONCA 715; *Lima v. Moya*, 2015 ONSC 324 at para. 76, aff'd 2015 ONSC 3605 (Div. Ct.).
[53] *Canning Construction Limited v. Dhillon*, 2021 ONSC 665 at para. 37.
[54] *Fontanilla Estate v. Thermo Cool Mechanical*, 2016 ONSC 7023; *Unegbu v. WFG Securities of Canada Inc.*, 2015 ONSC 6408, aff'd 2016 ONCA 501 (C.A.); *Durham (Regional Municipality) v. Oshawa (City)*, 2012 ONSC 5803 at paras. 35–41; *Bolton Oak Inc. v. McColl-Frontenac Inc.*, 2011 ONSC 6567 at paras. 12–14; *Pepper v. Zellers Inc. (c.o.b. Zellers Pharmacy)* (2006), 83 O.R. (3d) 648 at paras. 20–22 (C.A.); *Bhaduria v. Persaud* (1998), 40 O.R. (3d) 140 (Gen. Div.).
[55] *Vu v. Canada (Attorney General)*; 2021 ONCA 574 at para. 47; *Grant Thornton LLP v. New Brunswick* 2021 SCC 31; *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 at para. 41, leave to appeal ref'd, [2019] S.C.C.A. No. 91.
[56] *Vu v. Canada (Attorney General)*; 2021 ONCA 574 at para. 49; *Lawless v. Anderson*, 2011 ONCA 102 at para. 23.

[547] Ignorance of the law does not postpone the commencement of the limitation period; if the plaintiff knows or ought to know the constituent elements of his or her cause of action, the circumstance that he or she may not appreciate the legal significance of the facts does not postpone the running of the limitation period.[57] Similarly, knowledge of the full extent of the damages is not required to trigger a limitation period.[58]

[548] The discovery of a claim does not depend upon the plaintiff knowing that his or her claim is likely to succeed, which is the matter that will be determined by his or her lawsuit;[59] the limitation period runs from when the prospective plaintiff has or ought to have had, knowledge of a potential claim,[60] and the later discovery of facts which change a borderline claim into a viable one does not give rise to the discoverability principle.[61]

[549] For the limitation period to begin to run, a plaintiff need not know the exact act or omission that caused him or her to suffer a loss; all that the plaintiff need know is that the defendant committed some act or omission that cause the loss or damage.[62] For the limitation period to begin to run, it is not necessary that the plaintiff know the full extent or quantification of his or her damages; rather, the period begins to run with the plaintiff's subjective or objective appreciation of being damaged, *i.e.*, of being worse off than before the defendant's conduct.[63] For the limitation period to begin to run, it is enough for the plaintiff to have *prima facie* factual grounds to infer that the defendant caused him or her harm, and certainty of a defendant's liability for the act or omission that caused or contributed to the loss is not a requirement.[64]

[550] In *Grant Thornton LLP v. New Brunswick*,[65] which concerns New Brunswick's *Limitation of Actions Act*,[66] which has statutory language that is similar to sections 4 and 5 of Ontario's *Limitations Act, 2002,* Justice Moldaver, for the Supreme Court of Canada, discussed the measure of knowledge necessary to begin the commencement of a limitation period, and he stated at paragraph 42 that a claim is discovered when a plaintiff has knowledge, actual or constructive, of

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[57] *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629 at para. 52, aff'd 2016 ONCA 179; *Holley v. Northern Trust Co., Canada*, 2014 ONSC 889 at para. 156, aff'd 2014 ONCA 719; *Liu v. Silver*, 2010 ONSC 2218, aff'd 2010 ONCA 731; *Nicholas v. McCarthy Tétrault LLP*, [2008] O.J. No. 4258 at para. 27 (S.C.J.), aff'd [2009] O.J. No. 4061 (C.A.); *Milbury v. Nova Scotia (Attorney General)* (2007), 283 D.L.R. (4th) 449 (N.S.C.A.); *Calgar v. Moore*, [2005] O.J. No. 4606 (S.C.J.); *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (C.A.); *Hill v. South Alberta Land Registration District* (1993), 100 D.L.R. (4th) 331 (Alta. C.A.).

[58] *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc*, 2013 ONCA 474 at para. 1.

[59] *Dass v. Kay*, 2021 ONCA 565; *Sosnowski v. MacEwan Petroleum Inc*., 2019 ONCA 1005

[60] *Salman v. Patey*, 2016 ONSC 7999; *Szanati v. Melnychuk*, 2016 ONSC 1293; *Hughes v. Dyck*, 2016 ONSC 901; *Brown v. Wahl*, 2015 ONCA 778; *Cassidy v. Belleville (City) Police Service*, 2015 ONCA 794; *Lochner v. Toronto (City) Police Services Board*, 2015 ONCA 626 at para. 7; *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80 at paras. 58–61, aff'd 2013 ONCA 474.

[61] *Giakoumakis v. Toronto (City)*, [2009] O.J. No. 55 at para. 20 (S.C.J.); *Oakville Hydro Electricity Distribution Inc. v. Tyco Electronics Canada Ltd.* (2004) 71 O.R. (3d) 330 at paras. 10–13.

[62] *Gordon Dunk Farms Limited v. HFH Inc*., 2021 ONCA 681 at paras. 32-36.

[63] *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629 at paras. 64–66, aff'd 2016 ONCA 179; *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156.

[64] *Kowal v. Shyiak*, 2012 ONCA 512 at para. 18; *Duchesne v. St-Denis*, 2012 ONCA 699 at paras. 24–27; *Gaudet v. Levy* (1984), 47 O.R. (2d) 577 (H.C.J.).

[65] 2021 SCC 31

[66] S.N.B. 2009, c. L-8.5, s. 1.

the material facts upon which a "plausible inference of liability" on the defendant's part can be drawn. The *Grant Thornton LLP* decision has been adopted and followed in Ontario.[67]

[551] At paragraphs 45-47 of the judgment, Justice Moldaver illuminated the meaning of plausible inference of liability as follows:

> 45. Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). […]
>
> 46. The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect knowledge" (*De Shazo*, at para. 31; see also the concept of "perfect certainty" in *Hill v. South Alberta Land Registration District* (1993), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro*, at para. 18).

(b) The Appropriateness Factor

[552] The *Limitations Act, 2002* added the s. 5(1)(a)(iv) stipulation that a limitation period does not commence until a proceeding is a legally appropriate means for the plaintiff to seek a remedy.[68]

[553] Subparagraph 5(1)(a)(iv) of the *Limitations Act, 2002* can have the effect of delaying the commencement of the running of limitation period. However, to have this delaying effect, there must be a juridical reason for the person to wait; *i.e.*, there must be an explanation rooted in law as to why commencing a proceeding is not yet appropriate.[69]

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[67] *McFlow Capital Corp. v. James*, 2021 ONCA 753; *Gordon Dunk Farms Limited v. HFH Inc*., 2021 ONCA 681; *Vu v. Canada (Attorney General)*; 2021 ONCA 574; *Sunnybrook Health Sciences Centre v. Buttcon Ltd*. 2021 ONSC 6061.

[68] *Dass v. Kay*, 2021 ONCA 565 at para. 24.

[69] *Dass v. Kay*, 2021 ONCA 565; *Sosnowski v. MacEwan Petroleum Inc*., 2019 ONCA 1005; *407 ETR Concession Co. v. Da*y, 2016 ONCA 709, rev'g 2014 ONSC 6409, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 509;

[554] When resort to litigation would be appropriate is a fact-based inquiry that depends on the specific factual or statutory setting of each individual case, including taking into account the particular interests, abilities, and circumstances of the plaintiff.[70]

[555] While there may be other situations where delaying a lawsuit may be legally appropriate, the case law interpreting s. 5(1)(a)(iv) has recognized two situations where delay may be legally appropriate.[71] One situation is where the plaintiff instead of suing the defendant, justifiably relied on a defendant's superior knowledge and expertise to fix the problems, especially where the defendant took steps to ameliorate the loss.[72] The second situation is where the parties are waiting for the completion of an alternative dispute resolution process that offers an adequate remedy.[73]

[556] It is not legally appropriate to delay commencing an action because the plaintiff knows that he or she has been harmed by the defendant but is uncertain that he or she will be able to marshal evidence to prove the claim or is unsure whether the measure of damages makes litigation economically worthwhile, *i.e.,* whether the scale of the loss will make an action remunerative.[74]

[557] In *Presidential MSH Corp. v. Marr, Foster & Co. LLP*,[75] Justice Pardu stated at paragraph 26

> 26. Resort to legal action may be "inappropriate" in cases where the plaintiff is relying on the superior knowledge and expertise of the defendant, which often, although not exclusively, occurs in a professional relationship. Conversely, the mere existence of such a relationship may not be enough to render legal proceedings inappropriate, particularly where the defendant, to the knowledge of the plaintiff, is not engaged in good faith efforts to right the wrong it caused. The defendant's ameliorative efforts and the plaintiff's reasonable reliance on such efforts to remedy its loss are what may render the proceeding premature.

Markel Insurance Co. of Canada v. ING Insurance Co. of Canada; Federation Insurance Co. of Canada v. Kingsway General Insurance Co., 2012 ONCA 218.

[70] *Dass v. Kay,* 2021 ONCA 565; *Sosnowski v. MacEwan Petroleum Inc*., 2019 ONCA 1005; *C. (J.) v. Farant*, 2018 ONSC 2692; *Winmill v. Woodstock (City) Police Services Board*, 2017 ONCA 962; *407 ETR Concession Co. v. Day*, 2016 ONCA 709, rev'g 2014 ONSC 6409, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 509; *Gottlieb (Trustee for) v. Minuk Construction & Engineering Ltd. (c.o.b. Minuk Contracting Co.)*, 2016 ONSC 7350.

[71] *Dass v. Kay,* 2021 ONCA 565; *Sosnowski v. MacEwan Petroleum Inc*., 2019 ONCA 1005.

[72] *Canning Construction Limited v. Dhillon*, 2021 ONSC 665; *DeZwirek v. Swadron*, 2019 ONSC 1709; *Presley v. Van Dusen*, 2019 ONCA 228; *Presidential MSH Corp. v. Marr Foster & Co. LLP*, 2017 ONCA 325; *Barrs v. Trapeze Capital Corp.*, 2017 ONSC 5466; *YESCO Franchising LLC v. 2261116 Ontario Inc.*, 2017 ONSC 4273.

[73] *Canning Construction Limited v. Dhillon*, 2021 ONSC 665; *Beniuk v. Leamington (Municipality),* 2020 ONCA 238; *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2019 ONCA 761; *Ridel v. Goldberg* 2019 ONCA 636; *Nelson v. Lavoie*, 2019 ONCA 431; *Soleimani v. Levesque*, 2019 ONSC 619; *Har Jo Management Services Canada Ltd. v. York (Regional Municipality),* 2018 ONCA 469; *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325; *407 ETR Concession Co. v. Day*, 2016 ONCA 709, rev'g 2014 ONSC 6409, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 509; *Kadiri v. Southlake Regional Health Centre*, 2015 ONSC 621, aff'd 2015 ONCA 847; *U-Pak Disposals (1989) Ltd. v. Durham (Regional Municipality),* 2014 ONSC 1103.

[74] *Dass v. Kay,* 2021 ONCA 565 at paras. 43-44; *Sosnowski v. MacEwan Petroleum Inc*., 2019 ONCA 1005; *Peixeiro v. Haberman,* [1997] 3 S.C.R. 549.

[75] 2017 ONCA 325.

(c) Continuing Breaches and Rolling Limitation Periods

[558] In a breach of contract case, where there is a continuing breach of an ongoing obligation to make period payments, the limitation period may sometimes roll, which is to say it may commence anew with each successive breach of the contract.[76]

[559] Where a breach of contract involves a failure to perform an obligation scheduled to be performed periodically (for example, a requirement to make quarterly deliveries or payments such as rent), a failure to perform any such obligation gives rise to a breach and give rise to a claim as from the date of each individual breach.[77]

[560] Where there is an obligation to make periodic payments or to perform an obligation periodically, the limitation period bars claims for breach of contract for damages incurred outside of the limitation period for the particular periodic breach, but the limitations statute does not bar timely claims for damages that are suffered within the limitation period for subsequent period breaches.[78]

[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.[79]

[562] For example, if a tenant failed to pay rent for three years, and then the landlord commenced an action for the unpaid rent, the landlord's claim for the first year of the rent arrears would be statute barred but not the claims for the two years before the commencement of the lawsuit. For another example, an insured entitled to periodic disability payments under an insurance policy who is wrongfully refused payments would have his or her claims statute-barred for the period beyond two years before the date he or she commenced an action; however, as long as the entitlement to benefits continued, the limitation period would only bar claims originating outside of the prescribed period before the insured's commencement of the action.[80]

[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.[81] Where there is a breach of a continuing

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[76] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd*, 2022 ONCA 518; *Marvelous Mario's Inc. v. St. Paul Fire and Marine Insurance Co*., 2019 ONCA 635 at para. 35; *Pedersen v. Soyka*, 2014 ABCA 179.
[77] *Beccarea v. Canadian National Railway Co.*, 2018 ONSC 630; *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179; *Smith v. Empire Life Insurance Co.*, [1996] O.J. No. 1009 (Gen. Div.), leave to appeal refused [1996] O.J. No. 3113 (C.A.).
[78] *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629, aff'd 2016 ONCA 179 (C.A.); *Smith v. Empire Life Insurance Co.*, [1996] O.J. No. 1009 (Gen. Div.); *Wallace v. Wallace*, 2012 BCSC 1216.
[79] *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179; *Goorbarry v. Bank of Nova Scotia (c.o.b. Scotiabank)*, 2011 ONCA 793; *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.*, (1996), 31 O.R. (3d) 127 (C.A.).
[80] *Smith v. Empire Life Insurance Co.*, [1996] O.J. No. 1009 (Gen. Div.); *Zigouras v. Royal Insurance Co. of Canada*, [1987] O.J. No. 1173 (Div. Ct.); *Zappone v. Mutual of Omaha Insurance Co.*, [1986] O.J. No. 1198 (C.A.); *Coombe v. Constitution Insurance Co*. of Canada, [1980] O.J. No. 3714 (C.A.).
[81] *Beccarea v. Canadian National Railway Co.*, 2018 ONSC 630; *Bonaccorso v. Optimum Insurance Co.*, 2016 ONCA 34; *Richards v. Sun Life Assurance Co. of Canada*, 2016 ONSC 5492; *Sietzema v. Economical Mutual Insurance Co.*, 2014 ONCA 111; *Balzer v. Sun Life Assurance Co. of Canada (c.o.b. Sun Life of Canada)*, 2003 BCCA 306.

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.[82]

[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.[83] For example in *Bonilla v. Preszler*,[84] an insurer's refusal to continue to pay income replacement benefits triggered the running of the limitation period.

[565] The concept of a continuing breach may be difficult in application, and applying the concept depends upon determining the meaning of the contract promise and determining whether it may be breached once and for all or whether it is breached until the promise is made good.[85]

2. The Parties' Arguments

(a) Optimum Fee Claims

[566] With respect to the Optimum Fee Claims, relying on *Espartel Investments v. MTCC No. 993*,[86] *Community Savings Credit Union v. Bodnar*,[87] *Fresco v. Canadian Imperial Bank of Commerce*,[88] and *Prescott Finishing Inc. v. Prescott (Town)*,[89] the Plaintiffs submit that the Optimum Fee Claims were not discoverable until January 2010, when Shoppers introduced the 2010 Associate Agreement, which specifically provided for a fee for "loyalty programs".

[567] Further, the Plaintiffs submit that the limitation period for the Optimum Fee rolled. They submit that a fresh cause of action arose at each year-end, when Shoppers finalized the Service Fee payable and failed to make any adjustments to account for the Optimum Fees it had collected from Associates in that year.

[568] Thus, in the alternative, with the action having been commenced on November 19, 2010, based on a rolling limitation period, the Plaintiffs submit that the Optimum Fee Claims are: (a) timely for the year ends after November 19, 2008 for Class Members with 2002 Associates Agreements in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador; and (b) timely for the Class Members with 2002 Associates Agreements from Prince Edward Island, Yukon, Northwest Territories, and Nunavut the claims before November 19 2004.

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[82] *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179.
[83] *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd*., 2022 ONCA 518; *Richards v. Sun Life Assurance Company of Canada*, 2016 ONSC 5492.
[84] 2016 ONCA 759, aff'g 2016 ONSC 1411.
[85] *Bridgesoft Systems Corp. v. British Columbia*, 2000 BCCA 313; *Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation*), (1940) 64 C.L.R. 221 at 236 (Aust. H.C.)
[86] 2022 ONSC 4315.
[87] 2022 BCCA 263.
[88] 2020 ONSC 6098.
[89] 2010 ONSC 212.

[569] The Plaintiffs do not rely on subparagraph 5(1)(a)(iv) of the *Limitations Act, 2002* to postpone the running of the limitation period.

[570] For its part, Shoppers submits that: (a) the limitation period for the Optimum Fee Claims does not roll; and (b) the Plaintiffs, and by extension the Class Members, had subjective and objective knowledge that all their claims became statute barred as of November 19, 2008.

[571] Shoppers submits that the Associates have not rebutted the presumption that they were aware or ought to have been aware that a reasonable person in the same or similar circumstances using reasonable diligence would have been aware of the material facts underlying each claim associated with the 2002 Associates Agreement more than two years before issuing the Statement of Claim.

[572] Also, with respect to the Optimum Fee Claims, Shoppers submits that the cases relied on by the Plaintiffs, offer no assistance to the Class Members because the Plaintiffs and by extension the Class Members knew or ought to have known about how Shoppers was interpreting and applying the 2002 Associates Agreement from the outset of their entering into the 2002 Associates Agreement.

(b) Shoppers Charges Claims

[573] With respect to the Shoppers Charges Claims, the Plaintiffs submit that Shoppers Charges Claims were only discoverable in the summer of 2010 because before that date there was no basis to suggest that a reasonable Associate ought to have discovered the Shoppers Charge Claims at an earlier date.

[574] The Plaintiffs submit that the documents that were disseminated by Shoppers and the annual review materials do not disclose that Shoppers was taking profits on its fees for services and did not provide the information from which the profit-taking could be deduced.

[575] In particular, with respect to the Equipment Rental Fee, relying on *Van Allen v. Vos,*[90] the Plaintiffs submit that it was not apparent that Shoppers was charging an 11% rate of return. The Plaintiffs submit that a claim is not discoverable where the defendant's act or omission is not apparent on the face of the financial disclosure provided to the plaintiff.

[576] The Plaintiffs submit that the Shoppers Charges Claims were discovered and became discoverable at the earliest in the summer of 2010, when Mr. Spina consulted with other Associates, became concerned that Shoppers was profiting from the Shoppers Charges fees, and was unable to get answers to his concerns from his conversations with Shoppers's representatives.

[577] The Plaintiffs do not rely on subparagraph 5(1)(a)(iv) of the *Limitations Act, 2002* to postpone the running of the limitation period.

[578] In any event, the Plaintiffs submit that the limitation period for Shoppers Charges rolled. They submit that the material facts for these claims arose on a periodic annual basis when Shoppers

[90] 2014 ONCA 552

reviewed and settled the fees for each year and when Common Year Plans (annual store plans) were made for the following year.

[579] With respect to the Shoppers Charges Claims, Shoppers submitted that an Associate acting reasonably would have discovered its Shoppers Charges Claim long before the summer of 2010.

[580] Shoppers points out that Mr. Vanderburg testified that he had suspicions that Shoppers was profiting from Store Charges as early as 2005 or 2006, but he took no steps to investigate his suspicions. Indeed, it was the evidence of both Mr. Spina and Mr. Vanderburg that they entered the franchise relationship with Shoppers with the understanding that Shoppers was not making money from its service charges that eroded the sharing of profits via the Associate Earnings and Service Fee calculations. Thirteen times a year, the Associates received reports about the Shoppers Charges and these fees would be part of the Common Year Plan and the settlement of accounts at the end of each year.

[581] In particular with respect to the Equipment Rental Fee, Shoppers submits that the Plaintiffs and the Class Members were always aware that the lease rates for the equipment rental fee included a markup on cost and they even knew the percentage amount of that markup on each category of equipment, on an annual basis. For the Associates that received statutory disclosure statements, this information would have been apparent going back to at least 2001. Shoppers denies that there was a rolling limitation period.

(c) Distribution Centre Claims

[582] With respect to the Distribution Centre Claims, the Plaintiffs do rely on subparagraph 5(1)(a)(iv) of the *Limitations Act, 2002* to postpone the running of the limitation period.

[583] The Plaintiffs submit that the running of the limitation period with respect to the Distribution Centre Claims did not run during the period in which Shoppers was taking ameliorative steps to remedy the Class Members' complainants. As examples of ameliorative acts that delayed the running of the limitation period, the Plaintiffs point out that in the early 2000s, Shoppers extended the time limit for submitting inventory adjustment claims, and in 2008, Shoppers introduced the Logistics Committee to address ongoing "feedback" from Associates.

[584] With respect to the Distribution Centre Claims, Shoppers submits that there is no basis for the application of 5(1)(a)(iv) of the *Limitations Act, 2002* and that the individual Class Members knew or ought to have known about their claims precisely on the date when their grievance with the distribution policy or practices arose.

(d) Professional Allowance Claims

[585] With respect to the Professional Allowance Claims, the Plaintiffs submit that the Professional Allowance Claims are subject to a rolling limitation period, and, in any event, the claim was not discoverable earlier than 2009, which would make the 2010 Statement of Claim timely for all of the Professional Allowance Claims without a rolling limitation period.

[586] The Plaintiffs submit that given Shoppers's statutory, regulatory, and common law duties, it failed to disclose information about Professional Allowances to Associates throughout the five

and half years of the PA Class Period. The Plaintiffs submit that the Professional Allowance Claims were not discoverable until 2009.

[587] The Plaintiffs submit that the disclosures that were made to the Associates would not have alerted a reasonable Associate to a claim for Professional Allowances. The Plaintiffs submit that Shoppers did not tell the Associates that it was using the information to receive Professional Allowances and Shoppers deceived the Associates by representations that it applied the Professional Allowances to develop or implement a wide variety of patient care and disease state management related programs in the pharmacy.

[588] Further the Plaintiffs submit that the given the variability of the annual planning documents a reasonable Associate would not have discovered the Professional Allowances claim.

[589] With respect to the Professional Allowances Claim, Shoppers states that direct patient care was being reported beginning October 1, 2007 and it submits that all of the facts necessary to discover the Professional Allowances claim were known and knowable to the Associates in 2006, and by no later than early 2008 when the PA Class Members received their settlement memoranda for the 2007 year.

[590] Shoppers states that as a factual matter, all the Associates were or ought to have been aware that Shoppers had received Professional Allowances during 2007. Shoppers also submits that the PA Class Members would have been aware by their 2008 Common Year Plans that Shoppers was not planning to remit Professional Allowances.

3. Analysis: Discovery of Claims

[591] Applying this law about the operation of limitation periods to the circumstances of the immediate case and considering the arguments of the parties, leads to the following analyses.

(a) Discovery of the Optimum Fee Claims

[592] With the assumption, contrary to my finding, foreshadowed above and discussed below, that there is no merit to the Optimum Fee Claims, I agree with the Plaintiffs' argument that Optimum Fees Claims were not discoverable until January 2010 when Shoppers introduced the 2010 Associate Agreement, which specifically provided for a fee for "loyalty programs".

[593] With the same assumption, I disagree with Shoppers' argument that the Plaintiffs, and by extension the Class Members, knew or ought to have known about how Shoppers was interpreting and applying the 2002 Associates Agreement from the outset of their entering into the 2002 Associates Agreement.

[594] There are a number of problems with Shoppers' argument, including the wrong premise of the argument that misstates the state of knowledge that the Plaintiffs subjectively or objectively would have had to prove to rebut the presumptive commencement of the running of the limitation period.

[595] It is undoubtedly true that the Associates with the 2002 Associates Agreement actually knew how Shoppers was interpreting and applying the Associates Agreement to charge a fee for

the Optimum Program. It is also undoubtedly true that the Plaintiffs and by extension the Class Members ought to have known about how Shoppers was interpreting and applying the 2002 Associates Agreement from the outset of their entering into the 2002 Associates Agreement. However, what the Associates needed to subjectively or objectively know before suing Shoppers is that how Shoppers was interpreting and applying the 2002 Associates Agreement was a wrong interpretation.

[596] On the assumption, which I repeat is contrary to my ultimate finding on liability, I believe the Plaintiffs' evidence that they did not subjectively know that Shoppers had made a contracting mistake and the Plaintiffs did not subjectively know that the 2002 Associates Agreement did not authorize Shoppers to charge the Optimum Fee.

[597] Further, I find that until Shoppers introduced the 2010 Optimum Agreement, which specifically provided for a fee for loyalty programs, there was nothing to put the Plaintiffs on notice that they ought to make inquiries to determine whether Shoppers was lawfully imposing a charge for the Optimum program.

[598] Limitation period cases are all unique and depend on their own particular facts, but the Plaintiffs' argument is supported to varying modest degrees by the cases they rely on; namely: *Espartel Investments v. MTCC No. 993*,[91] *Community Savings Credit Union v. Bodnar*,[92] *Fresco v. Canadian Imperial Bank of Commerce,*[93] and *Prescott Finishing Inc. v. Prescott (Town),*[94]

[599] The factual circumstances of all these cases are distinguishable from the facts of the immediate case and save to the extent that these cases establish or utilize general legal principles, none of them are binding or determinative of the application of the laws to the particular facts of the immediate case. That said, the cases are modestly supportive of the Plaintiffs' argument and my decision that assuming that the 2002 Associates Agreement was breached with respect to the Optimum Fee, the claim was not discovered until 2010, which would make the 2010 Statement of Claim timely. Rather than relying on these cases, my decision stands on the application of the general principles to the particularities and peculiarities of the immediate case.

[600] For the present purposes of discussing the Optimum Fee Claims, of the cases relied on by the Plaintiffs, I need refer only to *Espartel Investments v. MTCC No. 993*.

[601] In *Espartel Investments v. MTCC No. 993*, Espartel was a commercial condominium that had a Reciprocal Agreement with MTCC No. 993, a neighbouring residential condominium. Pursuant to the Reciprocal Agreement the condominiums shared facilities. Under the Reciprocal Agreement, MTCC No. 993 paid the electricity and then billed Espartel for its defined share of the costs. The Reciprocal Agreement was signed in 1991, and it was amended in 1995. In 2017, Espartel learned that it had been overcharged for electricity. It 2018, Espartel sued for damages for unjust enrichment or breach of contract.

[91] 2022 ONSC 4315.
[92] 2022 BCCA 263.
[93] 2020 ONSC 6098.
[94] 2010 ONSC 212.

[602] In the litigation, MTCC No. 993 submitted that the claim was statute barred. It relied on the fact that in 2015, Espartel's general manager had concerns that the electricity charges were outrageously high.

[603] Justice Ramsey granted Espartel a judgment for unjust enrichment for $730,058.99 and held that the claim was not statute barred. There was nothing apparent from the Reciprocal Agreement that revealed that the MTCC No. 993 was making a mistake in the amount it was charging for electricity. On the evidence before her, Justice Ramsey found that Espartel did not know or could not have known with the exercise of reasonable diligence of the error that led to the overpayment until a consultant hired by MTCC No. 993 disclosed the error.[95]

[604] The case at bar bears some resemblance to *Espartel Investments v. MTCC No. 993*, but the case at bar can be decided based on first principles. In the immediate case, there is no reason for me not to believe the Plaintiffs' evidence that they did not know about the unauthorized Optimum Fee charge until the appearance of the 2010 Associates Agreement, and there were no reasons for the Plaintiffs to make inquiries until the appearance of the 2010 Associates Agreement. To quote from paragraph 45 of the Supreme Court of Canada's judgment in *Grant Thornton LLP v. New Brunswick*,[96] there was no 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 up until the release of the 2010 Associates Agreement. There was no reason for the Associates to make an investigation and no reason for them to have done anything other than to settle Associates Earnings and the Service Fee on the basis that Shoppers was entitled to charge the Optimum Fee (which actually is my finding as discussed below.)

(b) Discovery of the Shoppers Charges Claims

[605] As was the case with the Optimum Fee Claims, the situation with respect to the running of limitation periods is similar with respect to the Shoppers Charges Claims.

[606] With the assumption, contrary to my finding, foreshadowed above and discussed below, that Shoppers did not breach the Associates Agreement with respect to the Shoppers Charges, if Shoppers did breach the agreement or act in bad faith in levying these charges with a profit element, then on a class-wide basis, it is doubtful to the extreme that any of the Class Members had subjective awareness of the breach.

[607] I disagree with Shoppers's argument that on a class-wide basis, the Associates ought to have been aware of what they allege in this class action.

[608] Shoppers relied on the Court of Appeal's decision in *Albert Bloom Limited v. London Transit Commission*,[97] in support of its argument that the limitation period had run its course with respect to Shoppers Charges. Once again, every limitation period case is unique and dependent on its particular facts and the facts of the *Albert Bloom Limited*, which involved a limitation claim

[95] See also: *Vu v. Canada (Attorney General)*, 2021 ONCA 574 at para. 47; *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 at para. 41, leave to appeal ref'd, [2019] S.C.C.A. No. 91; *Van Allen v. Vos*, 2014 ONCA 552.
[96] 2021 SCC 31
[97] 2021 ONCA 74, aff'g 2020 ONSC 1413.

barring a defendant's cross claim in a contaminated groundwater environmental nuisance claim, are far-far removed from the facts of the immediate case. In that case, there was good reason to conclude that the defendant had constructive knowledge that he had a crossclaim against the co-defendant. The same state of knowledge does not exist in the immediate case, and it certainly does not exist on a class-wide basis.

[609] Once again, rather than relying on any particular case, my decision stands on the application of the general principles to the particularities and peculiarities of the immediate case which does not involve migrating trichloroethylene from a sludge pit that had been buried on a historical automobile factory.

[610] In the immediate case, the alleged breach of contract is that Shoppers was charging for its services with excess fees that went beyond the costs of the services being provided i.e., Shoppers's charges included a profit element in the Loss Prevention fee, the Academy fee, the Retail Accounting fee, and the Equipment Rental fee.

[611] Given that there is no evidence that any Associate actually knew how Shoppers was calculating its fees, the question then is when did the Associates have constructive knowledge of this breach? In other words, the question in the immediate case about the Shoppers Charges Claims is when did the Associates as a class have sufficient information to put them all on notice to inquire whether Shoppers was including a profit element in its fees. The answer to that question is that there was never a time where the class was put on notice.

[612] There may have a few veteran Associates like Mr. Spina and Mr. Vanderburg who believed back in the 1990s when they became franchisees that Shoppers was only charging for its services at cost. But a lot had changed since the 1990s, even for the veterans, like Messrs. Spina and Vanderburg, and the Shoppers's franchise enterprise in the 2000s was very different than the franchise enterprise in the 1990s.

[613] Even if I were to conclude - which I do not - that Mr. Spina's unfortune experience after the PEERS meeting, where he alleges intimidating conduct by two Shoppers's vice presidents, provided him with actual or constructive notice that would be constructive notice personal only to Mr. Spina. Other Associates would have no reason to make inquiries about how Shoppers was calculating the fees for the Shoppers Charges.

[614] Put somewhat differently, even if the Associates signing the 2002 Associates Agreement or the 2010 Associates Agreement knew that Shoppers was charging fees above the cost of the services being provided, they would have had no reason to hire a lawyer or an accountant to determine whether that was a breach of contract or an act of bad faith by Shoppers. But, of course, the Associates did not know how Shoppers was charging for services at all, and as was the case with the Optimum Fee, there was no 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.

[615] Generally speaking, it is difficult but not impossible to establish on a class wide basis that the Class Members' claims are statute barred and often the matter of limitation period defences is left as an issue to be dealt with at an individual issues trial, where the defendant can raise it as a defence to the individual Class Members' claim. If on this summary judgment motion, I treat Mr.

Spina's and Mr. Vanderburg's claims with respect to the Shoppers Charges as individual claims, I conclude that they have rebutted Shoppers's limitation period defence. They have rebutted the presumption by proving that they did not have actual notice and they did not have constructive notice which would have put them on notice that they ought to exercise due diligence else the running of the limitation period would continue.

[616] Assuming that the Class Members have Shoppers Charges Claims, those claims are not statute barred.

(c) Discovery of the Distribution Centre Claims

[617] As foreshadowed above and as discussed below, the Distribution Centre Claims are entirely idiosyncratic. There is no class-wide breach or systemic breach of contract or of Shoppers's duties of good faith. There is no unjust enrichment claim. What there may be, are discrete claims by individual Associates. These claims would have to be determined at individual issues trials.

[618] In this class action, it is safe to say that an individual Associate would subjectively and objectively know that he or she had a Distribution Center Claim contemporaneous to when, to use Class Counsel's metaphor, the annoying pebble was in the Associates' shoe.

[619] It follows that some Distribution Centre Claims are statute barred. Any Distribution Centre Claims of Class Members from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador are statute barred for the period before November 19, 2008. Any Distribution Centre Claims of Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut are statute barred for the period before November 19, 2004.

(d) Discovery of the Professional Allowance Claims

[620] To the subjective knowledge of the PA Class Members, between October 2006 and April 2013, Shoppers received Professional Allowances from generic manufacturers on Shoppers's purchases of generic drugs dispensed in Ontario.

[621] The PA Class Members, however, submit that Shoppers lied to it – not about its receipt of the Professional Allowances – but about its 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."

[622] I find that there was no lie here. What there was, was the difference of perspective, that lies at the heart of the PA Class Members' 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. The PA Class Members assert that this remunerative thing was earned by the Associates 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. With

respect to Professional Allowances there 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 the limitation period began to run at the year from the outset of the Professional Allowance Regime and it further 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.

[626] On the assumption, which is contrary to my finding foreshadowed above and discussed below 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 just foreclose claims for Professional Alliances for the year ends 2006 and 2007 - because the limitation period for Professional Allowance Claims would roll.

[627] The factual and legal situations of the Professional Allowance Claims are different than that of the Optimum Fee Claims and the Shoppers Charges Claims because the 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.

[628] The Plaintiffs do not rely on subparagraph 5(1)(a)(iv) of the *Limitations Act, 2002* to postpone the running of the limitation period for the Associates' Professional Allowance Claims.

[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.

S. The Claim for Aggregate Damages

[630] In this section of my reasons, I shall address the Class Members' claim for aggregate damages. For the purposes of doing so, contrary to the conclusions foreshadowed above and explained below, I shall assume that the Plaintiffs were successful in establishing liability for the Optimum Fee Claims, the Shoppers Charges Claims, and the Professional Allowances Claim. I shall also assume that there are no limitation periods to truncate the period of these claims.

[631] The analysis in this part of my Reasons for Decision proceeds in three parts. First, I shall discuss the law about aggregate damages under the *Class Proceedings Act, 1992*. Second, I shall analyze Mr. Rosen's methodology for calculating aggregate damages for the Plaintiffs' and Class Members' various claims with the exception of the Distribution Centre Claims, for which aggregate damages are not being claimed. Third, I shall discuss Mr. Jaishankar's Bottom Up Comparative Damages Assessment.

1. Aggregate Damages under the *Class Proceedings Act, 1992*

[632] Section 24 of the *Class Proceedings Act* authorizes the court to award aggregate damages in appropriate case. Section 24 states: :

> *Aggregate assessment of monetary relief*
>
> 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.
>
> *Average or proportional application*
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
>
> *Idem*
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class

members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis.

[633] Under s. 24 (1) of the *Class Proceedings Act, 1992*, a court may award aggregate damages where: (i) monetary relief is claimed on behalf of some or all class members; (ii) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined; and (iii) 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. A plaintiff must be able to prove all the elements of his or cause of action at the common issues trial to have a common issue about aggregate damages.[98]

[634] For there to be an award of aggregate damages, the plaintiff must advance a methodology or show that there is a reasonable likelihood of assessing the defendant's aggregate liability to the class without proof by individual class members.

[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.

[98] *Palmer v. Teva Canada*, 2022 ONSC 4690 at para. 291; *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at paras. 111-114, 139, leave to appeal ref'd, [2012] SCCA No 326.

[636] In *Fulawka v. Bank of Nova Scotia*,[99] Chief Justice Winkler described the nature of aggregate damages at paragraph 122 as follows:

> 122. Finally, s. 24(1)(c) states that the aggregate of the defendant's liability "can reasonably be determined without proof by individual class members." This provision 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".[100]

[637] In *Ramdath v. George Brown College*,[101] 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.[102] 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.[103]

2. Analysis

[639] The Plaintiffs seeks aggregate damages in respect of the claims for the Optimum Fee, Shoppers Charges, and Professional Allowances.

[640] Mr. Rosen opined that he had developed a methodology that could determine on an aggregate basis what was Shoppers's liability for (a) charging unauthorized Optimum Fees of $355.2 million; (b) overcharging $146.2 million for Shoppers Charges, and (c) not remitting $1.084 billion in Professional Allowances. His conclusion was that Shoppers's liability was: (a) $54.0 million for the Optimum Fee; (b) $21.9 million for Shoppers Charges; and (c) $256 million for Professional Allowances.

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[99] 2012 ONCA 443.
[100] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443. 126. See also *Omarali v. Just Energy*, 2016 ONSC 4094.
[101] 2015 ONCA 921.
[102] *Le Feuvre v. Enterprise Rent-A-Car Canada Company*, 2022 ONSC 4136; *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518 at para. 51.
[103] *Ramdath v. George Brown College*, 2014 ONSC 3066, aff'd 2015 ONCA 921.

[641] Mr. Rosen's methodology was to calculate on an annual basis, the unauthorized Optimum Fee, the overcharge for the Shoppers Charges, and the withheld Professional Allowances and then to severally apply these amounts to Shoppers's aggregate financial information for that year. Mr. Rosen used aggregate data from Shoppers's White Books, which are management's accounting reports prepared during the Class Period. Mr. Rosen used the audited, reconciled, consolidated, financial results of Shoppers and the Associates available from Shoppers. Mr. Rosen conducted his "top down" analysis by: (a) assuming that planned and actual store profitability could be applied equally among all Associates and then applying the total amount of excess Shoppers Store Charges and the Professional Allowances in each year first to cover any underage in total store profitability; (b) calculating the increase in Associate Earnings resulting from covering the underage; then (c) then applying the balance of excess Shoppers Charges and the Professional Allowances in each year to calculating the increase in Associate Earnings.

[642] In calculating the increase in Associate Earnings, Mr. Rosen used an assumed 25% midpoint between the 20% or 30% received by Associates as a percentage of any overage in-store profitability.

[643] Shoppers submits that there were at least four fundamental errors in Mr. Rosen's top-down analysis. I agree with three of Shopper's submissions.

[644] I agree that Mr. Rosen made a methodological error by applying planned and actual store profitability equally across the Associates Class for each year. Planned and actual store profitability are inherently individual assessments and depend on a several factors that change depending on the type of store.

[645] I agree that Mr. Rosen made a methodological error by assuming that if the additional revenues were applied, that Associates receiving the Associates Guarantee would collectively enter an overage position. That assumption is not born out by the facts. In this regard, it should be recalled that the infusion of Professional Allowances would only be available to Ontario Associates and if their gross revenue was increased so would the amount of the Shoppers Charges that were ratios of gross revenue. As Mr. Mariano explained, many Associates would continue to receive the Associate Guarantee even after attribution of Professional Allowances or excess in Store Charges.

[646] Third, I agree that Mr. Rosen made a methodological error by assuming that overages would be shared at the 25% midpoint between the 30% received by Associates in stores that generated a profit and the 20% (up to a maximum of $50,000) received by Associates in stores that operated at a loss. This assumption may overstate the amount of the sharing that should have been attributable to the Associate. Mr. Rosen admitted that he was not aware of how many stores in a particular year would receive 20% or 30% respectively. Rosen also did not take any account of the $50,000 cap for Associates in Stores that did not generate a profit.

[647] With respect to the fourth alleged error, I disagree with Shoppers's submission that Mr. Rosen made a fundamental methodological error by not retroactively adjusting planned profits with the benefit of the hindsight that there were unauthorized Optimum Fees, wrongful Shoppers Charges, and unremitted Professional Allowances. I shall return to the matter of this submitted error when I discuss Mr. Jaishankar's opinion evidence proffered by Shoppers about the

calculation of damages. For present purposes, it is sufficient to say that Mr. Rosen was not wrong in not making hypothetical adjustments based on hindsight about the possible outcomes of the Class Members' claims with respect to the Optimum Fee Claims, Shoppers Charges Claims, and Professional Allowance Claims.

[648] In addition to the methodological errors identified by Shoppers, there are others. As noted above, the Plaintiffs submitted that if that if the Class were successful on more than one claim, the total damages would be materially greater than the sum of the individual calculations. The truth is that it is indeterminate what would be the effect of infusing the Associates Earnings formula in a top-down calculation that simultaneously: (a) attributed the income from non-statute barred Professional Allowances, which attribution would not only increase the gross revenues of some of the stores but would also increase the Shoppers Charges that were measured against gross revenues; (b) deducted the wrongfully charged Optimum Fee and the excess Shoppers Charges that were at the same time being adjusted by the infusion of Professional Allowances in some but not all stores.

[649] Moreover, there are factual realities that stand against the possibility of any aggregate damages methodology being developed for the Class Period. For the years between 2002 and the introduction of the New Financial Model, the settlement of the Associates' Earnings was entirely idiosyncratic based on a meeting between the Associate and a representative of Shoppers's management. As indicated above, throughout the Class Period, the number of Associates churned with recruitments and with 559 Associate departures. There were also Associates exchanging stores and Associates operating more than one store that impaired the possibility of an aggregate assessment.

[650] At the certification motion, I did not certify aggregate damages as a certifiable common issue. At that time, the putative Class Members conceded that an aggregate award was not methodologically possible. The Class Members, however, now submit that notwithstanding that determination, they are entitled to seek aggregate damages at a common issues trial or on a summary judgment motion.

[651] I agree that the Plaintiffs are entitled to ask for an award of aggregate damages. The case law establishes that a common issues judge may award aggregate damages notwithstanding that aggregate damages were not certified as a common issue.[104]

[652] I do not doubt the authority of these cases, but the critical aspect of them is that the evidence at the common issues trial or summary judgment motion in those cases demonstrated that: (a) the requirements of s. 24 of the *Class Proceedings Act, 1992* that empower the court to award aggregate damages were satisfied including that there is a methodology to calculate the aggregate damages; and (b) the Class Members had proven and quantified aggregate damages.

[653] However, as the discussion and analysis above and below will reveal, in the immediate case: (a) the prerequisites for an aggregate award have not been satisfied; (b) the Plaintiffs have not established a methodology for quantifying aggregate damages because the assessment of damages is inherently idiosyncratic; and (c) the Plaintiffs have not established a methodology for

[104] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115; *Ramdath v. George Brown College*, 2014 ONSC 3066, aff'd 2015 ONCA 921; *Pioneer Corp. v. Godfrey*, 2019 SCC 42.

even for a base line minimum award because it is not the case that each and every Class Member suffered damages consequent on Shoppers's liability.

[654] I do not doubt the sagacity of Justice Belobaba, among other judges, and the judges of the Court of Appeal who have noted the attractiveness of aggregate damages as a means to provide access to justice, behaviour modification, and judicial efficiency, which are the salutary aims of the class proceedings regime in Ontario and across the country.[105] But as attractive as aggregate damages may be to the social utility of class proceedings, the Class Members must demonstrate a global top-down methodology and the Class Member must demonstrate that prerequisites for an aggregate award have been satisfied and that the evidence supports an aggregate award.

[655] In the immediate case, there is no reason to change my mind that the Class Members do not have a class-wide claim for aggregate damages. There is no methodology for aggregate damages or for a minimum base-line award of aggregate damages with more damages to follow at individual issues trials. In the immediate case, given the idiosyncratic nature of the Class Members' claims, the route to access to justice is individual issues trials to assess damages.

[656] In any event, the viability of the class actions regime does not depend on the availability of aggregate damages. I appreciate that in *Ramdath v. George Brown College*,[106] a decision affirmed by the Court of Appeal, Justice Belobaba stated at paragraph 1:

> 1. Aggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards should be more the norm, than the exception. Otherwise, the potential of the class action for enhancing access to justice will not be realized.

[657] I agree with Justice Belobaba's statement, but the statement's conditional modality needs to be kept in mind. Aggregate damages should be available **if** all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members and if there is a viable methodology. In the immediate case, the defendant's monetary liability cannot be determined without proof by individual members. Fairness and reasonability is not possible in the immediate case because the Plaintiffs 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.

[658] In the immediate case, it is not possible to accurately assess the quantum of damages on an aggregate basis given the Associate Earnings Model, and its effect on the quantum of damages.

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[105] *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053; *Létourneau c. JTI-MacDonald Corp*., 2015 QCCS 2382, aff'd 2019 QCCA 358; *Ramdath v. George Brown College*, 2014 ONSC 3066, aff'd 2015 ONCA 921.

[106] 2014 ONSC 3066, aff'd 2015 ONCA 921. See also *Nelson v. Telus Communications Inc. (Part 3)*, 2021 ONSC 24 at para. 79; *Francis v. Ontario*, 2020 ONSC 1644 at para. 623; *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867 at para. 298; *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053 at para. 480.

[659] As I noted at the certification motion, the Plaintiffs conceded that their claim for unjust enrichment and their claim for breach of contract for breaches of the Associates Agreements required individual assessments of the flow of the Professional Allowances through the revenue stream of each Shoppers's store.

[660] Thus, at the certification motion, I concluded that assuming liability were established, then there would still need to be individual trials to calculate the damages. The evidence adduced for the summary judgment motion confirms that the conclusion I made then still is sound; there is no basis for an aggregate damages award in the immediate case.

[661] Mr. Rosen opined that his methodology addressed all the contingencies of the Associate Earnings and Service Fee calculations of the Associates Agreements. For example, he calculated how the overcharges for Shoppers Charges would on a top-down basis impact Associate earnings. He applied the same methodology to quantify the aggregate loss to the PA Class for the withheld Professional Allowances. Mr. Rosen's aggregate damages assessments were performed on an annual basis and then the annual assessments were added together to provide the total aggregate assessment of Shoppers' liability. Mr. Rosen used his methodology to calculate Shoppers' liability: (a) for each year from 2002 through 2010 for the Optimum Fee Claims; (b) for every year in the almost thirteen year Class Period for the Shoppers Charges Claims; and (c) for each year from 2006 to 2013 for the Professional Allowance Claims.

[662] I am persuaded that Mr. Rosen's methodology is flawed. In my opinion, his attempt to provide an aggregate damages award failed. Indeed, I am convinced that an aggregate assessment is not possible in the immediate case.

[663] Increasing gross revenues by: (a) not charging the Optimum Fee; (b) reducing the Shoppers Charges to just the costs of the services; and (c) infusing Professional Allowances as revenue would in turn effect the calculation of the Shoppers Charges and Mr. Rosen's proposed top down global methodology does not address this cascading effect. The churning of Associates, mentioned above, is not adequately addressed by Mr. Rosen's methodology. The more informal basis that profits were shared from 2002 until 2006, when radical changes were made to the profit sharing model are not adequately addressed in Mr. Rosen's methodology.

[664] The impact, if any, on store profits of the Optimum Fee Claims, the Store Charges Claims and the Professional Allowance Claims is dependent on a number of factors including: (a) the store's planned and actual profits for each year; (b) the amount of the Associate Guarantee applicable to the Associate in that year; (c) whether the Associate moved between stores during the year; (d) whether the store was physically relocated; (e) whether a store had more than one Associate in any given year; (f) whether the Associate had any specific earnings arrangements with Shoppers; and (g) whether any additional adjustments were made to Store Profitability and Associate Earnings.

[665] In the case of Professional Allowances, the amount attributable to each store as revenue would depend on store-specific information such as: (a) the quantity of generic drugs dispensed at the store during the year; (b) how many prescriptions of generic drugs were paid under the ODB versus non-ODB Plan, and (c) the store-level direct patient care expenses at the store.

[666] Attributing the totality of the professional allowances or any alleged excess in Store Charges to all the stores on an annual basis would not necessarily increase all the profits for the Associates to share. An overall increase to Associate earnings cannot be calculated without considering the specific circumstances of each store. Determining the amount, if any, of the profit to be shared requires an individual analysis on a year-by-year basis.

[667] The necessity of: (a) adjusting Mr. Rosen's proposed top town global methodology to address the cascading effect of these revenue and expense factors and the churning of Associates; (b) adjusting Mr. Rosen's methodology to filter out the statute-barred claims; (c) performing Mr. Rosen's top down global methodology on an annual basis for the almost thirteen year Class Period, makes it highly unlikely that a methodology could be found for what is an inherently idiosyncratic assessment of damages. But more to the point, for present purposes, I am not convinced that Mr. Rosen developed a methodology appropriate for a top-down analysis in the immediate case.

[668] In contrast, a store-by-store calculation of damages for the Optimum Fee Claims, the Shoppers Charges Claims and the Professional Allowances Claims would be consistent with the principles of damages calculation for breach of contract discussed above.

[669] In this last regard, I do need to point out that I disagree with Shoppers's argument that a damages calculation would require a before and after comparison of the performance of the individual store. Shoppers argued that the "before financial position" would be that the individual store participated in the Optimum Program and secured its benefits but was charged an unauthorized fee and the "after financial position" would be that the store did not participate in the Optimum Program. Relying on *Bookman v. U-Haul Co. (Canada)*,[107] a case about accounting for asset depreciation expenditures in a damages calculation, and *Sayles v Acton*,[108] a case about damages for the delay in closing a real estate transaction, Shoppers submitted that this before and after calculation was necessary to ensure that the Associate was not in a better position by the breach than it would be had there been no breach.

[670] There is no merit in Shoppers's damages calculation argument. *Bookman v. U-Haul Co. (Canada)* and *Sayles v Acton* concern entirely different damages situations. In the immediate case, there is no before or after position in which the Associate would not receive the benefit of the Optimum Program, which was a contractual benefit that it was entitled to receive in any event. The breach is not that the Associate was provided with a service that it was not entitled to receive and was charged for the service; the breach is simply that the Associate was charged for a service that it ought not to have been charged for. Much the same thing can be said about the alleged excess charges for the Shoppers Charges Claims.

[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 *Class Proceedings Act, 1992* that will simplify the assessment of damages.

[672] I doubt that Shoppers ever planned a poison pill in the Associates Agreement that would foreclose an aggregate assessment of damages, but there would be nothing nefarious if it did have

[107] (2007), 229 OAC 194 (Div.Ct.).
[108] (2005), 139 ACWS (3d) 1108 (S.C.J.).

that plan because the *Class Proceedings Act, 1992* envisions that class proceeding may move from a common issues determination to individual issues trials. The avoidance of an aggregate assessment is not a means to prevent access to justice for the injured class member.

[673] The Plaintiffs submitted that individual issues trials would be a denial of access to justice because Shoppers no longer had the data from which an individual Associates could prove his or her claim. Although I asked during the course of the oral argument why individual Associates, who would have filed income tax returns and who may have kept copies of the profit and loss statements and other reconciliation financial data provided by Shoppers on an annual basis would not be able to prove their individual claims, or whose personal accountants may have retained information, would be unable to prove a claim, I was never provided with an answer.

[674] I shall return to this topic later in these Reasons for Decision, but there is no merit to the Plaintiffs' self-serving, *in terrorem,* and incorrect argument that individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992* would not provide access to justice and behaviour modification, the main goals of the class proceedings regime because the evidence to prove the claims is no longer available. As I shall demonstrate below, the evidence is undoubtedly available for individual Class Members to come forward and prove their claims.

[675] For the above reasons, I conclude that aggregate damages are not available in the immediate case for any of the claims advanced by the Plaintiffs and the Class Members.

3. Mr. Jaishankar's Bottom Up Comparative Damages Assessment

[676] The accuracy of Mr. Rosen's methodology was tested by Mr. Jaishankar. Using information gathered by Mr. Mariano, Mr. Jaishankar did a bottom-up analysis for the stores using 2012 as the sample year. The year 2012 was chosen because it was the only year for which Shoppers retained store-by-store data.

[677] Mr. Jaishankar undertook two different analyses. Using individual store data, he reviewed each of the 2012 Class Members' planned and actual store profitability, and infused the revenues with the Professional Allowances, which would have been available just for the Ontario stores, and with the excess in Store Charges attributable to each store. He did not make any adjustment for the Optimum Fee. With the infusion of funds, he determined the increase in the amount of profits, if any, that would be available to the Associate. Then, Mr. Jaishankar added up the individual determinations.

[678] Mr. Jaishankar undertook two analyses because in the first analysis, Mr. Jaishankar made no adjustment of the planned store profitability (the "no-hindsight analysis") and in the second analysis, with the benefit of hindsight ("the hindsight analysis"), he assumed that Shoppers would have adjusted the store's planned profitability with the anticipation that it would remit and not keep the Professional Allowances and he implemented that assumption into his analysis.

[679] Thus, for the sample year of 2012, Mr. Jaishankar performed two separate store-by-store bottom-up analyses and he compared the outcome to Mr. Rosen's top-down analysis.

[680] Pausing here in the discussion, I have four preliminary observations about Mr. Jaishankar's evidence.

[681] First, I note that the Plaintiffs submitted that no or little weight should be given to Mr. Jaishankar's evidence because he was retained to provide partisan evidence based on the curated evidentiary inputs from Mr. Mariano. In my opinion, this criticism of Mr. Jaishankar is without substance or merit. By all appearances, Mr. Jaishankar honoured his oath as an expert witness. He honestly reported that his opinion was that Mr. Rosen's top-down analysis significantly overstated Shoppers's liability to the Associates. He honestly reported his opinion about the outcome of a bottom-up assessment of Shoppers's exposure to liability.

[682] Second, I disagree with Shoppers's submission that Mr. Jaishankar used more accurate data for his bottom-up analysis and that Mr. Rosen can be faulted for incorrect and/or out-of-date data in his top-down analysis for the year 2012. For the purposes of what was in effect an analytical forensic experiment, Mr. Jaishankar's data may have been more accurate than Mr. Rosen's data, however, the data was sufficiently close so that the competing experiments remained comparable.[109]

[683] I see no fault in Mr. Rosen's use of the White Books. Mr. Rosen used a document titled "2012 Corporate Year P&L" for aggregate planned store profitability figures based on the so-called White Books. That document reflected planned profits as of the beginning of the 2012 year, but it did not include any updates made over the course of 2012. Those updates were reflected in the store-by-store data relied upon by Mr. Jaishankar (in a document referred to as the "Earnings Spreadsheet"). It is true that the updated planned store profitability would have been used to determine Associate Earnings during the Class Period; however, not using the updated planned profitability is not a methodological error. Had Mr. Rosen's methodologically otherwise been sound, then its results could be adjusted by the proper inputs of data.

[684] Third, I do not find Mr. Jaishankar's hindsight analysis helpful. Indeed, I find it to be wrong. As noted above, I disagree with Shoppers's submission that Mr. Rosen made a methodological error by not retroactively adjusting planned profits with the benefit of hindsight. Rather, it was Mr. Jaishankar who erred by applying a methodology that would allow a contract breaching party to recalibrate the damages assessment after the fact. This error, however, does not impugn Mr. Jaishankar's no-hindsight analysis.

[685] Fourth, using individual store date for each of the 2012 stores to make adjustments to a store's planned profits, Mr. Jaishankar made some exceptions for particular cases because it was too complicated to do the calculations with the benefit of hindsight. Mr. Jaishankar did, however, test these exceptions and he concluded that they did not materially affect his overall calculations. The Plaintiffs criticized Mr. Jaishankar's assumptions and his conclusion that they would not materially affect his overall calculations. Since, I find Mr. Jaishankar's no-hindsight analysis wrong and unhelpful, it is not necessary to rule on whether its assumptions about a store's planned profits were also wrong.

[686] Returning to the discussion, comparing his two bottom-up analyses to Mr. Rosen's top-down methodology, Mr. Jaishankar 's opined that Mr. Rosen's conclusions of an aggregate award

[109] Mr. Jaishankar delivered his initial expert report in December 2021. Mr. Rosen delivered a reply report in February 2022 in which he observed that the data Mr. Jaishankar relied on did not reconcile to the White Books. Mr. Mariano then located additional data and Mr. Jaishankar delivered a supplementary expert report with calculations based on the data provided by Mr. Mariano.

for 2012 overstated Shoppers's liability by 36% if no adjustments were made to planned profits (the no-hindsight analysis) and overstated Shoppers's liability by 437% with the benefit of hindsight in the planned profits for the store.

[687] I give no weight to Mr. Jaishankar's opinion that he has demonstrated a 437% overstatement in the amount of a global aggregate damages award in comparison to the aggregation of individual damage assessment on a store-by-store analysis. However, I do conclude that Mr. Jaishankar's no-hindsight test of the accuracy of Mr. Rosen's top-down methodology does demonstrate that Mr. Rosen's methodology overstates Shoppers's liability by 36% for the sample year. This is a meaningful comparison. In this regard, it must be recalled that Mr. Jaishankar did a bottom up calculation using Mr. Rosen's methodology of infusing the Associates' claims into the Associates' Earnings/Service Charge calculations on a store-by-store basis instead of the top-down analysis that used aggregated figures derived from Shoppers's enterprise-wide data.

[688] Two minor observations need to be made about Mr. Jaishankar's bottom-up no-hindsight analysis. First, his computation for 2012 has not been adjusted for statute-barred claims or for the fact that the Professional Allowances claim was only successful for the 2002 Associates Agreement. Second, his conclusion of a 36% overstatement of liability cannot be extrapolated to other years of the Class Period.

[689] In any event, more significant than the accuracy of Mr. Jaishankar's bottom-up analyses, if Mr. Jaishankar had not done his bottom up comparative analysis, I still would have concluded that the Plaintiffs had not proven that there was a feasible methodology for an aggregate damages assessment in the circumstances of the immediate case.

[690] Indeed, in my opinion, an aggregate assessment is an inherent impossibility in the circumstances of the immediate case. If I am mistaken about the soundness of Mr. Jaishankar's without hindsight analysis and it demonstrates nothing, I still would have concluded that the Plaintiffs had not demonstrated a sound methodology that could and would produce an award that was all of fair, reasonable, and just, and that would not overstate Shoppers's liability.

[691] Somewhat ironically from Shoppers's perspective, Mr. Jaishankar's store-by-store analysis demonstrates that many stores did indeed suffer damages for which Shoppers could be liable.

[692] Those damages could be determined at individual issues trials, a topic to which I shall discuss later in these Reasons for Decision.

T. Legal Background: The Principles of Contract Interpretation

[693] As noted at the outset of these Reasons for Decision, the immediate case is at its core an action about seven alleged breaches of contract involving the 2002 Associates Agreement and the 2010 Associates Agreement. In this part of my Reasons for Decision, I shall describe the principles of contract interpretation which along with the franchise law discussed in the next part of the Reasons are the legal background for the analyses of the merits of Plaintiffs' Optimum Fee Claims, the Shoppers Charges Claims, and the Professional Allowance Claims.

[694] The rules of contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement.[110]

[695] The words of a contract must be interpreted in context. Although, with a few exceptions for situations of ambiguity, evidence of negotiations and of the parties' subjective intent is not admissible, in interpreting a commercial contract, the court should have regard to the surrounding circumstances; that is, the factual background and the commercial purpose of the contract.[111]

[696] Provisions should not be read in isolation but in harmony with the agreement as a whole, and the clauses of the agreement must be given an interpretation that takes the entire agreement into account.[112] The court should read the contract in a manner that gives meaning to all of its terms"[113] and the court should avoid an interpretation that would render one or more of its terms ineffective".[114]

[697] In searching for the intent of the parties, the court should give particular consideration to the terms used, by the parties, the context in which they are used, and the purpose sought by the parties in using those terms.[115]

[698] In *Sattva Capital Corp. v. Creston Moly Corp.*,[116] in the Supreme Court of Canada, Justice Rothstein explained that all contracts must be interpreted in a factual nexus. Evidence of context is always admissible whether or not the language of the agreement is ambiguous. In *Sattva Capital Corp.*, Justice Rothstein stated at paragraphs 56-61 [citations omitted]:

> *The Role and Nature of the "Surrounding Circumstances"*
>
> 56. I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. […]
>
> 57. While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement […]. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract

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[110] *Consolidated-Bathurst Export Ltd v. Mutual Boiler & Machinery Insurance Co.,* [1980] 1 S.C.R. 888.
[111] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53; *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.); *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.).
[112] *Canadian Newspapers Co. v. Kanda General Insurance Co*. (1996), 30 O.R. (3d) 257 at p. 270 (C.A.), leave to appeal refd. [1996] S.C.C.A. No. 553; *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12); *Scanlon v. Castlepoint Dev. Corp*. (1993), 11 O.R. (3d) 744 (C.A.); *Hillis Oil and Sales Limited v. Wynn's Canada,* [1986] 1 S.C.R. 57*; McClelland and Stewart Ltd v. Mutual Life Assurance Co. of Canada*, (1981) 2 S.C.R. 6.
[113] *Trade Finance Solutions Inc. v Equinox Global Limited*, 2018 ONCA 12; *Salah v Timothy's Coffees of the World Inc*, 2010 ONCA 673; *Van Ginkel v QGZ Ltd,* [2009] O.J. No 6204.
[114] *Trade Finance Solutions Inc v. Equinox Global Limited*, 2018 ONCA 12; *Salah v Timothy's Coffees of the World Inc*, 2010 ONCA 673; *BG Checo International Ltd v British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12.
[115] *Frenette v. Metropolitan Life Insurance Co*., [1992] 1 S.C.R. 64.
[116] 2014 SCC 53.

> […]. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement […].
>
> 58. The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract […], that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the *parol evidence rule* […] this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" […]. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*
>
> 59. It is necessary to say a word about consideration of the surrounding circumstances and the *parol* evidence rule. The *parol* evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing […].
>
> 60. The *parol* evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. […]
>
> 61. […] it is sufficient to say that the *parol* evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

[699] Justice Rothstein was articulating traditional and venerable principles of contract interpretation. The rules for the interpretation of contracts direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement.[117] The court is directed not to read provisions in isolation but in harmony with the agreement as a whole.[118] The court is directed to consider the terms used by the parties, the context in which they are used, and the purpose sought by the parties in using those terms.[119]

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[117] *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888.
[118] *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12); *Scanlon* v. *Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.); *Hillis Oil and Sales Limited* v. *Wynn's Canada*, [1986] 1 S.C.R. 57; *McClelland and Stewart Ltd.* v. *Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6.
[119] *Frenette* v. *Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647.

[700] The idea that words take meaning from their immediate context is sometimes known by the Latin maxim *noscitur a sociis*. A simple example of the importance of context is provided by the word "demise", which, depending on the accompanying language, may mean a "death", a "conveyance" or a "lease".

[701] Justice Rothstein was explaining long established law about the use of extrinsic evidence. In a much-cited passage, in the leading English authority, *Reardon Smith Line Ltd. v. Hansen-Tangen*,[120] which is quoted at paragraph 47 of *Sattva Capital Corp.*, Lord Wilberforce stated:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed … In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[702] Five years earlier, in *Prenn v. Simonds*,[121] Lord Wilberforce stated:

> "[T]he time has long since passed when agreements … were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations." English law was not to be considered to have been "left behind in some island of literal interpretation".

[703] Determining what constitutes the surrounding circumstances at the time of the execution of the contract is a question of fact. The surrounding circumstances are the background facts and information that would have been within the knowledge of both parties, including the purpose of their contracting, the nature of the relationship to be constituted by the contracting, the customs of the market and the industry, and other matters that would have affected how the parties would understand the language of their contract.[122]

[704] Evidence of the subjective intentions of the parties cannot be admitted to add to, subtract from, vary or contradict a contract that has been wholly reduced to writing.[123] Contextual evidence is limited to objective contextual evidence known or reasonably capable of being known by the parties at the time of the execution of the agreements, including, among other things, evidence of the nature or custom of the market or industry, evidence of the commercial purpose and objectives of the agreements, and evidence of the objective intention of the parties.[124] Contextual evidence

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[120] [1976] 3 All E.R. 570 (H.L.).
[121] [1971] 3 All E.R. 237 (H.L.).
[122] *IFP Technologies (Canada) v. EnCana Midstream and Marketing*, 2017 ABCA 157, leave to appeal to the S.C.C. ref'd [2017] S.C.C.A. No. 303; *Ledcor Construction Ltd.* v. *Northbridge Indemnity Insurance Co*., 2016 SCC 37; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *King v Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80; *Geoffrey L. Moore Realty Inc. v The Manitoba Motor League*, 2003 MBCA 71; *Investors Compensation Scheme Ltd. v West Bromwich Building Society*, [1998] 1 W.L.R. 896 913 (H.L).
[123] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53.
[124] *Lake Louise Limited Partnership v. Canada Corp*. *of Manitoba Ltd*., 2014 MBCA 61; *Coventree Inc. v. Lloyds Syndicate 1221 (Millennium Syndicate),* 2012 ONCA 341; *King v. Operating Engineers Training*, 2011 MBCA 80.

does not include evidence of the subjective intention of the parties, evidence of the negotiations, or evidence of the subsequent conduct of the parties after the execution of the agreements."[125]

[705] Over the centuries, courts have developed numerous canons or maxims of contractual and statutory interpretation or construction. The canons of interpretation typically have Latin names. For the summary judgment motion, as the discussion below will reveal, two of these maxims are particularly pertinent to the resolution of the motions.

[706] The first of these principles is the *ejusdem generis* ("of the same kind or nature") maxim, which postulates that when a contract term (or a statutory provision) sets out a list of specific words that are followed by a general term, it will normally be appropriate to limit the general term to the genus of the enumeration that precedes it.[126]

[707] The second of these principles is the *expressio unius est exclusio alterius* "(the expression of one thing is the exclusion of the other), maxim, which postulates that when a contract term (or a contract provision) expresses one type of thing it excludes other types of things.[127]

[708] In the immediate case, the *contra proferentem rule* is also pertinent. This rule postulates that if there are competing interpretations, ambiguities about how a contract should be interpreted, and the ambiguities cannot be resolved by other rules of construction, then resort may be had to the *contra proferentem* rule, i.e., that the language of the contract will be construed against the party that inserted the provision to the other with no opportunity to modify its meaning.[128]

U. Legal Background: Franchise Law and Good Faith and Fair Dealing and the Performance of Contracts

[709] In this part of my Reasons for Decision, I shall describe the principles of franchise law, which along with the principles of contract law interpretation discussed in the immediately preceding part of these Reasons, are the legal background for the analyses of the Plaintiffs' claims against Shoppers.

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[125] *Lake Louise Limited Partnership v. Canada Corp. of Manitoba Ltd*., 2014 MBCA 61; *Lloyds Syndicate 1221 (Millennium Syndicate) v. Coventree Inc.*, 2012 ONCA 341; *King v. Operating Engineers Training*, 2011 MBCA 80; *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129.

[126] *Kim v. Ottawa (City)*, 2022 ONSC 4648 (Div. Ct.); *Kroetsch v. Hamilton (City) (Integrity Commissioner)*, 2021 ONSC 7982 (Div. Ct.); *Hamilton (City) v. Ontario (Ombudsman)*, 2018 ONCA 502; *Schnarr v. Blue Mountain Resorts Ltd*., 2018 ONCA 313 at para. 52; *National Bank of Greece (Canada) v. Katsikonouris*, (1990), 74 D.L.R. (4th) 197 at p. 203 (S.C.C.).

[127] *Nolet v. Fischer*, 2020 ONCA 155; *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2019 ONCA 508; *Cadieux (Litigation guardian of) v. Cloutier*, 2018 ONCA 903; *Schnarr v. Blue Mountain Resorts Ltd.*, 2018 ONCA 313; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63; *Marche v. Halifax Insurance Co.*, 2005 SCC 6; *University Health Network v. Ontario (Minister of Finance)* [2001] O.J. No. 4485 (C.A.), leave to appeal ref'd, [2002] S.C.C.A. No. 23, *National Bank of Greece (Canada) v. Katsikonouris*, (1990), 74 D.L.R. (4th) 197 at p. 203 (S.C.C.).

[128] *Scanlon* v. *Castelpoint Dev. Corp.* (1992), 11 O.R. (3d) 744 (C.A.); *Hillis Oil and Sales Limited* v. *Wynn's Canada*, [1986] 1 S.C.R. 57; *McClelland and Stewart Ltd.* v. *Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Reliance Petroleum Limited* v. *Stevenson* [1956] S.C.R. 936.

[710] Franchise agreements are contracts of adhesion.[129] As described in Frank Zaid, *Franchise Law* [130] at page 15, a franchise agreement has certain identifying core features:

> Franchising is fundamentally a form of business investment and ownership governing the distribution and sale of goods or services. In a franchise, the franchisor typically develops a business system, in association with a trademark, and licenses the use of that system to a franchisee, for a period of time. The franchisee is required to conform to the standards of the system and to pay consideration to the franchisor, usually as a combination of an initial fee and ongoing payments in the nature of royalties based on gross sales of the products and services associated with the franchise system.

[711] Because the franchisee agrees to operate under the uniform system or regime of the franchisor, which systems controls the goods and services to be offered to customers and how and at what costs and prices those goods and services are to be offered to customers, one of the core features of a franchise is that the franchisee loses the freedom of choice of how to operate his or her business that normally is the hallmark of an independent businessperson.[131]

[712] Section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000* imposes a statutory duty of good faith and fair dealing as between the franchisor and the franchisee. Subsection 3(2) gives a party to a franchise agreement a right to damages against the other party for the breach of the duty of fair dealing in the performance and enforcement of the agreement. Subsection 3(3) provides that the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

[713] The *Arthur Wishart Act* is remedial legislation, designed to address the power imbalance between franchisor and franchisee, and it is entitled to a generous interpretation to give effect to its purpose.[132]

[714] Section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000* and the comparable provisions in Alberta, Manitoba, New Brunswick, and Prince Edward Island are a codification of

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[129] *Fairview Donut Inc v. The TDL Group Corp.*, 2012 ONSC 1252 at para. 415, aff'd 2012 ONCA 867; *Landsbridge Auto Corp. v. Midas Canada Inc.* [2009] O.J. No. 1279 (S.C.J.); *Shelanu Inc. v. Print Three Franchising Corp*. (2003), 64 O.R. (3d) 533 at para. 58 (C.A.).

[130] (Toronto: Irwin Law Inc., 2005). Adopted by Strathy, J., as he then was, in *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 178, aff'd 2012 ONCA 867.

[131] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at paras. 181-2, aff'd 2012 ONCA 867.

[132] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at para. 496; *Trillium Motor World Ltd. v. General Motors o[Canada Ltd.*, 2011 ONSC 1300 at paras. 31, 74; TA & K Enterprises Inc. v. Suncor Energy Products Inc., (2010] O.J. No. 5532 at para. 41*; Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 at para. 26 (S.C.J.), affd, 2010 ONCA 673.

the common law.[133] At common law, parties to commercial contracts owe duties of honest performance and must exercise contractual discretion in good faith.[134]

[715] The determination of whether a franchisor or franchise has breached it duties of good faith and fair dealing is a fact specific determination requiring an examination of the franchise contract made by the parties and all the circumstances of the particular case.[135]

[716] In assessing whether a party has demonstrated good faith and fair dealing in the performance and enforcement of the agreement, the party's conduct must be considered in the context of and in conjunction with the contract that the parties have made.[136]

[717] The duties of good faith and fair dealing are imposed to secure the performance of the contract the parties have made, and the duties are not intended to amend or alter that contract or to replace the contract.[137]

[718] The statutory or common law duties of good faith and fair dealing do not preclude a party acting in a self-interested way provided that the party does not ignore the legitimate interests of the other contracting party.[138]

[719] A party breaches the duty of good faith and fair dealing when it acts in bad faith, which is conduct that is contrary to community standards of honesty, reasonableness, or fairness.[139]

[720] The content of the duty of good faith and fair dealing includes not acting in a way that eviscerates or defeats the objectives of the agreement that the parties have made.[140]

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[133] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 496, aff'd 2012 ONCA 867; *Landsbridge Auto Corp. v. Midas Canada Inc*., [2009] O.J. No. 1279 at paras. 24, 59 (S.C.J.); *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 at para. 66 (S.C.J.); *Shelanu Inc. v. Print Three Franchising Corp*. (2003), 64 O.R. (3d) 533 (C.A.); *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 at para. 114 (Ont. S.C.J.); *Imasco Retail Inc. (c.o.b. Shoppers Drug Mart) v. Blanaru* (1995), 104 Man. R. (2d) 286 (Q.B.), affd (1996), 113 Man. R. (2d) 269 (C.A.).

[134] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7; *Bhasin v. Hrynew*, 2014 SCC 71.

[135] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 498, aff'd 2012 ONCA 867.

[136] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 499, aff'd 2012 ONCA 867; *IT/NET Inc. v. Cameron*, [2006] O.J. No. 156 (C.A.); *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No 4656 (C.A.), rev'g [2002] O.J. No 4650 (S.C.J.)

[137] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 499, aff'd 2012 ONCA 867; *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 at paras. 68-72 (S.C.J.); *Pointts Advisory Ltd. v. 754974 Ontario Inc*., [2006] O.J. No. 3504 at para. 55 (S.C.J.); *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No 4656 (C.A.), rev'g [2002] O.J. No 4650 (S.C.J.).

[138] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 499, aff'd 2012 ONCA 867; *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 at paras. 68-72 (S.C.J.).

[139] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 499, aff'd 2012 ONCA 867; *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 at paras. 68-72 (S.C.J.).

[140] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 502 aff'd 2012 ONCA 867; *Landsbridge Auto Corp. v. Midas Canada Inc*., [2009] O.J. No. 1279 at para. 17 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc*., [2008] M.J. No. 316 at para. 272 (Q.B.) *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No 4656 at para. 53 (C.A.), rev'g [2002] O.J. No 4650 (S.C.J.); *Katotikidis v. Mr. Submarine Ltd.*, [2002] O.J. No. 1959 at para. 72 (S.C.J.); *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (S.C.T.D.), affd (1992), 112 N.S.R. (2d) 180, 307 (C.A.); *Greenberg v. Meffert* (1985), 50 O.R. 2d) 755 (C.A.).

[721] Pursuant to the duties of good faith and fair dealing, where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.[141]

V. Liability: Optimum Fee Claims

1. The Parties' Arguments

(a) The Plaintiffs' Submissions

[722] The Associates claim compensation for having been charged a fee for the Optimum Program under the 2002 Associate Agreement. They submit that the 2002 Associates Agreement does not permit Shoppers to charge Associates a fee for this loyalty program.

[723] The Associates argue that Article 11.05 (iv) of the 2002 Associates Agreement requires Associates to pay fees for "other services from time to time rendered by [Shoppers] to the Associate that are not included in the services furnished by [Shoppers] to Associates generally at the present time" and they submit that the Optimum Program was included in the services furnished by Shoppers at the time of the negotiation of the 2002 Associates Agreement. Thus, the Optimum Program was an "included service" for which there was no authorization to charge an additional fee pursuant to s. 11.05 (iv).

[724] With respect to the Optimum Fee, there is no claim with respect to the 2010 Associates Agreement. Shoppers revised the Associate Agreement in 2010 to include a specific provision permitting Shoppers to charge Associates a fee for "loyalty programs".

(b) Shoppers's Submissions

[725] Shoppers pleads that it was expressly permitted to charge the Optimum Fee pursuant to Article 11.05 (iv) of the 2002 Associate Agreement because the language of the 2002 Agreement had been in place since at least 1992. Because the Optimum Program was introduced in 2000, Shoppers argues that it was one of the "services from time to time rendered by [Shoppers] to the Associates that [were] not included in the services furnished by [Shoppers] to Associates generally at the present time ...", within the meaning of the Associates Agreement for which it levied a fee.

[726] Shoppers also submits that the Associates are estopped from claiming damages as a result of paying the Optimum Fee under the 2002 Associate Agreement. Shoppers submits that the Associates are estopped because they represented their agreement to pay the Optimum Fee to Shoppers throughout the term of the 2002 Associates Agreement by their conduct. The estoppel argument is set out in paragraph 116 of Shoppers's factum as follows:

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[141] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 502 aff'd 2012 ONCA 867; *Landsbridge Auto Corp. v. Midas Canada Inc*., [2009] O.J. No. 1279 at para. 17 (S.C.J.); *CivicLife.com Inc. v. Canada (Attorney General)*, [2006] O.J. No. 2474, 215 at para. 50 (C.A.); *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 at para. 96 (C.A.).

> 116. The plaintiffs' conduct and positions throughout the term of the 2002 Associate Agreement reflected that they understood that the Optimum Fee was properly chargeable under the 2002 Associate Agreement. The plaintiffs knew even prior to 2002 that they were being charged a fee in respect of the Optimum Program and paid it throughout. It strains credulity to suggest they believed or understood that Shoppers was not permitted to charge the Optimum Fee but continued to pay it without complaint. Indeed, Mr. Spina expressly testified during certification that Shoppers was entitled to charge the Optimum Fee under the 2002 Associate Agreement, just under a different provision. Further, the plaintiffs are estopped from claiming damages they allege they incurred as a result of paying the Optimum Fee under the 2002 Associate Agreement, having represented their agreement to pay the Optimum Fee to Shoppers through their conduct.

2. Analysis

(a) The Interpretation of Article 11.05

[727] I agree with Shoppers's submissions, and I disagree with the Plaintiffs' argument about the interpretation of Article 11.05 of the 2002 Associate Agreement.

[728] The Plaintiffs' argument leads to *a reductio ad absurdum* conclusion. The Plaintiffs do not dispute that at the time that the Optimum Fee was introduced in 2000, it fit within the then current contractual language entitling Shoppers to charge fees in respect of Services "that [were] not included in the services furnished by the Company to Associates generally at the present time." The Plaintiffs do not dispute that the relevant language of the Associate Agreement at the time the Optimum Fee was introduced did not differ in any material way from the language of the 2002 Associate Agreement. The factual nexus at the time of the introduction of the 2002 Associates Agreement was that neither the Associates nor Shoppers would have understood that the right to charge the Optimum Fee had changed and was no longer permissible.

[729] Thus, the Plaintiffs' argument in effect is that the Optimum Fee was lawfully chargeable up until the introduction of the 2002 Associates Agreement but notwithstanding the continuation of the highly beneficial Optimum Program, the program service became a freebie with the introduction of the 2002 Associates Agreement that had the same language as was used when Shoppers was levying a charge. This is *reductio ad absurdum* and more to the point, the Plaintiffs argument does not properly interpret Article 11.05 in its factual nexus at the time of contracting.

[730] Article 11.05 of the 2002 Associate Agreement provides that the Associate agrees that the payments required for certain defined services and for "other services […] rendered by the Company to the Associate that are not included in the services furnished by [Shoppers] to Associates generally at the present time, shall be in addition to the fees payable by the Associate." This language had been in the Associates Agreements since 1992. Thus, having regard to what the parties would have understood at the time of the contracting as affecting their understanding of the language of their contract, the Optimum Program was a service included in the services furnished by Shoppers at the time of the introduction of the 2002 Associates Agreement for which it could charge (and was charging) at the time of the introduction of the 2002 Associates Agreement.

[731] Therefore, Shoppers did not breach Article 11.05 of the 2002 Associates Agreement by charging an Optimum Fee. It follows further that Shoppers did not breach any duties of good faith or fair dealing in extracting the Optimum Fee.

(b) The Estoppel Argument

[732] Moreover, if the above conclusion is wrong, then I agree with Shoppers's argument that the Associates are estopped from alleging that there was a breach of the 2002 Associates Agreement by Shoppers's levying a fee for the Optimum Program.

[733] Estoppel has roots both in the common law and in equity,[142] and there are different types of estoppel or different circumstances where estoppels may arise. However, the doctrine of estoppel is bothered by an erratic terminology for the various types of estoppel. Terms such as evidentiary estoppel, issue estoppel, equitable estoppel, proprietary estoppel, promissory estoppel, estoppel *in pais*, estoppel by representation, estoppel by convention, acquiescence, and waiver are not used with precision or consistency. In the immediate case, the kind of estoppel that Shoppers is referring to is estoppel by representation, also called estoppel *in pais*.

[734] The elements of estoppel by representation were set forth in *Greenwood v. Martins Bank Ltd.* by Lord Tomlin, who stated:[143]

> The essential factors giving rise to an estoppel are I think:
>
> > (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
> >
> > (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
> >
> > (3) Detriment to such person as a consequence of the act or omission.
>
> Mere silence cannot amount to a representation, but when there is a duty to disclose different silence may become significant and amount to a representation.

[735] With the qualification that recent authorities accept that estoppels may concern not only statements of fact but also assurances about the future,[144] the Australian case of *Grundt v. Great Boulder Proprietary Gold Mines Ltd.*[145] is often cited as a useful statement about the principles of estoppel by representation. In this case, Dixon, J. stated:[146]

> The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure from an assumption of fact which he has caused another

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[142] P.M. Perell, *The Fusion of Law and Equity* (Toronto: Butterworths, 1990), chap. 11.
[143] [1933] A.C. 51 at p. 57.
[144] *Maracle v. Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652 at p. 656 (S.C.C.); *Wauchope v. Maida* (1971), 22 D.L.R. (3d) 142 at p. 148 (Ont. C.A.).
[145] (1937), 59 C.L.R. 641.
[146] (1937), 59 C.L.R. 641 at p. 674.

> party to adopt or accept for the purpose of their legal relations. [...] One condition appears always to be indispensable. That other must have so acted or abstained from acting-upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. […] [T]he real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original position will operate as a detriment.

[736] The preconditions for an estoppel by representation are manifestly satisfied in the immediate case. The Associates by word and deed represented that they were willing and eager participants in the Optimum Program, which was hugely important to the success of the franchise chain in which they were a part. Shoppers relied to its detriment on the words and deeds of the Associates that they were participants, supporters, and beneficiaries of the Optimum Program and that would pay the Optimum Charge. Relying on those words and deeds, Shoppers acted to underwrite the costs of the Optimum program. Shoppers incurred huge expenses relying on the words and deeds of the Associates. In short, Shoppers relied to its detriment on the words and deeds, the representations, of the Associates governed by the 2002 Associates Agreement.

[737] I conclude that the Associates are estopped from asserting that they are not liable to pay the Optimum Charge.

W. Liability: Shoppers Charges Claims

1. The Parties' Arguments

(a) The Plaintiffs' Submissions

[738] The Plaintiffs submit that Shoppers could not set any fee for the Shoppers Store Charges above the cost of the service connected to the fee. They submit that read in its entirety the Associates Agreements allowed for only one source of profit for Shoppers; i.e., the Shoppers' Service Fee.

[739] The Plaintiffs submit that reading the entirety of the Associates Agreements and most particularly Article 11.01, which provides for the Service Fee payable to Shoppers, entails that Shoppers was permitted to share in profits from the Associates' stores only through the Service Fee. It follows from this argument that the provisions of the Agreement that provide for Shoppers Charges are constrained by Article 11.01 of the Associates Agreements and the fees cannot include a profit element.

[740] The Plaintiffs submit that contrary to the Associate Agreements and Shoppers's duties of good faith, it engaged in secret double-dipping of store profits by embedding profit in the what the Associates have described as Cost Recovery Fees, but which I have referred to throughout as Shoppers Charges. The Plaintiffs submit that Shoppers' conduct violated its contractual obligation to set these fees using the good faith exercise of its judgment.

[741] Further, the Plaintiffs submit that allowing Shoppers to set each fee unilaterally, without disclosure, and with an embedded profit element would be a breach of Shoppers's duties of good faith and would be, in effect, a re-writing of the Associate Agreement and the overall franchise relationship.

[742] The Plaintiffs submit that Shoppers' conduct would break the very basis of the profit-sharing arrangement between the parties. The Plaintiffs submit that the remedy for the breach of Shoppers' duties of good faith would be the same as the remedy for breach of contract. They submit that they are entitled to damages for Shoppers' levying of excess fees for the Shoppers Charges.

(b) Shoppers's Submissions

[743] Shoppers observes that there is no express provision in either Associates Agreement that limits Shoppers to charging its fees for services at cost. Shoppers submits that its only obligation was to set the Store Charges in the good faith exercise of its judgment, which it submits it did.

[744] Shoppers submits that the Associate Agreements provided that "fee or fees to be charged to the Associate […] shall be such amount or amounts as [Shoppers] shall, in the good faith exercise of its judgment, determine." Shoppers submits that that is precisely what it did; it submits that it set the fee for the Store Charges in the good faith exercise of its judgment.

[745] In response to the Plaintiffs' arguments that it was a breach of contract and an act of bad faith to include a profit element in the Shoppers Charges, Shoppers advanced a multipurpose factual and legal argument that its approach to Shoppers Charges was to set the charges in a way that was fair on the whole in the sense that taken together, i.e., collectively, the fees approached an "at cost" approach.

[746] Shoppers submitted that this collective approach was supported by an overall reading of the Associates Agreement and Shoppers submitted that it was consistent with the principles of good faith and fair dealing with its Associates to charge for services in the way that it did.

[747] To demonstrate that this approach produced a no-cost equilibrium of some sort, Shoppers instructed its forensic accountant Mr. Davidson to calculate the surpluses and the deficits of the Shoppers Charges, and he included the Advertising Contribution as a Store Charge. Mr. Davidson demonstrated that collectively Shoppers was not making any profit from the Shoppers Charges.

[748] The Plaintiffs disputed that the collective approach was contractually permissible, and they disputed that Shoppers ever used this approach. The Plaintiffs submitted that the collective approach was an after-the-fact reconstruction that was not supported by the contract. And relying on the evidence of Dr. Narayanan, the Plaintiffs submitted that the Advertising Contribution did not produce a deficit but rather was more or less at cost. Professor Narayanan concluded that the marketing departments revenues exceeded its expenses and that Mr. Davidson's calculations were not compliant with the matching principles of the profession or practice of accounting.

2. Analysis: Did Shoppers Breach the Associates Agreement by Charging More for its Services than the Services Cost?

[749] Although I find as a fact that that Shoppers did employ the so-called collective approach to setting the fee or levy for Shoppers Charges, I do not agree with Shoppers' argument that this approach provides it with a defence to the Plaintiffs' allegations that Shoppers breached the Associates Agreements by charging more for its services than the services cost. I do not interpret the Associates Agreement as requiring or as prohibiting the collective approach and the fact that Shoppers adopted this approach would only be relevant if the Associates Agreement was unclear about whether Shoppers was constrained to charge for its services at cost and without any profit element. However, as I interpret the Associates Agreements (and as how Shoppers apparently interpreted the Associates Agreements), Shoppers was not constrained to charge each of the discrete Shoppers Charges at cost and without any profit element.

[750] The point is subtle but the collective approach, which I do find as a fact to have been used by Shoppers, does not provide it with a defence because Shoppers did not breach the Associates Agreement by charging the Loss Prevention Fee, the Academy Fee, the Retail Accounting Fee, and the Equipment Rental Fee in the way that it did.

[751] The collective approach as a defence would have been relevant to Shoppers' duties of good faith and fair dealing if the Associates Agreements constrained Shoppers to only charge for its services at cost or if the Associates Agreement did not permit any profit taking save through the Service Fee. In those contractual circumstances (which I find not to have existed), then it would perhaps be a matter of discretion how Shoppers complied with the constraints of the Associates Agreement, and it would have an argument that a collective or overall approach could be employed.

[752] However, properly interpreted the Associates Agreement did not constrain Shoppers to charging for its services at cost. Properly interpreted the Associates Agreement did not constrain Shoppers to only the Service Fee as its source of profits. In this regard, it should be noted that under the Associates Agreements, Shoppers was entitled to keep the rebates and discounts etc. paid by the vendors of the merchandise sold in the Shoppers's stores. That was apparently a very profitable second source of profits for Shoppers that arises from the Associates Agreement. As noted much earlier in these Reasons for Decision, I disagree with Dr. Narayanan's opinion evidence that it is counterintuitive for Shoppers to have more than the Service Fee as a source of profits.

[753] It should be observed that the Plaintiffs' argument that Shoppers was constrained or prohibiting from charging the Shoppers Charges above the costs of the discrete services is not connected to any express language in the contract. Rather, the Plaintiffs' argument depends on reading Article 11.01 in the entirety of the Associates Agreements and then adding this restraint to Shoppers' authority to set the fee. In contrast, Shoppers has express language supporting how it set the fees that already fits with an overall reading of the contract. Article 11.01 expressly provides that the Shoppers Charges "shall be such amount or amounts as [Shoppers] shall, in the good faith exercise of its judgment, determine." I conclude that Shoppers did not breach the Associates Agreement and did not breach any duties of good faith by charging more for its services than the services cost.

[754] For the reasons expressed above, I find that Shoppers complied with the 2002 Associates Agreement and the 2010 Associates Agreement in its charging for the Loss Prevention Fee, the Academy Fee, the Retail Accounting Fee, and the Equipment Rental Fee.

[755] I find as a fact that Shoppers did not breach its statutory or common law duties of good faith by charging more for its services than the services costs, which it was entitled to do under the Associates Agreement.

3. Analysis: The Equipment Rental Fee Overcharge

[756] Although the above conclusions are dispositive of the Associates claim with respect to the Equipment Rental Fee, it is necessary to say something more about this particular claim.

[757] As noted in the facts portion of these Reasons for Decision, Shoppers charged an 11% rate of return on the cost of equipment. Based on Mr. Rosen's and Dr. Narayanan opinion, the Plaintiffs submitted that the 11% charged by Shoppers was unreasonable because it exceeded the cost of debt and had a profit element. The profit element was the 3% premium for the risk Shoppers took on in place of the Associate purchasing the assets.

[758] Given my conclusion that Shoppers could charge individual Shoppers Charges at a profit nothing turns on whether the Equipment Rental Fee was overcharged because of the 3% risk premium. However, I conclude that in the circumstances of the immediate case, it was appropriate to charge the 3% risk premium as a cost. In other words, I agree with Shoppers's arguments on this aspect of the Plaintiffs' claims. It follows that Shoppers did not profit by its Equipment Rental Fee.

[759] Further, the Plaintiffs' claim that Shoppers breached the Associate Agreements by failing to lease the Equipment "upon terms and conditions to be mutually agreed upon." This allegation of breach of contract is without merit.

[760] Associates agreed under sections 5.01(b) and 11.05/11.07 of the Associate Agreements that they were required to lease Equipment from Shoppers at a rate to be determined by Shoppers. Before entering into the Associate Agreements, Shoppers disclosed to the Associates the lease terms for each category of Equipment based on the useful life of the asset and the corresponding lease rate for each category of useful life. The 11% rate of return encompassed in these rates was calculable from this information. The Associates used the Equipment to operate their Stores and paid the Equipment Rental Fee in acceptance of these terms, which included agreeing to pay the applicable Equipment Rental Fee in accordance with the lease terms and rates specified by Shoppers.

X. Liability: Distribution Centre Claim

1. The Parties' Arguments

(a) Plaintiffs' Submissions

[761] The Plaintiffs claim that Shoppers' breached its statutory and common law duties and was unjustly enriched by three illegal practices; (a) the deployment of MOGs ("Mass-Order Generated

Goods") (2) the limiting of Associates' right to make claims for damaged or missing products or products delivered in error; and (3) the directing Associates not to receive inventory on an item-by-item basis.

[762] The Plaintiffs submit that Shoppers downloaded the financial risk of inventory management onto the Associates and profited for itself by its inventory store practices. The Plaintiffs submit that Shoppers abused its power as franchisor and acted without due regard to the legitimate interests of the Associates by implementing the policies and practices of the distribution centre and breached its common law and statutory duties to Associates.

[763] Further, the Plaintiffs submit that the Class Members suffered losses as a result of Shoppers' practices and that Shoppers received corresponding benefits for which there was no juristic reason, and, therefore, Shoppers is liable to the Class for unjust enrichment.

(b) Shoppers's Submissions

[764] Shoppers denies being unjustly enriched and submits that under the Associate Agreements, it was entitled to implement the inventory systems and that it did so in good faith for the mutual benefit of the Associates and Shoppers' franchise system. Shoppers submits that the inventory policies and procedures were enacted and implemented in good faith by it pursuant to its rights under Articles 6.01(b) and 3.06 of the Associates Agreements. It submits that there were good reasons for the policies and the procedures of the distribution centre and that these policies and practices were an integrally important aspect of the franchise enterprise across the country where common standards were necessary to maintain the success and the goodwill of the franchise. It submits that the distribution centre policies and the inventory policies maintained the MOGs significantly increased store sell through, efficiency, and profitability.

[765] Shoppers submits that the Plaintiffs have not provided that either of them were actually harmed by the inventory policies and that they and other Associates benefitted by the improved profits and the sustained efficiency of Shoppers's supply chain. There was no evidence that the Associates suffered any deprivation or that Shoppers enriched itself. In short, Shoppers submits that there is no factual basis for an unjust enrichment claim or to the Distribution Centre Claims as a breach of contract or as a breach of Shoppers's duties of good faith.

2. Analysis

[766] A request for a declaration is a very limited remedial request. A declaratory judgment acknowledges or conversely negates a legal right, but the judgment does not itself provide substantive relief.[147] In the immediate case, I do not regard the Plaintiffs' request for a declaration as a limited remedial request. Rather, its obvious purpose is to advance the Class Members' claims to individual issues trials.

[767] On a class-wide basis I agree with Shoppers's arguments. On a class-wide basis under the Associates Agreements, Shoppers exercised its marketing muscle to purchase merchandise for the

[147] *Rado-Mat Holdings Ltd. v. Peter Inn Enterprises Ltd.* (1988), 65 O.R. (2d) 299 (H.C.J); *Letter Carriers1 Union of Canada v. Canada Post Corp*. (1986), 8 F.T.R. 93 at p. 94; L. Sarna, *The Law of Declaratory Judgments* (3rd ed. (Thomson Canada Limited, 2007), p. l.

Associates' stores, and under the Associates Agreement, the Associates were required to treat Shoppers as their exclusive supplier of merchandise. Under the Associates Agreements, it was Shoppers's prerogative to set the policies and practices for the distribution centres, and it was its prerogative to set inventory policies. Pursuant to Article 6.01(b) Associate Agreements, Shoppers had the right to implement specifications, standards, policies and operating procedures prescribed from time to time. Pursuant to Article 3.06 of the Associate Agreements, Associates agreed that their continued rights under the Associate Agreement were subject to faithful adherence with those standards, terms, conditions, rules, and procedures

[768] I find as a fact that there was no systemic breach of contract. I find no unjust enrichment.

[769] Although there may have been discrete occasions on an individual store basis where Shoppers may have implemented its distribution centre policies and practices in what could be characterized as bad faith, I find no systemic breach of the duty of good faith in Shoppers's setting of distribution centre policies and practices.

[770] Under the Associates Agreements, Shoppers was entitled to prefer its own interests to that of the Associates with respect to distribution centre policies and practices, provided that it stayed within the boundaries of what the Associates Agreements provided. I find as a fact that there was no systemic breach of the Associates Agreement with respect to distribution centre policies and practices. Moreover, while retaining its prerogatives and privileges under the Associates Agreement, Shoppers did to a limited extent take the Associates' interests into accounting in setting the inventory practices.

[771] In arriving at these conclusions, I have not ignored Mr. Whibbs's damning reflections after the performance of the distribution centres was audited. At their highest, his reflections establish that there were occasions on an individual store basis that a case might be made that Shoppers did not implement its otherwise justified national standards, policies, and practices in a way that was a good faith exercise of Shoppers's prerogatives as franchisor.

[772] The prospect that there might be individual Distribution Centre Claims is why I am not making any declaration, which does not entail remedial relief, but I am allowing individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992* for those Associates who have grievances.

[773] In oral argument, Class Counsel submitted that the Representative Plaintiffs were much annoyed by how Shoppers managed the MOGs, its inventory policies, and the distribution centres. Annoyance is, of course, not a legal standard to measure breach of contract or breach of a contracting parties' duties of good faith. Annoyance, however, may be the smoke of some contractual delict, and the Associates with claims that are not statute barred shall have the opportunity to prove that where there is smoke there is the fire of claim.

[774] For the reasons expressed above, any Distribution Centre Claims of Class Members from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador are statute barred for the period before November 19, 2008.

[775] For the reasons expressed above, any Distribution Centre Claims of Class Members from Prince Edward Island, Yukon, Northwest Territories, and Nunavut are statute barred for the period before November 19, 2004.

Y. Liability: Professional Allowances Claims

1. The Parties' Arguments

(a) The Plaintiffs' Submissions

[776] The Plaintiffs argue that Professional Allowances were a unique statutory benefit for pharmacists that came into existence through the action of the Ontario government when it enacted the Professional Allowance Regime that prohibited rebates but allowed Professional Allowances funded by generic drug manufacturers.

[777] The Plaintiffs on behalf of the PA Class Members submit that Shoppers purported to treat the Professional Allowances as rebates, but rebates were made unlawful by the Professional Allowances Regime.

[778] The Plaintiffs submit that the PA Class Members qualified for the Professional Allowances because they provided the direct patient care services. The Plaintiffs submit that the PA Class Members' Professional Allowances were taken by Shoppers. The Plaintiffs submit that while statutory benefits could be taken away by contract, it requires clear language to do so,[148] but the Associates Agreements do not even address Professional Allowances.

[779] The Plaintiffs submit that Shoppers received the Professional Allowance moneys from the generic manufacturers, but instead of turning them over to the PA Class Members, Shoppers unjustly enriched itself as the expense of the PA Class Members. The Plaintiffs submit that the unjust enrichment was $1.084 billion.

[780] As an alternative to the unjust enrichment claim, the Plaintiffs submit that Professional Allowances are revenue for the PA Class Members' stores and should be treated as such. Under this alternative theory of the case, Shoppers breached the contract with the Associates by claiming revenue that should have been processed in accordance with the profit sharing formula of the Associates Agreements. The Plaintiffs submit the measure of damages for this breach of contract claim can be aggregated, and they claim $256 million on behalf of the PA Class Members.

[781] As a further alternative to the unjust enrichment claim and the breach of contract claim, the Plaintiffs submit that they were stakeholders in the drug supply chain and Shoppers had a statutory obligation to be transparent about the role of the Professional Allowance Regime within the franchise relationship between Shoppers and the Associates. The Plaintiffs submit that Shoppers was obliged to be transparent and faithfully disclose facts about Professional Allowances. The Plaintiffs submit that Shoppers acted in bad faith by failing to disclose material facts about

[148] The Plaintiffs rely on: *Pine Valley Enterprises Inc. v. Earthco Soil Mixtures Inc*., 2022 ONCA 265; *Bell Canada v. Plan Group Inc.*, 2012 ONSC 42; *Oakville Storage & Forwarders Ltd. v. Canadian National Railway* (1991), 3 O.R. (3d) 1 (C.A.); *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426.

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Professional Allowances. For example, the Plaintiffs submit that it was bad faith for Shoppers: (a) to not disclose anything about Professional Allowances in the statutory disclosure documents; (b) to not disclose its negotiations with the generic drug manufacturers; (c) to not disclose how Shoppers was using the information it was obtaining from the Associates; and (d) to not disclose what it was collecting in Professional Allowances.

[782] As an alternative to the unjust enrichment claim, the Plaintiffs, therefore, submit that the PA Class Members (the Ontario Associates) are entitled to damages for Shoppers' breach of its statutory and common law duties of good faith. The damages for the breach of Shoppers's statutory duty of good faith would be equal to the breach of contract calculation.

(b) Shoppers's Submissions

[783] Shoppers argues that there is no viable unjust enrichment claim and that there is no viable breach of contract claim. Shoppers submits that it was entitled to the Professional Allowances pursuant to the 2002 Associates Agreement and then again by the 2010 Associates Agreement.

[784] Shoppers submits that Professional Allowances are covered by Article 11.04 of the 2002 Associates Agreement, which states:

> 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.

[785] Shoppers submits that Professional Allowances are covered by Article 11.10 of the 2010 Associates Agreement, which states:

> 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.

[786] Shoppers submits that the Professional Allowances Regime, which it complied with, is irrelevant to the interpretation and performance of the Associates Agreements. Shoppers submits that Professional Allowances are "discounts, rebates, advertising or other allowances" that belong to it under the Associates Agreements. It submits that the definition of rebates in the statutes that govern the Professional Allowance Regime are not determinative or even relevant to how a private contract between the Associates and Shoppers should be interpreted.

[787] Although for the reasons expressed earlier in these Reasons for Decision, I do not regard the evidence as helpful, Shoppers also relies on the cross-examination testimony of Dr. Grootendorst that under the Professional Allowance Regime, a Professional Allowance would qualify as a rebate in common commercial parlance. Thus, based on Dr. Grootendorst's concession, even if the statutory public law definition governed the interpretation of the private

law contract between the parties, a Professional Allowance would be a rebate under the 2002 Associates Agreement and the 2010 Associates Agreement.

[788] Further, Shoppers submits that the PA Class Members have no entitlement under the Professional Allowances Regime. It submits that performing direct patient care services did not create any entitlement for anyone; rather the regime permitted generic drug manufacturers to pay Professional Allowances and permitted various entities, including pharmacists and pharmacy franchisors, to accept Professional Allowances from the generic drug manufacturers. Shoppers submits that pursuant to the Associates Agreement that it was Shoppers and not the Associates that could accept Professional Allowances.

[789] The generic manufacturers' contracts with Shoppers did not provide Associates or their Stores with the Professional Allowances. Shoppers submits that Professional Allowances were connected to its contracts with the generic drug manufacturers and in the absence of any such agreements with the Associates, there was no basis under the Professional Allowance Regime for the PA Class Members to accept Professional Allowances.

[790] Shoppers submits that since the PA Class Members did not purchase drugs from generic drug manufacturers and since the PA Class Members did not have any agreements with generic drug manufacturers, they had no entitlement under the Professional Allowances Regime. Indeed, in Shoppers's argument, under the Associates Agreement, the PA Class Members were prohibited from purchasing merchandise from other than Shoppers and thus the PA Class Members could not have had a relationship with the generic drug manufacturers.

[791] Shoppers submits that in contrast to its relationship with the generic drug manufacturers, which relationship gave it a clear entitlement to accept Professional Allowances from the generic drug manufacturer, there was no basis for Associates to receive Professional Allowances during the five-and-a-half years of the Class Period for the PA Class Members. Shoppers submits that the Associates had and have no entitlement to Professional Allowances under the Professional Allowances Regime or under the Associate Agreements. Since there was no entitlement for the Professional Allowances, there are no bases for claims for unjust enrichment, breach of contract, or breach of a duty of good faith.

2. Analysis Methodology

[792] As foreshadowed above and to be discussed further below, it is my conclusions that: (a) there is no unjust enrichment claim with respect to the Professional Allowances; but (b) Shoppers breached the 2002 Associates Agreement Shoppers - but not the 2010 Associates Agreement - by failing to remit Professional Allowances. The damages for this breach shall be determined pursuant to s. 25 of the *Class Proceedings Act, 1992* at individual issues trials for the period after November 19, 2008 to the end of term of the PA Class Members' respective 2002 Associates Agreements.

[793] I have explained above, why this breach of contract claim is statute barred for the period before November 19, 2008. I have explained above, why there is no aggregate damages methodology for the Professional Allowance Claims. Mr. Rosen's methodology and Mr. Jaishankar's critique of it does demonstrate that there are individual store-by-store breach of contract claims under the 2002 Associates Agreement.

[794] In this part of my Reasons for Decision, I shall explain these liability conclusions in four stages.

[795] In the first stage, I shall address the unjust enrichment claim.

[796] In the second stage, I shall address the breach of contract claim. In the second stage, to explain why Shoppers breached the 2002 Associates Agreement but not the 2010 Associates Agreement, it is necessary to undertake two separate contract interpretation and contract performance analyses. Two separate analyses are required because: (a) the standard form 2002 Associates Agreement was drafted by Shoppers when the Professional Allowance Regime did not exist; and (b) the standard form 2010 Associates Agreement was drafted by Shoppers after the Professional Allowance Regime came into existence. The factual nexus of the 2002 Associates Agreement is fundamentally different than the factual nexus of the 2010 Associates Agreement. The interpretative and contract performance question for the Associates governed by the 2002 Associates Agreement is whether Shoppers had a right to a concept not in existence when the 2002 Agreement was drafted by Shoppers. The interpretative and contract performance question for the Associates governed by the 2010 Associates Agreement is whether Shoppers had a right to a concept that was in existence when the 2010 Associates Agreement was drafted by Shoppers.

[797] In the third stage, I shall address the Plaintiffs' breach of good faith claim.

[798] In the fourth stage of the analysis, I shall explain why the quantification of damages must be determined pursuant to s. 25 of the *Class Proceedings Act, 1992* at individual issues trials.

3. Analysis: Professional Allowances as an Unjust Enrichment Claim

(a) The Principles of Unjust Enrichment

[799] The elements of a cause of action for unjust enrichment are: (1) the defendant has been enriched; (2) the plaintiff has suffered a deprivation that corresponds to the defendant's enrichment; and (3) the absence of any juristic reason justifying the defendant's retention of that transfer of value.[149]

[800] In *Moore v Sweet*,[150] the Supreme Court of Canada stated that for an unjust enrichment, it must be shown that something of value – a tangible 'benefit' – passed from the plaintiff to the defendant.[151] For an unjust enrichment claim there must be a correspondence between the defendant's enrichment and the plaintiff's deprivation in the sense that the plaintiff made a direct contribution causing the defendant's unjust enrichment or the plaintiff made an indirect contribution causally connected to the defendant obtaining a benefit that rightfully ought to have accrued to the plaintiff.[152]

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[149] *Moore v. Sweet*, 2018 SCC 52; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Pettkus v. Becker*, [1980] 2 S.C.R. 834.
[150] 2018 SCC 52 at para. 41.
[151] See also *Apotex Inc. v. Eli Lilley and Company*, 2015 ONCA 305 at paras 39-46.
[152] *Sharp v. Royal Mutual Funds Inc*., 2021 BCCA 307 at paras. 82-93, aff'g 2020 BSCS 1781; *Moore v. Sweet*, 2018 SCC 52 at para. 41 at para. 41; *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305 at para. 45.

[801] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason, which is to say that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case.[153]

[802] Juristic reasons to refute an unjust enrichment include: (a) a gift;[154] (b) a valid un-breached contract;[155] and (c) a valid statutory provision.[156]

[803] The juristic reason requirement is considered in stages. First, the plaintiff must establish a *prima facie* case that the defendant's enrichment cannot be justified on the basis of a juristic reason from an established category. If the plaintiff is successful, then at the second stage of the analysis, the defendant can show that there is another reason to deny recovery, based on the reasonable expectations of the parties or public policy considerations, and the court may conclude that a new category of juristic reason should be established, or the court may conclude that that there was no juristic reason for the defendant's enrichment.[157]

[804] I will have more to say about the juristic reason element of an unjust enrichment claim in the analysis below.

(b) Unjust Enrichment Analysis

[805] As foreshowed in the introduction to these Reasons for Decision and as to be discussed further below, Shoppers did not breach the 2010 Associates Agreement when it did not remit the Professional Allowances to the Associates. It follows that Shoppers was not unjustly enriched with respect to the 2010 Associates Agreement. With respect to the 2010 Associates Agreement, even if it could be said that the Associates' performance of direct patient care services enabled the enrichment of Shoppers and even if it could be regarded as a transfer of wealth from the Associates

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[153] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 30; *Peter v. Beblow*, [1993] S.C.R. 980 at p. 987; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at pp. 784, 788; *Sorochan v. Sorochan* [1986] 2 S.C.R. 38 at p. 44; *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at p. 456.

[154] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 44; *Peter v. Beblow*, [1993] S.C.R. 980 at pp. 990-91; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at p. 455

[155] *676083 B.C. Ltd. v. Revolution Resource Recovery Inc* 2021 BCCA 85; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 *Moore v. Sweet*, 2018 SCC 52; *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 496, aff'd 2012 ONCA 867; *Kerr v. Baranow*, 2011 SCC 10; *Re*Collections Inc. v. Toronto Dominion Bank*, 2010 ONSC 6560; *Brouilette Building Supplies v. 1662877 Ontario Inc.*, [2009] O.J. No. 92 (S.C.J.); *Georgian (St. Lawrence) Lofts Inc. v. Market Lofts Inc*., [2007] O.J. No. 81 (S.C.J.); *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 44; *Murray v. TDL Group Ltd.*, [2002] O.J. No. 5095 (S.C.J.); *Pak v. Reliance Resources Group Canada Inc*., [2002] O.J. No. 684 (S.C.J.); *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29, (Gen. Div.); *CIBC v. Melnitzer* [1993] O.J. No. 3021 (S.C.J.), aff'd [1997] O.J. No. 4634 (C.A.); *Peter v. Beblow*, [1993] S.C.R. 980 at pp. 990-91; *Kiss v. Palachik*, [1983] 1 S.C.R. 623, *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Rathwell v. Rathwell*, [1978] S.C.R. 436 at p. 455.

[156] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 44; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.); *Peter v. Beblow*, [1993] S.C.R. 980 at pp. 990-91; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at p. 455. *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445.

[157] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252, aff'd 2012 ONCA 867; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.

to Shoppers, there is a juristic reason for the enrichment. A valid un-breached contract justified the breach. There is no unjust enrichment claim with respect to the 2010 Associates Agreement.

[806] While there is a breach of contract claim, there is also no unjust enrichment claim with respect to the 2002 Associates Agreement.

[807] I agree with Shoppers' submission that the PA Class Members have no entitlement under the Professional Allowance Regime because they had no contract with the generic drug manufacturers. Contrary to the Plaintiffs' arguments, the Associates did not have any entitlement under the legislation to the Professional Allowances received by Shoppers. Since the Associates had no entitlement under the Professional Allowances Regime, there was no transfer of their wealth to Shoppers.

[808] There is no unjust enrichment, but there may be a breach of contract. It is important to immediately point out that the fact that there is no unjust enrichment claim does not resolve whether - as a matter of contract interpretation and performance - the PA Class Members had an entitlement to have the Professional Allowances remitted as store revenue, which would be shared with Shoppers pursuant to the profit sharing calculations of the Associates Agreements.

[809] As foreshadowed in the Introduction and as explained in the next section of these Reasons for Decision, there is a breach of contract claim with respect to the 2002 Associates Agreement. The 2002 Associates Agreement was a valid continuing contract, and the PA Class Members' remedy lies in breach of contract not unjust enrichment.

[810] Put somewhat differently, any unjust enrichment claims for the 2002 Associates Agreement entails a breach of contract analysis to determine what was the enrichment to Shoppers that was not justified by the contract between the PA Class Members and Shoppers. Any unjust enrichment claim is superfluous because as I shall explain below the Professional Allowances while not covered by Article 11.04 of the 2002 Associates Agreements are revenue of the Shoppers's stores that is covered by Article 7.00 of either Associates Agreement. That revenue was part of the business of the Shoppers's store, and it might have increased the profits of the store to be shared between the Associate and Shoppers, the lion's share of which belonged to Shoppers. This reality explains why under Mr. Rosen's analysis, the $1.084 billion unjust enrichment claim is reduced to something below $256 million as a breach of contract claim. I shall explain all of this in more detail below.

[811] For present purposes, the key conclusions are that: (a) there is no unjust enrichment claim for the 2010 Associates' Agreement because the Professional Allowances belong to Shoppers pursuant to Article 11.10 of the Agreement; and (b) there is no unjust enrichment claim for the 2002 Associates Agreement because the Professional Allowances are revenue pursuant to Article 7.00 of the 2002 Associates Agreement.

[812] The latter key point is subtle and is worthy of some elaboration. In the unique circumstances of the immediate case, if Shoppers' retention of the Professional Allowances was indeed an unjust enrichment, the enrichment would not be equal to the $1.084 billion claimed by the Associates. Rather, to determine what was the unjust enrichment, it would be necessary to determine what would have been the result had the contract been performed as it ought to have

been performed, which is another way of saying that in the unique circumstances of the immediate case, an unjust enrichment analysis is the same as a breach of contract damages analysis that places the innocent party in the same economic position it would have been in had the contract been performed as expected by the contracting parties.

[813] In the immediate case, a contract analysis would not yield a $1.084 billion damages claim for six reasons.

[814] First, Shoppers received only $955 million in Professional Allowances as potential revenue under Article 7.00 of the 2002 Associates Agreement.

[815] Second, of the $955 billion, there would be nothing unjust in Shoppers retaining the $77.2 million portion that it received from generic drug manufacturers for the direct patient care actually provided by Shoppers. The $77.2 million , reduces the unremitted Professional Allowances to $878 million.

[816] Third, there would be nothing unjust in Shoppers's retaining the Professional Allowances that it received pursuant to the 2010 Associates Agreement. Using Mr. Rosen's calculations for the receipt of Professional Allowances, the deduction for Professional Allowances under the 2010 Associates Agreement is $340 million (the Professional Allowances for years 2013, 2012, 2011, and two-thirds of 2010). That leaves $538 million to be shared on a store-by-store basis pursuant to Article 7.00 of the 2002 Associates Agreement.

[817] Fourth, the claims for Professional Allowances for 2006 ($50.1 million) and 2007 ($130.8 million) are statute barred further reducing the amount to be shared by $181 million leaving $357 million to be shared.

[818] Fifth, for the reasons expressed above, the Associates would have to share the Professional Allowances as revenue under the Associates Agreements. Mr. Rosen's methodology for a $1.084 billion dollar infusion of Professional Allowances suggests that the Associates' share pursuant to Article 7.00 would be approximately 24%, and, in turn, this suggests that as a rough estimate, the 2002 Associates' share of the Professional Allowances as a contract damages claim would be no more than approximately $86 million.

[819] Sixth, it is not a given that on a store-by-store basis that the Associates' financial position would be better than it would have been if the contract had been performed as promised. Visualize, a store experiencing losses (which would be absorbed by Shoppers) might still not be profitable once its share of Professional Allowances was attributed to the store's revenues assuming that the particular store had performed the direct patient care services that would justify its acceptance of the Professional Allowances.

[820] I conclude that in the circumstances of the immediate case that there is no restitutionary unjust enrichment claim because that claim would just replicate the breach of contract damages claim. The existence of the contract comprised of the Associates Agreement is a juristic reason that precludes the unjust enrichment claim. To the extent that Shoppers' was unjustly enriched, it would have to share that enrichment pursuant to the revenue sharing provisions of the contract else it would be the Associates who would be unjustly enriched.

[821] The analysis in the immediate case is supported by the recent decision of the British Columbia Court of Appeal in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*.[158] In this proposed class action *676083 B.C. Ltd.* sued Revolution for unjust enrichment and breach of contract. Revolution was a waste disposal company, and it was alleged that Revolution charged its customers, the putative class members, by routinely billing them for a municipal waste site tipping charge that it never actually incurred. Upholding the decision of the motions judge on the certification motion, the British Columbia Court of Appeal concluded that the Class Members' remedy was in contract and not in unjust enrichment. Contracts, however, will not be a juristic reason if they are not related at all to the unjust enrichment transaction or if the transaction falls outside of the ambit of the contract or if the contract is void, or unenforceable.

[822] The reasoning of Justice Voith for the Court was as follows. The existence of a contract is one of the established categories of juristic reason for an unjust enrichment. The reason that a contract is a juristic reason for an unjust enrichment is to protect the integrity of contractual relationships which allow parties to determine the benefits and burdens of a transfer of wealth and the law of restitution should not be used to rewrite the parties bargains.[159] Justice Voith summarized the law at paragraphs 50-51 of his judgment, where he stated:

> 50. The common theme in cases where claims in unjust enrichment have been allowed to proceed in the presence of a contractual arrangement is that in each case, the purported benefit was found […] to have been provided to the defendant extra contractually, or beyond the scope of the contract. This is consistent with the underlying principle of respecting the contractual allocations of benefits and burdens. Where a benefit is conferred beyond the scope of the negotiated terms of a contract, there is no concern that the contractual allocation of benefits and burdens will be disturbed.
>
> 51. The second broad set of circumstances where claims in contract and unjust enrichment can be pleaded concurrently is where some issue in relation to the validity or enforceability of the contract in question is raised. This may arise, for example, when issues of illegality, capacity, or frustration are raised.

[823] In *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* Justice Voith concluded that neither common theme was present in the circumstances of the case and therefore while the putative Class Members had a claim for breach of contract, they did not have an unjust enrichment claim. The immediate case is similar, the Associates with 2002 Associates Agreements have a claim in contract, but they do not have a claim for unjust enrichment.

[824] The treatment of the Professional Allowances is not beyond the scope of that contract. The Professional Allowances are revenue under the 2002 Associates Agreement. The Associates with the 2010 Associates Agreement do not have an unjust enrichment claim or a breach of contract claim, because properly interpreted in its factual nexus, the 2010 Associates Agreement provides that Shoppers' may retain the Professional Allowances.

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[158] 2021 BCCA 85.

[159] *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85, *Kosaka v. Chan*, 2008 BCCA 467.

4. Analysis: Professional Allowances as a Claim for Breach of Contract

[825] In this section of my Reasons for Decision, I shall explain why there is a breach of contract claim for the 2002 Associates Agreement but not for the 2010 Associates Agreement.

[826] Shoppers argues that for the Plaintiffs to succeed in a breach of contract claim, I must find that Professional Allowances are not rebates, not allowances, not discounts, and also not similar to those payments. As will appear from the discussion below, Shoppers' argument has traction with respect to the 2010 Associates Agreement precisely because the Professional Allowance Regime was in existence and part of the factual nexus for the 2010 Associates Agreement. I, however, disagree with Shoppers's argument in the different factual nexus of the 2002 Associates Agreement.

[827] It is true that beginning in 2006 when Professional Allowances were introduced that - from some perspectives - they bore a resemblance to rebates and the other payments that in turn had a resemblance to rebates under the 2002 Associates Agreement.

[828] The *Merriam-Webster Dictionary* defines a "rebate" as "a return of part of a payment".[160] *Black's Law Dictionary* defines a "rebate" as "[a] return of part of a payment, serving as a discount or reduction."[161] Thus, it is true that from some perspectives, Professional Allowances have a resemblance to rebates under the 2002 Associates Agreement. However, from other perspectives, Professional Allowances were a new breed or genus of payment from a vendor of merchandise to a wholesaler or a retail purchaser of merchandise. This different perspective supports the Plaintiffs' argument that Professional Allowances are different from rebates or the other matters addressed in Article 11.04 of the 2002 Associates Agreement.

[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, the third party beneficiary would be the patients who received direct patient care, but 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.

[830] As it happens, Shoppers's Associates had traditionally provided free direct patient services that were accounted for as an expense of their store's business, the profits of which were shared with Shoppers. After the introduction of the Professional Allowances Regime, the traditionally free services had been monetized in the sense that a generic drug manufacturer was allowed to pay

[160] Rebate" *Merriam-Webster.com Dictionary*, Merriam-Webster.
[161] "Rebate", Bryan A. Garner (Ed.), *Black's Law Dictionary*, (11th ed. 2019).

for them even though the services authorized to qualify for direct patient care did not even relate to the generic drug manufacturer's merchandize.

[831] With respect to the 2002 Associates Agreement, there is thus traction to the argument that Professional Allowances monetized existing direct patient care services and were a new payment that was outside of the language of the agreement and different from traditional rebates that never were connected to the provision of enumerated patient care services or a *Code of Conduct*. The key aspect to emphasize is that Professional Allowances were not typical of anything that existed at the time when the 2002 Associates Agreement came into existence.

[832] I agree with Shoppers that there is no basis under the 2002 Associates Agreement for the Associates to keep the Professional Allowances. In any event, however, I disagree with Shoppers that the Professional Allowances were for it to keep under Article 11.04 of the Agreement. As I will explain below, the Professional Allowances are revenue pursuant to Article 7.00 of the 2002 Associates Agreement for Shoppers and the Associates to share.

[833] For Associates governed by the 2002 Agreement, the question is: how does the 2002 Associates Agreement treat Professional Allowances, an abstract concept that did not exist at the time of the coming into existence of the 2002 Associates Agreement on December 28, 2002?

[834] The PA Class Members' answer to this question is that Professional Allowances are totally outside of the 2002 Associates Agreement, which answer entails a $1.084 billion unjust enrichment claim, or alternatively if Professional Allowances are covered by the 2002 Associates Agreement, then they are revenue pursuant to Article 7.00 of the 2002 Associates Agreement, which answer entails a $256 million aggregate damages breach of contract claim. (The claim is actually much less for the reasons expressed above and is possibly around approximately $86 million or less.)

[835] For the reasons expressed above, there is no unjust enrichment claim, and the PA Class Members' answer for the breach of contract claim is correct in parts and wrong in parts. Their answer is wrong in concluding that Professional Allowances are totally outside the 2002 Associates Agreement, but the answer is correct in concluding that Professional Allowances are not covered by Article 11.04 of the Associates Agreement.

[836] Thus, Professional Allowances are revenue under Article 7.00 of the 2002 Associates Agreement. It follows that Shoppers breached the 2002 Associates Agreement by failing to remit the Professional Allowances to the PA Class Members governed by the 2002 Associates Agreement. The PA Class Members governed by the 2002 Associates Agreement have a breach of contract claim, but, for the reasons expressed above, they do not have an unjust enrichment claim.

[837] In other words, the PA Class Members are correct to interpret Article 11.04 *expressio unius est exclusio alterius*, ("the mention of one thing excludes other things"). Interpreted as at the creation of the 2002 Agreement, "Professional Allowances" are not presciently "all discounts, volume rebates, advertising allowances or other similar advantages that [Shoppers] may obtain from any person, firm or corporation by reason of its supplying merchandise or services." Professional Allowances were a new remunerative thing not included under Article 11.04.

[838] Thus, the PA Class Members are correct that Professional Allowances are not covered by Article 11.04 of the 2002 Associates Agreement because Professional Allowances are not expressly mentioned in Article11.04 and thus they are revenue to be shared by the contracting parties under Article 7.00, which provides that:

> 7.00 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.

[839] In still other words, Shoppers's argument about Professional Allowances under the 2002 Associates Agreement is wrong. In contrast to the Class Members' *expressio unius est exclusio alterius* interpretation, Shoppers would interpret Article 11.04 *ejusdem generis* ("of the same kind or nature"), so that Professional Allowances fall within the specific list of "all discounts, volume rebates, advertising allowances" or they are "other similar advantages," i.e., Professional Allowances are of the same genus as "all discounts, volume rebates, advertising allowances."

[840] However, insofar as the 2002 Associates Agreement is concerned, Shoppers's *ejusdem generis* interpretation is incorrect. Interpreted in the factual nexus of the 2002 Associates Agreement, Professional Allowances are a different genus from "all discounts, volume rebates, advertising allowances" but are revenue under Article 7.00 of the Agreement.

[841] Moreover, I agree with the PA Class Members argument that, if necessary, given the alternative interpretations, and given that the 2002 Associates Agreement is a contract of adhesion, Article 11.04 should be interpreted in accordance with the *contra proferentem* rule, which states that when there is an ambiguity in an agreement that cannot be resolved by the other rules of construction, then resort may be had to the rule, that the language of the contract will be construed against the party that inserted the provision with no opportunity to the other party to modify its meaning.

[842] Applying the *contra proferentem* rule favours the PA Class Members' *expressio unius est exclusio alterius* interpretation over Shoppers *ejusdem generis* interpretation of Article 11.04.

[843] As explained above, Shoppers does have a partial limitation period defence to the PA Class Members' 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.

[844] Turning to the 2010 Associates Agreement, pursuant to Article 11.10 of that Agreement:

> The 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 [Shoppers] or its Affiliates."

[845] In interpretating the 2010 Associates Agreement, there are two fundamentally important interpretative factors that differ from the interpretative situation of the 2002 Associates Agreement.

[846] First, the language of Article 11.10 of the 2010 Associates Agreement differs slightly from the language of Article 11.04 of the 2002 Associates 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".

[847] Second, - and the far more significant interpretative 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.

[848] At the time of the introduction of the 2010 Associates Agreement, the PA Class Members would 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 PA 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.

[849] The words of the 2010 Associates Agreement interpreted in the factual nexus for that Agreement mean that Shoppers did not breach its contractual obligations under the 2010 Associate Agreements, its statutory obligations under s.3 of the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the PA Class Members by failing to remit Professional Allowances that relate to direct patient care services that were performed by the PA Class Members governed by the 2010 Associates Agreement.

[850] To reiterate, under the 2010 Associates Agreement, Shoppers could keep the Professional Alliances pursuant to Article 11.10 of the Agreement. Under the 2002 Associates Agreement, however, even if Professional Allowances were not captured by Article 11.04, they would have been "revenues and income derived by the Associate from the Franchised Business" within the meaning of Article 7.01 of the Associate Agreements. Section 7.01 of both Associate Agreements stipulate that all revenues and income are monies belonging to the store, which is subject to the Service Fee as set through the Associate Earnings Model.

5. Analysis: Professional Allowances and the Duty of Good Faith

[851] Turning now to the Plaintiffs' claim that Shoppers' breached its duties of good faith with respect to the Professional Allowances. I have already concluded that the words of the 2010 Associates Agreement interpreted in the factual nexus for that Agreement mean that Shoppers did not breach its contractual obligations under the 2010 Associate Agreements, its statutory obligations under s.3 of the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the PA Class Members by failing to remit Professional

Allowances that relate to direct patient care services that were performed by the PA Class Members governed by the 2010 Associates Agreement.

[852] Assuming that conclusion is wrong, I shall examine whether Shoppers' breached its statutory or common law duties of good faith.

[853] The PA Class Members submit that Shoppers breached its statutory obligation to make "stakeholders" knowledgeable of the flow of funds in the drug products supply chain and that Shoppers did not disclose information about its acceptance and retention of the Professional Allowances.

[854] Shoppers denies that the PA Class Members were stakeholders in the Professional Allowances Regime entitled to any more information than they received from Shoppers.

[855] In my opinion, Shoppers is wrong, but more to the point, I conclude that Shoppers did not breach its statutory obligation of good faith. As noted above, in the discussion of the discovery of claims Associates were aware of the flow of funds and knew all they needed to know about Shoppers's treatment of Professional Allowances.

Z. Section 25 of the *Class Proceedings Act, 1992* and Individual Issues Trials

[856] The above analysis explains why individual Class Members may have Distribution Centre Claims and why some PA Class Members have Professional Allowance Claims under the 2002 Associates Agreement. The Distribution Centre Claims are idiosyncratic and would have to be proved at individual issues trials. For the reasons expressed above, there is no methodology for an aggregate damages award for the PA Class Members and their claims also would have to be proved at individual issues trials.

[857] Section 25 of the *Class Proceedings Act, 1992* provides a mechanism for individual issues trials after a common issues trial or summary judgment determination of the common issues. Section 25 states:

> *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.

[858] Many paragraphs ago above, I mentioned that there is no merit to the Plaintiffs' self-serving, *in terrorem* and incorrect argument made in support of an aggregate damages award that that individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992* would not provide access to justice because the evidence to prove the claims is no longer available.

[859] The truth is that there is ample evidence for the Associates to prove damages for the breach of the 2002 Associates Agreements with respect to Professional Alliances. Or, should an appellate court add to Shoppers's liability for breach of contract, there is ample evidence for individual issues trials.

[860] The Professional Allowances reports that Shoppers filed with the Ministry of Long-Term Care are available and were produced in this litigation. Using Mr. Spina as an example, his Common Year Plans from 2006 to 2013 were produced. His Settlement Memorandum from 2002 to 2013 were produced. His Profit and Loss Statements from 2003 to 2013 were produced. In addition, I find it inconceivable that the Class Members do not have access to their individual and corporate tax returns.

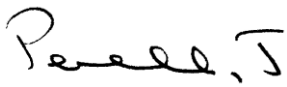
[861] Mr. Jaishankar's evidence demonstrated that individual damages assessments are possible and that on an individual basis, there may be claims worth pursuing. My guestimate above is that there may be claims worth approximately $86 million. There appears to be adequate data to run through the Associates Earnings calculations and the corresponding Service Fee, and it may be possible to use the resources of s. 25 of the *Class Proceedings Act* to simplify or expediate the individual issues trials.

[862] On the assumptions that my conclusions that Shoppers is not liable for the Optimum Fee or is not liable for the Shoppers Charges are wrong, then the Class Members could also prove on an individual basis these claims at individual issues trials.

[863] For the reasons discussed above, there is no proven aggregate damages methodology, but a damages calculation would be possible at individual issues trials pursuant to s. 25 of the *Class Proceedings Act, 1992*.

AA. Conclusion

[864] For the above reasons, both motions should be granted in part and dismissed in part as described above. With the very divided success, there should be no Order as to costs of the action.



Perell, J.

Released: February 17, 2023

BB. Schedule "A" – Associate Agreement Summary

SUMMARY OF SHOPPERS DRUG MART ASSOCIATE AGREEMENT

The following summary has been prepared to provide a concise synopsis of the contents of our standard Associate Agreement. […]

Article 1.00 - Recitals

Confirms the accuracy and truthfulness of the various recitals […]

Article 2.00 - Interpretation

Defines the various terms used throughout the Agreement to avoid repetition.

Article 3.00 - Grant of Licence

Grants a non-exclusive licence to the Associate to operate a retail drug store using the trade-marks owned by 911979 Alberta Ltd. ("Alberta"), of which the Company is an authorized user, and sets out the requirements for proper use of such trade-marks and the prohibitions against misuse […]

Article 4.00 - Term of Agreement

Defines the Term of the Agreement as being such number of Accounting Periods that are completed within 1 year of the date of the Agreement with two consecutive renewal terms of 13 Accounting Periods, but without further renewal after that date. Either party may terminate on 60 days written notice prior to the end of the Original Term or on 60 days written notice at any time during a renewal term. Where the Associate terminates, the Company reserves the right to shorten the 60 day period and reacquire the business earlier. […]

Article 5.00 - The Company's Covenants

Sets out generally the services to be provided by the Company. These services include store planning and design, introduction of efficient systems and controls in operations, establishment of security programs as well as the provision of financial advice and advertising and training programs. Only such Equipment as may be specified by the Company shall be used by the Associate, and the Associate shall not enter into any leases for Equipment except with the Company.

Article 6.00 - Associate's and Pharmacist's Covenants

From the Associate's point of view, this is an extremely important section of the Agreement because it contains in the form of covenants or positive undertakings, the duties and responsibilities assumed, which if breached can result in the Agreement being terminated by the Company. The major items to which strict attention should be paid are:

> (1) full time and attention must be devoted to the management, conduct and operation of the business. Only passive outside non-competitive investments are permitted;
>
> (2) the operating policies and procedures set down by the Company from time to time must be strictly adhered to. In particular all policies relating to

image, maximum pricing for products and services, dress code for staff, and designated hours of operation must be complied with;

(3) all of the lease terms relating to the premises where the business is operated must be observed;

(4) all regional and/or national advertising, marketing and promotion programs require full participation. In particular all programs designated by the Company from time to time must be observed whether such programs are intended for advertising, marketing, promotion or other purposes;

(5) […]

(6) proper books of account must be kept and a balance sheet and a statement of earnings and retained earnings shall be submitted annually. […];

(7) the Associate shall purchase all products to be offered for sale in the Franchised Business only from the following sources:

> (a) as to those products so designated by the Company, from a Distribution Centre owned or managed by the Company or by a third party designated by the Company;
>
> (b) for those products not carried in the Distribution Centre, from Direct Suppliers who are part of a specialized distribution network;
>
> (c) for those products not carried by the Distribution Centre and not available from Direct Suppliers, from Secondary Suppliers designated by the Company for the Franchised Business; and
>
> (d) […] .

The Distribution Centres designated by the Company shall charge prices for the products supplied, which when assessed as a whole over a reasonable period of time, will be competitive. […]

(8) all information systems and technology specified by the Company must be utilized and obtained from approved sources. […]; and

(9) the Associate must be a single purpose corporation of which the Pharmacist must be the sole director and the principal executive officer. […]

Article 7.00 - Banking

Requires the Associate to utilize normal banking facilities and deposit all funds no later than the day following receipt. The Company is entitled to all information regarding the account.

Article 8.00 - Security

The Associate is required to execute a general security agreement in favour of the

Company or any of its Affiliates, […]

Article 9.00 - Conditions

[…] First, it places a limit on the amount of compensation the Pharmacist or members of his or her family may receive from the Associate by way of salary, bonus, or dividend unless written approval is first obtained from the Company. […] This Article also requires the Associate to notify the Company of any application by a Bargaining Agent to represent the employees of the Franchised Business and […]

Article 10.00 - Insurance

Provides for the Associate to participate in blanket insurance coverage and pay for it on terms arranged by the Company.

Article 11.00 - Payments

This Article deals with the Fee due to the Company for the rights and privileges granted to the Associate. The Fee is based upon a percentage of Gross Sales. 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.

The Company will provide to the Associate a forecast of the projected financial performance of the Franchised Business for the next following Fiscal Year. The forecast will include information provided by the Associate to the Company and will include the Fee for that Fiscal Year. The forecast will take into account such factors as past over-performance or under-performance, local market conditions, competitive activity, economic environment, retail drug store trends and other factors as the Company considers relevant. If the total profitability of the Franchised Business is materially greater or less than originally projected, then the Fee may be increased or decreased by the Company at the end of each Fiscal Year in an amount it considers to be in good faith and in accordance with reasonable commercial standards.

This Article also commits the Associate to contribute to the cost of advertising, marketing and promotion in an amount determined by the Company in the Manual or otherwise, and contains an undertaking to pay for security programs, equipment rental, training programs, inventory service and other services or programs which are rendered to all Associates from time to time, all of such services or programs to be paid on the basis of charges established by the Company in good faith during the Term of the Agreement.

Article 12.00 - Restrictive Covenants

Provides that during the Term of the Agreement the Associate cannot be directly or indirectly involved in any Competitive Business involving the dispensing or sale of drugs or dealing in similar merchandise such as cosmetics, health and beauty aids, health foods and vitamins, retail postal outlets and home health care products. […]

Article 13.00 - Termination

The Associate may terminate the Agreement without cause on at least 60 days written notice at any time with the Company having the right to shorten the time period if notice has been received. The Company may terminate for breach of condition or in the circumstance where there has been a default or breach of covenant by the Associate which has not been remedied or rectified within 15 days of receipt of notice of default. It should be recalled that rectification is not available for a breach of condition under Article 9.00 except by the Company's agreement. The Agreement shall also be terminated at the Company's option in certain instances such as: […]

Article 14.00 - Indemnification

There is a general statement acknowledging the Associate will be responsible for any loss, damages, liability, and costs and expenses suffered by the Company as a result of anything done by the Associate or its employees in connection with the operation of the Franchised Business or as a result of a breach or default of the Agreement. […]

Article 15.00 - Pharmacist's Covenants

This is a covenant by the Pharmacist in his or her personal capacity to be responsible equally with the Associate with regard to all of the provisions of the Agreement. While it is acknowledged that the incorporation of the Associate as a corporation is of benefit to the Pharmacist from an operational point of view, as between the Company and the Pharmacist, the former considers the latter equally and fully liable for performance.

Article 16.00 - Relationship of Parties

Contains an acknowledgment by the Associate that for contractual and other purposes its status is that of independent contractor and not a partner, agent, or joint venture member with the Company. There is no trust or fiduciary relationship. The Associate must contract with third parties in its own name and obtain credit on its own resources and has no right or authority to bind or commit the Company to any liabilities. […]

Article 17.00 - General Contract Provisions

A general statement of various standard contract provisions […]

CC. Schedule "B" – Excerpts from the 2002 and 2010 Associates Agreement

2002 Associates Agreement	2010 Associates Agreement
Article 2.00 - Interpretation **2.01** In this agreement or in any amendment hereto, the following terms shall have the following meanings: […] (d) "Franchised Business" means the retail drug store business to be carried on by the Associate at the Premises pursuant to the provisions of this agreement; (e) "Gross Sales" means the entire amount of the actual sale price, whether for cash, credit or otherwise, of all sales of merchandise, services and other receipts whatsoever, including receipts from coin or credit card operated vending or rental machines, and of all business conducted or originating in, upon or from the Premises, including personal, mail or telephone orders received or taken at the Premises and filled from the Premises or elsewhere, and including all deposits not refunded to purchasers, and sales by any permitted concessionaires, licensees and other persons on the Premises, or otherwise in or from the Premises. No deduction shall be allowed for uncollected or uncollectible credit accounts. Gross Sales does not include any sums collected by the Associate for any duly constituted governmental authority and paid out by it to such authority on account of any direct tax imposed by such authority directly upon any purchaser in respect of retail sales made or services provided for compensation by the Associate upon or from the Premises to any such purchaser, or to any goods and services taxes or value added taxes, whether or not paid out to such governmental authority, nor the amount of returns of merchandise to shippers or manufacturers, nor the sales price of merchandise returned or exchanged by customers for which a credit or refund is made; nor shall Gross Sales include monies collected or arising from the operation of a retail postal outlet (other than on account of the sale of stamps), if any, established on the Premises, monies collected as utility payments or monies arising from the sale of lottery tickets, or monies collected on account of sales to employees of the Associate working in the Premises for their own use; […] **2.05** All accounting terms not specifically defined herein shall be construed in accordance with generally accepted accounting principles, consistently applied.	*Article 2.00 - Interpretation* 2.01In this Agreement or in any amendment hereto, the following terms shall have the following meanings: […] (j) "Franchised Business" means the retail drug store business to be carried on by the Associate at the Premises pursuant to the provisions of this Agreement; (k) "Gross Sales" means the entire amount of the actual sale price, whether for cash, credit, debit or otherwise, of all sales of merchandise, services and other receipts whatsoever, including receipts from coin or credit or debit card operated vending or rental machines, and of all business conducted or originating in, upon or from the Premises, including personal, mail, facsimile, electronic mail, telephone, or other orders received or taken at the Premises and filled from the Premises or elsewhere, and including all deposits not refunded to purchasers, and sales by any permitted concessionaires, licensees and other persons on the Premises, or otherwise in or from the Premises. No deduction shall be allowed for uncollected or uncollectible credit or debit accounts. Gross Sales does not include any sums collected by the Associate for any duly constituted governmental authority and paid out by it to such authority on account of any direct tax imposed by such authority directly upon any purchaser in respect of retail sales made or services provided for compensation by the Associate upon or from the Premises to any such purchaser, or to any goods and services or harmonized sales taxes or value added taxes, whether or not paid out to such governmental authority, nor the amount of returns of merchandise to shippers or manufacturers, nor the sales price of merchandise returned or exchanged by customers for which a credit or refund is made; nor shall Gross Sales include monies collected or arising from the operation of a retail postal outlet (other than on account of the sale of stamps and other related products or services), if any, established on the Premises, monies collected as utility payments, monies arising from the sale of lottery tickets, monies collected on account of sales to employees of the Associate working in the Premises for their own use, or monies collected or arising from such other items as may be designated by the Company from time to time as being excluded from Gross Sales; […]

	2.05 All accounting terms not specifically defined herein shall be construed in accordance with generally accepted accounting principles, consistently applied.
Article 3.00 – Grant of Licence […] **3.06** The Associate agrees that for the purpose of protecting and enhancing the value and goodwill of the Shoppers Marks and of ensuring that the public may rely upon the said Shoppers Marks as identifying drug stores of highest quality and standards, the continued right to display the Shoppers Marks at the Premises is subject to the continued faithful adherence by the Associate to the standards, terms and conditions set forth in or established in accordance with this agreement and the Manual referred to herein and that the Associate will operate the Franchised Business in accordance with the rules and procedures from time to time reasonably prescribed by the Company or 911979 Alberta. […]	*Article 3.00 – Grant of Licence* […] **3.06** The Associate agrees that for the purpose of protecting and enhancing the value and goodwill of the Shoppers Marks as identifying drug stores of the highest quality and standards, the continued right to display the Shoppers Marks at the Premises is subject to the continued adherence by the Associate to the standards, terms and conditions set forth in or established in accordance with this Agreement and the manual and that the Associate will use the Shoppers Marks and operate the Franchised Business in accordance with the standards, specifications, rules and procedures from time to time reasonably prescribed by the Company or 911979 Alberta. […]
Article 4.00 - Term 4.01 (a) Except as herein otherwise provided, this agreement, including the rights granted to the Associate hereunder shall remain in force for one (1) year. This agreement and all rights granted hereunder shall terminate at the end of the original term if notice of termination is sent by either the Associate or the Company to the other of them at least sixty (60) days in advance of the end of the original term. […] (b) If neither party exercises its right to terminate this agreement pursuant to subsection (a) hereof, then this agreement shall be automatically renewed for a further period of one (1) year on the same terms and conditions, including a right of the Associate and the Company to give notice of termination during the renewal term as provided in subsection (a) hereof and including one (1) (but only one) further automatic renewal of one (1) year. It is understood and agreed that at the expiry of such second automatic renewal term there shall be no further renewal of this agreement. Provided that notwithstanding anything to the contrary herein provided, the Company may in its sole and unfettered discretion at any time during such renewal period(s) terminate this agreement upon giving to the Associate sixty (60) days written notice. The Associate shall have a similar right to terminate this agreement during such renewal period(s), reserving unto the Company the right to abridge the sixty (60) day period as provided in subsection (a) hereof. […]	*Article 4.00 - Term* 4.01 (a) Except as herein otherwise provided, this Agreement, including the rights granted to the Associate hereunder, shall remain in force for such number of Accounting Periods that are completed within one (1) year of the date of this Agreement (the "Original Term"). If the commencement date of the Original Term of this Agreement is other than the first day of an Accounting Period, then the Original Term shall be extended by the number of days from the commencement date to the end of the Accounting Period in which the commencement date falls. This Agreement and all rights granted to the Associate hereunder shall terminate at the end of the Original Term if notice of termination is sent by either the Associate or the Company to the other of them at least sixty (60) days in advance of the end of the Original Term. […] (b) If neither party exercises its right to terminate this Agreement pursuant to subsection (a) hereof, then this Agreement shall be automatically renewed for a further term of thirteen (13) Accounting Periods on the same terms and conditions, including a right of the Associate and the Company to give notice of termination during the renewal term as provided in subsection (a) hereof and including one (1) (but only one (1)) further automatic renewal term of thirteen (13) Accounting Periods. It is understood and agreed that at the expiry of such second automatic renewal term there shall be no further renewal or any option or right to renew or extend this Agreement. Notwithstanding anything to the contrary herein provided, the Company may in its

	discretion at any time during such renewal period(s) terminate this Agreement and the rights granted to the Associate hereunder upon giving to the Associate at least sixty (60) days' written notice. The Associate shall have a similar right to terminate this Agreement during such renewal period(s) by providing the Company with at least sixty (60) days' written notice, reserving unto the Company the right to terminate this Agreement and the rights granted to the Associate hereunder at any time prior to the expiry of such sixty (60) day notice period or immediately upon receipt of such notice as provided in subsection (a) hereof. […]
Article 5.00 – Company's Covenants **5.01** The Company, in consideration of this agreement, agrees that it will render to the Associate the following services and assistance pertaining to the Franchised Business: (a) assistance in store planning and store design; (b) the acquisition and installation, on the Premises, of all furnishings, leasehold improvements, fixtures and equipment (hereinafter collectively referred to as the "Equipment") as the Company deems appropriate for the conduct of a Franchised Business, it being understood and agreed that such Equipment shall at all times be and remain the property of the Company or its Affiliates, as the case may be. Only the Equipment as specified by the Company shall be used in the conduct of the Franchised Business and the Associate agrees that it will not enter into any lease for Equipment with any person, firm or corporation other than the Company. All Equipment shall be leased to the Associate upon terms and conditions to be mutually agreed upon between the parties from time to time. For greater certainty, it is acknowledged and agreed that all Equipment presently located on the Premises is the exclusive property of the Company or its Affiliates, as the case may be. The Associate further agrees that any asset (including but not limited to computer software) purchased for the Franchised Business and which has previously been classified as an expense of the Franchised Business in accordance with generally accepted accounting principles shall automatically be acquired by the Company under the terms of Section 13.06 hereof upon any termination of this agreement without any additional compensation being due to the Associate pursuant to Section 13.07; (c) the seeking out of sources of supply of merchandise and the provision of the advantages of bulk purchasing, where practical; (d) the provision of efficient systems for bookkeeping and stock controls; (e) the provision of advertising programs;	*Article 5.00 – Company's Covenants* **5.01** The Company agrees that it will render or cause to be rendered to the Associate the following services and assistance pertaining to the Franchised Business: (a) assistance in store planning and store design; (b) the acquisition and installation, on the Premises, of all furnishings, leasehold improvements, fixtures and equipment (hereinafter collectively referred to as the "Equipment") as the Company deems appropriate for the conduct of the Franchised Business, it being understood and agreed that such Equipment shall at all times be and remain the property of the Company or its Affiliates, as the case may be. Only the Equipment as specified by the Company shall be used in the conduct of the Franchised Business and the Associate agrees that it will not enter into any lease for Equipment with any person, firm or corporation other than the Company or its Affiliates. All Equipment shall be leased to the Associate upon terms and conditions to be mutually agreed upon between the Associate and the Company or its Affiliates. For greater certainty, it is acknowledged and agreed that all Equipment presently located on the Premises is the exclusive property of the Company or its Affiliates, as the case may be. The Associate further agrees that any asset (including but not limited to computer software) purchased for the Franchised Business and which has previously been classified as an expense of the Franchised Business in accordance with generally accepted accounting principles shall automatically be acquired by the Company under the terms of Section 13.06 hereof upon any termination of this Agreement without any additional compensation being due to the Associate pursuant to Section 13.07; (c) the seeking out of sources of supply of merchandise and the provision of the advantages of bulk purchasing, where practical;

(f) the arrangement of certain insurance; (g) the provision of training programs for staff; (h) the provision of results of research on market trends of product lines; (i) the provision of counselling with respect to merchandising and in respect of the operation and promotion of the Franchised Business; (j) assistance regarding the Associate's dealings with the Provincial College of Pharmacy or other similar body having jurisdiction in the Province in which the Franchised Business is carried on; (k) financial advice and consultation; (l) consultations with the Associate regarding the establishment of an appropriate security program for the Franchised Business.	(d) the provision of efficient systems for bookkeeping and stock controls; (e) the provision of advertising programs; (f) the arrangement of certain insurance; (g) the provision of training programs for staff; (h) the provision of research on market trends of product lines; (i) the provision of counselling with respect to merchandising and in respect of the operation and promotion of the Franchised Business; (j) assistance regarding the Associate's dealings with the Provincial College of Pharmacy or other similar body having jurisdiction in the Province in which the Franchised Business is carried on; (k) financial advice and consultation; (l) consultations with the Associate regarding the establishment of an appropriate security program for the Franchised Business.
Article 6.00 - Associate's and Pharmacist's Covenants **6.01** Throughout the term of this agreement and any renewal thereof, the Associate and the Pharmacist jointly and severally agree: (a) to devote their entire time, labour, skill, effort and attention to the Franchised Business and the management, conduct and operation thereof. It is understood and agreed that subject to the provisions of Section 12.01, nothing in this Section shall be deemed to prevent or prohibit the Associate or the Pharmacist from investing their funds in such form of purely passive investments as they consider appropriate, unless the making of such investment is to a degree or of a type as to conflict with the efficient performance of this agreement or with any other obligations to the Company herein contained; (b) to conduct the Franchised Business in an orderly and business-like manner, in compliance with all laws, rules, regulations and orders as are applicable to the Associate, to the Pharmacist and to the Franchised Business, and strictly in conformity with all specifications, standards, policies and operating procedures from time to time prescribed by the Company relating to the operation of the Franchised Business (including without limitation the nature, type and quality of goods and services offered for sale by the Franchised Business and the maximum sale prices established for such goods and services, the safety, maintenance, cleanliness, function and appearance of the Premises and its contents, the general appearance, dress and use of prescribed uniforms and name badges by all employees, the use of the Shoppers Marks, hours during which the Franchised Business is open for business, and	*Article 6.00 - Associate's and Pharmacist's Covenants* **6.01** Throughout the Term of this Agreement, the Associate and the Pharmacist jointly and severally agree: (a) to devote their entire time, labour, skill, effort and attention to the Franchised Business and the management, conduct and operation thereof. It is understood and agreed that subject to the provisions of Section 12.01, nothing in this Section shall be deemed to prevent or prohibit the Associate or the Pharmacist from investing their funds in such form of purely passive investments as they consider appropriate, unless the making of such investment is to a degree or of a type as to conflict with the efficient performance of this Agreement or with any other obligations to the Company herein contained; (b) to conduct the Franchised Business in an orderly and business-like manner, in compliance with all laws, rules, regulations and orders as are applicable to the Associate, to the Pharmacist and to the Franchised Business, and strictly in conformity with all specifications, standards, rules, policies and procedures from time to time prescribed by the Company relating to the operation of the Franchised Business (including without limitation the nature, type and quality of goods and services offered for sale by the Franchised Business and the maximum sale prices established for such goods and services, the safety, maintenance, cleanliness, function and appearance of the Premises and its contents, the general appearance, dress and use of prescribed uniforms and name badges by all

the use and retention of standard forms). Specifications, standards, policies and operating procedures prescribed from time to time by the Company in the Manual, or otherwise communicated to the Associate in writing, shall constitute provisions of this agreement as if fully set forth herein, and all references herein to this agreement shall include all such specifications, standards, policies and operating procedures. The Associate acknowledges that changes in such specifications, standards, policies and operating procedures will be necessary from time to time and agrees that the Company may at its option from time to time add to, subtract from, or otherwise modify the Manual and any specifications, standards, policies and operating procedures. The master copy of the Manual maintained by the Company shall govern if there is a dispute relating to the contents of the Manual. The Associate acknowledges and agrees that the uniform application of such specifications, standards, policies and operating procedures is vitally important to the preservation of the goodwill and prestige which the Company enjoys with the public and to the collective success of all Associates. The Associate hereby acknowledges receipt and loan of a copy of the Manual and it undertakes not to disclose the same or its contents to any person, except insofar as it may be necessary in the conduct of the Franchised Business or make any reproductions or copies thereof, in whole or in part, without the prior written approval of the Company. The Manual, together with any copies or reproductions thereof, shall at all times remain the sole property of the Company and shall promptly be returned to it upon the termination of this Agreement; (c) to perform and observe all of the covenants on the part of the lessee contained in the lease of the Premises the particulars of which are set forth in Schedule "A" hereto, including the payment of all amounts reserved thereby and to indemnify and save the Company and its Affiliates harmless of and from any and all claims which may arise or be asserted against them or any of them by reason of the said lease during the term of this agreement; […] (f) to participate in the advertising programs prescribed from time to time by the Company for national and regional advertising and promotion, including without limitation adopting, implementing and using all marketing and promotional programs which are designated as "Core Marketing Programs" by the Company from time to time. All local advertising media and promotions to be employed independently by the Associate shall be submitted to and approved in writing by the Company prior to the use thereof; […]	employees, the use of the Shoppers Marks, hours during which the Franchised Business is open for business, and the use and retention of standard forms. Specifications, standards, rules, policies and procedures prescribed from time to time by the Company in the Manual, or otherwise communicated to the Associate in writing, shall constitute provisions of this Agreement as if fully set forth herein, and all references herein to this Agreement shall include all such specifications, standards, rules, policies and procedures. The Associate acknowledges that changes in such specifications, standards, rules, policies and procedures will be necessary from time to time and agrees that the Company may at its option from time to time add to, subtract from, or otherwise modify the Manual and any specifications, standards, rules, policies and procedures. The master copy of the Manual maintained by the Company shall govern if there is a dispute relating to the contents of the Manual. The Associate acknowledges and agrees that the uniform application of such specifications, standards, rules, policies and procedures is vitally important to the preservation of the goodwill and prestige which the Company enjoys with the public and to the collective success of all Associates. The Associate hereby acknowledges receipt and loan of a copy of the Manual in written or electronic format and it undertakes not to disclose the same or its contents to any person, except insofar as it may be necessary in the conduct of the Franchised Business or make any reproductions or copies thereof, in whole or in part, without the prior written approval of the Company. The Manual, together with any copies or reproductions thereof, including any copies stored in electronic format, shall at all times remain the sole property of the Company and shall promptly be returned to it upon the termination of this Agreement; (c) to perform and observe all of the covenants on the part of the lessee contained in the lease of the Premises the particulars of which are set forth in Schedule "A" hereto, including the payment of all amounts reserved thereby and to indemnify and save the Company and its Affiliates harmless of and from any and all claims which may arise or be asserted against them or any of them by reason of the said lease during the Term of this Agreement; […] (f) to participate in the programs prescribed from time to time by the Company for national and regional advertising, marketing and promotion including, without limitation, adopting, implementing and using all programs which are designated by the Company from time to time, whether such programs are intended for advertising, marketing, promotion or other

	purposes. All local advertising and marketing media and promotions to be employed independently by the Associate shall be submitted to and approved in writing by the Company prior to the use thereof; […]
(j) to advertise and sell in connection with the Franchised Business only such goods and to provide only such services as are approved by the Company in writing from time to time and are not thereafter disapproved. The Associate agrees that the maintenance of the standards of quality and uniformity of goods sold or merchandised in Shoppers Drug Mart stores is essential to the goodwill, success and continued public acceptance of the Shoppers Drug Mart system, for the benefit of the Company, the Associate and all other Associates licensed by the Company to operate a retail store using the Shoppers Drug Mart system and the Shoppers Marks. Accordingly, the Associate agrees to (A) sell, merchandise, promote or otherwise deal in products specified from time to time by the Company to be offered in the operation of the Franchised Business and provide only such services specified from time to time by the Company to be offered in the operation of the Franchised Business; (B) purchase all materials and supplies needed for the operation of the Franchised Business, and all products specified from time to time by the Company to be offered in the operation of the Franchised Business, either directly from the Company or from such other suppliers specified from time to time by the Company, which may include an Affiliate. If: (A) the Company establishes a Distribution Centre or Centres (which may be owned and managed by the Company, an Affiliate or a third party designated by the Company) for certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase all of its requirements of these items solely from the Distribution Centre(s). The prices charged by the Distribution Centre(s) will, when assessed as a whole over a reasonable period of time, be competitive. Despite anything contained in this agreement, the Company will not be liable for any delay or failure to supply these items due to any circumstances beyond its control; (B) the Distribution Centre(s) choose not to carry certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase such products directly from suppliers which are designated by the Company to be part of a specialized supplier distribution network ("Direct Suppliers"); (C) the Distribution Centre(s) established by the Company (i) are incapable of supplying to the Associate its total	(j) to advertise and sell in connection with the Franchised Business only such goods and to provide only such services as are approved by the Company in writing from time to time and are not thereafter disapproved. The Associate agrees that the maintenance of the standards of quality and uniformity of goods sold or merchandised and services provided, at or from Shoppers Drug Mart stores is essential to the goodwill, success and continued public acceptance of the Shoppers Drug Mart system, for the benefit of the Company, the Associate and all other Associates licensed by the Company to operate a retail store using the Shoppers Drug Mart system and the Shoppers Marks. Accordingly, the Associate agrees to (A) sell, merchandise, promote or otherwise deal in products specified from time to time by the Company to be offered in the operation of the Franchised Business and provide only such services specified from time to time by the Company to be offered in the operation of the Franchised Business; (B) purchase all materials and supplies needed for the operation of the Franchised Business, and all products specified from time to time by the Company to be offered in the operation of the Franchised Business, either directly from the Company or from such other suppliers specified from time to time by the Company, which may include an Affiliate So long as the Company has established a Distribution Centre or Centres (which may be owned and managed by the Company, an Affiliate or a third party designated by the Company) for certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase all of its requirements of these items solely from the Distribution Centre(s). The prices charged by the Distribution Centre(s) will, when assessed as a whole over a reasonable period of time, be competitive. Despite anything contained in this Agreement, the Company will not be liable for any delay or failure to supply these items due to any circumstances beyond its control. If: (A) the Distribution Centre(s) choose not to carry certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase such products directly from suppliers which are designated

requirements of any products specified from time to time by the Company to be offered in the operation of the Franchised Business, or (ii) do not supply or carry certain products which are approved by the Company for sale in the Franchised Business, or (iii) if certain products are not available from either the Distribution Centre(s) or a Direct Supplier, then the Associate shall purchase such products from a secondary supplier designated in writing by the Company for the Franchised Business ("Secondary Supplier"); and (D) the Associate wishes to sell certain products to meet the particular customer needs of the Franchised Business, which products are not otherwise specified by the Company to be offered in the operation of the Franchised Business, the Associate may purchase these items from other suppliers so long as the products: (i) are of a similar or superior quality than the type of products specified from time to time by the Company to be offered in the operation of the Franchised Business; (ii) will not result in a violation of any agreement which the Company may have with its suppliers (including Direct and Secondary Suppliers); (iii) comply with all current packaging and labelling legislation; (iv) are legitimate products not in violation of the trade marks, trade dress or proprietary rights of any third party; and (v) do not conflict with any products carried or offered for sale by the Distribution Centre(s) in the case of products which are "discontinued" or "close-out product lines". The Associate acknowledges that the Company may add to or remove from the products or services specified from time to time by the Company that will be provided or sold in connection with the Franchised Business, in which event the Associate will promptly conform to any such changes. […]	by the Company to be part of a specialized supplier distribution network ("Direct Suppliers"); (B) \the Distribution Centre(s) established by the Company (i) are incapable of supplying to the Associate its total requirements of any products specified from time to time by the Company to be offered in the operation of the Franchised Business, or (ii) do not supply or carry certain products which are approved by the Company for sale in the Franchised Business, or (iii) if certain products are not available from either the Distribution Centre(s) or a Direct Supplier, then the Associate shall purchase such products from a secondary supplier designated in writing by the Company for the Franchised Business ("Secondary Supplier"); and (C) the Associate wishes to sell certain products to meet the particular customer needs of the Franchised Business, which products are not otherwise specified by the Company to be offered in the operation of the Franchised Business, the Associate may purchase these items from other suppliers so long as the products: (i) are of a similar or superior quality to the type of products specified from time to time by the Company to be offered in the operation of the Franchised Business; (ii) will not result in a violation of any agreement which the Company may have with its suppliers (including Direct and Secondary Suppliers); (iii) comply with all current packaging, labelling and language legislation; (iv) are legitimate products not in violation of the trade-marks, trade dress, copyright, industrial design, patent, or other proprietary rights of any third party; and (v) do not conflict with any products carried or offered for sale by the Distribution Centre(s) in the case of products which are "discontinued" or "close-out product lines". The Associate acknowledges that the Company may add to or remove from the products or services specified from time to time by the Company that will be provided or sold in connection with the Franchised Business, in which event the Associate will promptly conform to any such changes. […]
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	**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

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. 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.	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 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 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	*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

statements, cancelled cheques, loan amounts, bills of exchange and documents of withdrawal as the Company may request. […]	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. **11.02** It is understood and agreed that if the Associate can demonstrate to the reasonable satisfaction of the Company that circumstances beyond its reasonable control materially adversely affected the profitability of the Franchised Business during any twelve (12) month period for which payment of fees under Section 11.01 hereof has been made or is payable, the Company will reduce the fee payable for such period by an amount equal to the lesser of: (a) one hundred percent (100%) of such fee; or (b) the net loss incurred by the Associate for such twelve (12) month period, as disclosed by the audited financial statements of the Associate for such period prepared in accordance with the provisions of Section 6.01(k)(ii)(B) hereof, after deduction of the aggregate of all amounts paid or payable by the Associate, during such twelve (12) month period, to or for the benefit of the Pharmacist and/or any other person or persons not dealing at arm's length (as that term is defined in the Income Tax Act (Canada) as amended from time to time) with the Associate or the Pharmacist.	*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. **11.02** For each Fiscal Year of the Associate, the Company shall provide to the Associate a forecast of the projected Gross Sales, earnings before taxes and profitability of the Franchised Business for the next following Fiscal Year which will set out details for the expected financial performance for the Franchised Business for that Fiscal Year. The forecast shall include information provided by the Associate to the Company and shall take into account such factors as past over-performance or under-performance, local market conditions, competitive activity, economic environment, retail drug store trends, hours of operation of the Franchised Business, multi-store operations, relocations and expansions and such other factors as the Company in its judgment considers relevant. The forecast shall include the Fee referred to in Section 11.01 for that Fiscal Year. The Pharmacist and the Associate acknowledge and agree that in preparing and providing any such forecast, the Company makes no representation, warranty or guarantee, express, implied or collateral, with regard to the Franchised Business or its likelihood of success or profitability, including possible Gross Sales, expenses or profits or any subsidy that the Company may pay to the Associate and that such forecast may be subject to change in accordance with the rights granted to the Company under this Agreement.

11.03 It is also understood and agreed that if the Company determines that the total profitability of the Franchised Business during any twelve (12) month period referred to in Section 11.01 is materially greater than that which was projected by the Company at the time that it fixed the fee payable by the Associate for such period under Section 11.01, then the Company may increase the fee payable for such period by such amount as the Company in the good faith exercise of its reasonable business judgment determines is fair and equitable in the circumstances. **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.	**11.03** It is understood and agreed that if the Company determines that the profitability of the Franchised Business during any Fiscal Year referred to in Sections 11.01 and 11.02 is materially greater or less than that which was projected by the Company at the time that it fixed the Fee payable by the Associate for such period under Sections 11.01 and 11.02, then, at the end of each Fiscal Year, the Company may increase or decrease the Fee payable by the Associate or any subsidy that the Company may pay to the Associate for such period by such amount as the Company in good faith and in accordance with reasonable commercial standards determines in the circumstances. **11.04** The parties acknowledge that further details, including standards and procedures for determining the matters set forth in Sections 11.01, 11.02 and 11.03 above may be set out in the Manual or otherwise. **11.05** In addition to the Fee payments provided for in Sections 11.01, 11.02 and 11.03 above, 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 (the "Advertising Contribution") as determined by the Company in the Manual or otherwise. The Company reserves the right to place and develop or cause to be placed or developed advertising as agent for and on behalf of the Associate. […]
11.05 The Associate acknowledges and agrees that the payments from time to time required of the Associate on account of the rental of the Equipment or the lease of the Premises or on account of services rendered by the Company in respect of (i) the establishment of a security program for the Franchised Business, (ii) training programs from time to time provided by the Company, (iii) taking of inventory, and (iv) other services from time to time rendered by the Company to the Associate that are not included in the services furnished by the Company to Associates generally at the present time, shall be in addition to the fees payable by the Associate from time to time under Section 11.01 hereof. The fee or fees to be charged to the Associate for any such additional services shall be such amount or amounts as the Company shall, in the good faith exercise of its judgment, determine. […] **11.07** If the total payments required of the Associate under Sections 11.01 and 11.04 hereof in respect of any twelve (12) month period is greater or less than the amount actually paid by the Associate to the Company for such period, an adjustment shall be made between the parties to the end that the amount of such excess or deficiency, if any,	**11.07** The Associate acknowledges and agrees that the payments from time to time required of the Associate on account of the rental of the Equipment or the lease of the Premises or on account of services or programs rendered or made available by the Company or its Affiliates in respect of (i) the establishment of a security program for the Franchised Business, (ii) training programs from time to time provided by the Company or its Affiliates, (iii) taking of inventory, (iv) loyalty programs from time to time developed by the Company or its Affiliates, and (v) other services or programs from time to time rendered or made available by the Company or its Affiliates to the Associate that are not included in the services or programs furnished by the Company or its Affiliates to Associates generally at the present time, shall be in addition to the Fee and other amounts payable by the Associate from time to time under this Agreement. The fee or fees to be charged to the Associate for any such additional services or programs shall be such amount or amounts as the Company shall determine in the good faith exercise of its judgment. […]

shall forthwith be paid in cash to the Company or the Associate as the case may be.	**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.
Article 15.00 - Pharmacist's Covenants **15.01** The Pharmacist hereby irrevocably and unconditionally guarantees to the Company the due and punctual payment, observance and performance by the Associate of all its liabilities, indebtedness, and obligations of the Associate to the Company (present or future), of whatsoever nature or kind and however arising, including without limitation all indebtedness, liability and obligation of the Associate arising under or by virtue of this agreement and any document delivered by the Associate in furtherance of this agreement (all such indebtedness, liabilities and obligations being herein referred collectively as the "Obligations"). **15.02** The Company shall not be bound to exercise or exhaust its recourse against the property of the Associate before being entitled to require payment by the Pharmacist of all its liabilities hereunder. **15.03** The liabilities of the Pharmacist hereunder shall not be released, discharged or in any way affected by any release or discharge of, or dealing with the Associate with respect to the Obligations or otherwise, or anything done, suffered or permitted to be done by the Company in relation to the Associate, or by any change, alteration, modification or termination of the Obligations, or by any compromise, arrangement or plan of reorganization affecting the Associate, or by the bankruptcy or insolvency of the Associate, or by any other act or proceeding in relation to the Associate or the Obligations whereby the Pharmacist might otherwise be released or exonerated. The guarantee provided for herein shall continue notwithstanding the termination of this agreement for any cause. **15.04** The liabilities of the Pharmacist hereunder shall be continuing liabilities and a fresh cause of action shall arise in respect of each default on the part of the Associate giving rise to a liability of the Pharmacist hereunder.	*Article 15.00 - Pharmacist's Covenants* **15.01** The Pharmacist hereby irrevocably and unconditionally guarantees to the Company the due and punctual payment, observance and performance by the Associate of all its liabilities, indebtedness, and obligations of the Associate to the Company (present or future), of whatsoever nature or kind and however arising, including without limitation all indebtedness, indemnity, liability and obligation of the Associate arising under or by virtue of this Agreement and any document delivered or to be delivered by the Associate in furtherance of this Agreement (all such indebtedness, liabilities and obligations being herein referred collectively as the "Obligations"). 15.02 The Company shall not be bound to exercise or exhaust its recourse against the Associate or the property of the Associate before being entitled to require payment, in observance or performance by the Pharmacist under Section 15.01 hereof. **15.03** The liabilities of the Pharmacist under Section 15.01 hereof shall not be released, discharged or in any way affected by any release or discharge of, or dealing with the Associate with respect to the Obligations or otherwise, or anything done, suffered or permitted to be done by the Company in relation to the Associate, or by any change, alteration, modification or termination of the Obligations, or by any compromise, arrangement or plan of reorganization affecting the Associate, or by the bankruptcy or insolvency of the Associate, or by any other act or proceeding in relation to the Associate or the Obligations whereby the Pharmacist might otherwise be released or exonerated. The guarantee provided for in Section 15.01 hereof shall continue notwithstanding the termination of this Agreement for any cause. **15.04** The liabilities of the Pharmacist under Section 15.01 hereof shall be continuing liabilities and a fresh cause of action shall arise in respect of each breach or default on the part of the Associate giving rise to a liability of the Pharmacist thereunder.
Article 16.00 - Relationship Of Parties **16.01** The Associate agrees that it is not an agent of the Company, but is an independent contractor completely	***Article 16.00 - Relationship Of Parties*** **16.01** The Associate agrees that it is not an agent of the Company, but is an independent contractor completely

separate from the Company, and that the Associate has no authority to bind or attempt to bind the Company in any manner or form whatsoever or to assume or incur any obligation or responsibility, express or implied, for or on behalf of, or in the name of the Company. This agreement shall not be construed so as to constitute the Associate a partner, joint venturer, agent or representative of the Company for any purpose whatsoever. The Associate shall use its own name in obtaining credit or when executing contracts or making purchases, so that the transaction shall clearly indicate that the Associate is acting as an Associate and is not acting for the Company.	separate from the Company, and that the Associate has no authority to bind or attempt to bind the Company in any manner or form whatsoever or to assume or incur any obligation or responsibility, express, implied or collateral, for or on behalf of, or in the name of the Company. This Agreement shall not be construed so as to constitute the Associate and/or Pharmacist as a partner, employee, joint venturer, agent or representative of the Company for any purpose whatsoever, or to create any such relationship or any trust or fiduciary relationship. The Associate shall use its own name in obtaining credit or when executing contracts or making purchases, so that the transaction shall clearly indicate that the Associate is acting as an Associate and is not acting for the Company. The Associate agrees that the employees of the Associate shall not, because of this Agreement, or because of their employment with the Associate, be constituted as employees of the Company. In addition, the Associate shall not represent or assert to any person or in any forum, that any employee of the Associate is, because of this Agreement, or because of their employment with the Associate, an employee of the Company. […]
Article 17.00 - General Contract Provisions **17.01** This agreement constitutes the entire agreement between the parties and supersedes all previous agreements and understandings in any way relating to the subject matter hereof between the parties. It is expressly understood and agreed that no representations, inducements, promises or agreements oral or otherwise between the parties not embodied herein shall be of any force and effect. No failure of the Company to exercise any right given to it hereunder, or to insist upon strict compliance by the Associate of any obligation hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of the Company's rights to demand exact compliance with the terms hereof. Waiver by the Company of any particular default by the Associate shall not affect or impair the Company's right in respect of any subsequent default of the same or of a different nature, nor shall any delay or omission of the Company to exercise any rights arising from such default affect or impair the Company's rights as to such default or any subsequent default. […]	*Article 17.00 - General Contract Provisions* **17.01** This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements and understandings in any way relating to the subject matter hereof between the parties. It is expressly understood and agreed that no representations, warranties, inducements, promises or agreements oral or otherwise between the parties not embodied herein shall be of any force and effect. No failure of the Company to exercise any right given to it hereunder, or to insist upon strict compliance by the Associate of any obligation hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of the Company's rights to demand exact compliance with the terms hereof. Waiver by the Company of any particular breach, default or violation by the Associate shall not affect or impair the Company's right in respect of any subsequent breach, default or violation of the same or of a different nature, nor shall any delay or omission of the Company to exercise any rights arising from such default affect or impair the Company's rights as to such default or any subsequent default. […]
17.12 The Associate and the Pharmacist each acknowledge: (a) each has been given an opportunity to be advised by professional advisors of its and his own choosing regarding	**17.12** The Associate and the Pharmacist each acknowledge: (a) each has been given an opportunity to be advised by professional advisors of its and his or her own choosing

all pertinent aspects of this agreement and the relationships created by this agreement; (b) each has conducted an independent investigation of the business venture contemplated by this agreement, recognizes that it involves business risks, and understands that its success will be largely dependent upon its and his ability as an independent businessman; and (c) each has been given enough time to read this agreement and understands its provisions. […]	regarding all pertinent aspects of this Agreement and the relationship created by this Agreement; (b) each has conducted an independent investigation of the business venture contemplated by this Agreement, recognizes that it involves business risks and understands that its success will be largely dependent upon its and his or her ability as an independent businessperson; and (c) each has been given enough time to read this Agreement and understands its provisions. […]

DD. Schedule "C" – Vandenburg 2004 Profit & Loss Statement

SHOPPERS DRUG MART / PHARMAPRIX
CORPORATE YEAR P&L - 062 SHOPPERS WORLD (ONTARIO)
Period 13 Ended January 1, 2005

VP : BOB MCCORD — ASSOCIATE : ROMEO VANDENBURG — SELLING FT²: 9,900 — HOURS : Midnight
DM : GEORGE STEPHENSON — CONCEPT : LARGE FORMAT — LOCATION TYPE : STRIP CENTRE/PLAZA — OP HOURS : 111 — OP DAYS : 7

CURRENT PERIOD								YEAR TO DATE							
PLAN 2004	% SALES	ACTUAL 2004	% SALES	VARIANCE TO PLAN	PRIOR 2003	% SALES	VARIANCE TO PRIOR		PLAN 2004	% SALES	ACTUAL 2004	% SALES	VARIANCE TO PLAN	PRIOR 2003	% SALES	VARIANCE TO PRIOR
								Sales								
345,000	29.47%	321,643	33.01%	(23,357)	407,182	30.93%	(85,518)	Prescription	4,408,000	37.91%	4,132,991	39.16%	(275,009)	4,051,372	36.97%	81,619
825,791	70.53%	652,624	66.99%	(173,167)	909,350	69.07%	(256,726)	Front Store	7,219,400	62.09%	6,420,064	60.84%	(799,336)	6,906,365	63.03%	(486,301)
0	0.00%	0	0.00%	0	0	0.00%	0	Tobacco	0	0.00%	0	0.00%	0	0	0.00%	0
1,170,791	100.00%	974,267	100.00%	(196,524)	1,316,532	100.00%	(342,244)	Total Sales	11,627,400	100.00%	10,553,075	100.00%	(1,074,325)	10,958,736	100.00%	(406,662)
								Gross Profit								
87,799	25.45%	72,676	22.60%	(15,123)	99,647	24.47%	(26,971)	Prescription	1,121,790	25.45%	1,021,559	24.72%	(100,231)	1,026,657	25.34%	(5,098)
244,067	29.56%	151,697	23.24%	(92,370)	344,741	37.91%	(193,044)	Front Store	2,137,159	29.60%	1,536,999	23.94%	(600,160)	1,975,095	28.59%	(438,426)
0	-	0	-	0	0	-	0	Tobacco	0	-	0	-	0	(78)	-	78
331,866	28.35%	224,373	23.03%	(107,493)	444,388	33.75%	(220,015)	Gross Profit	3,258,948	28.03%	2,558,228	24.24%	(700,720)	3,001,674	27.39%	(443,446)
								Store Expenses								
								Occupancy								
36,324	3.10%	36,295	3.73%	29	45,405	3.45%	9,110	Rent	472,209	4.06%	470,126	4.45%	2,083	480,017	4.38%	9,891
8,029	0.75%	1,453	0.15%	7,577	2,721	0.21%	1,269	Utilities	55,290	0.48%	47,747	0.45%	7,543	43,532	0.40%	(4,215)
3,012	0.26%	2,863	0.29%	149	3,655	0.28%	792	Common Area	39,155	0.34%	37,831	0.36%	1,323	38,419	0.35%	588
0	0.00%	0	0.00%	0	0	0.00%	0	Business Tax	0	0.00%	0	0.00%	0	0	0.00%	0
8,979	0.77%	8,738	0.90%	241	10,897	0.83%	2,159	Realty Tax	116,725	1.00%	111,658	1.06%	5,067	115,971	1.06%	4,313
57,144	4.88%	49,348	5.07%	7,796	62,678	4.76%	13,329	Total Occupancy	683,378	5.88%	667,362	6.32%	16,016	677,939	6.19%	10,577
								Wages & Benefits								
34,351	2.93%	32,269	3.31%	2,082	39,003	2.96%	6,715	Pharmacy	405,801	3.59%	410,265	3.89%	5,517	395,110	3.61%	(15,174)
60,526	5.17%	46,719	4.80%	13,807	73,313	5.57%	26,594	Front Store	679,219	5.84%	611,493	5.79%	67,726	741,227	6.76%	129,734
2,999	0.26%	2,777	0.29%	223	5,784	0.44%	3,008	Administrative	38,992	0.34%	40,723	0.39%	(1,731)	43,846	0.40%	3,123
530	0.05%	30	0.00%	501	(626)	(0.05)%	(656)	FSM Incentive	7,000	0.06%	(244)	(0.00)%	7,244	658	0.01%	902
9,384	0.72%	9,651	0.99%	(1,267)	11,194	0.85%	1,543	Postal	36,352	0.65%	103,130	0.98%	(4,778)	101,802	0.93%	(1,328)
9,326	0.80%	7,804	0.80%	1,522	11,823	0.90%	4,019	Benefits	133,449	1.15%	125,820	1.19%	7,630	141,011	1.29%	15,192
462	0.04%	376	0.04%	85	462	0.04%	85	Pharmacist Equity Plan	6,000	0.05%	2,667	0.03%	3,333	6,000	0.05%	3,333
116,597	9.96%	99,664	10.23%	16,914	140,954	10.71%	41,270	Total Wages & Benefits	1,373,813	11.86%	1,293,873	12.26%	84,941	1,429,655	13.04%	135,782
23,680	2.02%	25,505	2.62%	(1,825)	29,798	2.26%	4,293	Equipment Rent - SDM	302,844	2.61%	324,347	3.07%	(21,503)	312,480	2.85%	(11,867)
937	0.08%	0	0.00%	937	0	0.00%	0	Equipment Rent - Other	11,794	0.10%	0	0.00%	11,794	0	0.00%	0
15,806	1.35%	13,152	1.35%	2,654	17,773	1.35%	4,621	Advertising - SDM	156,970	1.35%	142,389	1.35%	14,581	147,662	1.35%	5,273
								Selling Other								
599	0.05%	366	0.04%	233	504	0.04%	138	Advertising & Promotion	7,650	0.07%	5,854	0.06%	1,796	8,916	0.08%	3,062
615	0.05%	8,078	0.83%	(7,462)	(1,490)	(0.11)%	(9,567)	Display & Pricing	8,000	0.07%	14,383	0.14%	(6,383)	4,628	0.04%	(9,756)
1,454	0.12%	674	0.07%	780	1,668	0.14%	1,194	Rx Supplies & Systems	16,035	0.14%	11,217	0.11%	4,818	13,901	0.13%	2,684
450	0.04%	744	0.08%	(294)	499	0.04%	(245)	Delivery	6,265	0.05%	4,228	0.04%	2,057	4,527	0.04%	299
2,044	0.17%	891	0.09%	1,154	2,490	0.19%	1,599	Front End Supplies	20,304	0.17%	15,443	0.15%	4,861	17,254	0.16%	1,811
4,487	0.38%	3,662	0.38%	826	4,821	0.37%	1,159	Credit Card	47,335	0.41%	44,953	0.43%	2,383	43,621	0.40%	(1,332)
9,639	0.82%	14,404	1.48%	(4,764)	8,891	0.68%	(5,743)	Total Selling Other	105,608	0.91%	96,079	0.91%	9,531	92,846	0.85%	(3,233)
4,701	0.40%	4,609	0.47%	92	7,594	0.58%	2,985	Optimum Expense	54,166	0.47%	52,301	0.50%	1,864	58,264	0.53%	5,963
								General Expense								
2,976	0.25%	1,226	0.13%	1,750	5,301	0.40%	4,076	Security	36,304	0.31%	31,169	0.30%	5,136	26,040	0.24%	(3,129)
1,391	0.12%	1,158	0.12%	233	1,422	0.11%	265	Insurance	13,813	0.12%	14,950	0.14%	(1,137)	11,829	0.11%	(3,121)
1,960	0.17%	3,694	0.38%	(1,734)	1,165	0.09%	(2,529)	Computer	24,808	0.21%	22,537	0.21%	2,271	22,133	0.20%	(404)
3,823	0.33%	1,987	0.19%	1,836	5,302	0.40%	3,435	Repairs & Maintenance	36,563	0.33%	49,676	0.47%	(11,113)	66,527	0.63%	16,851
1,950	0.17%	716	0.07%	1,234	713	0.05%	(3)	Other Store Expenses	22,364	0.19%	29,665	0.28%	(7,301)	26,703	0.26%	(961)
1,494	0.13%	1,809	0.19%	(315)	1,454	0.11%	(355)	Accounting Fees	19,422	0.17%	18,639	0.18%	783	18,097	0.17%	(541)
384	0.03%	426	0.04%	(43)	681	0.05%	255	Interest & Bank Charges	4,553	0.04%	5,226	0.05%	(673)	4,553	0.04%	(643)
1,097	0.09%	378	0.04%	719	956	0.01%	(213)	Office Supplies	11,126	0.10%	11,709	0.11%	(583)	13,325	0.12%	1,615
579	0.05%	596	0.06%	(7)	5,996	0.46%	5,410	Licences	6,229	0.05%	7,579	0.07%	(1,349)	9,955	0.09%	2,376
1,062	0.09%	1,059	0.11%	3	1,200	0.09%	141	Communication	13,804	0.12%	14,041	0.13%	(237)	12,838	0.12%	(1,203)
469	0.04%	456	0.05%	31	1,223	0.09%	765	Travel & Training	11,510	0.10%	13,456	0.13%	(1,946)	7,617	0.07%	(5,840)
293	0.03%	1,240	0.13%	(947)	(746)	(0.06)%	(1,986)	Other General Expenses	2,907	0.03%	81,173	0.77%	(78,266)	6,768	0.06%	(74,405)
17,197	1.47%	14,619	1.50%	2,578	23,879	1.81%	9,261	Total General Expense	205,424	1.77%	299,940	2.84%	(94,516)	232,414	2.12%	(67,526)
4,738	0.40%	7,154	0.73%	(2,396)	7,279	0.55%	144	Interest Expense	78,187	0.66%	60,279	0.57%	15,909	62,736	0.57%	2,458
0	0.00%	0	0.00%	0	0	0.00%	0	Special Service Fees	0	0.00%	0	0.00%	0	0	0.00%	0
0	0.00%	0	0.00%	0	0	0.00%	0	Amortization	0	0.00%	0	0.00%	0	70	0.00%	70
5,444	0.47%	0	0.00%	5,444	8,198	0.62%	8,198	Deferred Charges	70,776	0.61%	90,179	0.85%	(19,404)	64,238	0.59%	(25,942)
266,883	21.56%	228,465	23.45%	27,398	306,901	23.30%	78,317	Total Store Expenses	3,048,960	26.20%	3,026,647	28.68%	19,413	3,075,505	28.09%	51,958
(10,787)	(0.92)%	(9,125)	(0.94)%	(1,662)	(11,348)	(0.86)%	(2,221)	Purchase Discounts	(119,150)	(1.02)%	(116,256)	(1.12)%	(596)	(116,186)	(1.06)%	2,073
(31,515)	(2.69)%	(15,828)	(1.59)%	(15,687)	(22,698)	(1.72)%	(7,171)	Postal	(212,774)	(1.83)%	(219,500)	(2.08)%	6,726	(206,588)	(1.88)%	12,912
(962)	(0.08)%	(946)	(0.10)%	(16)	(31)	(0.00)%	915	Lottery	(10,913)	(0.09)%	(10,968)	(0.10)%	(47)	(5,783)	(0.05)%	5,062
(133)	(0.01)%	(234)	(0.02)%	100	(1,279)	(0.10)%	(1,045)	Miscellaneous	(3,071)	(0.03)%	(8,246)	(0.08)%	5,175	(4,969)	(0.04)%	3,276
(19)	(0.00)%	5,115	0.53%	(5,134)	(1,759)	(0.13)%	(6,874)	In-Store Damages - (Net)	6,532	0.09%	25,353	0.24%	(14,671)	46,921	0.43%	21,718
(43,417)	(3.71)%	(17,717)	(1.82)%	(25,700)	(37,123)	(2.82)%	(19,406)	Total Sundry Revenue	(335,383)	(2.88)%	(331,667)	(3.14)%	(3,716)	(286,505)	(2.61)%	45,163
119,399	10.20%	13,606	1.40%	(105,794)	174,710	13.27%	(101,104)	Store Profitability	548,272	4.72%	(136,751)	(1.30)%	(685,024)	209,673	1.91%	(346,425)

EE. Schedule "D" – Statutory and Regulatory Background

1. *Ontario Drug Benefit Act*, (October 1, 2006 to March 31, 2013)

Principles

0.1 In this Act, the following principles are recognized:

1. The public drug system aims to meet the needs of Ontarians, as patients, consumers and taxpayers.

2. The public drug system aims to involve consumers and patients in a meaningful way.

3. The public drug system aims to operate transparently to the extent possible for all persons with an interest in the system, including, without being limited to, patients, health care practitioners, consumers, manufacturers, wholesalers and pharmacies.

4. The public drug system aims to consistently achieve value-for-money and ensure the best use of resources at every level of the system.

5. Funding decisions for drugs are to be made on the best clinical and economic evidence available, and will be openly communicated in as timely a manner as possible.

[…]

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.

Extended definition of "manufacturer"

(2) […]

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.

Executive officer may make order

(4) If the executive officer believes, on reasonable grounds, that a manufacturer is not complying with subsection (1), the executive officer may make an order requiring the manufacturer to pay to the Minister of Finance the amount calculated under subsection (5).

Calculation

(5) For the purposes of this section, the following rules apply to calculating the amount that is to be paid under subsection (4):

1. The amount shall be calculated by determining the difference between the expected value of all units of drug products and listed substances purchased and the actual cost of acquiring those units by the wholesaler, operator of a pharmacy, or company that owns, operates or franchises pharmacies.

2. The expected value mentioned in paragraph 1 shall be determined by multiplying the drug benefit price by the volume of units provided by the manufacturer or wholesaler for all the listed drug products and listed substances.

3. The actual cost of acquiring those products and substances mentioned in paragraph 1 shall be determined by subtracting the monetary value of the rebate from the amount paid for the drug products and listed substances by the wholesaler, operator of a pharmacy, or company that owns, operates or franchises pharmacies.

Deemed drug benefit price

(6) For the purposes of subsection (5), the drug benefit price of a drug in respect of which clause (1) (b) applies shall be deemed to be the price submitted by the manufacturer. Reconsideration

(7) Within 14 days of being served with the order, the manufacturer may submit evidence to the executive officer as to its compliance with subsection (1), or that the amount calculated under subsection (5) is not correct, and the executive officer shall reconsider the order based on that evidence.

Actions of executive officer after reconsideration

(8) After reconsidering the order, the executive officer may do one of the following, and shall promptly serve the manufacturer with notice of his or her decision.

1. Affirm the order.

2. Rescind the order.

3. Vary the order.

Executive officer may act

(9) Where a manufacturer has not complied with an order under subsection (4) within 14 days of being served with it, or has submitted evidence within 14 days under subsection (7) and the order has been affirmed or varied under subsection (8) and the manufacturer has not complied with the affirmed or varied order within 14 days of being served with it, the executive officer may either issue a further order under subsection (4) or do either or both of the following:

1. If the drug that is the subject of the order is a listed drug product, remove its designation.

2. Not make further designations of any of the manufacturer's drug products as listed drug products under section 1.3, nor consider any of its drug products for approval under section 16, nor designate any of its products as interchangeable under the *Drug Interchangeability and Dispensing Fee Act* until such time as the executive officer is of the opinion that the manufacturer is no longer offering the rebate.

[…]

Executive officer order where rebate accepted

(12) Where the executive officer believes, on reasonable grounds, that a person has accepted a rebate contrary to subsection (3), the executive officer may make an order requiring the person to pay to the Minister of Finance the amount calculated under subsection (5).

[…]

(b) a professional allowance.

2. *Ontario Drug Benefit Act,* (October 1, 2006 to June 30, 2010)

Code of conduct

11.5 (15) The executive officer shall establish a Code of Conduct respecting professional allowances under this Act and the *Drug Interchangeability and Dispensing Fee Act* in consultation with the pharmacy and drug manufacturing industries, and shall update the Code of Conduct from time to time in consultation with those industries.

Publication

11.5 (16) The executive officer shall publish the Code of Conduct on the website of the Ministry and may publish it in any other format that the executive officer considers advisable.

[…]

Definition

11.5 (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

[…]

Regulations

18. (1) The Lieutenant Governor in Council may make regulations,

[…]

(k.5.1) clarifying the definition of "rebate in section 11.5, including providing that certain benefits are not rebates, prescribing benefits for the purpose of that definition, clarifying how the calculations are to be made in that section and defining "professional allowance" for purposes of that definition, including governing how professional allowances are to be calculated, setting limits on professional allowances and incorporating the content of the Code of Conduct referred to in subsection 11.5 (15) as amended from time to time;

[…]

3. *Ontario Drug Benefit Act*, (July 1, 2010 to March 31, 2013)

Definition

11.5 (15) 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 something provided in accordance with ordinary commercial terms.

11.5 (16)-(18) Repealed

[…]

Regulations

18. (1) The Lieutenant Governor in Council may make regulations,

[…]

(k.5.1.) clarifying the definition of "rebate" in section 11.5, including providing that certain benefits are not rebates, prescribing benefits for purpose of that definition, clarifying how the calculations are to be made in that section and defining "ordinary commercial terms" for purposes of that definition, including setting limits on ordinary commercial terms;

4. Ont. Reg. 201/96 (*Ontario Drug Benefit Act*) (October 1, 2006 to June 30, 2010)

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% 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.

[…]

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.

Manufacturers' Representatives

Manufacturers' representatives shall conduct business ethically and in a manner that is in the best interest of patients.

Any information provided by manufacturers' representatives, whether written or oral, must be full, factual and without misrepresentation.

Manufacturers shall be held responsible for the behaviour of their representatives.

Pharmacy Representatives

Pharmacy representatives shall conduct business ethically and in a manner that is in the best interest of their patients.

Pharmacies must not make procurement and purchasing decisions based solely on the provision of professional allowances.

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.

5. Ont. Reg. 201/96 (*Ontario Drug Benefit Act*) (July 1, 2010 to March 31, 2013)

1. (8) For greater certainty, a benefit provided as a professional allowance before July 1, 2010 is a rebate and is not a professional allowance unless the manufacturer providing the benefit and the person receiving it report to the executive officer the amount of professional allowance paid or received in the same manner as provided in Schedule 3 of this Regulation as it read before July 1, 2010.

(9), (10) Revoked.

(11) For the purposes of section 11.5 of the Act, a "rebate" does not include the value of a benefit that is provided in accordance with ordinary commercial terms that meet all of the following conditions:

1. The benefit is provided in the ordinary course of business in the supply chain system of listed drug products that are designated as interchangeable under the *Drug Interchangeability and Dispensing Fee Act* between any of a manufacturer, a wholesaler, an operator of a pharmacy or a company that owns, operates or franchises pharmacies.

2. The value of the benefit is set out in a written agreement between any of a manufacturer, a wholesaler, an operator of a pharmacy and a company that owns, operates or franchises pharmacies.

3. The benefit relates to an ordinary commercial relationship that is any of the following:

i. A prompt payment discount.

ii. A volume discount.

iii. A distribution service fee.

4. The total value of any benefits does not exceed 10 per cent of the value of the listed drug products based on the drug benefit price in the Formulary and the number of units dispensed by a pharmacy and reimbursed under the Act.

5. A person who receives the benefit reports to the executive officer, if required by the executive officer to do so, the net selling price of the drug products representing the drug benefit price less the value of the benefits received.

(12) For the purposes of section 11.5 of the Act, a "rebate" does not include the value of a benefit provided in accordance with ordinary commercial terms with respect to a listed drug product that is not interchangeable where the ordinary commercial terms are a discount for prompt payment.

6. Drug Interchangeability and Dispensing Fee Act

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.

Extended definition of "manufacturer"

(2) For the purposes of this section and in section 12.2, unless the context requires otherwise,

"manufacturer" includes a supplier, distributor, broker or agent of a manufacturer, except in,

(a) clause (1) (b) of this section,

(b) paragraph 2 of subsection (8) of this section,

(c) subsection (10) of this section, and

(d) clauses (b) and (c) of the definition of "drug benefit price" in subsection (14) of this section.

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.

Executive officer may make order

(4) If the executive officer believes, on reasonable grounds, that a manufacturer is not complying with subsection (1), the executive officer may make an order requiring the manufacturer to pay to the Minister of Finance the amount calculated under subsection (5).

Calculation

(5) For the purposes of this section, the following rules apply to calculating the amount that is to be paid under subsection (4):

1. The amount shall be calculated by determining the difference between the expected value of all units of the drug products purchased and the actual cost of acquiring those units by the wholesaler, operator of a pharmacy, or company that owns, operates or franchises pharmacies.

2. The expected value mentioned in paragraph 1 shall be determined by multiplying the drug benefit price by the volume of units provided by the manufacturer or wholesaler for all the products.

3. The actual cost of acquiring those products mentioned in paragraph 1 shall be determined by subtracting the monetary value of the rebate from the amount paid for all the products by the wholesaler, operator of a pharmacy, or company that owns, operates or franchises pharmacies.

[…]

Actions of executive officer after reconsideration

(7) After reconsidering the order, the executive officer may do one of the following, and shall promptly serve the manufacturer with notice of his or her decision:

1. Affirm the order.

2. Rescind the order.

3. Vary the order.

Executive officer may act

(8) Where a manufacturer has not complied with an order under subsection (4) within 14 days of being served with it, or has submitted evidence within 14 days under subsection (6) and the order has been affirmed or varied under subsection (7) and the manufacturer has not complied with the affirmed or varied order within 14 days of being served with it, the executive officer may either issue a further order under subsection (4) requiring the manufacturer to pay a revised amount calculated under subsection (5), or do either or both of the following:

> 1. If the drug that is the subject of the order is an interchangeable product, remove its designation.
>
> 2. Not make further designations of any of the manufacturer's products as interchangeable under this Act, or as listed drug products under section 1.3 of the *Ontario Drug Benefit Act*, nor consider any of its products for approval under section 16 of that Act, until such time as the executive officer is of the opinion that the manufacturer is no longer offering the rebate.

[…]

Executive officer order where rebate accepted

(11) Where the executive officer believes, on reasonable grounds, that a person has accepted a rebate contrary to subsection (3), the executive officer may make an order requiring the person to pay to the Minister of Finance the amount calculated under subsection (5).

[…]

Definitions

(14) In this section,

> "drug benefit price" means, with respect to a product,
>
> > (a) its drug benefit price under the *Ontario Drug Benefit Act*,
> >
> > (b) in the case of a product that is not a benefit under the *Ontario Drug Benefit Act*, a price submitted by the manufacturer under the regulations that has been posted by the executive officer in the Formulary, or
> >
> > (c) in the case of a product mentioned in clause (1) (b), the price submitted by the manufacturer;
>
> "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.

Regulations

(15) The Lieutenant Governor in Council may make regulations clarifying the definition of "rebate" in this section, including providing that certain benefits are not rebates, prescribing benefits for the purpose of that definition, clarifying how the calculations are to be made in this section and defining "professional allowance" for the purposes of that definition, including governing how professional allowances are to be calculated, setting limits on professional allowances and incorporating the content of the Code of Conduct referred to in subsection 11.5 (15) of the *Ontario Drug Benefit Act* as amended from time to time.

7. R.R.O. 935 (*Drug Interchangeability and Dispensing Fee Act*)

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.

CITATION:, Spina v. Shoppers Drug Mart Inc. 2023 ONSC 1086
COURT FILE NO.: CV-10-414774-00CP
DATE: 2023/02/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and –

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 17 2023