

## Ontario Court of Appeal Upholds Decision in Shoppers Drug Mart Franchise Class Action

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The Ontario Court of Appeal has substantially upheld the lower court summary judgment decision in the long-running franchise class action, [Spina v. Shoppers Drug Mart Inc.](#) The case was commenced in 2010 and was brought by Shoppers pharmacist franchisees against Shoppers, who alleged that Shoppers owed them substantial sums for the non-payment of professional allowances and their overpayment of various fees.

The decision under appeal arose out of competing summary judgment motions and concerned a subclass of pharmacist franchisees based in Ontario. While the Court of Appeal largely upheld the motion judge's decision, it reversed one key finding and found that the franchisor had breached its duty of good faith and fair dealing under the *Arthur Wishart Act (Franchise Disclosure), 2002* (the Wishart Act) by not only withholding the sums payable to its franchisees, but also dishonestly categorizing that revenue in its reporting to other entities.

### Background

The class action arose after the Ontario government amended legislation to ban certain rebates for products from generic drug manufacturers (which Shoppers had previously been collecting) but to also allow payment of "professional allowances," defined as benefits provided by manufacturers for the purposes of specified direct patient care.

The two forms of franchise agreements at issue stipulated that Shoppers was entitled to the benefit of any discounts, volume rebates, advertising allowances, or similar advantages that it or any affiliates may obtain as a result of its supply of merchandise or services to the pharmacist or to associates of Shoppers or its affiliates. The 2010 agreements also specifically entitled Shoppers to retain the benefits of "other allowances, concessions, or other similar advantages." The pharmacists claimed that they were entitled to payment for providing professional allowances, since they were the ones to provide direct patient care. Shoppers claimed that they were entitled to keep them given the terms of the franchise agreements.

The motion judge held that Shoppers had breached the earlier agreements (though some claims were brought too late and were statute-barred), but that it had not breached the 2010 agreements given the updated language in those agreements. Both parties appealed aspects of the decision. While the Court of

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Appeal allowed an appeal of one aspect of the lower court decision, relating to the amount of professional allowances received by Shoppers during the class period and its breach of good faith and fair dealing in addressing that amount, it otherwise left the motion judge's decision undisturbed. Cassels' summary of that decision can be found [here](#).

## The Court of Appeal's Reasons

As a preliminary issue, the Court of Appeal confirmed that the lower court decision could only be reversed if the motion judge had made a "palpable and overriding error" since his decision related to a distinct factual matrix that was unlikely to arise again, even though the franchise agreements were standard-form. As a result, his decision would have little precedential value.

On the merits, the Court of Appeal considered the following issues:

1. Did the motion judge err in concluding that there was a breach of the 2002 Agreement or, in the alternative, that there was no claim for unjust enrichment?
2. Did the motion judge err in concluding that there was no breach of the 2010 Agreement or, in the alternative that there was no claim for unjust enrichment?
3. Did the motion judge err in finding that the professional allowance claims for 2006 and 2007 were statute-barred and in finding that a rolling limitation period applied to the professional allowance claims?
4. Did the motion judge err in holding that Shoppers received \$955 million in Pro professional allowances over the class period?
5. Did the motion judge err in refusing to award aggregate damages?

The answers to each of those questions were no, apart from the matter of the amount of professional allowances received by Shoppers.

First, the Court of Appeal agreed with the motion judge that professional allowances were distinct from typical rebates or discounts covered by the 2002 agreements, noting that they were 'earned' by the pharmacists by providing direct patient care. If Shoppers were allowed to keep them, despite having no contractual basis to do so, this would amount to an unfair windfall. Since the unjust enrichment claims were being pursued in the alternative to the breach of contract claims, they were not considered further.

Second, the Court of Appeal agreed that the 2010 agreements entitled Shoppers to keep the professional allowances earned by pharmacists who had entered those agreements. This was because of the broader language of the clause in those agreements (which included "other allowances" and "concessions") but even more significantly, because the adoption of the professional allowance regime following the legislative changes was a part of the factual nexus in which the 2010 agreements were signed. In other words, when

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the franchisees signed their agreements, they were aware of professional allowances and it was clear from the wording of this clause that they would be kept by Shoppers. Given this reality, the unjust enrichment claims also failed.

Third, the Court of Appeal saw no error in the motion judge's conclusion that the franchisees ought to have been aware of their claims against Shoppers from the outset of the adoption of the professional allowance regime in 2006. Since a two-year limitation period applied and the class action was commenced in 2010, the franchisees could only advance their claims relating to breaches of contract from 2008 onwards (including those from early 2008, since Shoppers reconciled revenues at the end of the calendar year).

Fourth, the Court of Appeal agreed that the motion judge had erred in determining the amount of professional allowances improperly received by Shoppers. Shoppers had provided the government with accounting reports setting out the total amount of professional allowances received, and representing that they were submitted on behalf of the pharmacists. Ontario pharmacists had provided \$1.44 billion in eligible services, but Shoppers was only allowed to claim \$1.084 billion in services in Ontario. Shoppers then unilaterally reallocated \$129 million to other provinces. The Court of Appeal determined that its decision to do so was a breach of its duty of good faith and fair dealing under the Wishart Act and of its duty of good faith and honest performance of the agreements at common law, and noted that the motion judge had erred by commenting that this was tantamount to Shoppers "cooking the books" and yet failing to consider it in his decision.

Finally, the motion judge's refusal to order aggregate damages was upheld. Aggregate damages may be ordered in a class proceeding in certain circumstances, including where the aggregate amount owing to multiple or all class members can be reasonably determined without individualized proof, in what courts have termed a 'top-down' approach. In this case, the damage incurred by each class member depended on idiosyncratic factors specific to them, which could not be extrapolated across all class members. Further, given the size of the class (500 to 800 members) and the amount of money at stake, analyzing those factors in order to individually assess damages (as the motion judge had held was necessary) was appropriate and just.

## The Take-Away

In the result, the Court of Appeal's decision provides some finality to one of the longest-running class actions before the Ontario courts. While damages remain to be assessed and an application for leave to appeal to the Supreme Court of Canada could still materialize, this decision may provide the final word on the topic. Though the facts before the Court arose in a highly specific context, the decision is a useful reminder that when determining how to address revenue or fee-sharing arrangements in a franchise agreement and when complying with those provisions, the parties must be mindful of all context and of their obligations under the Wishart Act.

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