SCC File No. 38899

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

KERRY J.D. WINTER, JEFFREY BARKIN, PAUL T. BARKIN, and JULIA WINTER, personal representative of DANA C. WINTER, deceased

APPLICANTS
(Appellants)

- and -

THE ESTATE OF BERNARD C. SHERMAN, deceased, MEYER F. FLORENCE, APOTEX INC. and JOEL D. ULSTER

RESPONDENTS
(Respondents)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL AND MOTION FOR EXTENSION OF TIME

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I - OVERVIEW AND FACTS

1. This Application for Leave to Appeal – filed nearly fifteen months after the expiry of the applicable deadline – identifies no novel question of law and proposes no genuine issue of national or public importance. The Applicants' true purpose in bringing this Application is clear: they seek leave to re-litigate, for the fifth time, questions of fact or mixed fact and law that have been determined conclusively against them in two proceedings by no fewer than eight Ontario judges.[1] These judges made consistent factual findings and applied well-established principles of law in rejecting repeatedly the Applicants' unmeritorious claims.

2. Even if this Application was not tainted by the Applicants' efforts to re-litigate matters that were determined conclusively years before in a different proceeding, it would still be misguided. Contrary to the Applicants' assertions, there is no need for this Court to provide guidance in identifying the types of undertakings that give rise to a fiduciary duty.[2] Although the Applicants attempt to depict an uncertain and conflicting legal landscape regarding the formation and hallmarks of fiduciary relationships, the reality is that the legal principles governing the establishment and operation of fiduciary relationships – including so-called "joint interest" fiduciary relationships – are uncontroversial and well-established.

3. Over the past three decades, this Court has addressed repeatedly the creation, nature and purpose of fiduciary duties.[3] In particular, the criteria governing the existence of an *ad hoc*

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1 *Winter v. The Royal Trust Company*, 2013 ONSC 4407 *per* Perell J. ("**Royal Trust Action**") [Amended Application for Leave to Appeal ("**AR**"), Tab 6, pp. 96-128], affirmed 2014 ONCA 473 *per* Laskin, Rouleau, and Epstein JJ.A. ("**Royal Trust Appeal**"); and *Winter v. Sherman*, 2017 ONSC 5492 *per* Hood J. ("**Summary Judgment Reasons**") [AR, Tab 3(A), pp. 22-32], affirmed *Winter v. Sherman Estate*, 2018 ONCA 703 *per* Sharpe, Jurianz, and Roberts JJ.A. ("**Appeal Reasons**") [AR, Tab 3(B), pp. 33-38].

2 Applicants' Memorandum of Argument ("**MOA**"), at paras. 1 and 29 [AR, Tab 4, pp. 39 and 43-44].

3 See, among many other cases: *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136 *per* Wilson J. (dissenting); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 645 *per* La Forest J., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 409-10 *per* La Forest J.; *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 71-78 *per* Cromwell J. [*Perez*]; *PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at paras. 121-22 *per* Rothstein J.; *Manitoba Métis Federation Inc. v. Canada*

fiduciary duty (alleged by the Applicants in this case) were authoritatively settled by this Court in 2011 in its landmark decision in *Alberta v. Elder Advocates of Alberta Society* ("***Elder Advocates***").[4] In that case, this Court enumerated six mandatory factors that "identify the existence of a fiduciary duty."[5] These factors have since been endorsed and applied repeatedly and consistently by trial and appellate courts throughout Canada.[6]

4. Applying *Elder Advocates*, Justice Hood of the Ontario Superior Court of Justice held that the Respondents owed no *ad hoc* fiduciary duties to the Applicants and granted summary judgment dismissing all of the Applicants' claims.[7] Justice Hood further ruled that, in any event, the action was an abuse of process because it was an attempt to re-litigate facts and issues that had been finally determined in a separate proceeding years earlier.[8] The Court of Appeal for Ontario unanimously affirmed Justice Hood's decision and dismissed the Applicants' appeal in a brief six page endorsement.[9]

5. Dissatisfied with the findings of fact and conclusions of mixed fact and law reached by the Superior Court and Court of Appeal, the Applicants now seek leave to appeal in an effort to ultimately persuade this Court to reverse the central finding of the lower Courts that the Respondents owed no fiduciary duty to the Applicants. The Applicants seek to transform Canada's

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(Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 50 *per* McLachlin C.J. and Karakatsanis J.; *R. v. Caron*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 105 *per* Cromwell and Karakatsanis JJ.; and *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 44 *per* Wagner J., and at para. 162 *per* Brown J. (dissenting).

4 *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 [*Elder Advocates*].

5 *Elder Advocates*, *supra* note 4 at para. 29.

6 See, among many other cases: *Ross v. Canada (Attorney General)*, 2018 SKCA 12, at paras. 55-58; *The City of Saint John v. Hayes*, 2018 NBCA 51, at paras. 26-45, leave to appeal to S.C.C. refused 2018 CarswellNB 486 (S.C.C.); *Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada)*, 2017 ONCA 526, at paras. 175-95; *MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143, at paras. 158-62, leave to appeal to S.C.C. refused 2015 CarswellNS 259 (S.C.C.).

7 Summary Judgment Reasons, *supra* note 1 [AR, Tab 3(A), pp. 22-32, and particularly pp. 27-28].

8 Summary Judgment Reasons, *supra* note 1 at paras. 47-51 [AR, Tab 3(A), pp. 29-30].

9 Appeal Reasons, *supra* note 1 [AR, Tab 3(B), pp. 33-38].

highest Court into a *de novo* trial court before which they intend to re-litigate factual issues that have long since been determined. That effort is entirely misplaced, and should not be condoned. The Application should be dismissed.

A. Summary of Facts

6. The Applicants Kerry Winter, Jeffrey Barkin and Paul Barkin are the children of Louis and Beverley Winter. Julia Winter is the sister-in-law of the other Applicants (and the wife of Dana Winter, now deceased, who was also a child of Louis and Beverly Winter).

7. The Respondent Dr. Bernard Sherman (whose interests are represented in this action by his Estate) was a nephew of Louis and Beverley Winter and a cousin of the Applicants. On December 15, 2017, Dr. Sherman and his wife, Honey Sherman, were found murdered in their Toronto home. To this day, the crimes against them remain unsolved and unexplained.

8. The Respondents Meyer F. Florence and Joel D. Ulster were Dr. Sherman's brother-in-law and long-time friend, respectively.[10] Mr. Florence and Mr. Ulster were also Dr. Sherman's business partners many years ago. As explained below, Dr. Sherman, Mr. Florence, Mr. Ulster and Mr. Ulster's father were co-founders of a corporation known as Sherman and Ulster Limited ("**S&U**"), the successor corporation to Empire Laboratories ("**Empire**"). The Respondent, Apotex Inc., is a Canadian generic pharmaceutical drugs manufacturer.

i. The Acquisition of Empire

9. The events giving rise to the instant Application reach back over half a century – to the early 1960s – when Louis and Beverley Winter owned a pharmaceutical company known as Empire. As a teenager, Dr. Sherman worked for his uncle at Empire over several summers while attending school.[11]

10. In November 1965, Louis and Beverley Winter both died, leaving behind their four young children. The Royal Trust Company ("**Royal Trust**") was appointed as the trustee of the estates of Louis and Beverley Winter (the "**Winter Estates**"). The four Winter children, who were

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10 Royal Trust Action, *supra* note 1 at para. 95 [AR, Tab 6, p. 109].
11 Royal Trust Action, *supra* note 1 at para. 87 [AR, Tab 6, p. 108].

subsequently adopted by the Barkin family, were beneficiaries of the Winter Estates. Royal Trust was charged with administering the Winter Estates, which included responsibility for managing Empire, until the children reached the age of 30.[12]

11. In November 1965, Dr. Sherman (then in his early twenties and pursuing graduate studies at M.I.T.) made an offer to Royal Trust to step in as General Manager of Empire in exchange for, among other things, a right of first refusal to purchase Empire. Royal Trust rejected Dr. Sherman's offer, and instead appointed a Management Committee to run Empire.[13]

12. By late 1966, however, Royal Trust began looking for buyers for Empire. Although it received 90 inquiries and 30 expressions of interest, Royal Trust received only two formal offers. The highest and best offer was made by S&U (a company in which Dr. Sherman and the Ulsters were the principal shareholders, and Mr. Florence was a minor shareholder).[14]

13. The assets of Empire were sold to S&U in October 1967 in an arm's length commercial transaction. As part of the sale, S&U entered into multiple agreements with Royal Trust, including an option agreement (the "**Option Agreement**"). The Option Agreement granted to each of the four Winter children: (i) a conditional option to be employed by the company that owned the "Purchased Business" upon reaching the age of 21; and (ii) a conditional option to purchase 5% of the issued shares of the Purchased Business for 120% of their book value after two years of employment at the Purchased Business.[15] In deciding the two proceedings referred to above Justices Perell and Hood both held that the "Purchased Business" was the business purchased by S&U from Royal Trust.[16]

14. The option to acquire 5% of the shares of the Purchased Business under the Option Agreement was highly conditional, and could only be exercised if all of the following prerequisites

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12 Royal Trust Action, *supra* note 1 at paras. 89-91 [AR, Tab 6, p. 108].

13 Summary Judgment Reasons, *supra* note 1 at para. 13 [AR, Tab 3(A), p. 23]; and Royal Trust Action, *supra* note 1 at para. 91 [AR, Tab 6, p. 108].

14 Royal Trust Action, *supra* note 1 at paras. 94-95 [AR, Tab 6, pp. 109-10].

15 Royal Trust Action, *supra* note 1 at para. 105 [AR, Tab 6, p. 111].

16 Royal Trust Action, *supra* note 1 at para. 157 [AR, Tab 6, p. 121]; and Summary Judgment Reasons, *supra* note 1 at para. 49 [AR, Tab 3(A), p. 29].

were satisfied by the individual seeking to exercise the option:[17] (a) the individual must have reached the age of 21; (b) after having reached the age of 21, the individual must have elected to work at S&U; (c) the individual must have been employed by S&U for at least two years; (d) Dr. Sherman, Mr. Ulster, or Mr. Ulster's father must have been in control of S&U at the time the individual sought to exercise the option; (e) S&U must have been a private corporation at the time of the exercise of the option; and (f) the individual seeking to exercise the option must have agreed to enter into and be bound by the terms of any shareholders' agreements of S&U that were outstanding at the time the option was exercised.

15. The Option Agreement expressly stated that the Agreement would be null and void if any of the foregoing conditions remained unsatisfied as at the date that the options provided for under the Agreement were exercised. At the time that Empire was sold to S&U, Royal Trust attempted to negotiate with Dr. Sherman a less conditional Option Agreement. However, Dr. Sherman was not willing to offer more.[18]

ii. Dr. Sherman's Sale of Empire and the Founding of Apotex

16. On December 31, 1969, Dr. Sherman and the Ulsters sold a majority of the shares of S&U to an arm's length third party that operated a series of retail pharmacies known as Vanguard Pharmacy Limited ("**Vanguard**"). Although Dr. Sherman and the Ulsters retained a minority interest in S&U, Dr. Sherman was no longer in control of the company following this share sale to Vanguard.[19]

17. Two years later, on January 1, 1972, International Chemical Nuclear Corporation ("**ICN**"), a public company listed on the New York Stock Exchange, acquired all of the shares of S&U, including the minority interests of Dr. Sherman and the Ulsters. Following the acquisition by ICN of S&U in 1972, it was no longer possible for the conditions in the Option Agreement to be fulfilled. This is so because, among other reasons, Dr. Sherman and the Ulsters gave up control

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17 Royal Trust Action, *supra* note 1 at para. 105 [AR, Tab 6, pp. 111-12].
18 Royal Trust Action, *supra* note 1 at para. 121 [AR, Tab 6, pp. 115-16].
19 Royal Trust Action, *supra* note 1 at paras. 129-30 [AR, Tab 6, p. 117].

over S&U at the latest in 1972 as a result of ICN's acquisition of the company.[20]

18. As of the time of this sale to ICN on January 1, 1972, the four Winter children were between the ages of 10 and 13. None of them had reached the age of 21, had been employed by S&U, or had fulfilled any of the other conditions specified in the Option Agreement.

19. In 1974, Dr. Sherman founded Apotex, in part with the proceeds he received from the sale of his interest in S&U to ICN. Apotex did not own or use any of the assets, goodwill, property or business of either Empire or S&U.[21] As an entirely new business and an entirely different company, Apotex was not a party to or encumbered by the terms of the Option Agreement.[22]

iii. The Royal Trust Action

20. More than 30 years later, in 2006, the Applicants commenced an action against Royal Trust in the Superior Court (the "**Royal Trust Action**"). In that Action, the Applicants alleged, among other things, that: (i) the Option Agreement carried over to and encumbered Apotex; (ii) Royal Trust had breached its fiduciary duty by failing to enforce the Option Agreement against Dr. Sherman and Apotex on behalf of the Applicants; and (iii) if the Option Agreement did not apply to Apotex, Royal Trust breached its fiduciary duty by failing to negotiate an unconditional or less conditional Option Agreement for the benefit of the Applicants.[23] In the Royal Trust Action, the Applicants accused Dr. Sherman of misappropriating Empire and of shirking responsibilities he was alleged to have owed to the Applicants.[24]

21. On June 26, 2013, Justice Perell granted summary judgment dismissing the Applicants' claims against Royal Trust in respect of the Option Agreement. Justice Perell held that in accordance with its plain and unambiguous meaning, the Option Agreement did not extend or apply to Apotex. Rather, the Option Agreement was limited to granting the Applicants a

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20 Royal Trust Action, *supra* note 1 at paras. 131-33 [AR, Tab 6, p. 117].
21 Royal Trust Action, *supra* note 1 at para. 153 [AR, Tab 6, p. 120].
22 Royal Trust Action, *supra* note 1 at paras. 156-57 [AR, Tab 6, p. 121].
23 Royal Trust Action, *supra* note 1 at para. 9 [AR, Tab 6, p. 97].
24 Royal Trust Action, *supra* note 1 at paras. 113-15 and 122-23 [AR, Tab 6, pp. 113-14 and 116].

conditional right to acquire 5% interests in S&U.[25] Accordingly, Justice Perell held that Royal Trust did not breach its fiduciary duties by not seeking to enforce the Option Agreement in the period after S&U was sold and the Option Agreement had lapsed.[26] Justice Perell described the Applicants' interpretation of the Option Agreement as extending to and encompassing Apotex as "wishful thinking beyond fanciful".[27]

22. In addition, Justice Perell found that in 1967, Royal Trust had been represented in the negotiations with Dr. Sherman by experienced businesspeople and lawyers, and that they had acted prudently and properly in accepting the offer put forward by S&U.[28] Justice Perell accepted that Royal Trust had attempted to convince Dr. Sherman to agree to a more "expansive and generous" Option Agreement, but that Dr. Sherman had refused to offer anything beyond the "limited, qualified, contingent, and conditional" Option Agreement that was entered into at the time that Empire was sold to S&U.[29] Justice Perell held that Royal Trust did not breach any fiduciary duty owed to the Applicants by allegedly failing to negotiate a less conditional Option Agreement.[30]

23. Crucially, Justice Perell rejected explicitly the Applicants' accusation that Dr. Sherman had misappropriated Empire from the Winter Estates. Specifically, Justice Perell held that:

> …there was no theft of the business, no misuse of Dr. Sherman's family relationship, and no misappropriation of any entitlements by Dr. Sherman. Dr. Sherman and the Ulsters were under no obligation to offer employment opportunities or equity to the children, and Dr. Sherman and the Ulsters substantially outbid the only other potential purchaser, Fireco Sales Limited, after [Royal Trust] conducted a responsible and reasonable effort to market the Winter Estates' business assets.[31] [emphasis added]

24. The only claims of the Applicants that were permitted to proceed to trial pertained to an alleged royalty agreement. That agreement, however, is not relevant in this proceeding.

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25 Royal Trust Action, *supra* note 1 at paras. 156-57 [AR, Tab 6, p. 121].
26 Royal Trust Action, *supra* note 1 at paras. 149-50 [AR, Tab 6, pp. 119-20].
27 Royal Trust Action, *supra* note 1 at para. 157 [AR, Tab 6, p. 121].
28 Royal Trust Action, *supra* note 1 at para. 122 [AR, Tab 6, p. 116].
29 Royal Trust Action, *supra* note 1 at para. 123 [AR, Tab 6, p. 116].
30 Royal Trust Action, *supra* note 1 at paras. 123-27 [AR, Tab 6, p. 116].
31 Royal Trust Action, *supra* note 1 at para. 122 [AR, Tab 6, p. 116].

iv. The Appeal in the Royal Trust Action

25. The Applicants appealed Justice Perell's decision in the Royal Trust Action to the Ontario Court of Appeal. The Applicants claimed that Justice Perell had erred in his interpretation and application of the Option Agreement and in holding that Royal Trust did not breach its fiduciary duty by failing to negotiate a less conditional Option Agreement.

26. On June 16, 2014, the Court of Appeal dismissed the appeal and affirmed Justice Perell's decision in a brief four page endorsement.[32] Without calling upon counsel for Royal Trust,[33] Justices Laskin, Rouleau and Epstein held unanimously that: (i) the Option Agreement was unambiguous, did not apply to Apotex, and was null and void;[34] and (ii) Justice Perell committed no error in holding that Royal Trust did not breach its fiduciary duty in negotiating the Option Agreement with Dr. Sherman.[35]

27. The Applicants did not seek leave to appeal to this Court from the decision of the Ontario Court of Appeal. As a result, that judgment has been final and binding for more than five years.

B. The Decision of the Superior Court in this Proceeding

28. In 2007, while the Royal Trust Action was ongoing, the Applicants commenced the instant proceeding. Duplicative of the relief sought in the Royal Trust Action, the Applicants' original Statement of Claim in this proceeding alleged that the Option Agreement entitled each of them to 5% of the shares of Apotex.[36]

29. After the release of the decision of the Ontario Court of Appeal in the Royal Trust Action, the Applicants moved to file a Fresh as Amended Statement of Claim[37] (the "**Amended Claim**"). In their Amended Claim, the Applicants abandoned their claims based on the Option Agreement

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32 Royal Trust Appeal, *supra* note 1.
33 Royal Trust Appeal, *supra* note 1 at para. 2.
34 Royal Trust Appeal, *supra* note 1 at para. 3.
35 Royal Trust Appeal, *supra* note 1 at para. 4.
36 Original Statement of Claim dated January 24, 2007, at paras. 30-36 [Tab 2A, p. 23].
37 Fresh as Amended Statement of Claim dated May 27, 2016 and issued October 25, 2016 ("**Amended Claim**") [Tab 2B, p. 53]; and Summary Judgment Reasons, *supra* note 1 at para. 22 [AR, Tab 3(A), p. 25].

and asserted instead supposedly new claims based on the alleged breach of an *ad hoc* fiduciary duty claimed to have been owed by Dr. Sherman. In the Amended Claim, the Applicants alleged that Dr. Sherman breached a fiduciary duty said to arise from his alleged commitment to "grow Empire for the benefit of the [Applicants] as future shareholders and employees", and his alleged undertaking to "expressly or impliedly [act] in the best interests of the [Applicants] and not to place his interests ahead of their own".[38] Crucially, the documents that the Applicants relied upon to assert this alleged commitment and undertaking in the instant proceeding are the very same documents that the Applicants had relied upon previously to accuse Dr. Sherman of misappropriating Empire in the Royal Trust Action.[39]

30. On September 15, 2017, Justice Hood granted summary judgment dismissing all of the Applicants' claims. Justice Hood held that there was no undertaking, express or implied, given by Dr. Sherman that could give rise to an *ad hoc* fiduciary duty. Justice Hood held that the alleged commitment and undertaking from Dr. Sherman relied upon by the Applicants in their efforts to establish an *ad hoc* fiduciary duty was contained in an offer that was rejected by Royal Trust in 1965 – almost two years before Empire was ultimately sold to S&U pursuant to an entirely new and different purchase agreement. Furthermore, Justice Hood applied the test in *Elder Advocates* and held that even if Dr. Sherman had, in fact, provided an undertaking to the Applicants, none of the other factors identified by this Court in *Elder Advocates* existed in sufficient measure to create an *ad hoc* fiduciary duty. Moreover, Justice Hood agreed with Justice Perell that Dr. Sherman made clear to Royal Trust in 1967 that "there was only so much that [he] was prepared to do for the [Applicants] if he was to become the buyer of [Empire]" and that "[a]t the end of the day, [Dr.] Sherman was looking after his own interests – not those of the [Applicants]".[40]

31. Justice Hood remarked that it was up to Royal Trust, as the fiduciary of the Applicants, to look after their best interests. Conversely, that was certainly not the responsibility of Dr. Sherman

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38 Amended Claim, *supra* note 37 at paras. 23 and 28 [Tab 2B, p. 53].

39 Affidavit of Kerry Winter sworn August 31, 2009, at paras. 13-14 [Tab 2C, p. 73]; Applicants' Royal Trust Appeal Factum dated November 7, 2013, at para. 22 [Tab 2D, p. 114]; and Summary Judgment Reasons, *supra* note 1 at paras. 13-14 [AR, Tab 3(A), pp. 23-24].

40 Summary Judgment Reasons, *supra* note 1 at para. 40 [AR, Tab 3(A), p. 28].

who, at the time of the transaction in question, was a university student seeking to protect and advance his own interests. Dr. Sherman's refusal during arm's length negotiations to agree to a less conditional Option Agreement proposed by Royal Trust (*i.e.*, an alternative form of Option Agreement that would have been more beneficial for the Applicants) was compelling evidence that Dr. Sherman was never asked to undertake, and never undertook, to place the Applicants' interests, or any alleged "joint interest", above his own self-interest.[41]

32. In addition to the substantive flaws in the Applicants' claims, Justice Hood also found that the Applicants' claims were an abuse of process. He found that the core dispute over whether the Option Agreement granted the Applicants a right to acquire 5% of the shares of Apotex was an issue that had already been conclusively determined in the Royal Trust Action. He held that the "whole of the evidentiary underpinning of [the underlying action] is the same as that of the Royal Trust [A]ction",[42] and that the reframed claim of the Applicants based on the alleged commitment and undertaking was nothing more than a collateral attack on Justice Perell's rejection of the allegation that Dr. Sherman had wrongfully misappropriated assets or had deceived Royal Trust into selling Empire to S&U.[43]

C. The Decision of the Court of Appeal in this Proceeding

33. The Applicants appealed Justice Hood's decision to the Court of Appeal. The Applicants claimed that Justice Hood erred by failing to find an *ad hoc* fiduciary duty and by holding that the instant proceeding was an abuse of process.[44]

34. On August 29, 2018, Justices Sharpe, Juriansz and Roberts dismissed the Applicants' appeal. The Court of Appeal held that Justice Hood had applied properly the criteria for the creation of *ad hoc* fiduciary duties established by this Court in *Elder Advocates*, and that there was no error in his "meticulous analysis or findings".[45] The Court of Appeal also agreed with Justice Hood that the claim of the Applicants in this proceeding were based on the same evidence that had

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41 Summary Judgment Reasons, *supra* note 1 at para. 40 [AR, Tab 3(A), p. 28].
42 Summary Judgment Reasons, *supra* note 1 at para. 50 [AR, Tab 3(A), p. 28].
43 Summary Judgment Reasons, *supra* note 1 at para. 52 [AR, Tab 3(A), p. 28].
44 Applicants' Court of Appeal Factum dated April 3, 2018, at para. 41 [Tab 2E, p. 165].
45 Appeal Reasons, *supra* note 1 at paras. 5-6 [AR, Tab 3(B), pp. 35-36].

been presented by them years before in the Royal Trust Action, and that this proceeding amounted to an abusive and impermissible attempt to re-litigate previously decided facts.[46]

D. The Application for Leave to Appeal

35. The Applicants seek leave to appeal in an effort to persuade this Court to re-visit issues of fact and mixed fact and law that have already been determined conclusively by eight Ontario judges, sitting in four different panels, in the context of two overlapping proceedings. As Justice Hood stated, the crux of the Applicants' claims against Dr. Sherman is the interpretation of the Option Agreement and whether that Agreement provides each of them with a right to acquire an interest in Apotex. The Applicants' current request for leave to appeal is a continuation of their abusive campaign to re-litigate settled facts.

PART II - RESPONSE TO APPLICANT'S PROPOSED QUESTION OF LAW

36. To the best of the Respondents' ability to discern them, two proposed questions of law are raised by the Applicants:

(a) What is the legal test for identifying whether an undertaking creates an *ad hoc* fiduciary duty?

(b) What is the legal test for identifying an *ad hoc* fiduciary duty in circumstances where a so-called "joint interest" is shared between the alleged fiduciary and the supposed beneficiary?

37. Substantial quantities of ink have been spilled on both of these questions, which have been answered clearly and repeatedly both by this Court and by a number of provincial appellate courts. Neither of these proposed questions of law are novel. They raise no issue of national or public importance meriting the attention of this Court.

PART III - LAW AND ARGUMENT

A. The Test for the Creation of *Ad Hoc* Fiduciary Duties is Well-Settled and Clear

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46 Appeal Reasons, *supra* note 1 at paras. 8-9 [AR, Tab 3(B), pp. 37-38].

38. As noted above, almost a decade ago a unanimous panel of this Court settled conclusively the test for the imposition of *ad hoc* fiduciary duties in *Elder Advocates*. In that case, this Court articulated the necessary preconditions for the existence of an *ad hoc* fiduciary duty:[47] (a) an express or implied undertaking must have been given by the alleged fiduciary to act in the best interests of the supposed beneficiary, or in accordance with the duty of loyalty reposed on the alleged fiduciary;[48] (b) the alleged fiduciary duty must be owed to a defined class of persons who are vulnerable to the alleged fiduciary as a result of the specific relationship between the alleged fiduciary and the supposed beneficiary;[49] (c) the alleged fiduciary must have scope for the exercise of some discretion or power;[50] (d) the alleged fiduciary must be in a position to exercise unilaterally that power or discretion;[51] (e) a legal or vital practical interest of the supposed beneficiary must stand to be adversely affected by the alleged fiduciary's exercise of power or discretion;[52] and (f) the supposed beneficiary must be peculiarly vulnerable to or at the mercy of the alleged fiduciary's exercise of discretion or power.[53]

39. Importantly, in describing the above factors as "those which identify" the existence of an *ad hoc* fiduciary duty, this Court made clear that it had enumerated a comprehensive list of factors that judges must use to assess whether an *ad hoc* fiduciary duty exists in the wide variety of cases that come before the courts.[54] Although the Applicants appear to concede that the *Elder Advocates* test for the establishment of *ad hoc* fiduciary duties applies to the instant proceeding, they complain that courts have not provided sufficient guidance as to when a fiduciary undertaking arises.[55] The Applicants' complaints in this regard are without merit.

i. This Court has Provided Clear Guidance on Fiduciary Undertakings

40. Contrary to the Applicants' assertions, this Court has provided clear guidance on the

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47 *Elder Advocates*, *supra* note 4 at para. 29.
48 *Elder Advocates*, *supra* note 4 at paras. 30-32.
49 *Elder Advocates*, *supra* note 4 at para. 33.
50 *Elder Advocates*, *supra* note 4 at para. 27.
51 *Elder Advocates*, *supra* note 4 at para. 27.
52 *Elder Advocates*, *supra* note 4 at paras. 34-35.
53 *Elder Advocates*, *supra* note 4 at para. 27.
54 *Elder Advocates*, *supra* note 4 at paras. 29 and 36.
55 Applicants' MOA, at paras. 31-33 [AR, Tab 4, p. 44].

question of when an alleged undertaking is sufficient to give rise to an *ad hoc* fiduciary duty. In *Perez v. Galambos*, this Court confirmed that "what is required […] is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her" (emphasis added).[56] In that decision, Justice Cromwell discussed extensively the type of undertaking that could potentially give rise to a fiduciary duty, noting that such an undertaking may arise expressly (as a result of statute or an express agreement), or implicitly as a result of an implied agreement or a gratuitous undertaking "to act with loyalty".[57] Justice Comwell explained that the key inquiry when determining whether to impose a fiduciary duty is whether, as a result of the impugned undertaking, the alleged fiduciary obtained a position that granted discretionary power to affect the legal or vital interests of the beneficiary.[58] This Court's guidance on fiduciary undertakings in *Perez* was re-affirmed in *Elder Advocates*.

a. The Identification of Express Undertakings is a Settled Issue

41. The Applicants allege that the criteria for identifying an express undertaking sufficient to establish an *ad hoc* fiduciary duty is an unresolved issue,[59] and that both Justice Hood and the Court of Appeal erred because of the "scant guidance" that differentiates (i) express contractual undertakings to act as a fiduciary from (ii) express gratuitous undertakings to do so.[60] This assertion is nothing more than an attempt by the Applicants to manufacture a distinction without a substantive difference.

42. What matters, as this Court has made abundantly clear, is that the undertaking in question must be a clear promise to "act in accordance with the duty of loyalty reposed on" the alleged fiduciary.[61] It is irrelevant whether the undertaking to act with loyalty arises from a contract, or is given gratuitously.

43. As this Court made clear in *Perez*, the necessary undertaking may arise by statute, be given

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56 *Perez*, *supra* note 3 at para. 75.
57 *Perez*, *supra* note 3 at para. 77.
58 *Perez*, *supra* note 3 at para. 70; and *Elder Advocates*, *supra* note 4 at para. 36.
59 Applicants' MOA, at para. 53 [AR, Tab 4, pp. 47-48].
60 Applicants' MOA, at para. 32 [AR, Tab 4, p. 44].
61 *Perez*, *supra* note 3 at para. 75.

pursuant to agreement, or "simply [be] an undertaking."[62] This list was simply an enumeration by this Court of the types of contexts in which a fiduciary undertaking may be given. The necessary undertaking may arise in a number of different ways provided that, in substance, the fiduciary promises to be bound by a duty of loyalty owed to the beneficiary. Contrary to the Applicants' assertion, this Court did not suggest that different doctrinal principles would apply to different *ad hoc* fiduciary relationships depending on the context – contractual or non-contractual – in which the relevant undertaking was given.

44. Moreover, the Applicants' assertion that there is "scant guidance" addressing the identification of an express undertaking is belied by even a cursory review of the jurisprudence. Since 2011, at least 74 reported cases have discussed the principles governing "express undertakings" giving rise to *ad hoc* fiduciary duties, as articulated in *Elder Advocates* .[63] In each case, that assessment has been treated as an evidence based question of fact or mixed fact and law, with the conclusion varying based on whether the court finds that an undertaking to act in accordance with the duty of loyalty did, in fact, exist.

45. The applicable test from *Elder Advocates* was applied correctly both by Justice Hood and by the Ontario Court of Appeal in the present proceeding. The Courts below did not err by failing to appreciate that an express undertaking could arise outside of a contract. Rather, Justice Hood agreed with Justice Perell's earlier factual finding in the Royal Trust Action that Dr. Sherman's conduct in negotiating at arm's length with Royal Trust on his own behalf, and in his own self-interest, did not include, constitute or give rise to an express gratuitous undertaking.[64] The Court of Appeal affirmed that decision while remaining clearly alive to the possibility that an *ad hoc* fiduciary undertaking could arise outside of contract.[65]

46. Contrary to the Applicants' assertions, the test for identifying express undertakings,

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62 *Perez*, *supra* note 3 at para. 77.

63 Based on a basic search undertaken in the WestlawNext Canada database. See also *supra* note 6 for examples of appellate courts applying the *Elder Advocates* test, a necessary component of which is the identification of a fiduciary undertaking.

64 Summary Judgment Reasons, *supra* note 1 at paras. 34-35 [AR, Tab 3(A), pp. 26-27].

65 Appeal Reasons, *supra* note 1 at para. 5 [AR, Tab 3(B), p. 35].

whether contractual or otherwise, has been conclusively resolved by this Court.

b. The Identification of Implied Undertakings is a Settled Issue

47. This Court's decision in *Perez* also settled the test for identifying implied undertakings. Regardless of whether the undertaking is express or implied, this Court held that the key feature of a sufficient undertaking is that the alleged fiduciary must "have bound [itself] in some way to protect and/or to advance the interests of another" (emphasis added).[66] This Court further held that "[r]elevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty".[67]

48. None of the cases cited by the Applicants is incompatible with this Court's guidance in *Perez* and *Elder Advocates*. In this regard, the Applicants' submissions regarding the alleged lack of coherence between *Perez* and the British Columbia Court of Appeal's decision in *Armstrong v. Lang*[68] stems directly from their misreading of that case. In *Armstrong*, a majority of the British Columbia Court of Appeal held that the appellant and the respondent group insurer were in an *ad hoc* fiduciary relationship because the appellant held any amounts she received from the provincial workers' compensation scheme for the benefit of the insurer.[69] This *ad hoc* fiduciary relationship arose in part from the implied undertaking the appellant provided to the respondent through the claim she made under the respondent's group insurance plan (which required her to repay the recovery in question).[70] Accordingly, the implied undertaking in *Armstrong* did not arise as a result of something done to the appellant, as the Applicants suggest.[71] Rather, the implied undertaking arose as a result of the appellant's acceptance of employment with the employer, her participation in the employer's group insurance plan and the claim that she made under that plan.

49. The common thread that permeates the Applicants' complaints regarding the allegedly

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66 *Perez*, *supra* note 3 at para. 78.
67 *Perez*, *supra* note 3 at para. 79.
68 *Armstrong v. Lang*, 2011 BCCA 205, 18 B.C.L.R. (5th) 146 [*Armstrong*].
69 *Armstrong*, *supra* note 68 at para. 45.
70 *Armstrong*, *supra* note 68 at para. 45.
71 Applicants' MOA, at para. 71 [AR, Tab 4, p. 51].

confusing or amorphous case law concerning express or implied *ad hoc* fiduciary undertakings is that such undertakings have been found to exist in some cases but not in others. However, the divergent outcomes in those cases stem directly from differences in the facts at issue, as well as from the very nature of the *ad hoc* fiduciary duty. As its name confirms, the existence of an *ad hoc* fiduciary duty is assessed through an application of a well established legal test to the unique facts and circumstances of each individual case. Virtually by definition, such a duty will be found to exist in some cases and not in others. This result does not arise from any uncertainty or inconsistency in the law or the applicable legal test, but is rather the natural outcome of the courts applying settled legal principles in different factual contexts. The Applicants complain that the courts below failed to find an *ad hoc* fiduciary duty in this case because of an alleged lack of clarity in the law. In reality, however, the courts below rejected the Applicants' claims because the *evidence* did not establish that the requisite criteria for an *ad hoc* fiduciary duty had been satisfied.

ii. The Law on Establishing Fiduciary Duties in "Joint Interest" Scenarios is Settled

50. The Applicants argue that, following *Perez*, the law is unclear as to whether fiduciary relationships can arise in situations where the alleged fiduciary has a joint interest with the supposed beneficiary. This argument is meritless. The Applicants appear to assert that judges may be confused about whether a fiduciary relationship can arise in so-called "joint interest scenarios" because this Court quoted an article in *Perez* that stated that a fiduciary must "relinquish" self-interest.[72] The Applicants contend that, as a result, lower courts may conclude that so-called "joint interest" fiduciary relationships no longer exist.[73]

51. The Applicants' concerns in this regard are unfounded. Neither *Perez* nor *Elder Advocates* concerned so-called "joint interest" fiduciary relationships. As a result, this Court understandably used language in those cases that was tailored to non-joint interest scenarios. In *Perez*, the question for this Court was whether an employer had undertaken to act in his employee's interest rather than his own. In *Elder Advocates*, the question was whether the provincial Crown had undertaken

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72 Applicants' MOA, at para. 96 [AR, Tab 4, pp. 56-57]; *Perez*, *supra* note 3 at para. 78; and *Elder Advocates*, *supra* note 4 at para. 31.

73 Applicants' MOA, at paras. 97-99 [AR, Tab 4, p. 57].

to put the interests of nursing home residents above the interests of others. Neither case supports the Applicants' proposition that fiduciaries in a so-called "joint interest" relationship must continue to put the beneficiary's interest above all else.

52. The Applicants' concern that courts may not be able to distinguish "joint-interest" fiduciary relationships from so-called "total relinquishment" fiduciary relationships is misplaced. The well-established principles applicable in the former context are evident from the vitality of the law of partnerships. The Respondents are not aware of any case where a Canadian court has held that fiduciary duties do not exist between partners because the partners are inherently unable to "totally relinquish" their self-interest in an enterprise from the overall mutual interest of the partnership. The law has been settled for decades (indeed, for centuries) that each partner owes a reciprocal fiduciary duty to the partnership as whole.[74] Notably, in 2017 (after the release of *Perez*), the Court of Appeal confirmed that the overarching fiduciary duty of a partner is to place the interests of the partnership (*i.e.*, the joint interest) ahead of the partner's private interests.[75] Evidently, *Perez* has not caused judges to somehow forget that fiduciary relationships exist in so-called "joint-interest" situations, as the Applicants claim to fear.[76]

53. In this case, the courts below did not "errantly [use] the framework […] that applies when there is no joint interest".[77] S&U purchased Empire from the Winter Estates in an arm's length commercial transaction negotiated with Royal Trust that was recorded and implemented in a comprehensive Asset Purchase Agreement. Royal Trust was responsible for protecting the rights and interests of the Applicants. Dr. Sherman most certainly was not. There was, in fact, no joint interest or venture between Dr. Sherman and the Applicants in respect of S&U – much less in respect of Apotex. The Courts below found that the Applicants' rights were expressly and exclusively provided for in the Option Agreement, with all of its qualifications and restrictions.

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74 *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.), 1996 CarswellOnt 2148, at para. 57, leave to appeal to Div. Ct. refused 1997 CarswellOnt 633 (Div. Ct.).

75 *Tim Ludwig Professional Corp. v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570, at para. 36. See also: *Rochweg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.), 2002 CarswellOnt 990, at para. 62, cited with approval in *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 48.

76 Joint interest fiduciary relationships are common in corporate fiduciary contexts as well.

77 Applicants' MOA, at para. 99 [AR, Tab 4, p. 57].

The Courts held that the Applicants had no interests, joint or otherwise, in S&U beyond those provided for in the four corners of the Option Agreement. There was no joint interest between Dr. Sherman and the Applicants that Dr. Sherman was required to put before his own. The Courts below expressly found that Dr. Sherman's self-interest was always made clear and known to Royal Trust.

54. The Applicants' position reflects flawed and circular reasoning. They start from the premise that a fictitious joint interest existed,[78] then argue that the courts below erred by failing to analyze whether a fiduciary relationship existed in respect of that non-existent joint interest,[79] and conclude by asserting that the courts would have found an *ad hoc* fiduciary relationship in respect of the alleged joint interest if they had applied the so-called "joint interest framework".[80] Contrary to the Applicants' assertions, the Courts below correctly found that no joint interest existed between Dr. Sherman and the Applicants,[81] that when he acquired Empire Dr. Sherman did not undertake to put the Applicants' interests ahead of his own,[82] and that in the unique factual circumstances at issue here, no *ad hoc* fiduciary duties arose.[83]

55. This Application discloses no novel question of law or issue of public or national importance. Rather, the Applicants ask this Court to revisit consistently upheld factual findings that are unique to this particular case. The Application does not come close to meeting the requisite test for leave to appeal, and accordingly should be dismissed.

B. Abuse of Process

56. Importantly, and as noted above, Justice Hood and the Ontario Court of Appeal both dismissed this action not only because the claims of the Applicants are devoid of merit, but also because they are barred by the doctrine of abuse of process. In reaching that determination, they applied properly well-established principles of law to the unique facts and circumstances of this

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78 Applicants' MOA, at para. 97 [AR, Tab 4, p. 57].
79 Applicants' MOA, at paras. 99-100 [AR, Tab 4, p. 57].
80 Applicants' MOA, at paras. 103 [AR, Tab 4, p. 57].
81 Summary Judgment Reasons, *supra* note 1 at paras. 34-35 [AR, Tab 3(A), at pp. 26-27].
82 Summary Judgment Reasons, *supra* note 1 at para. 40 [AR, Tab 3(A), at pp. 28].
83 Summary Judgment Reasons, *supra* note 1 at para. 37 [AR, Tab 3(A), at pp. 27].

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57. In the Courts below, the Applicants attempted to attack collaterally Justice Perell's findings in the Royal Trust Action by recasting their claims in this proceeding from an alleged breach of contract to an alleged breach of an *ad hoc* fiduciary duty. Those claims, however, are based upon the very same facts and evidence. Justice Hood was alert to the Applicants' abuse of process and their efforts to "litigate by instalment". He held correctly that the Applicants' newfound arguments regarding an alleged *ad hoc* fiduciary undertaking were flatly inconsistent with Justice Perell's factual findings in the Royal Trust Action made some four years before. Justice Hood held that "it would be unfair and an abuse of process to allow the plaintiffs to, in effect, re-litigate their case, with a new theory, to see if this one will succeed where their previous theories have failed".[84]

58. The Court of Appeal upheld Justice Hood on this basis as well:

> We agree with the motion judge that the whole evidentiary underpinning is the same as that of the Royal Trust action and that it would be unfair and an abuse of process to allow the appellants to "in effect, re-litigate their case, with a new theory, to see if this one will succeed where previous theories have failed." Moreover, the doctrine of abuse of process applies to prevent re-litigation of previously decided facts […] As the motion judge determined, the relief and issues put forward by the appellants in this proceeding "arise from the same relationships and subject matter that have already been dealt with by Perell J. and the Court of Appeal" in the Royal Trust Action.[85]

59. On this basis as well the Application for Leave to Appeal should be dismissed. There is no proper basis upon which this Court could or should interfere with these important findings. They alone are dispositive of all of the issues that the Applicants seek to raise in their proposed appeal.

PART IV - SUBMISSIONS CONCERNING COSTS

60. The Respondents claim their costs of responding to this Application on a partial indemnity basis.

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84 Summary Judgment Reasons, *supra* note 1 at para. 50 [AR, Tab 3(A), p. 30].

85 Appeal Reasons, *supra* note 1 at para. 8 [AR, Tab 3(B), p. 37].

PART V - ORDER SOUGHT

61. The Respondents respectfully request that an order be made dismissing this Application for Leave to Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2020.

per. **Kent E. Thomson**

Chantelle Cseh

Chenyang Li

Counsel for the Respondents, The Estate Bernard C. Sherman, Meyer F. Florence, Apotex Inc., and Joel D. Ulster

PART VI - TABLE OF AUTHORITIES

	CITATION	At Paragraph(s)
	Cases	
1.	*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261	3, 4, 30, 34, 38-40, 44, 45, 48, 50, and 51
2.	*Armstrong v. Lang*, 2011 BCCA 205, 18 B.C.L.R. (5th) 146	48
3.	*Frame v. Smith*, [1987] 2 S.C.R. 99	3
4.	*Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada)*, 2017 ONCA 526	3
5.	*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377	3
6.	*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574	3
7.	*MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143	3
8.	*Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623	3
9.	*McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108	52
10.	*Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.), 1996 CarswellOnt 2148	52
11.	*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247	3, 40, 42, 43, 47, 48, and 50-52
12.	*PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660	3
13.	*R. v. Caron*, 2015 SCC 56, [2015] 3 S.C.R. 511	3
14.	*Rochweg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.), 2002 CarswellOnt 990	52
15.	*Ross v. Canada (Attorney General)*, 2018 SKCA 12	3

16.	*Tim Ludwig Professional Corp. v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570	52
17.	*The City of Saint John v. Hayes*, 2018 NBCA 51	3
18.	*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83	3
19.	*Winter v. The Royal Trust Company*, 2013 ONSC 4407	1, 8-29, 32, 34, 45, 57, and 58
20.	*Winter v. The Royal Trust Company*, 2014 ONCA 473	1 and 25-27
21.	*Winter v. Sherman*, 2017 ONSC 5492	1, 4, 11, 13, 29-33, 45, 54, 56, and 57
22.	*Winter v. Sherman Estate*, 2018 ONCA 703	1, 4, 33, 34, 45, and 58