SCC Court File No.: 38899

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

(Appellant)

- and -

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

Respondents

(Respondents)

REPLY TO THE RESPONSE TO THE APPLICATION FOR THE LEAVE TO APPEAL AND THE MOTIONS FOR EXTENSION OF TIME AND ADDITION OF PARTIES

Pursuant to Rule 28 and 50 of the *Rules of the Supreme Court of Canada*

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Reply to the Response to the Application for Leave to Appeal

I. OVERVIEW

1. In their Response to the Application for Leave to Appeal, the Respondents have limited their argument to a discussion of the state of the law in circumstances of *per se* and *ad hoc* fiduciary duties without engaging in the specific and crucial issue identified by the Applicants. In doing so, they wrongly attempt to apply principles from partnership law to the present case, principles which arise under the law of *per se* fiduciary relationships, and which are irrelevant to the law of *ad hoc* fiduciary duties. The crucial indicia of *ad hoc* fiduciary duties from *Elder Advocates*, and in particular the idea of a fiduciary undertaking, has no application to the law of *per se* fiduciary relationships, which includes fiduciary law governing partnerships.

2. The Respondents repeat in their submissions the same error that was committed by the Courts below, which is to wrongly apply the "total relinquishment framework" to a joint interest scenario. This exact same error was the basis on which the Courts below mistakenly rejected the Applicants' claim and also concluded that this litigation represented an abuse of process as it was duplicative of the Royal Trust action.

3. Unless that error is corrected by this Court, vulnerable parties in joint interest *ad hoc* fiduciary relationships will continue to remain at the total and complete mercy of unaccountable fiduciaries.

II. ARGUMENT

A. No guidance from this Court on the issue of joint interests in ad hoc *fiduciary relationships*

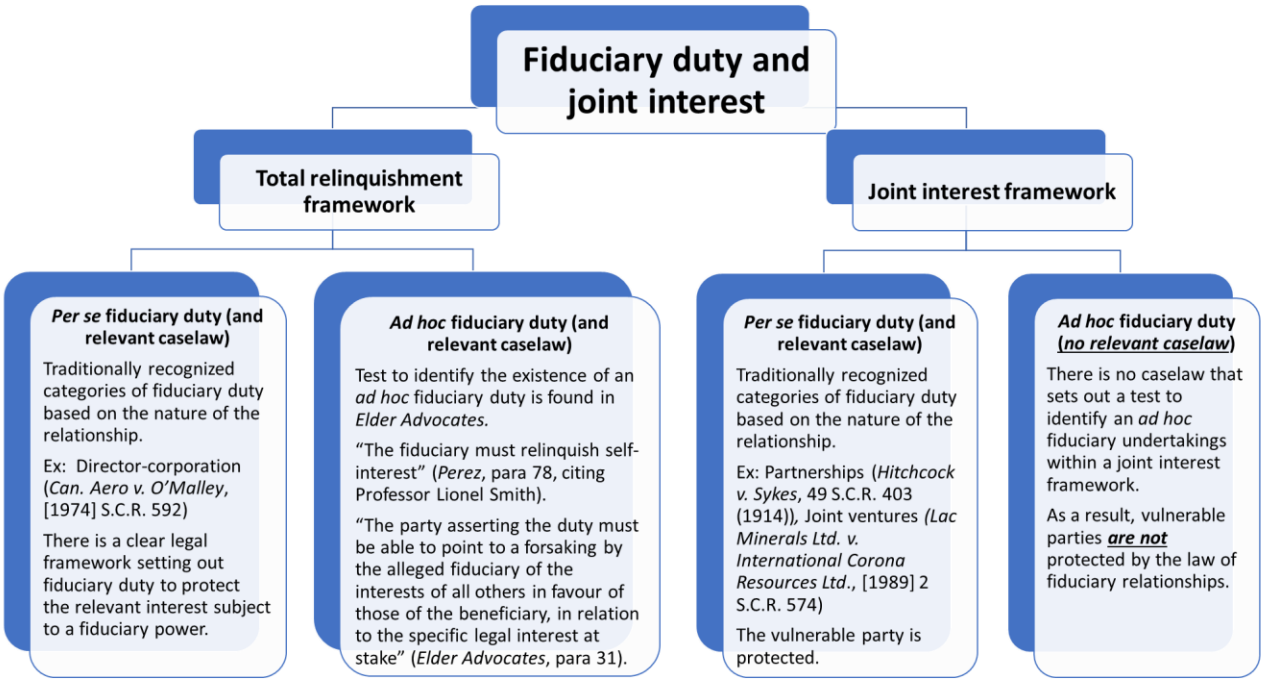
4. Although the Applicants agree with the Respondents' statements that neither *Perez* nor *Elder Advocates* addresses joint interest fiduciary relationships and that the Court's guidance in those cases was tailored to non-joint interest scenarios,[1] the relevance of *Perez* and *Elder Advocates* to determining the existence of an *ad hoc* fiduciary duty in non-joint interest cases is not the issue. The issue is the need for the Court's guidance for the situations where a fiduciary

[1] *Respondent's Memorandum of Argument, Response to Application for Leave to Appeal* at para 51 [*Response*].

has joint interests with the beneficiaries in an *ad hoc* fiduciary relationship. The Respondents have not pointed to any case where the Court has provided such guidance.

5. None of the leading cases pointed to by the Respondents[2] address the specific legal issue raised by this Application for Leave to Appeal: *in what circumstances will an ad hoc fiduciary duty be recognized where the fiduciary has control of a joint interest involving the fiduciary and the beneficiary or beneficiaries*? There is a clear lacuna in this Court's jurisprudence, as evidenced by the conclusions of the Courts below in the present matter.

6. To respond to the Respondents and elucidate the void in the jurisprudence identified in relation to the joint interest framework, the Applicants have included, below, a chart of the law of fiduciary obligations to depict the place and salience of *per se* fiduciary duties, *ad hoc* fiduciary duties, the undertakings giving rise to *ad hoc* fiduciary duties, as well as the scope of the total relinquishment and joint interest frameworks.



[2] *Galambos v. Perez*, 2009 SCC 48 [*Perez*]; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*].

B. Partnerships are per se *fiduciary relationships, not* ad hoc

7. When the Respondents argue that elaborating principles relating to "joint interest" fiduciary relationships is unnecessary because the law of partnership explains how individuals with both self-interests and mutual interest are to act, they omit to consider the fundamental difference between *per se* and *ad hoc* fiduciary relationships.

8. As the Respondents indicate, the law is settled that in a partnership each partner must place the interests of the partnership ahead of their own private interests.[3] Although *ad hoc* joint interest cases bear a resemblance to partnerships and joint ventures, in some situations where a joint interest exists, there is no recognized fiduciary duty. For example, this would be the case of the relationship between a corporate director and the shareholder of said corporation. Both have a joint interest in the success of the corporation, but the director's fiduciary duty is to the corporation and not to the shareholders. The mere existence of partnership law does not resolve the matter of whether an *ad hoc* fiduciary duty exists in the presence of joint interests. This Court needs to clarify what constitutes an implied or express fiduciary undertaking in *ad hoc* fiduciary relationships where the fiduciary and beneficiary share a joint interest.

9. To illustrate some of the many possible circumstances in which *ad hoc* "joint interest" fiduciary relationships may arise, consider the following three cases:

a. *Parent and child jointly work in a family business*: The parent-owner enticed the child to join the business and entered into an employment agreement with the child, but also promised the child an ownership interest in the future if they continued to work in the business. What disclosure, informational and other obligations does the parent have to the child, including if the parent wishes to sell the family business?

b. *Siblings have inherited a family business*: The eldest sibling was given the role to run the business by his siblings on the understanding and his or her promise that he or she would always look after the interests of his or her siblings. The inactive family members rely on and are dependent on the active sibling for all decisions

[3] *Response*, *supra* note 1 at para 52, citing *Tim Ludwig Professional Corp. v. BDO Canada LLP*, 2017 ONCA 292 and other cases.

and information. What disclosure, informational and other obligations does the active sibling have if he or she wishes to acquire the inactive siblings' shares?

c. *Cousins have inherited a cherished family vacation home*: The home has been in the family for several generations and it was given to them after they promised their respective parents that they would ensure it would continue to be held for the enjoyment of the extended family on both sides of the family. What disclosure, informational and other obligations do they have when approached by a developer to sell the property for a premium price?

10. In each of these examples, the law has not indicated how the joint interest fiduciary is to act, and the obligations he or she owes when their personal interest conflicts with the joint interest of the fiduciary and beneficiary (or beneficiaries) with whom the fiduciary shares a joint interest.

11. In situations where there is a *per se* fiduciary who wishes to act for a beneficiary while under a conflict of interest, (e.g., the fiduciary wishes to purchase property from the trust she administers), the law provides a clear process and safeguards to protect the interests of the beneficiaries. These protections include requiring the fiduciary to make full disclosure to the beneficiaries and obtain their consent or court approval, or both, after full disclosure.

12. In situations where there is an *ad hoc* fiduciary, and the *ad hoc* fiduciary has a joint interest with the beneficiaries, there is no case law with regard to how he or she is to act and his or her obligations to the beneficiaries.

C. Identifying express fiduciary undertakings in joint interest ad hoc *fiduciary relationships is unresolved*

13. The Respondents fail to consider the essential elements of the argument advanced by the Applicants, simply stating that there is ample guidance provided by the jurisprudence to identify an express undertaking giving rise to *ad hoc* fiduciary duties, all the while ignoring the reality that these cases do not offer any guidance in the context of joint interests. The jurisprudence does not provide needed guidance to parties, normally non-arm's length groups and typically family members, who engage in a mix of contractual, promissory and other undertakings.

14. In 1987, in the *Frame* case, Wilson J articulated a "rough and ready" guide to help courts and litigants identify and specify fiduciary duties within novel fact situations.[4] In the years following *Frame*, the SCC developed and discussed the fiduciary indicia from *Frame*, in cases such as *Lac Minerals*, *Norberg*, *Hodgkinson*, and *M(K)*.[5] In 2009 and 2012, in *Perez* and *Elder Advocates* respectively, the SCC added to the fiduciary indicia from *Frame*, finding that in addition to those indicia a party seeking to establish an *ad hoc* fiduciary duty must also show that the purported fiduciary made an express or implied fiduciary undertaking. In the intervening years since *Perez* and *Elder Advocates*, however, neither the SCC nor Canada's appellate courts have discussed and developed guidance to help litigants and courts identify fiduciary undertakings, a lacuna that is especially pronounced where joint interests are in play.

D. The purchase of Empire was a not an arm's length transaction

15. The Respondents employ the terms "arm's length" no less than 6 times in their Response to describe their negotiation and purchase of Empire Laboratories Ltd and to describe the Option Agreement. With respect, this characterization is false. The series of transactions that involved the assignment of Dr. Sherman's and Mr. Ulster's Personal Covenant to their company left the impression that the parties to these transactions were at arm's length, where they were not.

III. CONCLUSION

16. This Application for Leave to Appeal raises important issues in the area of joint interest *ad hoc* fiduciary undertakings. In the present context of the ongoing, massive and widespread intergenerational wealth transfer, the lacuna in the jurisprudence will lead to injustice for non-arm's length joint interest fiduciaries if not addressed by this Court.

RESPECTFULLY SUBMITTED this 20th day of January 2020

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[4] *Frame v. Smith*, [1987] 2 S.C.R. 99.
[5] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *M(K) v. M. (H.)*, [1992] 3 S.C.R. 6.

IV. TABLE OF AUTHORITIES

AUTHORITY	PARAS CITED
CASELAW	
Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24.	31
Can. Aero v. O'Malley, [1974] S.C.R. 592.	
Frame v. Smith, [1987] 2 S.C.R. 99.	
Galambos v. Perez, 2009 SCC 48.	78
Hitchcock v. Sykes, (1914) 49 S.C.R. 403.	
Hodgkinson v. Simms, [1994] 3 S.C.R. 377.	
Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 SCR 574.	
M(K) v. M. (H.), [1992] 3 S.C.R. 6.	
Norberg v. Wynrib, [1992] 2 S.C.R. 226.	
Tim Ludwig Professional Corp. v. BDO Canada LLP, 2017 ONCA 292.	