SCC Court File No.:

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)

AMENDED APPLICATION FOR LEAVE TO APPEAL
Under s. 40(1) of the *Supreme Court Act* and
Rule 25 of the *Rules of the Supreme Court of Canada*

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TAB 1

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM COURT of APPEAL ONTARIO)
(Name of the court appealed from)

BETWEEN:

KERRY J.D. WINTER
(Name of the applicant as it appears on the court of appeal judgment)

APPLICANT

PLAINTIFF
(Status of party in the court appealed from)

AND :

THE ESTATE of BERNARD C. SHERMAN, SHERMAN ESTATE: DECEASED, MEYER F. FLORENCE, ADOZA INC. AM JOEL D. ULSTER
(Name of the respondent as it appears on the court of appeal judgment)

RESPONDENT

DEFENDANTS
(Status of party in the court appealed from)

**Note - if you require additional space for your party names, please include a separate page*

APPLICATION FOR LEAVE TO APPEAL

KERRY J.D. WINTER
(Name of the applicant)

(647) 834-1427
kerrywinter@rogers.com

535 SHERBOURNE AVE. WEST. #503
TORONTO, ONTARIO
M5H 2R7
(Your address, telephone number, fax number and e-mail address, if any)

ESTATE of BERNARD C. SHERMAN, MEYER F. FLORENCE, ADOZA INC. AM JOEL D. ULSTER
(Name of the respondent)

(Counsel's name (or party's if unrepresented), address, telephone number, fax number and e-mail address, if any)

(If applicable, agent's name, address, telephone number, fax number and e-mail address, if any)

TABLE OF CONTENTS

My name is Kerry J. D. Winter and I'm the lead plaintiff in the Winter v. Sherman/Apotex Inc. et al lawsuit that has been in the courts for over 10 years. I'm not a lawyer and due to financial circumstances will represent myself in this leave to appeal application to the Supreme Court of Canada. During this "David and Goliath" legal battle, where my lawyers have represented me and my siblings on a full contingency, including disbursements....my late cousin Barry Sherman, a multi billionaire has had unlimited financial resources and one of the top law firms in the country, Stikemans. I can assure you that he has fully used this advantage.

The lawsuit and this leave to appeal is based on 3 legal arguments, clearly stated at the bottom. I believe the courts here in Ontario have not only heard this case under the rules for summary judgement incorrectly, but have failed to appreciate the nuances of this unique case. As I will clearly layout below, this is a **MOST** unique case due to the option, which is at the heart of the lawsuit.

1. Duty to discose prior to extinguishing an option to future equity in a business.

2. That an ad hoc fiduciary duty did arise from the execution of the option agreement.

3. Fraudulent activities carried out by the directors of Sherman and Ulster Ltd. and their failure to disclose the option and royalty agreements in business transactions, namely the Vanguard Drug Store merge and I.C.N. share swap .Theshareholders of S & U Ltd. were asked by I.C.N. if any shares were indeed promised to family memebrs.....Barry denied that shares were promised to me and my brothers. Barry and Joel did commit fraudulent concealment under the O.B.C.A.

4. The failure of Justice Hood and the court of appeal to view the purchase by my cousin Barry and his partner Joel Ulster as a non-arms length transaction. That this unique purchase of my father's group of drug companies from my late parents executors, The Royal Trust Comapny by a family member with promised future equity warrants a uniuqe interpetation and set of eyes.

5. The option agreement was never discosed to the Official Guardians Office, even though we were legally wards of the state and entitled to their protection and involvement.

6. The option agreement was never disclosed to the courts during the first passing of the Royal Trust's estate accounts through the courts.

7. The option agreement was never disclosed to my adoptive parents, even though Barry, his sister Sandy and his mother, my Aunt Sara were regularly in contact and visited us with the Barkins.

8. Barry's failure to honour a 5 year noncompete agreement with I.C.N. and the transfer of the royalty agreement to I.C.N., which was valid for 15 years.

9. ONLY the Empire Drug Company's catalogue was handed over to I.C.N. Other assets, including the building on Lansdowne were kept in S & U Ltd.'s control; as well as sales force and goodwill.

10. The wording of the option clearly states that in the event Barry and Joel "lose" control of the purchased business, the option would die. Barry and Joel NEVER lost control....they "gave up" control to rid themselves of the 20% promised to me and my brothers. S & U Ltd. was very profitable and my cousin chose to sell....he NEVER lost control!

11. The trust company put faith and trust in my cousin to act with honour. To behave in an ethical and moral manner regarding the option and a promise to watch over us and bring us into my father's business. Barry wasn't just a 1st cousin; he would have been an older brother to me and my brothers had my parents lived. In fact, my father willed everything to Barry before my older brother Tim was adopted. Who, but a family member would even offer an option to orphaned children to come and work at their father's company?!?!

12. The wording of the option wasn't simply entered into for Barry to find loop holes and sell the catalogue a few years later, only to start the exact same business, turn his back on us, and continue to break brand name drug company patents as my father did and taught Barry. The option had an implied undertaking: that if my cousin was indeed successful in generics, he remained in control, that it stayed privately controlled....we would at least be invited to the table.

13. Both Justice Hood and the appeal court state that ONLY the Royal Trust Company had a fiduciary duty to us.

14. The court of appeal were wrong to agree with Justice Hood that wanting a fair trial with all the facts was an abuse of process. Justice Paul Perrell clearly stated in the Royal Trust case that he simply couldn't rule on Barry's fiduciary duty to us. I believe our legal matter should not have been decided by way of a short summary judgement hearing, but at trial. A trial that would show all the facts and would force my cousin Barry to take the stand to be questioned by my lawyers. **Here lies my right to justice denied.**

15. Barry and Joel rely on 2 business transactions that are littered with fraud and non-disclosure to rid themselves of my legal right to join my father's business with my brothers.

16. As argued in front of Justice Hood by my brother Jeff, who was self represented, we were unfairly treated and oppressed under the O.B. C. A. and deserved the oppression remedy as futire shareholder's in S & U Ltd.

After Barry and Joel negotiated the inclusion of the option and royalty agreements, they asked and did recieve permission from the Royal Trust Co. to assign these agreeements to S & U Ltd. This didn't negate my cousin fiduciary obligation. Barry's lawyer, Kathryn Kay would like the courts to beleive that S & U Ltd. offered up the option and therefor it was an arms lenght transation: FALSE!!! As a footnote; I beleive Kay was in conflict representing my cousin and Apotex Inc. because she is the daughter of Jack Kay, the 2nd in command and now running Apotex since my cousin's death.

17. Surely, the courts must go off the four corners of the written option agreement to understand the intention of the parties as clearly stated by Lord Millett, Bristol and West Building Society v Mothew:

"A fiduciary is someone who has undertaken to act for and on behalf of another ina particular matter in circumstances which give rise to a relationship of trust and confidence". The Royal Trust entered into the sale of my father's drug companies with a future right to me and my brother's, because they trusted and beleived Barry would act honourably.

18. After Barry and Joel purchased the assets, not the shares for the Royal Trust, they act soley in self interest. They never considered us. Surely, there was a shared interest.....that if my cousin was successful with my father's generic drug business, we would go "along for the ride" or at least be invited to the table at 23 yrs of age.

19. The "cornerstone" to my lawsuit against my cousin Barry was my belief that he indeed had a fiduciary duty to us and behaved contrary to the intention of the otion agreement.

20. Barry and Joel behaved criminally once they entered into the purchase agreement with the option and royalty agreements. Their behaviour shouldn't be condoned by the highest court in the land. Rather, they should be made accountable for their conduct and punished.

*** The Supreme Court of Canada will hear case based on: public importance, or

Of such a nature or significance as to warrant decision by the court.

1. I strongly believe my lawsuit is important to clarify and expand upon a family members obligation to orphaned children after entering into an agreement with a future option;

and the defintion of what constitutes an ad hoc fiduciary duty. According to Elder Advocates of Alberta Society v. Alberta, 2011 SCC 24, (2011) 2 S.C.R. 261, at paras, 27 and 36, six factors must exist to create an an hoc fiduciary duty. I beleive the relationship between me and my cousin meet ALL six.

2. To clarify the need to give notice to parties that hold a future interest of equity in a corpoation and give notice prior to extingushing their legal future right.

3. For directors of public and private companies to not soley act in self interest and to fully dislose relevent agreements during commercial transactions. Directors cannot act with conflict of interest.

*** It appears my cousin used his close relationship with my father, as a family member and his knowledge of my fathers unique, extremely profitable generic drug business and the use of the option to "sweeten" the purchase of the assets from the Royal Trust Company with no sincere interest in ever bringing us in and honouring the option.

Surely, my cousin's wording of the option agreement was entirely designed to help get the business

He buried the option, sold the Empire catalogue within 5 years and kept a numer of assets, including the Vanguard drug stores. He quickly re-entered generics, not respecting the 5 year non-competition clause,

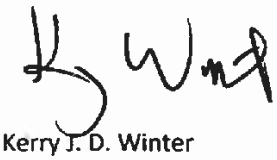
with the exact same business and the same business model: attacking brand name drug companies patents under a different name and manufacturing generics.

Apotex Inc. is Empire Laboratories.....NO difference.

Lastly, I truly believe that if the Supreme Court Of Canada chooses to hear my case, you'll clearly find a serious miscarriage of justice and a legally precedent setting case that will help define ad hoc fiduciary laws in Canada and the right for future equity holders in a business to be notified prior to directors of the corporation extinguishing/killing their inherent rights.

Please read our factum for the motion for summary judgement, the transcript of the hearing, Justice Hood's order, our factum for the court of appeal, and their decision. I honestly believe that if you do so, you will select and hear my case. Of course, I will have a lawyer argue in front of the Supreme Court.

Thank-you for your consideration.



Kerry J. D. Winter

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SERVED COPY
SIGNIFICATION

FORM 25

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

LAW of FIDUCIARY DUTY (AD HOC) AND ABUSE OF PROCESS.
(Legislative provision or provisions on which this document is based)

TAKE NOTICE that KERRY WINTER hereby applies for leave to appeal to the Court,
(Your name)

pursuant to SECTIONS 40(1) AND 43(1) of THE SUPREME COURT ACT AND RULE 25(1)
(Cite the legislative provision or provisions that authorizes the application for leave)

from the judgment of the ONTARIO PROVINCIAL COURT of APPEAL C64434
(Name of the court appealed from) *(File number from the court)*

made AUG. 29 2018, and for APPEAL THE JUDGEMENT OF JUSTICE KENNETH HOOY
(Date of court of appeal judgment) *(Insert the nature of order or relief sought)*

(Insert the nature of order or relief sought)

or any other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

Clearly number each ground.

Continuance of Notice of application for leave to appeal (Form 25)

TAKE NOTICE that Kerry J. D. Winter applies for leave to appeal to the court, prusuant to sections 40(1) and 43(1) of the Supreme Court Act and rule 25(1) of the Rules of the Supreme Court of Canada from the judgement of the Ontario Provincial Court of Appeal in file numbered C64434, Winter v. Sherman Estate, 2018 ONCA 703, Date 2018,08,29, heard Aug, 15/2018. On appeal from the judgement of Justice Kenneth G. Hood of the Superior Court of Justice, dated Sept, 15, 2017, reasons reported at 2017 ONSC 5492, and for an order:

The Justices on the Court of Appeal clearly stated and upheld Justice Hood's decision that my claim against my cousin, Mike Florence, Joel Ulster and Apotex Inc. was an abuse of process. They also agreed with Justice Hood's ruling that my cousin Barry Sherman did not have an ad hoc fiduciary duty to me with regards to the option included in the purchase agreement between the executors, the Royal Ttrust Company of Canada of my late parents Louis and Beverely Winter buying the assets, the group of companies comprising of Empire Laboratories in 1967. That only the Royal Trust Co. had a fiducairy duty to me.

To set aside the Court of Appeals decision.

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

This application involves an important public question for all Canadians concerning the fiduciary duty and implied undertaking/obligation of a family member to vulnerable orphaned children. A close family member who purchases assets from the executor of an estate with an option for future equity for orphaned children should be noted and further define fiduaciary laws in Canada. Barry Sherman, my blood cousin and Joel Ulster PERSONALLY made available this option for 20%, (5% each for me and my 3 brothers), and later asked permission from the Royal Trust to assign the option to their corporate entity, Sherman and Ulster Ltd. A corporation didn't buy assets from an estate with a future option for 4 children in an arms lenght transaction. In other words, did my cousin Barry and his partner Joel have a duty to preserve with honour and intergity the option to bring me and my brothers into the business at the age of 21? And, after 2 years of employment, our right to buy 5% of the company at book value, ought to have been disclosed to the courts at the estate passing of accounts and the Barkins? The option was buried for over 34 years and we were VERY lucky to have uncovered it. We were never meant to know about this option and the Royal Trust Co. and Barry Sherman did their very best to keep it hidden. It is my belief, that once we uncovered it, the Royal Trust and Barry colluded and yes....conspired to defeat us with legal tactics, stall and delaying, dismissing our attempt for justice by using motions for summary judgement. Family members should be held accountable to a higher standard of care and diligence, then complete strangers conducting a commercial transaction. In all my research, I've not come upon a purchase agreement in a commercial transaction for a 20% future interest when 4 orphans each turn 21. The sheer unique and extrmely rare option aspect to Barry's asset purchase DEMANDS a unique set of eyes and interpetation by the courts!

My name is Kerry J. D. Winter and I'm the lead plaintiff in the Winter v. Sherman/Apotex Inc. et al lawsuit that has been in the courts for over 10 years. I'm not a lawyer and due to financial circumstances will represent myself in this leave to appeal application to the Supreme Court of Canada. During this "David and Goliath" legal battle, where my lawyers have represented me and my siblings on a full contingency, including disbursements....my late cousin Barry Sherman, a multi billionaire with unlimited financial resources and represented by one of the top law firms in the country, Stikemans,which I can assure you that he has fully used this advantage.

The lawsuit and this leave to appeal is based on 3 legal arguments, clearly stated at the bottom. I believe the courts here in Ontario have not only heard this case under the rules for summary judgement incorrectly, but have failed to appreciate the nuances of this case. As I will clearly layout below, this is a **MOST** unique case due to certain facts and a valuable option for young orphaned cousins which is at the heart of the lawsuit.

1. Duty to discose prior to extinguishing an option to future equity in a business.

2. That an ad hoc fiduciary duty did arise from the execution of the option agreement.

3. Fraudulent activities carried out by the directors of Sherman and Ulster Ltd. and their failure to disclose the option and royalty agreements in business transactions, namely the Vanguard Drug Store merge and I.C.N. share swap .Theshareholders of S & U Ltd. were asked by I.C.N. if any shares were indeed promised to family memebrs.....Barry denied that shares were promised to me and my brothers. Barry and Joel did commit fraudulent concealment under the O.B.C.A.

4. The failure of Justice Hood and the court of appeal to view the purchase by my cousin Barry and his partner Joel Ulster as a non-arms length transaction. That this unique purchase of my father's group of drug companies from my late parents executors, The Royal Trust Comapny by a family member with promised future equity warrants a uniuqe interpetation and set of eyes.

5. The option agreement was never discosed to the Official Guardians Office, even though we were legally wards of the state and entitled to their protection and involvement.

6. The option agreement was never disclosed to the courts during the first passing of the Royal Trust's estate accounts through the courts.

7. The option agreement was never disclosed to my adoptive parents, even though Barry, his sister Sandy and his mother, my Aunt Sara were regularly in contact and visited us with the Barkins. Had

my adopted parents made aware of the option and given notice of the I.C.N. transaction, they could

have sought legal advice to protect out interest in S & U Ltd. and possibly derailed the share swap in

1972.

8. Barry's failure to honour a 5 year noncompete agreement with I.C.N. and the transfer of the royalty agreement to I.C.N., which was valid for 15 years. His intentions were clear: sell the catalogue after less than 5 years for a healthy profit and quickly re-enter the generic drug industry without partners and the orphaned children with Apotex; exact same business model with industry contacts, sales

force and aggressive litagation with the brand named drug companies.

9. ONLY the Empire Drug Company's catalogue was handed over to I.C.N. Other assets, including the building on Lansdowne were kept in S & U Ltd.'s control; as well as sales force and goodwill.

10. The wording of the option clearly states that in the event Barry and Joel "lose" control of the purchased business, the option would die. Barry and Joel NEVER lost control....they "gave up" control to rid themselves of the 20% promised shares to me and my brothers. S & U Ltd. was very profitable and my cousin chose to sell....he **NEVER** lost control! I like to state loud and clearly here:

*** If Barry and Joel were forced to sell my father's group of drug companies or take it public, because they were in financial difficulty and it was a smart, sensible and prudent decison based on survival within the generic indusrty, I wouldn't have sued and taken legal action. This isn't what happened. They simply pulled a move, hid the option from the day it was inked, and conducted themselves as if it was never executed on closing.

11. The trust company put faith and trust in my cousin to act with honour. To behave in an ethical and moral manner regarding the option and a promise to watch over us and bring us into my father's business. Barry wasn't just a 1st cousin; he would have been an older brother to me and my brothers had my parents lived. In fact, my father willed everything to Barry before my older brother Tim was adopted. Who, but a family member would even offer an option to orphaned children to come and work at their father's company?!?! Again, the Royal Trust relied on Barry's close relationship with

my father and his promised option with future value without concern of betrayal and wrongful behaviour.

12. The wording of the option wasn't simply entered into for Barry to find loop holes and sell the catalogue a few years later, only to start the exact same business, turn his back on us, and continue to break brand name drug company patents as my father did and had taught Barry. The option had an implied undertaking: that if my cousin was indeed successful in generics, he remained in control, that it stayed privately controlled....we would at least be invited to the table when we came of age.

13. Both Justice Hood and the appeal court state that ONLY the Royal Trust Company had a fiduciary duty to us. Once Barry and Joel entered into the option, they also had a fiduciary duty.

14. The court of appeal were wrong to agree with Justice Hood that wanting a fair trial with all the facts was an abuse of process. Justice Paul Perrell clearly stated in the Royal Trust case that he simply couldn't rule on Barry's fiduciary duty to us. I believe our legal matter should not have been decided by way of a short summary judgement hearing, but at trial. A trial that would show all the facts and would force my cousin Barry to take the stand to be questioned by my lawyers. **Here lies my right to justice denied.**

15. Barry and Joel rely on 2 business transactions that are littered with fraud and non-disclosure to rid themselves of my legal right to join my father's business with my brothers. This fraudulent concealment was carried out to "hide" the option from the shareholders of the Vanguard Drug chain and the lawyers representing I.C.N.

16. As argued in front of Justice Hood by my brother Jeff, who was self represented, we were unfairly treated and oppressed under the O.B. C. A. and deserved the oppression remedy as future shareholder's in S & U Ltd.

After Barry and Joel negotiated the inclusion of the option and royalty agreements, they asked and did recieve permission from the Royal Trust Co. to assign these agreeements to S & U Ltd. This didn't negate my cousin fiduciary obligation. Barry's lawyer, Kathryn Kay would like the courts to beleive that S & U Ltd. offered up the option and therefoer it was an arms lenghth transaction: FALSE!!! As a footnote; I beleive Kay was in conflict representing my cousin and Apotex Inc. because she is the daughter of Jack Kay, the 2nd in command and now running Apotex since my cousin's death.

17. Surely, the courts must go off the four corners of the written option agreement to understand the intention of the parties as clearly stated by Lord Millett, Bristol and West Building Society v Mothew:

"A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence". The Royal Trust entered into the sale of my father's drug companies with a future right to me and my brother's, because they trusted and beleived Barry would act honourably.

18. After Barry and Joel purchased the assets, not the shares for the Royal Trust, they acted solely in self interest. They never considered us. Surely, there was a shared interest.....that if my cousin was successful with my father's generic drug business, we would go "along for the ride" or at least be invited to the table at 21 years of age and have our right to exercise our option at book value at 23 yrs of age.

19. The "cornerstone" to my lawsuit against my cousin Barry was my belief that he indeed had a fiduciary duty to us and behaved contrary to the intention of the otion agreement. There was an implied undertaking to act/behave with a higher standard of care. Surely, he could have kept control and privately held the Empire Group of companies. The option wasn't written nor designed for Barry and Joel to "outsmart" the wording and make unethical business decisions to dishonour the promised convenant....which is exactly what they did. One could easily view the option with it's simple intention: that Barry and Joel would do their best to run my father's successsful generic drug businesses, keep it privately held and in their control, and we would be have an opportunity to share in their success. Apotex Inc. is essentially Empire Labs with a name change. Barry and Joel did their very best to carry out the opposite: to undermine their personal commitment under the option and conducted their business affairs as if there wasn't even an option!!!! In other words, they made the option to get the busineeses and after achieveing this end, discarded it in the garbage can.

20. Barry and Joel behaved criminally once they entered into the purchase agreement with the option and royalty agreements. Their behaviour shouldn't be condoned by the highest court in the land. Rather, they should be made accountable for their conduct and punished.

*** The Supreme Court of Canada will hear case based on: public importance, or

Of such a nature or significance as to warrant decision by the court.

1. I strongly believe my lawsuit is important to clarify and expand upon a family members obligation to orphaned children after entering into an agreement with a future option;

and the defintion of what constitutes an ad hoc fiduciary duty. According to Elder Advocates of Alberta Society v. Alberta, 2011 SCC 24, (2011) 2 S.C.R. 261, at paras, 27 and 36, six factors must exist to create an an hoc fiduciary duty. I beleive the relationship between me and my cousin meet ALL six.

2. To clarify the need to give notice to parties that hold a future interest of equity in a corporation and give notice prior to extinguishing their legal right.

3. For directors of public and private companies to not soley act in self interest and to fully dislose relevant agreements during commercial transactions. Directors cannot act with conflict of interest. Directors should always consider future equity holders in all their decision regarding the success and

Longevity of the business.

*** It appears my cousin used his close relationship with my father, as a family member and his knowledge of my fathers unique, extremely profitable generic drug business and the use of the option to "sweeten" and secure the purchase of the assets from the Royal Trust Company without a Sincere interest to ever bring us in.

Surely, my cousin's wording of the option agreement was entirely designed to help get the business and easily find a "way out".

He buried the option, sold the Empire catalogue within 5 years and kept a numer of assets, including the Vanguard drug stores. He quickly re-entered generics, not respecting the 5 year non-competition clause, with the exact same business and the same business model: attacking brand name drug companies patents under a different name and manufacturing generics.

Apotex Inc. is Empire Laboratories.....NO difference.

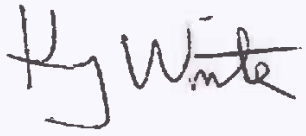
Lastly, I truly believe that if the Supreme Court of Canada chooses to hear my case, you'll clearly find a serious miscarriage of justice and a legally precedent setting case that will help define ad hoc fiduciary laws in Canada and the right for future equity holders in a business to be notified prior to directors of the corporation extinguishing/killing their inherent rights. This idea of a "shared" right and interest should be aknowledeged in my case. That Sherman's fiduciary duty to us wasn't exclusive nor should he have been expected to sacrifice and forfeit his desire for profit and gain. Only, to carry out his promise and share his success in generics with me and my siblings. Society as a whole should Protect and defend orphans....not rob them. I know this sounds harsh, but this is exactly what Barry and Joel did.

Please read our factum for the motion for summary judgement, the transcript of the hearing, Justice Hood's order, our factum for the court of appeal, and their decision I would also suggest reading the examinations of Barry.

I believe if you, the judges sitting on our Supreme Court familairize yourself with this legal matter, you Will select to hear this case.

Of course, I will have a lawyer argue in front of you, the highest court in our land.

Thank-you for your consideration.



Kerry J. D. Winter

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Continuance of Notice of application for leave to appeal (Form 25)

NOTE: ***You may include additional pages if you have more grounds.***

SIGNED BY

K. Winter — APRIL 15 2019.

(Your signature) *(Date)*

KERRY WINTER
535 SHEPPARD AVE. WEST
503
NORTH YORK
M3H 2R6 (647) 834-1427

(Your name, address, telephone number, fax number and e-mail address, if any)

kerry winter @ rogers. com

ORIGINAL TO: **THE REGISTRAR**

COPY TO:

(Name, address, telephone number, fax number and e-mail address (if any), of all other parties and interveners in the court appealed from)

ESTATE of BERNARD C. SHERMAN
JOEL ULSTER, MIKE FLORENCE
AND APOTEX INC.
C/O KATHERINE L. KAY

(416) 869-5507
STIKEMAN ELLIOTT LLP
~~5300~~ 5300 COMMERCE COURT WEST
199 BAY ST.
TOR. ON M5L 1B9

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days of the date a file number is assigned in this matter. You will receive a copy of the letter to the applicant confirming the file number as soon as it is assigned. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration.

kkay @ stikeman.com

This form must be completed to advise the Court of any information that is confidential.

PUBLIC ACCESS TO INFORMATION FORM

I, Kerry Winter, hereby inform the Court that:
(Your name)

Please check box:

1. I am filing documents that include information subject to a publication ban.
   - ☑ NO
   - ○ YES Give details:

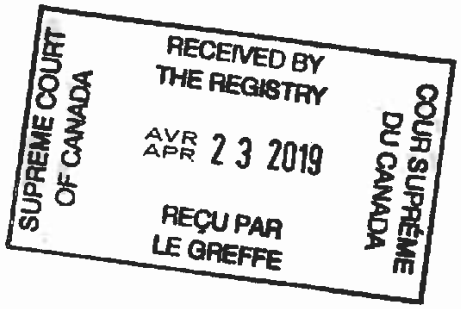
2. I am filing documents that were sealed in the courts below or that were confidential and not accessible to the public.
   - ☑ NO
   - ○ YES Give details:

SIGNED BY

K. Winter
(Your signature)

February 19 / 2019.
(Date)

NOTE: ***Please include a copy of any order from a lower court which prohibits the publication of information or restricts access to the documents you are filing.***



File Number (if any)

AFFIDAVIT OF SERVICE

* LEAVE TO APPEAL TO THE SUPREME COURT OF CANADA

(Style of Cause)

I, KERRY WINTER, of TORONTO, ONTARIO,

(name of deponent), *(place, province or territory)*,

MAKE OATH AND SAY AS FOLLOWS:

THAT on the 17 / 04 / 2019, I did serve KATHERINE L. KAY,

(day, month, year) *(name of person served)*

with a true copy of FORM 25

(identify document served)

by *(check box of method of service used)*:

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    - Response; and
    - Reply.
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    - Response; and
    - Reply.
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    - Response; and
    - Reply.
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    - Reply.

File Number (if any)

☑ Leaving a copy with the other party's lawyer or agent or with an employee in the office of the lawyer or agent.

- This method can be used for an/a:
  - Application for leave to appeal;
  - Response; and
  - Reply

Sworn (*or Affirmed*) before me at the City of Toronto
(*City, Town, etc.*) (*name*)

in the Province of Ontario, this 16 of April,
(*Province or Territory*) (*name*) (*day*) (*month*)

20 19
(*year*)

H-Warner — Hy Winter
(*A Commissioner of Oaths*) (*Signature of deponent*)

TAB 2

SCC Court File No.:

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)

AMENDED NOTICE OF APPLICATION FOR LEAVE TO APPEAL

Application for Leave to Appeal under s. 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that Kerry J.D. Winter, Jeffrey Barkin, Paul T. Barkin and Julia Winter, personal representative of Dana C. Winter, deceased, apply for leave to appeal to the Supreme Court of Canada under section 40(1) of the *Supreme Court Act* from the judgment of the Court of Appeal for Ontario (C64434) made on August 29, 2018.

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. Kerry J.D. Winter filed an incomplete Application for Leave to Appeal on October 29, 2018 as a self-represented litigant. He subsequently filed a Notice of Application for Leave to Appeal on April 23, 2019.

2. This leave application presents a question of public and national importance.

3. In particular, this Honourable Court must decide how litigants and courts are to identify fiduciary undertakings for the purpose of establishing a fiduciary duty, including in situations where there is a contract and contractual obligations.

Made in Ottawa, October 16, 2019.

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TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A

COPIES TO:

STIKEMAN ELLIOTT
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TAB 3A

CITATION: Winter v. Sherman, 2017 ONSC 5492
COURT FILE NOS.: CV-07-326360PD3
DATE: 20170915

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KERRY J.D. WINTER, PAUL T. BARKIN and JULIA WINTER, personal representative of DANA C. WINTER, deceased and JEFFREY A. BARKIN Plaintiffs	*Brad Teplitsky*, for the Plaintiffs *Jeffrey A. Barkin*, appearing in person
– and –	
BERNARD C. SHERMAN, MEYER F. FLORENCE, APOTEX INC. and JOEL D. ULSTER Defendants	*Katherine L. Kay & Mark Walli*, for the Defendants
	HEARD: July 6 & 7, 2017

HOOD J.

REASONS FOR DECISION

Introduction

[1] The plaintiffs in this case are siblings, with the exception of Julia Winter, who is their sister-in-law. The plaintiffs' parents, Louis and Beverly Winter, died when they were young. The defendant, Bernard C. Sherman ("Sherman") was the Winters' nephew and is the plaintiffs' cousin.

[2] The Winters owned a number of companies that were involved in the pharmaceutical business ("the Empire Companies"). Royal Trust Company and Royal Trust Corporation of Canada ("Royal Trust") was the executor of the Winters' estates, and administered the estates until 1994. The plaintiffs are the beneficiaries of the estates.

[3] In 1967, Royal Trust sold the Empire Companies to Sherman and his business partner. In 1974, Sherman founded Apotex, another pharmaceutical company.

[4] In 2006, the plaintiffs started an action against Royal Trust alleging, among other things, that Royal Trust was negligent in the enforcing and drafting of an option agreement and a royalty agreement with Sherman as part of the sale of the Empire Companies. For the purposes of this motion, I am only concerned with the option agreement. Simply put, the plaintiffs blamed Royal Trust for permitting Sherman to get away with dishonouring of the option agreement, which they said entitled them to 20% of Apotex.

[5] In 2007, the plaintiffs started this action against Sherman, alleging that he breached the fiduciary duty he owed to them by dishonouring the option agreement and that they were entitled to 20% of Apotex or the equivalent in damages.

[6] Royal Trust brought a motion for summary judgment seeking a dismissal of the action against it in its entirety. On June 26, 2013, Justice Perell granted part of Royal Trust's motion and dismissed the part of the action dealing with the option agreement. The plaintiffs appealed. On June 16, 2014 the Court of Appeal dismissed the appeal.

[7] Sherman now moves for summary judgment, arguing that this action is an abuse of process and, alternatively, that there is no genuine issue requiring a trial. The defendants argue that this claim is not an abuse of process, and that the issue between the parties is whether Sherman owed them an *ad hoc* fiduciary duty in relation to their interest in obtaining employment in Apotex and a 20% equity position in Apotex. The defendants agree that the issue of whether Sherman owed an *ad hoc* fiduciary duty is amenable to a summary judgment motion.

[8] For the following reasons, the plaintiffs' action should be dismissed and the defendants' motion for summary judgment granted.

Facts

[9] Louis and Beverly Winter passed away in 1965 within 17 days of each other. The plaintiffs are their children, with the exception of Julia Winter, who was married to the late Dana C. Winter. The plaintiffs were young at the time of their parents' deaths.

[10] The children were the beneficiaries of their parents' estates. Royal Trust was appointed as executor of the estates.

[11] Sherman was the nephew of Louis and Beverly Winter, and is the plaintiffs' cousin. When the Winters passed away, Sherman was at MIT working towards his PhD.

[12] Before his death, Louis Winter ran a number of companies involved in the pharmaceutical business ("the Empire Companies"). Sherman had worked for his uncle at the Empire Companies from time to time.

[13] When the Winters died, Sherman made an offer to Royal Trust in a letter dated November 25, 1965. He stated that he was "interested in purchasing all the assets of Louis and Beverly Winter relating to the pharmaceutical and chemical industries and am furthermore

anxious to protect the value of the said assets for the benefit of the children of Louis and Beverly Winter". He therefore proposed that he would "assume the position of General Manager of the pharmaceutical and chemical companies until January 31, 1966, in consideration of……the right of first refusal on the sale of the…..assets", a salary, and the use of an automobile. His offer was open for one day. Royal Trust rejected the offer.

[14] The plaintiffs argue that this letter was a representation made to Royal Trust that Sherman would protect their future interests and that it was the start of what they argue was his Commitment and Undertaking giving rise to an *ad hoc* fiduciary duty owed to them.

[15] His offer rejected, Sherman continued with his studies. Royal Trust continued to run the Empire Companies. In 1967, however, Royal Trust decided to sell the Empire Companies' business. The history of the sale is set out in Justice Perell's decision at paragraphs 94 to 100 of his reasons; I will not repeat it here. Sherman and Joel Ulster's offer of about $450,000 was the higher of the two offers, about $100,000 above the only other offer.

[16] The Sherman & Ulster offer also included an option for the Winters children to be employed by the purchased business and to acquire 5% of the shares of the company if employed for two years.

[17] The option had four pre-conditions attached; the opportunity of employment and subsequent acquisition of shares would only arise if all four pre-conditions were met. If any one of the conditions was not fulfilled at the point in time when the children were to have the opportunity of employment or share acquisition, Sherman's obligations were to be null and void.

[18] Royal Trust had wanted stronger option terms that would have inhibited Sherman's ability to resell the purchased business or take the Empire Companies public. Sherman refused such terms. As Justice Perell put it at paragraph 123 of his reasons:

> Sherman was only prepared to offer a limited, qualified, contingent and conditional employment agreement and option agreement. He was asked to be more expansive and generous, but he would not be moved….Royal Trust did not leave any money on the negotiating table by negligently drafting the Option Agreement or by not squeezing Dr. Sherman to ensure that his promise extended to employment and an interest in any and every generic drug business in which he might become involved in the future.

[19] The shares in the Empire Companies were owned by Sherman and Ulster Limited ("S & U"). In 1969, S & U, entered into a share swap with the shareholders of Vanguard Pharmacy, S & U's largest customer. As a result of this transaction, Sherman & Joel Ulster no longer controlled S & U.

[20] In late 1971, the shares in S & U were purchased by ICN, a publicly traded company. In exchange for his S & U shares, Sherman received ICN shares. While the option agreement arguably became null and void at the time of the 1969 share swap, it is clear – and was found by

Justice Perell and confirmed by the Court of Appeal – that the option agreement was null and void after the sale to ICN in 1971.

[21] In 1974, Sherman founded Apotex, which is in the business of manufacturing and selling generic pharmaceuticals. As sworn by Sherman – and as found by Justice Perell and confirmed by the Court of Appeal – Apotex did not own or use any of the assets, goodwill, property or business of the Empire Companies. The definition of "purchased business" in the asset sale agreement of the Empire Companies and the option agreement does not apply to Apotex. At paragraph 157 of his reasons, Justice Perell found that "Apotex cannot be interpreted to be the "Purchased Business" under the Option Agreement……The Plaintiffs' interpretation is wishful thinking beyond fanciful."

[22] The plaintiffs' claim against Sherman has gone through a number of revisions since it was first issued in 2007. The most recent version was amended on October 25, 2016. In it the plaintiffs plead that Sherman made a Commitment to Royal Trust to grow the Empire Companies for the benefit of the plaintiffs, as future shareholders and employees, which was one of the reasons Royal Trust agreed to sell the Empire Companies to Sherman and in order to provide some assurance that Sherman followed through on his Commitment, the option agreement was created.

[23] The plaintiffs then plead that in providing the Commitment to Royal Trust Sherman gave an Undertaking to the plaintiffs to act in their best interests and not to place his interests ahead of their own. This Undertaking gave rise to an *ad hoc* fiduciary duty to the plaintiffs which Sherman has breached.

[24] Sherman and Apotex are the focus of the plaintiffs' complaints. There is no evidence of Joel Ulster being involved in any of the matters at issue. There is one reference to Myer F. Florence in Kerry Winter's responding affidavit. The pleading makes very minimal reference to Ulster or Florence. The alleged Commitment and Undertaking were from Sherman and he, it is pleaded, is the *ad hoc* fiduciary.

Summary Judgment Principles

[25] Summary judgment is available where there is no genuine issue for trial: *Hyrniak v. Mauldin*, 2014 SCC 7, 366 D.L.R. (4th) 641, at para. 34.

[26] The court will find that there is no genuine issue requiring a trial when it is able to reach a fair and just determination on the merits. The motions judge should determine if there is a genuine issue requiring a trial based only on the evidence before her, without using the fact-finding powers in Rule 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: *Hyrniak*, at paras. 49 and 66.

[27] The standard for a "fair and just determination" is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute. The evidence need not

be equivalent to that at trial but must be such that the judge is confident that she can fairly resolve the dispute: *Hyrniak*, at paras. 50 and 57.

[28] On a summary judgment motion, the court is entitled to assume that the parties have advanced their best case and that the record contains all of the evidence the parties would present at trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, [2014] O.J. No. 851, at para. 33.

[29] While summary judgment can operate as a timely, fair, and cost-effective means of adjudicating a civil dispute, it has its limits. Not all civil disputes are amenable to a final adjudication on the merits by summary judgment. In certain cases, adjudication exclusively on a written record poses a risk of substantive unfairness. Great care must be taken to "ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial": *Baywood Homes Partnerships v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at para. 44; see also *Cook v. Joyce*, 2017 ONCA 49, 275 A.C.W.S. (3d) 399, at para. 91.

Summary Judgment Analysis

[30] In my opinion, I am able to decide this matter on a summary judgment motion.

[31] The plaintiffs argue that in order for Sherman's actions to give rise to an *ad hoc* fiduciary duty, there must have been an Undertaking that resulted from a Commitment to Royal Trust. I find that Sherman did not make such a Commitment. There was, accordingly, no Undertaking, and Sherman owes no *ad hoc* fiduciary duty to the plaintiffs.

[32] The plaintiffs argue that certain correspondence from Sherman created a Commitment to Royal Trust. I fail to see how any of it did. The letter written in November 25, 1965 was merely an offer to Royal Trust that was rejected. Without acceptance of the offer, there could be no legal Commitment from Sherman. The other correspondence, written around the time of the sale of the Empire Companies to S & U, was nothing more than a reiteration of Sherman's position vis-à-vis the children as set out at paragraph 14.00 of the purchase agreement and again in the option agreement, which merely mirrored the wording in the purchase agreement.

[33] The correspondence cannot be elevated into something more. Sherman and S & U had set out in writing exactly what they were prepared to do for the children following the sale of the Empire Companies.

[34] I agree with Justice Perell's analysis, as confirmed by the Court of Appeal, that:

- There was never an entitlement to an option agreement (paragraph 119);
- Royal Trust attempted to have Sherman offer more but he refused to budge (paragraph 121);

- Sherman was under no obligation to offer employment opportunities to the children (paragraph 122);
- Sherman was only prepared to offer a limited, qualified, contingent and conditional employment contract and option agreement (paragraph 123);
- Sherman was asked to be more generous but would not budge (paragraph 123);
- The option agreement expressed precisely what had been agreed upon by the parties (paragraph 123);
- The children were acquiring a right for which they had no legal entitlement (paragraph 125).

[35] The evidence, as set out in the original affidavit material that was before Justice Perell, and Sherman's more recent affidavit, affirmed January 27, 2017, clearly supports this analysis. Kerry Winter's affidavit, as I read it, does not provide any new evidentiary support for an alleged Commitment, other than his alleged conversation with Mr. O'Brien to the effect that it was Sherman's promise and verbal assurances to include the children in the business that convinced Royal Trust to sell to S & U. I was not referred to any evidence from Sherman's more recent cross-examination that supports different conclusions than those reached earlier by Justice Perell, or that is contrary to Sherman's position on this motion.

[36] I am unable to rely on the evidence from Mr. Winter concerning the alleged conversation with Mr. O'Brien. It is hearsay which cannot be tested by cross-examination, as Mr. O'Brien is dead. Secondly, these discussions allegedly took place in 2008 and therefore could have been put forward on the Royal Trust motion in an affidavit from Mr. O'Brien, or alternatively, on a Rule 39.03 examination. Thirdly, this evidence directly contradicts the purchase and sale agreement agreed to by Royal Trust. Fourthly, the purchase and sale agreement contains an entire agreement clause which specifically provides that there were no "verbal statements, representations, warranties, undertaking or agreements between the parties." Fifthly, it ignores the fact that Sherman's offer was $100,000 more than the only other offer. And finally, it ignores Justice Perell's finding, at paragraph 110 of his reasons, that Mr. O'Brien told Mr. Ward that "[i]t appears that we have fully canvassed the market and our chances of selling the companies at a higher price than offered by Barry Sherman would be minimal." This was the rationale for the sale, not the one now put forward by the plaintiffs.

[37] Even if it could be found that there was a Commitment to Royal Trust that created an Undertaking, I am unable to conclude that Sherman owed the plaintiffs an *ad hoc* fiduciary duty.

[38] Six factors must exist to create an *ad hoc* fiduciary duty: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 27 and 36. The following six factors must exist:

(1) the fiduciary has scope for the exercise of some discretion or power;

(2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or substantial practical interests;

(3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power;

(4) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

(5) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

(6) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[39] The plaintiffs argue that they were vulnerable. However, vulnerability alone is insufficient to create a fiduciary duty: *Elder,* at para. 28. Even if there is vulnerability the relevant consideration is the extent to which it arises from the relationship between the fiduciary and the beneficiary. Here, the plaintiffs were not vulnerable because of anything Sherman had done. Rather, they were vulnerable because of the unfortunate deaths of their parents and because they were young. The fiduciary relationship that existed was between the plaintiffs and Royal Trust as executor of their parents' estates.

[40] It was up to Royal Trust to look after the plaintiffs' interests, not Sherman. It is clear from the correspondence, Sherman's evidence, the purchase agreement itself, and the findings made by Justice Perell that there was only so much that Sherman was prepared to do for the plaintiffs if he was to become the buyer of the Empire Companies. Royal Trust knew that. At the end of the day, Sherman was looking after his own interests – not those of the plaintiffs. His obligations to the plaintiffs were clearly set out in the purchase agreement and eventual option agreement. The obligations, such as they were in the contracts, cannot create a fiduciary duty. There was never a point where Sherman relinquished his own self-interest and agreed to act solely on behalf of the plaintiffs: *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377, at para. 33. To the contrary, Sherman's self-interest was always clear. That self-interest was made known to Royal Trust and found its way into the contracts for the purchase of the Empire Companies.

[41] The plaintiffs argue that Sherman had an obligation under the option agreement to advise them that he was selling shares under the option agreement, and that if he had done so, they might have been able to do something to protect themselves. They argue that his failure to do so was a breach of his *ad hoc* fiduciary duty. Having found there to be no *ad hoc* fiduciary duty this cannot be a breach. In any event, there is no evidence as to what the plaintiffs could or would have done to prevent the sale. They have an obligation to put their best foot forward on a summary judgment motion, and it is not enough to simply argue that they might have done something without providing evidence as to what they might have done.

[42] The plaintiffs' argument that there had to be a fiduciary duty because the option was so limited, is, to me, nonsensical. A trial is unnecessary to determine this. Again, the argument

presupposes that there was a Commitment to be enforced either by a contract or by a fiduciary duty. Further, the limited, qualified, contingent and conditional nature of an option does not create a fiduciary duty where the requirements for an *ad hoc* fiduciary duty as set out in *Elder* are not met.

[43] The oppression claim under the OBCA flows from the existence of a Commitment, Undertaking and an attendant fiduciary duty. The plaintiffs claim that they were "beneficial" shareholders of S & U and are "beneficial" shareholders of Apotex because of the Commitment and Undertaking. As I have found that there was no Commitment, this claim must also fail.

[44] Moreover, it has already been found by Justice Perell and confirmed by the Court of Appeal that the "purchased business" under the option agreement does not extend to any generic drug manufacturer and seller owned by Sherman, or in other words, to Apotex. Accordingly, there can be no stand-alone oppression remedy claim.

Abuse of Process

[45] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of issue estoppel. One circumstance in which abuse of process has been found is where the litigation before the court is, in essence, an attempt to re-litigate a claim which the court has already examined: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37.

[46] The doctrine of abuse of process, unlike res judicata or issue estoppel, does not require mutuality of parties. The doctrine reflects the inherent power of a judge to prevent an abuse of his or her court's authority. In assessing whether an abuse of process has been established, it is typically necessary to consider all of the relevant context and background: *Bear v. Merck Frosst Canada & Co*., 2011 SKCA 152, 345 D.L.R. (4th) 152, at paras. 36 and 41.

[47] Having considered all the relevant circumstances, I conclude that this claim is an abuse of process and ought therefore to be dismissed.

[48] At the crux of the claim against Sherman, as it stood when the Royal Trust motion was determined, was the interpretation of the option agreement and the plaintiffs' allegation that Apotex was the same business as the Empire Companies, entitling each of them to 5% of its shares.

[49] In the Royal Trust claim, Justice Perell and the Court of Appeal interpreted the option agreement and the definition of "purchased business" against the plaintiffs. With the courts already having found against the plaintiffs, concerning the extent of the option agreement and whether Apotex came within the definition of "purchased business" it is no wonder that this action stalled. The claims within it were no longer tenable.

[50] The plaintiffs, now alleging a Commitment and Undertaking from Sherman, cannot avoid the fact that the whole evidentiary underpinning of this action is the same as that of the Royal Trust action. There is nothing new other than the alleged conversation between Kerry Winter and Mr. O'Brien - which, for a variety of reasons, I have found to be inadmissible. In addition, this evidence and theory could have been presented and argued before Justice Perell. I find that it would be unfair and an abuse of process to allow the plaintiffs to, in effect, relitigate their case, with a new theory, to see if this one will succeed where previous theories have failed. Litigation by instalment is not allowed: *Pennyfeather v. Timminco Limited*, 2016 ONSC 3124, 266 A.C.W.S. (3d) 726, at para. 71. I am mindful of the fact that the defendants are different, but the Commitment and Undertaking could and should have been raised earlier. Mr. O'Brien was one of the trustees of the family trusts. He was a member of the Royal Trust Management Committee. He was involved in the sale of the Empire Companies. Surely if Royal Trust was not relying upon the option as part of the sale, but upon other things that formed the Commitment, this was relevant to the issue of whether Royal Trust was negligent, as the plaintiffs alleged before Justice Perell.

[51] It is an abuse of process, in the circumstances of this case, to come to the court asking to proceed, even if against different parties, where the relief and issues arise from the same relationships and subject matter that have already been dealt with by Justice Perell and the Court of Appeal. In argument, the plaintiffs contend that the decisions and findings made in the Royal Trust proceeding assist them in this action, and that accordingly this action cannot be an abuse of process. I fail to see how this can be so.

[52] The argument that there was a Commitment from Sherman flies in the face of the arguments made before Justice Perell as set out in paragraphs 114, 115 and 116 of his decision and the findings made at paragraphs 118, 119 and 121 thereof.

[53] The option agreement was limited, qualified, contingent and conditional. The claimed interest in Apotex was wishful thinking, and beyond fanciful. Nothing can now change these findings of fact.

Costs

[54] The defendants are presumptively entitled to costs. If the parties are unable to agree upon the issue of costs, the defendants are to provide submissions consisting of no more than two typed double-spaced pages along with a bill of costs, any offers, and appropriate case law to my attention to the Judges' Administration office, Room 170, 361 University Avenue, on or before September 29, 2017. The plaintiffs are to provide their submissions subject to the same directions on or before October 16, 2017. There are to be no reply submissions.

HOOD J.

Released: September 15, 2017

CITATION: Winter v. Sherman, 2017 ONSC 5492
COURT FILE NOS.: CV-07-326360PD3
DATE: 20170915

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiff

– and –

BERNARD C. SHERMAN, MEYER F. FLORENCE, APOTEX INC. and JOEL D. ULSTER

Defendants

REASONS FOR DECISION

HOOD J.

Released: September 15, 2017

TAB 3B

COURT OF APPEAL FOR ONTARIO

CITATION: Winter v. Sherman Estate, 2018 ONCA 703
DATE: 20180829
DOCKET: C64434

Sharpe, Juriansz and Roberts JJ.A.

BETWEEN

Kerry J.D. Winter, Jeffrey Barkin, Paul T. Barkin
and Julia Winter, personal representative of Dana C. Winter, deceased

Plaintiffs
(Appellants)

and

The Estate of Bernard C. Sherman, deceased, Meyer F. Florence,
Apotex Inc. and Joel D. Ulster

Defendants
(Respondents)

Brad Teplitsky, for the appellants

Katherine Kay and Mark Walli, for the respondents

Heard: August 15, 2018

On appeal from the judgment of Justice Kenneth G. Hood of the Superior Court of Justice, dated September 15, 2017, with reasons reported at 2017 ONSC 5492.

REASONS FOR DECISION

[1] The appellants appeal from the dismissal of their action.[1] The motion judge found there was no genuine issue requiring a trial that the late Dr. Sherman owed the appellants an *ad hoc* fiduciary duty to look after their financial interests. He also dismissed the action on the ground that the action was an abuse of process in that it was an attempt to re-litigate issues determined by the appellants' unsuccessful action against the Royal Trust Company and Royal Trust Corporation of Canada ("Royal Trust"), the trustee of their parents' estates.

[2] These proceedings arise out of a bitter family dispute between the appellants and their first cousin, the late Dr. Sherman. The appellants allege Dr. Sherman made a commitment to look after their financial interests when the appellants were very young children and recently orphaned. Specifically, they contend this *ad hoc* fiduciary duty arose during the purchase by Dr. Sherman and Joel Ulster of the assets of the family businesses owned by the estates of the appellants' parents ("the Empire Companies"). They plead the respondents breached that duty by dishonouring an option agreement given as part of the consideration for the purchase that would have allowed the appellants to be employed by and acquire 5% of the shares of the Empire Companies. Because

[1] By notice dated August 8, 2018, the respondents abandoned their costs appeal.

of the breach, the appellants claim a 20% interest in Apotex Inc. or the equivalent in damages.

[3] The appellants submit that the motion judge erred by failing to recognize that the crux of the present action against the respondents was whether Dr. Sherman owed them an *ad hoc* fiduciary duty and to identify the clear indicia of the fiduciary relationship between them. They say he further erred by concluding that the identical issues had been determined by Perell J. in the proceedings against Royal Trust and were dispositive of the issues in the present action.

[4] We do not accept these submissions.

[5] The motion judge properly considered the criteria for the creation of an *ad hoc* fiduciary duty as articulated by the Supreme Court in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261. Applying those criteria, he carefully analyzed the evidence of the parties' relationship and the communications between Dr. Sherman and Royal Trust in relation to Dr. Sherman's acquisition and subsequent sale of his interest in the Empire Companies. He did not accept the appellants' interpretation of that evidence as giving rise to a fiduciary relationship or duty. Rather, he concluded that Dr. Sherman did not undertake to look after the appellants' interests or ever abandon his own self-interest. As the motion judge succinctly put it:

> It was up to Royal Trust to look after the plaintiffs' interests, not Sherman. It is clear from the

> correspondence, Sherman's evidence, the purchase agreement itself, and the findings made by Justice Perell that there was only so much that Sherman was prepared to do for the plaintiffs if he was to become the buyer of the Empire Companies. Royal Trust knew that. At the end of the day, Sherman was looking after his own interests – not those of the plaintiffs. His obligations to the plaintiffs were clearly set out in the purchase agreement and eventual option agreement. The obligations, such as they were in the contracts, cannot create a fiduciary duty. There was never a point where Sherman relinquished his own self-interest and agreed to act solely on behalf of the plaintiffs: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 33. To the contrary, Sherman's self-interest was always clear. That self-interest was made known to Royal Trust and found its way into the contracts for the purchase of the Empire Companies.

[6] There is no error in the motion judge's meticulous analysis or findings.

[7] Further, the appellants too narrowly construe the doctrine of abuse of process. This doctrine is flexible and unencumbered by the specific requirements of *res judicata* or issue estoppel: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para 40; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2002] 3 S.C.R. 77, at para. 42. Where a precondition for issue estoppel has not been met, such as mutuality of parties, courts have turned to the doctrine of abuse of process to preclude re-litigation of the same issue: *C.U.P.E.*, at para. 37. While the doctrine is similar to issue estoppel in that it can bar litigation of legal and factual issues "that are necessarily bound up with the determination of" an issue in the prior proceeding, abuse of process also applies where issues

"could have been determined": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 54; *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633, 363 D.L.R. (4th) 470, at para. 13; *McQuillan v. Native Inter-Tribal Housing Co-Operative Inc.* (1998), 42 O.R. (3d) 46 (C.A.), at pp. 50 - 51. As such, the doctrine of abuse of process is broader than *res judicata* and issue estoppel and applies to bar litigation that, if it proceeded, would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *C.U.P.E.*, at para. 37.

[8] We agree with the motion judge that the whole evidentiary underpinning of this action 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: *Intact Insurance Company v. Federated Insurance Company of Canada*, 2017 ONCA 73, 134 O.R. (3d) 241, at para. 28, leave to appeal refused, [2017] S.C.C.A. No. 98; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 46; *C.U.P.E.*, at para 37. As the motion judge determined, the relief and issues put forward by the appellants in these proceedings "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.

[9] We do not accept the appellants' argument that their present action encompasses more than the interpretation of the option agreement and that the existence of a fiduciary duty overlays any obligations that Dr. Sherman had under that agreement. As the motion judge observed, Perell J. determined that the "limited, qualified, contingent and conditional" option agreement expressed precisely what had been agreed upon by the parties and that Dr. Sherman was not prepared to offer anything further.

[10] As a result, we find no error in the motion judge's determination that the appellants' present action is an abuse of process.

Disposition

[11] Accordingly, the appeal is dismissed.

[12] The respondents are entitled to their costs of $60,000, the amount the parties agreed to be reasonable, including disbursements and all applicable taxes.

"Robert J. Sharpe J.A."
"R.G. Juriansz J.A."
"L.B. Roberts J.A."

TAB 4

PART I – CONCISE OVERVIEW OF THE APPLICANTS' POSITION

A. Overview

1. The present case has profound implications for every situation in which a purported fiduciary undertakes to act on behalf of the interests of another party, or on behalf of a joint interest shared with another party, raising a question that lies at the heart of fiduciary liability and is of public and national importance: How are litigants and courts to identify fiduciary undertakings for the purpose of establishing a fiduciary duty, including in situations where there is a contract and contractual obligations?

2. The Applicants respectfully submit that the motion judge and the Court of Appeal [the "**lower courts**"] applied the wrong legal framework to the fact situation, thereby committing a fatal error of law that resulted in their failure to recognize Mr. Sherman's undertakings to protect the Applicant's interest in the family business as fiduciary undertakings.

3. As a further consequence, the lower courts failed to recognize Mr. Sherman's *ad hoc* fiduciary duty to disclose in a timely manner his intention to take action that could, practically, if not legally, imperil the Option. They applied an analytic framework for identifying fiduciary undertakings that is appropriate if a power-holder is entrusted to administer loyally the interest of another party, wherein the power-holder must totally relinquish self-interest in relation to the entrusted interest [the "**total relinquishment framework**"].

4. The total relinquishment framework, however, is inconsistent with the ordinary fiduciary undertakings and obligations of individuals who share a joint interest subject to discretionary power, such as partners, joint venturers, and the parties to this dispute.

5. In joint-interest fiduciary relationships, the joint interest supplies a vehicle through which each person's self-interest is advanced rather than relinquished. Fiduciaries in these cases are subject to a duty of loyalty with respect to the joint interest, which is distinguished and kept separate from the exclusive self-interest of the fiduciary [the "**joint interest framework**"].

6. When a court must rule on whether there is a fiduciary undertaking on the facts, a question of pure law it must first answer correctly is the context-sensitive question of which legal framework applies, the total relinquishment framework or the joint interest framework. If a court

adopts the wrong legal framework given the facts, as in the present case, then any alleged findings of fact with respect to fiduciary undertakings are infected by the initial error of law.

7. The failure to apply such legal principles could have devastating consequences to all parties in Canada who share a joint interest with a fiduciary, such as co-beneficiaries under a Will wherein only one is the executor, or joint heirs of a family business whose administration is entrusted to some but not all heirs of the business.

B. The Facts

8. The Applicants, Kerry J. D. Winter, Jeffrey Barkin, and Paul T. Barkin are brothers. The late Dana C. Winter was also their brother. The Applicant Julia Winter, the wife of the late Dana C. Winter, is his personal representative for the purpose of the current proceedings.

9. Louis Lloyd Winter, the Applicants' late father, was a successful self-made businessman and a pioneer in generic drugs in Canada. He founded and owned Empire Laboratories ["**Empire**"]. Both Louis Winter and his wife Beverly Winter died in 1965, within seventeen days of one another. The oldest Applicant at the time was 7 years old. The Winter estate was executed by The Royal Trust Company ["**Royal Trust**"].

10. Barry Sherman ["**Mr. Sherman**"] was the Applicants' first cousin and Louis Winter's nephew. Mr. Sherman's father died when he was 10 years old, and Louis Winter became a "surrogate" father to him. The Winter and Sherman families were very close.[1]

11. Mr. Sherman worked for Louis Winter during the summers as a youth, and the experience he gained, he later said, was of "*critical importance*" to his "*future career*."[2]

12. In 1967, he and his partner Joel Ulster purchased the Applicants' late father's business, Empire, from Royal Trust. Upon closing the transaction, they assigned their interest in the purchase agreement for Empire to their holding company, Sherman & Ulster.

13. Throughout the negotiation of the sale of Empire, Mr. Sherman expressly undertook to protect the interest of the Applicants. In particular, he wrote to Royal Trust, saying "*I [...] am*

[1] Affidavit of Kerry Winter, sworn March 16, 2017 at para 7, Tab 10 of the Applicants' Leave to Appeal Application [*Winter Affidavit*].
[2] Barry Sherman, "A Legacy of Thoughts" at p. 17, Tab 11 of the Applicants' Leave to Appeal Application.

anxious to protect the value of the [family business] assets for the children."[3] Mr. Sherman's "mantra" to Mr. O'Brien, a lawyer for the Winter estate and trustee of a family trust established by Louis Winter and Beverly Winter, was the promise that he would bring the Applicants into the family business as senior employees and shareholders in order to respect the legacy wishes of Louis Winter.[4] On cross-examination in litigation involving Royal Trust and cross-examination for the motion at bar, Mr. Sherman stated on multiple occasions that he wanted to help, assist and protect the Applicants' interests.[5]

14. Under the agreement with Royal Trust for the purchase of Empire in 1967, Mr. Sherman executed an option in favour of the Applicants [the "**Option**"]. Under the Option, the Applicants, who were minors at the time, would be entitled to be employed by Empire when they turned twenty-one years of age, and each would be entitled to acquire a five percent interest in the company when they turned twenty-three years of age. A right to royalties for four specific drugs was also provided for in a separate agreement [the "**Royalty Agreement**"]. However, the Option contained an expiry provision making it conditional on Barry Sherman or one of his partners, or a company controlled by any of them, retaining control of the purchased business.

15. In 1969, after Sherman & Ulster merged with another company, Mr. Sherman was no longer the majority shareholder of Empire. He did not disclose this transaction to the Applicants' legal guardians, or the fact that the Option could be interpreted to expire as a result of it. Mr. Sherman did not disclose the Option to the purchaser despite the purchaser's request, as part of its due diligence, for disclosure of any options held by third parties. He then sold his remaining interest in Empire in 1971 and 1972, again without disclosure of the Option to the Applicants' legal guardians and without disclosure to the purchaser. The Applicants first became aware of the Option more than two decades later.

16. In 1974, Mr. Sherman used the proceeds from the sale of his shares in Sherman and Ulster Limited to ICN to found Apotex Inc. ["**Apotex**"], a generic drug manufacturing company[6].

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[3] Letter dated November 25, 1965 from Barry Sherman to the Royal Trust, Exhibit A of the *Winter Affidavit*, *supra* note 1, Tab 10A of the Applicants' Leave to Appeal Application; also cited in *Winter v Sherman,* 2017 ONSC 5492 at para 13.
[4] *Winter Affidavit*, *supra* note 1.
[5] *Ibid* at para 10; Cross-examination of Bernard Sherman, May 10, 2017, paras 91-97, para 156.
[6] *Winter v The Royal Trust Company*, 2013 ONSC 4407 at para 153.

C. Royal Trust Litigation

17. The Applicants commenced proceedings against Royal Trust, the executor of the Winter Estate, in 2006. They alleged that Royal Trust was negligent in negotiating and drafting the Option at the time of the sale of Empire to Barry Sherman, and in not enforcing the Option and Royalty Agreement afterwards. The Applicants also alleged that Royal Trust breached its duty to them by not disclosing the Option and Royalty Agreement.

18. In 2013, Justice Perell dismissed the proceedings as against Royal Trust with respect to the Option on a motion for summary judgement,[7] but allowed the litigation concerning the Royalty Agreement to proceed.

19. Crucially for the case at bar, however, Justice Perell found that "*the issue of whether Dr. Sherman had fiduciary duties to offer employment and an Option Agreement to the Winter children to acquire a 5% equity interest in and be employed by any generic drug business in which Dr. Sherman might become involved*" was an issue "*to be decided in the separate action*," which is the present action against the Respondents.[8]

20. The Applicants' appeal of Justice Perell's decision with regard to the Option to the Court of Appeal of Ontario was dismissed[9].

D. Litigation Against Apotex, its Principals, and the Estate of Barry Sherman

a. Motion for Summary Judgment before the Motion Judge

21. The litigation against Mr. Sherman, Apotex and its principals started in 2007. The Applicants alleged that Barry Sherman owed them an *ad hoc* fiduciary duty in relation to the Option and the undertakings he made in acquiring Empire, and that he breached this duty by failing to disclose to the Applicants' legal guardians the transaction or transactions that, on some interpretations of the Option (including Perrell J's and the motion judge's interpretation), could result in it being rendered void.

22. In 2017, Mr. Sherman moved for summary judgment, arguing that the proceedings against him and Apotex were an abuse of process or, alternatively, that there was no genuine issue for trial.

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[7] *Ibid* at para 18.
[8] *Ibid* at para 142.
[9] *Ibid* at paras 2 and 8.

23. The motion judge granted the motion for summary judgment and dismissed the Applicants' action. Relying on Justice Perell's judgment in the Royal Trust proceedings, he concluded that Barry Sherman did not owe an *ad hoc* fiduciary duty to the Applicants.[10]

24. For purposes of this appeal, the motion judge's most relevant finding was his adoption of the total relinquishment framework. He found that Mr. Sherman's undertakings that he would protect the Applicant's interests were *contractual* rather than *fiduciary* in nature, based on a finding that Sherman did not relinquish his self-interest nor agree to act solely for the Applicants.[11]

25. The motion judge concluded that the claim was an abuse of process as "*the relief and issues arise from the same relationships and subject matter that have already been dealt with by Justice Perell and the Court of Appeal*."[12]

b. Court of Appeal decision

26. The Applicants appealed the motion judge's decision on the grounds that (1) the motion judge erred by failing to recognize that the core of the action against Mr. Sherman and Apotex was whether Mr. Sherman owed them an *ad hoc* fiduciary duty, and (2) he erred in concluding that the issues had already been determined by Justice Perell in the proceedings for negligence against Royal Trust.[13]

27. The Court of Appeal dismissed the appeal, accepting the motion judge's analysis and finding that the motion judge had properly considered and applied the criteria for the creation of an *ad hoc* fiduciary duty.[14]

28. The Court of Appeal also agreed that it would be an abuse of process to allow the Applicants to re-litigate their case.[15]

PART II – QUESTION IN ISSUE

29. As previously stated, the present case raises a question that lies at the heart of fiduciary liability and is of public and national importance: ***How are litigants and courts to identify***

[10] *Winter v. Sherman,* 2017 ONSC 5492 at para 31-34.
[11] *Ibid* at para 40.
[12] *Ibid* at para 51.
[13] *Winter v. Sherman Estate*, 2018 ONCA 703 at para 3.
[14] *Ibid* at paras 4-5, citing at para 5 *Winter v. Sherman,* 2017 ONSC 5492 at para 40.
[15] *Winter v. Sherman Estate*, 2018 ONCA 703 at para 8.

fiduciary undertakings for the purpose of establishing a fiduciary duty, including in situations where there is a contract and contractual obligations?

PART III – STATEMENT OF ARGUMENT

A. Legal Principles for *Ad Hoc* Fiduciary Duty, and Express and Implied Undertakings

30. In *Galambos*, this Court established the legal principle that for an *ad hoc* fiduciary duty to arise, there must be an express or implied undertaking on the part of the purported fiduciary to act in the interests of the other party, but provided only the general contours of an analytic framework to assist litigants and courts to determine whether a fiduciary undertaking is present on any given set of facts.[16]

31. The Court reaffirmed that a fiduciary undertaking is a necessary condition of fiduciary liability in the cases of *Elder Advocates of Alberta Society v. Alberta*, *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*. and *PIPSC v. Canada (Attorney General)*, but without clarifying the content of express or implied fiduciary undertakings, and without specifying the conditions under which an undertaking of either kind is to count as fiduciary.[17]

32. With respect to express fiduciary undertakings, the caselaw prior and subsequent to *Galambos* provides scant guidance to distinguish between the very different situations of, in the one instance, an express fiduciary undertaking to act for another party and, in another instance, a contractual obligation to perform a service or provide a benefit for another party. Had there been such guidance, the lower courts may not have made the error in law of treating Mr. Sherman's undertakings to protect the Applicants' interests as purely contractual rather than as contractual *and* fiduciary in nature.

33. With respect to implied fiduciary undertakings, the jurisprudence offers just a few vague references that gesture toward the relevant indicia. As a consequence, the putative fiduciary's obligation is at times imposed by statute in a context that lacks the conventional hallmarks of a fiduciary relationship. Additionally, the caselaw inconsistently attributes narrow and restricted roles to some but not all purported fiduciaries, arbitrarily concluding that some circumscribed power-holders are fiduciaries while others are not.

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[16] *Perez v. Galambos*, 2009 SCC 48 at paras 66-79 [*Galambos*].
[17] *Alberta v. Elder Advocates of Alberta Socie*ty, 2011 SCC 24 at paras 31-36 [*Elder Advocates*]; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*., 2011 SCC 23 at paras 141-143; and *PIPSC v. Canada (Attorney General)*, 2012 SCC 71 at paras 124-127.

34. With regard to both express and implied undertakings, this Honourable Court has not addressed how they are to be determined in contexts such as partnerships, joint ventures, and more specifically the case at bar: legal relations in which the interest protected by fiduciary duty is a joint interest of the beneficiary *and* the fiduciary.

35. The lower courts omitted to address in any manner whatsoever the Applicants' and Respondents' joint interest in the family business and, *a fortiori*, declined to use a framework appropriate for determining the existence of a fiduciary undertaking in cases of joint interests. Through these omissions, a gaping hole has been brought to light in the law governing fiduciary liability: the absence in this Honourable Court's jurisprudence of a framework for determining whether a putative fiduciary with discretionary power over a joint interest has made an express or implied fiduciary undertaking and thereby become subject to a fiduciary duty.

36. It is urgent that this Court intervene to ensure the law's protection of vulnerable beneficiaries in all forms of fiduciary relationship. As the law presently stands, the Courts recognize traditional *per se* fiduciary relations involving joint interests, such as partnerships and joint ventures. However, Courts are not recognizing, despite the relational vulnerability of those affected, *ad hoc* fiduciary duties owed to beneficiaries who share a joint interest with the fiduciary.

37. Uncertainty surrounding the nature and indicia of fiduciary undertakings has unfortunately led to inconsistent and as-needed applications of the concept in jurisprudence in six provinces, namely British Columbia, Alberta, Manitoba, Ontario, Quebec, and Nova-Scotia.

38. The present fact situation offers this Court an unprecedented opportunity: (1) to clarify the nature and indicia of express and implied fiduciary undertakings generally; (2) to provide guidance on fiduciary liability across the entire spectrum of the law of *ad hoc* fiduciaries; and (3) to explain how a self-abnegating fiduciary undertaking can be directed toward a joint interest in which the fiduciary has a stake, notwithstanding the presence of a contract.

39. More particularly, in wealth transfers and transactions involving non-arms' length family members, such as Mr. Sherman's purchase of the family business, which often involve undertakings and promises made in combination with a contractual agreement, clarity in the law is critical to ensure equitable transactions in the succession of wealth across Canadian society.

40. The strictly contractual approach adopted by the the lower courts does not reflect the reality and legal significance of more informal arrangements often made in the family context, where family members reasonably presume that other family members will act in good faith. To restrain opportunism and sharp dealing in this context, it is urgent that this Court articulate a clear legal framework to identify and characterize fiduciary undertakings that would trigger *ad hoc* fiduciary duties.

41. In particular, it is imperative that this Court develop a transparent and effective legal framework to govern non-arm's length contexts in which an ascendant party makes representations that trade on a family relationship, such as those made by Mr. Sherman to induce the sale of an estate asset to the possible detriment of the vulnerable Winter children.

42. The prospect of injustice prevailing is heightened if the fiduciary, as in the case at bar, has a personal interest which conflicts with the joint interest he shares with other family members.

43. Conventional fiduciary law strictly prohibits fiduciaries from acting under conflict. The rules proscribing conflicts and unauthorized profits support the fiduciary duty of loyalty to act in what the fiduciary reasonably perceives as the best interests of the beneficiary. The absence of a clear analytical framework to identify fiduciary undertakings threatens to undermine the strict prohibitions and demanding duty of loyalty in fiduciary law.

B. Fiduciary undertakings as total relinquishment of self-interest

44. In the law of fiduciaries, there are two fundamental kinds of fiduciary relationships: per se fiduciary relationships and *ad hoc* (or fact-based) fiduciary relations.[18] *Per se* relationships denote historically recognized categories, such as trustee-beneficiary and agent-principal relations, whereas *ad hoc* fiduciary relationships are established on the specific facts of the case, on a case-by-case basis.

45. In *Galambos* and *Elder Advocates*, this Court developed the proposition laid down by McLachlin J (as she then was) in *Norberg v. Wynrib* that "*fiduciary relationships…are always dependent on the fiduciary's undertaking to act in the beneficiary's interest*."[19] Cromwell J held in *Galambos* that "*it is fundamental to ad hoc fiduciary duties that there be an undertaking by the*

[18] *Elder Advocates*, *supra* note 17 at para 33.
[19] *Norberg v. Wynrib* [1992] 2 SCR 226, at p. 273.

fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party."[20]

46. Cromwell J cites Professor Lionel Smith to outline what is meant by a fiduciary undertaking: "*The fiduciary must relinquish self-interest; that is an act which the fiduciary does, not an act which is done to the fiduciary*."[21] [Emphasis in original.]

47. Professor Smith is referring to the relinquishment requirement from the total relinquishment framework within which the fiduciary's interest and beneficiary's interest are entirely separable (e.g., the standard trustee-beneficiary case).

48. The issue of what constitutes a fiduciary undertaking, however, has not been resolved and needs to be settled.

C. The question of what constitutes an express fiduciary undertaking is unresolved

49. This Honourable Court has yet to decide any case in which the key issue in dispute is whether a putatively express fiduciary undertaking is in fact a fiduciary undertaking for the purpose of grounding an *ad hoc* fiduciary relationship.

50. In the appellate jurisprudence since *Galambos*, there is just one case that purports to address the issue: *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd*., 2013 ABCA 111.[22]

51. In *Indutech*, the Alberta Court of Appeal found that the express terms of two agency agreements contained non-compete undertakings of loyalty made by the defendants."[23]

52. With respect, *Indutech* was actually not a case about *ad hoc* fiduciary undertakings. The Alberta Court of Appeal erred by engaging in an *ad hoc* fiduciary analysis, as the relationship between the parties was one of agency, and the agent-principal relationship is itself a *per se* rather than *ad hoc* fiduciary relationship.[24]

53. A crucial issue of public and national importance that the jurisprudence does not answer is how express fiduciary undertakings are to be distinguished from merely contractual undertakings designed to benefit the counter-party. Had the jurisprudence supplied a principled

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[20] *Galambos, supra* note 16 at para 66.
[21] *Galambos*, *supra* note 16 at para 78, citing Lionel Smith, "Fiduciary Relationships - Arising in Commercial Contexts - Investment Advisors: *Hodgkinson v. Simms*" (1995), 74 Can Bar Rev 714, at p. 717.
[22] *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd*., 2013 ABCA 111.
[23] *Ibid* at para 40.
[24] *Elder Advocates*, *supra* note 17 at para 33.

basis for making this distinction, then arguably the lower courts would not have treated as merely matters of contract law Mr. Sherman's reiterated representations that he would protect the Applicants' interests in the family business.

54. While, as a matter of doctrine, fiduciary duties are the exception rather than the rule in commercial relations (arms-length commercial parties are presumed capable of protecting their interests),[25] in some cases fiduciary obligations may arise from the legal incidents of contracts, such as agency agreements, while in other cases *ad hoc* fiduciary obligations may arise from "*the facts surrounding the relationship*."[26] La Forest J in *Hodgkinson* held that "*[t]he existence of a contract does not necessarily preclude the existence of fiduciary obligations.*"[27]

55. In *Dunkin' Brands Canada Ltd. v. Bertico Inc*, the Quebec Court of Appeal found that the franchisor made an express undertaking to "*protect and enhance*" its brand for the joint benefit of the franchisor and its franchisees.[28] This undertaking, considerations of equity, and the long-term or "relational" business dealings between the franchisor and franchisees generated a demanding contractual duty of good faith on the part of the franchisor to protect and enhance its brand.

56. While fiduciary duties have a prescribed and narrow scope in Quebec private law, and were not at issue in *Dunkin',* Kasirer JA recognized the closeness of the facts to fiduciary cases. He deferred "*to another day*" the question of whether "*the doctrine of the implied obligation of good faith might have a more robust or more expansive content, including the question as to whether 'good faith' and 'loyalty' are qualitatively different sources of contractual duty*"[29] [Emphasis added].

57. The Applicants submit that the day has come for this Court to answer this critical question by delineating clearly the boundary and interaction between contract and fiduciary law. On similar facts in a common law province, an undertaking to protect and enhance the brand in which the franchisor and franchisees had a joint interest would arguably be a fiduciary as well as contractual undertaking. On Kasirer JA's interpretation in *Dunkin',* the undertaking gave rise to an obligation owed to franchisees that required the franchisor to relinquish and forsake some measure of its separate commercial interest.

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[25] *Frame v. Smith*, [1987] 2 SCR 99 at para 63.
[26] *Ibid*.
[27] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at p. 407 [*Hodgkinson*].
[28] *Dunkin' Brands Canada Ltd. v. Bertico Inc*, 2015 QCCA 624, at paras 48-98.
[29] *Ibid* at para 75.

58. While this Court in *Jirna v. Mister Donut of Canada* affirms that franchisors and franchisees stand in a contractual and not fiduciary relation to one another,[30] the case is distinguishable because it lacked an express undertaking akin to the undertakings in *Dunkin'* and that made by Mr. Sherman.

59. The paucity of jurisprudence on express fiduciary undertakings, however, would leave the characterization of the undertaking in serious doubt, a characterization that goes to the heart of the relationship between contract law and fiduciary law.

60. In *Mustaji v. Tijn,* the court commented on the relationship between contract and fiduciary law, citing *Hodgkinson* and *Lac Minerals*, and elaborating on the nexus between fiduciary and contractual liability, explaining that fiduciary and contractual duties may be distinct or overlapping or "*substantially similar*."[31]

61. In *Mustaji*, however, the court takes for granted the possibility of parallel contractual and fiduciary obligations, but without offering guidance as to how to identify and distinguish fiduciary duties from contractual obligations. This is precisely the salient issue in the case at bar. This Court is called upon to develop a framework capable of assessing whether Mr. Sherman's various undertakings gave rise to a fiduciary duty to treat the Option as something of significant value to the Applicants once he and his partners purchased Empire from the Winter estate and once Royal Trust was out of the picture, notwithstanding that principles of contract law would apply to interpret the specific meaning of the Option's various provisions. The law in this area needs to be clarified to determine if Mr. Sherman's previous representations constituted an *ad hoc* fiduciary undertaking that grounded a duty to disclose his designs regarding Empire, limiting his ability to unilaterally extinguish the Winter children's rights.

62. In *Birtchnell v. Equity Trustees*, the High Court of Australia had to determine whether a written partnership agreement exhausted the obligations that flowed between the parties, or whether they owed each other fiduciary obligations not explicitly contemplated in the partnership agreement. Dixon J, writing in the majority, held that the character of the partnership venture and

[30] *Jirna v. Mister Donut of Canada*, [1975] 1 SCR 2, at p. 3.
[31] Vickers, J in *Mustaji v. Tijn,* [1995] B.C.J. No. 39, at para 34, aff'd in *Mustaji v. Tijn*, [1996] B.C.J. No. 1376, 78 B.C.A.C. 178 (BCCA) (referred to in *Galambos*, *supra* note 16 at para 56).

"*not merely the express agreement of the parties*" determines the whether fiduciary obligations apply.[32]

63. Commenting on *Birtchnell*, Prof. Harding concludes that "*the full scope of the fiduciary undertakings of the partners is to be ascertained not only by looking to the terms of their contract, but also by considering non-contractual voluntary undertakings*."[33] The Applicants submit that the existence and "full scope" of Mr. Sherman's express fiduciary undertakings are to be ascertained by considering his "non-contractual voluntary undertakings" to protect the Applicants' interest in the family business. Those undertakings, however, can only be properly assessed within an analytic framework for specifying fiduciary undertakings that is itself amenable to joint interests. Yet, such a framework is woefully lacking in Canadian jurisprudence.

64. In the present matter, Mr. Sherman made express undertakings to the Applicants' trustees that to carry out his late uncle Louis Winter's wishes and intentions, he would bring Winter's orphaned children into the family business when the children came of age.

65. The case at bar provides this Court an exemplary opportunity to develop jurisprudence on the nature and indicia of express fiduciary undertakings, and by implication jurisprudence to clarify the border and interactions between contract and fiduciary law.

66. It is urgent for the Court to seize this opportunity so that litigants and courts tasked with interpreting long-term and non-arm's length contractual relations can know when those relations present fiduciary undertakings as well as contractual promises. Doing so will equip courts across Canada to decide cases in this area of law in a consistent and reliable fashion while duly protecting vulnerable parties such as the Winter children from faithless fiduciaries.

D. The question of what constitutes an implied fiduciary undertaking is unresolved

67. In *Galambos*, Cromwell J. held that a fiduciary undertaking "*may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way,*"[34] but, he emphasized that the undertaking need not be express,

[32] *Birtchnell v. Equity Trustees, Executors and Agency Company Limited*, (1929) 42 CLR 384, at pp. 407-08.
[33] Matthew Harding, *Fiduciary Undertakings*, in P. Miller & A. Gold, eds., Contract, Status, and Fiduciary Law (Oxford: Oxford University Press, 2016), at p. 83.
[34] *Galambos, supra* note 16 at para 77.

and that relevant to the inquiry is "*whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.*"[35]

68. In some cases the fiduciary steps into a role, position, or office that is impressed with fiduciary duties, and from that act of occupancy a fiduciary undertaking is reasonably inferred. The British Columbia Court of Appeal has held that recruiters of temporary foreign workers holding themselves out as independent advisors and subject to a code of ethics impliedly undertook to act in the interests of temporary workers.[36]

69. The Alberta Court of Appeal has found that agreeing to become key employees is to impliedly undertake to discharge the fiduciary duties inherent to that relationship.[37]

70. In other cases, however, an obligation imposed by statute bears none of the hallmarks of fiduciary obligations, but is nonetheless used to ground an implied fiduciary undertaking. In *Armstrong v. Lang*, the defendant received an award from the Workers' Compensation Board that her group insurance required her to repay because she was already receiving long-term disability benefits. She declared bankruptcy. Her debt would not have been recoverable by the plaintiffs unless they could show that it was held in "a fiduciary capacity," *per* s. 178(1)(d) of Bankruptcy and Insolvency Act.[38]

71. In *Armstrong*, the British Columbia Court of Appeal held that the obligation to repay the overpayment "*satisfies the undertaking requirement*" from *Galambos*.[39] But, contrary to *Galambos'* ruling, the defendant in *Armstrong* had not actually done anything to undertake a fiduciary duty. Thus, the finding in *Armstrong*, with respect, stretches the concept of an implied undertaking too far, turning the so-called implied undertaking into an act done *to* the fiduciary rather than an act done (impliedly) *by* the fiduciary. The debtor's actual undertaking in that case was to avoid her debt through bankruptcy, plainly preferring her interests over the plaintiffs'.

72. Additionally, the legal position of debtors would be poorly described as one that exhibits a discretionary power to repay or not repay the debt. The debtor has a simple obligation to repay the creditor. But because the indicia from the jurisprudence on implied undertakings are so

[35] *Ibid* at para 79.
[36] *Basyal v. Mac's Convenience Stores Inc*., 2018 BCCA 235.
[37] *H.R.C. Tool & Die Mfg. Ltd. v. Naderi*, 2016 ABCA 334, at para 19.
[38] *Armstrong v. Lang*, 2011 BCCA 205 at para 1.
[39] *Ibid* at para 27.

amorphous, they invite courts to use mandatory obligations as proxies for voluntary undertakings, resulting in cases such as *Armstrong* in which *ad hoc* fiduciary duties are imposed where the purported fiduciaries did not undertake such a duty.

73. A decision by this Court that sets out a framework for identifying fiduciary undertakings would prevent this problem from recurring. Such a decision would have enabled the lower courts to determine whether Mr. Sherman had made an implied fiduciary undertaking to advance the joint interest he shared with the Applicants to grow the family business.

74. The jurisprudence also reveals an inconstant approach to applying the doctrine of implied fiduciary undertakings. In some cases but not others, the courts closely circumscribe the mandate of the fiduciary, taking into account the precise interest potentially subject to fiduciary duty.

75. In *Filkow et al v. D'Arcy & Deacon LLP*, for example, the Manitoba Court of Appeal found that a law firm owed and breached an *ad hoc* fiduciary duty to the estate of a deceased partner.[40] At issue was a tax liability produced by income the firm allocated to the partner the year after his death. The firm had not disclosed to the estate its intention to allocate this income prior to or during settlement negotiations.

76. In her *ad hoc* fiduciary analysis, Cameron JA noted *inter alia* the firm's unique knowledge of the partner's financial affairs vis-à-vis the firm, and the firm's duty to account to the estate. She held that these considerations disclosed an "*implied undertaking on behalf of the respondent to act, above all other interests, in the best interests of the estate*" before and during negotiation of the settlement agreement.[41]

77. *Filkow* may appear to stand in tension with the doctrine from *Galambos* and *Elder Advocates* which insists that purported fiduciaries must undertake to relinquish self-interest if they are to make a fiduciary undertaking. When the firm negotiated a settlement agreement with the estate, it plainly pursued its own interests. Cameron JA nonetheless held that there was an implied undertaking "*pursuant to which the respondent would, in some circumstances, including the negotiation of the settlement agreement, act in the best interests of the deceased's estate*."[42]

[40] *Filkow et al v. D'Arcy & Deacon LLP*, 2019 MBCA 61 at paras 68-74 and 87-89.
[41] *Ibid* at para 74.
[42] *Ibid* at para 70.

78. This decision does not address the apparent tension between its ruling and the self-abnegation requirement of fiduciary undertakings. However, the tension dissipates if the firm is understood to occupy two fiduciary roles, differentiated by their subject matters, beneficiaries and mandates. In its principal role, it represents its partners collectively and acts for their joint interests. In a secondary role, however, the firm acts as an account manager and quasi-trustee for its partners, such that when a partner passes away the firm retains a narrow fiduciary duty to disclose all relevant financial matters to the partner's estate. Importantly, the firm owes this duty to the deceased partner's estate while still being entitled to act as a fiduciary agent for its partners while negotiating a settlement agreement with the estate.

79. In the case at bar, the Applicants submit that Mr. Sherman had an *ad hoc* fiduciary duty to disclose to the Applicant's legal guardians his intention to take action that could, practically, if not legally, render the Option worthless. In *Filkow*, *supra*, the law firm's unique knowledge of the deceased partner's financial affairs mirrors Mr. Sherman's unique knowledge of the Option and his joint interest with the Applicants to grow the family business. In *Filkow, supra*, the Manitoba Court of Appeal took the firm's knowledge and position relative to the estate into account, and held the firm to a fiduciary obligation to disclose *at the time* the firm was pursuing its separate interest and negotiating a settlement.

80. In the present case, the duty arises after negotiations are concluded, Mr. Sherman has agreed to an Option in favour of the Applicants, ownership of the family business has passed to Mr. Sherman, and Royal Trust is no longer managing the family business nor responsible to the Applicants for its administration.

81. Mr. Sherman's fiduciary duty to disclose his intention to take action that could imperil the Option's value to the Applicants arose from his unilateral discretionary power over his joint interest with the Applicants, part of which was crystallized in the Option, and his express and implied undertakings to safeguard that interest.

82. Had Mr. Sherman complied with his fiduciary duty to disclose to the Applicants' legal guardians his intention to take action inimical to the value of the Option, his legal guardians could have used best efforts to defend the Applicants' interests. The Applicants' guardians, for example, could have entered negotiations with third-parties interested in purchasing the family business from Mr. Sherman with the aim of preserving the Option's value. Similarly, the

Applicants' guardians could have pressed Mr. Sherman to comply with his contractual duty of good faith to take reasonable action to preserve the Option, and not act with total indifference to it, or have brought an action against Mr. Sherman to ensure compliance with the Option, after which Mr. Sherman would have been free to found Apotex, but the Option would have remained.

83. More important still, under the long-standing *Brickenden* rule, there are various legal presumptions that severely restrict the entitlement of a breaching fiduciary to claim that the wrong occasioned by the breach is non-compensable, as recently confirmed by the Federal Court stating that "*the plaintiff is entitled to have compensation assessed as if he would have made the most favourable use of property*" and that "*if there has been a breach of the duty to fully disclose material facts to the beneficiary, the trustee cannot argue that the decision would have been the same even if the facts were disclosed.*"[43]

84. In the case at bar, 'the most favourable use of property' would have been the Applicants' legal guardians ensuring the survival of the Option across the various transactions through which Mr. Sherman changed the ancillary details but not the nature of the family business in generic drugs that he purchased from Royal Trust in 1967. While Mr. Sherman gave up control of Empire, he did not change the nature of the family business when he founded Apotex, and the guardians could have ensured that the Option continued to attach to Apotex.

85. In *Raso v. Dionigi*,[44] the Ontario Court of Appeal cited *Brickenden*, and held that in a case involving a breach of fiduciary duty to disclose, "*speculation as to what would have transpired if disclosure had been made is not relevant*."[45]

86. Other fiduciary cases, however, decline to adopt the nuanced approach from *Filkow*, producing uncertainty in the law governing the boundary and interactions between contract and fiduciary law.

87. In *Gichuru v. Smith*, the British Columbia Court of Appeal concludes that a lawyer who takes on an articling student cannot impliedly make a fiduciary undertaking to the student "*because a lawyer's primary duty is to the lawyer's clients, to whom, and without any doubt, the*

[43] *Southwind v. Canada,* 2017 FC 906, at para 239, citing *Brickenden v London Loan Savings Co et al*, 1934 CanLII 280 (UK JCPC), [1934] 3 DLR 465 (PC).
[44] *Raso v. Dionigi*, 1993 CanLII 8664 (ONCA), 100 DLR (4th) 459 (ONCA).
[45] *Ibid* at p. 467.

lawyer owes fiduciary obligations."[46] They find that a fiduciary duty to the student would be "*incompatible with the lawyer's existing fiduciary obligations to the lawyer's clients*."[47]

88. An immediate difficulty with this holding is that it is inconsistent with a lawyer's fiduciary duties to her partners, because these too might conflict with the lawyer's duties to her clients. The law manages the lawyer's multiple fiduciary duties through role differentiation, distinguishing her position as a client's advocate from her position as a partner in a firm, and assigning duties that reflect the distinct requirements and limited mandates inherent to each role.

89. In *Galambos*, Cromwell J agreed that in *Mustaji* the employer dominated the affairs of a foreign live-in caregiver such that he could use his "*power or discretion without her knowledge or consent so as to affect her legal and practical interests*."[48]

90. In *Mustaji* the employer did not expressly undertake to put the caregiver's interests first. Rather, the undertaking was implied from his position of dominance and ascendancy vis-à-vis the caregiver. This was very similar to the position Mr. Sherman occupied relative to his cousins after he bought the family business. Like the employer in *Mustaji*, Mr. Sherman could use his "*power or discretion without [his cousins'] knowledge or consent so as to affect [their] legal and practical interests*."[49] Royal Trust was completely out of the picture because they had sold the family business to Mr. Sherman, leaving the Applicants' interests with respect to the family business entirely in Mr. Sherman's hands.

91. Nonetheless, this approach to implied undertakings, like the approach to the bankrupt debtor in *Armstrong*, does not clarify the concept so much as unjustifiably stretch it from an act done by the fiduciary to an act done to the fiduciary. The employer in *Mustaji* and the defendant in *Armstrong* both expressly asserted the primacy of their interests.

92. The present case provides this Honourable Court with a much-needed opportunity to clarify the law on implied fiduciary undertakings, with facts that could not be better tailored to this purpose. The case at bar invites this Honourable Court to develop a framework—possibly using role differentiation—to resolve cases in which parties have multiple fiduciary obligations (e.g., law partners) or have limited fiduciary duties of disclosure in a context in which the

[46] *Gichuru v. Smith*, 2014 BCCA 414 at para 182.
[47] *Ibid*.
[48] *Galambos*, *supra* note 16 at para 56 (paraphrasing with approval the findings of the trial court).
[49] *Ibid*.

fiduciary is entitled to pursue her own self-interest (e.g., *Filkow*). What ties these fact situations together and makes the case at bar highly relevant is that there is in all of them a vulnerable interest subject to a discretionary power in a context in which the power-holder is entitled, within bounds, to pursue their own interest.

E. Fiduciary law's anaemic guidance in cases with joint interests

93. In cases involving joint endeavours such as partnerships and joint ventures, fiduciaries are expected to benefit, but they must pursue their interests from within the joint endeavour. In these kinds of cases, the fiduciary's primary duty is to avoid conflicts between his or her personal interest and the joint interest of the endeavour's participants. Participants relinquish their self-interest inasmuch as its pursuit in relation to the subject matter of the joint endeavour would result in conflicted decision-making or unauthorized profits.

94. In *2475813 Nova Scotia Ltd. v. Rodgers*, Cromwell JA of the Nova Scotia Court of Appeal (as he then was) held that the owner of 80% of the units in a condominium owed a fiduciary duty to the remaining unit owners to act in the best interests of all unit owners.[50] Cromwell JA explained the implications of a joint endeavour for fiduciary duty, emphasizing that the fiduciary's duty in this context "*does not preclude the fiduciary from acting in the joint interests of him or herself and those to whom the duty is owed.*"[51] [Emphasis added]

95. In his discussion of the relationship between contract and fiduciary law in *Hodgkinson,* La Forest J avers to the possibility of joint interests serving as the subject matter of fiduciary obligation, an obligation which follows from a determination that *"'the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests' [...]".*[52] [Emphasis added.]

96. *Galambos* brought fiduciary undertakings squarely within the leading indicia of fiduciary duties, and with this development came a concern that purported fiduciaries relinquish their self-interest. A salutary effect of this jurisprudential development is that, in principle, fiduciary liability is limited to parties who have undertaken to act as fiduciaries. This salutary effect, however, comes with the risk that fiduciary undertakings involving joint interests will not be

[50] *2475813 Nova Scotia Ltd. v. Rodgers*, [2001] NSCA 12.
[51] *Ibid* at para 61.
[52] *Hodgkinson*, *supra* note 27 at p. 407, citing Federal Court of Australia Justice (ret) Paul D. Finn, "Contract and the Fiduciary Principle" (1989), 12 UNSWLJ 76, at 88.

counted as such. This risk may materialize because courts may fail to recognize that joint interests are capable of falling under the fiduciary aegis and are distinguishable from the separate personal interests of the participants in a joint endeavour.

97. The lower courts both failed to recognize that Mr. Sherman's joint interest with the Applicants was subject to fiduciary principles and was distinguishable from his separate personal interests. In the result, the lower courts failed to recognise that Mr. Sherman had a fiduciary obligation in relation to his joint interest with the Applicants.

98. Though citing *Hodgkinson*, the lower courts neglected entirely the most relevant dictum in *Hodgkinson*, which refers to the distinction between a joint interest and the fiduciary's exclusive and separate self-interest.

99. The lower courts errantly use the framework for fiduciary undertakings that applies when there is no joint interest and the interests of the fiduciary and beneficiary are entirely separable, i.e., the total relinquishment framework. Were the total relinquishment framework appropriate to contexts involving the exercise of legal powers over joint interests, then partners and joint venturers could not owe one another fiduciary duties, since they would then be deemed to avowedly pursue their self-interest through the partnership or joint venture, which is to say, through their shared joint interest. But, per *Rodgers*, fiduciary duties can be owed in contexts involving joint interests.

100. The Applicants respectfully submit that in the case at bar, the motion judge and the Court of Appeal used the total relinquishment framework in error, because that framework precludes the possession and use of fiduciary power with respect to joint interests, including the interest shared by the Applicants and Respondents in the success of the family business after Mr. Sherman and his partners bought the business from Royal Trust.

101. In joint interest contexts, it is respectfully submitted, the court must use the joint interest framework set out above, which is a framework for assessing fiduciary undertakings that recognizes that fiduciary duties can be held in relation to joint interests, and that the relinquishment of self-interest is not total, but rather is nuanced and in relation to the subject matter of the joint interest. There is an emerging line of authority that articulates elements of this framework.

102. The Applicants further submit that when a court must rule on whether there is a fiduciary undertaking on the facts, it must first answer correctly a question of pure law: *Which legal framework applies, the total relinquishment framework or the joint interest framework?* If a court adopts the wrong legal framework, then any alleged findings of fact it makes with respect to fiduciary undertakings are infected by the initial error of law. Those findings are no more deserving of deference than findings of fact made subsequent to a judge committing an error of law by allowing in inadmissible evidence, and then basing "findings" of fact on that "evidence."

103. In the case at bar, the findings that Mr. Sherman made no fiduciary undertakings are fatally infected by the error of law he committed by using the total relinquishment framework for assessing undertakings rather than the joint interest framework. It is urgent that this Court delineate the scope and bounds of these and potentially other analytical frameworks for identifying fiduciary undertakings.

104. The facts of the present case are especially congenial to drawing the distinction between the total relinquishment framework and the joint interest framework, since there plainly is a joint interest on the facts, which is the success of the family business. But the facts are also congenial to developing a broader jurisprudence to identify fiduciary undertakings more generally, because there are on the facts both express and implied undertakings. And finally, the presence of the purchase agreement and the Option means that this Honourable Court has a standing invitation to provide much needed clarity on the relationship between contract law and fiduciary law.

105. The case at bar comes before this Court at a time of immense wealth transfers between generations of all income levels in Canadian society. It is urgent that the Court intervene to undo the injustices that result when individuals entrusted with family resources intended for the joint benefit of themselves and others are not held to account on a principled basis.

PART IV – SUBMISSIONS CONCERNING COSTS

106. As this leave to appeal application raises issues of public importance that should be brought before this Court, the Applicants ask for their costs of this application.

PART V – ORDER SOUGHT

107. The Applicants respectfully request leave to appeal the *Winter v. Sherman Estate*, 2018 ONCA 703, decision of the Ontario Court of Appeal, with costs.

RESPECTFULLY SUBMITTED this 16th day of October, 2019

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PART VI – TABLE OF AUTHORITIES

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7.	Federal Court of Australia Justice (ret) Paul D. Finn, "Contract and the Fiduciary Principle" (1989), 12 UNSWLJ 76	88
8.	Lionel Smith, "Fiduciary Relationships – Arising in Commercial Contexts – Investment Advisors: *Hodgkinson v. Simms*" (1995), 74 Can Bar Rev 714	717
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TAB 5

No. C932366
Vancouver Registry

95 019 029

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
SARMINI MUSTAJI	
PLAINTIFF	**REASONS FOR JUDGMENT**
AND:	**OF THE HONOURABLE**
KHI YOENG TJIN and ROSNA ELLY TJIN also known as ELLY ROSNA	**MR. JUSTICE VICKERS**
DEFENDANTS	

Counsel for the Plaintiff:	Donald G. Crane M. Alman
Counsel for the Defendants:	J. Brett Carlson
Dates and Place of Hearing	December 5, 6, 7, 8, 9 and 15, 1994 at Vancouver, B.C.

This is a motion for judgment following the verdict of a jury. The issues on this motion are as follows:

1. Did the defendants owe a fiduciary duty to the plaintiff?

2. If the answer is yes, has there been a breach of fiduciary duty?

3. Given the jury verdict, is the plaintiff entitled to recover exemplary or punitive damages? and

4. What is the plaintiff entitled to recover for unpaid Canada Pension Plan and Unemployment Insurance deductions and for any additional income tax that might become payable as a result of receiving the equivalent of two and a half years of income in a single payment?

Jury Decision

2 The plaintiff sought to recover damages for breach of contract or in the alternative, damages for unpaid wages on the basis of *quantum meruit*. In addition, she sought exemplary or punitive damages for breach of fiduciary duty or breach of contract.

3 The evidence was that the plaintiff had been employed as a nanny by the defendants, in Indonesia and Singapore. While employed in Indonesia, she was asked by her employers, the defendants, if she would join them in Canada and continue working as their nanny. She agreed and arrangements were made for her to work pursuant to the Foreign Domestic Movement Program, FDMP, an initiative of Employment and Immigration Canada.

4 A document was signed by the plaintiff and the defendant Khi Yoeng Tjin which outlined the plaintiff's obligations, including washing dishes, kitchen clean-up, child care for four children, and housekeeping duties. The defendant was to pay wages at the rate of $883 per month or $5.07 per hour for a forty hour

work week. It was also stipulated that room and board was to be deducted at the rate of $225 per month.

5 The plaintiff and the defendants, together with the defendants' children, ages 3, 5, 6 and 7, arrived at Vancouver in February 1989.

6 The statement of defence denied the existence of an employment contract. This position was reasserted on the first day of trial. However, in his opening remarks to the jury, counsel for the defendants acknowledged a contact of employment. As the trial progressed, it became apparent the parties were in agreement that the terms of the contract were set out in the document provided by FDMP. As the document had not been signed by the defendant, Rosna Elly Tjin, counsel on her behalf argued she was not bound by its terms. As a consequence of these developments, there was no need to leave questions relating to the claim in *quantum meruit* with the jury, although the issue of whether Mrs. Tjin was a party to the contract was left for the jury's consideration. I exercised my discretion and declined to leave with the jury a question as to whether there had been a breach of fiduciary duty, although questions of fact relating to the equitable claim were left for the jury to decide.

7 The plaintiff testified that after her arrival in Vancouver she worked as their live-in servant and nanny, 7 days a

week, 365 days a year and was not paid in accordance with the contract. She said she was given $40 or $50 every two or three months. When the time came for her to apply for landed immigrant status, two years after her arrival, an account was established at a bank with an initial deposit of $4,300 made by the defendants. She said that while living with and working for the defendants, she had been denied the use of the telephone; denied the freedom to go out on her own, except to two ESL classes and a cooking class; denied the opportunity to invite friends home; and, in general, lived in fear of losing her employment and being returned home to Indonesia.

8 The defendants denied the plaintiff had not been paid. They said she was given money whenever she asked and the deposit of $4,300 was money she had earned up to the time the account was established. Initially, they alleged an entitlement to deduct money advanced on behalf of the plaintiff to obtain an exit permit from Indonesia; first class air fare from Singapore; all air fares and other expenses incurred when she travelled on vacation with their family to such places as Disney World, Hawaii and Edmonton; and all medical, dental and legal fees incurred on her behalf in Canada. When it became apparent that such deductions were precluded by the provisions of the ***Employment Standards Act*** S.B.C. (1980) ch. 10, the defendants claimed a right to recover the same funds, alleging it was money loaned to the defendant. As there was no evidence of any loan agreement, I declined to leave the issue of

whether the defendants were entitled to recover such payments with the jury.

9 On April 12, 1992, the plaintiff, with the assistance of friendly neighbours and a lawyer appointed by the Domestic Workers Association, fled the defendants' home. She filed a claim for wages with the Employment Standards Branch, Ministry of Labour (British Columbia). With their assistance, she recovered $5,000 for the last six months of her employment. This action was then taken to recover the wages earned in the first two and a half years of her employment.

10 On her departure, the defendant, Khi Yoeng Tjin, instructed his accountant to prepare tax returns for the plaintiff, which he then arranged to file, unsigned. In the statement of defence, the defendants alleged the plaintiff had been paid and proof of payment was to be found in the filing of the tax returns. She never saw the accountant and had nothing to do with the filing of the returns, all of which was arranged by the defendant, Khi Yoeng Tjin.

11 Each of the defendants denied that the plaintiff's personal movement had been restricted. They denied she had not been able to use the telephone or have friends in their home. They said she worked no more than 40 hours in a week and never worked on

a weekend. They also denied she did the work or worked to the extent she had said in the course of her evidence.

12 In his final submission to the jury, counsel for the defendants submitted that his clients owned no more than approximately $15,000 to the plaintiff without making any deductions for the items to which I have already referred. Counsel for the plaintiff sought an award in excess of $100,000 for wages and overtime pursuant to the contract.

13 The questions left with the jury and the answers to those questions are as follows:

1. Was Rosna Elly Tjin, also known as Elly Rosna, an employer in B.C. of the plaintiff, and thus a party to the contract?

   Answer: **Yes**

2. Are the employers or one of them, in breach of their contract with the plaintiff?

   Answer: **Yes**

3. If the answer to question 2 is "yes", what are the damages that flow from that breach of contract?

   Answer: **$73,777.58**

4. Were all of the plaintiff's claims settled and released in full by the payment of $5,000?

   Answer: **No**

5. If the answer to Question 4 is "no", is the conduct of the defendants toward the plaintiff deserving of punitive and exemplary damages?

   Answer: **Yes**

6. If the answer to Question 5 is "yes", at what amount do you assess the punitive and exemplary damages?

   Answer: **$175,000**

7. Do you find the plaintiff could reasonably have expected that the defendants would act in her interest in and for the purposes of her employment with the Tjin Family?

   Answer: **Yes**

8. Do you find the plaintiff was in a position of trust, vulnerability and dependence on the defendants?

   Answer: **Yes**

9. Do you find the defendants took over the affairs of the plaintiff in all dealings concerning her immigration and employment in Canada?

   Answer: **Yes**

10. Do you find that the defendants had the opportunity to exercise power or discretion over the affairs of the plaintiff?

Answer: **Yes**

11. If the answer to Question 10 is "yes", do you find that the defendants had the capability of using that power or discretion without the plaintiff's consent or knowledge in such a way as to affect her legal or practical interests?

Answer: **Yes**

12. If the answer to Question 11 is "yes", was the plaintiff especially vulnerable to the defendants' exercise of that discretion or control?

Answer: **Yes**

14 With respect to all but one question, the jury was unanimous. One juror did not agreed with the verdict on question 6. ***Jury Act***, R.S.B.C. 1979, Chapter 210, Sec. 19.

15 It is clear from the verdict of the jury that they accepted the evidence of the plaintiff and those persons called to testify on her behalf at the trial. Conversely, the verdict of the jury can only mean they did not accept the evidence of the defendants. In that regard, I would have had no difficulty in reaching a similar conclusion.

16 The jury was told they could award punitive damages if the wrongful acts of the defendants were outrageous or reprehensible and offensive to ordinary standards of decent conduct in the community. They understood the type of conduct that might justify such an award included malicious, vindictive or harsh conduct or conduct which indicated a contempt for the plaintiff's rights. It is implicit in the jury's verdict on questions 4 and 5 that they considered the conduct of the defendants to be offensive to ordinary community standards and their award was fixed in an amount of money that would, in the view of the majority of seven jurors, deter others from similar conduct and, as well, serve as a punishment to the defendants.

Fiduciary Duty

17 Counsel relied primarily on the recent decision of the Supreme Court of Canada in ***Hodgkinson v. Simms*** (1994) 117 D.L.R. (4th) 161, ("***Hodgkinson***"). In that case, La Forest J., speaking for the majority, held that fiduciary obligations may arise in one of two situations. First, fiduciary obligations may arise as innate qualities of relationships that are themselves inherently fiduciary. With reference to his judgment in ***Lac Minerals Ltd. v. International Corona Resources Ltd.*** (1989) 61 D.L.R. (4th) 14, he said at page 176:

> I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing

> certain relationships that have as their essence discretion, influence over interests, and an **inherent** vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationship are *per se* fiduciary, Wilson J.'s three-step analysis [from *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 ("*Frame*")] is a useful guide.

18 Wilson J.'s approach to identifying new fiduciary relationships, set out in ***Frame (supra)***, is found at page 176 of ***Hodgkinson (supra)***, as follows:

> ...relationships in which a fiduciary obligation have been imposed are marked by the following three characteristics:
>
> 1. The fiduciary has scope for the exercise of some discretion or power;
>
> 2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
>
> 3. The beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

19 Alternatively, fiduciary obligations may arise in specific circumstances of a particular relationship that is not inherently fiduciary. In that regard, La Forest J., at page 176, said as follows:

> ...the three-step analysis...encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz, situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

20 Counsel for the plaintiff submitted that the jury's affirmative answers to questions 7 to 12 satisfied both branches of the test. Counsel for the defendants submitted that despite the jury's findings of fact, neither branch of the test had been satisfied. In his submission, the test for the existence of a fiduciary duty set out in ***Hodgkinson, (supra)***, is more stringent than what is suggested by the foregoing excerpts from the judgment. The defendant relied on the following, from the judgment of La Forest J., at page 176:

> ...what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and has agreed to act solely on behalf of the other party.

21 He submitted that absent evidence the parties had reached a "mutual understanding" that the defendants would relinquish their own self-interest and act in the plaintiff's best interests, no fiduciary obligation could be found. In his submission, the only evidence before the court was evidence of the plaintiff's unilateral understanding and there was no evidence of mutual understanding.

22 In my view, mutuality of understanding applies only to "reliance" relationships. La Forest J. distinguished between "reliance" relationships, such as the investment advisor-investor relationship in ***Hodgkinson***, ***(supra)***, and "power dependency" relationships, such as the doctor-patient relationship in ***Norberg v. Winrib*** (1992), 68 B.C.L.R. (2d) 29 (S.C.C.).

23 A "power dependency" relationship is a relationship characterized by "unilateral discretion" and, as stated at page 178 of ***Hodgkinson***, ***(supra)***, it is a concept describing situations where:

> ...one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party.

24 The relationship between the defendants and the plaintiff in this case is clearly a "power dependency" relationship. Discretion was vested exclusively in the hands of the defendants.

25 Whatever the applicability of La Forest J.'s "mutual understanding" requirement in respect of "reliance" relationships, that requirement has no applicability to "power dependency" relationships. The power imbalance inherent to such relationships is sufficient to render any notion of mutuality virtually meaningless. In my view, La Forest J. recognizes the inapplicability of proof of mutuality to "power dependency" relationships when he states at page 178 of ***Hodgkinson*** ***(supra)***:

> As is evident from the different approaches taken in *Norberg*, the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties....The existence of a fiduciary duty in any given case will depend upon the reasonable expectations of the parties, and these in turn depend on such factors as trust, confidence, complexity of subject matter, and community or industry standards.

26 I conclude that proof of mutuality of understanding is not required in order to find a fiduciary obligation in respect of a "power dependency" relationship. Consequently, there is no need for the plaintiff to prove that the parties had a mutual understanding consistent with the imposition of a fiduciary duty. Proof that the plaintiff had a reasonable expectation that in all

of the circumstances the defendant would act in her best interests in respect of the matters in issue is sufficient to discharge the onus of proving a fiduciary obligation existed.

27 The jury's findings clearly support a conclusion that the defendants owed the plaintiff a fiduciary duty, based on either branch of the ***Hodgkinson*** test. The jury's findings support the conclusion that the nature of the relationship between the plaintiff and the defendants was inherently fiduciary. Wilson J.'s three step analysis in ***Frame v. Smith***, ***(supra)***, is a useful guide for determining whether a given relationship is inherently fiduciary. Questions 10 through 12 of the jury assignment are simply an articulation of this three step analysis. The jury found that the defendants had the opportunity to exercise power or discretion over the affairs of the plaintiff, were capable of using that power or discretion without the plaintiff's knowledge or consent so as to affect her legal and practical interests, and that the plaintiff was especially vulnerable to the defendants' exercise of that discretion or control. This three part analysis indicates that the parties' relationship was inherently fiduciary in nature.

28 This may be one of those limited situations where, despite the results of the three part analysis, the relationship itself cannot truly be said to be inherently fiduciary. Wilson J.'s approach is merely a guide; it does not conclusively determine the existence of a fiduciary relationship. In the

circumstances of this case, it seems to me that something more is required before a court can properly conclude that the inherent purpose of the parties' relationship creates a rebuttable presumption that the defendants owed the plaintiff a duty to act in her best interests.

29 Fiduciary relationships, including doctor-patient relationships, agent-principal relationships, trustee-beneficiary relationships, and parent-child relationships, have as their essence discretion, influence over interests and inherent vulnerability. The parties' relationship, although rife with the indicia typical of a inherently fiduciary relationship, cannot be said to have these essential qualities. It cannot be said that the inherent purpose of the parties' relationship was to compel the defendants to act in the plaintiff's best interests. Whatever obligation the defendants had to so act was, in my view, incidental to their relationship, which was essentially contractual in nature. The relationship remains fundamentally one of domestic employment.

30 Such relationships are not within the class of relationships normally recognized as fiduciary, although employment relationships do often give rise to fiduciary obligations on their peculiar facts (for example, the duty of loyalty and confidentiality). Thus, while it is undeniable that fiduciary obligations arise in employment relationships in appropriate circumstances, those situations are more appropriately dealt with under the second

branch of the ***Hodgkinson*** ***(supra)*** test. It would be going too far in the present case to say the jury's findings lead inexorably to the conclusion that the relationship between the parties was inherently fiduciary.

31 The jury's findings do, however, support the conclusion that the defendants stood in a fiduciary position vis-a-vis the plaintiff in certain matters as "a matter of fact [arising] out of the specific circumstances of [their] particular relationship". The applicable test is whether, given all the surrounding circumstances, the plaintiff could reasonably have expected the defendants to act in her best interests with respect to the matters in issue. The jury was unanimous, finding that the plaintiff had exactly that reasonable expectation in the circumstances (Question 7). This finding alone would satisfy the second branch of the ***Hodgkinson*** ***(supra)*** test. This conclusion is buttressed, however, by the jury's answer to Question 8, where the jury confirmed that factors indicative of fiduciary obligations, including trust, vulnerability and dependence, were present. On the whole, the jury's findings demonstrate conclusively that the defendants owed the plaintiff a fiduciary duty in the circumstances. In my view, they were entirely correct in that regard.

Breach of Fiduciary Duty

32 Before a breach of fiduciary duty can be found, the scope of the fiduciary obligation must be determined. Because of the difficulty inherent in articulating fiduciary obligations, the scope of the fiduciary obligation and its breach were reserved for determination by the trial judge. In that regard, I relied on the authority of Ruttan J. in ***Coodin v. Hodgkinson et al*** (1983) 49 B.C.L.R. 359. In my opinion, those issues in equity could not be left with the jury.

33 The nature of the relationship between the parties is an important consideration in determining the scope of the duty owed. In this case, the parties' relationship was primarily contractual, flowing from an agreement to provide domestic services by the plaintiff in exchange for compensation. The employment contract created a number of reciprocal rights and obligations. However, the substance of the parties' relationship cannot be captured adequately within a strict employment framework. In the particular circumstances of this case, the plaintiff was not simply an employee under the terms of the employment agreement; she was also the beneficiary of certain fiduciary obligations imposed on the defendants by virtue of their power and discretion over her, relating to matters both within and outside the scope of their employment relationship. While principally one of employment, the

parties' relationship can be more accurately described as being part-contractual and part-fiduciary.

34 In any mixed contractual-fiduciary relationship, the contractual and fiduciary aspects of the relationship may be distinct, giving rise to different duties, or overlapping, in whole or in part, giving rise to substantially the same duties but from distinct legal and equitable sources. Where the fiduciary and contractual duties give rise to separate, distinct duties, the breach of those obligations gives rise to independent causes of action. Where the fiduciary and contractual duties give rise to substantially similar duties, albeit in equity and in law respectively, the breach of one duty is the breach of the other. Recovery in such circumstances is properly permitted in law or in equity, but not both.

35 Contractual duties and fiduciary duties may exist in the same relationship at the same time. ***Lac Minerals Ltd. v. International Corona Resources Ltd. (supra)***. The co-existence of contractual and fiduciary duties in the same relationship was also recognized in ***Hodgkinson (supra)*** at page 174, where La Forest J. observed that:

> ...the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm

> example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations... (emphasis added)

36 This case is another paradigmatic example of a situation where the legal incidents of a contract give rise to a fiduciary duty. In the same way that an employee having access to confidential information within a company may, as a legal incident of his employment contract, have imposed upon him or her a fiduciary obligation of confidentiality and trust with respect to the company's trade secrets, the defendants here assumed certain fiduciary obligations toward the plaintiff incidental to their employment contract with her by virtue of the provisions and requirements of the FDMP.

37 The continuing validity of the plaintiff's work permit depended upon her maintaining employment exclusively as a domestic worker with the defendants and continuing to reside in their home. Her occupational and physical mobility was severely restricted under the terms of the FDMP. These requirements contributed significantly to the plaintiff's vulnerability and vested significant power in the hands of the defendants.

38 A principal benefit of the FDMP, from the perspective of the worker, is the ability to ultimately obtain landed immigrant status in Canada. An application for such a status could be made

under the FDMP after the domestic worker had worked in Canada for two years. To obtain the status, the foreign domestic worker had to meet certain program requirements, one of which was the achievement of a proscribed level of social adaptation.

39 The requirements of the FDMP, superimposed upon the parties' contractual relationship, placed the plaintiff in a position of vulnerability and dependence vis-a-vis the defendants, and conferred upon the defendants significant power and discretion over the plaintiff's legal and practical interests. It is in the exercise of that power and discretion, both in respect of matters covered by their employment contract with the plaintiff and in other matters, which imposed fiduciary obligations on the defendants.

40 By withholding wages, requiring the plaintiff to work excessive amounts of unpaid overtime, and by threatening to return the plaintiff to Indonesia, the defendants can be said to have used their power over the plaintiff to promote their interests in the employment relationship in a manner that conflicted with their overriding duty not to take advantage of her vulnerability. While most employees could simply have exercised their right to withdraw their labour in the face of unreasonable demands from their employer by resigning their employment, the plaintiff could not do so without jeopardizing her broader interests beyond the employment relationship. As the plaintiff could not reasonably have been

expected to have protected her own interests in these circumstances, equity imposes on the defendants an obligation not to abuse their contractual rights to the detriment of the plaintiff. These same allegations can also be characterized as instances of the defendants profiting at the expense of the plaintiff.

41 Finally, by withholding wages, depriving the plaintiff of reasonable time off work, insisting she have no recreational or social life, and depriving her of contact with others, in person or by telephone, the defendants can be said to have breached the trust vested in them by the plaintiff that they would not act in a manner nor exercise their contractual rights in a manner that would adversely affect the plaintiff's ability to qualify for landing under the FDMP. By engaging in the conduct alleged, the defendants effectively deprived the plaintiff of the opportunity to fulfil the social adaptation requirements of the FDMP, potentially threatening her legal and practical interests under the FDMP.

42 In my opinion, the defendants breached their fiduciary obligations to the plaintiff in the circumstances of this case. Those obligations were, in part, separate and distinct from the obligations arising under the parties' employment agreement.

43 To fully comprehend the role of equity in the parties' relationship and the distinctive nature of their employment relationship in particular, the affect of the FDMP on that

relationship must be acknowledged. Section 9.16(2)(c) of the **Immigration Manual**, Employment and Immigration Canada, relating to the FDMP, reads as follows:

> One of the most important objectives of skills upgrading is to give domestics the **opportunity to become part of the community by making it easier for them to make contacts outside the home environment.** It has been found that registration in various courses or structured activities outside the home **not only reduces the likelihood of exploitation,** but also gives domestics an opportunity to make friendships within the community while expanding their knowledge in whatever field they may select. (emphasis added)

44 The more restricted or limited the domestic worker's contact with the broader community, the greater the likelihood of exploitation at the hands of her employers. That is exactly what occurred in this case. More importantly, it is implicit in this passage and in the FDMP as a whole that persons who employ foreign domestic workers have an obligation to encourage, or at the very least not to fetter, the domestic worker's opportunities to develop contacts and make friendships in the community. There can be no doubt the defendants failed to fulfil this obligation. Their conduct towards the plaintiff can only be described as exploitative and a clear breach of the fiduciary duty owed to the plaintiff.

45 The importance of developing contacts in the community is also reflected in ***De Gala* v. *Minister of Employment and Immigration*** (1987), 8 F.T.R. 179 (F.C.T.D.). In that case, the court noted at

page 183 that the extent to which a foreign domestic worker has adapted to a Canadian lifestyle and established contacts in the community is a key consideration in the assessment of the worker's application for status as a landed immigrant under the FDMP. In such circumstances, those employing foreign domestic workers under the FDMP have a duty in equity to ensure that the domestic worker is afforded a reasonable opportunity to meet the requirements of the Program. The defendants' conduct in this case potentially deprived the plaintiff of that opportunity and constituted a breach of fiduciary duty.

Punitive and Exemplary Damages

46 The jury found the defendants in breach of the contract of employment (Question 2) and awarded damages in the amount of $73,777.58 (Question 3). No issue arises with respect to those findings on this motion for judgment.

47 The plaintiff seeks punitive damages for breach of contract or breach of fiduciary duty. The jury found the defendants' conduct merited an award of punitive damages in the amount of $175,000 (Question 5 and 6). In ***Vorvis*** ***v.*** ***I.C.B.C.*** (1989), 36 B.C.L.R. (2d) 273 (S.C.C.), McIntyre J. said at page 291:

> ...punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.

48 As I have already noted, the jury concluded the defendants' conduct was harsh, reprehensible and malicious. Those words properly describe their exploitation of the plaintiff. Their conduct was completely unacceptable in this community.

49 In dismissing the plaintiff's claim for punitive damages for wrongful dismissal in ***Vorvis***, (***supra***), McIntyre J. said at page 291:

> ...while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award.

50 With respect to the conduct complained of in that case, McIntyre J. said at page 293:

> It is argued that the conduct of the defendant, that is, the supervisor, Reid, prior to the dismissal was such that it caused mental distress and frustration to the appellant. This conduct, however, was not considered sufficiently offensive, standing alone, to constitute [an] actionable wrong: see Hinkson J.A., and in my view was not of such a nature as to justify the imposition of an award of punitive damages.

51 The issue on this motion for judgment is whether the plaintiff is entitled to recover punitive and exemplary damages at all, and if so, whether the award is properly attributable to the breach of fiduciary duty, standing alone, or alternatively, to the breach of contract, the breach of fiduciary duty constituting the requisite independent actionable wrong.

52 On behalf of the defendants, it was argued that punitive damages for breach of fiduciary duty do not lie in the absence of underlying tortious misconduct. Counsel urged me to conclude that damages for breach of fiduciary duty, like contractual damages, are fundamentally compensatory. Unless the defendants' breach of fiduciary duty was also tortious, the defendants say it is irrelevant whether the plaintiff's claim is framed in breach of contract or in breach of fiduciary duty because punitive damages cannot be recovered as a matter of law.

53 In support of this proposition, the defendant relied on a passage from the majority judgment in ***Hodgkinson, (supra)***. That case also involved concurrent claims in breach of contract and breach of fiduciary duty. La Forest J. at page 209, said:

> In view of my finding that there existed a fiduciary duty between the parties, it is not in strictness necessary to consider damages for breach of contract. However, in my view, on the facts of this case, damages in contract follow the principles stated in connection with the equitable breach. The contract between the parties was for independent

> professional advice. While it is true that the appellant got what he paid for from the developers, he did not get the services he paid for from the respondent. The relevant contractual duty breached by the respondent is of precisely the same nature as the equitable duty considered in the fiduciary analysis, namely the duty to make full disclosure of any material conflict of interest. This was, in short, a contract which provided for the performance of obligations characterized in equity as fiduciary.
>
> (emphasis added)

54 In my view, the defendants cannot rely on those words because they are not applicable to the facts of this case. As already noted, the contractual obligations and the fiduciary obligations in this case were co-extensive, but only in part, contrary to the situation in ***Hodgkinson***, ***supra***. In that case, the defendant's contractual duty to provide independent investment advice and his fiduciary duty to avoid conflicts of interest and duty were identical, i.e. entirely co-extensive. On the facts of ***Hodgkinson***, ***supra***, the contractual obligation and the fiduciary obligation amounted to the same thing.

55 In this case, the breach of contract and the breach of fiduciary duty, although sharing a common nexus – the duty to pay wages in a timely manner – are not identical. The breach of contract alleged by the plaintiff was the simple failure to pay wages. The correlative fiduciary duty, as set out in the statement of claim, was the duty not to withhold wages. The sum of $73,777.78 awarded by the jury as general damages for breach of

contract was compensation for money earned and not paid under the contract of employment. No portion of that general damage award was meant to punish the defendants for their harsh, reprehensible and malicious conduct which I have concluded also amounted to a breach of their fiduciary duties to the plaintiff, conduct which included but was not limited to the withholding of wages.

56 The plaintiff's claim for breach of fiduciary duty in this case was concerned with both the withholding of wages by the defendants, a breach co-extensive with the breach of the contractual duty to pay wages, and the breach of other related fiduciary obligations, breaches extending beyond the simple withholding of wages and having no correlative contractual counterpart. When the defendants failed to pay the plaintiff's wages, amounting to both a contractual and equitable breach, she did not challenge their actions, fearing that she would be returned to Indonesia. She was a stranger in this country, with no one to whom she could turn for assistance. The defendants' failure to meet their fiduciary obligations under the FDMP made the possibility of seeking that assistance all the more remote. The plaintiff's vulnerability and the defendants' willingness to exploit that vulnerability deprived the plaintiff of the ability to enforce her contractual right to receive wages. These fiduciary obligations, save the obligation not to withhold wages, were separate and distinct from the defendants' contractual obligations, but were bound together with the contractual duty to pay wages by

virtue of the nexus between that duty and its correlative fiduciary obligation not to withhold wages. The withholding of wages was merely one aspect of the defendants' harsh, reprehensible and malicious conduct amounting to a breach of their fiduciary obligations to the plaintiff and deserving of condemnation by the court.

57 It is not open to the defendants, in order to avoid liability for punitive damages, to now claim that the obligations characterized as fiduciary in the statement of claim were simply equitable counterparts of contractual obligations existing under the parties' employment contract. As stated above, although the fiduciary duty not to withhold wages can be said to be co-extensive with the contractual duty to pay wages (one simply being the inverse of the other), none of the other breaches of fiduciary duty can be said to have contractual counterparts.

58 The fiduciary obligations in issue here were separate and distinct, such that it cannot be said, as submitted by counsel for the defendant, that the purpose of the plaintiff's breach of fiduciary duty claim is merely to circumvent the rule in ***Vorvis***, ***supra***, so as to legitimize a claim for punitive damages that would otherwise be precluded by law. In my view, where the independent actionable wrong required under ***Vorvis***, ***supra***, arises from the breach of fiduciary obligations that are separate and distinct from the obligations arising under the contract (i.e. having no

contractual counterpart), the rule in ***Vorvis*** precluding punitive damages for breach of contract does not extend to the claim in equity. Thus, so long as there is at least a partial nexus between a breach of contract claim and a breach of fiduciary duty (i.e. the duties are neither identical nor wholly independent), the breach of fiduciary duty can stand as an independent actionable wrong and form the basis for an award of punitive damages for the breach of contract.

59 Alternatively, the defendants submitted that, without regard to the rule in ***Vorvis***, ***supra***, the decision in ***Fern Brand Waxes Ltd. v. Pearl et al.*** (1972) 29 D.L.R. (3d) 662, is authority for the proposition that punitive damages are not available for breach of fiduciary duty, or any other equitable claim, absent tortious conduct. At page 670, the Ontario Court of Appeal held that:

> In the matter of punitive damages, the appeal must be allowed. The claim in this action is for an accounting. No claim is made in tort. No precedent exists to justify an award of punitive damages in this type of action. While the trial Judge had ample reason for castigating the defendant Pearl for his nefarious conduct his judgment awarding punitive damages cannot be supported and the appeal in this respect must be allowed.

60 Thus, ***Fern Brand***, ***(supra)***, which predates ***Vorvis***, ***(supra)***, appears to extend to all equitable claims a similar rule

as to punitive damages, even where the equitable claim is not otherwise co-extensive with a corresponding contractual claim.

61 In my opinion, ***Fern Brand***, ***supra***, has been overtaken by subsequent developments in the jurisprudence. ***Huff*** ***v.*** ***Price*** (1990), 51 B.C.L.R. (2d) 262 (B.C.C.A.); ***M.(K.)*** ***v.*** ***M.(H.)*** (1992), 96 D.L.R. (289 (S.C.C.).

62 In ***M.(K.)*** ***v.*** ***M.(H.)***, ***supra***, the extent to which the law has evolved is reflected in the following passage from the judgment of La Forest J., at page 337:

> The question in this appeal is whether there are different policy objectives animating the breach of a parent's fiduciary duty as compared with incestuous sexual assault. In my view, the underlying policy objectives are the same. Both seek to compensate the victim for her injuries and to punish the wrongdoer. The jury award of general damages was made in full knowledge of the injuries suffered by the appellant and her rehabilitative needs. The same concerns would apply in assessing equitable compensation, and as such I would decline to provide any additional compensation for the breach of fiduciary obligation. **The punitive damages award should not be varied in equity. Of course, equitable compensation to punish the gravity of the defendant's conduct is available on the same basis as the common law remedy of punitive damages: *Aquaculture Corp. v. New Zealand Green Mussel Co.*,** [1990] 3 N.Z.L.R. 299 at p.301.
>
> (emphasis added)

The foregoing is sufficient to dispose of the defendants' submissions as to the relationship between breach of fiduciary duty and punitive damages.

63 The leading authority with respect to punitive damages for breach of contract is ***Vorvis, (supra)***. At page 290, McIntyre J. said:

> When, then, can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff. This would be consistent with the approach of Weatherston J.A. in *Brown*, supra, and it has found approval in the Restatement (2d) on the Law of Contract in the United States, as noted with approval by Craig J.A., at p. 49, where he referred in the Court of Appeal to § 355, which provides:
>
> > Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

McIntyre J., in adopting the above rule, was content to say that the impugned conduct must, standing alone, constitute an actionable wrong. I have found that in this case the impugned conduct standing alone is an actionable wrong, namely, a breach of

fiduciary duty. The jury has determined that the conduct of the defendants, which I have found to be a breach of fiduciary duty, warranted an award of $175,000. In my view, the plaintiff is entitled to recover that sum of money for punitive damages as determined by the jury.

64 In view of my findings with respect to the plaintiff's entitlement to recover exemplary and punitive damages, I do not propose to consider the arguments concerning misrepresentation made at the late stages of the trial.

Canada Pension Plan; Unemployment Insurance and Income Tax

65 Employers are required to deduct and remit from the earnings of an employee pursuant to the provisions of the ***Unemployment Insurance Act***, the ***Canada Pension Plan*** and the ***Income Tax Act***. The defendants failed to make the appropriate deductions in relation to the employment of the plaintiff. Counsel for the plaintiff has filed the report of a Chartered Accountant, Ms. Dianne J. Alsop. She has calculated that there remains a total of $2,884 due and owing for Unemployment Insurance benefits and Canada Pension Plan payments for the period of the plaintiff's employment.

66 Ms. Alsop calculates that the plaintiff's receipt in one taxation year of two and a half years of earnings will result in an additional income tax liability of $11,881. In this calculation

the defendants have not been credited with the taxes paid by the defendants when tax returns were filed by them without the consent of the plaintiff. In the plaintiff's submission, the current tax liability is unchanged by the previous payment. Thus, the total amount claimed by the plaintiff under these three items is $14,765.

67 Counsel for the defendants says that the figure should be $10,897.25 and in that regard files the professional advice of an accountant who says that damages for loss of employment are not CPP assessable. Secondly, he seeks a credit for the sum of $2,816.75 paid by the defendant Khi Yoeng Tjin when he improperly filed tax returns for the plaintiff, without her knowledge and consent. Finally, he says there is an error in the tax calculation of $303.

68 I accept the fact that there is an error in the tax calculation filed by the plaintiff. I conclude that the additional sum of money required to pay income taxes, arising out of the fact the money will all be paid in one tax year, is $11,578.

69 The defendants have not explained how the plaintiff can receive a tax credit from Revenue Canada for a payment she did not make on the filing of tax returns she did not authorize or sign. If anyone is entitled to a return of the money, it is the defendant who made the payment. It is he who should make the appropriate enquiries with the tax authorities to recover the money. The plaintiff should not be left with any uncertainty as to whether or

not she would be able to claim the money as a credit. The problem results from the wrongful action of the defendant and he should be left with the obligation of sorting it out with the tax authorities. I do not propose to allow a credit for the money paid.

70 The damage award for unpaid wages is not an "allowance for loss of office or employment". In my view, the defendants are liable for CPP contributions owing but not paid.

71 The plaintiff is entitled to recover the sum of $2,884 for UI and CPP payments that remain due and owing. She is entitled to recover $11,578 to cover the additional income tax to be paid.

Summary

72 The plaintiff is entitled to judgment as follows:

1. The sum of $73,777.58 awarded by the jury, for breach of contract;

2. The sum of $175,000 as exemplary and punitive damages for breach of fiduciary duty:

3. Prejudgment interest on the damages for breach of contract;

4. The sum of $14,462 for UIC, CPP and Income Tax; and

5. Costs.

D. H. Vickers, J.

Vancouver, British Columbia
January 13, 1995

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TAB 6

CITATION: Winter v. The Royal Trust Company, 2013 ONSC 4407
COURT FILE NO.: 06-CV-308098PD1
DATE: June 26, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
KERRY J.D. WINTER, JEFFREY A. BARKIN, PAUL T. BARKIN and JULIA WINTER, personal representative of DANA C. WINTER, deceased	)	*Maurice J. Neirinck, Margaret O'Sullivan, Claudia Sgro* and *Charles B. Wagner* for the Plaintiffs
Plaintiffs	)	
– and –	)	
THE ROYAL TRUST COMPANY and ROYAL TRUST CORPORATION OF CANADA	)	*Laura K. Fric and Gillian S.G. Scott* for the Defendants
Defendants	)	
	)	**HEARD**: June 13, 14, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] The Plaintiffs Kerry J.D. Winter, Jeffrey A. Barkin, Paul Timothy Barkin, and Julia Winter, as the personal representative of Dana C. Winter, deceased, sue the Royal Trust Company and Royal Trust Corporation of Canada (collectively "Royal Trust").

[2] Pursuant to Rule 20 of the *Rules of Civil Procedure*, Royal Trust brings a motion for summary judgment, and it seeks an order dismissing the action in its entirety.

[3] With the exception of Julia Winter, who is a sister-in-law, the Plaintiffs are the children of Louis Lloyd Winter and Beverley Winter, who both died in 1965, when the siblings were between three to six years of age. Julia Winter is the widow of the late Dana Winter, also a child of Louis and Beverley Winter.

[4] Royal Trust was the executor of the Winter Estates; i.e., the combined estates of Louis and Beverley Winter, and it administered the Estates for 28 years from 1966 until 1994. The Plaintiffs are the beneficiaries of the Winter Estates, which were not to be wound up until the children reached the age of 30.

[5] In 1967, two years after the start of the administration of the Estates, Royal Trust, as executor, sold the Winter family business, a generic drug manufacturing business, to Dr. Bernard (Barry) Sherman, who was a first cousin of the Winter children.

[6] Over 30 years later, in 1999, Paul Barkin made inquiries of Royal Trust about its administration of the Winter Estates, and as a result of those inquires, he and the other Plaintiffs learned for the first time that the sale of the family's business had included an Option Agreement under which, subject to certain contingencies, each of the children had a right to obtain employment and a right to a 5% interest in the business that had been sold to Dr. Sherman. The Plaintiffs also learned that there was a Royalty Agreement under which the Winter Estates were entitled to royalties from the manufacturing of four drugs, and they learned that no royalty payments had been made to the Estates.

[7] Infused with this knowledge, in a separate action from the case at bar, the Plaintiffs sued Dr. Sherman, who had become the billionaire owner of Apotex, a generic drug manufacturing business that the Plaintiffs say is precisely the family business in which they are entitled to a 20% interest. In their separate action against Dr. Sherman, which also includes claims against Apotex and two other defendants, the Plaintiffs say that Dr. Sherman breached his fiduciary duties to the Plaintiffs in not honouring the Option Agreement and is liable for royalty payments under the Royalty Agreement. Generally, the action is for oppression, pursuant to s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

[8] In addition to suing Dr. Sherman and Apotex, the Plaintiffs decided by the action now before the court to sue Royal Trust, which they blame for permitting Dr. Sherman for getting away with the dishonouring of the Option Agreement and for the failure to make payments under the Royalty Agreement. The Plaintiffs submit that Royal Trust was negligent and that it breached fiduciary duties owed to the beneficiaries of the Winter Estates. They also sue Royal Trust for miscellaneous instances of mismanagement of the Winter Estates. They claim $500 million in damages. (The claim is $1 billion in damages in the other action against Dr. Sherman and Apotex.)

[9] In the action against Royal Trust, the Plaintiffs submit that Royal Trust kept the Option Agreement and the Royal Agreement secret and that on the passing of the accounts of the Winter Estates, it should have told the Official Guardian (now known as the Children's Lawyer) about these agreements. The Plaintiffs submit that they have been damaged by the non-disclosure of the two agreements. They submit that Royal Trust was negligent in drafting the Option Agreement and in not enforcing the Option Agreement and the Royalty Agreement. In the alternative, they submit that if the Option Agreement turns out to be unenforceable as against Dr. Sherman and Apotex, then Royal Trust was negligent and in breach of its fiduciary duties in failing to obtain a better Option Agreement that would be binding on Dr. Sherman.

[10] Further, in this action against Royal Trust, the Plaintiffs submit that Royal Trust was negligent and in breach of fiduciary duty with respect to the realization on several assets of the estate. They make miscellaneous claims for negligence and breach of fiduciary duty.

[11] In this motion for summary judgment, Royal Trust submits that there is no genuine issue for trial with respect to any of these allegations, and it submits that the Plaintiffs' action should be dismissed in its entirety. Royal Trust denies all of the allegations against it, and it submits that the case at bar is suitable for summary disposition. It submits that there was no negligence in the sale of the Winter Estates assets and no obligation to inform the children about the Option Agreement, which had lapsed, or about the Royalty Agreement, which had never been activated. Royal Trust submits that there was no reason to bring the lapsed Option Agreement or the inchoate Royalty Agreement to the attention of the children or to the Official Guardian at the time of the passing of the accounts of the Winter Estates.

[12] Thus, Royal Trust agrees with Dr. Sherman, who, in the separate action, has taken the position that the Option Agreement lapsed when he resold the family business and that the Option Agreement does not attach to Apotex, which is his independent generic drug business. Similarly, Royal Trust agrees with Dr. Sherman that no payments were due and payable under the Royalty Agreement because pursuant to its terms, no royalties had ever been earned.

[13] In submitting that there are no issues to be tried, Royal Trust relies on the fact that the administration of the Winter Estates passed the scrutiny of the court, because on two occasions, the court approved Royal Trust's accounts on a passing of those accounts.

[14] The Plaintiffs resist the motion for summary judgment. They submit that there are genuine issues that require a trial and that it would be unjust and unfair to summarily dismiss their claims, especially because Royal Trust clearly breached its fiduciary duty of disclosure, and, thereby, it damaged the Plaintiffs' ability to prove the claims against Dr. Sherman, which claims concern events that occurred almost 50 years ago. In these circumstances, the Plaintiffs assert that a trial is necessary for the court to have a full appreciation of their claims. The Plaintiffs say a trial is necessary to find out the truth and to obtain more information. They submit that justice cannot be done without a trial judge hearing and seeing the testimony of Dr. Sherman. And the Plaintiffs assert that a trial is necessary because a summary judgment might adversely influence the outcome of their unconsolidated separate action against Dr. Sherman.

[15] In my opinion, which I will detail below, with the exception of the issue of whether there are royalties owing under a Royalty Agreement, this is a case that can be and should be decided by summary motion. The major claims concern the Option Agreement and the critical matter for these claims is an issue of interpretation for which a trial is not required. A trial is also not necessary to conclude that Royal Trust was not negligent and that it did not breach its fiduciary duties in negotiating or documenting the Option Agreement, in not enforcing the Option Agreement, or in failing to obtain a better Option Agreement.

[16] Notwithstanding the Plaintiffs' arguments, my conclusion is that the Option Agreement is not ambiguous. I conclude that in accordance with its plain meaning, the Option Agreement lapsed in 1972 and it does not apply to an interest in Apotex. There was no negligence or breach of fiduciary duty in Royal Trusts' not disclosing a spent non-applicable agreement, and there was no negligence or breach of fiduciary duty with respect to the sale of the Winter Estates' assets including the drug business.

[17] I conclude, however, that a trial is necessary to determine whether Royal Trust breached its duties by not disclosing the Royalty Agreement and, if so, whether and to what extent, if at all, payments were due under the Royal Agreement. Reserving the parties' right to bring another

motion for summary judgment after examinations for discovery, I, therefore, direct a trial only of the claims with respect to the Royalty Agreement.

[18] I conclude that are no genuine issues for trial with respect to the balance of the Plaintiffs' claims. Thus, save for the issues associated with the Royalty Agreement, I conclude there are no issues requiring a trial. In the circumstances of this case, I see no sufficient reason to defer deciding Royal Trust's motion for summary judgment because of the Plaintiffs unconsolidated action against Dr. Sherman. Thus, for the reasons that follow, except for the Royalty Agreement claims, the Plaintiffs' action against Royal Trust should be dismissed and Royal Trust's motion for summary judgment should be granted.

B. METHODOLOGY

1. Organization of the Reasons for Decision

[19] To explain my reasons for decision, I shall organize this judgment under the following headings:

- Introduction and Overview
- Methodology
    - Organization of the Reasons for Decision
    - The Significance of the Passing of the Accounts
- Procedural and Evidentiary Background
- The Court's Jurisdiction to Grant Summary Judgment
- Analysis
    - Introduction
    - Royal Trust's Liability for the Asset Purchase Agreement
    - The Issues Associated with the Lapsing of the Option Agreement
    - The Royalty Agreement Issues
    - The Other Drugs Issue
    - The Diazapam Issue
    - The Issues Associated with the Administration of the Estate
        - The Diamond Pendant
        - Professional Printing Services Limited
        - Capital Investment in Puerto Rico
        - Alleged Bank Deposits in Puerto Rico
        - Frank Lively
- Conclusion

[20] After this section about methodology, in the next section, "Procedural and Evidentiary Background," I describe how it came about that that the claims against Royal Trust and the claims against Dr. Sherman in the related action came to be discovered, and I shall describe the procedural history of the case at bar.

[21] In the procedural background portion of these Reasons for Decision, I will describe the evidentiary record for this motion for summary judgment action and also some of the history of Royal Trust's disclosure of documents, which, has been a contentious matter and a factor in

determining whether the case at bar is appropriate for a summary judgment under Rule 20 or the *Rules of Civil Procedure*.

[22] Immediately, following the section describing the procedural and evidentiary background to this motion for summary judgment, I shall address the matter of this court's jurisdiction on a motion for summary judgment and the Plaintiffs' arguments that this case is inappropriate for a summary judgment and their argument that it is in the interests of justice that there be a trial.

[23] In this section about the court's jurisdiction, I will discuss their arguments that they are entitled to their day in court and nothing less than a trial will do and their argument that this court should not grant summary judgment because of the influence of a judgment in this case on the pending unconsolidated action against Dr. Sherman. I shall conclude that this is an appropriate case to grant a summary judgment. Indeed, I shall conclude that with respect to the interpretation of the Option Agreement, this would have been an appropriate case for a summary judgment under the more restrictive summary judgment regime that existed before the introduction of the amendments to Rule 20 in 2010. I shall also discuss the significance, if any, of the separate action against Dr. Sherman as a factor in this motion for summary judgment by Royal Trust.

[24] The Analysis portion of the judgment is next. In this section, I shall combine a discussion of the factual background with an analysis of the parties' arguments and any relevant case law to determine whether there are or whether there are not genuine issues requiring a trial. In that section of this judgment, I will bring together in one section what are often three separate parts of Reasons for Decision; that is, the facts, the position of the parties, and the analysis. Thus, in a narrative and more or less chronological fashion, the Analysis section of this judgment will: (a) set out the facts that are not contested or that are not contestable; (b) identify the issues of controversy; (c) discuss any relevant case law, and (d) explain why there are no genuine issues requiring a trial, save for the issues associated with the Royalty Agreement.

[25] I conclude by granting the motion for summary judgment save for the issues associated with the Royalty Agreement reserving the rights of the parties to bring a motion for summary judgment after the completion of examinations for discovery.

2. The Significance of the Passing of the Accounts

[26] Before getting underway with the balance of this judgment, I note one matter that I will not analyze and that is not a factor in determining whether there are genuine issues requiring a trial.

[27] As noted above, in moving for a summary judgment, Royal Trust relies on the fact that on two occasions there was a passing of the accounts of the Winter Estates. I shall note the passing of the accounts in the factual narrative, but for the following reasons, I give the passing of accounts no legal significance as possible bars to the Plaintiffs' claims in this action. In other words, for the following reasons, the fact that the accounts were approved by the Court will not assist Royal Trust in its motion for summary judgment.

[28] Turning to the reasons, as noted above, Royal Trust administered the Winter Estates from 1966 until 1994. The sale of the Winter Estates' generic drug business and the creation of the Option Agreement and the Royalty Agreement occurred in 1967.

[29] In 1973, Royal Trust submitted the Winter Estates' accounts for passing by the Court. The Plaintiffs were represented by the Official Guardian, and their adoptive father, Dr. Martin Barkin, was aware of the passing of accounts. The Official Guardian was advised about the valuations with respect to the sale of the drug business; however, the Official Guardian and the Court was not told about the Option Agreement or the Royalty Agreement.

[30] In 1993, Royal Trust submitted the Winter Estates accounts for a final passing by the Court. Once again the Official Guardian was not advised about the Option Agreement or the Royalty Agreement.

[31] Unfortunately, on this second passing of the accounts, the Plaintiffs were represented by Howard Carr of Goodman and Carr LLP. This was unfortunate because Mr. Carr's retainer had been arranged and paid for by Dr. Sherman, and Mr. Carr had acted for Dr. Sherman with respect to the purchase and the resale of what had been the Winter Estates' generic drug business. Later, after the passing of the accounts, when the Plaintiffs discovered the Option Agreement and the Royalty Agreement, they were quite understandably upset that Mr. Carr and Goodman and Carr LLP did not make known what, undoubtedly, was an inappropriate conflict-of-interest-tainted retainer.

[32] In any event, once again, the matter of the Option Agreement and the Royalty Agreement were not disclosed to the court, and, once again, the court approved Royal Trust's statement of accounts.

[33] In these circumstances, I give no legal significance to the fact that the court approved the Winter Estates accounts on two occasions.

[34] Thus, the court's passing of the accounts does not assist Royal Trust in its motion for summary judgment nor does the court's passing of accounts harm the motion. As I will explain below, to the extent that Royal Trust's motion is successful, its success is independent of what was disclosed or not disclosed on the passing of accounts and the defence succeeds notwithstanding that the Option Agreement and the Royalty Agreement were not disclosed to the Official Guardian.

C. PROCEDURAL AND EVIDENTIARY BACKGROUND

[35] I shall now describe the procedural and evidentiary background to this motion for summary judgment.

[36] Mr. and Mrs. Winter died in November 1965. Approximately four months later, in March 1966, Royal Trust was appointed executor and trustee of the Winter Estates.

[37] There are no current employees of Royal Trust that were involved in the administration of the Estates. For the purposes of this motion for summary judgment, Royal Trust relied primarily on its records and files and on the evidence of Michael van der Kooy, who swore two affidavits and who was cross-examined. Mr. van der Kooy is the Regional Vice-President for the Ontario and Atlantic Region, and he only became involved with the Winter Estates after the Plaintiffs commenced their action against Royal Trust.

[38] Royal Trust also relied on the affidavit evidence of Dr. Sherman, who was cross-examined on his affidavits.

[39] In resisting the motion, the Plaintiffs relied on affidavits from Jeffrey Barkin and Kerry Winter, who were cross-examined.

[40] The Plaintiffs also summonsed and conducted examinations of eight witnesses, namely: (1) Richard Ulster, brother to Joel Ulster and former counsel to Dr. Sherman and others in the sales of shares in Sherman and Ulster Limited to ICN; (2) Sandra Florence, sister of Dr. Sherman; (3) Joseph Casse, counsel at Goodman & Carr LLP, who acted for Dr. Sherman on the purchase of the assets of the Winter Companies; (4) Sol Layton, external accountant for the Winter Companies before and after the death of Louis and Beverley Winter, who served on the Management Committee and as co-trustee of a Family Trust; (5) Clayton Hudson, counsel for Royal Trust on the 1973 Passing of Accounts; (6) Debra Stephens, of the Office of the Children's Lawyer, formerly known as the Official Guardian, which represented the Plaintiffs on the 1973 Passing of Accounts; (7) Michael Fitzpatrick, counsel for Royal Trust on the 1993 Passing of Accounts; and, (8) Howard Carr, of Goodman and Carr LLP, who served as counsel for the Plaintiffs on the 1993 Passing of Accounts.

[41] Each of these eight witnesses indicated that he or she generally no longer had a clear recollection of the Winter Estates administration or was never directly involved in that administration. All of the witnesses required reference to documents to refresh their memories or to inform themselves.

[42] With the exception of Dr. Sherman's evidence, both Royal Trust's and the Plaintiffs' knowledge of events is gleaned from old documents.

[43] As I will detail below, in administering the Winter Estates, Royal Trust sold the Estates' assets, including a generic drug business. The generic drug business was sold to Sherman Ulster Limited. Royal Trust invested the amounts realized from the sale of the Winter Estates assets in securities. All inter-corporate debts, where possible, were paid or written off, and the Winter Companies were subsequently wound up between 1971 and 1984.

[44] With the Winter children coming of age, Royal Trust completed its administration of the Winter Estates in 1994.

[45] In 1999, while in university, Jeffrey Barkin became curious to learn more about his late father's corporate activities, and he asked Royal Trust for information. Unsatisfied with the answers, he retained Robert Price, Q.C., and Mr. Price found a *Bulk Sales Act* court file about a sale to Sherman and Ulster Limited, and he asked Royal Trust for access to its files. This request was refused, and Royal Trust refused to answer any questions about the sale or Royal Trust's administration of the Estates' corporate assets.

[46] In 2001, Mr. Barkin commenced an application against Royal Trust to compel it to produce the records. For this application, James Church, who had been a sales manager with the late Mr. Winter and at Sherman and Ulster Limited, swore an affidavit, but it was not served or delivered. I will discuss Mr. Church's affidavit further below, but here simply note that the Plaintiffs rely on information from Mr. Church in resisting the motion for summary judgment with respect to the Royalty Agreement.

[47] On February 20th, 2002, Justice Pitt ordered Royal Trust to disclose its records to Mr. Barkin. See *Barkin v. Royal Trust*, [2002] O.J. No. 661 (S.C.J.).

[48] Subsequently, in 2002, Mr. Barkin attended at the Royal Trust offices to review records, and he made photocopies of documents. The Plaintiffs state that it was only then that they discovered the full extent of the misconduct of Royal Trust in administering the Estates.

[49] The Plaintiffs commenced this action in March 2006. Around this time they also commenced a separate action against Dr. Sherman and Apotex.

[50] On June 30, 2006, the Defendants delivered their Statement of Defence.

[51] After the Plaintiffs commenced the action against Royal Trust, it reviewed its files and conducted extensive lateral searching. While doing so, it located additional records, and in October 2006, Royal Trust produced those records to the plaintiffs, on DVD.

[52] Royal Trust has now produced all records of the administration of the Winter Estates in its possession, regardless of their relevance to this action. Royal Trust says that any documents that were destroyed were destroyed in compliance with Royal Trust's document retention policies, in the regular course of business. Royal Trust did not claim privilege over any document created before the commencement of litigation, except for solicitor-and-client correspondence and privileged documents relating to and created in the course of the application commenced by Jeffrey Barkin in 2001.

[53] Royal Trust acknowledges that the Plaintiffs have made various accusations concerning a lack of access to records regarding the Winter Estates but says that the Plaintiffs now have a DVD with copies of every document that Royal Trust has in its possession regarding the Winter Companies and the Winter Estates. Moreover, the Plaintiffs received a letter of direction from Royal Trust in 2001 that gave them access to all of David Ward's files. The Plaintiffs also reviewed all of Martin O'Brien's available files before commencing this action, and in this proceeding, through summonses to witnesses, have received the documents of those summonsed.

[54] On February 26, 2008, the Plaintiffs delivered a Fresh as Amended Statement of Claim.

[55] On March 7, 2008, the Defendants delivered an Amended Statement of Defence.

[56] In February 2009, the Defendants launched their motion for a summary judgment.

[57] The parties exchanged affidavits for the motion, and they completed cross-examinations and the examinations of eight witnesses summonsed by the Plaintiffs by the early autumn of 2010.

[58] In late January 2011, the Royal Trust provided answers to its undertakings.

[59] On September 6, 2011, Master Hawkins ordered that Dr. Sherman answer three questions he had refused to answer on his cross-examination.

[60] On June 12, 2012, Justice C.J. Brown varied the order of Master Hawkins, and on October 18, 2012, Justice Lederer dismissed a motion for leave to appeal to the Divisional Court.

[61] Because of scheduling difficulties, it took another year before Royal Trust's summary judgment motion was argued.

D. THE COURT'S JURISDICTION TO GRANT SUMMARY JUDGMENT

[62] Under rule 20.04(2)(a), on a motion for summary judgment, the court must decide whether the moving party has established that there is "no genuine issue requiring a trial with respect to a claim or defence." Before the summary judgment rule was amended in 2010, the test for summary judgment was described by the Court of Appeal in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), and the Court noted that the essential purpose of the summary judgment rule was to terminate claims and defences that are factually unsupported.

[63] To undertake this exercise of determining whether a claim or defence is factually tenable, the court gives a good hard look at the evidentiary record then before it, and if it determines that the facts do not entitle the plaintiff to some remedy or do not establish any defence, then the court should grant summary judgment: *Aronowicz v. Emtwo Properties Inc.*, [2010] O.J. No. 475 at paras. 17-18 (C.A.); *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 at p. 238 (Gen. Div.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 10; *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.).

[64] On a motion for a summary judgment, the court is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties respectively will present at trial: *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra; Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R (3d) 481 (C.A.). The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing: *Pizza Pizza Ltd. v. Gillespie*, *supra*; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), affd [1997] O.J. No. 3754 (C.A.).

[65] In *1061590 Ontario Ltd. v. Ontario Jockey Club*, (1995), 21 O.R. (3d) 547 at para. 35 (C.A.), Justice Osborne stated: "a respondent on a motion for summary judgment must lead trump or risk losing." The parties are expected to provide a complete evidentiary record for their cases, and if a fuller factual record is not necessary to determine the legal issue, the court should proceed to decide it on the motion for summary judgment and save the parties the expense of an unnecessary trial: *Dean v. Mister Transmission (International) Ltd.* (2009), 98 O.R. (3d) 604 at paras. 55-61 (S.C.J.).

[66] The 2010 amendments to Rule 20 removed restrictions on the ability of the motion judge to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence. The amended rule permits the motion judge to decide the action where he or she is satisfied that by exercising the powers to weigh the evidence, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution. The amendments were a legislative reversal of the case law that had held that a judge could not assess credibility, weigh evidence, or find facts on a motion for summary judgment, and the amendments permit a more meaningful analytical review of the paper record: *Hino Motors Canada Ltd. v. Kell*, [2010] O.J. No. 1105 (S.C.J.); *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037.

[67] The new approach to summary judgment was not designed to eliminate trials but rather to determine when trials are unnecessary and when the summary judgment process provides an appropriate means for effecting a fair and just resolution of the litigation: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.) at para. 38.

[68] In *Combined Air Mechanical Services Inc. v. Flesch, supra*, which was a joint hearing of five appeals selected to examine the scope and operation of the summary judgment rule, the Court of Appeal without attempting to be exhaustive, held that there are three types of cases that are amenable to summary judgment; namely: (1) cases where the parties agree that it is appropriate to determine an action by way of summary judgment; (2) cases where claims or defences can be shown to be without merit. (This type of case was encompassed by the predecessor version of the test for a summary judgment and is augmented by the judge's power to weigh evidence.); and (3) cases where the trial process is not required in the interest of justice.

[69] Pausing here, in my opinion, the case at bar falls into the second and the third type of case that is suitable of a summary judgment.

[70] To measure when the trial process is not required, in *Combined Air Mechanical Services Inc. v. Flesch, supra* at paragraphs 46-55 of its judgment, the Court of Appeal examined the special forensic resources of the trial process that in a given case are required to arrive at a fair and just resolution of a dispute. The Court recognized that a trial judge's experience of extensive, comprehensive, and immediate exposure to the evidence in the presence of the lawyers who orchestrate the presentation of the competing cases enables the trial judge to have an appreciation of the issues and the evidence that is not available to a judge asked to decide a case summarily.

[71] The Court of Appeal stated that in order to determine whether to grant a summary judgment in the interests of justice, the motion judge must ask the question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[72] In considering whether a trial is necessary, the motion judge should consider whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record, the judge cannot be satisfied that the issues are appropriately resolved on a motion for summary judgment.

[73] Turning to the case at bar, with an exception for the genuine issue of whether or not royalties are payable under the Royalties Agreement, in my opinion, there are no genuine issues requiring a trial and a full appreciation of the evidence and issues is possible on this summary judgment motion. As the discussion below will reveal, the factual underpinning for the various claims about the Option Agreement has been established by uncontestable or uncontested facts that are revealed by the documentary record. What was done or not done in association with the sale of the Winter Estates' assets was documented and is readily apparent from the paper record. The contractual nexus or factual circumstances for interpretation of the Option Agreement is readily apparent and is uncontested or uncontestable.

[74] The critical issue associated with the Option Agreement is a matter of contract interpretation, and unless the Option Agreement is ambiguous, which it is not, the parol evidence rule would prohibit questioning witnesses about what their subjective intention was in signing the agreement. On the examinations for the summary judgment motion, notwithstanding the parol evidence rule, Dr. Sherman, the only witness who could give evidence about the parties' subjective intentions was cross-examined about what he intended. His evidence was not

favourable for the Plaintiffs, and there is nothing to be gained by having a reprise of this evidence or having a repeat cross-examination at trial. The conclusions below about the proper interpretation of the Option Agreement do not depend upon the evidence of Dr. Sherman and can be confidently reached without the forensic machinery of a trial.

[75] Similarly, the issues associated with Royal Trust's alleged negligence and alleged breach of fiduciary duty with respect to the Option Agreement are largely a matter of argument based on uncontested or uncontestable facts for which there is a documentary record. In other words, as will become clearer in the discussion below, where I examine the evidence and interpret the contracts, it is my opinion that the full appreciation test is satisfied in the case at bar for the Option Agreement and for the miscellaneous claims advanced by the Plaintiffs. Further, it is also my opinion that a summary judgment would have been appropriate under the former version of Rule 20.

[76] From the perspective of the availability of a summary judgment, the situation, however, is different for the claims relating to the Royalty Agreement. As will be seen, the main material fact in dispute is whether four particular drugs were manufactured by Sherman and Ulster Limited using a chemical as opposed to a mechanical process. Here, the documentary and testimonial evidence supporting Royal Trust's defence is weak, and the defence evidence is only, in a relative sense, stronger than the Plaintiffs' very weak evidence that royalties were payable.

[77] Unlike the circumstances of the Option Agreement, there is a reliability issue and Royal Trust's defence does depend upon Dr. Sherman's evidence being believed. Moreover, as I will explain below, even if for the purposes of the summary judgment motion, I accepted Dr. Sherman's evidence about the Royalty Agreement as true, I could not rely on his evidence for the totality of the time in which the Royalties Agreement might have been operative. Moreover, there is an argument that it is not in the interests of justice to decide the Royalty Agreement issue summarily at this juncture reserving the right of either party to bring another motion after examinations for discovery have been completed.

[78] I reach the above conclusions without giving any weight to the Plaintiffs' arguments that they are entitled to their day in court and nothing less than a trial will do and their argument that this court should not grant summary judgment because of the influence of a judgment in this case on the pending unconsolidated action against Dr. Sherman and Apotex.

[79] No litigant is entitled to a trial. A litigant is entitled to access to justice and a fair procedure, which may or may not require a trial. The test for a summary judgment, both before and after the 2010 amendments, modulates when in an adversarial system of administering justice, procedural fairness and substantive justice requires a trial. The motion procedure for a summary judgment provides a litigant with natural justice and with his or her day in court and Rule 20 is designed to identify claims and defences that do not require a trial, which is not a privilege or entitlement but a procedural mechanism that is used to determine the merits of some but not all claims and defences in an adversarial dispute resolution system.

[80] Under the *Rules of Civil Procedure*, on a motion for a summary judgment, the court expects a party resisting the motion to present evidence of its best case. It is no defence to a motion for summary judgment for the responding party to request a trial because of the possibility or prospect that the inquisition of a trial will disclose a better case or a new one. In the case at bar, a trial is required for the Royalty Agreement claims because the best case advanced

by Royal Trust on this genuine issue did not prove its defence. In the case at bar, a trial is not required to show that Royal Trust has proved its defence to the balance of the Plaintiffs' claims.

[81] The fact that there is an unconsolidated companion action against Dr. Sherman and Apotex does not change the procedural calculus for Royal Trust's motion for summary judgment. Had the actions been consolidated, as a co-defendant, Royal Trust would still have brought its motion for summary judgment, and Dr. Sherman and Apotex could have stood on the sidelines or brought their own motion for summary judgment. Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 states that "as far as possible, multiplicity of proceedings shall be avoided" but sometimes multiple proceedings are unavoidable and the influence of one proceeding on another is a regular occurrence that is regulated by the law of *res judicata,* issue estoppel, and abuse of process.

[82] The Plaintiffs choose to sue Royal Trust and Dr. Sherman and Apotex in separate proceedings, but Royal Trust would always have had the choice of bringing a motion for summary judgment and, in my opinion, the fact that Dr. Sherman and Apotex are on the sidelines and may possibly benefit from the outcome is not a reason to deny Royal Trust and the Plaintiffs their day in court for the case at bar.

E. ANALYSIS

1. Introduction

[83] As noted above, in order to address the competing arguments about whether there are genuine issues requiring a trial, I shall combine the normal factual background and analysis portions of a judgment. In the following parts of this judgment, I shall set out the facts chronologically under headings that identify the Plaintiffs' various claims that might give rise to issues requiring a trial, and I shall intersperse the factual narrative with the parties' arguments and my own analysis and conclusions with respect to those arguments.

2. Royal Trust's Liability for the Asset Purchase Agreement, the Option Agreement, and the Royalty Agreement

[84] Before his unexpected death at age 43 by heart attack, Louis Lloyd Winter was a successful entrepreneur and a Canadian pioneer in the generic drug business. He founded and operated Winter Laboratories, Winrock Chemical Limited, Anchor Serum Company of Canada Limited, and Empire Laboratories The primary business, Empire Laboratories, was a generic pharmaceutical company. It was owned by Mr. Winter and by Anchor Serum Company, which was owned by Mrs. Winter. At the time of his death, Mr. Winter operated the largest privately-controlled group of generic drug companies in Canada.

[85] Mr. Winter was married to Beverley Anne Winter. They had four children: Paul, born December 1958; Jeffrey, born May 1960; Kerry, born June 1961; and Dana, born June 1962.

[86] The Winters established trusts for their children. The trustees of the Family Trusts were: (1) Sol Layton, who was a friend and the external accountant for the Winter Companies, (2) David Ward, the founding partner of the law firm Davies, Ward & Beck, and (3) Martin O'Brien,

a senior tax lawyer who was with McDonald and Zimmerman, and later the law firm of Shibley, Righton & McCutcheon.

[87] Dr. Bernard Sherman was Mr. Winter's nephew, and they had a close relationship. Dr. Sherman's own father had passed away when he was very young, and Mr. Winter cared for his nephew. Beginning when he was a teenager, Dr. Sherman was given part-time work at the Winter Companies. Mr. Winter treated Dr. Sherman like a son.

[88] It seems, however, that Mrs. Winter distrusted Dr. Sherman and also had little trust for her other in-laws. In a codicil to her will, Mrs. Winter expressed the wish that none of the brothers or sisters of her late husband or any child of any such brother or sister should be authorized to act as the guardian or adoptive parent for the Winter children.

[89] On November 5, 1965, Mr. Winter died suddenly from a heart attack, and two weeks later, on November 22, 1965, Ms. Winter died from leukemia. At that time, their four children were between the ages of three and six years old. They were now orphans, but they were soon adopted in March 1966 by Dr. Martin Barkin and Carol Barkin, who were not blood relatives. The Winters Estates made monthly support payments to the Barkins and the children were the beneficiaries of what in the 1960s was a substantial estate left to them by their deceased natural parents.

[90] Royal Trust was appointed as the executor and trustee of the Winter Estates in March 1966, and it acted in that role until October 17, 1994. The Plaintiffs were the beneficiary of the Winter Estates, and Royal Trust was charged with administering the Estates until the Plaintiffs reached the age of thirty.

[91] By virtue of its executorship, Royal Trust became the trustee of the assets of the Winter Estates, and it assumed responsibility for managing its businesses. Royal Trust did not immediately sell the family businesses. Rather, Royal Trust created a Management Committee, which was comprised of: (1) Dr. George Wright, President of the Winter Companies and a scientist and friend of Louis Winter; (2) C.B. Clarkson, an accountant and acting Secretary/Treasurer of the Winter Companies; (3) Mr. Layton, who, as noted above, was also a trustee of a Family Trust; (4) Douglas Raymond, a Senior Trust Officer with Royal Trust; (5) Frank Lively, a Royal Trust junior employee; and (6) Martin O'Brien, legal counsel, who, as noted above, was also a trustee of a Family Trust.

[92] More will be said below about Mr. Lively, who after he left Royal Trust was convicted of crimes unconnected to his time at Royal Trust. I simply note here that Mr. Lively was a junior trust officer supervised by a senior officer and there is no evidence that he committed any wrongdoing while employed by Royal Trust.

[93] The Management Committee held regular formal meetings to oversee the management of the Winter Companies and the eventual sale of the Winter Estates' assets. The Committee had formal agendas and kept minutes of its meetings. Royal Trust and the Management Committee also consulted regularly with David Ward, a trustee of a Family Trust. It may thus be noted that all the trustees of the Family Trusts were aware of the decisions of the Management Committee.

[94] In late 1966 and early 1967, Royal Trust began looking for buyers for the Winter Estates' businesses. Royal Trust placed advertisements in publications such as the *Financial Post*. In response to the advertisements and other communications, Royal Trust received 90 inquiries, and

over 30 expressions of interest. In March 1967, Royal Trust sent letters to all persons that had expressed an interest and several of them examined the business records and visited the premises of the Winter businesses.

[95] Royal Trust received two formal offers. One was from Dr. Sherman, Joel Ulster, and Benjamin Ulster. Joel Ulster was a close friend of Dr. Sherman, and Joel's father, Benjamin Ulster, was a wealthy man, who agreed to finance the transaction. In making his bid for his late uncle's business, Dr. Sherman saw the potential of the generic drug business, and he was eager to acquire his uncle's business. Indeed, two years' earlier, he had expressed his interest in acquiring the drug business within days of his uncle's death.

[96] The Sherman and Ulster offer provided that in addition to signing the Asset Purchase Agreement two further agreements would be executed: (1) an employment and share option agreement, i.e., the Option Agreement; and (2) a Royalty Agreement. All of these agreements were eventually accepted and signed by the parties.

[97] The other offer to purchase the Winter Estates' drug business was from Fireco Sales Limited. It included a Royalty Agreement but no Option Agreement.

[98] Royal Trust accepted the Sherman and Ulster offer on behalf of the Winter Estates.

[99] On October 23, 1967, the Sherman and Ulster Group assigned their interests under the Asset Purchase Agreement to a newly incorporated company, Sherman and Ulster Limited, in which the Sherman and Ulster Group collectively held about 88% of the shares. On October 23, 1967, the Asset Purchase Agreement was completed, and the Option Agreement and Royalty Agreement were signed by Sherman and Ulster Limited on the closing of the sale.

[100] I will return to some of these points below, but the Sherman and Ulster offer had a financial value of approximately $450,000, which was within the range of appraised or estimated values for the business and about $100,000 above the Fireco Sales Limited offer. Both offers included Royalty Agreements, but the Sherman and Ulster offer was for a longer royalty period and the agreement covered four drugs and not just one as had been offered by Fireco. As noted above, the Fireco Sales Limited offer did not include any Option Agreement or Employment Contract for the Winter children.

[101] It is not disputed that the Official Guardian was not informed about the negotiation of the Option Agreement in which the Winter children were third party beneficiaries, and later the Official Guardian was not told about the lapsing of the Option Agreement. However, the Official Guardian received a copy of the valuation of the businesses at the time of sale and a copy of the statement of adjustments for the sale.

[102] In the Asset Purchase Agreement and in the Option Agreement, the "Purchased Business" was defined as follows:

> "Purchased Business" means the business presently and heretofore carried on by the Vendors [the Winter Companies] in Canada consisting mainly of the manufacturing, selling and dealing in drugs and drug products, laboratory, testing and related activities

[103] There is a serious issue between the parties about the meaning of the "Purchased Business" in the agreements. I will discuss this dispute below, but I foreshadow to say that the

interpretative dispute can be resolved on a motion for summary judgment and there is no genuine dispute requiring a trial about the interpretation of the Option Agreement.

[104] For present purposes, the pertinent provisions of the Asset Purchase Agreement are set out below:

> WHEREAS the Vendors are presently engaged in the business, among other things, of manufacturing and selling drugs and drug products;
>
> AND WHEREAS the Purchasers are desirous of purchasing the said business of the Vendors as well as certain lands, premises, equipment and supplies used in connection therewith and the goodwill, customers' lists and accounts receivable, all as more particularly hereinafter set out;
>
> *2.00 – Agreements to Purchase*
>
> Subject to the terms and conditions thereof, the Vendors agree to sell, assign and transfer to the Purchasers, and the Purchasers agree to purchase from the Vendors as of the Effective Date, all the undertaking, property and assets of the Purchased Business as a going concern, of every kind and description and whatsoever situated (except as hereinafter in this paragraph referred to), including without limiting the generality of the foregoing: ....
>
> *6.00 - Closing Arrangements*
>
> 6.06 On or before closing the Purchasers shall deliver to the Vendors: ...
>
> (ii) A duly executed agreement granting the options described in paragraph 14.00 hereof;
>
> *14.00 - Options*
>
> The Purchasers shall deliver to the Vendors on the Closing Date an agreement to give to each of the children of the late Louis Winter, whether subsequently adopted or not, an opportunity, if they shall so respectively desire, to become responsible full-time employees of the Purchased Business when they attain the age of twenty-one (21) years or when they have completed their formal education, including university or higher education and that, any such child who so becomes an employee of the Purchased Business shall have the right after two (2) years of employment with the Purchased Business to purchase five per cent (5%) of the issued shares or such greater amount as the Purchasers and such child shall agree upon, in the capital of the Company or Companies owning the Purchased Business for a consideration equal to one hundred and twenty per cent (120%) of book value thereof. Any such child shall be given ample opportunity to, and shall be encouraged to, advance to a responsible management position in the business. If any such child shall be so employed, he shall not be discharged without lawful excuse. Such options shall be conditional upon:
>
> > (a) Any one or more of Bernard C. B. Sherman, Joel D. Ulster and Benjamin P. Ulster or any persons, firms or corporations which any one or more of them controls having control of the Company or companies which own the Purchased Business.
> >
> > (b) The Company or Companies which own the Purchased Business being private companies.
> >
> > (c) Such child advancing to the Company or Companies which own the Purchased Business such amount, by way of shareholder's loan, that is the pro rata share of the amounts loaned to the Company or Companies by their outstanding shareholders at such time.

(d) Such child entering into and agreeing to be bound by the terms of any shareholders' agreements which may be outstanding with respect to any such Company or Companies.

15.00 - Assignment

The parties hereto hereby acknowledge and agree that the Purchasers shall be entitled to assign this agreement and all their rights and obligations therein to a Company and upon such assignment, and the assumption by the Company of the Purchasers= liabilities hereunder, then all liabilities of any nature whatsoever arising under this agreement shall cease as against the Purchasers, except as to the obligations to pay trade creditors assumed by the Purchasers in accordance with paragraph 5.03 hereof.

16.00 - Royalties

Notwithstanding anything hereinbefore contained, it is agreed and understood that this offer is conditional upon the parties executing a Royalty Agreement with respect to the processes for the manufacture of the following chemicals, otherwise this Agreement to be null and void and the Purchasers entitled to the return of all monies paid to the Vendors, without interest or deduction. The Royalty Agreement shall provide for payment to the Vendors by the Purchasers of royalties of one and one-half per cent (1-1/2%) on "Sales," (hereinafter defined), exceeding Twenty-Five Thousand Dollars ($25,000.00) per annum for a period of fifteen (15) years from the date of closing. The chemicals referred to in this paragraph are briefly described as follows: Tolbutamide, Probenecid, Acetylsulphisozazole, Saccharin.

Sales shall be:

(a) with respect to sales to third parties in bulk, the sale price of such chemicals, and

(b) with respect to intra company sales, the market price of such chemicals.

22.00 - Successors and Assigns

This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

[105] Under the Option Agreement, which corresponds with the terms of the Sherman and Ulster Limited Asset Purchase Agreement, the Winter children were provided with: (1) a right to be employed by the Purchased Business; and (2) the right after two years of employment to purchase 5% of the issued shares in the capital of the company and/or companies for 120% of the book value of those shares. The terms of the Option Agreement are set out below.

Memorandum of Agreement made as of the 23 day of October 1967

Between:

WINTER LABORATORIES LIMITED, WINROCK CHEMICAL LIMITED, ANCHOR SERU, COMPANY OF CANADA LIMITED and EMPIRE LABORATORIES LIMITED, all companies incorporated under the laws of the Province of Ontario (hereinafter referred to as the "Vendors") OF THE FIRST PART

- and –

SHERMAN AND ULSTER LIMITED, a company incorporated under the laws of the Province of Ontario (hereinafter referred to as the "Purchaser) OF THE SECOND PART

1. The Purchaser hereby covenants and agrees to give to each of the children of the late Louis Winter, of the Municipality of Metropolitan Toronto, in the County of York, whether such children may be subsequently adopted or not, an opportunity if such children shall so respectively desire, to become responsible full-time employees of the Purchased Business (as that term is defined in the Purchase Agreement) when they attain the age of twenty-one (21) years or when they have completed their formal education, including university or higher education.

2. The Purchaser does further covenant and agree that, with respect to any such child who may so become an employee of the Purchased Business, the Purchaser shall give to any such child an option to purchase, upon the completion of two (2) years of employment with the Purchased Business, five per cent (5%) of the issued shares, or such greater amount as the Purchaser and such child shall agree upon, in the capital of the Company or Companies owning the Purchased Business for a consideration equal to One Hundred and Twenty per cent (120%) of the book value thereof.

3. The Purchaser does further covenant and agree to give to any such child ample opportunity to, and the Purchaser shall encourage such child to, advance to a responsible management position in the business. The Purchaser does further covenant and agree that no such child shall be discharged without lawful excuse.

4. All of the covenants given by the Purchaser in this [Option] Agreement shall be conditional upon

> (a) any one or more of Bernard C. Sherman, Joel D. Ulster and Benjamin P. Ulster or any persons, firms or corporations which any one or more of them controls, having control of the Company or Companies which own the Purchased Business;
>
> (b) The Company or Companies which own the Purchased Business being private companies.
>
> (c) Such child advancing to the Company or Companies which own the Purchased Business such amount, by way of shareholder's loan, that is the pro rata share of the amounts loaned to the Company or Companies by their outstanding shareholders at such time.
>
> (d) Such child entering into and agreeing to be bound by the terms of any shareholders' agreements which may be outstanding with respect to any such Company or Companies.

5. For the purpose of greater particularity, it is expressly understood and agreed between the parties hereto that in the event that any one of the conditions contained in paragraph 4 hereof should not be fulfilled upon the dates upon which the Purchaser is to perform the obligations set forth in paragraphs 1, 2, and 3 hereof, then this Agreement and all of the said obligations of the Purchaser shall be null and void.

6. This Agreement shall be binding upon and shall enure to the benefit of the parties hereto, their successors and assigns.

[106] As may be noted, for the option to be available at the time that each Plaintiff reached 21 years of age, among other conditions, any or all of Dr. Sherman and the Ulsters would still have to control the company or companies that owned the Purchased Business. As already noted above, a major issue between the parties is that on the one hand, the Plaintiffs' interpret "Purchased Business" to be any generic drug business owned by Dr. Sherman, and, on the other hand, Royal Trust (and Dr. Sherman) interpret Purchased Business to refer only to Sherman and

Ulster Limited, the business subsequently owned by ICN Pharmaceuticals, Inc. and not Dr. Sherman or the Ulsters.

[107] A second major issue between the parties is that if the Option Agreement is interpreted as Royal Trust (and Dr. Sherman) would have it interpreted, then the Plaintiffs submit that they were "entitled," their word, to something less contingent. I will return to these issues below.

[108] Returning to the narrative, as noted above, the Management Committee and Royal Trust reviewed both offers, and it selected the offer from the Sherman and Ulster Group. In making their decision about what offer, if any, to accept, Royal Trust had obtained valuations of the business. Royal Trust had retained Grier Dyer, chartered accountants, to conduct a valuation of the shares of the Winter Companies and to review the Sherman and Ulster Group offer. On July 21, 1967 Grier, Dyer recommended that the Sherman and Ulster Group offer be accepted.

[109] Royal Trust also retained Elder, Donaldson & Crofts to provide a formal opinion and valuation. George Ovens, the valuator, provided a range of values, and given risks and delays suggested "that careful consideration be given to any offers received". The Sherman and Ulster Group's offer fell within the range of values that Mr. Ovens provided. Mr. Ovens regarded as a "plus factor," the possibility of jobs for the Winter children and their right to buy shares in due course. Mr. Ovens told the Management Committee that this might turn out to be a very good thing.

[110] Mr. O'Brien, a Family Trust trustee and a member of the Management Committee, reviewed with Mr. Ward the sale process for the Winter Estate assets, and he told Mr. Ward that "It appears that we have fully canvassed the market and our chances of selling the companies at a higher price than offered by Barry Sherman would be minimal."

[111] There is an issue between the parties about the significance of the Option Agreement to the Management Committee's decision to sell the drug business to the Sherman and Ulster Group. Royal Trust argues that the Option Agreement was irrelevant to the assessment of the competing offers because apart from the Option Agreement, the purchase price offered by the Sherman and Ulster Group exceeded that in the Fireco Sales Limited offer. Moreover, Mr. O'Brien was of the view that the option was worthless.

[112] Dr. Sherman testified that Royal Trust had asked for a better Option for the children, but he refused and never would have agreed to a more "'iron-clad' Option Agreement...". He said that he and the Ulsters rejected any provision that would inhibit the right to sell the generic drug business.

[113] There is an issue between the parties about whether Royal Trust exercised sufficient due diligence i.e., about whether it was negligent and in breach of its fiduciary duties having regard to what it knew about Dr. Sherman's character. The Plaintiffs submit that Royal Trust knew that before her death, Mrs. Winter had expressed grave concerns about Sherman, including that he "would ruin the business and steal it from her and the children". The Plaintiffs submit that Royal Trust also knew about the codicil in Mrs. Winter's will, in which she expressed a lack of trust in her in-laws. The Plaintiffs submit that the knowledge of Mrs. Winter's antipathy for her husband's family, including Dr. Sherman, should have put Royal Trust on notice that any involvement of Sherman with the business would require great scrutiny and oversight and that

Royal Trust ignored these warnings, and repeatedly failed to take the reasonable and prudent steps required of a fiduciary necessary to protect the interests of the Winter Children.

[114] The Plaintiffs, however, acknowledged during argument that Royal Trust was not obliged to obtain an employment contract or an Option Agreement granting them an interest in the business being sold, but they submitted that once such agreements were offered by Dr. Sherman, Royal Trust was under a fiduciary duty to obtain the best employment contract and option agreement available from Dr. Sherman.

[115] The Plaintiffs submit that Dr. Sherman was using the Option Agreement and his familial relationship with the beneficiaries of the Winter Estate and with their late father to entice Royal Trust into selling to him the generic drug business. Dr. Sherman would have it that he was being kind and magnanimous in offering the Option Agreement, but that there were limits to how far he would go. The Plaintiffs would have it that Dr. Sherman was being opportunistic and manipulative and taking advantage of what he knew about their family's business. Whatever the motives, the Plaintiffs submit that Royal Trust was obliged to use Dr. Sherman's eagerness for the family's business to obtain an option agreement that would bind Dr. Sherman to have a place for them in any generic drug manufacturing business.

[116] The Plaintiffs allege that there is a genuine issue for trial that Royal Trust was negligent and in breach of its fiduciary duties in its treatment of the Option Agreement. The nature of these allegedly breached duties are set out in paragraphs 25, 27-29, 120 and 122 of their factum as follows:

> 25. In those circumstances, Royal Trust owed the Winter Children trust, fiduciary and professional duties to negotiate and secure a definitive, binding and enforceable option in their favour to acquire 5% equity interest in and be employed by any generic drug business in which B. Sherman might thereafter become involved. Furthermore, since the option to be given was in favour of the Winter Children, as opposed to Royal Trust or to the Empire Companies, and as the Winter Children were then between about five and eight years of age, Royal Trust had a duty to apprise and involve the Office of the Official Guardian with respect to the negotiation and entering into of the option to ensure and protect the interests of the Winter Children.
>
> 27. Royal Trust did not notify the Official Guardian of the proposed Option Agreement or, for that matter, of the underlying option offered by B. Sherman. As a result, neither the Official Guardian nor anyone else provided independent representation and protected the individual rights and interests of the Winter Children with respect to the negotiation and entering into of the Option Agreement. For that alone, Royal Trust is accountable and liable to the Plaintiffs.
>
> 28. Neither Royal Trust nor B. Sherman disclosed the Purchase Agreement, Option Agreement and Royalty Agreement to (i) the Barkins, (ii) the Official Guardian, (iii) the Winter Children or (iv) to anyone else on behalf of the Winter Children, although the Option Agreement and Royalty Agreement were clearly intended to benefit the Winter Children.
>
> 29. The option to which each of the Winter Children were entitled was later dishonoured and no steps were ever taken to enforce the rights therein by Royal Trust, and disclosure of its existence was never made to the Winter Children or their legal representatives before the operative dates of the Option Agreement or at all.
>
> 120. Where, as here, a trustee for whatever reason arranges for certain rights for the benefit of the beneficiaries of an estate, the trustee is responsible and liable to the beneficiaries for the consequences: *Madock v. Grauer* [2010] 2010 BCSC 567 at paras. 56-58 and 60-61.

> 122. Here, all of the rights of the Winter Children pursuant to the Option Agreement (collectively referred to as the "Option Rights") and the rights of the Children to the royalties under the Royalty Agreement ("the Royalty Rights") were received as partial consideration for the sale of the business of the Empire Companies. There is no doubt that the Royalty Rights became an Estate asset. The Option Rights are in favour of the Winter Children but there can be also no doubt that Royal Trust is liable and responsible to the Winter Children on account of same because it chose (i) to negotiate and enter into contractual provisions regarding those rights and thereby interfere with the rights of the Children and, at that, (ii) without disclosing what it did to anyone on behalf of the Children.

[117] The Plaintiffs submit that Royal Trust is liable to the Winter Children for failing to notify the Official Guardian of the proposed Option Agreement on behalf of the Children to ensure their interests and rights were properly represented and protected. The Plaintiffs submit that the orphan Winter children should have had the benefit of independent representation with respect to the negotiation, entering into, oversight and enforcement of the Option Agreement but were wrongfully and negligently denied that right by Royal Trust. They submit that Royal Trust's glaring failure to do so is particularly unconscionable because of Royal Trust's further failure to disclose the Option Agreement, along with the Purchase Agreement and the Royalty Agreement, to any person acting on behalf of the Winter Children so that their rights and interests would be cared for and protected.

[118] Putting aside for the moment, the matter of interpreting the Option Agreement, which I discuss in the next section of these Reasons, I have no doubt that there is no genuine issue for trial about whether Royal Trust breached a fiduciary duty or professional duty to secure a "binding enforceable option in their favour to acquire 5% equity interest in and be employed by any generic drug business in which B. Sherman might thereafter become involved." In the case at bar, Royal Trust was not negligent nor in breach of its fiduciary duties.

[119] It is my conclusion that a trial is not necessary to conclude that Royal Trust was under no original obligation to obtain a future employment contract and ownership option for the Winter children. There never was an entitlement to an Option Agreement, and the fact that Dr. Sherman offered an Option Agreement does not elevate an offer into an entitlement that required the children to have the protection of independent advice or the involvement of the Official Guardian.

[120] *Madock v. Grauer* [2010] 2010 BCSC 567, which is referred to in the Plaintiffs' factum, offers no support for the Plaintiffs' theory of their case. In that case, the court found that the defendant Peter Grauer was holding a mineral property in his own name but that he always intended to hold the property in his capacity as an executor and in trust for the beneficiaries of his late father's estate. The mineral rights, however, were lost, when Peter failed to keep the mining claim in good standing, and he was found liable to the beneficiaries for the loss of the mineral rights. The circumstances of the *Madock* case are not even remotely comparable to the circumstances of the case at bar.

[121] A trial is also not necessary to conclude that once Dr. Sherman offered a future employment contract and ownership option, Royal Trust breached no fiduciary duty to the Winter children. Royal Trust did not reject what was a potentially useful opportunity for the children, and the documentary evidence indicates that it did try to better the Option Agreement

through negotiations. A trial is not necessary to conclude that Royal Trust attempted to have Dr. Sherman offer more but that Dr. Sherman refused to budge.

[122] A trial is not necessary to conclude that the experienced businessman and lawyers and trust officers were not gullible and that they were diligent, cautious, and responsible in their negotiations with Dr. Sherman and in the sale of the Estates. With or without awareness of Mrs. Winter's warnings of Dr. Sherman's desires to "steal the business from the children," 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 the Management Committee, conducted a responsible and reasonable effort to market the Winter Estates' business assets.

[123] The evidentiary record shows that from the outset, Dr. Sherman was only prepared to offer a limited, qualified, contingent, and conditional employment contract and option agreement. He was asked to be more expansive and generous, but he would not be moved. The Option Agreement that was signed by Sherman and Ulster Limited expresses precisely what the parties actually agreed and, to speak collegially, Royal Trust did not leave any money on the negotiating table by negligently drafting the Option Agreement or by not squeezing Dr. Sherman to ensure that his promise extended to employment and an interest in any and every generic drug business in which he might become involved in the future.

[124] There was no evidence about the standard of care that might be associated with a tort of negligent negotiation, but in any event, the evidentiary record establishes that Royal Trust exercised proper due diligence with the oversight and participation of a well-qualified and competent Management Committee that included representatives who were was also trustees for the Family trusts for the Winter children. Royal Trust prime responsibility was to sell the Estates' assets for the most value possible and thereby maximize the value of the estate for its beneficiaries, and the evidence establishes that it acted prudently.

[125] There was no reason for Royal Trust to involve the Official Guardian in the negotiations for the Option Agreement. No vested rights of the Winter children were being forfeited, disposed of, or prejudiced; rather, the Winter children were acquiring a right for which they had no legal entitlement, and Royal Trust was diligent in obtaining that new right and optimizing it as best it could while carrying out its prime responsibility of selling the assets of the Estates.

[126] Although the current Children's Lawyer was examined as witness for this summary judgment motion and sensibly demurred taking sides and saying what might have happened had the Official Guardian been involved, there is no reason to think that the Official Guardian would have found any fault in Royal Trust's conduct, because there was no misconduct to be found.

[127] There is no reason to think that a trial is necessary to reach these conclusions or to think that if there was a trial, a different conclusion might be reached. There are no genuine issues here requiring a trial about the negotiation of and the drafting of the Option Agreement.

3. The Issues Associated with the Lapsing of the Option Agreement

[128] Returning to the narrative, I shall now explore whether there are any genuine issues requiring a trial about the lapsing of the Option Agreement.

[129] It is uncontestable that Sherman and Ulster Limited owned the "Purchased Business," and on December 31, 1969, some of the shareholders of Sherman and Ulster Limited entered into a share purchase agreement with Vanguard Pharmacy Limited, a drug store chain that was Sherman and Ulster Limited's largest customer.

[130] After the sale to Vanguard Pharmacy of the shares of Sherman and Ulster Limited, Mr. Sherman and the Ulsters retained a minority interest in Sherman and Ulster Limited, but, technically speaking, they no longer controlled Sherman and Ulster Limited.

[131] On January 1, 1972, International Chemical and Nuclear Corporation ("ICN"), a public company listed on the New York Stock Exchange (which later changed its name to ICN Pharmaceuticals, Inc.) acquired all of the issued and outstanding shares of Sherman and Ulster Limited, including the minority interest retained by the Dr. Sherman and the Ulster shareholders after the Vanguard transaction.

[132] The ICN transaction did not include the transfer of the ownership of the land and premises at 301 Lansdowne Ave., which were owned by Dr. Sherman and the Ulsters. The premise were leased to ICN, and subsequently sold in the summer of 1973.

[133] Thus, as of 1972, ICN controlled Sherman and Ulster Limited, the company that had owned the Purchased Business. At that time, Paul Barkin, the eldest of the Plaintiffs, was 13 years old.

[134] Thus, Royal Trust submits that as of December 31, 1969, the date when Vanguard purchased the generic drug business at the earliest, or as of January 1, 1972, the date of the ICN transaction, at the latest, the Option Agreement lapsed because Dr. Sherman and the Ulsters no longer had control of the Purchased Business.

[135] The Plaintiffs in this action and in their action against Dr. Sherman dispute this interpretation of the Option Agreement. They say that "the Purchased Business" was the business of manufacturing and selling generic drugs and drug products and the options in the Option Agreement attached to any companies controlled by Mr. Sherman owning and operating that type of business when the options became exercisable."

[136] Further, the Plaintiffs assert that Dr. Sherman and the Ulsters personally owed the Winter Children trust, fiduciary and equitable duties not to do anything which might cause them to lose or to be stripped of the Option Agreement to which they were entitled.

[137] The Plaintiffs acknowledge that they never signed the Option Agreement, but then they argue that Mr. Sherman and Mr. Ulster remained liable under the Option Agreement because it was given in favour of the Winter children and they say their entitlement to an interest in the Family business was something that could not be given away. The Plaintiffs say that the obligations to the Winter Children were personal and non-assignable.

[138] The Plaintiffs submit that the fiduciary duties arose "in light of, among other factors: (1) the terms of the Purchase Agreement and of the Option Agreement; (2) the naked vulnerability

of the minor orphaned Winter Children to B. Sherman and J. Ulster, (3) the representations and assurances that B. Sherman gave to Royal Trust with respect to the well-being, future and interests of the Winter Children and, in the case of B. Sherman, (4) the blood and familial relationship between B. Sherman on the one hand and the Winter Children on the other as his first cousins and with Louis Winter, his uncle, the founder of the business and who had "treated him like a son."

[139] The Plaintiffs submit that Mr. Sherman's and Mr. Ulster's conduct as directors and officers of at least Sherman Ulster Limited and Apotex without regard for the option in favour of the Winter Children was oppressive, prejudicial, and unfairly disregardful of the rights of the Winter Children under and pursuant to the Option Agreement.

[140] The Plaintiffs submit that Royal Trust ignored the Option Agreement following the closing of the Purchase Agreement and their rights and interests were materially and irreparably prejudiced by Royal Trust's negligent failure to enforce the Option Agreement which negligence was particularly egregious because Royal Trust "ought to have been on notice to take extra care and precautions in any dealing with Mr. Sherman in light of the warnings it had."

[141] The Plaintiffs submit that if Mr. Sherman and Mr. Ulster escape liability for the Option Agreement, then Royal Trust is liable to the Winter Children for wrongfully and negligently allowing Mr. Sherman and Mr. Ulster to escape liability.

[142] Apart from the issue of whether Dr. Sherman had fiduciary duties to offer employment and an Option Agreement to the Winter children to acquire a 5% equity interest in and be employed by any generic drug business in which Dr. Sherman might become involved in perpetuity, which is an issue to be decided in the separate action, for the reasons expressed in the last section, I am satisfied that Royal Trust was neither negligent nor in breach of any fiduciary duties with respect to the creation of the Option Agreement, and I can now add that there is no genuine issues requiring a trial about Royal Trust's alleged failure to enforce the Option Agreement that was provided by Sherman Ulster Limited.

[143] Whether Royal Trust is liable for failing to enforce the Option Agreement and for failing to disclose that it was not enforcing the Option Agreement to the Official Guardian or the Plaintiffs depends upon whether there was anything enforceable or worthy of bringing to the attention of the Plaintiffs or to the Official Guardian. In turn, whether there was anything to enforce or to disclose depends upon the interpretation of the Option Agreement.

[144] The Plaintiffs submit that the interpretation of the Option Agreement is at least ambiguous and a trial is required to interpret the Option Agreement. I disagree on both counts. The Plaintiffs' interpretative arguments are set out in paragraphs and 110 of their factum as follows:

> 45. Paragraph 1.06 of the Purchase Agreement specifically defines the "Purchased Business" as "the business presently and heretofore carried on by the Vendors in Canada consisting mainly of the manufacturing, selling and dealing in drugs and drug productions, laboratory, testing and related activities." The latter is the same business as that of Apotex. Furthermore, the words "Company" and "Companies" are capitalized in the Purchase Agreement but are not defined therein or otherwise. It is therefore clear that the rights pursuant to the option and the Option Agreement were not restricted to a single company, be it Sherman Limited or otherwise.

> 46. Accordingly, the "Purchased Business" for purposes of the Option Agreement ought to be interpreted as a business operated by the purchaser, B. Sherman, on the applicable date, "consisting mainly of the manufacturing, selling and dealing in drugs and drug productions, laboratory, testing and related activities." The latter is precisely the business of Apotex.
>
> 110. Royal Trust did not negotiate the best available terms for the option from B. Sherman. Its counsel, O'Brien, expressed concern the option was "not worth the paper it is printed on". There is no evidence that Royal Trust reviewed the final form of Option Agreement submitted by Sherman. The facts relating to the formation of Apotex are consistent with the business to which Sherman agreed to give the option in favour of the Winter Children. If for any reason the final form of Option Agreement is found not to attach to Apotex, Royal Trust breached its trust/fiduciary duties to the Winter Children and was negligent in not attempting to obtain an Option Agreement consistent with what was agreed upon including the clear and express intent of B. Sherman. B. Sherman is now attempting to resile from the existence of the option and the Option Agreement.

[145] I begin my own interpretation by saying that I will assume that the Option Agreement was a personal obligation of Dr. Sherman, notwithstanding that the Option Agreement was signed by Sherman and Ulster Limited. In my opinion, the Option Agreement has a plain meaning, and in accordance with the normal principals of contract interpretation, it is readily apparent that the option is a limited, qualified, contingent, and conditional agreement that ended when Sherman Ulster Limited was sold to ICN.

[146] This interpretation does not depend upon believing or not believing Dr. Sherman. Notwithstanding the arguments of the Plaintiffs, which are just as readily made now and do not require a trial to decide, there is no ambiguity in the Option Agreement, and there is no reason to hear evidence about the subjective intentions of the parties, and there is no reason to wait to see and hear what Dr. Sherman has to say in the witness box under cross-examination about what he had in mind for the Option Agreement.

[147] I do note that if one does resort to the external evidence about the intention of the parties, it is consistent only with the conclusion that the Option Agreement was not an open-ended promise by Dr. Sherman. The Option Agreement was manifestly a limited or qualified agreement. The Plaintiffs' interpretation takes a manifestly contingent right and makes it unconditional and perpetual for Dr. Sherman's lifetime.

[148] Pausing here, this is a convenient time to note that some of the Plaintiffs' arguments about the interpretation of the Option Agreement were morality-based arguments about how Dr. Sherman's undertaking in the Option Agreement "ought' to be interpreted. I, however, cannot and do not decide the interpretation of the Option Agreement because of moral sentiments about whether Dr. Sherman ought to have provided for his cousins in any generic drug business with which he was connected because of some moral debt he owed his late uncle. I decide only that, as a legal matter, the Option Agreement does not include that unconditional promise.

[149] In my opinion, there is no genuine issue requiring a trial about the drafting of the Option Agreement, which unambiguously reflects the fact that Dr. Sherman was prepared only to offer a conditional, qualified, or restricted Option Agreement. For the reasons discussed in the previous section of this judgment, there was no obligation to obtain a better Option Agreement.

[150] There are no genuine issues requiring a trial about the interpretation of the Option Agreement and no genuine issues requiring a trial about the fact that the conditions for performance of the Option agreement had lapsed after the first passing of Accounts and before

the Second Passing of Accounts. It follows that Royal Trust is not liable for failing to enforce the Option Agreement and it is not liable for failing to disclose the Option Agreement to the Official Guardian or the Plaintiffs because there was nothing to enforce or nothing worthy to disclose. The conditional agreement had lapsed.

4. The Issues Associated with the Plaintiffs' Entitlement to an Interest in Apotex

[151] Returning once again to the narrative, I turn now to whether there are any remaining issues associated with the Plaintiffs' alleged entitlement to an ownership interest in Apotex.

[152] After ICN acquired control of Sherman and Ulster Limited and the Purchased Business in 1972, it continued to operate the business of Sherman and Ulster Limited. Dr. Sherman worked for ICN for about a year, and then his employment was terminated. (These facts shall also prove important when I discuss below the issues associated with the Royalty Agreement.)

[153] In 1974, Dr. Sherman founded Apotex Inc. to manufacture and sell generic pharmaceuticals. Apotex did not own or use any of the assets, goodwill, property or business of the Purchased Business. It seems that most of the money to start Apotex came from government funding, although Dr. Sherman also used proceeds from the sale of his shares in Sherman and Ulster Limited to ICN. In any event, even if all the capital for Apotex came from the sale of Sherman Ulster Limited, that circumstance would not change the interpretation of the Option Agreement.

[154] As noted several times above, the Plaintiffs have commenced a separate lawsuit against Dr. Sherman, Apotex and others, seeking shares in Apotex, based on allegations similar to those made in this proceeding. As noted above, the Plaintiffs allege that the purpose of the Option Agreement is or ought to be have been for them to have the right to acquire a 5% equity interest in and be employed by any generic drug business in which Dr. Sherman might become involved in perpetuity. They submit that if it should be found otherwise for any reason whatsoever, then Royal Trust would be negligent in agreeing to the Option Agreement.

[155] The nature of this claim, which depends on how the Option Agreement is or ought to be interpreted, is set out in paragraphs 39 to 41, 47, and 48 of their factum as follows:

> 39. Today, B. Sherman is one of the wealthiest individuals not only in Canada but in the world and Apotex is one of the most successful generic drug companies in the world. It is purported that, through his generic drug business, B. Sherman has amassed a worth of about $5 Billion.
>
> 40. B. Sherman's acquisition of the Purchased Business formed the basis for B. Sherman's amassed fortune. But for his acquisition of the Purchased Business of the Empire Companies, B. Sherman would not have become, or have, what he does today. In fact, as B. Sherman has himself acknowledged, B. Sherman would probably have never become involved with the generic drug business in which his uncle, Louis Winter, was a pioneer, but for his acquisition of the Purchased Business of the Empire Companies.
>
> 41. As B. Sherman himself states in the Legacy [a personal memoir of Dr. Sherman], B. Sherman used the proceeds from the sale of his shares in Sherman Limited to set-up and operate Apotex to carry on the very same Purchased Business as (i) that which was acquired from the Empire Companies through Royal Trust and (ii) that is the subject matter of the Option Agreement.

> 47. Royal Trust was also placed on notice by Beverley Winter when she expressed grave concerns about any dealings with B. Sherman. Royal Trust failed to heed that warning, and did not take necessary precautions in its subsequent negotiations with B. Sherman.
>
> 48. As to the provisions in the options clause in the paragraph 14.00 of the Purchase Agreement, the beneficiaries of the options to be given pursuant thereto were the Winter Children, not Royal Trust, and the options forming the subject matter of the Option Agreement were options to become employees of the "Purchased Business" and to purchase shares in whatever company or companies that happened to own the Purchased Business when the Winter Children became entitled to exercise the options. The Winter Children were entitled to the benefit of the options so long as the Purchased Business was being carried on by and controlled by B. Sherman when they became entitled to exercise the options. The name of the company that happened to be then carrying on the Purchased Business was irrelevant to their entitlement to exercise the options. For the reasons set out above, subsequent transactions with Vanguard Pharmacy and ICN did not "extinguish" the options.

[156] I have already concluded that there is no genuine issues for trial that Royal Trust was not negligent or in breach of any fiduciary duty in negotiating, documenting, or enforcing the Option Agreement and that Royal Trust was not under any fiduciary duty to obtain a promise from Dr. Sherman to employ them and to give them interests beyond what he and Sherman Ulster Limited contracted to provide. I further conclude that there is no genuine issue for trial that the Option Agreement cannot be interpreted so as to ground an entitlement to purchase shares "in whatever company or companies that happened to own the Purchased Business when the Winter Children became entitled to exercise the options" The Option Agreement does not bear the meaning that "the Winter Children were entitled to the benefit of the options so long as the Purchased Business was being carried on by and controlled by B. Sherman when they became entitled to exercise the options."

[157] Put simply, Apotex cannot be interpreted to be the "Purchased Business" under the Option Agreement. The Purchased Business was purchased by Sherman and Ulster Limited and sold to ICN. The Plaintiffs' interpretation is wishful thinking beyond fanciful, and there is no way to move what the interpretation of the Option Agreement "is" to what the Plaintiffs based on moral sentiments say the interpretation "ought" to be.

[158] There are no genuine issues requiring a trial about the Option Agreement.

5. The Royalty Agreement Issues

[159] Returning, once again, to the factual narrative, I can now address whether there are genuine issues requiring a trial with respect to the Royalty Agreement.

[160] The Plaintiffs' argument is that there should be a trial about whether Royal Trust failed to enforce the Royalty Agreement and to collect royalties for the Estate. This argument is intricate and elaborate.

[161] The Plaintiffs argument is that Royal Trust had a fiduciary duty of disclosure of the assets of the Winter Estate; however, there is no evidence that Royal Trust ever disclosed the Royalty Agreement to the beneficiaries of the Estate or to the court, and there is no evidence that employees at Royal Trust administering the Estate knew about or took steps to enforce the Royalty Agreement once it had been obtained as an asset of the estate. The Plaintiffs submit that it follows, therefore, that they have proven a *prima facie* breach of fiduciary duty causing

damages. Those damages would at least be equal to the value of the lost opportunity of the Estate beneficiaries proving that royalties were owed to the Estate by Sherman Ulster Limited. With their having proven a *prima facie* breach of fiduciary duty, the Plaintiffs submit that the onus shifts to Royal Trust to show that there was no breach of fiduciary duty and no damages consequent upon that breach of fiduciary duty. The Plaintiffs submit, therefore, that there are genuine issues requiring a trial.

[162] Further, the Plaintiffs submit that Royal Trust did not discharge its trust and fiduciary duties and was professionally negligent in failing to enforce the Royalty Agreement and that it should have ensured that the certified statement of aggregate sales and sales prices was received on a semi-annual basis as set out in the Royalty Agreement, and it should have exercised its ongoing rights to inspect production data, shipping invoices and other records of Sherman Limited.

[163] Royal Trust's response to this elaborate argument is that it has met the onus of showing that there was nothing to disclose about the Royalty Agreement, because, in truth, nothing was payable under the Royalty Agreement. Thus, it submits that there are no genuine issues requiring a trial about the Royalty Agreement

[164] To come to a resolution of whether there are genuine issues requiring a trial, I begin by noting that I am entitled to assume that the parties, and in this case, I mean that both sides of this case, have put their best evidentiary foot forward.

[165] As noted above, the Royalty Agreement provided for royalties to be paid to the vendors if the purchaser used certain processes that were being sold to it to manufacture certain named chemicals. The relevant terms of the Royalty Agreement are set out below:

> 1. The Purchaser hereby agrees to pay to the Vendors a Royalty upon the sales by the Purchaser of the chemicals known as Tolbutamide, Probenecid, Acetylsulphisoxazole and Saccharin (hereinafter collectively referred to as the AChemicals@) so long as such Chemicals are manufactured by the Purchaser according to the processes transferred to the Purchaser by the Vendors as set forth in Schedule 2 of the Purchase Agreement or chemically equivalent processes (as hereinafter defined) or colourable imitations thereof, upon the terms and conditions hereinafter set forth.
>
> For the purposes of this Agreement, the term "Chemically Equivalent Processes" shall mean processes having modifications to the processes transferred to the Purchaser by the Vendors as set forth in Schedule 2 of the Purchase Agreement but which retain the essence of the invention of such processes.
>
> 2. The Royalty to be paid by the Purchaser to the Vendors shall be a sum equal to one and one-half (1-1/2 %) per cent of the amount, if any, by which the Sales Price as hereinafter defined of the Chemicals produced by the Purchaser in accordance with the processes as aforesaid exceeds the sum of Twenty-five Thousand Dollars ($25,000.00) in each fiscal year of the Purchaser.
>
> 3. Within sixty (60) days after each half-fiscal year of the Purchaser, the Purchaser shall send to the Vendors c/o, the Royal Trust Company, 66 King Street West, Toronto, Ontario, Attention: D. Raymond, or such other address as they may from time to time direct, a written statement, duly certified by the officer of the Purchaser, setting forth the following information in respect of the said half-fiscal year:
>
> > (a) the aggregate of all sales in bulk without further, processing after production in accordance with the processes as aforesaid made by the Purchaser of Chemicals

> manufactured in accordance with the processes as aforesaid to third parties, showing the price at which the Chemicals were sold, exclusive of any sales or other taxes, and after allowing the usual discounts for payment allowed to the trade; and
>
> (b) the aggregate of all intra-company sales in bulk, without further processing after production in accordance with the processes as aforesaid, made by the Purchaser of Chemicals manufactured in accordance with the processes as aforesaid, calculated at the lowest prevailing price available for such Chemicals upon the open market from a source with which the Purchaser deals at arm's length or the price at which the Purchaser is then selling such Chemicals to third parties, whichever is the lesser.
>
> The aggregate of the prices calculated with respect to sub-paragraphs (a) and (b) hereof shall be the "Sales Price" for the purposes of this Agreement.
>
> 4. The Vendors shall have the right to inspect such of the production data, shipping invoices and other records kept by the Purchaser as may be necessary to satisfy themselves as to the correctness of the said certified statement, and the Vendors agree to regard as confidential any information they may obtain in the course of such inspections.
>
> 5. Within ninety (90) days after each fiscal year end of the Purchaser, the Purchaser shall forward to the Vendors payment of the Royalty due hereunder.
>
> 6. The term of this Agreement shall be fifteen (15) years from the 1st day of November, 1967 to the 31st day of October, 1982.
>
> 9. The Purchaser agrees that in the event that the processes as aforesaid should be sold or licensed by it to any other person, firm or corporation, the Purchaser shall require such person, firm or corporation to assume all of the obligations of the Purchaser hereunder.

[166] Thus, the Royalty Agreement concerned the manufacturing and sale of Tolbutamide, Probenecid, Acetylsulphisoxazole, and Saccharin. Mr. Sherman's evidence is that Sherman and Ulster Limited never manufactured nor sold Acetylsulphisoxazole. Further, Mr. Sherman's evidence is that although Sherman and Ulster Limited did manufacture Tolbutamide, Saccharine and Probenecid, he says that it did not use the chemical processes it had purchased to manufacture the drugs. Indeed, he says that all of Sherman and Ulster Limited's drugs, including Tolbutamide, Saccharine and Probenecid were manufactured by physical or mechanical processes (compressing raw materials purchased from other manufacturers) and not by a chemical processes. He says no patent or licence was required for this type of work; Sherman and Ulster Limited engaged only in Dosage Form Manufacturing.

[167] The only evidence that the Plaintiffs' have to rebut the evidence of Mr. Sherman is an undelivered affidavit from the now deceased James Church, which had been prepared for Jeffrey Barkin's 2001 Application to obtain Royal Trust's records and from Mr. Barkin, who spoke to Mr. Church before his death. Mr. Church's affidavit is an exhibit in Mr. Barkin's affidavit for this summary judgment motion.

[168] Mr. Church was the vice-president of sales at the Winter Companies. In his undelivered affidavit, he deposes that the Lansdowne Avenue location of the Empire Companies was set up for the primary purpose of manufacturing chemicals such as Tolbutamide, which they could convert into dosage forms on their own. Mr. Jeffrey Barkin states in his affidavit that "according to what Mr. Church advised me … all of the four respective products listed in the August 28th

Royalty Agreement were directly manufactured by Empire and by its successor companies for most if not all of the respective royalty agreement's fifteen years".

[169] There is no genuine issue for trial that no royalties were paid under the Royalty Agreement and that Royal Trust did not enforce the Royalty Agreement or report it in the passing of accounts. The possible genuine issues for trial concern whether royalties were ever payable, and the factums of the parties and the argument at the hearing of the summary judgment spent a great deal of time and effort debating about what weight should be given to the evidence of Dr. Sherman and Mr. Church about whether or not royalties were payable under the Royalty Agreement.

[170] For the purposes of this motion for summary judgment, I need not resolve these debates and I need not resolve the Plaintiffs' elaborate argument for refusing to grant a summary judgment about the Royalty Agreement. There are simpler reasons for dismissing this part of the motion for summary judgment.

[171] The term of the Royalty Agreement was from November, 1967 to the 31st day of October, 1982 (fifteen years). Dr. Sherman sold his interest in Sherman Ulster Limited in 1972 to ICN and worked for ICN for about a year. Thus, at best, Dr. Sherman can give reliable evidence about the manufacturing process at the Purchased Business for approximately six years. Royal Trust has not meet the onus on a motion for summary judgment of showing an evidentiary foundation for its argument that there is no genuine issue for trial of its substantive defence that no royalties were payable under the Royalty Agreement because of the manner in which the drugs were manufactured.

[172] Further, although on a motion for summary judgment, the court is entitled to assume that the parties' have respectively put their best evidence forward, in the case at bar, it is obvious that the parties have not done enough to prove how Acetylsulphisoxazole, Tolbutamide, Saccharine and Probenecid were manufactured. Even with the passage of over 40 years, one would have thought that in as heavily government regulated a business as the generic drug business is and has been that the parties would have been able to do better than the limited evidence of Dr. Sherman and the late Mr. Church.

[173] In my opinion, it is in the interests of justice to have the genuine issue of whether payments are due under the Royalty Agreement proceed to a trial reserving the rights of either party to bring another motion for summary judgment after examinations for discovery.

6. The Other Drugs Issue

[174] The Plaintiffs claim that Royal Trust should have negotiated the inclusion of other drugs in the Royalty Agreement. Royal Trust, however, argues that the Royalty Agreement only covered novel chemical processes. The drugs that the Winter Companies were manufacturing formed part of the Purchased Business, the value of which was reflected in the purchase price paid for all of the assets of the Winter Companies. The Plaintiffs have not presented any evidence to the contrary. I agree with the argument of Royal Trust. There is no genuine issue requiring a trial.

7. The Diazapam Issue

[175] The Plaintiffs claimed that Royal Trust was negligent in failing to demand and obtain compensation on account of the licence that the Empire Companies had obtained for Diazapam (Valium). They say that the licence was obtained after the Empire Companies had been appraised and the substantial value of that licence was never included in the appraised value of the Empire Companies. In the circumstances, the Plaintiffs submit that Royal Trust had a duty to, at the very least, ensure that Dr. Sherman and Ulster and Sherman Limited pay a royalty to the Winter Estates on account of any sales of Diazapam upon obtaining a licence to manufacture and sell Diazapam as the successor to the Empire Companies.

[176] There is no genuine issue for trial that the Winter Companies had a non-assignable licence to manufacturer Diazepam. However, the Diazepam Compulsory Licence could not be transferred, and it was not transferred, to Sherman and Ulster Limited. Rather, Sherman and Ulster Limited applied for and obtained its own licence for the manufacture of Diazepam. However, it never manufactured Diazepam because the cost of obtaining regulatory approval for this new drug were thought to be prohibitive.

[177] This being the factual record, I agree with Royal Trust's argument that there is no genuine issue requiring a trial about compensation for the diazepam licence.

8. The Issues Associated the Administration of the Winter Estate

(a) The Diamond Pendant

[178] The Plaintiffs claim that Royal Trust failed to secure Mrs. Winter's jewellery, primarily, a 4-5 carat diamond pendant. The documentary evidence is to the contrary, and it demonstrates that Royal Trust secured Mrs. Winter's jewellery, including the Diamond Pendant. There is no genuine issue requiring a trial.

(b) Professional Printing Services Limited

[179] Professional Printing Services Limited, also known as the "Matthews Press," was another company owned by the late Mr. Winter. It was purchased by Sherman and Ulster in a separate agreement for $5,490. Dr. Sherman's and the Ulster's offer to purchase the assets of Matthews Press was made on October 5, 1967, and it was accepted by Royal Trust on December 5, 1967. There is no genuine issue requiring a trial. The evidence establishes that Royal Trust did nothing wrong with respect to in the sale of Professional Printing Services Limited.

(c) Capital Investment in Puerto Rico

[180] The Plaintiffs allege that Royal Trust failed to secure a US $250,000 corporate investment made by a Winter Company subsidiary, Empire Chemical Corporation, in Puerto Rico on or about June 15, 1965. There is no evidence of any such investment actually proceeding.

[181] To the contrary, correspondence between Royal Trust and Louis Winter's former counsel from 1965-1966 indicates that Empire Chemical Corporation could not locate a suitable industrial facility for the plant leading it to abandon the Puerto Rico project. The letters from Mr. Winter's counsel indicate that the only assets of value belonging to the Empire Chemical Corporation were the tax exemption license obtained from the Puerto Rican government and the value of the legal fees and work devoted to obtaining the license and incorporating the company. There is no mention in any of this correspondence of a $250,000 capital investment.

[182] Moreover, the documents attached as exhibits to the Plaintiffs' affidavits do not support the existence of this investment. The Certificate of Incorporation states that the "authorized capital" of Empire Chemical Corporation was $250,000, but the certificate goes on to state that "the paid-in capital which the corporate shall have at the outset of the business operation shall be a minimum of $1,000 which may be represented by cash or property." There is no evidence that any one ever bought shares in the company for $1,000, let alone $250,000.

[183] I agree with Royal Trust's argument that there is no genuine issue for trial about the alleged investment in Puerto Rico.

(d) Alleged Bank Deposits in Bermuda

[184] The Plaintiffs allege that Royal Trust failed to secure unspecified and unidentified bank deposits in Bermuda which the plaintiffs believe to be in the names of Louis and/or Beverley Winter or the Winter Companies. The Plaintiffs have not adduced any evidence that Louis and/or Beverley Winter, or any of the Winter Companies, held assets in banks in Bermuda. No evidence supports this claim. The Plaintiffs submit that the lack of co-operation of Royal Trust is the reason that they have not been able to make inquiries of the Bermuda banks.

[185] Without deciding the point, I assume that Royal Trust should have been more co-operative in determining whether there was any substance to the Plaintiffs' presently unsubstantiated belief about bank deposits in Bermuda, but, if so, then the Plaintiffs should have proceeded as Mr. Birken did previously in his 2001 Application and obtained the assistance of the court to compel Royal Trust to be more co-operative.

[186] On this motion for summary judgment, it is too late for the Plaintiffs to rely on Royal Trust's non-co-operation. Royal Trust demonstrated that with all the miscellaneous claims that it had acted in the normal course of an estate administration, and there is no reason to think otherwise with respect to the alleged Bermuda Bank Accounts.

(e) Frank Lively

[187] The Amended Statement of Claim refers to Frank Lively, who acted as the junior trust officer of the Winter Estates from their inception until September of 1967. In the years following Mr. Lively's departure from Royal Trust in 1967, criminal charges were laid against him. At the time that he was charged, Mr. Lively was working with Eastern and Chartered Trust or Canada Permanent Trust. Mr. Lively was never investigated, charged or convicted in connection with the administration of the Winter Estates or any other aspect of his employment at Royal Trust.

[188] There is no evidence that Mr. Lively did anything criminal or otherwise improper in regards to the Winter Estates. Further, the evidence is that Mr. Lively's involvement on the file was overseen at all times by his superiors at Royal Trust, including by Douglas Raymond, a Senior Trust Officer at Royal Trust.

[189] I agree with the arguments of Royal Trust that there are no genuine issues for trial with respect to the involvement of Frank Lively in the administration of the Winter Estates.

F. CONCLUSION

[190] For the above reasons, except for the Royalty Agreement claims, the Plaintiffs' action against Royal Trust should be dismissed and Royal Trust's motion for summary judgment should be granted.

[191] If the parties cannot agree about costs, they may make submissions in writing beginning with Royal Trust's submissions within 20 days of the release of this judgment followed by the Plaintiffs' submissions within a further 20 days.

Perell, J.

Released: June 26, 2013

CITATION: Winter v. The Royal Trust Company, 2013 ONSC 4407
COURT FILE NO.: 06-CV-308098PD1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

THE ROYAL TRUST COMPANY and ROYAL TRUST CORPORATION OF CANADA

Defendants

REASONS FOR DECISION

Perell, J.

Released: June 26, 2013.

TAB 7

CONTRACT AND THE FIDUCIARY PRINCIPLE

PAUL FINN*

I. INTRODUCTION

Modern legal history has been unkind to contract law. The nineteenth and early twentieth century gave to it an apparent integrity and internal coherence in doctrine, but a straightened compass and concern.[1] In a legal environment which exalted individual responsibility and self-reliance, which had a spartan regard for the consequences of one's actions upon others,[2] this contrived body of law could insist upon its own imperatives and could be relatively indifferent to the casualties of that insistence. But the world changed. The twentieth century explosion in the law of negligence with the 'neighbourhood' idea at its core, saw to that. How one conducts oneself towards another and the consequences thereof have become a pervasive concern.[3] Contract law facilitated social and commercial interaction, but it little addressed the conduct to be expected of parties engaged in that interaction. It was intolerant of fraud. It expected binding promises to be kept or else damages paid if they were not. It proscribed a limited variety of impositions on a contracting party.[4] And it exacted certain minimal standards of probity and fairness.[5] However, its

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1 These last are evidenced in a number of spheres: *e.g.* in the contraction in liability based on representation and reliance: see P.D. Finn (ed.), *Essays on Equity* (1985), *62ff*; in the insistence upon consideration and privity; in the twentieth century reluctance to allow third party enforcement through the trust device; in narrow mistake rules; etc.

2 *E.g. Ward* v. *Hobbs* (1878) 4 App Cas 13; *Derry* v. *Peek* (1889) 14 App Cas 337; *Allen* v. *Flood* [1898] AC 1, 46.

3 For an explicit recognition of this see *e.g. Nicholson* v. *Permakraft (N.Z.) Ltd* (1985) 3 ACLC 453, 459.

4 *E.g.* penalties, forfeitures and unconscionable dealings.

5 *E.g.* in the misrepresentation doctrine and in terms implied by law.

doctrines remained for the most part immune to those considerations of care and of responsibility to or for others that so characterised emerging tort doctrine. An asymmetry had developed between the respective ethos informing two important bodies of law. And if one was out of harmony with evolving social and legal policy, it was contract's.

It is trite to note the tension there is in contracting. It is at once a selfish and a cooperative endeavour.[6] The reconciliation of these often antagonistic pressures is an issue of contemporary moment. But it is not one confined to contract though its significance there is a heightened one. It is merely part of a more general concern in the law with the standards of conduct which should be expected of persons and enterprises in, or in consequence of, their relationships and dealings with others. What limits are to be set to advantage taking, to prejudicial action? The question is not one we alone are asking. It resonates in the laws of Canada, New Zealand, the United States and, more mutedly, England. England apart, there are marked similarities in the substance of the answers being given. It is a heightened insistence upon fair dealing. The doctrinal vehicles used to express those answers, though, differ markedly. Confining attention to contractual and near contractual relationships and disregarding the direct impact of tort law, a quartet of common law (or common law derived)[7] doctrines and, in Australia, a statutory innovation have provided the law's tools. The common law doctrines are unconscionable dealing (and in Australia a more general but still indeterminate unconscionability principle), estoppel, fiduciary law and the implied term (particularly that of good faith and fair dealing[8] and its more specific surrogates).[9] The statutory jurisdiction is section 52 of the Trade Practices Act 1974 (Cth) - a provision the potential of which could marginalise the importance of much legal doctrine. The uses of, and emphasis upon, these 'tools' vary as between the countries of the common law world. While the concern of this article is with one alone - the fiduciary principle in Australia - it is useful to begin with a comparative perspective noting in particular the uses and abuses of that principle in the cause of exacting fair dealing.

II. COMPARISONS

To the extent that the major common law jurisdictions are registering interest in the standards of conduct to be expected of contracting parties, four problem areas of relevance to the concerns of this article have attracted particular attention.[10] A common difficulty experienced in

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6 This tension is reflected in the central pillar of contract law - the consideration doctrine.
7 To the extent that these may now have statutory justification.
8 In the United States.
9 In Commonwealth countries.
10 The specific and important question of negligence in contract performance is not treated in what follows.

formulating satisfactory responses in them has been a purely doctrinal one. What body of law can adequately express and justify the appropriate reaction to be made? Fiduciary law - but not only fiduciary law - has regularly had this burden cast upon it, usually quite inappropriately.

A. CAVEAT EMPTOR AND NONDISCLOSURE[11]

A rigid insistence upon the caveat emptor rule is now acknowledged to be capable of producing "singularly unappetizing"[12] results in some instances. As a consequence there is an emerging trend to insist upon disclosure to prevent undue advantage taking in dealings and this in recognition of the view that there is a widening "array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair."[13] But if, in some circumstances, disclosure is to be coerced, what doctrinal vehicle can best accomplish this? Those few established doctrines we have which required disclosure in specific contexts - insurance proposals,[14] suretyship agreements[15] and vendor-purchaser transactions[16] - provided no useful basis for greater generalisation. United States jurisdictions, seeing in fiduciary law a ready made disclosure obligation in dealings between fiduciary and beneficiary, were prepared with varying enthusiasm to exploit the 'fiduciary relationship' to exact disclosure in contracting. That relationship ran the risk of becoming as fluid as the circumstances warranting disclosure:[17] it began to look like an "accordion term".[18] More recently some jurisdictions have severed this nexus with fiduciary law and have gone directly to a limited tort of nondisclosure in 'business transactions' to complement their more developed contractual doctrine of unilateral mistake.[19] To the extent that Australian and Canadian law has used equitable doctrine for this purpose it has, in the main, relied upon the unconscionable dealings jurisdiction, the lack of relevant knowledge of one party being but one of the composite of factors invoked to make out the position of special disadvantage required by that jurisdiction.[20] Equally Canada, though not Australia, has shown some propensity here to be cavalier with fiduciary

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11 For more detailed treatment see P.D. Finn (ed.), *Essays on Torts* (1989), Ch.7; P.D. Finn, "The Fiduciary Principle", in T.M. Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989).
12 Prosser and Keeton, *The Law of Torts*, (5th ed., 1984), 738.
13 *Chiarella* v. *United States* 445 US 222, 248 (1980) *per* Blackmun J.
14 In the *uberrimae fidei* doctrine.
15 *E.g. Behan* v. *Obelon Pty Ltd* [1984] 2 NSWLR 637.
16 *E.g. Tsekos* v. *Finance Corp. of Australia* [1982] 2 NSWLR 347.
17 See *e.g.* the formulations in *Denison State Bank* v. *Madiera* 640 P 2d 1235 (1982).
18 See F. Kessler and E. Fine, "*Culpa in Contrahendo*, Bargaining in Good Faith and Freedom of Contract: A Comparative Study", (1964) 77 *Harv L Rev* 401, 444.
19 See *Restatement, Second, Torts*, S.551; *Restatement, Second, Contracts*, S.161.
20 See *e.g. Commercial Bank of Australia Ltd* v. *Amadio* (1983) 151 CLR 447; *National Australia Bank Ltd* v. *Nobile* (1988) ATPR 40-856.

relationships.[21] For the purposes of Australian law pressure on the fiduciary principle to sanction nondisclosure in ordinary contractual dealings seems now unlikely and this for the reason that we have discovered that section 52 of the Trade Practices Act 1974 (Cth) is more than equal to this burden as well.[22]

B. PREJUDICIAL ACTION TAKEN BEFORE AGREEMENT

Parties may so conduct themselves in anticipation of agreement being reached between them as to make it unfair and unjust for one, by terminating negotiations or otherwise, to act to his own advantage or to the other's prejudice without attracting some measure of legal responsibility to that other. The issues we now more readily perceive to arise here are ones of risk allocation and of protecting reasonable expectations or reliance. The two major bodies of law which are assuming roles in remedying such injustice as can arise are estoppel[23] and restitution (or unjust enrichment).[24] The matter germane to fiduciary law which warrants note in this context is that in this decade we have witnessed its invocation to protect parties who have negotiated for, but have not formally agreed upon, a relationship which itself will be fiduciary (usually a partnership or a fiduciary joint venture).[25] Equally, as is now well accepted, fiduciary law will in the guise of the action for breach of confidence protect confidential information disclosed in and for the purposes of contractual negotiations.[26]

C. ADVANTAGE TAKING IN CONTRACTING

The contractual paradigm presupposes the bargaining of independent parties competent to preserve their own interests. Acknowledging that the

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21 See *Standard Investments Ltd* v. *C.I.B.C.* (1985) 22 DLR (4th) 410 - an influential decision.

22 See *e.g. Henjo Investments Pty Ltd* v. *Collins Marrickville Pty Ltd* (1988) ATPR 40-850; *Finucane* v. *New South Wales Egg Corporation* (1988) 80 ALR 486; *Aliotta* v. *Broadmeadows Bus Service Pty Ltd* (1988) ATPR 40-873; and *cf. Kabwand Pty Ltd* v. *National Australia Bank Ltd* (1989) ATPR 40-950.

23 See *e.g. Crabb* v. *Arun District Council* [1976] Ch 179; *Walton Stores (Interstate) Ltd* v. *Maher* (1988) 164 CLR 387 *Drennan* v. *Star Paving Co.* 333 P 2d 757 (1958); see also *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority,* unreported Supreme Court of Victoria, 19 August 1988; *Austotel Pty Ltd* v. *Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

24 See *e.g. Sabemo Pty Ltd* v. *North Sydney Municipal Council* [1977] 2 NSWLR 880; *Dickson Elliot Lonergan Ltd* v. *Plumbing World Ltd* [1988] 2 NZLR 608.

25 See *e.g. United Dominions Corp. Ltd* v. *Brian Pty Ltd* (1985) 157 CLR 1; *Fraser Edmiston Pty Ltd* v. *A.G.T. (Qld) Pty Ltd* [1988] 2 Qd R 1; *Marr* v. *Arabco Traders Ltd* (1987) 1 NZBLC 102, 732; *Van Dijk* v. *McCracken,* unreported, High Court of New Zealand, 30 June 1987; but *cf. Lac Minerals Ltd* v. *International Corona Resources Ltd,* unreported, Supreme Court of Canada, 11 August 1989.

26 See *e.g. Seager* v. *Copydex Ltd* [1967] 1 WLR 923; *Talbot* v. *General Television Corp. Pty Ltd* [1980] VR 224; *A.B. Consolidated Ltd* v. *Europe Strength Food Co. Pty Ltd* [1978] 2 NZLR 515; *Lac Minerals Ltd* v. *International Corona Resources Ltd, ibid.*

reality is often otherwise has produced a greater sensitivity in the law to the possible exploitation or manipulation of one party by the other in the contracting process itself. The translation of that sensitivity into effective legal doctrine has been by no means a happy one in some countries (notably in England). The reason for this is that those doctrines capable of useful revitalisation (the unconscionable dealings jurisdiction in particular) had languished friendless for many years.[27] In the event, unconscionable dealing, fiduciary law and undue influence (if the latter is not merely an exemplification of the former)[28] have all been used and, in some countries, confused in ways which, for Australian purposes, makes the use of foreign authority hazardous in this sphere. English law is the most difficult. In reaction to the unfortunate reasoning of the Court of Appeal in *Lloyds Bank Ltd* v. *Bundy*,[29] unconscionable dealing and undue influence have been merged in an uncertain way[30] and this mix in turn has been divorced from any association with fiduciary law though the two, it is said, can overlap in some circumstances.[31] The English position has little to recommend it. It is more the product of unhappy appellate ruling than of sound and convincing principle. Canada flirted briefly with fiduciary law before accepting its limitations in this context.[32] It now for the most part is content to exploit its own version of unconscionable dealing.[33] In Australia little use has been made of fiduciary law in remedying exploitation and manipulation in contractual dealings save in those cases where, on orthodox grounds, a fiduciary relationship can be found between the parties.[34] Aided by two comprehensive decisions of the High Court,[35] we have been able to use unconscionable dealing in a principled way to provide relief to the specially disadvantaged in their contracting. Within its limited sphere, the law of penalties has been similarly so used.[36]

D. THE PREJUDICIAL EXERCISE OF RIGHTS AND POWERS

The issue here can be put simply. Though authorised or entitled for his own benefit to take a decision or action which bears directly upon the

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27 Such was not the case in Australia largely as a result of the important decision of the High Court in *Blomley* v. *Ryan* (1956) 99 CLR 362.

28 See Finn, "The Fiduciary Principle", note 11 *supra*, 43-6.

29 [1975] QB 326. Put in terms of modern Australian law a relatively straighforward case of unconscionable dealing was decided on highly questionable fiduciary grounds.

30 See *National Westminster Bank PLC* v. *Morgan* [1985] AC 686.

31 *Bank of Credit & Commerce International S.A.* v. *Aboody* [1989] 2 WLR 759, 777-9.

32 See *e.g. First Calvary Financial Savings & Credit Union Ltd* v. *Meadows* (1989) 66 Alta LR (2d) 7.

33 See *e.g. Bertolo* v. *Bank of Montreal* (1986) 57 OR (2d) 577.

34 *E.g. Daly* v. *Sydney Stock Exchange Ltd* (1986) 60 ALJR 371; see also *Westmelton (Vic.) Pty Ltd* v. *Archer* [1982] VR 305.

35 *Commercial Bank of Australia Ltd* v. *Amadio* note 20 *supra; Blomley* v *Ryan* note 27 *supra.*

36 *E.g. Esanda Finance Corp. Ltd* v. *Plessnig* (1989) 84 ALR 99.

interests of the other party, should a contractor be obliged in any circumstances to have regard to the interests of that other in addition to his own and, if necessary, desist from or modify the proposed course of action in consequence where not to do so could be said to be unfair? Put in more concrete terms should rights be able to be exercised, for example, so as to nullify the reasonable expectations of the other;[37] so as to obtain a windfall advantage at the other's expense;[38] in a way that occasions undue and avoidable prejudice to the other's interests;[39] or without reasonable notice, endeavours, *etc.*, where such would be expected?[40]

Though judicial responses have been by no means uniform both within and between common law countries, the emerging trend in case law is one of guarded sympathy for claims to fair dealing by the party adversely affected. But consistent with what has been said earlier in this article, when the need to accord relief has been accepted, the paths taken have been quite diverse: negligence, estoppel, unconscionability, unjust enrichment, fiduciary law and the implied term have all been invoked in varying degrees. For the most part, the issue for the courts, whether openly acknowledged or not, has been whether and to what extent they should commit themselves to an implied term of good faith and fair dealing in contractual performance and enforcement either generally or for limited and specific purposes.[41] But the understandable diffidence in making that commitment has in some contexts at least resulted, for remedial purposes, in contractual relationships being termed fiduciary and the requirement of fair dealing being metamorphosed into a fiduciary duty. This tendency is in evidence in the case law of some United States jurisdictions particularly in relation to commercial transactions. But it is by no means only a United States phenomenon.[42] Thus one finds instances of a distributorship or franchise being said to be fiduciary to no greater purpose than to regulate the exercise of powers under the agreement;[43] of a mortgagee being termed fiduciary to protect the interests of the mortgagor in the exercise of the power of sale;[44] and of majority shareholders being the fiduciaries of the minority to prevent demonstrable unfairness;[45] *etc.* Again it is necessary to

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37 *E.g. Caratti Holdings Co. Pty Ltd* v. *Zampatti* (1978) 23 ALR 655.
38 *E.g. Stern* v. *McArthur* (1988) 62 ALJR 588.
39 *Cuckmere Brick Co. Ltd* v. *Mutual Finance Ltd* [1971] Ch 949.
40 *E.g. Meehan* v. *Jones* (1982) 149 CLR 571; see also *K.M.C. Co. Inc.* v. *Irving Trust Co.* 757 F 2d 752 (1985); *Crawford Filling Co.* v. *Sydney Valve & Filling Pty Ltd,* unreported, New South Wales Court of Appeal, 23 November 1988.
41 On 'good faith and fair dealing' see generally H.K. Lücke, "Good Faith and Contractual Performance", in P.D. Finn (ed.), *Essays on Contract* (1987).
42 See *e.g. Offshore Mining Co. Ltd* v. *Attorney-General,* unreported, Court of Appeal of New Zealand, 28 April 1988.
43 *E.g. Arnott* v. *American Oil Co.* 609 F 2d 873 (1979) - this represents a minority view in the U.S.: see *Rickel* v. *Schwinn Bicycle Co.* 192 Cal Rptr 732 (1983); *Dunfee* v. *Baskin-Robbin Inc.* 720 P 2d 1148 (1986).
44 *E.g. Murphy* v. *Financial Development Corp.* 495 A 2d 1245 (1985).
45 *E.g.* 18A Am Jur 2d, S.764 ("Corporations").

note that there is nothing in Australian law to suggest our courts will follow such paths.[46] Nor should they. The fair dealing issue here is simply not a fiduciary one. The right to act self-interestedly is being curtailed, not denied.

A conclusion one can draw from the brief comparative survey above is that Australia, more clearly so than other common law countries, has remained immune from an unprincipled penetration of the fiduciary principle into ordinary contractual dealings. Three factors have contrived this happy state: first, the revitalisation of the unconscionable dealings doctrine and the more general elaboration of an unconscionability principle have parallelled growing judicial preparedness to scrutinise the propriety of conduct in contract formation and performance and these are more obviously suited to that end; secondly, appreciation of the possibilities of section 52 of the Trade Practices Act 1974 (Cth) has obviated in considerable degree the need to resort to contrivances to sustain intervention in relationships and dealings; and thirdly, the decision of the High Court in *Hospital Products Ltd* v. *United States Surgical Corp.*[47] both dampened excessive enthusiasm for the fiduciary principle and signalled that principle and orthodoxy were to govern its application and development.[48] Fiduciary law, for us at least, is destined to have a very modest role in refurbishing and supplementing contract doctrine. But the impression should not be given that it has thus been made a quite unimportant player in regulating contractual activity. The contrary is the case. With society increasingly dependent upon agents, brokers, advisers and service providers ('reliance' relationships) and with commercial activity commonly being conducted through cooperative business arrangements ('partnership' relationships) a significant part of modern contractual activity occurs in contexts, or results in relationships, which can attract fiduciary responsibilities.

III. CONTRACTUAL RELATIONSHIPS - FIDUCIARY RELATIONSHIPS

It is so often the case that what we accept as of course is by no means easy to justify convincingly. We assume, doubtless correctly, that an ordinary contractual relationship (*e.g. of sale or loan*) is not fiduciary: "something more is needed."[49] But the justification for this assumption is by no means

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46 See *e.g. Hospital Products Ltd* v. *United States Surgical Corp.* (1984) 156 CLR 41; *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd,* unreported, New South Wales Court of Appeal, 12 April 1989.

47 *Ibid.*

48 The Hon. Mr Justice G.A. Kennedy in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987), 13-15.

49 *Cf. Committee on Children's Television Inc.* v. *General Foods Corp.* 673 P 2d 660, 675 (1983).

self-evident and it cannot be arrived at by any process of strict legal reasoning. A contracting party, ordinarily, is bound at least to do some prescribed act or acts for the other's benefit and can be relied upon for this: such is the effect of the consideration doctrine. A fiduciary, ordinarily, is obliged to act in the beneficiary's interests in some particular matter or matters and can be relied upon for that. Yet despite the apparent similarity we hold there is a difference. It is one thing to act for another's benefit. It is another to act in that other's interests. When we describe a relationship as being fiduciary we are saying not only that it possesses certain characteristics but also that we wish to exact a particular standard of conduct (*i.e.* loyalty) from one or both parties to it. An ordinary contractual relationship for its part may possess many if not all of the supposed characteristics of a fiduciary relationship, but despite this the conduct standard we wish to exact from contractors is a different one. This can be illustrated simply. A fiduciary is accountable for profit made from a breach of fiduciary duty. A contractor is not liable, as a rule, for profit made from breach of contract. To account for this, as also for the possible significance of the fiduciary principle to contracting parties, three questions need answering:

(1) What is a fiduciary relationship, and when and why is it so?
(2) Why is a simple contractual relationship not of itself fiduciary?
(3) When will a contract create a fiduciary relationship or be subject to a fiduciary regime?

As the three questions interlock they cannot conveniently be considered separately.

First, a brief note on the apparent burden of fiduciary law. At the core of many legal doctrines which impact on contracting parties (*e.g.* unconscionable dealing, section 52 of the Trade Practices Act 1974 (Cth), *etc.*) is the legal intent to prevent unfair advantage taking or unfair prejudice being occasioned. In achieving this, the path taken by the law is essentially one of mediation between the *several* interests of the parties to the dealing. That is not the path of the fiduciary principle. It does not as a rule mediate between or reconcile conflicting interests. Its object is to secure the paramountcy of *one party's* interests in a relationship or, less commonly as in a partnership, of the parties' *joint* interest. The beneficiary's interests are the ones to be protected. And this is achieved through a regime designed to secure loyal service of those interests - a loyalty that is unselfish and undivided. In consequence a fiduciary's conduct may be condemned though it has no adverse effect at all on the beneficiary's interests: a disloyal tendency is enough as the seminal decision of *Keech* v. *Sandford*[50] makes plain.

50 (1726) Sel Cas T King 61; 25 ER 223.

The true nature of the fiduciary principle is revealed in this. It originates, self-evidently, in public policy. To maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service. The fiduciary is not to use his position or the power or opportunity it gives him to serve an interest other than his beneficiary's - be this his own or a third party's. Translated into legal doctrine this has produced two, overlapping proscriptions: A fiduciary,

(a) cannot use his position , or knowledge or opportunity obtained in or by reason of it, to his own or to a third party's possible advantage or to the beneficiary's disadvantage; or

(b) cannot, in any matter within the scope of his service, have a personal interest or an inconsistent engagement with a third party,

unless this is freely and informedly consented to by his beneficiary or is authorised by law.[51]

Loyalty is thus exacted, often in a draconian way. But no more than loyalty is exacted. This warrants emphasis. It is not the case that the pure negligence of a lawyer, an agent's excess of authority, a partner's breach of the partnership contract, or a trustee's improvement investment is a breach of fiduciary duty no matter how harmful in fact to the interests of the client, *etc.* Fiduciaries these may be. But if no issue of disloyalty is involved their conduct will be actionable, if at all, for other reasons and on other bases: negligence, breach of contract, breach of trust or whatever. As a Canadian judge tersely put the matter: "[t]he word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth."[52]

For the purposes of contract law a note of caution needs to be sounded about the language of loyalty. Advocates of a doctrine of good faith in contract performance are apt to express the essence of the good faith idea in terms of 'loyalty'.[53] But for them its signification is not that outlined above. It requires 'fidelity' to the bargain and

> a real commitment to the laws which govern contracts, to the contract itself, and, most importantly, to the other party's aims and objectives, provided these are or should be known and understood.[54]

And when is a person expected to be loyal as a fiduciary - when is a relationship fiduciary?

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51 The most explicit and authoritative recognition of the dual themes in the duty of loyalty is to be found in the judgment of Deane J. in *Chan* v. *Zacharia* (1984) 154 CLR 178.

52 *Giradet* v. *Crease & Co.* (1987) 11 BCLR (2d) 361, 362 *per* Southin J.

53 See *e.g.* the excellent discussion in Lücke, note 41 *supra.*

54 *Ibid,* 164.

IV. A FIDUCIARY RELATIONSHIP?[55]

The received judicial wisdom is that it is unwise, perhaps unhelpful, to attempt to provide a general answer to that most basic question: when and why will a relationship be a fiduciary one?[56] Prudent this may be: a useful jurisdiction should not be fettered; "the categories of fiduciary relationship are not closed."[57] But it is, in the end, an endorsement of uncertainty, not of understanding.

To the extent that judges of recent times have attempted to isolate general characteristics common to fiduciary relationships, they have focussed unevenly on two phenomena: first, the capacity (the power or discretion) one party has to affect the interests of the other and the corresponding vulnerability of that other;[58] secondly, the reliance one party has upon the other because of the trust or confidence reposed in, or because of the influence or ascendancy enjoyed by, that other.[59] The seeds, but only the seeds, of understanding are to be found here. One or other, sometimes both, of these phenomena will be present in all fiduciary relationships - as they will be in some measure in all contractual, business and social relationships. These phenomena are clearly important in explaining why the law may wish to supervise conduct in a relationship: the vulnerable, the reliant, understandably, are amongst the law's chosen. But they do not explain why that supervision should necessarily require one party to act loyally in the other's interests. In many instances where either or both are present in a relationship, no more is - or should be - required of one party than that he should not take unconscientious advantage of the other or that he should deal fairly with the other and this, importantly, while still being permitted positively to pursue self-interest. To be fiduciary "something more is needed."[60]

It is generally accepted, though usually without explanation, that there is nothing fiduciary in an ordinary contractual dealing - a sale, a loan and the like. But to give an unexceptionable justification for this conclusion reveals much about how we perceive fiduciary relationships. Commonly enough a simple contract will contain a combination of those factors which at least the fiduciary rhetoric says are important in the genesis of

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55 The following draws significantly on a chapter entitled "The Fiduciary Principle" contributed by the writer to and published in Canada in T.M. Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989).

56 See *e.g.* the opinions expressed in *Hospital Products* v. *United States Surgical Corp.*, note 46 *supra.*

57 A perennially repeated observation.

58 For the most recent examination of these see *Lac Minerals Ltd* v. *International Corona Resources Ltd,* note 25 *supra.*

59 See *e.g. United Dominions Corp. Ltd* v. *Brian Pty Ltd* note 25 *supra; Royal Bank of Canada* v. *Aleman* (1988) 57 Alta LR (2d) 341; *Lloyds Bank Ltd* v. *Bundy* note 29 *supra, per* Sachs L.J. U.S. authority is legion which emphasises this.

60 *Cf. Committee on Children's Television Inc.* v. *General Foods Corp.*, note 49 *supra,* 675.

fiduciary relationships. First inequality. Rarely, if at all, do contracting parties deal with each other from positions of actual equality: relative need, unequal access to material information and varying skill and judgment make inequality in some degree an endemic feature of contracting. Second, acting for the other's benefit. The consideration doctrine ordinarily requires that each party do an act or acts for the other's benefit. Third, reliance and vulnerability. To secure the anticipated benefits of the relationship each party is compelled to rely upon the other's performance and to that extent is in a position of vulnerability. Fourth, trust and confidence. A party's commitment to a dealing and his expectations in it may well be informed by trust in the integrity, reliability, skill or fairness of the other.[61] Fifth, cooperative endeavour. In many dealings, particularly long term ones, cooperation (often in a high degree) may be necessary if the anticipated benefits of the contract are to be realised. But for all this we still affirm[62] that a simple contractual relationship is not fiduciary.

It was open to us to say that at least to the extent that each party to a contract is obliged to do an act or acts for the other's benefit, to that extent he is obliged to act in that other's interest - to be that other's fiduciary. This, for example, would have settled in a quite different way than is now the case, argument over disgorgement of profits made by an "efficient contract breaker."[63] But as noted earlier, we have not taken this path. We have not equated an obligation to do an act for another's benefit with an obligation to serve that other loyally. It is likewise with the trust, reliance, vulnerability *etc.* which may be present in a contractual relationship. Important these may be. Abused these may be. But we do not see all or any of them as leading to the conclusion that the party who trusts, relies, *etc.* is, as a result, ordinarily entitled to expect that the other will act in his interests. He may, often will, be entitled to expect that advantage will not be taken of him; that obligations will be honoured and fairly so; that cooperation will be forthcoming, *etc.* And we provide a significant array of doctrines (both common law and equitable) which can protect such expectations. But even these we see as doing no more than ensuring that the parties' chosen road of individual self-interest is pursued fairly by each. In short such is the character we attribute to a simple contractual

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61 See *e.g. Asleson* v. *West Branch Land Co.* 311 NW 2d 533, 539-40 (1981); *Citizens & Southern National Bank, Augusta* v. *Arnold* 240 SE 2d 3, 4 (1977); *Burwell & South Carolina National Bank* 340 SE 2d 786, 790 (1986); *Royal* v. *Bland Properties Inc.* 333 SE 2d 145, 147 (1985); *Haroco Inc.* v. *American National Bank & Trust Co. of Chicago* 647 F Supp 1026, 1035 (1986).

62 *E.g. Satellite Financial Planning Corp.* v. *First National Bank of Wilmington* 633 F Supp 386, 401 (1986).

63 See *e.g.* E.A. Farnsworth "Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985) 94 *Yale LJ* 1339; G.Jones "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 *LQR* 443; P. Birks "Restitutionary Damages for Breach of Contract" [1987] *Lloyds M & CLQ* 421.

relationship that we do not see its nature and purpose in the usual case as being other than to serve the several interests of each party.

At bottom the fiduciary relationship question is a question of relationship characterisation - and one arrived at in the consciousness that a fiduciary finding carries with it an exacting loyalty obligation. It is one not answered by the application of rigid formulae. A variable mix of legal phenomena, factual phenomena, presumptions, and public policy, guide and structure the judgment made when a character is to be attributed to a relationship. Some relationships we perceive as serving the *several interests* of each party and, as such are not fiduciary. That perception, it may be noted, is often expressed obliquely in our law in the observation that the parties (usually contractors) are dealing at arm's length and on an equal footing.[64] Some relationships on the other hand serve the *interests of one party alone* or, less commonly as with partnerships, *a joint interest* of the parties and are fiduciary in consequence. And yet some again, having discrete parts and purposes, may be fiduciary in part, non-fiduciary in part.[65] Importantly, our perception whether or not a relationship is fiduciary does not turn simply upon whether it allows the alleged fiduciary to derive benefits from it. Fiduciaries are not expected to be charitable institutions.[66] Benefit derivation, though important, is not of itself determinative of the fiduciary question: an agent, a doctor, a company director or a partner may receive remuneration for services rendered but will not be the less a fiduciary for this. The critical matter is our evaluation of the nature and purpose of a relationship (or of a part of it) and of the roles to be ascribed to one or both parties in it: whose interests is the relationship structured or contrived to serve and who in the relationship is responsible for serving them? Here the case law, more often in what it does than in what it says, indicates how and why that determination is arrived at.

The cases suggest that there are two distinct approaches to relationship characterisation, though they overlap in some factual contexts. They entail quite different inquiries. The first requires an analysis of the *actual legal incidents* of a relationship itself in the setting in which it occurs and from this a conclusion is arrived at as to the purpose to be attributed to the relationship and to a party's role in it.[67] Thus the *Restatement, Second, Agency,*[68] for example, asserts unequivocally of the principal and agent relationship that "an agent is a fiduciary with respect to matters within the

64 The observations to this effect in the judgment of the High Court in *Keith Henry & Co. Pty Ltd* v. *Stuart Walker & Co. Pty Ltd* (1958) 100 CLR 342, 351 are regularly repeated in response to fiduciary arguments.

65 See *Hospital Products* v. *United States Surgical Corp.* note 46 *supra*, 98 *per* Mason J.

66 *Cf. Dale* v. *Inland Revenue Commissioners* [1954] AC 11.

67 For a recent illustration of this process see *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd* note 46 *supra.*

68 S.131

scope of the agency."[69] The second approach focuses upon the presence (actual or presumed) of *factual phenomena* in a relationship - an ascendancy or influence acquired, a dependence or reliance conceded, a trust or confidence given - and from these a conclusion is arrived at as to the character to be attributed to the relationship and as to the role of the 'superior' party in it. To the extent that presumptions are employed here they result (i) from generalisations we make, as a matter of received wisdom, about the likely relative positions of parties in particular types of relationship, for example, solicitor-client or doctor-patient, or (ii) from the "trust and confidence", *etc.* we are prepared to assume certain types of functionary invite or engender - as is the case with at least some advisory or service functions. The end point of both approaches is to ascertain whether the parties are so circumstanced that, for some or all purposes of the relationship, the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests.

The apparent differences in method employed by the High Court in *Hospital Products Ltd* v. *United States Surgical Corporation*[70] and *United Dominions Corp. Ltd* v. *Brian Pty Ltd*[71] in characterising the respective relationships in issue (manufacturer-distributor, and parties negotiating for a joint venture) stem from the fact that the circumstances of the former case raised, essentially, the first of the above approaches, while the latter involved the second. For convenience in exposition the two approaches will be differentiated by describing the one as identifying 'relationships fiduciary *in law*', the other, 'relationships fiduciary *in fact*'. Of importance to contractors, the former of the approaches is the one of relevance when the question is: Does a contract itself create a fiduciary relationship? It is the latter which is more commonly invoked when the question is: Is the contractual dealing one between parties in a fiduciary relationship?[72]

What should be emphasised in what follows is that the writer has not considered that difficult but somewhat discrete class of case where a person, whether or not under contract, is given ownership, possession or control of property or confidential information but no right or only a limited right to use it for his own benefit. This class of fiduciary relationship is assuming growing importance in commercial and contractual contexts:

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69 The contrary view - see *e.g. Hospital Products* v. *United States Surgical Corp.* note 46 *supra*, 71-2; *R.H. Deacon & Co. Ltd* v. *Varga* (1972) 30 DLR (3d) 653 - confuses the existence of a fiduciary relationship with its *scope* in a given case.

70 Note 46 *supra.*

71 Note 25 *supra.*

72 There is no rigid dichotomy here. A contract between a trustee and beneficiary, for example, does not involve resort to the second approach to determine whether the parties antecedently stand in a fiduciary relationship.

(a) in relation to monetary receipts in agency-type relationships;[73]
(b) in the devices used to guard against the possible insolvency of a party to a commercial contract;[74]
(c) in affording secrecy protection;[75] and
(d) in circumventing the 'efficient breach' notion in vendor-purchaser transactions.[76]

It is here also that the issue foreshadowed in Justice Mason's dissenting judgment in *Hospital Products Ltd* v. *United States Surgical Corp.*[77] looms for future resolution. In holding an exclusive distributor to be a fiduciary in protecting and promoting the manufacturer's "product goodwill", his Honour has opened for consideration an issue as important as it is difficult. Are property and confidential information the only interests ('things') we are prepared through a fiduciary regime to protect from misuse or misappropriation. Or are there other interests ("intangible elements of value")[78] - names,[79] business opportunities or connections,[80] product goodwill, *etc.* - which, in particular contexts, can have such economic or other value to their 'owner' as would warrant a like protection?

V. CONTRACTS AND RELATIONSHIPS FIDUCIARY IN LAW

Whether or not a contract itself creates a fiduciary relationship can be determined in many, though by no means all, instances by an evaluation of its formal incidents in the setting in which it occurs. From an appraisal,

i) of the manner in which, and the apparent purpose for which, rights, powers, duties and discretions are allocated by the contract;
ii) of the character of the parties to the contract, the manner of its negotiation and its commercial or other setting; and[81]
iii) of the actions lawfully open to a party notwithstanding the contract,[82]

one can for the most part determine whether the role and reason of a party

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73 *E.g. Westpac Banking Corp. Ltd* v. *Savin* [1985] 2 NZLR 41; *'The Tiiskeri'* [1983] 2 Lloyds R 658.
74 See the Hon. Mr Justice L.J. Priestley, "The Romalpa Clause and the *Quistclose* Trust", in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987).
75 The case law is now legion.
76 See *Bunny Industries Ltd* v. *F.S.W. Enterprises Pty Ltd* [1982] Qd R 712.
77 Note 46 supra.
78 The description is Mr Justice Dixon's in *Victoria Park Racing & Recreation Grounds Co. Ltd* v. *Taylor* (1937) 58 CLR 479, 509.
79 *Cf. English* v. *Dedham Vale Properties Ltd* [1978] 1 WLR 93.
80 *Cf. Russell* v. *Austwick* (1826) 1 Sim 52; *Fraser Edmiston Pty Ltd* v. *A.G.T. (Qld) Pty Ltd* [1988] 2 Qd R 1.
81 For a recent decision with emphasis on such factors see *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd* note 46 *supra.*
82 See *e.g. Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra.*

in a contract (or in a discrete part of it) can properly be said to be to serve his own interests, the parties' joint interests, or the interests of the other party. In the Californian decision *Rickel* v. *Schwinn Bicycle Co.*,[83] for example, consideration of a distributorship agreement led to the finding that there was nothing fiduciary in it, the court concluding its purpose to be to promote the "non-mutual profit" of the parties and noting in this the right each had to make a range of decisions adverse to the other's interests.[84]

The judgmental process at work here is by no means a mechanical or value neutral one and it is not indifferent to the consequences that the imposition of a duty of loyalty may have upon a contractor both within and beyond the contract. Particularly with negotiated contracts in commercial settings, Australian courts have demonstrated considerable reluctance to supplement contractual obligations with fiduciary ones unless these are "consistent with and conform to" the terms of the contract itself.[85] Even where such a contract expressly manifests a fiduciary intent, the courts have demonstrated a like reluctance to give the duty of loyalty any greater effect than is necessary to effectuate the purpose of the contract according to its terms.[86] In a judicial environment which is increasingly receptive to obligations of good faith and fair dealing in contract performance,[87] this reticence in constraining commercial activity by fiduciary duties may now reflect, not an unpreparedness to set standards of conduct for commercial parties, but a concern to impose ones appropriate to what should be expected in and of business dealings.

Four additional comments should be made of the process of relationship characterisation under discussion.

First, it excludes as of course from any question of fiduciary responsibility those contractual rights and powers which a party has to protect or to further his own interests. For this reason, and despite occasional United States authority to the contrary,[88] there is nothing fiduciary, for example, in a mortgagee's power of sale, a franchisor's discretionary power to terminate the franchise, or a broker's power to close out a margin contract, drastic though the effect of the exercise of each may be on the other party's interests. Such powers, though, can raise fair dealing questions in a critical form. It is noteworthy that those United

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83 Note 43 *supra.*

84 Similar emphases can be found, *e.g.* in *Jirna Ltd* v. *Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639; affirmed (1973) 40 DLR (3d) 303; *Hospital Products Ltd* v. *United States Surgical Corp.*note 46 *supra, per* Gibbs C.J.

85 *Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra,* 97 *per* Mason J.; *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd* note 46 *supra.*

86 See *e.g. Noranda Australia Ltd* v. *Lachlan Resources N.L.* (1988) 14 NSWLR 1.

87 See P.D. Finn "Commerce, the Common Law and Morality" (1989) 17 *Melb U LR* 87.

88 See *e.g. Murphy* v. *Financial Development Corp.* 495 A2d 1245 (1985) - a mortgage case; *Arnott* v. *American Oil Co.* 609 F 2d 873 (1979) - a franchise case; and *cf. Commercial & General Acceptance Ltd* v. *Nixon* (1981) 56 ALJR 130, 134.

States decisions which have been lured to the 'fiduciary' in the examples given, have used it to no greater purpose than to exact good faith and fair dealing.[89]

Secondly, subject to a significant exception noted below, relatively little difficulty has been experienced where the fiduciary issue has been no more than whether the purpose of a contractual relationship is to serve both parties' several interests or the interests of one alone. Agency contracts, for example, are characterised as fiduciary as of course. Their allocation of rights and responsibilities and the reasons for this warrant, as a rule, one party being entitled to expect that the other will act in his interests within the scope of the agency. Loan, sales and mortgage contracts equally are not seen as fiduciary unless specific and atypical provisions in the contract contrive a contrary conclusion (usually in relation to a discrete part of the relationship): a *Quistclose* trust in a loan; a reservation of title clause in a sales agreement; or a mortgagee's power to control disbursements under a mortgage contract.[90] The atypical case apart, the structure and design of these relationships we do not perceive as warranting either party being entitled to expect that the relationship exists other than to serve each equally and individually.

Thirdly, greater difficulties have surfaced when the characterisation issue is whether the relationship, or powers in it, exists for the parties' joint rather than for their several interests. This has been particularly so in what may be described as 'cooperative contractual enterprises': non-partnership joint ventures;[91] distributorships, franchises, licensing agreements and the like. An initial problem lies, often, in identifying the true nature of the relationship itself. What in name is a joint venture may in fact be a partnership,[92] a distributorship in fact a true agency - and thus both be fiduciary.[93] Both distributorships and franchises exist as a rule to serve the 'non-mutual profit' of each party and should not be found fiduciary save in exceptional circumstances.[94] The great preponderence of

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89 For an excellent example see *Dunfee* v. *Baskin-Robbins Inc.* 720 P 2d 1148 (1986); and see D.A. De Mott "Beyond Metaphor: an analysis of Fiduciary Obligation" (1988) *Duke LJ* 879.

90 See *e.g. Garbish* v. *Malvern Federal Savings & Loan Assoc.* 517 A 2d (1986).

91 See *e.g.* The Hon. Mr Justice B.H. McPherson "Joint Ventures" and the commentary thereon in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987).

92 See *e.g. Canny Gabriel Jackson Advertising Pty Ltd* v. *Volume Sales (Finance) Ltd* (1974) 131 CLR 321; *United Dominions Corp. Ltd* v. *Brian Pty Ltd* note 25 *supra* and *cf. Reynes-Retana* v. *PTX Food Corp.* 709 SW 2d 695 (1986).

93 See *e.g. Arnott* v. *American Oil Co.* note 88 *supra.*

94 That is (i) where a particular provision of the agreement on its proper construction is designed to be exercised by one party in their joint interest or in the interest of the other party; (ii) if a 'trusteeship' is created of an asset in the relationship: and see the dissenting judgment of Mason J. in *Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra*; (iii) if the contract is such that one party is required to surrender all independence in the relationship to the other party.

authority accords with this view.[95] The non-partnership joint venture is more problematic. Though ordinarily structured for the several profit of each party, its management provisions may well attract fiduciary incidents and, because of the relationships it may create to property and/or to confidential information, it may be fiduciary for other reasons.[96]

Fourthly, in one large and practically important class of case, the characterisation process under discussion is quite indecisive if not potentially misleading. This is where one party, usually for an agreed remuneration, provides a service to the other: doctor-patient, automobile servicer-customer, information provider-client, tradesman-customer, solicitor-client, travel agent-client and the like. In such relationships where one is the actor, the other the payer, a characterisation based on the incidents of the legal relationship itself loses utility. Some, but not all, of the above examples are characterised as fiduciary. However, in reaching this conclusion a new and variable set of factors takes on importance. The service provider class seems to mark the point of transition from a process which determines whether a relationship is fiduciary in law to one which determines whether it is fiduciary in fact, as here factual phenomena and more overt considerations of public policy enter the law's equation.

VI. CONTRACTS AND RELATIONSHIPS FIDUCIARY IN FACT

The issue here for a contracting party is not whether the contract itself creates a fiduciary relationship but whether the contract will be said to be one between parties to such a relationship, with its propriety in consequence to be tested by fiduciary law.[97] The topic is a large and important one which, for reasons of length, can only be dealt with selectively.

It has long been accepted that a duty of loyalty can arise ad hoc and this because in the actual circumstances of a relationship in which a contractual dealing occurs, the nature of one party's trust or confidence in the other, the corresponding power to influence or opportunity to deceive enjoyed by the other, are such as to warrant the imposition of a duty of

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95 For recent U.S. decisions see *C. Peppas Co. Inc.* v. *E. & J. Gallo Winery* 610 F Supp 662 (1985); *W.K.T.Distributing Co.* v. *Sharp Electronics Corp.* 746 F 2d 1333 (1984); *Rickel* v. *Schwinn Bicycle Co.* note 43 *supra*; *St Joseph Equipment* v. *Massey-Ferguson Inc.* 546 F Supp 1245 (1982); *Dunfee* v. *Baskin-Robbins Inc.*note 89 *supra; Power Motive Corp.* v. *Mannesmann Demag Corp.* 617 F Supp 1048 (1985); *Chmieleski* v. *City Products Corp.* 660 SW 2d 275 (1983). In Canada *Jirna Ltd* v. *Mister Donut of Canada Ltd* note 84 *supra.* In Australia see *Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra.*

96 See *e.g.* P.D. Finn "Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures", (1984) *AMPLA Yearbook* 160; see also *Noranda Australia Ltd* v. *Lachlan Resources N.L.* note 86 *supra*; *Australian Oil & Gas Corp. Ltd* note 46 *supra.*

97 See *e.g. Daly* v. *Sydney Stock Exchange Ltd* note 34 *supra.*

loyalty.[98] Here the fiduciary question is essentially factual in character. And here the rhetoric of trust, confidence, dependence, influence, ascendancy and the like comes into its own. It is not a difficult conception that one person should be obliged to show loyalty to another when that other, generally, or in some matter, in fact so relies upon that person as to place the effective protection and promotion of his interests in his hands or is invited by that other so to rely and does so. No less than in a formal trust relationship, if we entrust our interests to another person's care, we should be entitled to expect that that other will act in our interests - at least where that other knows or has reason to know[99] we are so doing and apparently accepts this.[100] The basal idea is simple enough. But its translation into effective fiduciary doctrine has been problematic for what is essentially a practical reason. In a very real sense we do on a day-to-day basis rely upon others, place our trust in others, for the advancement of our own interests. We can do this simply in our contracting, or in obtaining advice, information or the provision of a service. Here we can and do 'entrust' to others a role in the furtherance of our interests. But equally we have not said, and are unlikely to say, that such reliance relationships of themselves are fiduciary ones: again "something more is needed." The difficulty, however, lies in isolating that "something more" especially when, as here, one is supposedly concerned with factual phenomena in relationships - trust, influence and the like. My trust in a motor vehicle mechanic may, in fact, greatly exceed my trust in a lawyer yet only the latter is likely to be found to be a fiduciary. At the margins public policy is a potent element in the matter.

Though the raw materials of a fiduciary finding here are a trust and confidence reposed, a dependence or reliance conceded, or an ascendancy or influence acquired, the important matter is the character to be attributed to the role the alleged fiduciary has, or should be taken as having,[101] in the circumstances of the relationship. It must so implicate that person in the conduct of the other's affairs or so align him with the protection and promotion of that other's interests (or their joint interest) that "foundation"[102] exists for the fiduciary expectation: it must be such as could properly entitle that other to expect that he will act in that other's interests (or their joint interests) - at least to the extent that he is practically enabled to affect those interests by action, recommendation, advice or otherwise.[103]

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98 See *e.g. Union Fidelity Trustee Co. of Australia Ltd* v. *Gibson* [1971] VR 573; *Hayward* v. *Bank of Nova Scotia* (1985) 19 DLR (4th) 758; *O'Sullivan* v. *Management Agency & Music Ltd* [1985] QB 428; *Zeilenga* v. *Stelle Industries Inc.* 367 NE 2d 1347 (1977).

99 *Cf. Royal Bank of Canada* v. *Aleman* (1988) 57 Alta LR (2d) 341.

100 See *e.g. Croce* v. *Kurnit* 565 F Supp 884 (1982).

101 *Ibid.*

102 *Cf. Burwell* v. *South Carolina National Bank* 340 SE 2d 786, 790 (1986).

103 *Consolidated Oil & Gas Inc.* v. *Ryan* 250 F Supp 600, 604 (1966); *City of Harrisburg* v. *Bradford Trust Co.* 621 F Supp 463, 473 (1985).

Where the phenomena of trust and confidence, of dependency and reliance, or of ascendancy and influence are of importance in this is in the light they throw on the role which in the circumstances, one party has assumed, or should be taken as having assumed, in the relationship. First, it is obviously not enough simply to show that some degree of personal trust and confidence are present: these are commonly placed in the skill, integrity, fairness and honesty of the other party to an ordinary contractual dealing.[104] Secondly, it is obviously not enough to show that there is dependence or reliance by one party on the other: these are characteristic of all relationships where performance of some sort is required of another. Thirdly, it is obviously not enough to show merely an ascendant position or a capacity to influence: parties commonly are in unequal positions, and in many instances in contractual dealings representations are made as of course with the object of, and in fact, influencing the other party. Elements of all of the above may be present in a relationship - and consumer transactions can illustrate this - without it being in any way fiduciary. What is necessary to be shown is that the nature of the trust and confidence given or invited, the dependence or reliance conceded, or the ascendancy and influence acquired are of such nature in the circumstances as to warrant or require a fiduciary responsibility in the trusted *etc.* party. What in the end one is seeking to identify is a relationship in which one party has in fact relaxed, or is justified in believing he can relax, his self-interested vigilance or independent judgment because, in the circumstances of the relationship, he reasonably believes or is entitled to assume that the other is acting or will act in his (or in their joint) interests. The trust reposed or invited, the ascendancy acquired, *etc.* must in the circumstances be of such a nature as to be capable of sustaining this conclusion.

In the contracting context the cases must be rare indeed in which a fiduciary relationship will arise so as to regulate the contract of *strangers* who come together for the purpose of a dealing which does not itself create a fiduciary relationship. Whatever may transpire in the negotiating process, truly exceptional circumstances would need to exist before one party could properly say that, despite the other's manifest self-interest in the matter, that other nonetheless was obliged to act in his interests in the process leading to contract. Save in one distinctive case, a fiduciary finding virtually presupposes some antecedent association between the parties which itself attracts the duty of loyalty to their contracting - an advisory[105] or tutelary relationship,[106] a managing or directing role

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104 *E.g. Royal* v. *Bland Properties Inc.* 333 SE 2d 145, 147 (1985).

105 *E.g. Daly* v. *Sydney Stock Exchange Ltd* note 34 *supra; O'Sullivan* v. *Management Agency & Music Ltd* note 98 *supra; Hayward* v. *Bank of Nova Scotia* (1985) 45 OR (2d) 542; (1985) 51 OR (2d) 193.

106 *E.g. Tufton* v. *Sperni* [1952] 2 TLR 516.

assumed in the affairs of the other,[107] *etc.* The distinctive case is where the parties, even though strangers, are negotiating for a contract which itself creates a fiduciary relationship, for example, a partnership of a fiduciary joint venture.[108] Here the relationship negotiated for is itself seen as contriving such trust as one party is entitled to have in the conduct of the other in advance of formal agreement. While allowing for self-interest in the formulation of and commitment to the bargain, the courts have been prepared to intrude fiduciary law into the pre-contract arena to prevent deceptive conduct[109] or the usurption of the business opportunity the subject of the negotiations.[110]

The sphere of contracting in which the ad hoc (or 'factual') fiduciary question has been most controversial in modern times is that of on-going consumer relationships and particularly that of banker and customer, borrower or guarantor. The banking case law warrants brief mention.

Judicial statements are many that the banker-consumer or banker-borrower relationship is not fiduciary *per se*; that banks have interests of their own to serve in such relationships;[111] that banks "are not charitable institutions".[112] But alongside this is a growing acknowledgement that the nature of banking services to borrowers and customers has undergone considerable transformation over time;[113] that financial transactions can have a complexity which can place banks in a position of superior knowledge and understanding;[114] and that banks perform "vital public services" in modern society.[115] In combination these factors can attract significant reliance upon banks in their client dealings[116] - and a reliance often invited by banks themselves. In some United States jurisdictions this perception of the relationship has led to its being seen as having a latent fiduciary potential[117] - a potential which can be actualised, exceptionally, by an acknowledged disparity in knowledge

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107 *E.g. Coleman* v. *Myers* [1977] 2 NZLR 225; *Union Fidelity Trustee Co.* v. *Gibson* [1971] VR 573; *Deist* v. *Wachholz* 678 P 2d 188 (1984).

108 All joint ventures are not such in Australian law: see *United Dominions Corp. Ltd* v. *Brian Pty Ltd* note 25 *supra.*

109 *E.g. ibid.*

110 *E.g. Fraser Edmiston Pty Ltd* v. *A.G.T. (Qld) Pty Ltd* note 80 *supra; Marr* v. *Arabco Traders Ltd,* unreported, High Court of New Zealand, Tompkins J., 22 May 1987; *Cf. Lac Minerals Ltd* v. *International Corona Resources Ltd,* note 25 *supra.*

111 For an emphatic assertion of this see *Sternberg* v. *Northwestern National Bank of Rochester* 238 W 2d 218, 219 (1976).

112 *National Westminster Bank PLC* v. *Morgan* [1983] 3 All ER 85, 91.

113 See *e.g. Woods* v. *Martins Bank Ltd* [1959] 1 QB 55, 70; *Stewart* v. *Phoenix National Bank* 64 P 2d 101, 106 (1937) - a decision widely cited in U.S. jurisdictions: see K.W. Curtis, "The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationship" (1987) 20 *Loyola L Rev* 795.

114 See *e.g. Tokarz* v. *Frontier Federal Savings & Loan Assoc.* 656 P 2d 1089, 1092 (1983).

115 *Cf. Commercial Cotton Co. Inc.* v. *United California Bank* 209 Cal Rptr 551, 554 (1985).

116 See *e.g. Barrett* v. *Bank of America, N.T. and S.A.* 229 Cal Rptr 16, 20-1 (1986).

117 See *e.g. Tokarz* v. *Frontier Federal Savings & Loan Assoc.* note 114 *supra,* 1092; *Barrett* v. *Bank of America, N.T. and S.A., ibid.*

and information,[118] or, more regularly, by a known reliance on the bank for counselling, assistance or information.[119] A similar tendency, though less openly expressed, was apparent in England until terminated abruptly by the House of Lords in *National Westminster Bank PLC* v. *Morgan.*[120] Australian case law by way of contrast, while demonstrating its own preparedness to exact a heightened standard of fair dealing from banks, has abjured the fiduciary in favour of an approach based on unconscionable dealing.[121] In this it has shown a more acute appreciation of the issues and interests involved in dealings with banks. With banks having, and being expected to have a manifest self-interest in their dealings with customers in the provision of financial services, it is difficult to see, save in quite exceptional cases,[122] that customers *etc.* could reasonably be entitled to expect anything other than fair dealing and reasonable care and skill from the bank. In the writer's view the English fiduciary decision, *Lloyds Bank Ltd* v. *Bundy*[123] - the source of much subsequent doctrinal confusion in English law[124] - is only supportable on an unconscionability basis.

VII. CONCLUSION

There are three reasons why one may wish to call a contracting party a fiduciary: first, because on grounds that are orthodox, a fiduciary relationship is there (whether created by the contract or otherwise); secondly, because conduct has occurred in contract formation or performance which excites disapproval but for which there is no other obvious doctrine available for its challenge; and thirdly, because a bountiful remedy system has a capacity to provide relief which registers more accurately than ordinary contract remedies the level of disapproval and sanction appropriate to the actual wrongdoing involved. Examples of all three are clearly in evidence in recent case law, though the latter two far less so in Australian law than elsewhere.

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118 See *e.g. First National Bank in Lenox* v. *Brown* 181 NW 2d 178 (1970) - an extreme case; and see the formulations of the law in *Denison State Bank* v. *Madeira* 640 P 2d 1235 (1982). In Commonwealth countries this factor is much more suggestive of a claim based on the unconscionability principle.

119 *Stewart* v. *Phoenix National Bank* note 113 *supra; Klein* v. *First Edina National Bank* 196 NW 2d 619 (1972); *Deist* v. *Wachholz* 678 P 2d 188 (1984); *Atlantic National Bank of Florida* v. *Vest* 480 So 2d 1328, 1333 (1986); *Barrett* v *Bank of America, N.T. and S.A.* note 116 *supra,* 20-1.

120 Note 30 *supra.*

121 *E.g. Commercial Bank of Australia Ltd* v. *Amadio* note 20 *supra*; *National Australia Bank Ltd* v. *Noble* note 20 *supra*; *Westpac Banking Corp. Ltd* v. *Clemesha,* unreported, Supreme Court of New South Wales, Cole J., 29 July 1988.

122 See Finn, "The Fiduciary Principle", note 11 *supra,* 51-2.

123 Note 59 *supra.*

124 See *National Westminster Bank PLC* v. *Morgan* note 30 *supra*; *Bank of Credit & Commerce International S.A.* v. *Aboody* [1989] 2 WLR 759. Canada also was not spared its havoc for some time.

The burden of this article has, in the main, been with the first - with what we should regard as the orthodox province of the fiduciary principle. This gives to it a place of some importance in regulating contractual activity but in distinctive though by no means uncommon circumstances. It denies its importance in the shaping and progressive evolution of the law of contract itself. Both of these outcomes are products first, of the type of relationship presupposed by the fiduciary principle and secondly, of the exacting standard of conduct it insists upon. That type of relationship is not characteristic of that which, in general, is to be found between contracting parties; that standard of conduct is not that which, in general, we would wish to demand of contracting parties. But alter this relationship or this standard, and the way is opened to the other two reasons for 'fiduciary findings' noted above - and for fiduciary law to be used to redress perceived deficiencies in existing contract doctrine.

Such alteration is, in the writer's view, to be resisted. It is at best misguided to distort without good reason one reasonably intelligible and coherent body of law to remedy what is wanting in another.

If it is felt necessary further to sanction unfair conduct in contract formation and performance, other means more specifically focussed on contractual dealings and embodying conduct standards more appropriate to the contractual enterprise exist in or are nascent in our law. For Australian purposes, the unconscionable dealings jurisdiction and the provisions of the Trade Practices Act 1974 (Cth) have gone some distance in this already at least in relation to contract formation. Contract performance and enforcement, is less well served. The emerging unconscionability principle may be found to have some vitality here,[125] and, inevitably, consideration will be given to the appropriateness in one guise or another of a requirement of good faith and fair dealing in contract performance. The fiduciary principle is a poor substitute for this last.

If it is felt necessary to be more flexible in the remedies we are prepared to visit on contractual wrongdoing, that surely is a matter which should be addressed directly not obliquely - and addressed in the light of the interests it is considered contract remedies should protect. Perhaps the judgment of Deane J. in *Hospital Products Ltd* v. *United States Surgical Corp.*[126] foreshadows this.

In the end one can only make the obvious comment. Fiduciary law is concerned with an imposed standard of conduct. Its standard is not one suited to the generality of contractual relationships and dealings.

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125 See *Stern* v. *McArthur* (1988) 62 ALJR 588; F.M.B. Reynolds, "Discharge by Breach as a Remedy", in P.D. Finn (ed.), *Essays on Contract* (1987).

126 Note 46 *supra*

TAB 8

Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisors: *Hodgkinson* v. *Simms*.

Lionel Smith*

Fiduciary law is developing rapidly in Canada. The most visible part of that development is in the form of the extension of the fiduciary relation to new situations. A story is told that the Chief Justice of Australia once remarked to Dickson C.J. that he understood that in Canada there were only three classes of people: those who are fiduciaries; those who are about to become fiduciaries; and judges.[1] What is less visible in the development of fiduciary law is the formulation of a test for deciding whether or not a person owes fiduciary obligations to another. Particularly vexing is the case in which such obligations are alleged to arise in commercial context, between parties with equal bargaining power. In *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*,[2] the Supreme Court of Canada divided three to two on whether a fiduciary relationship arose between two corporations involved in an abortive business venture. In *Hodginkson* v. *Simms*,[3] the Court returned to this difficult issue. It must be said it remains unresolved. The Court divided four to three; as in *Lac Minerals*, the lead judgments were written by La Forest J. in favour of the existence of a fiduciary relationship, and by Sopinka J. in opposition to one (although in *Hodgkinson*, Sopinka J. delivered a joint judgment with McLachlin J.). The difference was that this time La Forest J. carried the majority. The result, however, is that it is no easier to determine who owes fiduciary duties to whom than it was before *Hodgkinson* was handed down.

I. *The Facts*

The plaintiff Hodgkinson was a stockbroker who switched jobs in 1979 and began earning substantially more money than he had in the past. He began to think about how he could invest his income in ways that would minimize his tax liabilities. He contacted the defendant Simms, who was a partner in a firm of accountants. Simms specialized in analyzing tax shelters, and in particular multiple-unit residential buildings, or MURBs. Hodgkinson was not someone

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[1] This story is told by E.A. Cherniak, Q.C., in "Comment on Paper by Jeffrey G. Macintosh", in *Special Lectures of the Law Society of Upper Canada 1990 — Fiduciary Duties* (Toronto: The Society, 1991) at 275. The Chief Justice of Australia is not identified in the story, and since it is undated the identity of Dickson's C.J. possibly apocryphal interlocutor remains a mystery. Parenthetically, I am unaware of a case in which it was argued that a judge owed fiduciary duties to litigants; but it probably will not be long coming. Thus there might be only two classes.

[2] [1989] 2 S.C.R. 574, discussed in depth by D.W.M. Waters, "*Lac Minerals Ltd.* v. *International Corona Resources Ltd.*" (1990) 69 Can. Bar Rev. 455.

[3] [1994] 3 S.C.R. 377.

who lacked any knowledge of income tax or investment principles. He did, however, go to Simms for his expert opinions on tax-sheltered investments, and he usually (though not always) took Simms's advice. There was uncontradicted evidence that Simms held himself out as providing independent advice. Simms advised Hodgkinson to invest in certain MURB developments, and this advice was taken. It was found as a fact that it was good advice, in the sense that at the time it was given it was suitable to Hodgkinson's needs in terms of tax savings and in terms of the relationship between risk and expected return.

There was however a significant problem with the advice Simms gave. He was also acting for the developers of the MURB projects in question. He advised them on the structure of the transactions, and moreover he earned bonuses from them when he procured investment by others in the projects. He did not tell Hodgkinson of this, but went ahead and took his commissions. In 1981, there was an unforeseen drop in the real estate market, and the value of Hodgkinson's investment fell precipitately. He brought this action against Simms, alleging breach of contract, breach of fiduciary duty and negligence. His goal was to recover the money he had lost on his investments. The claim in negligence was dismissed and this decision was not appealed.

The other claims were allowed by Prowse J. at trial.[4] She assessed the damages for breach of fiduciary duty on the basis that they should put the plaintiff in the position he would have been in had he never made the investments. Alternatively, she would have allowed the contract claim as well, on the basis that Simms's non-disclosure was a breach of an implied term. She would have assessed contract damages in the same amount as those for breach of fiduciary duty. The Court of Appeal allowed the appeal and held that there was no fiduciary relationship between the parties.[5] It also reduced the damages for breach of contract, holding that Hodgkinson could only recover the fees which Simms had collected from the developers.[6] Hodgkinson appealed.

II. *The Decision on Fiduciary Obligations*

Briefly, the majority of four judges decided that Simms owed a fiduciary obligation to Hodgkinson; that he had breached it; and that he was liable to make good Hodgkinson's losses. In *obiter dicta,* the majority also concluded that Simms was liable in the same measure for breach of contract. The three

[4] (1989), 43 B.C.L.R. 122 (S.C.).

[5] (1992), 65 B.C.L.R. 264 (C.A.).

[6] This was done on the basis that the law assumes that the value of the investment was less than the price paid, by the amount of the secret commission received. This is a rather fictional way of attempting to force the award into a compensatory framework. It would be easier to say that the award was not one of compensation but one of disgorgement: it was measured not by the plaintiff's loss but by the defendant's gain. See L.D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and `Efficient Breach'" (1994) 24 Can. Bus. L.J. 121.

dissenting judges said that Simms did not owe a fiduciary obligation to Hodgkinson; and, that Hodgkinson's loss was not recoverable in breach of contract. On the surface, the difference between the judgments essentially comes down to the concept of *vulnerability*. The dissenting judges would have it that vulnerability is essential to the presence of a fiduciary relationship.[7] The majority held that vulnerability can be an important indicator of a fiduciary relationship, but it is not essential.

The objective of the more detailed discussion of the judgments which follows is to determine the extent to which they set out usable tests for determining whether or not a fiduciary relationship exists between two parties. An attempt to formulate a test can fail in a number of ways. It might be thought to be poorly targeted, in that it is either too wide or too narrow according to a particular commentator. Most commentators would probably agree that a test which allowed fiduciary obligations to be imposed unilaterally by the beneficiary of those obligations would be too wide. A test can also fail for logical reasons. For example, it can be question-begging: it turns on whether or not the relationship between the parties has some feature, when in fact it is the function of the test to tell us whether that feature is present.

While the issue of the measure of damages will be addressed briefly in the next section, this note is primarily concerned with the fiduciary question.

A. La Forest J.

La Forest J., writing for himself and L'Heureux-Dubé and Gonthier JJ., began by distinguishing claims based on fiduciary obligations from other types of claims, such as those based on unconscionability or undue influence. The fiduciary principle, he said,[8] "monitors the abuse of a loyalty reposed." After this introduction, La Forest J. delved more deeply into the nature of fiduciary law. He cited the now-familiar test in the judgment of Wilson J. in *Frame* v. *Smith*,[9] which states that obligations which are fiduciary have three characteristics: the fiduciary has some discretion or power; that discretion or power can be exercised unilaterally to affect the beneficiary's legal or practical interests; and the beneficiary is peculiarly vulnerable to the exercise of the discretion or power. La Forest J. said that these "guidelines constitute *indicia* that help recognize a fiduciary relationship rather than ingredients which define it."[10]

He went on to reiterate his own useful categorization, first set out in *Lac Minerals*,[11] of the ways in which the term "fiduciary" has been used. The first is to describe the recognized categories of fiduciary relationships, such as

[7] At least one which arises outside of the traditional categories such as solicitor-client. This point is discussed below.

[8] *Supra* footnote 3 at 406.

[9] [1987] 2 S.C.R. 99 at 136.

[10] *Supra* footnote 3 at 409.

[11] *Supra* footnote 2.

trustee-beneficiary, where, he said, there is a rebuttable presumption that there is a fiduciary duty.[12] At the risk of importing the luggage of another theoretical debate, these will be called "institutional fiduciary relationships" in this note. The second is to describe situations where a fiduciary relationship arises on the facts. These will be called "fact-based fiduciary relationships" herein. The third usage of "fiduciary," properly deprecated by La Forest J., is the instrumental one: a relationship is described as fiduciary solely to invoke the consequences which flow from the existence of such a relationship. Fact-based fiduciary relationships were relevant here, and in what is arguably the crux of the entire judgment, La Forest J. said:[13] "Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."

The critical phrase is "mutual understanding." Fact-based fiduciary relationships must arise out of some arrangement between the fiduciary and the beneficiary. The essence of the fiduciary duty is that the fiduciary is not allowed to pursue his or her self-interest; he or she is barred from competing in any sense with the beneficiary. That is the content of the duty. The more difficult issue is how the duty arises. The suggestion here is that the understanding as to how the fiduciary will behave must be *mutual.* The fiduciary must *agree* to act solely on behalf of the other party. The fiduciary must *relinquish* self-interest; that is an act which the fiduciary does, not an act which is done to the fiduciary. This was put slightly differently by Austin Scott, who said that "a fiduciary is a person who *undertakes* to act in the interest of another person."[14]

Either way, the important point is that a person cannot become a fiduciary unless he or she wills it.[15] This might seem obvious, but it is sometimes overlooked. It can be overlooked through the formulation of Wilson J. from *Frame* v. *Smith.*[16] If all that is required is that one person is vulnerable to another, and the other has a power which can be exercised unilaterally to affect the first person's interests, then the Chief Justice of Australia's remark, quoted earlier, begins to look less whimsical. A guarantor of a debt is peculiarly vulnerable to the primary debtor's decision not to pay the debt, and the primary debtor has a power (which can be exercised unilaterally) to affect seriously the guarantor's legal and practical interests. Does a debtor owe fiduciary obligations to her guarantor? Similarly, a pedestrian on a crosswalk is peculiarly vulnerable to an approaching motorist, and the motorist has a power (which can be exercised

[12] This is arguably not well put. It might be more accurate to say that in these situations a fiduciary relationship arises automatically, but it is subject to modification by the parties. This point is discussed below.

[13] *Supra* footnote 3 at 409-410.

[14] "The Fiduciary Principle" (1949) 37 Cal. L.R. 539 at 540 (emphasis added). See also *Guerin* v. *Canada,* [1984] 2 S.C.R. 335 at 384, where Dickson C.J. stated that the relinquishment of self-interest can come about by statute, agreement or unilateral undertaking.

[15] In the institutional fiduciary relationships, he or she must willingly occupy the office which, as a matter of law, attracts the fiduciary obligations. The relationship between institutional and fact-based fiduciary relationships will be discussed briefly below.

[16] *Supra* footnote 9.

unilaterally) to affect seriously the pedestrian's practical interests. Is the motorist a fiduciary?

These are not fanciful questions. The judgment of La Forest J. continues in terms which could have the effect of reducing or eliminating the need for any arrangement or undertaking by the fiduciary. He makes passing reference to the "transfer of encumbered power" theory of J.C. Shepherd,[17] which again imports an act of relinquishment of self-interest by the fiduciary. There then follows a curious segue, in which fiduciary relationships are said to be "a species of a broader family of relationships that may be termed `power-dependency' relationships."[18] That broader category "gives rise to a variety of often overlapping duties."[19] And when La Forest J. returns from the broader category of power-dependency relationships to the sub-species of fiduciary relationships, the test for the presence of the latter has changed, subtly but crucially:[20]

> Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.

Thus there is a shift from the earlier requirement that a person must relinquish their self-interest in order to become a fiduciary, to the test which was in the minority in Lac Minerals: that a fiduciary relationship can arise out of reasonable expectations. Moreover, it does so apparently in common with other concepts such as the duty to take reasonable care in tort law. The motorist as fiduciary no longer seems ludicrous. What has been removed in the step to reasonable expectations is an unequivocal requirement that the fiduciary relinquish his or her self-interest. And yet La Forest J. was at pains, at the beginning of his judgment, to distinguish the very concepts which he later sought to unify. The way in which he distinguished the fiduciary relationship, in particular, was to say that the fiduciary principle "monitors the abuse of a loyalty reposed."[21] That at least excludes the motorist-pedestrian relationship, unless we say that pedestrians repose loyalty in motorists generally. But, perhaps foreshadowing the goal of arriving at the test of reasonable expectations, the idea of loyalty reposed also does not necessarily impose a requirement that the fiduciary relinquish his or her self-interest. Loyalty can be reposed unilaterally.

La Forest J. went on to reject as irrelevant any requirement that there be unilateral power held by the fiduciary. He also rejected any independent requirement that there be vulnerability. Vulnerability arose, he said, out of the very expectations which created the fiduciary relationship. Considering a range

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[17] *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 96-110.

[18] *Supra* footnote 3 at 411.

[19] *Ibid.* at 412.

[20] *Ibid.*

[21] *Ibid.* at 406.

of authorities, he concluded that a decision that a professional independent advisor owed a fiduciary duty to his advisee would not represent any addition to the law. It was not an arm's-length transaction, but one in which there was reliance by the advisee:[22]

> In all of these cases, as here, the ultimate discretion or power in the disposition of funds remained with the beneficiary. In addition, where reliance on the investment advice is found, a fiduciary duty has been affirmed without regard to the level of sophistication of the client, or the client's ultimate discretion to accept or reject the professional's advice .... Rather, the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact.

The focus shifts, then, from reasonable expectations to reliance, with some role for "the confidential and trust-like nature" of a relationship. That is what made this relationship so different from the one in *Lac Minerals*. A client of a professional advisor relies on the advisor to give independent advice; the relationship is characterized by trust, not by self-interest. There then followed another shift, as La Forest J. went on to examine certain policy reasons for holding a financial advisor to be a fiduciary. He said that, for reasons of economic efficiency or to preserve public confidence in certain activities, the standard imposed must be fiduciary. This was reinforced by the code of professional conduct for accountants, which of course precludes secret commissions.

On the facts, he found that there was a transfer of power from Hodgkinson to Simms. He also found that Hodgkinson relied on Simms, and that Simms cultivated this reliance. He rejected as irrelevant the fact that Hodgkinson had made certain high-risk investments on his own, without Simms's advice. On these bases, he affirmed the trial judge's decision that Simms owed fiduciary duties to Hodgkinson.

B. Iacobucci J.

Iacobucci J. agreed with the conclusions of La Forest J. In a one-paragraph judgment, he said:[23] "Although I agree with much of my colleague's excellent reasons, I prefer to treat *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*[24] by simply distinguishing that case from the present one."

The meaning of this Delphic pronouncement is none too clear. The dissenting judgment of Sopinka J. and McLachlin JJ. is based on the idea that *Lac Minerals* is a controlling precedent which restricts the intrusion of fiduciary law into commercial relationships. La Forest's J. judgment is based on the argument that *Lac Minerals* is distinguishable for various reasons. What exactly did Iacobucci

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[22] *Ibid.* at 418-419.

[23] *Ibid.* at 480.

[24] *Supra* footnote 2.

J. mean by "simply" distinguishing the most relevant precedent? On what basis did he distinguish it? Presumably not the same basis as La Forest J., or he could simply have concurred.

C. Sopinka and McLachlin JJ.

Sopinka and McLachlin JJ. gave a joint judgment, with which Major J. concurred. They agreed that there are institutional and fact-based fiduciary relationships. Citing the majority judgment of Sopinka J. in *Lac Minerals*, though, they said that a fact-based fiduciary relationship cannot arise unless the beneficiary is vulnerable to the alleged fiduciary.

They went on to say that even where there is an institutional fiduciary relationship, not all aspects of the relationship between the parties are necessarily encumbered by fiduciary obligations. Citing Southin J. in *Girardet* v. *Crease & Co.*,[25] they said[26] that "not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation":[27]

> [T]he cases suggest that the distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation.

This recalls Shepherd's theory of the transfer of encumbered power. The requirement that the encumbered transfer be with "the knowledge of both parties" imports Scott's requirement that the fiduciary relinquishes self-interest, and prevents fiduciary obligations from arising by the unilateral act of the beneficiary. The dissenting judges went on to suggest that the concept of vulnerability encompasses all three parts of the *Frame* v. *Smith*[28] test:[29]

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[25] (1987), 11 B.C.L.R. (2d) 361 (S.C.).

[26] *Supra* footnote 3 at 464.

[27] *Ibid.* at 466.

[28] *Supra* footnote 9.

[29] *Supra* footnote 3 at 467. Probably in response to this passage, La Forest J. said near the beginning of his judgment, at 405:

> From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species [*sic*] of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicia [*sic*] of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

In fact this passage fails to answer the dissenters' argument. They argue that vulnerability is a *necessary* condition for a fact-based fiduciary relationship. La Forest J. shows that vulnerability does not always lead to a fiduciary relationship; but that only proves that vulnerability is not a *sufficient* condition for a fiduciary relationship.

> This then is the hallmark to which a court looks in determining whether a fiduciary relationship exists; is one party dependent upon or in the power of the other. In determining if this is the case, the court looks to the characteristics referred to by Wilson J. in *Frame* v. *Smith*.

The dissenting judges thought that the majority's attempts to distinguish *Lac Minerals* were unsuccessful. They saw no reason to distinguish a relationship of professional advice from commercial relationships generally. Further, they agreed with the majority's view that policy favours the protection of certain relationships by the imposition of fiduciary obligations; but they denied that the giving of professional advice was such a relationship.

Turning to the facts, they said that the requisite degree of vulnerability was not present. Hodgkinson did not cede total power to Simms; rather, he made his own decision on each investment which Simms recommended.

D. *Analysis*

It would seem uncontroversial that not all obligations are fiduciary obligations. The challenge is to determine which ones are. Attempting to analyze this case doctrinally is extremely difficult, and, it will be argued, reveals underlying uncertainties about the nature and role of equitable jurisdiction in general, and possibly of fiduciary law in particular.

The majority judgment reveals a bewildering variety of theoretical bases for the imposition of fiduciary duties. To begin, there is a discussion of unjustified advantage taking, and of the relationship as one of trust and confidence rather than one of self-interest. Both of those arguably beg the question and so will not serve as tests for the imposition of fiduciary relationships. If there is no fiduciary obligation, then the more powerful party is free to use his or her advantages in the relationship, and to pursue his or her self-interest. If there is a fiduciary duty, then the fiduciary cannot use his or her advantages in the relationship, which becomes one of trust rather than one of self-interest.

The policy arguments are also arguably circular.[30] We can explain the imposition of fiduciary obligations on the basis that the credibility of some institutions needs to be protected in the public eye. That, however, does not help us to decide which ones need protecting. Similarly, it is easy to say that it is economically efficient to require parties to relinquish their self-interest in certain circumstances; it is harder to prove it. The Coase Theorem[31] tells us that in the absence of transaction costs, the efficient result will be reached regardless of the legal regime we impose. In order for it to matter whether someone is a fiduciary or not, from an efficiency standpoint, there must be transaction costs which entail that one legal regime is more efficient than another. It is therefore impossible

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[30] This is possibly illustrated by the fact that the dissenting judges agreed with the policy arguments put forward by La Forest J.: *supra* footnote 3 at 469-470.

[31] R.H. Coase, "The Problem of Social Cost" (1960) 3 J. L. & Econ. 1.

to assess the situation in terms of economic efficiency without detailed empirical evidence regarding transaction costs.[32] One can say that some skills are very costly to master, or that some functions require the entrustment of property, and so it is important to render people fiduciaries in order to encourage the purchase of these skills or the performance of the function.[33] But how do we know that it would not be more efficient to require clients to bargain for the relinquishment of self-interest? It would clearly be more difficult and expensive for clients, but that does not mean that it would be less efficient in the technical sense used in economic analysis.[34]

The judgment also refers to power-dependency relationships, to reasonable expectations, and to reliance by the weaker party. These ideas are not question-begging, but could be too wide. La Forest J. is clear that not all power-dependency relationships are fiduciary. The example of the motorist and the pedestrian illustrates this. The focus in the judgment (although even this is not wholly clear) seems to be on reasonable expectations, and, to a lesser extent, on reliance. The difficulty with these as bases for imposing fiduciary obligations is not that they are question-begging, but rather that they have the potential to permit such obligations to be imposed unilaterally. What if someone relies on me to act in their interest, and expects me to do so, without my knowledge or consent? That cannot make me a fiduciary.

The response must be that such expectations are not reasonable. Similarly, we could say that only reasonable reliance will generate a fiduciary relationship. But then we must consider what will be reasonable. It is strongly arguable that the only expectations or reliance which are reasonable are those induced by the stronger party.[35] That appears to be consistent with two other bases which appear in the judgment. The first is Shepherd's theory of the transfer of encumbered power. Under that theory, the transferee of the power must have notice of the encumbrance in order to make them a fiduciary. The second, which him or her says arguably the same thing in a different way his or her, is the requirement of an undertaking: the fiduciary must relinquish their self-interest, expressly or by implication. It cannot be relinquished for his or her. As La Forest J. said:[36] "Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."

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[32] For the same argument in other contexts, see I.R. Macneil, "Efficient Breach of Contract: Circles in the Sky" (1982) 68 Va. L.R. 947, and S. Walt and E.L. Sherwin, "Contribution Arguments in Commercial Law" (1993) 42 Emory L.J. 897 at 932-942.

[33] See *supra* footnote 3 at 420-421, 469-470.

[34] This leaves aside the larger question of whether economic efficiency is a value to be pursued. See R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard Univ. Press, 1985) ch. 12.

[35] In *Re Goldcorp Exchange Ltd.*, [1995] A.C. 74, [1994] 3 W.L.R. 199 (P.C., N.Z.), Lord Mustill rejected an argument that there was a fiduciary relationship in a commercial context, saying (at 98 (A.C.), 216 (W.L.R.)) "high expectations do not necessarily lead to equitable remedies."

[36] At 409-410.

So on one view, the majority simply affirms one of the classic theories of fiduciary obligation, albeit in a roundabout way. The other alternative is that expectations or reliance can be reasonable, so as to generate fiduciary obligations, where there is not a relinquishment of self-interest by the stronger party. That would open the door to a much larger scope for fiduciary obligations. But it is difficult to know whether that is what the majority intended, since so little is said about what might make expectations reasonable.[37]

The dissenting judges focus on vulnerability. The argument is that vulnerability is a necessary condition for the imposition of fiduciary obligations. It does not appear to be suggested that vulnerability is *sufficient* for the imposition of such obligations;[38] so, the motorist does not owe fiduciary duties to the pedestrian. It follows that something else is required. As mentioned above, the dissenting judgment is also consistent with the classic idea that there must be a relinquishment of self-interest by the fiduciary. The judges said that "[i]t is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation."[39]

Possibly the differences between the judges are far narrower than might appear,[40] but that cannot be determined until more is known about the generation of fiduciary obligations by "reasonable expectations." If, "reasonable" means "induced," then the judges would be in agreement as suggested above, that a person cannot become a fiduciary unwillingly, but must deliberately (albeit possibly impliedly and unreflectingly) relinquish his or her self-interest. Although it takes some digging through this lengthy case, it is possible to extract the following two passages, both of which have appeared above.[41]

> La Forest J.: Thus, outside the established categories, what is required is evidence of a *mutual* understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.
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> Sopinka and McLachlin JJ.: [T]he cases suggest that the distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this *mutual* conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation.

The remaining differences between them are as to "vulnerability," but even that difference is arguably smaller than it looks. For the dissenting judges, vulnerability is essential. Presumably this is because if it is absent, it follows that there has

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[37] It is noteworthy that in *M. (K.)* v. *M. (H.)*, [1992] 3 S.C.R. 6 at 63, La Forest J. wrote for the majority: "I would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."

[38] See *supra* footnote 29.

[39] *Supra* footnote 3 at 466.

[40] It is true that the tone of the judgments suggests that the judges themselves would not agree with this view. See also Waters, *supra* footnote 2 at 473, who came to a similar conclusion with respect to *Lac Minerals*.

[41] *Supra* footnote 3 at 409-410, 466 (emphasis added).

not been a transfer of a sufficient amount of power to generate a fiduciary obligation. For the majority, if there is a power-dependency relationship, vulnerability is *ipso facto* present; it arises out of the reasonable expectations of the weaker party. In other words, it arises out of the transfer of power. But since a fiduciary relationship is a type of power-dependency relationship, it follows that a transfer of power is not sufficient to create a fiduciary relationship unless there is a transfer of enough power to create a power-dependency relationship.

All of the judges are saying that there must be a transfer of a certain level of power. The dissenters test this by looking for vulnerability; the majority test it by requiring that there be a power-dependency relationship, and note that if this is so there is necessarily vulnerability. They are saying the same thing. It also seems that they agree that the fiduciary must undertake to act in the beneficiary's interests, or must relinquish his or her own self-interest.[42] The disagreement appears to be on the facts. That will often be the case here in this area of the law, because the transfer of power which allegedly gives rise to the fiduciary duty will generally not be formalized; and even if the transfer is formalized, the alleged undertaking to act in the beneficiary's interests might not be. Thus, there will be misunderstandings and litigation. Probably the biggest difference between the majority and the dissent is not as to the legal requirements for generating a fiduciary obligation, but as to how clearly it must be proved that the alleged fiduciary relinquished his or her self-interest.[43] Technically, the judges would agree that it must be proved on a balance of probabilities; but how a particular judge interprets that measure may vary.

The last point to be addressed here is the relationship between institutional fiduciary relationships and fact-based ones. It seems clear that there is some difference, so that a plaintiff alleging a fiduciary relationship in one of the traditional categories need not jump through the same hoops as one alleging a fact-based fiduciary relationship. But how are they different? One possibility would be that the *probanda* are the same, but the onus of proof is reversed.[44] That does not seem correct. The reason is that it would be too easy to disprove the *probanda,* leading to a conclusion that there was no fiduciary relationship. Consider a single director on a corporation's board of twenty directors. We can even assume that this director is on no committees and gets no respect from any other director. In these circumstances, the corporation is not vulnerable to the director, nor is there a power-dependency relationship. Nonetheless, even if those facts were proved by the director, he would (I suggest) be a fiduciary. Similarly, assume an impecunious sole practitioner engaged by a wealthy and well-informed client; we can make the client another lawyer to better illustrate

[42] The only caveat, as discussed above, is whether the majority envisions that reasonable expectations can generate fiduciary obligations in the absence of such an undertaking.

[43] The dissenting judges clearly seek a regime in which a person can say with some certainty whether or not he or she is a fiduciary. See the Conclusion below.

[44] This was arguably suggested by La Forest J., *supra* footnote 3 at 409, when he said that there is a rebuttable presumption of fiduciary duty in the traditional categories.

the point. It might well be that the client is totally independent of the sole practitioner, able to weigh all of the advice which the latter gives. It might be that the balance of power in the relationship lies in favour of the client. Nonetheless, the sole practitioner is surely a fiduciary.

The better view appears to be that the *probanda* which must be established to show a fact-based fiduciary relationship simply do not need to be proved in an institutional category. The fiduciary relationship arises automatically.[45] When the fiduciary enters into the institutional relationship, he or she relinquishes self-interest by operation of law, even if not voluntarily. If that is right, then there will sometimes be fiduciary relationships in institutional categories which could not be established as fact-based fiduciary relationships. The justification for this can be found in the idea that certain institutions and relationships require protection.[46] The creation of a new institutional category, then, would have to be based on communitarian reasoning: the benefit to society would have to outweigh the harm to individuals, now fiduciaries, who would not have been fiduciaries had the category not been created. A recent example where this calculus clearly justified a new institutional fiduciary relationship was the decision that parents owe fiduciary obligations to their children.[47]

III. *The Decision on Damages*

The last issue was that of damages. There is here a terminological problem which must be sorted out soon if the law of remedies is to develop properly. La Forest J. said:[48]

> It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred.

The problem is that the legal response LaForest J. is talking about is one that most commentators would call compensation, not restitution. Restitution has developed a specialized meaning, involving taking away defendants' gains, not making good plaintiffs' losses.[49] The Supreme Court of Canada has already

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[45] Of course, it can be modified, either by the contract which creates it (see e.g. *337965 B.C. Ltd.* v. *Tackama Forest Products Ltd.* (1992), 67 B.C.L.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused [1993] 1 S.C.R. v), or by the informed consent of the beneficiary.

[46] See e.g. P.D. Finn, "Conflicts of Interest and Professionals", in *Professional Responsibility* (Auckland, Legal Research Foundation Inc., 1987) cited by both the majority and the dissent.

[47] *M. (K.)* v. *M. (H.), supra* footnote 37. La Forest J., writing for the majority, said at 63: "In the present case, however, it is sufficient to say that being a parent comprises a unilateral undertaking that is fiduciary in nature." Rather than finding a presumed or fictional version of the undertaking which is required for fact-based fiduciary relationships, it is clearer to say that no undertaking is required for institutional fiduciary relationships.

[48] *Ibid.* at 440.

[49] See for example P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora: Ont.: Canada Law Book, 1990).

once used the word "restitution" to mean "compensation."[50] It is undeniable that there is a legal response of restitution, however, so if restitution and compensation mean the same thing, we are going to need another word for restitution. On the bright side, La Forest J. referred to the response chosen by the Court of Appeal, which was confined to taking away the defendant's wrongful gains, as "disgorgement." I have argued elsewhere[51] that remedial responses can be classified into three groups based on the goal of the response: if it is to make good the plaintiff's loss (regardless of any gain by the defendant), it is *compensation;* if it is to take away the defendant's gain (regardless of any loss suffered by the plaintiff), it is *disgorgement;* and if it is designed to reverse a transfer of wealth, taking away from the defendant a gain which corresponds to a loss suffered by the plaintiff, it is *restitution.* I will not rehearse that argument here.

That aside, the majority and dissenting judges diverged on two different issues, namely causation and remoteness. On the causation issue, the defendant's argument was that even with full disclosure, Hodgkinson would have made the same investments and suffered the same loss. This illustrates the problem which arises when we attempt to put a plaintiff in the position he or she "would have been in" had the duty in question not been breached: we generally do not know what would have happened had the duty not been breached. It is a counterfactual inquiry about a hypothetical world. The majority judges rejected the defendant's argument, citing *Rainbow Industrial Caterers Ltd.* v. *Canadian National Railway Co.*[52] That case supports a long-standing legal and equitable principle to the effect that one who wrongfully creates an evidential difficulty will have that difficulty resolved against him or her. Here the difficulty is the question of what the plaintiff would have done, had he been told of the defendant's pecuniary interest in the investments in question. Conceivably a defendant might be able to prove that the plaintiff would have entered into the contract in any event, but that was not the case here.

On causation, the defendant attempted to avoid liability by citing *Canson Enterprises Ltd.* v. *Boughton & Co.*,[53] in which the Court held that even in cases of compensation for breach of fiduciary duty, the courts must take a "common sense view of causation." The majority rejected this argument. In their view, *Canson* stands for the proposition that a court exercising equitable jurisdiction is not precluded from considering the limiting factors developed by the common law, namely remoteness, causation and intervening act. Courts should use those principles to ensure that an equitable remedy is not overly harsh in the light of

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[50] *Canson Enterprises Ltd.* v. *Boughton & Co.*, [1991] 3 S.C.R. 534, McLachlin J. See however Stevenson J., who said at 590: "This case is not one of profit making and restitutionary concepts do not fit."

[51] See L.D. Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672.

[52] [1991] 3 S.C.R. 3.

[53] *Supra* footnote 50 at 556.

the defendant's behaviour. In *Canson,* the fiduciary duty arose by operation of law, and the plaintiff's loss was caused by the wrongful act of a third party. Here, the duty arose on the facts, and "the duty [Simms] breached was directly related to the risk that materialized and in fact caused [Hodgkinson's] loss."[54]

This is a somewhat questionable use of language, since the risk that materialized was a market risk, which is inherent in every investment, and regarding which Simms made no non-disclosure or misrepresentation. The dissenting judges noted that the breach was connected to the plaintiff's loss "merely on a `but-for' basis."[55] There is, however, some authority for the notion that the moral culpability of the defendant can determine the applicability of limiting factors such as causation, remoteness and intervening act;[56] and as La Forest J. noted, a wider recovery in more culpable breaches can perhaps be justified as a deterrent.[57]

The majority judges disagreed with the older English case of *Waddell* v. *Blockey,*[58] in which on similar facts the Court of Appeal denied the plaintiff recovery for his market loss on an investment induced by fraud. Finally, they noted that even if the case had been decided solely as a contract case, they would have allowed the plaintiff to recover his full market loss. The dissenting judges, having held that there was no fiduciary duty, had to decide the case solely on contractual grounds. They would have held that the plaintiff's losses failed on both branches of the test in *Hadley* v. *Baxendale.*[59] In the first place, the losses did not arise naturally from the breach; the judges interpreted this as a requirement of non-remote causation, more proximate than "but-for" causation. They relied on *Waddell* v. *Blockey* and *Canson* to hold that the test was not met. Secondly, the losses were not within the reasonable contemplation of the parties at the time the contract was made. A reasonable person would not have contemplated market losses as potentially arising out of a breach of a duty to disclose. Students of *Hadley* will no doubt relish the prospect of its continuing relevance. I confine myself to the observation that if Hodgkinson's loss was not too remote to recover as a matter of contract law, it is difficult to know what would be. The connection between the loss and Simms's wrong (be it breach of contract or of fiduciary duty) was no stronger than "but-for" causation.

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[54] *Supra* footnote 3 at 445.

[55] *Ibid.* at 476.

[56] See P.M. McDermott, *Equitable Damages* (Sydney: Butterworths, 1994) at 104.

[57] *Supra* footnote 3 at 452-453.

[58] (1879), 4 Q.B.D. 678.

[59] (1854), 9 Ex. 341, 156 E.R. 145 (Exch. Ct.). Recent research casts doubt on whether the reality of this case corresponds with the way it is generally understood: F. Faust, "*Hadley* v. *Baxendale:* An Understandable Miscarriage of Justice" (1994) 15 J. of Legal History 41.

IV. *Conclusion*

Having striven to extract from the judgements in *Hodgkinson* v. *Simms* a doctrinal test for the existence of fact-based fiduciary obligations, we may usefully ask why this exercise seems to have been so difficult in this case. Two possible reasons will be considered. The first is a judicial tendency to avoid creating general tests at all, and rather to reserve a discretion to decide cases on an individual basis. The second is the uncertain role of fiduciary law. Finally, the question of whether it really mattered that Simms was held to be a fiduciary will be addressed.

A. *Judicial Discretion vs. Doctrinal Certainty*

It seems obvious that the trend in judicial reasoning, particularly in the exercise of equitable jurisdiction, is away from attempts to formulate principles of general application and towards the resolution of particular disputes on a case-by-case basis. Equity has come full circle, from its origin as an extraordinary discretion to intervene in particular cases, through a phase of rule-based formalism, and back to an enterprise with little ambition beyond the case at bar. P.V. Baker, one of the editors of *Snell's Equity* and now a Chancery judge, observed this trend developing in the U.K. some years ago:[60]

> A comparison of the headnotes of reports of cases decided in say 1906 with those of 1976 is revealing, the former being distinguished by propositional brevity, the latter by factual comprehensiveness. Pleadings are coming to read more like affidavits.

The headnote of *Hodgkinson* v. *Simms* runs to twelve pages in the Supreme Court Reports.[61] Not only is the legal profession faced with the problem of judgments from which it is increasingly difficult to extract a general doctrinal test; such judgments which are likely to contain a disclaimer such as this one, from the reasons of La Forest J.:[62]

> Moreover, I caution against the use of this approach [to the evidence] in all cases where the issue of fiduciary duty arises. While the approach is perhaps a useful guide in the professional advisor context, a different fact situation may call for a different approach.

The function of this type of disclaimer is difficult to understand. If a subsequent case is dissimilar, it can be distinguished whether or not the earlier judgment contained a disclaimer. The attempt seems to be to avoid laying down any sort of precedent, thereby leaving a future court the maximum amount of flexibility.

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[60] P.V. Baker, "The Future of Equity" (1977) 93 L.Q.R. 529 at 538. This trend is stronger in Canada, where doctrine generally does not get the respect it does in the rest of the Commonwealth: see D. Stevens, review of A. Burrows, *Essays on the Law of Restitution* (1994) 23 Can. Bus. L.J. 292.

[61] In an interesting contrast, though, the editors of the Dominion Law Reports produced a one-page headnote. The S.C.R. report is of course bilingual.

[62] *Supra* footnote 3 at 428.

The trend toward discretionary adjudication appears in statutes as well, with more and more statutes taking the approach of simply granting unfettered discretion to judges in particular situations.[63]

The tension between the flexibility to decide individual cases on their merits, and the certainty which is supposedly provided by fixed doctrinal rules, is one of the classical formulaic policy arguments which can be deployed by any competent law student with respect to almost any legal dispute.[64] Here, perhaps, lies the real disagreement between the majority and the dissenting judges in *Hodgkinson* v. *Simms*. The dissenting judges said:[65]

> The difficulty lies in determining *what* measure of confidence and trust are sufficient to give rise to a fiduciary obligation. An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty. [. . .] The vast disparity between the remedies for negligence and breach of contract — the usual remedies for ill-given advice — and those for breach of fiduciary obligation, impose a duty on the court to offer clear assistance to those concerned to stay in the former camp and not stray into the latter.

It is not obvious to what extent the attempt to provide clear doctrinal rules ever succeeds in creating certainty in the law.[66] We know that it is an inherent feature of language that a rule stated in words will be uncertain of application over at least part of its range. To the extent that we are convinced that it will always be uncertain over all of its range, we must despair of doctrine, and perhaps reduce all public and private law to a requirement that everyone act reasonably. But even in Canada, the legal profession has not yet reached that stage.

B. *What Does "Fiduciary" Mean?*

The other possible reason that the Supreme Court of Canada declined to spell out any clear tests in *Hodgkinson* v. *Simms* is that the role of fiduciary law is uncertain. Historically and etymologically, of course, the word "fiduciary"

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[63] In addition to the family law legislation of most provinces, see the remedies sections of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, and cognate provincial statutes, which frequently give a court the power to make "any order it sees fit." A harbinger of this development was the Law Reform (Frustrated Contracts) Act 1943, 6 & 7 Geo. 6, c. 40; the courts were not called upon to interpret the Act's wide remedial discretion until *B.P. Exploration Co. (Libya) Ltd.* v. *Hunt,* [1979] 1 W.L.R. 783 (Ch.D.), aff'd [1981] 1 W.L.R. 232 (C.A.), aff'd [1983] 2 A.C. 352 (H.L.). Meanwhile, the discretion granted in the Variation of Trusts Act 1958, 6 & 7 Eliz. 2, c. 53, was called "revolutionary" by Lord Evershed M.R. in *Re Steed's Will Trusts,* [1960] Ch. 407 at 420-421 (C.A.).

[64] D. Kennedy, "Legal Education and the Reproduction of Hierarchy" (1982) 32 J. Leg. Educ. 591 at 595.

[65] *Supra* footnote 3 at 465-466; emphasis in original.

[66] See Sir Robin Cooke, "The Place of Equity and Equitable Doctrines in the Modern World: A New Zealand Perspective" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993) at 25; D. Kennedy, "Toward a Critical Phenomenology of Law" in A. Hutchinson and P. Monahan, eds., *The Rule of Law: Idea or Ideology* (Toronto: Carswell, 1987) at 141.

means "trust-like." The doctrinal tests proposed above are based on this understanding. We began by imposing onerous duties on trustees;[67] then we generalized and decided that persons in certain other defined positions are so like unto trustees that we will impose the same duties. The next step was to decide that anyone can put himself or herself into a trustee-like position, by acquiring power over someone while giving an undertaking to act in that person's best interests. There is a question as to whether there is to be another step, in which the historical ties between the modern concept of fiduciary and the office of the trustee are to be weakened further, or perhaps cut altogether.

There is a sense in which a fiduciary obligation is the most serious and demanding type of obligation the law imposes. This can lead to a perception that if a given relationship is not fiduciary, then the law is not taking it as seriously as it might. If the fiduciary concept were cut entirely free from its historical underpinnings, it could be applied directly to particular relationships as a way of increasing the standard of conduct demanded by the law. There is a parallel in the remedial constructive trust. The trust imposed by law could originally only arise where certain required background facts were present. Those facts provided a link to the historical jurisdiction to impose the trust. Now, the constructive trust is a remedy of general application. A constructive trust can be imposed to effect disgorgement of a wrongful gain, even in the absence of a pre-existing fiduciary relationship. There are still prerequisites for its imposition;[68] but these are functional considerations based on the appropriateness of the *result,* not historical considerations required to ground the jurisdiction to make the order.

It would be possible to manipulate the fiduciary concept in the same way. If, for example, it was thought appropriate that a given wrong should be subject to a longer limitation period, a fiduciary duty could be imposed to achieve the desired result. Similarly, a duty to disclose or to act in good faith could be imposed through fiduciary law. This line of reasoning, however, has been rejected in its pure form by the Supreme Court of Canada in *Lac Minerals* and now again in *Hodgkinson* v. *Simms.* According to all the judges, the fiduciary relationship must keep its historical shape as a concept which protects a relationship of trust; it is not simply a standard which is a notch or two above reasonable care.[69] The rigour of this conviction is, however, unclear. The majority judges are willing to base a fiduciary obligation on reasonable

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[67] *Keech* v. *Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, 2 Eq. Cas. Abr. 741, 22 E.R. 629 (L.C.).

[68] Although what they are is unclear. This is another area in which there is an absence of doctrinal leadership.

[69] Similarly, in *Norberg* v. *Wynrib,* [1992] 2 S.C.R. 226 at 272, McLachlin J. (with whom L'Heureux-Dubé J. concurred) held that the relationship of physician-patient is an institutional fiduciary relationship, not for the results which flowed from this, but because a feature of the relationship was "the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests".

expectations. That undefined concept would certainly admit of a weakening of the link between the modern fiduciary relationship and its historical counterpart. It could be the first step towards a complete break, leading ultimately to the "remedial fiduciary relationship."

C. *Does It Really Matter?*

The last question is whether it really mattered that Simms was held to be a fiduciary, and whether it matters generally. For this case, it was in fact irrelevant to the result; Hodgkinson could have recovered his full loss in contract. Similarly in *Lac Minerals,* there was no fiduciary relationship, but the plaintiff obtained a constructive trust order over the land in question on the basis of a breach of confidence.

When will it matter? To answer this, we need to know what results ensue when a fiduciary relationship is found to exist. The dissenting judges made reference to "[t]he vast disparity between the remedies for negligence and breach of contract".[70] The disparity might not be so vast as is sometimes assumed. It is sometimes assumed that the characteristic feature of fiduciary obligations is that the beneficiary is able to take away gains made by the fiduciary in breach of the duty, without regard to whether the plaintiff suffered any loss.[71] In other words, the response of disgorgement is available for breach of fiduciary duty. That response, however, is not unique to breaches of fiduciary duty. It is available, in the guise of "accounting of profits," for breach of confidence[72] and intellectual property violations.[73] It is available for at least some torts,[74] and arguably for breach of contract.[75] In all of these cases, presumably it is available either through a money award or the award of a constructive trust. So the response of disgorgement is not particularly unique to the wrong of breach of fiduciary duty. If this were more generally understood, there would be less pressure to find fictional fiduciary relationships where judges sought to impose the response of disgorgement.

Nonetheless, fiduciary duties are unique in several ways. The main distinguishing feature of fiduciary duties is not the responses they yield, but the fact that they carry a high standard which is easy to breach. A fiduciary who puts himself in

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[70] *Supra* footnote 3 at 465-466.

[71] *Canadian Aero Service Ltd.* v. *O'Malley,* [1974] S.C.R. 592 at 621-22.

[72] *Lac Minerals, supra* footnote 2 at 618, 670.

[73] C.L. Kirby, "Accounting of Profits: The Canadian Approach" (1993) 9 I.P.J. 263.

[74] *United Australia Ltd.* v. *Barclays Bank Ltd.,* [1941] A.C. 1, [1940] 4 All E.R. 20 (H.L.) (conversion); *Ministry of Defence* v. *Ashman,* [1993] 40 Estates Gazette 144, 66 Property & Conveyancing Rep. 195 (C.A.) (trespass to land); *My Kinda Town Ltd.* v. *Soll,* [1983] R.P.C. 15 (Ch.D.), rev'd on other grounds, [1983] R.P.C. 407 (C.A.) (passing off).

[75] L.D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and `Efficient Breach'" (1994) 24 Can. Bus. L.J. 121.

a position where his duty and interest *appear* to conflict may find that he must disgorge any resultant gains. In the light of this, firms of accountants which give investment advice may now wish to consult the decision in *MacDonald Estate* v. *Martin:*[76] a fiduciary investment advisor may be in a conflict if her own client's interest is opposed to that of her partner's client, and the advisor may be presumed to know about her partner's client in the absence of institutional mechanisms designed to confine knowledge to certain members of the firm.[77]

It is also relevant that a fiduciary obligation which exists in a contractual relationship may subsist after the contractual relationship has terminated, albeit only in relation to information acquired during the currency of the relationship.[78] Moreover, the limiting factors of causation and remoteness may apply differently in the fiduciary context; this point was made by both the majority and the dissent in *Hodgkinson* v. *Simms*.[79] Finally, the limitation period will often be longer for breaches of fiduciary duty, although this point is of diminishing significance to the extent that courts are importing a "discoverability" rule into the law of limitations.[80]

The future is unclear. After long consideration, the Supreme Court of Canada has declined to take another look at fiduciary obligations in the commercial context in *Luscar Ltd.* v. *Pembina Resources Ltd.*[81] For now, we must be satisfied with *Hodgkinson* v. *Simms* as our only guide to the uncertain scope of fact-based fiduciary relationships.

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[76] [1990] 3 S.C.R. 1235.

[77] See Canadian Bar Association, Conflict of Interest Disqualification: *Martin* v. *Gray and Screening Methods* (1993), *Report of the Canadian Bar Association Task Force on Conflict of Interest* (Ottawa: The Canadian Bar Association, 1993).

[78] *Canadian Aero Service, supra* footnote 71.

[79] See above, text at footnote 54; for the dissenting judges, see *supra* footnote 3 at 470.

[80] *M. (K.)* v. *M. (H.), supra* footnote 37.

[81] (1994), 24 Alta. L.R. 305 (C.A.), leave to appeal to S.C.C. filed 9 January 1995, File No. 24496; leave refused, 17 August 1995. Fiduciary law was relevant in that case due to limitation periods, and particularly the Alberta Court of Appeal's decision that there is no "discoverability" rule in respect of limitation periods for contract claims.

TAB 9

Contract, Status, and Fiduciary Law

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entering into the contract.[64] Such material facts presumably include facts about actions contrary to norms of fiduciary law that the fiduciary will be free to take due to the exclusion or limitation.[65] Absent such disclosure, the contract will have been formed in breach of the no conflict rule and the principal may have it set aside.[66] The contract, on a true construction, may well exclude or limit a fiduciary undertaking as desired by the fiduciary, but equity may nonetheless intervene to prevent the fiduciary from having the benefit of the bargain.[67]

A second type of case in which contract law proves inexhaustive on the relation of fiduciary undertakings and contracts is where a non-contractual fiduciary undertaking augments a contractual fiduciary undertaking. This possibility was alluded to by Dixon J of the High Court of Australia in *Birtchnell v Equity Trustees, Executors and Agency Company Limited*.[68] Speaking of circumstances where partners have, by contract, made fiduciary undertakings in relation to the matters provided for in that contract, Dixon J stated that '[t]he subject matter over which fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instrument or not, but also from the course of dealing actually pursued by the firm.'[69] In other words, the full scope of the fiduciary undertakings of the partners is to be ascertained not only by looking to the terms of their contract, but also by considering non-contractual voluntary undertakings.

Cases where non-contractual fiduciary undertakings augment contractual fiduciary undertakings suggest that there is interesting work to be done exploring the distinctive contributions of fiduciary law to regulating relational contracts.[70] One such contribution is to be found in fiduciary law's role in controlling the exercise of discretionary powers in relational contracts.[71] This is important because parties to relational contracts often enjoy significant discretionary powers to affect each other's interests. Another equally important contribution is fiduciary law's willingness

[64] '[I]f an arrangement is to stand, whereby a particular transaction, which would otherwise come within a person's fiduciary duty, is to be exempted from it, there must be full and frank disclosure of all material facts': *New Zealand Netherlands Society 'Oranje' Incorporated v Kuys* [1973] 1 WLR 1126 at 1131–32 per Lord Wilberforce.

[65] See Joshua Getzler, '*ASIC v Citigroup*: Bankers Conflict of Interest and the Contractual Exclusion of Fiduciary Duties' (2007) 2 J of Eq 62 at 65–66.

[66] See, eg, *Maguire v Makaronis* (1997) 188 CLR 449.

[67] In the *Citigroup* case, even though the facts suggested that a pre-contractual fiduciary undertaking might have been present, the plaintiff did not press the point and so the effect of any such undertaking on the proper legal analysis of the facts was not considered: (2007) 160 FCR 35 at [306] and [333].

[68] (1929) 42 CLR 384. [69] Ibid at 407–08.

[70] There is, of course, disagreement on what constitutes a 'relational' contract: see, for example, the critical analysis in Melvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1997) 291. For present purposes, I need not take sides in those debates; it will suffice simply to point to those contracts that on anyone's view are 'relational' in a sociological sense, viz, long-term contracts establishing 'thick' relationships between their parties (such as distributorship agreements, franchise agreements, employment contracts, and the like).

[71] For an analysis of this contribution: Charles J Goetz and Robert E Scott, 'Principles of Relational Contracts' (1981) 67 Va L Rev 1089 at 1126–30.

TAB 10

Court File No.07-CV-326360 PD3

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

BERNARD C. SHERMAN, MEYER F. FLORENCE,
APOTEX INC. and JOEL D. ULSTER

Defendants

AFFIDAVIT OF KERRY WINTER
(sworn March 16 , 2017)

I, **KERRY WINTER**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a Plaintiff herein and as such have knowledge of the matters to which I hereinafter depose.

BACKGROUND

The "Crux" Of The Case

2. In his Affidavit, Barry references the Reasons of Mr. Justice Perell in support of his motion for Summary Judgment. He also states (para. 7) that the "crux of the Plaintiffs' claims against myself and the other Defendants in this action is that the Plaintiffs were entitled to, or had been wrongfully deprived of, option rights".

3. The 1967 option (the "Option") is not the "crux" of our case and we are not seeking to relitigate Justice Perell's interpretation of the Option. To the contrary, we are relying on His Honour's interpretation to support our position that Barry owed us a fiduciary duty. I note that although Barry quotes extensively from His Honour's Reasons, he does not reference the fact that Justice Perell expressly stated (para. 142) that he was not ruling on whether Barry owed us a fiduciary duty.

Barry Denies That He Owed Us A Fiduciary Duty

4. In his Affidavit (para 73), Barry denies the following allegations that:

(a) he owed us a fiduciary duty;
(b) he undertook to act in our best interests;
(c) he had extraordinary power to affect our legal and practical interests; and,
(d) the Executors reposed their trust in him.

5. In my Affidavit, I do not opine on whether he owed us a fiduciary duty (as Barry does in his Affidavit) as that will be for counsel to address at the hearing of the motion. However, I do reference the facts we rely on in support of the allegation that Barry owed us a fiduciary duty including the assertions that he undertook to act in our best interests, that he was trusted to do so, and that he had extraordinary power to affect our interests. Stated differently, in my Affidavit, I address these points: did he promise to act in our best interests, was he trusted to do so, and did he have power over us to affect our interests? I then address the issue of whether he kept his promises.

BEST INTERESTS

Barry's Relationship With The Winters

6. Our parents passed away within seventeen days of each other. I was four years old at the time. Tim, the eldest, was seven.

7. Louis Winter, my father, was like a surrogate father to Barry. Barry acknowledges this. Barry had lost his father when he was a child. Barry worked for my father during the summers. We were very close with Barry. My parents initially even bequeathed him their assets prior to our being born. When Barry's sister (Sandra) married, my father gave her away.

Barry's Promises

8. Barry made a series of verbal promises to the Estate Trustees concerning his desire to protect our future interests. He also made written representations to them (referred to in my Affidavit as the "Letters" which are attached hereto and marked as Exhibit "A"). Most notably, he wrote the Estate Trustees and the Executors leading up to the purchase of Empire that:

> "I am…anxious to protect the value of the [Empire] assets for the children" (November 25, 1965).

9. Mr. O'Brien told me that Barry promised him that he would include us in the Empire business (Mr. O'Brien referred to this as Barry's "mantra").

10. On Barry's cross-examination in the Royal Trust matter, he stated the following:

- he would assist us in ways that "probably no other person would" (p. 1131 of Barry's motion record);
- he would help us in any "way he could" (p.1317) ; and,
- he wanted to protect our future interests (p. 1135).

11. In his dealings with the Estate, he relied on his relationship with my late father to purchase Empire. In an undated letter from Barry's representative to Royal Trust, his representative stated that:

> "We ask that the vendors take note of the fact that Dr. Sherman is the nephew of the late Lou and Beverly Winter, and that Beverly Winter expressed to her lawyer, Martin O'Brien, the wish that Dr. Sherman be given an opportunity to meet the highest offer. Please also note that the agreement includes options for the children of Louis and Beverly Winter to

> become responsible senior employees of the business and to buy back shares in the business. We feel that Mr. Winter would have wanted his children to have this opportunity, since he often expressed the hope that one or more of them would come into the business when they come of age"

12. In a July 12, 1967 letter, Martin O'Brien wrote his co-Estate Trustee, David Ward, the following:

> "Barry Sherman indicated to me before offers were tendered that he would like the opportunity to meet the top price in view of his close relationship to the family and the fact that he was offering an option to the children to acquire an interest in the business (an option which, in my opinion, is not worth the paper it is printed on)"

13. Mr. O'Brien made it very clear to me that it was not the Option they were relying on but rather Barry's verbal promises, good faith and his relationship with my late father and family.

The "Irrelevant" Option

14. According to Barry, the Option meant nothing, was irrelevant, and not worth the paper it was written on (p.1317-9, 1148 of Barry's motion record). He said that the Option would not do anything "for the children" and was only put in to help him get preference over any other bidders. On his cross-examination, Barry discussed the Option in the following terms:

> But they knew that we really couldn't be bound to anything that would be too onerous, otherwise it wouldn't make the transaction viable from our point of view. We couldn't have a transaction in which there was an option that would tie us up and make us unable to deal with the business in the way that was best from the financial viewpoint. So, the option would have to be a very soft option, but it was simply, in my mind, an expression of the fact that I did have an eagerness to help the children if I could, and therefore that should be taken into account in terms of a decision on the part of the vendors as to what is best for the estate and the children, the beneficiaries. (pps. 1139, 1149 of Barry's motion record)

15. I believe that Barry is correct in saying that the main purpose of the Option was to get preference over other bidders. However, given that everyone knew that the Option "was not worth the paper it was written on", there had to be more if he was going to get the preference he wanted and according to Mr. O'Brien, that something more was his assurance that he would include us in

the business. Mr. O'Brien told me that everyone was looking beyond the Option in terms of what Barry had promised and committed to us.

16. Barry's position as I understand is that there was nothing more than the Option in terms of what his commitment was. I do not understand that. If the Option was the total of what he had promised us, he effectively promised us nothing and made no undertaking to act in our best interests.

My Discussions With Mr. O'Brien

17. When I was investigating the circumstances of Barry's acquisition of Empire, I had discussions in 2008 with Martin O'Brien and David Ward. They had a fairly good recall of what happened in 1967. Our matter, according to Mr. Ward, was not an "everyday file" or "run of the mill file" (I do not recall his exact wording).

18. Mr. O'Brien was considerably more forthcoming with information concerning the 1967 transaction than Mr. Ward. Mr. O'Brien agreed to sit down with our former counsel and swear an affidavit however he passed away (in 2009 after a lengthy illness) before he was able to do so. My understanding is that Mr. Ward was going to be examined as a witness in the Royal Trust proceeding but died in an accident (in 2010) before that examination could take place.

19. According to Mr. O'Brien, it was Barry's promise to bring us into Empire which won him over in terms of agreeing to sell to him because selling to Barry would make it possible for us to come into the business whereas selling to a stranger would not.

20. Mr. O'Brien told me that this was Barry's "mantra" (ie his promise to include us in the business). He also said that without this promise, he does not know if they would have consented to the sale. The reason for this (perhaps ironically) was Barry's persistent assertion that my father

and mother wanted us to have an opportunity to join the business.[1] It was for this reason that this became such an important consideration in terms of deciding whether to sell to Barry. In other words, it was Barry who made the issue so important to the Estate Trustees. As I reference above, Mr. O'Brien made it clear to me that it was not the Option they were relying on (not being "worth the paper it was written on") but rather Barry's repeated verbal assurances that he would include us in the business.

21. Mr. O'Brien said that it was because Barry was our cousin, had been very close to my father and his repeated assurances that he was going to act in our best interests, that they had a level of comfort that he would honour his promises. However, he also quite clearly stated that it ultimately came down to a matter of trusting Barry to act in good faith.

22. At the time the Estate Trustees agreed to the sale of Empire to Barry, I know that Mr. O'Brien never contemplated that he would turn around five years later and sell Empire and abandon us. But that is exactly what transpired.

Barry's Position That He Was Not Acting On Our Behalf

23. I understand that Barry wanted the business not only to help us but also himself. However, from our perspective, he undertook to grow Empire for our benefit as well as his. Otherwise, I believe that his promises to preserve Empire's value and to include us in the business would have meant nothing. I do not know if Barry considers his promises to be binding on him. My siblings and I do. Quite apart from the fact that he made this promises as a close family member, his promises played an important factor in his acquisition of Empire.

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[1] I was advised, many years later by my uncle (my mother's brother), Wayne Rockliffe, and do believe that my father felt that he had created something very unique in Empire and wanted very much for us to one day help him grow the company. According to Wayne, legacy was important to my father and he wanted to pass the business on to us. My father's wishes in this regard were confirmed to me by maternal grandmother (Mary Rockliffe) and also by Mr. Ward, who was my father's personal lawyer. Mary and Mr. Ward advised me and I do believe that it was my father's wish that we join him in the Empire business

24. I accept that Barry's motivation to help us was genuine at the time and was due to the tragedy we had recently suffered and to a sense of obligation he felt he had to my late father.

25. However, Barry states in his Affidavit (para. 70), that despite his earlier assurances and promises, he in fact was not in a position to act on behalf of the Plaintiffs because he was not an "executor, an estate trustee, or guardian of the children".

26. Barry is correct in saying that that he was not acting in any of these capacities. But to suggest that he was not acting on our behalf and representing our interests is something which I entirely disagree with and which seems spurious to me given the promises he made. Of those involved at the time, it was Barry who professed to have had the most genuine concern for our interests and who our biggest advocate because of his relationship to my family. And it was Barry after all who warned the Estate Trustees that we might have claims against them if they did not sell to him so that he could preserve the assets for us. Barry even stated that this threat may have played a role in his getting the business.

27. It seems to me that Barry was more than willing to make the promises and rely on his strong ties with our family when it served his purpose to get the Empire business but lost interest in these promises once he acquired Empire.

REPOSING TRUST IN BARRY

28. As I referenced above, Mr. O'Brien trusted Barry[2] to do the right thing and in particular, to honour his promises. After all, we were his cousins, Louis was like a father to him, we were

[2] I note that Barry was just starting out in business and had not yet earned a reputation, positive or negative, as to whether he was trustworthy

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recently orphaned and Barry's entry into generics was due to my father and the help he had given him. And as Mr. O'Brien told me, the promise to include us in the business was Barry's "mantra".

29. Tying up Barry with an onerous option would have worked against our interests rather than in our favour and Barry likely would not have agreed to a "strong" option in any event. Martin O'Brien knew that there were no guarantees. Mr. O'Brien and Mr. Ward knew that our future as potential employees and owners depended entirely on him honouring his promises and they trusted him to do so. That said, as prudent Estate Trustees, they and Royal Trust negotiated the best option that they could with Barry according to Justice Perell.

HIS EXTRAORDINARY POWER AND DISCRETION

30. Barry had undertaken to preserve Empire for our benefit. How he went about doing this had profound implications for us but ultimately was his own prerogative. There were no stated constraints on his decision making as to how best to protect our interests and he was certainly not subject to onerous terms in the Option. There was no one overseeing him. We were just children and obviously were not in a position to question his choices.

31. His decision making regarding Empire affected our future economic interests. He could make decisions which gave effect to the terms of the Option (as weak as they were) and/or the promise to include us in the generic drug business. He could decide the terms under which we would be included in the business, the degree to which we would be dependent on him in that business relationship and the terms of our equity participation. He had unfettered discretion subject to his alleged duty to act in our best interests.

32. From my perspective, Barry's duty to us did not end when he sold Empire (as I reference below). Although I believe that he had the right to sell the business provided that his reason for doing so was made in good faith and provided that he continued to protect our interests, Barry also had the power to affect our interests even after the sale of Empire by including us in Apotex or in some other manner that was fair and reasonable under the circumstances.

BARRY'S ALLEGED BREACHES OF HIS FIDUCIARY DUTY AND CONFLICT OF INTEREST

The Sale of Empire and Creation of Apotex

33. It is our position that Barry breached his duty to us and was acting in a conflict of interest when he decided to sell Empire without regard to:

(a) his promise to preserve the Empire assets for us;

(b) his promise to include us in the Empire business;

(c) our interests in the Option; or,

(d) any consideration as to how the sale would affect our lives.

34. Once Barry sold Empire, he did nothing to preserve a portion of the proceeds of the sale to ICN for us, or more importantly, to grant us any right to acquire an interest in Apotex. Instead, Barry had no further contact with us after he sold Empire in 1972.

35. Under these circumstances, I do not understand how Barry was protecting our future interests or was fulfilling any of the promises he made. Although Barry had the legal authority to sell Empire, our position is that he had to take into account our interests before doing so, and particularly so where he was not compelled to sell. His conduct in this regard in my opinion comes nowhere close to doing "whatever he could" for us. He in fact did nothing and as a consequence we were left with nothing.

36. What is particularly disconcerting to me is that it appears he did not give any consideration to the implications of the sale of Empire to us. In other words, he did not even think about us at all (other than his perhaps believing that he had no further obligation to us upon the termination of the Option).

37. I have never heard any explanation from Barry as to why he did not provide us with an opportunity to participate in Apotex. The only reason I can think of is the fact that he did not want partners. It appears that he started Apotex primarily to shed himself of his Empire partners and to avoid having to take us into Apotex. On his examination, Barry stated that he:

> "had mixed feelings about it because I liked the business. I liked what I was doing. I was interested in continuing, but at the same time, I knew that we were at risk, the price was good. And also, I was not too happy being in a business where I was in a minority position and wasn't free to make decisions" [3](159 of his discovery transcript).

38. The fact that this was his main reason for selling, from my perspective, discloses an additional aspect of bad faith on his part.

39. Even though Barry decided to disregard his promises and our future interests in Empire, I believe that he still could have addressed his conflict of interest by granting us a right to participate in Apotex. However, rather than do that, he again chose to prefer his interests over our own.

Apotex As A Successor To Empire

40. Barry denies that Apotex is a "successor" company to Empire. I do not know if Apotex was a successor at law to Empire or whether it even matters.

41. From my perspective, Apotex was merely a continuation of Barry's Empire operations minus his partners. There were no new processes used in Apotex and it was simply a pared down version of Empire until Barry could grow Apotex into what it has become. As referenced above, Barry had no compelling business reason to sell Empire and he was ambivalent about even whether to sell. As referenced above, it appears that his main reason for selling was to shed himself of his partners in Empire.

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[3] And in the document he wrote, titled "Legacy of Thoughts", he stated: "Unless I were to take in other partners, which I did not wish to do, the only available funds [to start Apotex] would be the several hundred thousand dollars of profit that I had made on the sale of Empire to ICN".

42. In his Affidavit (para. 9g), Barry asserts that "at no time did Apotex own or use any of the assets, goodwill, property or business of [Empire]". I believe that this is for the most part correct given that Barry could not directly use those assets in Apotex. Rather, he needed to sell those assets in order to get money to start Apotex. Barry did use the cash from the sale of the ICN shares as well as the knowledge, skill, expertise, and for certain some of the intangible property that he acquired from Empire, in order to start Apotex. And he did all of this to our exclusion.

43. Barry also references the fact that Apotex was not incorporated until (May of) 1974, more than two years after the sale of ICN closed (in January of 1972). I assume he does this to put as much time as he can between the two companies. However, regardless of when he actually started Apotex, it is clear from the document he wrote, called Legacy of Thoughts[4] (the "Legacy") and his evidence that:

(a) at the time he sold Empire to ICN, he had already decided to start his own generic drug manufacturing business (Apotex);

(b) he needed to fund Apotex from the proceeds of the sale of the ICN shares he received when he sold Empire and that he was not permitted to sell them for at least six months after the closing; and,

(c) as one would expect, he began planning for his new business (Apotex) before he incorporated it in (May of) 1974.

Barr Laboratories Inc.

44. In our Claim, we refer to the fact that Barry invested in a generic drug manufacturing company called "Barr Pharmaceuticals" ("Barr"). Barr was incorporated in 1970. It was founded

[4] Legacy of Thought was written years before we commenced litigation against Barry. He wrote it while on a safari in Africa. It is in Barry's motion record, starting at p.194. Barry told me that he was the only person he had given a copy of the Legacy to. He also told me that Legacy explained how he bought the business and his reasons for doing so and that it would answer all of my questions and that I should stop all of the "nonsense". The "nonsense" according to Barry was my interest in knowing how he acquired Empire

by a Mr. Edwin Cohen. However, under Barry's direction and control, it developed into a multi-billion dollar company.

45. We do not know the exact year in which Barry began investing or when he acquired control of Barr. However, we do know that he began investing in the 1970's (and we believe it was the early 1970's, and possibly while he was still operating Empire or was in the process of selling it to ICN). According to the Barr corporate documentation we found on line, Barry was an "early investor" in Barr. As for whether Barry used any of Empire's assets, or the proceeds of the sale of Empire, to invest in Barr (as he did with Apotex), only Barry has that information. When he was asked whether he used any of the ICN share proceeds to invest in Barr, he said that it was "impossible to know".

46. I first heard of Barr in or about 1991 when I was at Apotex's offices looking at an aerial photograph of a very large manufacturing facility. When I asked Barry about the photograph, he told me that it was a company he owned in New Jersey called "Barr" and that it had been Barr which had enabled him to take Apotex "worldwide". Barry told me that he had made hundreds of millions from Barr and that he had invested in the company around the time he started Apotex.

47. Our position is not that Barry was required to make us partners in every business opportunity he had. Rather, it is that having made the promise to grow Empire for us and include us in the business, he could and should have still honoured the substance of that promise even after he sold Empire either by including us in Apotex or Barr.

48. Barry makes no reference to Barr in his Affidavit presumably because of his position that anything he did after Empire is irrelevant.

Barry's Alleged Obfuscation

49. Barry withdrew from our lives following the sale to ICN in 1972. We became reacquainted with Barry in or about 1989.

50. Barry never disclosed the existence of the Option to our adoptive parents (the Barkins), our relatives, the owners of Vanguard or ICN (and in the case of ICN, when asked whether any shares in Empire were promised to relatives, Barry's response was that none were). Barry's explanation for not telling anyone about the Option is that it had expired before any of us had turned twenty-one and as such, there was no point in mentioning it.

51. When my brother Jeffrey commenced a proceeding against Royal Trust to obtain documentary disclosure because Royal Trust was refusing to provide us with their files, Barry was against his doing so and convinced me not to participate and told me that under no circumstances was I to provide any assistance to Jeffrey in this regard. Mr. Justice Pitt granted my brother's Application.

52. When Jeff and I first learned of the existence of the Option from David Ward in or around 2001 (but had not yet seen a copy of it), Barry denied that it had ever even existed. Then, once we located an unsigned copy of the Option, he claimed that it had never been executed. And finally once we were able to obtain an executed copy of the Option (after litigating with Royal Trust), he claimed that he had forgotten all about it and that it never meant anything and that he did not owe us a fiduciary duty. Barry made this comment about not owing us a fiduciary even though we had never mentioned the term "fiduciary" to him and in fact had never heard of the term.

53. Barry told me that the Legacy explained how he acquired our father's business. However, there is no reference in the Legacy to the Option or the promises he made to the Estate Trustees even though he mentions the circumstances giving rise to his purchase of Empire and appears to have a very good recollection of events going back to the late 1960's.

54. Barry mentions in his Affidavit (para. 75) that he made the Goodman & Carr file respecting the purchase of Empire available for us to inspect. However, he does not mention in his Affidavit that there were no copies of the Option or the Letters in the file. Nor does he mention the fact that he did not agree to have the file produced until after Justice Pitt granted my brother's Application. Further, Barry told me that the file would be available on four different occasions for me to inspect yet it was not until the fourth time that I attended that he actually made the file available.

Barry's Purported Generosity

55. We did not become reacquainted with Barry in order to get money from him. We knew very little about him, did not even know that he had acquired our father's business or what Apotex was. A friend of our late parents suggested that my brother Dana contact him which we did. Jeff and I followed suit. We did not initially ask him for any money. He offered to help us finance business ideas. I believe that Barry wanted to see us do well.

56. He had us sign loan documentation for the money he lent us. Had we not sued him seven years later, perhaps he would have forgiven the debt – I do not know.

57. These loans were not made interest free nor were they made without security including our remaining inheritances from our parents' Estates.

58. From my perspective, making loans at 7% interest to the children of his surrogate father and securitizing them with their remaining inheritances, considering his financial resources, was not particularly generous when one also takes into account the fact that the loans were made in the

face of his broken promises. Stated differently, I do not think that Barry was doing "everything he could for us".

59. What I find particularly troubling about these loans is that Barry had us pledge our inheritances to him at a time when he knew that Dana and I were heavily involved in drugs and were not making sensible decisions. Barry was also well aware that Jeff suffered from ongoing mental health issues and that he had been unwell for many years.

60. Perhaps from Barry's perspective, he was trying to make up for his broken promises in making the loans. When he was cross-examined in the Royal Trust case, he suggested that the making of the loans was part of his earlier commitment to the Estate Trustees to help us.

61. However, we viewed the loans as a form of control over our lives and in particular our decision making as to whether to sue Barry once we found out about the Option and Letters. If it was not Barry's intention at the time he made the loans to intimidate us in the event we discovered the Option and the Letters, he certainly did subsequently use them as a method of pressuring us into not to suing him when we did find out. It was not just Barry who tried to convince us not to sue. It was also Mike Florence and Jack Kay. And they offered used financial incentives not to sue and referred to our concerns as "nonsense". And when we did sue, Barry of course called the loans, sold our properties and tried to put some of us out on the street (literally).

Why We Sued Barry

62. We never wanted to become dependant on Barry as we ultimately did. In my case, it was that dependence in the face of Barry's broken promises that led to my decision to sue him. I knew that I would be cut off and any assets that I owned would be sold if I sued. It would have been much easier just to have gone along receiving his hand outs. But I could no longer accept that. I felt that he had taken advantage of us and his threats to cut us off did not sit well with me. Nor did his urging me to change my name back to Winter from my adoptive surname (Barkin) which I did (and later regretted).

63. I of course do not blame Barry for my personal problems and in particular my former drug addiction (I have been drug free for over five years). My late brother Dana succumbed to his addiction. I do not know whether our lives would have turned out any differently had Barry honoured his promises. I do feel that he should have checked in on us during our formative years, asked us if we were interested in joining him, counselled us on how best to prepare for potential careers working in generic drug manufacturing, and I do believe that he should have honoured his promises.

64. When Barry made the promises to us (via the Estate Trustees), he knew that we were not in immediate need of help. We had an inheritance and the Barkins were able to support us. The point was to help us as we grew into our late teens and twenties by offering us employment and by brining us into the business. Barry could have done that with Empire had he not sold or just as easily with Apotex.

65. Had he honoured his promises, I believe that we would have had a greater *opportunity* to become financially independent and secure, initially as employees and then as co-owners. It would have given us all more direction than we had had growing up. The promise of future employment itself (quite apart from the promise to include us in Empire) was a tremendous opportunity for us. I also believe that Barry improperly (and needlessly) denied us this opportunity while benefiting himself and his family to our detriment, all the while acting in a conflict of interest.

ALLEGED ABUSE OF PROCESS AND DELAY

66. In Barry's Affidavit, he refers to delay on the part of the Plaintiffs in moving this proceeding forward including our changing of counsel, the administrative dismissal and the amending of our Claim.

67. There are several reasons why our Claim has been in the Courts since 2007. One reason is that our efforts were primarily focussed on responding to Royal Trust's motion for Summary Judgment (and the appeal therefrom) the duration of which was five years (2009-2014). Another reason is, as Barry mentions, the fact that we changed counsel. Finding counsel who has not had a potential conflict of interest has been difficult. Part of Barry's business model is litigation and many firms have represented him and Apotex. As Barry references in his Affidavit, he objected to Mr. Kronby acting for us because of a purported conflict of interest.

68. Another reason has been our lack of financial resources and Barry's attempt to delay this proceeding. For example, he has refused to produce documents which were relevant (and in breach of Court Order(s), did not produce them). He also initially refused to consent to the reinstatement of this proceeding following its administrative dismissal. As referenced in Barry's Affidavit, Master Muir in 2016 agreed to case manage this proceeding even though Barry did not consent to our request for case management. Barry has the financial wherewithal to litigate on an indefinite basis – he has no financial constraints.

69. Barry points out the fact that we are seeking to amend our Claim "yet again". There has only been one substantive amendment to our Claim which was made when our current counsel assumed carriage. We are now seeking to amend the Claim again because we have learned that Barry's financial affairs have been arranged to defeat our claims should we obtain Judgment.

70. I make this Affidavit in response to the Defendants' motion to dismiss this proceeding.

SWORN BEFORE ME at)
The City of Toronto, in)
The Province of Ontario)
This 16 day of March,)
2017)
)

A commissioner for taking oaths

Kerry Winter

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Exhibit A to the Affidavit of Kerry Winter sworn March 6 2017

A commissioner for taking oaths

(10)

WITHOUT PREJUDICE

To the Executor and Trustees of
the Louis and Beverly Winter Companies.

I, Bernard Charles Sherman, am interested in purchasing all the assets of Louis and Beverly Winter relating to the pharmaceutical and chemical industries, and am furthermore anxious to protect the value of the said assets for the benefit of the children of Louis and Beverly Winter.

I, therefore, propose that I assume the position of General Manager of the pharmaceutical and chemical companies until January 31, 1966, in consideration of the following:

(1) The right of first refusal on the sale of the above-mentioned assets.

(2) A salary of $1,500 per month until January 31, 1966.

(3) The use of an automobile until January 31, 1966.

In view of my present commitments in the United States and the need to prevent any deterioration of the companies, it is imperative that this matter be decided by November 26, 1965.

Signed at Toronto this 25th day of November, 1965.

BERNARD CHARLES SHERMAN

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Royal Trust Co
Att: F.C.Lively
Trust officer

COVERING LETTER

(81)

Dear sirs:

We enclose five copies of an agreement between Bernard Sherman et al (purchasers) and Winter Laboratories Limited et al (vendors) for the purchase and sale of the assets of Winter Laboratories et al. Also enclosed is a certified cheque in the amount of forty thousand dollars payable to the Royal Trust Company as an additional deposit in indication of good faith. It is understood that the entire deposit of fifty thousand dollars will be refundable on June 12, 1967, unless the vendors have executed the agreement in duplicate and delivered the same to the purchasers.

The purchasers believe that their offer is a reasonable one. However their position is very flexible, and they request the opportunity to negotiate, should their offer not be the highest one.

We ask that the vendors take note of the fact that Dr. Sherman is a nephew of the late Louis and Beverley Winter, and that Beverley Winter expressed to her lawyer, Martin L. O'Brien, the wish that Dr. Sherman be given an opportunity to meet the highest offer. Please also note that the agreement includes options for the children of Louis and Beverley Winter to become responsible senior employees of the business and to buy back shares in the business. We feel that Mr. Winter would have wanted his children to have this opportunity, since he often expressed the hope that one or more of them would come into the business when they come of age.

Sincerely yours

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(100)

McDonald & Zimmerman
Barristers and Solicitors

TELEPHONE 364-1241 (AREA CODE 416)
CABLE ADDRESS: MAXIMS

WILLIAM H. ZIMMERMAN, Q.C.
RICHARD J. ZIMMERMAN, Q.C.
CARL T. GRANT
MARTIN L. O'BRIEN

JOHN G. McDONALD, Q.C.
H.E. ZIMMERMAN
J.R.Y. HUGO
G.S. BENNETT
JAMES D. SHARPLES

DOUGLAS WINTERS, Q.C.
GRAHAM D. WORLEY
R.S. PADDON
HAROLD R. BERRY

199 Bay Street
Toronto 1, Ontario

July 12, 1967

David A. Ward, Esq.
Barrister & Solicitor
Messrs. Davies, Ward & Beck
4 King Street West
TORONTO 1, Ontario.

DELIVERED

Dear David:

Sale of Winter Companies

As I advised you, I was telephoned today by Mr. Norman, who is the solicitor for Fireco, requesting an opportunity to discuss his client's offer. I suggested to Mr. Norman that it would not be possible for me to discuss the offer with him at this time pending discussions with the person who had tendered the best offer.

The prospect of not being the successful purchaser was not received with any enthusiasm by Mr. Norman and he suggested that his client was quite interested in purchasing and would be interested in deleting any offensive clauses and possibly upping his purchase price. Mr. Norman had authority from his client to delete the paragraph from the Agreement whereby the purchaser paid nothing for inventory in excess of $240,000 and was willing to leave the clause whereby we received 67¢ of each dollar difference between actual inventory value and $240,000.

He is also authorized to delete the provisionwhereby the purchaser only purchases the first $100,000 of accounts receivable and the purchaser would act as our agent in collecting any accounts receivable in excess of $100,000.

I advised Mr. Norman that his client's offer was not necessarily acceptable because of these two provisions but that the purchase price offered was substantially lower than the best offer. He suggested that his client would be willing to increase the purchase price by $50-100,000 but that he had no specific instructions in this regard.

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McDonald & Zimmerman

July 12, 1967

Also, Barry Sherman indicated to me before offers were tendered that he would like the opportunity to meet the top price in view of his close relationship to the family and the fact that he was offering an option to the children to acquire an interest in the business (an option which, in my opinion, is not worth the paper it is printed on). Barry suggested that he would increase his price by $30,000.

We also have another person who is interested in purchasing the company but who does not want to present a formal offer but would rather negotiate on a face to face basis.

In considering these offers, you might also consider whether we should suggest to both offerors that they submit to us the highest price that they are willing to pay and that we decide on these prices, rather than the prices set out in the offers.

Yours very truly,

Martin L. O'Brien.

MLO"jl

KERRY WINTER et al

Plaintiffs

and

BERNARD SHERMAN et al

Defendants

Court File No.:

ONTARIO SUPERIOR COURT OF JUSTICE

AFFIDAVIT OF KERRY WINTER

Teplitskys
25 Sheppard Ave. W, #1600
Toronto, Ont.

Brad Teplitsky LSUC #37342N
Tel: 416-319-7024
Fax: 416-981-7604

Lawyer for the Plaintiffs

TAB 11

A LEGACY OF THOUGHTS

by Bernard C. Sherman

PREFACE

Serengeti, Tanzania, December 27, 1996.

I admit to being a workaholic.

This is day eight of my two week vacation with my wife, Honey, and four children, Lauren, Jonathon, Alexandra and Kaelen.

Usually when going on vacation, I take business files along and am in frequent contact with my office. This time, however, I took no files and have been incommunicado.

It occurred to me today that there is no better time then now to put pen to paper and begin to write a text that has been forming in my mind for some time.

I have always been very conscious of my personal mortality.

I have enjoyed considerable success in building the Apotex group of companies, which probably will survive me.

However, memories are brief, and even should there survive some physical manifestation of my existence, my thoughts will be forever lost unless I commit them to

paper.

I thus set out to write this text in the perhaps arrogant belief that what I have to say may be of use or interest to my progeny and others.

CHAPTER 1 - THE MEANING OF LIFE

From my earliest years, I have been an atheist.

I find it incomprehensible that countless persons, including some of apparent intelligence, believe not only in existence of a "Supreme Being", but in very specific and seemingly preposterous mythologies.

Having debated with numerous theists, I have come to realize that the best way to bring debate to a brief conclusion is to explain that one cannot have meaningful dialogue without a mutual understanding of what is meant by words to be used. I thus ask that, before the conversation proceeds, the theist define exactly what he means by the word "God". Is it an intelligent three-headed monster who created the universe and who intercedes in our lives at its whim? Is it an evil being that creates suffering for its sadistic gratification? Where did this creature come from? If our universe needed a creator to explain its existence, then why did this creature not also need a creator?

There follow invariably an inability to answer my questions as a prerequisite to debate.

What seems clear is that most if not all theists cannot define that in which they purport to believe, and any attempt at explanation leads to absurdities.

It thus appears that theistic beliefs are not a result of observation and logical deduction, but are either a thoughtless continuing acceptance of what has been "learned" in naive youth or, in the alternative, a state of mind founded in fear rather than reason, in an attempt to give meaning to life and ease the apprehension of death.

Clearly a desire for something to be true does not make it so. A truthful answer to whether or not a "God", however defined, exists can only be grounded in observation and logical deduction.

It is clear that numerous questions can be asked for which we have no answers and may never have answers. Did time have a beginning? How could the universe have had a beginning without there being something present to cause the beginning? Is the universe finite? Are there other universes? The fact that there are imponderables does not, however, prevent intelligent beings from coming to some conclusions with a high degree of confidence in their correctness, based on observation and logical deduction.

As stated by Descartes; "Cogito ergo sum (I think therefore I am)". The fact that we think leads to the inescapable conclusion that we do exist.

Based on the anthropological evidence, no thinking mind can doubt that we and all other species are here as a result of evolution, through countless individual episodes of mutation and natural selection.

Another inescapable conclusion from endless observation is that mass and energy consistently behave in space and time according to laws of physics which have been largely, although not yet entirely, elucidated.

The foregoing statement, accepting it to be true, leads to the corollary that there is no "God" that interferes in the operation of the universe. Moreover, the postulation of a "God" to explain creation does not serve that purpose, as there would follow an even more imponderable question as to the origin of that "God". The only plausible conclusion is thus that there is no "God", however reasonably defined.

Another corollary of the laws of physics is that we have no "free will". Each of us has a physical existence analogous to the hardware and software of a computer. Just as the response of a computer to any input follows from how it is built and programmed, our response does likewise.

If an automatons were built with human appearance and adequately programmed to simulate human behaviour, how could an objective observer conclude that the human has free will but the automaton does not? There is undoubtedly a subjective "feeling" within each of us that we are "free" to make certain choices. However, the fact that we consist of mass-energy, albeit of very complex structure, and the fact that mass-energy believes according to laws of physics must mean that every event of the future, including our every future thought and action, is predetermined by the present. Free

will is an illusion.

"Meaning" and "purpose" are, by definition, dependent on an intelligent being having an intent in mind. A corollary of the nonexistence of a "God" is that we are here with no "meaning" or "purpose" to our lives.

In summary, I hold the following to be self-evident truths:

1. There is no "God".

2. There is a universe and we do exist.

3. We and all other species are here as a result of evolution.

4. Mass and energy behave in space and time according to laws of physics that have been largely, but not yet entirely, elucidated.

5. Free will is an illusion.

6. Life has no meaning or purpose.

CHAPTER 2 - THE PURSUIT OF HAPPINESS

I find no inconsistency in holding intellectually that life has no meaning, while at the same time being highly motivated to survive and to achieve.

We are all driven by instincts that are genetically encoded and integral to genetic survival and evolution.

I cannot see that human behaviour differs in any fundamental way from that of numerous species on the savannahs of Serengeti. We are all driven by our instincts to eat, drink, copulate, protect ourselves and our young, and cooperate with others, particularly those most closely related to us, if and when it is to our mutual advantage. Happiness is, I believe, best defined as satisfaction of these drives, and it is that which we all pursue.

Humans are distinguished by superior intelligence, which gives us greater self-awareness and ability for philosophical thought. We also have unique manual dexterity, which together with our intelligence has given us unparalleled control over our environment. These distinctions are, however, not fundamental, but only a matter of degree.

In pursuit of happiness, as aforesaid, we cooperate with others. We do so both in direct

personal dealings and by establishment of and submission to governmental authorities.

Although we all share the same drives, it is clear that individuals exhibit these drives in different proportions, be it as a result of genetic differences, differing environmental influences, and differing opportunities.

Individuals who help others to an unusual extent, are considered to be "kind", "moral" or "generous", although, if my thesis that everything is done in pursuit of happiness is correct, then there can be no such thing as attruistic, kindness, generosity or morality.

I have always felt disdain for organized religion and for the foolishness or hypocrisy of clergymen who sell religion as a source of morality or everlasting life. Undoubtedly, there are many persons who are both committed to religion and generous, but I see no general correlation. Indeed, countless clergymen and others who espouse religion live in relative opulence while much of humanity languishes in squalor. If anything, from my experience in fundraising for charitable organizations, I have sensed a reverse correlation. Atheists often are enormously more generous than persons obsessively committed to seemingly absurd religious rituals. It may be that persons who believe that they get salvation from observance of rituals feel less need to derive happiness from helping others.

Voltaire said that; "Nobless oblige"; with power and wealth comes obligation. I do not

see any rational basis for that pronouncement. There is no objective basis to hold that anyone is obligated to do anything not required by law. Each person can be expected only to pursue personal happiness in whatever manner he sees best from his own perspective.

Power and wealth bring no obligation, but they do bring opportunity.

Given that our instincts give us a desire to help others, particularly those close to us, power and wealth bring an opportunity to derive an extra measure of happiness by acting to help others, be it family, friends, members of our community, our country, or mankind at large.

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CHAPTER 3 - MY EARLY YEARS 1942-1967

I was born in Toronto on February 25, 1942 to Herbert Sherman and Sara Winter Sherman. My sister, Sandra, had been born eighteen months earlier.

My parents had both also been born in Toronto, my father in 1906 and my mother in 1910. Their parents had arrived in Canada at the turn of the century as a result of antisemitic pogroms in Eastern Europe, my father's parents from Russia, and my mother's parents from Poland.

My legal given names were "Bernard Charles", but I have always been called "Barry. My mother later told me that she preferred the name "Barry", but thought that "Bernard" sounded more distinguished and would serve in me better as a legal name in later life.

My first ten years were unremarkable. My father earned his income as president and senior of two partners in American Trimming Company, a small manufacturer of zippers in downtown Toronto.

On Monday, November 17, 1952 my father went to work but did not return. He suffered a massive heart attack at work, and died immediately. We subsequently learned that he had suffered from a congenital heart defect, but had never informed my mother, perhaps because he did not believe the prognosis and did not wish to burden her with

concern. Obviously, he should have told her.

I do not have strong recollections of my father. One episode remains clear. On a Saturday morning some weeks before his death, he took me with him to work. I asked what I could do to help while he worked in his office. He sat me at a table where zippers where ready to be counted into boxes of twenty. In order to please him, I worked quickly. When he finished his work and came to get me, he exhibited surprise at the number of boxes I had filled, apparently more than would have been done in the same time by any of his paid staff. However, he then proceeded to select a few boxes at random to check the counts. I was extremely offended that he doubted that my counts would be accurate.

Notwithstanding this specific memory, I'm sure that my father was a loving parent, as was my mother.

I do not recall feeling any great sense of loss upon my father's death. However, some weeks later I was at school in a class being taught by a specialty teacher, and the teacher began to scold me for daydreaming and being inattentive. Coincidentally, at that moment, by homeroom teacher entered the room, and on hearing what was happening, said aloud to the specialty teacher that I had suffered a "recent family tragedy" and should be excused for inattentiveness.

I recall being surprised that my teacher would know about my father's death, and also recall wondering whether or not she was correct in attributing my inattentiveness to my father's death.

Although I do not know to what extent, if any, I was affected by my father's early death, a psychologist would likely suggest that the drive to achieve which I later exhibited was caused, at least in part, by a resulting insecurity.

A year earlier, when I was nine years of age and in grade 5, I had been nicknamed "grandpa" by my teacher, as a result of my apparent lethargy. From that early age to the present, I have been continuously aware of chronic lethargy and fatigue, which has made it all the more difficult for me to fulfill that drive to achieve.

Before her marriage, my mother had been an occupational therapist. Upon my father's death, my mother received little from the sale of my father's interest in his business. She thus resumed work as an occupational therapist in order to support herself, my sister, and me.

I did not excel as a student either in primary school or in the earlier years of high school. However, as time went on, not only did I become more motivated and competitive, but I discovered that I had unusually strong skills in mathematics and the sciences. When in grade 13, I won first place in a national physics contest for high

school students, and I graduated from high school with thirteen "firsts" (i.e. subjects with an "A" grade), more than any other student in the province of Ontario. My marks were not necessarily the highest, so that the number of "firsts" may have been more an indication of motivation than of intelligence.

Throughout high school, in addition to being lethargic, I was physically awkward and introverted. I had few friends, but did develop a strong friendship with Joel Ulster, who subsequently became a business partner for several years, and who has remained a lifelong close friend.

In September 1960, I began undergraduate studies in Engineering Physics (now Engineering Science) at the University of Toronto. I specifically chose Engineering Physics because it was reputed to be the most difficult of programs related to mathematics and the physical sciences.

Grade averages of all students were published annually by the University. Among all students in the Faculty of Engineering, I ranked fourth in first year, third in second year, second in third year, and first in the fourth and final year. Upon graduation, I was thus awarded the Wilson Medal for standing first in Engineering Physics and the Gold Medal of the Association of Professional Engineers for standing first in the entire Faculty. It seems that the tougher the going got, the better I did.

Before the death of my father in 1952, my mother, sister and I had spent our summers at our cottage near Barrie, Ontario. In early 1953, my mother sold the cottage, and I was sent to summer camp in the summers of 1953 to 1957. Perhaps needless to say, I did not enjoy camp. I felt imprisoned rather than on vacation.

Beginning in 1958 when I was 16 years of age, I spent my summers in Toronto working at various jobs.

In the summer of 1958, for lack of another possibility, I joined the student militia of the First Localing Regiment, Royal Canadian Artillery. I did not enjoy that summer either, as the drills were physically gruelling for me and, moreover, I was, and always have been, reluctant to submit to any authority. Most memorable were the several sessions with the Regiment's Chaplain, who preached Christianity, and whom I engaged persistently in aggressive and disrespectful debate, much to the amazement of my fellow recruits.

During the summer of 1959, I worked for the Ontario Government processing useless information in an obscure office in the basement of Queen's Park.

The summers of 1960, 1961 and 1962 were spent working for my mother's younger brother, Louis Winter. Uncle Lou was a biochemist. He had, some years earlier, founded Winter Laboratories which was a medical testing laboratory, located on Barton

Street in Toronto, the bulk of its work being pregnancy tests done on urine samples picked up from drug stores. He had also more recently started Empire Laboratories, which was a small distributor of generic prescription drugs. Empire Laboratories operated out of a converted house on Ossington Avenue. The operations at that location consisted of the repackaging of tablets and capsules purchased in bulk from American generic manufacturers.

I spent the summers of 1960 and 1961 as a driver, picking up urine samples from and delivering pharmaceuticals to pharmacies.

In 1962, Lou established his first pharmaceutical manufacturing operation at 77 Florence St. That summer, I worked at the plant helping set up operations.

Earlier that year Lou's wife, Beverly, had been diagnosed as having leukemia, and he decided to take off several weeks for a vacation with her in Bermuda. The staff was small and Lou left no one in particular in charge. He was also unreachable by telephone. Before he left, Empire had been awarded a contract to supply ASA tablets under the private label of the recently established Towers Department Stores. Lou had arranged the production of what he though was ample inventory, but, a few days after he left, the Towers office phoned to advise that sales were larger than expected to ask us to supply much larger quantities.

I took it upon myself to phone Mrs. Pani Relle, at Atlantic Chemicals, who was the supplier of bulk ASA, and negotiated with her purchase a substantially increased quantity at a substantially lower price. I also organized around-the-clock production to fill the orders. Upon his return, Uncle Lou was very pleased with what I had done.

Although I did not know it the time, these summers at Empire Laboratories would later prove to be of critical importance to my future career.

In 1963, while in my third year of Engineering Physics, I was one of two Canadian students selected by the U.S. National Aeronautics and Space Administration (NASA) for its summer program for promising undergraduates. I spent several weeks in classes at Columbia University in New York City, followed by a several week tour of major NASA installations throughout the U.S., including the launch facility at Cape Canaveral.

After completing the fourth and final year of Engineering Physics in May 1964?, I went to work for the summer at the Spar Aerospace Division of DeHavilland Aircraft in Toronto. My assignment related to analysis of the vibrational dynamics of the ISIS satellite, which was then being designed.

My first choice of a university for graduate work was M.I.T. (The Massachusetts Institute of Technology). I was accepted into the graduate program in M.I.T.'s Department of Aeronautics of Astronautics and was awarded a fellowship which covered both tuition

and living costs. I thus set out for Boston and M.I.T. in September 1964.

I had expected that graduate work at M.I.T. would be much more challenging than undergraduate studies at the U. of T., and that competition would be much tougher. I was surprised to find otherwise.

I was awarded a Master of Science degree in Aeronautics and Astronautics in June 1965, and Doctor of Philosophy in Systems Engineering in January 1965, thus earning both a Masters and a Doctorate in a little over two years. My gradepoint average on leaving M.I.T. was a perfect 5.0.

My Ph.D. thesis was entitled Precision Gravity Gradient Satellite Altitude Control.

It consisted of about two hundred pages of mathematical analysis of the dynamics of a system for controlling the orientation of a satellite in earth orbit, a system which I had invented and on which I subsequently obtained a U.S. patent.

In the first week of November 1965, during my second year at M.I.T., I received a phone call in the middle of the night. On hearing the phone ring, I expected that it would be a call to tell me that Beverly Winter, my Uncle Lou's wife, had died, as she was then terminally ill with leukemia. I was astounded to be told by my sister, Sandra, not that Beverly had died, but that Lou, who was then forty-one years of age had died.

He had suffered a heart attack at his office and been taken to St. Joseph's Hospital where he died soon after arrival. St. Joseph's was the very hospital in which his wife, Beverly, lay terminally ill. I went to Toronto for Lou's funeral, and I visited Beverly at St. Joseph's Hospital. I recall that, when I was in her room, all the lights when out in the Great Blackout which caused power losses in much of the eastern United States and in Canada. Three weeks later, I had to return to Toronto again for Beverly's funeral.

Lou and Beverley Winter left behind four sons, all of whom were subsequently adopted by Dr. Martin Barkin and his wife, Carole.

In their wills Lou and Beverly had appointed as executors and trustees of their estates the Royal Trust Company and two lawyers, David Ward and Martin O'Brien. By the time I obtained my Ph.D. in January 1967, I had decided that I did not want to seek employment as an astronautical engineer. I was interested in both science and business, and I also wanted to return to Toronto to live. Thus, in January 1967, I returned to Toronto to seek out an opportunity in a scientific business.

CHAPTER 4 - EMPIRE YEARS 1967-1973

When I returned to Toronto in early 1967, Joel Ulster was working toward Certification as a Chartered Accountant and was employed at a firm of accountants. We had an understanding that, if we could arrange and finance a suitable acquisition, he would leave accounting and join me as my partner.

The obvious target was Empire Laboratories, the generic pharmaceutical firm which had been founded by my Uncle Lou. Not only was it a scientific business, but I had knowledge of it, having worked for Lou in the summers of 1960, 1961 and 1962.

I phoned the Royal Trust Company, which was one of the executors and had been allowed by the other two executors, David Ward and Martin O'Brien, a free hand in managing the estate. They told me that they were not yet interested in selling.

Because the acquisition appeared ideal, I did not back off. I went to visit the offices of Empire Laboratories to talk to some of the staff. The operations were now located in a five storey building, at 301 Lansdowne Ave. in Toronto, to which the company had moved before Lou Winter's death in 1965. I learned that the Royal Trust Company had appointed as president on a part-time basis Dr. George Wright, who was a Professor of Chemistry at the University of Toronto and had previously been a consultant to Lou Winter. I learned from the staff that they considered Dr. Wright to be incompetent to

manage the business, that sales had declined from over a million dollars per year in 1965 to about eight hundred thousand dollars per year, and that the company would likely soon be insolvent.

I phoned David Ward and Martin O'Brien to tell them what I had learned, to suggest that the trust company might be more interested in continuing to manage Empire Laboratories to earn fees than in a prudent sale, and to point out that, if the company went insolvent, Lou's children might some day hold them liable for negligence as executors and trustees.

Within days I received a phone call from the Royal Trust Company advising that they were ready to negotiate a sale. We were given full access to the books and records, as a result of which our suspicions of imminent insolvency were confirmed. We offered to purchase the assets at net book value, which would require payment of about two hundred and fifty thousand dollars after deduction of the liabilities to be assumed.

Royal Trust was reluctant to accept. There had been eager buyers at much higher prices upon Lou's death in 1965, and Royal Trust thus now franticly sought out other potential buyers.

While awaiting an answer from Royal Trust, I received a phone call from Jules Gilbert. Jules was the founder and owner of Jules R. Gilbert Limited, another generic

went bankrupt 2-3-5 after purchasing "Starkman"

manufacturer that he had founded in the mid 1950's. Jules is considered to be one of the fathers, if not the father, of the Canadian generic drug industry. Jules asked that I visit with him at his offices and factory on Dundas Street in West Toronto, and I obliged.

He gave me a tour of the premises and introduced me to his son-in-law, Fred Klapp, who was then endeavouring to expand sales through telemarketing.

Jules told me that he had heard that Joel and I were negotiating to buy Empire Laboratories, and he wanted to warn me that the purchase would be a great mistake. He said that he had just completed formulating a new plan that would make his company very successful and would put Empire Laboratories out of business within months. He told me that he required some further funding for his new plan and thought it would be best for both of us if I were to purchase a minority position in his company instead of buying Empire Laboratories. He said; "If you do so, I will be the king, but you will be the crown prince."

I told him that I could not give proper consideration to such a proposition without knowing what the plan was that would put Empire Laboratories out of business. He responded that the plan was of such great value that he did not wish to tell me, but on being pressed he relented. He told me that the plan was to be known as the "7P Program" which was an acronym for "Prorated Prescription Pricing Plan for Physicians, Pharmacists, and Patients". Instead of being packaged in bottles of 500 or 1000 for

dispensing by the pharmacist, each product would be packaged in the usual prescription quantity, be it 7, 10, 30, or whatever.

The pharmacist would then only have to place his dispensing label on the package. Such "unit of use" packaging was already prevalent in Europe, but not North America. He further stated that the price for each package would be exactly the same regardless of cost of production. I told him that uniform pricing sounded impractical and would undoubtedly result in small sales of products priced too high and large sales of products priced too low.

He responded that physicians would appreciate the uniform pricing and would insist on use of his product for all prescriptions.

It appeared to me that Jules Gilbert, although a very nice gentleman and very knowledgeable, could not distinguish between what was practical and what was not.

Within days after that meeting, Ben Ulster, Joel's father, told us that his friend Lou Craig wanted to have lunch with Ben, Joe and me, to also try to talk us out of proceeding with the purchase.

Lou Craig was a brother-in-law of Jules Gilbert. They had originally been in business together but had parted company some years earlier. At lunch, Lou Craig explained

that he had recently sold his generic drug company, which he had operated under the name Bell-Craig, to an American Company, Denver Laboratories. He said that the generic drug business was a commodity business that was and always would be highly competitive. He said he was glad to be out and that if we proceeded to buy Empire Laboratories we would inevitably fail and lose our investment.

He also advised us against investing with Jules Gilbert, and stated that we should entirely refrain from investing in this industry.

Despite the warnings of Jules Gilbert and Lou Craig, Joel Ulster and I decided to proceed to try to complete the purchase, although not without substantial trepidation.

Royal Trust kept putting us off day after day, apparently being reluctant to accept our offer, notwithstanding that there appeared to be no other buyer in sight.

NOT TRUE

FIRECO AT $1100K MORE

I phoned David Ward and Martin O'Brien again. I told them that we were about to pursue another opportunity, and that if our offer to purchase Empire were not accepted within two days it would be withdrawn. Within the two days Royal Trust advised that they would accept our offer, and our solicitors began to draw up the formal documents.

It remained to arrange the financing. We required about two hundred and fifty thousand dollars to complete the purchase, plus an operating line of credit. $450,000.00

At that time, my mother had investments totalling about one hundred thousand dollars. She offered to put up all of her assets as security for a bank loan. The Bank of Montreal, at which my mother and I both banked, agreed to lend me one hundred thousand dollars against my mother's assets, which was the full face value. It still seems surprising that both my mother and the Bank were prepared to take that risk, as we easily could have failed. Fortunately, we did not fail.

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The very day we took control, we terminated the services of Dr. George Wright.

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Jim Church, the sales manager, informed us that Novopharm Limited, another generic firm founded a few years earlier by Leslie Dan was now a serious competitive threat. Jim explained that for those several years, Empire Laboratories had been supplying products to Novopharm in bulk, and Novopharm had been packaging the products and undercutting Empire's prices at Empires' pharmacy accounts. Jim had repeatedly asked Dr. Wright to cease supplying Novopharm, but Dr. Wright had nevertheless continued the sales. Jim stated that the selling prices to Novopharm had been too low and that he had suspected improprieties but could not prove it.

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We immediately ceased all sales to Novopharm, but the horse was already out of the barn. By then Novopharm had manufacturing capability of its own, and was no longer dependent on Empire.

We recognized that, if we were to succeed, we would have to operate efficiently, provide good quality and service, and develop new products as quickly as possible.

At that time I knew little about pharmaceutical manufacturing, and virtually nothing about how to formulate a tablet or capsule.

Within the first few days on the job, I asked Jim Church to provide a list of all products with quality problems, in order of priority. Number one on the list was ascorbic acid (Vitamin C) tablets. Jim told me that the tablets were so soft that they were breaking in

the bottles, and much of what was sold was being returned by the customers.

The production department was on the third floor of 301 Lansdowne Avenue, and the production manager was Rehmat Sheikh, who was a pharmacist trained in India.

I went up to Rehmat's office and I asked him to explain to me what the problem was with our ascorbic acid tablets. He responded that there was nothing wrong with the tablets. He said that he had designed the formulation himself, and that every product formulated by him was the best that could be made.

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I obtained samples of ascorbic acid tablets of other manufacturers to compare to ours. Ours were much easier to break than the others, and were clearly too soft. It was thus clear to me that Rehmat Sheikh was both incompetent and arrogant, which is a potent combination.

Coincidentally and fortunately, a few days later, when I was still trying to figure out how to handle the problem, Rehmat told me that he had been offered a job as vice-president of manufacturing at another firm and at a higher salary, and he would have to resign

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based on review of the results of one or more series of comparative experiments.

To increase sales, we were urgently in need of new products. However, virtually all products not already in our line, and having sales large enough to be worth developing, were covered by patents held by the brandname manufacturers. At that time, Section 41 of the Canadian Patent Act had a provision called compulsory licensing, which related to medicines, pursuant to which one could obtain from the Commissioner of Patents for a license under any relevant patents. Licences were available only for synthesis of chemicals in Canada and not for importation, and it was necessary to pay to the patentee a royalty as set by the Commissioner of Patents.

Under the Section 41, three compulsory licences had been issued and were being worked. One was to Denver Laboratories (formerly Bell-Craig) for chlordiazepoxide hydrochloride, for which the equivalent brand name product was Librium of Hoffman LaRoche Limited. Denver had capacity to produce only very small quantities, which it used to make capsules for sale under the Denver label. The other two licences had been issued to Micro Chemicals Limited of Cooksville (now Mississauga), Ontario, one for chlordiazepoxide hydrochloride, and the other for trifluoperazine hydrochloride, for which the equivalent brandname product was Stelazine of Smith Kline and French Laboratories.

Micro Chemicals Limited was a member of a group of three related companies. Micro

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Within a few months, we introduced both products under the Empire label. Total sales thereby increased substantially, and the company became profitable.

Fortunately for us, the potential for generic drugs continued to grow.

Prior to 1968, in every province except Alberta, when a prescription was written by a

physician using a brandname, a pharmacist was required by law to use only the brand as written, and could not substitute an equivalent generic product.

In 1968, Dr. Alan E. Dyer was an Assistant Deputy Minister in the Ontario Ministry of Health, and responsible for pharmaceutical policy. Dr. Dyer understood that drug prices of brandname products were excessive, and that, if they were to be reduced, it would be necessary to allow pharmacists to substitute generic products for brandname products.

However, there was substantial concern about whether or not all generic products were of good quality, as the regulations under the Federal Food and Drugs Act were weak, and did not include sufficient requirements to ensure good manufacturing practices.

Dr. Dyer designed a program entitled PARCOST, which was an acronym for Prescriptions At Reasonable Cost. The Ontario Ministry of Health would establish an expert committee, entitled the Drug Quality and Therapeutics Committee. The Committee would inspect all manufacturers, review production documents and test results, and decide which brandname and generic products were of satisfactory quality. The products meeting the requirements would be listed in a Parcost Formulary. Pharmacists would be entitled to use any product listed in the Formulary in place of an equivalent brandname product, unless the physician specified "no substitution".

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The necessary amendments to the Pharmacy Act were passed by the Ontario Legislature in 1968.

Dr. Dyer and his Committee came to inspect Empire Laboratories. They indicated being very impressed with the extent and capabilities of our quality control laboratories (located on the fifth floor of 301 Lansdowne Avenue), and in particular were pleased that we were testing raw materials for impurities by thin layer chromatograph and gas chromatography.

During the discussions, Dr. Dyer asked me how we purchased our raw materials. I responded that we sent requests for quotation to all known suppliers and purchased at the lowest quoted price, knowing that we would ensure quality by fully testing every lot of raw material received.

Dr. Dyer did not like my answer. The politically correct answer, which I was expected to give, was that we scoured the world to find manufacturers with the best facilities and best quality control to ensure quality a priori, and that we bought only the best materials, regardless of price. I pointed out that the Ontario Ministry of Health purchased all medicines for the psychiatric hospitals exactly the way we bought our raw materials.

Despite my apparent gaffe, the first edition of the Parcost Formulary included most of

our products, as well as some from Novopharm, along with most brandname products. The products of several generic manufacturers, not deemed to have adequate quality controls, were excluded. Some brandname products were also excluded by reason of inadequate quality control.

Within the next few years, other provinces began to introduce interchangeable formularies as well, and all provinces began to pay for prescription drugs for senior citizens.

Another major step forward for the generic industry came in 1969. Prior to that time, Section 41 of the Canadian Patent Act provide for compulsory licensing under pharmaceutical patents, only if the licensee produced the chemical in Canada. Few licences had been issued, because the costs of setting up chemical synthesis were high and the potential generic sales in the Canadian market were relatively small.

In 1969, the Liberal Party was in power in Ottawa, and Pierre Trudeau was Prime Minister. Bill C-102 was introduced by John Turner as Minister of Consumer Affairs. When the Bill was passed and given royal assent, Ron Bassford was Minister of Consumer Affairs, and Turner has been moved to Justice. Pursuant to Bill C-102, Section 41 was amended to provide that compulsory licences could now be obtained for importation of pharmaceuticals.

We promptly incorporated S & U Chemicals Limited as a subsidiary of Sherman and Ulster Limited, and, through that subsidiary, we applied for and obtained numerous compulsory licences.

It turned out that getting the licences was the easy part.

Pursuant to the Regulations under the federal Food and Drugs Act, it was unlawful to sell a "new drug" without first filing a submission with the Food and Drugs Directorate ("FDD") to satisfy the Directorate as to safety and effectiveness. A "new drug" was defined as one that had not been sold in Canada for long enough and in sufficient quantity to be generally accepted as safe and effective.

The Directorate began to take the position, somewhat arbitrarily, that if a brandname product was on the market before 1963, a generic equivalent would not be considered to be a new drug, but, if the original brandname product had been introduced more recently, a generic product could not be sold unless the generic manufacturer filed and obtained approval of its own New Drug Submission.

The most significant patented product which was not then considered to be New Drug was ampicillin capsules, sold under the brandname Ampicin and Penbrittin by two brandname manufacturers pursuant to an agreement between them.

At Empire Laboratories we worked quickly to ensure that we could be the first to launch generic ampicillin capsules, and we succeeded to do so in 1970.

A few months later we received a visit by an inspector from the FDD. He advised us that one of the brandname manufacturers had purchased and tested several lots of our ampicillin capsules and found one to be subpotent, the minimum acceptable potency being ninety percent of the amount per capsule stated on the label. The FDD laboratory had confirmed the low potency. The inspector suggested that we recall the lot from all pharmacies to which it had been shipped. We asked the inspector to give us one day to retest the product ourselves. Our retesting indicated the potency to be within the required limits. We so advised the inspector, but he stated that, nevertheless, we would be well advised to recall this lot in view of the low result found by the FDD laboratory and the "politically sensitive" nature of this product, which was the first introduced under the new expanded compulsory licensing provisions.

The inspector assured us, although not in writing, that, if we did the recall, there would be no action against us by FDD. In any event, recalls were commonly done when some problem was detected after sale, and there had never been a prosecution in such a case so long as the manufacturer acted responsibly.

A few weeks later, an RCMP officer served us with a summons informing us that Sherman and Ulster Limited, operating as Empire Laboratories, had been charged with

a criminal offence under the Food and Drugs Act for having sold a subpotent product.

It became clear that, notwithstanding the passage of Bill C-102, the brandname companies still had strong influence over the workings of government.

To defend us, we retained Willard ("Bud") Estey, a prominent attorney who subsequently became a Justice of the Supreme Court of Canada. When the matter eventually came to court we were acquitted. The Crown had relied on a single test by a junior chemist, who was shown on cross-examination to have made several errors.

Our most significant crisis in the "the Empire Years" arose on January 25, 1971. On that date, we received a letter from Dr. G. Showalter, an employee of the federal Department of Supplies and Services, who purported to act as Chairman of a board which selected drug suppliers acceptable to his Department. Dr. Showalter's letter included a list of about fifteen complaints about Empire products that had been received by the Board, and stated that the Board had reviewed the complaints and found them to be valid, and that for this reason and "other reasons", the Board had removed Empire Laboratories from the list of approved suppliers. The letter further stated that notice of our delisting had already been sent to all users of the list.

It appeared that Dr. Showalter and his Board had never heard of the principles of natural justice with which, according to common law, all judicial and quasi-judicial

bodies must comply.

The decision of the Board was fatally flawed in the following respects:

1. The Board had failed to disclose the allegations to us and to give us a chance to defend ourselves before making its decision.

2. Most of the complaints cited related to products sold years earlier by Empire Laboratories Limited, and not by Empire Laboratories, a division of Sherman and Ulster Limited.

3. One of the complaints cited was the charge against us in relation to ampicillin, which had not yet gone to trial and in relation to which we were entitled to a presumption of innocence.

4. The "other reasons" were not even disclosed.

We immediately panicked. Listing by the Showalter's Board was a prerequisite for becoming and remaining listed in the Ontario Parcost Formulary, and was also a prerequisite to being a supplier to most hospitals and other major customers.

Dr. Showalter had already left his office for the day. I obtained his home phone number

from Ottawa Information and phoned him at home. I told him that the Board's decision and his letter were outrageously unfair and thus unlawful, and that, unless the decision were reversed forthwith, we would hold him personally responsible. He told me that the decision would not be changed by threats from me and he hung up the phone.

The next day we met with Willard Estey and instructed him to initiate legal action against Showalter of the Board. Within a few days, Estey filed in the appropriate Court an application for a Writ of Certiorari quashing the Board's decision and a Writ of Mandamus compelling relisting.

Estey also drafted for us a letter to Dr. Dyer at the Ontario Ministry of Health cautioning him not to delist our products on the basis of the Board's decision as the validity of that decision was before the Courts. Dr. Dyer agreed to refrain from any steps pending the outcome of our attack on the Board's decision.

Within two weeks, and before the matter could come to a hearing in the Court, Dr. Showalter and his Board backed down and relisted our company. Dr. Showalter and the Board did not bother us again thereafter.

This was the first time in my career that I found it necessary to initiate a legal action. It was to be the first of many.

In the years 1971 and 1972, the sales of Empire continued to grow, and by the end of 1972 sales had reached a level of a little under two million dollars a year.

In early 1973, we received a phone call from a young man name Gil LeVasseur. He was a Harvard MBA type who was working on acquisitions for ICN Pharmaceuticals Inc., a public U.S. company, of which the founder and chairman was Milan Panic.

ICN had recently purchased Winley-Morris, another small generic drug company located in Montreal, from Morris Goodman. Winley-Morris had been renamed ICN Canada Limited, and Morris Goodman had stayed on as president. LeVasseur told us that ICN wanted to buy Empire Laboratories (i.e. Sherman and Ulster Limited) and to merge it into ICN Canada Limited.

Joel Ulster and I were ambivalent about selling, but decided to let ICN evaluate our company and make an offer to us.

Although we had done reasonably well over the previous few years, we had concerns, some of which were as follows:

1. Our facilities, being located in a five storey building were antiquated and inefficient.

2. We produced numerous types of dosage forms, including compressed tablets, coated tablets, solutions, suspensions and ointments. This meant large operating costs for relatively small sales.

3. The generic market was competitive and profit margins were small.

4. The federal Food and Drugs Directorate was treating new generic products as new drugs, thus requiring expensive development work for each new product.

We were able to negotiate a selling price of a little under two million dollars, which we decided to accept.

There were only two flies in the ointment (pun intended).

The first was that the contracts drafted by ICN required that the vending shareholders agree to not compete for five years. I wanted to be free to go back into the same business. Fortunately for me, I was not a shareholder directly, but only through my holding company, Bernard C. Sherman Limited. I hoped that, if we withheld the schedule of shareholders until the last minute, ICN would not pick up this technicality and I would thus not be personally bound not to compete. This worked out exactly as I hoped.

The second was that ICN was prepared to pay only with ICN share and not cash. Moreover, we would have to agree to hold the shares until they were registered, which would take up to six months, before we could sell them. We considered the ICN shares to be a hot potato. They were priced at about twenty U.S. dollars per share, having risen from only a few dollars per share a year or two earlier on the strength of a string of acquisitions all using shares. The net book value per share and earnings per share clearly did not justify the price of ICN's stock.

After much agonizing, we decided to take the risk and make the deal. The transaction closed in September 1973. In the following few months while we were holding the ICN shares, the share price continued to climb to about forty U.S. dollars per share, and we were, of course, ecstatic. However, the price then began to fall just as rapidly. By the time our shares were freed for sale, the price was down to U.S. twenty dollars per share again, and we quickly sold all our shares at about that price. The price then continued to tumble down to about U.S. two dollars per share. We were very fortunate, indeed, to have gotten out in time. After payment of relevant taxes and all of our debts, Joel and I each netted several hundred thousand dollars.

Some weeks after we completed the sale, Morris Goodman, president of ICN Canada Limited, came to see me in Toronto. I suspected in advance that the purpose of the trip was to terminate me as an employee of Sherman and Ulster Limited, which was now a subsidiary of ICN Canada Limited.

My suspicion was correct. Morris Goodman thus became the only person ever to fire me from a job.

He was, of course, right to do so, as he had to consolidate operations, and I was not needed. In any event, I had already decided that I was ready to leave to start another generic pharmaceutical company.

I invited Joel Ulster to join me in the new venture, but he declined. We have nevertheless remained very close friends.

During these "Empire years", in August 1970, I met Honey Reich. On July 2, 1971, we were married by a judge at York County Courthouse. We have four children; a daughter Lauren, Lauren born October 9, 1975; a son Jonathon, born January 28, 1983, and daughters, Alexandra and Kaelen, born April 22, 1986 and Nov. 17, 1990 respectively.

The fact that I make little mention of my wife and children should not be taken as suggesting, that they are not important to my life, as that would be anything but true. However, it seems to me that information about my family is likely to be of less interest to a reader than my observations relating to philosophy, Canadian politics, and the pharmaceutical industry.

CHAPTER 5 - APOTEX INC. - STARTING ANEW

When I set out in late 1973 to found a new generic pharmaceutical company, I was acutely aware of the possibility of failure.

It seems many new ventures fail for one or more of the following reasons:

I. The intended product or service is novel, and it turns out that the expected market is nonexistent or weaker than expected.

ii. The venture is not as efficient as competitors and thus cannot operate profitably while giving adequate value to customers.

iii. The venture is undercapitalized. The funds available are insufficient to finance the required assets and to cover operating losses until the break-even point is reached.

As the intended products were the very ones being sold by Empire Laboratories, Novopharm and others, there was no doubt that the market size was adequate to support a viable business.

As to efficiency, I was now, as a result of my experience at Empire, well qualified to

design and manage an efficient pharmaceutical manufacturing enterprise. It was thus clear that the key to survival and success lay in developing a plan that would get the business established and to the break-even point with the minimum possible investment in assets, and as quickly as possible in order to have minimum operating losses during the time to break-even.

Joel Ulster had declined to join me in the new venture. Unless I were to take in other partners, which I did not wish to do, the only available funds would be the several hundred thousand dollars of profit that I had made on the sale of Empire to ICN.

I needed to design a business that would get to break-even with minimum equipment, minimum floor space, minimum personnel, and in minimum time. The only plan that made sense was thus as follows:

1. The company would produce only one type of dosage form, which would be a tablets (both compressed and coated). All tablets would be made by dry mix processes only (i.e. no wet granulations). This would minimize the types of equipment needed.

2. The production capacity would be small and there would be no redundancy in equipment. We would thus acquire only one mixer, one oscillating granulator (for screening powders), one tablet press, one coating pan, and one electronic tablet

counter for packaging, the total cost of which would be under one hundred thousand dollars.

3. The products initially would be only "old drugs"; that is to say generic products which were not considered by the FDD to be "new drugs" and thus could be sold without filing New Drug Submissions and awaiting approval of same. There were about a dozen such products with sufficient market potential to be worth producing.

4. In-house testing of raw materials and finished products would be limited to the simple physical tests that did not require analytic equipment. All other testing would be contracted out.

5. Selling would be done initially only by mailings to pharmacies plus telemarketing to minimize selling costs.

6. The total staff would be a skeleton staff of not more than five persons.

I estimated that it would be possible to have the initial product line developed, the required stability studies done, and sales initiated within a year of start up.

Phase 2, would be initiated when and only when significant sales were achieved. In

phase 2, all revenues derived from sales as well as borrowed funds would be invested in expansion of capacity and development of the newer generic products requiring New Drug Submissions to FDD. The development of these new products would be done as aggressively as possible in order to build the company rapidly.

We followed this plan and it worked.

(A lot more to come.)

TAB 12

Court File No. 07-CV-326360 PD3
ONTARIO
SUPERIOR COURT OF JUSTICE

SM/jlk

B E T W E E N:
KERRY J.D. WINTER, PAUL T. BARKIN, JEFFREY BARKIN and JULIA WINTER, Personal Representative of DANA C. WINTER, deceased

Plaintiffs

- and -

BERNARD C. SHERMAN, MEYER F. FLORENCE, APOTEX INC. and JOEL D. ULSTER

Defendants

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This is the Cross-Examination of BERNARD C. SHERMAN, a Defendant herein, on his Affidavits sworn on the 27th day of January, 2017 and on the 17th day of April, 2017, taken at the offices of Stikeman Elliott LLP., Suite 5300, 199 Bay Street, Toronto, Ontario, on the 10th day of May, 2017.

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APPEARANCES:
BRAD TEPLITSKY -- for the Plaintiffs
KATHERINE L. KAY } -- for the Defendants
MARK WALLI }
ALSO PRESENT:
Margaret R. O'Sullivan (Estate lawyer)
Kerry J.D. Winter

them because she knew the Barkin family. And she was involved too to try to make sure that they were taken care of.

And the other aspect, as I said, when I went to see what was happening with the business, I was very upset about that. I tried in 1965 to step in because I thought I was the most appropriate person to do it at the time.

89. Q. So let's talk about that for a moment further.

A. Yes.

90. Q. In 1965 you were prepared to go and manage the business as long as you got a first right of refusal, right?

A. Yes.

91. Q. So you were prepared to stay in there even if you weren't an ordinary manager, right?

A. If I had first right of refusal, yes.

92. Q. Right. But that first right of refusal would only be operative in the event that the trustees decided to sell?

A. Correct.

93. Q. So you were prepared to actually go

in there and run the business, weren't you?

A. If I got paid for it and had that first right of refusal. What I wrote speaks for itself.

94. Q. And you were prepared to do that to help the kids, no?

A. In part it was to help myself too, I suppose. I thought it would have been a good opportunity for me because I had the skills, I thought, to salvage the business and build it, create value for them and an opportunity for myself. It was both.

95. Q. Create value for them. That makes sense to me. But what do you mean, "Create value for them"? How? How were you going to do that?

A. Because if I didn't run the business it would go insolvent, I thought. I didn't know that they would succeed in finding somebody else who could run it. They didn't.

96. Q. So how are you going to be creating value for them by running the business, by preventing it from going bankrupt?

A. Yes. By building the value.

97. Q. Building the value. So one of the things you were thinking of in 1965 when you made

your offer, was to help grow the business for your benefit, potentially, if you ever got to buy it, and also for the benefit of the children?

A. Yes.

98. Q. That's fair enough. And when I asked you before about helping in any way you could, you have a better understanding of why I asked you, because those are the words you spoke, right, when you were cross-examined. That's objected to by your lawyer, Dr. Sherman, so you shouldn't answer.

A. Well, I think, I've answered you fully...

99. Q. Okay.

A. ...in any way that I could. How could I? The only things I could do was to try to help protect the value of the business and to try to help, if I could, to ensure they got into a good home.

100. Q. Why did you stop visiting them?

A. Because I didn't want to interfere. I discussed that with the Barkins.

101. Q. You got that feeling from whom?

A. From the Barkins, Caroline and Moishe Barkin.

102. Q. Did they actually tell you that,

at MIT. And I assumed that the trust company would take care of the business as was their responsibility, but they didn't.

154. Q. And in '66 or '67 you approached them again to get involved.

A. '67. I don't think I did it in '66.

155. Q. I'm just trying to be fair just so there's no dispute about the dates...

A. Not to get involved. 1967 I approached them to...and told them they had better sell the business to me or somebody else.

156. Q. You threatened them, didn't you? You told them that Kerry might have a lawsuit against them...

A. Yes, of course, I did.

157. Q. ...if they didn't get their act together.

A. Of course I did.

158. Q. And why did you do that?

A. Because it was true.

159. Q. No. I know a lot of things are true, but we don't do them. So...

A. Because...

160. Q. ...why was it important to you that you had to threaten these people?