

**CITATION:** Spina v. Shoppers Drug Mart Inc., 2025 ONSC 3213  
**COURT FILE NO.:** CV-10-414774-00CP  
**DATE:** 20250529

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 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

**BEFORE:** Justice Glustein

**COUNSEL:** *Linda Rothstein, Odette Soriano, Paul Davis and Catherine Dunne* for the plaintiffs  
*Mark A. Gelowitz, Geoffrey Hunnisett, Malcolm Aboud, Lipi Mishra and Tiffany Dang* for the defendants

**HEARD:** May 26, 2025

**REASONS FOR DECISION**

**NATURE OF MOTION AND OVERVIEW**

[1] On behalf of the class, the representative plaintiffs seek production from the defendants (collectively, “Shoppers”), prior to a motion to address procedural directions pursuant to s. 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”).

[2] The background facts are not in dispute and are set out in the Order of the Court of Appeal for Ontario dated August 29, 2024:

- (i) Shoppers has been found liable to a class of its Ontario franchisees (called “Associates” in the Shoppers franchise system) who were party to the 2002 version of the standard form franchise agreement (the “Associate Agreement”).
- (ii) Shoppers breached the Associate Agreement, its contractual and common law duties of good faith, and its duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 by retaining “Professional

Allowances” and failing to remit Professional Allowances to Professional Allowance Class Members who signed a 2002 Associate Agreement.

- (iii) “[T]he Defendants did not perform the contract honestly or transparently and the Defendants exercised their discretion under the 2002 Associate Agreement unreasonably”.
- (iv) Shoppers received Professional Allowances in the amount of \$1.084 billion.
- (v) Damages to “Eligible Associates” (those class members who signed a 2002 Associate Agreement for the years they were subject to that agreement) “shall be determined pursuant to an individual issues process to be established pursuant to s. 25 of the *CPA*”.

[3] In their reasons set out at 2024 ONCA 642, the Court of Appeal held:

- (i) Shoppers kept all of the Professional Allowances: at para. 189.
- (ii) Under the Associate Agreement, virtually all of the Professional Allowances were revenue of the Associates’ stores: at paras. 46, 151.<sup>1</sup>
- (iii) Shoppers should have attributed a portion of the \$1.084 billion to each Associate’s store(s) revenue for each year from 2008 - 2013, inclusive: at para. 87.
- (iv) Under the s. 25 process, there is (a) “considerable flexibility available to craft a fair and efficient process” and (b) “considerable latitude” reserved to the case management judge to “[craft] efficient procedures and [dispense] with unnecessary formalities to assess individual damages in the most cost-effective way possible”: at paras. 227, 231.
- (v) The “individual damage assessments under s. 25 of the *CPA* need not necessarily involve individual trials if a more procedurally efficient process can be designed under an individual issues protocol”: at para. 226.

[4] The motion to establish the s. 25 process is currently returnable August 26-27, 2025.

[5] The plaintiffs seek records from Shoppers (the “Requested Documents”) to support a “bottom-up” damages assessment to determine individual damages under s. 25(3) of the *CPA* in

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<sup>1</sup> The total corporate-level direct patient care services provided by Shoppers was \$77.2 million. Shoppers was not required to share this amount of Professional Allowances: *ONCA Reasons*, fn. 7.

“the least expensive and most expeditious method of determining the [s. 25] issues that is consistent with justice to the class members and the parties.”

[6] Shoppers opposes the motion. Shoppers submits that:

- (i) The motion cannot succeed without an expert report from a forensic accountant or other expert explaining the intended damage calculation process and the necessity for the Requested Documents.
- (ii) The request is premature because the Requested Documents should only be ordered to be produced if the court accepts the bottom-up process following the s. 25 hearing in August 2025.
- (iii) The plaintiffs’ requests for documents are “overbroad” and “will require major effort to produce”.
- (iv) In the alternative, Shoppers should only be required to produce the Requested Documents for the representative plaintiffs Spina and Vandenburg.

[7] In their factums, both parties spent the majority of their submissions addressing the issue of whether the proposed bottom-up process is fair and efficient under s. 25. The plaintiffs submit that it provides a fair and efficient method to address individual damage claims. The defendants submit that it is improper because it either seeks to circumvent the finding that aggregate damages could not be ordered, or because the process would still require individual evidence and as such would not be a fair or efficient process under s. 25. I do not address any of those issues as they relate to the merits of the s. 25 motion and not the issue of production before me on this motion.

[8] For the reasons that follow, I grant the motion and order production of the Requested Documents, although I restrict the category of class members (i) to those Associates who were parties to the 2002 Associate Agreement between 2008 to 2013 and (ii) only for the relevant years in which they were subject to that agreement.

## **FACTS**

[9] In addition to the uncontested background facts set out in the Court of Appeal’s Order and its reasons, the parties each filed evidence for the production motion before me. The evidence relates to (i) the categories of documents required to determine individual damages, (ii) Shoppers’ role as custodian of the Requested Documents and (iii) evidence related to the ability to obtain the Requested Documents and any cost or time issues arising from such a request.

*The categories of documents required to determine individual damages*

[10] In its reasons, the Court of Appeal described four categories of information that would be required “[t]o determine exactly how much of the Professional Allowance monies each Associate would be entitled to under” the profit-sharing agreement called the New Financial Model, “if those monies were attributed to a store’s revenue”: at paras. 28-29.

[11] The four categories of documents referenced by the Court of Appeal are: (i) financial information related to each store’s planned profit and actual profit, and the Associate’s earnings for each year, (ii) the quantity of drugs dispensed at an individual store location by year, (iii) the prescriptions of generic drugs and whether they were Ontario Drug Benefit (“ODB”) or non-Ontario Drug Benefit (“non-ODB”) Plan, and (iv) direct patient care store expenses.

*Shoppers’ role as custodian of the Requested Documents*

[12] I summarize the relevant evidence of Shoppers’ role as custodian of the Requested Documents as follows:

- (i) Shoppers contractually required each Associate to use Shoppers’ information technology systems and bookkeeping and accounting services, the Shoppers Drug Mart Systems (the “SDM Systems” as described below), and required each Associate to pay a fee for such use. When an Associate left the franchise system for any reason, they were contractually required to return to Shoppers all books, documents, prescription files, and patient records.
- (ii) Shoppers’ control over the Requested Documents was foundational to the franchise system. In the ordinary course of business (a) Shoppers collected, tracked, and maintained the store-level data being requested, and (b) Shoppers routinely used the data to perform store-level calculations, produce reports, and perform operational analytics.
- (iii) The SDM Systems are interconnected and include: (a) Lawson: Shoppers’ central accounting platform for operating and maintaining the books and records of each store, (b) Point of Sale System: Shoppers’ platform for recording sales and other information at each store’s cash registers, (c) HealthWatch: Shoppers’ Ontario-wide pharmacy system for processing every prescription, including collecting, organizing, and managing prescription, patient, patient services, and third-party information, and (d) Merchandise Management System: Shoppers’ platform for store-level data on inventory including movement of generic drugs.

[13] Through the SDM Systems, Shoppers collected, tracked, and maintained comprehensive data from each store, such as:

- (i) Financial information, including data on each store's prescription sales, planned and actual revenues, expenses, and profits. Shoppers has access to store-level data including the general ledgers and financial records of the stores and has information from 2008 forward that would allow it to search and identify specific stores based on annual financial performance.
- (ii) Drug-dispensing information, including data on the number and identity of molecules dispensed from each store, whether the molecule was generic and brand name, payor information for each prescription sold (i.e., ODB vs. non-ODB), and prescription and patient information.
- (iii) Direct patient care activities, including data relating to compliance packaging, diabetes monitor dispensing, prescription and over-the-counter sales, refill information, pharmacist, student and technician shift hours, and other expenses spent on direct patient care activities.

[14] Using this data, Shoppers routinely generated store-specific reports including Profit & Loss Statements, Common Year Plans, Settlement Memoranda, Rx Dashboard Reports, and Generic Penetration Reports.

[15] Shoppers produced data obtained by queries for store-level data on a prior summary judgment motion in this class action.

*Evidence as to whether production of the Requested Documents is reasonable, feasible and proportionate*

#### Evidence of William Ellwood

[16] On behalf of the class, the representative plaintiffs tendered a report from William Ellwood ("Ellwood"), an expert in digital forensic science with many certifications in the retrieval and extraction of database contents.

[17] Ellwood observed that:

When data in the database is to be used or reviewed, the user most often runs reports to obtain the data in a human-friendly, readable format. ...The reporting process starts with a 'query.'...The view that results from a query is the foundation of a point-in-time report. ...A report can be presented to a computer display screen, or it can be printed to paper or saved in a digital format.

[18] In his report for this motion, Ellwood concluded that:

[T]he Requested Documents should be readily available and accessible from SDM's information systems in a reasonable manner. Nothing we have reviewed suggests that these will not be accessible or readily available from SDM Systems.

[19] On cross-examination, Ellwood testified that he could "make a rough estimate" on how much work would be involved to produce the Requested Documents. He later elaborated that, even if third-party specialists are required because Shoppers does not have the necessary specialists:

Based on my experience with other enterprises of a similar scale and the information contained within the disclosure... it would be more in the order of thousands or tens of thousands of dollars rather than hundreds of thousands or millions, and maybe days or weeks, versus months or years.

#### Evidence of Mary Lyn Seymour

[20] Shoppers filed evidence from Mary Lyn Seymour ("Seymour"), Vice President, Corporate Controller, at Shoppers, who is responsible for Shoppers' reporting obligations. Seymour acknowledged in her affidavit that she had no direct involvement with the databases or documents at issue. She stated, at para. 8 of her affidavit:

In my role as Vice President, Corporate Controller, I am not personally familiar with the context of the Requested Documents and do not interact with these documents or any databases that may house the requested information in my day to day responsibilities. However, based on my experience, the individuals with familiarity with and responsibility over these documents would include other Shoppers personnel including individuals from the Retail Accounting team, the Legal team, and various teams within the Pharmacy group including the Pharmacy Procurement team, the Pharmacy Analytics team and the Pharmacy Systems team.

[21] Although she had no specific knowledge of the documents or databases containing the information sought, Seymour set out her belief as to how the information in the Requested Documents is stored. She stated, at para. 9 of her affidavit:

Based on my experience, I also believe that the Requested Documents are stored in a number of different formats, including the following:

- (a) Certain of the requested documents are in databases maintained by Shoppers, however the ability to access historical data and reports may be more difficult. For example, for Lawson – Shoppers' legacy general ledger

system – while the database is maintained, the version of the general ledger software used by Shoppers is no longer fully supported by the software vendor. While the data has been preserved, the ability to generate reporting therefrom is more burdensome;

- (b) Certain of the Requested Documents are loose documents in electronic formats;
- (c) I believe that certain of the Requested Documents may be stored in hard copy form, which would be required to be identified in storage and scanned.

[22] Seymour set out her belief that “many thousands of documents” would be requested and stated that certain “individuals with responsibility over the documents requested during the period when they were prepared have left Shoppers and LCL altogether”. Seymour concluded, at para. 12 of her affidavit:

Because of the above, I believe that collecting the Requested Documents – particularly for hundreds of Stores – would involve many hours of work from a number of Shoppers employees (and potentially former employees), at significant cost and causing significant business disruption to the company.

## **ANALYSIS**

[23] Shoppers opposes the motion. Shoppers submits that:

- (i) The motion cannot succeed without an expert report from a forensic accountant or other expert explaining the plaintiffs’ intended damage calculation process and the necessity for the Requested Documents.
- (ii) The request is premature because the Requested Documents should only be ordered to be produced if the court accepts the bottom-up process following the s. 25 hearing in August 2025.
- (iii) The plaintiffs’ requests for documents are “overbroad” and “will require major effort to produce”.
- (iv) In the alternative, Shoppers should only be required to produce the Requested Documents for the representative plaintiffs Spina and Vandenburg.

[24] I address each of these objections below.

*Objection 1: Expert evidence is required as to the proposed bottom-up process.*

[25] In their factum, the plaintiffs set out a three-step proposed bottom-up process to determine individual damages:

- (i) **Step one:** Determine what portion of the \$1.084 billion Shoppers received in Professional Allowance revenue was store revenue for the Eligible Associate's store(s) in each year ("Professional Allowance Revenue Allocation").
- (ii) **Step two:** Quantify how much the allocated Professional Allowance revenue would have increased the Eligible Associate's earnings in each year, if at all ("Impact on Associate Earnings").
- (iii) **Step three:** Calculate the total impact on Associate Earnings by adding up the Impact on Associate Earnings (i.e., Step 2) for each year.

[26] I do not agree with Shoppers that no production can be ordered unless the court was satisfied, on expert evidence, that the proposed process would be effective to determine individual damages.

[27] The first and second steps described above are already taken by Shoppers (without the Professional Allowances having been included in revenue) when dealing with their Associates annual earnings. The third step is only an addition calculation made once Step 2 is completed.

[28] It is not the role of the court on a production motion to determine whether the proposed method to calculate individual damages will be appropriate on the s. 25 motion. The defendants can raise any concerns with the model at that time, including any individual issues outside of the process if the defendants submit that such issues arise.

[29] On the present motion, however, the only issue is whether the Requested Documents can assist the plaintiffs in establishing a process which could meet the s. 25(3) test. Given that Shoppers already operates in a manner consistent with steps one and two, the plaintiffs have proposed a process which, depending on the evidence which may be led at the s. 25 hearing, may satisfy the court that the proposed process to determine individual damages is fair and efficient. That low threshold is met on this production motion, based on the evidence before the court.

[30] Consequently, evidence of a forensic accountant or other expert as to a hypothetical process for which the Requested Documents could be relevant is not required. The test is whether the Requested Documents are relevant to establishing a process which could meet the requirements under s. 25(3), and in the present case, that test is met.

*Objection 2: The request is premature because the Requested Documents should only be ordered to be produced if the court accepts the bottom-up process following the s. 25 hearing in August 2025.*

[31] Shoppers submits that there may be individual issues affecting damages calculations even if the proposed process was used. Consequently, Shoppers submits that it is premature for the court to order the production of documents related to all of the Eligible Associates, unless and until the court accepts the bottom-up process at the s. 25 hearing in August 2025. I do not agree.

[32] The feasibility of the proposed process is not to be determined at this production motion, nor whether the proposed individual issues make such a bottom-up process impracticable.

[33] When the court determines the practicability of the process at the s. 25 hearing, the court should have the relevant evidence to determine whether individual issues will arise for some or all class members on individual damages assessments. The defendants can raise any objection to the accuracy of such a process at that time. Otherwise, the court will be left with speculation as to the possible effects of purported individual issues, without individual damage calculations of class members and without the ability to consider the validity of the plaintiffs' proposed process or the defendants' objections.

[34] Hypothetical objections to hypothetical individual damage calculations will not assist the court in determining whether the proposed bottom-up process is fair and efficient. To the contrary, a report from an expert retained by the plaintiffs explaining how the process applies to each class member, and responding evidence from Shoppers, allows the court to fully consider the submissions of both parties at the s. 25 hearing.

*Objection 3: The plaintiffs' requests for documents are "overbroad" and "will require major effort to produce".*

[35] Shoppers submits that:

Ordering voluminous production by Shoppers would be disproportionate and overbroad in light of the time, effort, expense and business disruption involved in collecting the Requested Documents, in circumstances where production of those documents for over 595 Associates is not reasonably required for the purported purpose of establishing an individual issues protocol.

[36] I do not agree. The evidence does not support a finding that it would be disproportionate for Shoppers to produce the Requested Documents for the approximately 600 class members.

[37] Consequently, I now review the issues of production costs and time relevant to the issue of proportionality for production of such documents for all of the class members.

[38] Shoppers chose to file no evidence from any representative who had direct involvement with the database or documents at issue. Instead, Shoppers filed evidence from Seymour, who acknowledged that “I am not personally familiar with the context of the Requested Documents and do not interact with these documents or any databases that may house the requested information in my day to day responsibilities”.

[39] Given her lack of any direct evidence regarding the databases or documents, I attach no weight to Seymour’s conclusory statements that “collecting the Requested Documents – particularly for hundreds of Stores – would involve many hours of work from a number of Shoppers employees (and potentially former employees), at significant cost and causing significant business disruption to the company”.

[40] In contrast, Ellwood has considerable experience with information storage at large corporations. While he has no direct working knowledge of the systems at Shoppers (nor should he as an independent expert), his conclusion is based on direct experience with (i) retrieving information from such large databases, and (ii) the nature of the information being sought from Shoppers in the Requested Documents.

[41] Consequently, I accept Ellwood’s evidence that with respect to the database searches, costs would be limited to “the order of thousands or tens of thousands of dollars rather than hundreds of thousands or millions” and queries would require “maybe days or weeks, versus months or years”.

[42] I further note that Ellwood’s evidence is consistent with the past approach of Shoppers in the litigation to produce records based on queries, often in short order to address issues on the summary judgment motion.

[43] Shoppers submitted that the searches required could extend beyond queries in a database, since (i) “[c]ertain of the Requested Documents are loose documents in electronic formats” and (ii) Seymour “[believes] that certain of the Requested Documents may be stored in hard copy form, which would be required to be identified in storage and scanned”. However, that evidence does not establish that the search for the Requested Documents is disproportionate.

[44] First, Shoppers has been found, by the Court of Appeal, to have wrongly retained \$1.084 billion in Professional Allowances. Any additional cost or expense to find a “loose” document in electronic format or a hard copy document that “may” be stored, pales in comparison to the scope of the litigation and the damages to be assessed in the present case.

[45] Second, Seymour’s evidence as to how documents are stored is highly speculative. She states only that she “*believes*” that (i) certain of the documents are “loose” in electronic form and that (ii) some documents “*may*” be in hard copy. However, such speculative evidence cannot support a finding that it would be too costly or too time-consuming to provide the necessary production for the s. 25 hearing.

[46] Third, the document production sought is consistent with the document gathering Shoppers already engages in with respect to determining the Associate’s earnings under the “New Financial Model”. Using an automated system, Shoppers already is the bookkeeper and guardian of all financial records relevant to each Associate, demonstrating that the search for the Requested Documents would not be disproportionate to the process of establishing damages when Shoppers wrongfully retained over \$1 billion of Professional Allowances.

[47] I note that the parties each seek significant costs for this motion alone (with the defendants seeking approximately \$70,000 on a partial indemnity scale and the plaintiffs seeking approximately \$160,000 on a partial indemnity scale), further supporting that costs in the “tens of thousands” for production would be well proportionate given the decision of the Court of Appeal.

[48] Finally, Shoppers submits that time and cost will be significant because counsel will be required to review the Requested Documents for privilege and relevance. However:

- (i) Given that the Requested Documents are accounting records held by Shoppers, it is hard to conceive of any privilege issues that would arise, particularly when Shoppers produced similar documents without privilege or confidentiality concerns in earlier summary judgment litigation.
- (ii) Given that the Requested Documents are relevant to the bottom-up process proposed by the plaintiffs, it is difficult to conceive of any time or cost related to determining the relevance of the documents.

[49] For the above reasons, I find that it is not disproportionate for Shoppers to produce all Requested Documents for the approximately 600 class members.

*Objection 4: In the alternative, Shoppers should only be required to produce the Requested Documents for the representative plaintiffs Spina and Vandenburg*

[50] Shoppers relies on a “with prejudice” offer to settle the present motion on the basis that they provide the Requested Documents only for the two representative plaintiffs Spina and Vandenburg. As an alternative, Shoppers submits that any production of the Requested Documents be limited to those plaintiffs. I do not agree.

[51] At the motion hearing, Shoppers acknowledged that even if the proposed process was found to be workable for the two representative plaintiffs, Shoppers could take the position at the s. 25 hearing that there might be other individual issues which would make the process unworkable for some or all of the other class members.

[52] Further, Shoppers acknowledged that (subject to the evidence produced) it may take the position at the s. 25 hearing that there are gaps in the evidence of either the representative plaintiffs or other class members that result in the proposed bottom-up process being unworkable.

[53] On that basis, there is no benefit in proceeding with a sample of two plaintiffs or some other sample size.

[54] Further, there is no evidence that the work or cost would be significantly different depending on the sample size. This is consistent with Shoppers' automated systems which would also be based on queries from the relevant databases. I accept Ellwood's conclusion in his report that:

[T]he information in the Requested Documents should be readily available and accessible from SDM's information systems in a reasonable manner. Nothing we have reviewed suggests that these will not be accessible or readily available from SDM's systems.

[55] Conversely, even if Shoppers could establish that the process was not workable for the two representative plaintiffs, the proposed bottom-up process could be found (at a s. 25 hearing) to be a fair and efficient process for other class members. As individual damage assessments are to be conducted under s. 25, the remaining plaintiffs should not be bound by findings related to two representative plaintiffs.

[56] Since the plaintiffs have agreed to limit their request for documents only to those Associates who were subject to the 2002 Associate Agreement (and only for the relevant years they were subject to that agreement), a process which incorporates the evidence related to those individuals provides the court with the information required to determine whether there is a fair and efficient process available to determine individual damages on a bottom-up basis, without the need for individual trials.

[57] For the above reasons, I do not accept Shoppers' alternative submission that if production is ordered, Shoppers should only be required to produce the Requested Documents for the representative plaintiffs Spina and Vandenburg.

## **ORDER AND COSTS**

[58] For the above reasons, I grant the motion subject to the restriction that production of the Requested Documents is ordered only for those Associates who were subject to the 2002 Associate Agreement (and only for the relevant years they were subject to that agreement).

[59] I do not set a timetable for production in these reasons. While I accept the evidence of Ellwood that the deadline for queries should be a matter of “days or weeks, versus months”, I am prepared to have Shoppers, acting reasonably, propose a timetable to the plaintiffs which will include any other searches for loose documents or hard copy documents which may require some additional time. If the parties cannot agree on a timetable for production, I will set a schedule at a case conference to be scheduled for a date during the last two weeks of June 2025.

[60] As for costs of the present motion, most of the submissions in the factums related to whether the proposed process met the requirements under s. 25, which is not at issue before me on the present production motion. Much of the research and drafting for the factums on this motion will be at issue on the s. 25 hearing. Consequently, I reserve costs to that hearing.

[61] I will maintain the August 26-27 hearing dates until further court order, although it appears very unlikely that production of the Requested Documents, expert reports, cross-examinations, and factum preparation could be completed in such a short time. Those dates may be useful to address any outstanding issues arising from these reasons or the ongoing process, and I will keep those dates for such purpose (or in the unlikely event the s. 25 hearing is ready to proceed). Further scheduling issues may be addressed at the June 2025 case conference.

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Justice Glustein

Released: May 29, 2025

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**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

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**REASONS FOR DECISION**

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Justice Glustein

**Released:** May 29, 2025