Court File No. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC.** (Collectively, the "Applicants)

AND IN THE MATTER OF **TCC/URBANCORP (BAY) LIMITED PARTNERSHIP**

BOOK OF AUTHORITIES OF THE RESPONDENT, DS (BAY) HOLDINGS INC. (MOTION RET. MAY 1, 2018)

April 26, 2018

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Fax: 416 598 3730

Lawyers for the Respondent,
DS (Bay) Holdings Inc.

TO: Service List

INDEX

Tab

TAB 1

See page 20

CITATION: Target Canada Co. (Re), 2016 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Linda Galessiere and *Gus Camelino* for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *Daniel Hamson* for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark and Melaney Wagner for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

Harvey Chaiton for the Directors and Officers of the Applicants

Stephen M. Raicek and *Mathew Maloley* for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada

Vern W. DaRe for Doral Holdings Limited and 430635 Ontario Inc.

Stuart Brotman for Sobeys Capital Incorporated

Catherine Francis for Primaris Reit

Kyla Mahar for Centerbridge Partners and Davidson Kempner

William V. Sasso, Pharmacist Representative Counsel

Varoujan C. Arman for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.

Brian Parker for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.

Roger Jaipargas for Glentel Inc., Bell Canada and BCE Nexxia

Nancy Tourgis for Issi Inc.

HEARD: December 21, 2015 & December 22, 2015

SUPPLEMENTARY WRITTEN SUBMISSIONS: December 30, 2015, January 6, 2016 and January 8, 2016

ENDORSEMENT

[1] The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

[2] On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

[3] These are the reasons.

[4] The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

[5] The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

[6] The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

[7] The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner,

[1] Capitalized terms not defined herein have the same meaning as set out in the Plan.

CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

[8] The Monitor also supports the motion.

[9] The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

[10] In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

[11] By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

[12] The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

[13] The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

[14] Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

[15] The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

[16] The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

[17] In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

[18] The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 – Breach of paragraph 19A of the Amended and Restated Order

[19] First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

[20] Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for

> the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

[21] The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> "A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order…[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation."

[22] The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;
>
> (a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and
>
> (b) a fair and reasonable balancing of interests.

[23] Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP – it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

[24] The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 – Breach of paragraph 55 of the Claim Procedure Order

[25] Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

[26] The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

[27] The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

[28] In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

[29] In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

[30] Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[31] Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

[32] Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

[33] Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

[34] The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

[35] Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

[36] The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

[37] With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

[38] Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

[39] The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

[40] The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

[41] If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

[42] Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

[43] The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, or any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of shareholders of the company, to be summoned in such manner as the court directs.

[44] Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.).

[45] Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd.*, Re, 2009 NSSC 163, 55 C.B.R. (5th) 205).

[46] Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

[47] Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

[48] Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

[49] Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of

the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

[50] The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List], affirmed 2008 ONCA 587, (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

[51] Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

[52] With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

[53] The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

[54] As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

[55] At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

[56] Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

[57] The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

[58] Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

[59] The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

[60] With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

[61] Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

[62] In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp*., Re, 2013 ONSC 823, 2013 CarswellOnt 3043 [Commercial List]. Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

[63] In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,

> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.

Likewise, the Claims Procedure Order, as amended, clearly provides that:

> (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
>
> (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
>
> (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.

There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order…

[64] With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc.*, Re, 2003 ABQB 745, 20 Alta. L.R. (4th) 264, aff'd 2004 ABCA 31, 346 A.R. 28, where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

[65] Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

[66] Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[67] In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

[68] Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

[69] As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

[70] Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Re Quintette Coal Ltd*. (1992), 13 C.B.R. (3d) 146 (B.C.S.C.); *Re Dairy Corp. of Canada Ltd*., [1934] O.R. 436 (Ont. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co*. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Re Northland Properties Ltd*. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at p. 182, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re BlueStar Battery Systems International Corp*. (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

[71] As explained below, the Plan cannot meet the required criteria.

[72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to

release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

[73] The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

[74] The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

[75] The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

[76] Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

[77] However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

[78] Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

[79] This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

[80] Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having

any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be

considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

[87] Accordingly, the Plan is not accepted for filing and this motion is dismissed.

[88] The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

[89] At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Regional Senior Justice G.B. Morawetz

Date: January 15, 2016

TAB 2

See pages 8-11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pine Valley Mining Corporation (Re),***
2008 BCSC 446

Date: 20080414
Docket: S066791
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Business Corporations Act*,
R.S.B.C. 2002, c. 57, as amended

In the Matter of Pine Valley Mining Corporation,
Falls Mountain Coal Inc., Pine Valley Coal Inc., and
Globaltex Gold Mining Corporation

Petitioners

Before: The Honourable Madam Justice Garson

Supplementary Reasons for Judgment on the Inter-Company Claim of Pine Valley Mining Corporation

Counsel for Pine Valley Mining Corporation:	J. R. Sandrelli O. Jones
Counsel for Tercon Mining PV Ltd.:	B.G. McLean C. Armstrong
Counsel for the Monitor:	W. Kaplan, Q.C.
Counsel for Petro-Canada:	D.A. Garner
Counsel for CN Rail:	J.D. Bergman
Date and Place of Hearing:	April 9, 2008 Vancouver, B.C.

[1] These supplementary Reasons for Judgment concern the admissibility of a court appointed monitor's report, and the compellability of a monitor as an expert witness, at the summary trial of a contested application in this proceeding under the ***Companies' Creditors Arrangement Act,*** R.S.C. 1985, c. c-36, as amended ("CCAA").

[2] I issued Reasons for Judgment on March 14, 2008 (2008 BCSC 356) concerning the procedure that would govern the summary trial of the claim of Pine Valley Mining Corporation ("PVM") against Falls Mountain Coal Inc. ("FMC"). Following delivery of those Reasons for Judgment, the Monitor applied for leave to make further submissions with respect to para. 15 of the Judgment. No party opposed the application to re-open the hearing. The order emanating from the Reasons for Judgment not having been entered, I granted leave to all parties to make further submissions concerning the admissibility of the Monitor's Report and the compellability of the Monitor at the summary trial.

[3] This dispute concerns a claim, by PVM against its previously wholly-owned-subsidiary FMC, for approximately $42 million. The dispute centers on the question of whether payments made by PVM to FMC were in whole, or in part, loans or investments. If the latter, then PVM would rank after the general creditors in the CCAA proceeding. The facts which form the background to this inter-company claim are set out in my Reasons for Judgment at 2008 BCSC 356.

[4] At para. 15 of those Reasons for Judgment I stated:

> The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

[5] At the subsequent hearing the parties made further submissions concerning the use to which the Monitor's Report could be put at the trial of the inter-company claim and whether the Monitor's conclusion as to the characterization of the payments made by PVM to FMC could be used as an expert opinion at the trial.

[6] I am now satisfied that, for the most part, the parties have been able, with the assistance of the Monitor, to satisfy themselves as to the proper accounting of the inter-company claim. The remaining issue between the parties is whether the amounts so paid are properly characterized as debt or equity. No party is opposed to the admissibility, at the summary trial, of those portions of the Monitor's Report which detail the numerous transactions between PVM and FMC. What is now at issue is the question as to whether the Monitor's conclusions, that about $27 million dollars of the payments is properly characterized as debt owed to PVM and not as an equity investment by PVM in FMC, is admissible evidence at the summary trial and if so whether and under what terms the Monitor is compellable as a witness. In my earlier Reasons for Judgment, I did not differentiate between what I shall for convenience call the accounting portions of the Monitor's Report and his conclusions or opinion on the proper characterization of the payments.

[7] Mr. Sandrelli, for PVM, wishes to rely on the Monitor's conclusions as contained in his Report. Mr. McLean, for Tercon on behalf of the general creditors, contends that if I permit PVM to use the entirety of the Monitor's Report as evidence, PVM will be obtaining "a leg up", and, in effect, reversing the burden of proof, notwithstanding that in my earlier Reasons for Judgment, I held that PVM carried the burden of proving its whole claim regardless of the Monitor's conclusions.

[8] Mr. Kaplan, counsel for the Monitor, suggested the following directions, which he says take into account the special role of the Monitor as an impartial officer of the Court:

> 1. Either party may file with the Court the Monitor's 4th Report concerning the inter-company claim ("Monitor's Report") or the Notice of Revision concerning the PVM inter-company claim ("Notice of Revision"), at the hearing concerning the inter-company claim presently scheduled to commence May 28, 2008 (the "Hearing").
>
> 2. The Monitor's Report may be received into evidence at the Hearing as evidence of the following matters:
>
> (a) that the transactions referenced therein occurred on or about the date referenced in the Monitor's Report, and in the amounts referenced in the Monitor's Reports;
>
> (b) that the summaries of the Petitioners' accounting of dollar values of transactions over a given time period referenced in the Monitor's Report are accurate summaries of the dollar values of such transactions over such period of time as referenced in the Monitor's Report;
>
> (c) the Monitor's conclusions concerning whether a particular transaction was in the nature of a debt transaction or equity transaction can be received into evidence by the Court but such conclusions are not binding upon the Court; and
>
> (d) that the Monitor's conclusion that a particular payment or receipt was a payment or receipt on behalf of either PVM or

FMC, as the case may be, may be received into evidence at the hearing but that such conclusion is not binding upon the Court.

3. On or before _____, 2008, either party may deliver questions or inquiries to the Monitor in respect to the Monitor's Report, including, without limiting the foregoing, questions or inquiries concerning the following matters:

   (a) details of the Monitor's accounting of the various transactions, including details of the Monitor's tracing of transactions through any bank accounts or accounting records of the Petitioners;

   (b) documents relied upon by the Monitor in respect to the accounting of a particular transaction or transactions;

   (c) the content of management input in respect to the accounting of any transaction or transactions; and

   (d) details concerning the information or document requested from the companies by the Monitor in respect to any transaction, whether or not such information or documentation was provided to the Monitor and, if not, why not.

4. The Monitor shall deliver a supplementary report (the "Monitor's Supplementary Report") responsive to the questions posed to the Monitor by the parties within 10 days of receipt of the questions and circulate the Monitor's Supplementary Report to the parties and the Court. In the event the Monitor is unable to respond to a question the Monitor shall provide the reasons for such inability in the Monitor's Supplementary Report.

5. Any party is at liberty to deliver follow-up questions to the Monitor upon receipt of the Monitor's Supplementary Report and the Monitor shall make every effort to respond to such follow-up questions at the earliest reasonable time.

6. Either party may file the Monitor's Supplementary Report at the Hearing and the Monitor's Supplementary Report may be received into evidence at the Hearing on the same terms and conditions as described in paragraph 2 herein in respect of the Monitor's Report.

7. Either party may apply to the Court for further directions concerning examination of the Monitor at the hearing on the Monitor's Report or the Monitor's Supplementary Report.

> 8. The Monitor may be subject to examination at the Hearing of this matter, by the Court, at the Court's discretion or on the application of either party, in respect to any matter contained in the Monitor's Report or the supplementary Monitor's Report.

[9] In ***Bell Canada International (Re)***, [2003] O.J. 4738 (Ont. S.C.J.) (QL), Mr. Justice Farley discussed the question of the admissibility of a monitor's report, and the role of the monitor. He stated, at paras. 6, 7 and 8:

> 6 L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:
>
> > A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
> >
> > Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).
>
> 7 Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."
>
> > Officers of the court [such as court appointed receivers (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and

> are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Re Bakemates International Inc.*, [2002] O.J. No. 3569 (C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 5; *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1125 (Ont. S.C.J. [Comm. List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1985), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 103-2 where I stated:
>
> > As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel “to get to the truth of the matter”(at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.
>
> The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this

> endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines - The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

[10] In *Rescue! Companies' Creditors Arrangement Act*, (Toronto: Carswell, 2007) Janis P. Sarra, wrote at p. 269:

> 7. Monitor's Reports and the Issue of Compellability
>
> As an officer of the court, the monitor has been found not to be compellable to give evidence in a proceeding, although the monitor reports to the court on a regular basis. The monitor's reports have been found to be "not evidence" and hence not generally subject to cross-examination; rather, as an officer of the court, the monitor is to act "lawfully, fairly and honourably". In Ontario, the court has held that insolvency officers will not generally be subject to cross-examination of their reports, while acknowledging that these court-appointed officers do occasionally make themselves available for examination in the spirit of co-operation and common sense.

The Ontario Supreme Court of Justice in *Bell Canada International Inc.* held that although the situation did not warrant it in the instant case, an officer of the court may be cross-examined on a report in exceptional or unusual circumstances. Such circumstances could include situations where the monitor refused to co-operate in clarifying a part of its report or in not expanding on any element in the report as may be reasonably requested. The Court held that the reasonability of a request must take into account the objectivity and neutrality of the officer of the court; specifying that: "woe betide any officer of the court who did not observe his duty to be neutral and objective". This judgment indicates that one of the monitor's duties is to clarify information to stakeholders based on a reasonableness test. Failing this, the court may in exceptional circumstances compel the monitor to be examined. It also indicates that the court's deference will depend on the monitor complying with its duty to be impartial, objective and fulsome in its report.

The monitor's report offers an opinion to the court as to the accuracy of the information or the wisdom of particular proposed actions. This is not problematic if the monitor is not acting as an advocate for the debtor corporation. However, where it is, it is unclear that the courts have yet generally recognized that this may be problematic for creditors and other stakeholders seeking to challenge the monitor's conclusions. This has implications for interim decisions during the course of *CCAA* proceedings, such as a sale of assets during the proceeding and the court's reliance on the monitor for its business judgment. Rarely has the court preferred the evidence of creditors or disregarded the opinion of the monitor.

In the *Canadian Airlines* proceeding, the noteholders sought to cross-examine the monitor on its liquidation analysis. It was the first time that such an issue had come before the court. Madam Justice Paperny of the Alberta Court of Queen's Bench concluded that cross-examination might not be necessary if the monitor provided further information. It directed the noteholders and dissenting shareholders to send written questions to the monitor, finding that if the need arose, the court would put questions to the monitor in the courtroom. The monitor subsequently answered almost 70 questions in two Special Reports and the issue became moot.

The Court's approach in *Canadian Airlines* reflected the public interest in full disclosure of the monitor's reasoning while protecting the monitor as an officer of the court. Monitors would generally be far less effective if they were at risk of being compelled to be cross-examined on each of their reports or opinions to the court.

> However, the courts have cautioned that monitors' reports should not include information that really should be led as evidence by the debtor corporation in a *CCAA* proceeding. The use of the monitor's report to insulate the debtor from cross-examination may have implications for the dispute resolution process under the *CCAA* as the debtor may have a tactical advantage in the bargaining process where the monitor acts as advocate.
>
> The Ontario Superior Court of Justice in *Bell Canada International* commented on this risk of the debtor shirking its disclosure obligations through the use of the monitor's report. It observed that there have been problems with motions supported by nothing other that *[sic]* the monitor's report. The Court held that if a matter is reasonably expected to be contentious or turns contentious, it is important to have an affidavit from the moving party and time to allow cross-examination. This represents recognition by the court that the monitor may risk its impartiality or the perception of impartiality if its reporting role is used inappropriately to insulate parties from cross-examination.

[11] Kevin P. McElcheran in *Commercial Insolvency in Canada* (Markham: Lexis Nexis 2005) states on p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[12] From these authorities and commentaries, I conclude that my discretion should be guided by the following principles:

1. Presumptively a monitor's report, such as the one here, is admissible in evidence at a hearing concerning the subject matter of the report.
2. In unusual circumstances an officer of the court, such as a monitor, may be cross-examined on his report.
3. The monitor must remain neutral as between the various stakeholders in a ***CCAA*** proceeding.

4. The court should strive to protect the monitor from close involvement in the adversarial process between the claimants.

[13] In my previous Reasons for Judgment, I ordered that the Monitor's Report be admissible primarily in order that the Monitor's accounting work be before the Court, and so that the parties not be put to the time consuming and expensive process of duplicating the Monitor's work. Now that the parties have reached almost complete agreement as to the accounting, the question remains as to whether those portions of the Report containing the Monitor's conclusions should also be available to PVM as expert or opinion evidence.

[14] It is open to either party to obtain an outside opinion, on the character of these payments, such opinion being based on the extensive accounting and investigation already done by the Monitor. Because the Monitor has done the "heavy lifting" so to speak, I do not think it would be particularly burdensome for either party, if they choose to do so, to obtain expert opinions on the characterization of the payments.

[15] Nothing in these Reasons for Judgment should be taken as determining whether such an opinion would be considered an opinion on a question of law or mixed fact and law or is one on which the Court requires expert evidence. I would not wish these Reasons to be considered as in any way tying the hands of the trial judge to rule on the question of the admissibility of such a report. However it is necessary for me to rule on the question of the use that may be made of the Monitor's Report now, so as to enable the parties to adequately prepare for the summary trial.

[16] Would the neutral role of the Monitor be compromised by permitting PVM to use his conclusions as expert opinion evidence?

[17] I have concluded that the Monitor's 4th Report (and any supplementary reports concerning the inter-company accounting) is admissible for purposes of the trial, but his conclusion as to the characterization of the payments as debt or equity are not admissible as an expert opinion. In reaching this conclusion I have considered the fact that the Monitor is an officer of the Court. He is the eyes and ears of the Court. His role is to assist the Court. To permit either party to use his conclusions on the very question the Court must decide as opinion evidence offends the principle that he must remain entirely neutral as between competing claims of the various stakeholders. The Monitor must be insulated from the adversarial nature of the contested claim; he should not be fearful that, as a result of stating his opinions, he will become embroiled in the litigation in an adversarial way. I have already decided that the summary trial is a trial *de novo*. It is not an "appeal" from the Monitor's findings. I have already decided that PVM carries the burden of proving its whole claim. In this case, it is convenient, and perhaps necessary, to use the accounting portion of the Monitor's Report, for a fair and summary adjudication of the inter-company claim, but the same argument for convenience cannot be made out for the Monitor's characterization of the payments; and, in any event, to admit the Monitor's conclusions on that issue would be to expose the Monitor unnecessarily to the adversarial process. This issue differs from one in which the Court relies on the business judgment of the Monitor such as the approval of the

sale of assets or a liquidation analysis as in the ***Canadian Airlines (Re)***, 2001 ABQB 146 case*.*

[18] In the exceptional circumstances of this case, and particularly given that most of the accounting is no longer at issue, I remain of the view that those portions of the Monitor's Report in which he had painstakingly reviewed the accounts of the company are of great assistance to the parties and the Court and ought to be admissible. As to those findings, the directions suggested by the Monitor apply if the parties are unable, on an informal basis, to obtain any additional information that they need from the Monitor. However, paras. 2(c) and (d) as proposed by the Monitor will be removed from the directions. The parties should set a date for inclusion in para. 3 of the directions.

[19] If further applications for pre-trial directions are necessary, they should be made to the trial judge assigned to this matter.

N. GARSON, J.

TAB 3

See pages 40-41

CITATION: Das v. George Weston Limited, 2017 ONSC 4129
COURT FILE NO.: CV-15-526628CP
DATE: 20170705

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
ARATI RANI DAS, REHANA KHATUN, MOHAMED ALAUDDIN, and KASHEM ALI Plaintiffs	*Joel P. Rochon, Peter R. Jervis, Lisa M. Fenech* and *Golnaz Nayerahmadi* for the Plaintiffs
– and –	
GEORGE WESTON LIMITED, LOBLAWS COMPANIES LIMITED, LOBLAWS INC., JOE FRESH APPAREL CANADA INC., BUREAU VERITAS – REGISTRE INTERNATIONAL DE CLASSIFICATION DE NAVIRES ET D'AERONEFS SA, BUREAU VERITAS CONSUMER PRODUCT SERVICES, INC. and BUREAU VERITAS CONSUMER PRODUCTS SERVICES (BD) LTD. Defendants	*Christopher D. Bredt, Markus Kremer,* and *Alannah Fotheringham* for the Defendants George Weston Limited, Loblaws Companies Limited, Loblaws Inc., Joe Fresh Apparel Canada Inc. *Michael A. Eizenga, Ranjan K. Agarwal,* and *Gannon G. Beaulne* for the Defendants Bureau Veritas – Registre International de Classification de Navires et d'Aeronefs SA, Bureau Veritas Consumer Product Services Inc. and Bureau Veritas Consumer Products Services (BD) Ltd. *Brent Kettles* and *Lisa La Horey* for the Attorney General of Ontario, Intervenor
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: April 3-7, 10-13, 2017

PERELL, J.

REASONS FOR DECISION

[25] And behold, a lawyer stood up to put him to the test, saying, "Teacher, what shall I do to inherit eternal life?" [26] He said to him, "What is written in the Law? How do you read it?" [27] And he answered, "You shall love the Lord your God with all your heart and with all your soul and with all your strength

At present, I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as

> and with all your mind, and your neighbour as yourself." [28] And he said to him, "You have answered correctly; do this, and you will live." [29] But he, desiring to justify himself, said to Jesus, "And who is my neighbour?" [30] Jesus replied, "A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him and departed, leaving him half dead. [31] Now by chance a priest was going down that road, and when he saw him he passed by on the other side. [32] So likewise a Levite, when he came to the place and saw him, passed by on the other side. [33] But a Samaritan, as he journeyed, came to where he was, and when he saw him, he had compassion. [34] He went to him and bound up his wounds, pouring on oil and wine. Then he set him on his own animal and brought him to an inn and took care of him. [35] And the next day he took out two denarii and gave them to the innkeeper, saying, "Take care of him, and whatever more you spend, I will repay you when I come back." [36] Which of these three, do you think, proved to be a neighbour to the man who fell among the robbers?" [37] He said, "The one who showed him mercy." And Jesus said to him, "You go, and do likewise."
>
> [*Luke* 10:25-37]

> in the other systems as a species of '*culpa*', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> [*Donoghue v. Stevenson*, [1932] AC 562 at p. 580]

A. Introduction and Overview

[1] For many years, Loblaws, Canada's largest retailer, purchased clothes from a manufacturer whose factory was in the Rana Plaza, a building in Bangladesh. On April 24, 2013, the Rana Plaza collapsed. 1,130 people died, and 2,520 people were seriously injured. On April 22, 2015, just before the second anniversary of the tragedy, four citizens of Bangladesh commenced a proposed class action in Ontario against Loblaws.

[2] The Plaintiffs are Mohamed Alauddin, Arati Rani Das, and Rehana Khatun, who were among the injured garment workers, and Kashem Ali, whose two sons and a daughter-in-law were garment workers that died in the collapse.

[3] The Plaintiffs' action is brought pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. It is against George Weston Limited, Loblaws Companies Limited, Loblaws Inc., and Joe Fresh Apparel Canada Inc. (collectively, "Loblaws"). It is also against Bureau Veritas - Registre International de Classification de Navires et d'Aeronefs SA, Bureau Veritas Consumer Product Services Inc., and Bureau Veritas Consumer Products Services (BD) Ltd. (collectively "Bureau Veritas"). Bureau Veritas is a consulting services enterprise that Loblaws had retained to conduct what is known as a "social audit" of factories in Bangladesh, including one of the factories in Rana Plaza.

[4] There are now multi-faceted motions before the court; the Plaintiffs' motion for certification of their action as a class proceeding, and the Defendants' motions to have the proposed class action dismissed. The opposing motions raise numerous issues including:

- Does an Ontario court have jurisdiction *simpliciter* (territorial and subject-matter jurisdiction) for the proposed class action?
- Would it be unconstitutional for an Ontario court to assume jurisdiction *simpliciter* over putative Class Members who are "Absent Foreign Claimants;" i.e., persons: (a) who are resident outside of Ontario; and (b) who have not formally attorned to the jurisdiction of the court?
- If the Ontario court has jurisdiction *simpliciter,* how is choice of law determined and what is the choice of law to determine liability?
- If Bangladesh tort law applies, is it ousted to be replaced by Ontario law?
    - In this regard, is Bangladesh law ousted because it is uncertain, nascent, or underdeveloped?
    - In this regard, is Bangladesh law ousted on grounds of public policy because it includes Sharia law that discriminate between male and female heirs of a wrongful death claimant?
    - In this regard, is Bangladesh law ousted because it has not recognized the remedy of punitive damages?
- If Bangladesh law applies, then are the tort claims and the breach of fiduciary duty claims statute-barred in whole or in part under Bangladesh's *Limitation Act 1908* (Act No. IX of 1908)?
- If Bangladesh or if Ontario tort law applies, then is it plain and obvious that it does not include a legally viable tort claim against Loblaws?
    - In this regard, did Loblaws have a duty of care to the Plaintiffs and the putative Class Members because it adopted Corporate Social Responsibility Standards ("CSR standards") under which Loblaws would not purchase goods from suppliers who did not have and comply with appropriate workplace safety standards?
    - In this regard, did Loblaws have a duty of care to the Plaintiffs and the putative Class Members who were working to manufacturer goods for Loblaws because Loblaws had control of their workplace through its substantial purchasing power and its CSR standards and because it knew that the workplace was hazardous and that Bangladesh's public authorities were incompetent in keeping it safe?
    - In this regard, was Loblaws vicariously liable for the negligence of the employer because Loblaws knew that the employees were working in notoriously dangerous buildings and Loblaws had a non-delegable duty to protect the employees?
- If Bangladesh or if Ontario tort law applies, is it plain and obvious that it does not include a legally viable tort claim against Bureau Veritas?
    - In this regard, did Bureau Veritas have a duty of care to the Plaintiffs and the putative Class Members to conduct the social audit to ensure that Rana Plaza was structurally safe?

- If Bangladesh or if Ontario law applies, is it plain and obvious that it does not include a legally viable breach of fiduciary duty claim against Loblaws?
- If the Ontario court has jurisdiction *simpliciter* and if there are viable causes of action, do the Plaintiffs satisfy the certification criteria for a class action?
- If the certification criteria are satisfied, should the paragraphs of the Statement of Claim that plead: (a) an apology; or (b) allege other factory accidents in Bangladesh be struck out as improper pleadings contrary to the *Apology Act, 2009,* S.O. 2009, c. 3 and rule 25.11 of the *Rules of Civil Procedure*?

[5] For the reasons that follow, the ultimate answer to these questions is that the Plaintiffs' action should be dismissed. A synopsis of my major conclusions is:

- An Ontario court has jurisdiction *simpliciter* for the Plaintiffs' proposed class action against Loblaws and Bureau Veritas.
    - In this regard, the court has a constitutionally *infra vires* jurisdiction *simpliciter* based on a combination of: (a) the traditional attornment factors for jurisdiction; (b) the connecting factors from *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17; and, (c) an opt-in definition for class membership.
    - In this regard, it is not necessary to decide whether the putative Class Members who signed consent forms before the certification motion attorned to this court's jurisdiction. This is not necessary because they would attorn by opting into the action.
    - In this last regard, had the court certified the proposed class action, it would not have been necessary for the putative Class Members to have formally attorned before the certification motion and their attornment would have been achieved post-certification by a court supervised opt-in notice program.
- There are no Absent Foreign Claimants, and Loblaws' constitutional challenge motion is moot and is dismissed.
- The law of Bangladesh applies to the putative Class Members' claims.
- Under the law of Bangladesh, with an exception for putative Class Members who were born on or after April 22, 1996 (hence minors at the time of the collapse of Rana Plaza), any tort claims are statute-barred under the *Limitation Act, 1908* and, therefore, the tort claims should be dismissed, except for the putative Class Members who were minors at the time of the collapse of Rana Plaza.
- Under either the law of Bangladesh or under the law of Ontario, it is plain and obvious that the putative Class Members have no legally viable tort claims or breach of fiduciary duty claims against either Defendant, and, therefore, the Plaintiffs' action should be dismissed.
- Since there are no legally viable claims, the Plaintiffs' action cannot be certified as a class action.
- However, if these cause of action conclusions are wrong and there were legally viable claims, then with some qualifications or adjustments, the Plaintiffs' proposed class action satisfies the criteria for certification.

- Had the class action been certified, then the impugned paragraphs in the Statement of Claim should be struck out.

B. Witness and Evidentiary Background

[6] In addition to the Defendants, the corporate actors in the tragic events at Rana Plaza were Pearl Global Limited ("Pearl Global") and New Wave Style Limited and New Wave Bottoms Limited (collectively "New Wave").

[7] Before the building collapse, Loblaws hired Pearl Global to produce garments for Loblaws' "Joe Fresh" line of clothing, and Pearl Global, in turn, out-sourced some of the work to New Wave. New Wave manufactured garments in leased premises at Rana Plaza in Savar, Bangladesh. New Wave Bottoms was on the third floor. New Wave Style was on the sixth and seventh floors. There were plans to expand New Waves' operations to a ninth floor that was under construction at Rana Plaza.

[8] For the motions now before the court, the Plaintiffs proffered the following evidence:

- Affidavit of **Bashir Ahmed** dated February 25, 2016. Mr. Ahmed, of Dhaka, Bangladesh, was New Wave's Factory Manager. He suffered trauma and a fractured left leg in the collapse of Rana Plaza. Mr. Ahmed was cross-examined.
- Affidavit of the Plaintiff **Mohamed Alauddin** dated January 12, 2016. Mr. Alauddin, of Joydeupur, Bangladesh, worked at New Wave Style. He suffered a head trauma in the collapse and was in a coma for two weeks. Mr. Alauddin can read Bangla, but cannot read or speak English.
- Affidavit of the Plaintiff **Kashem Ali** dated January 18, 2016. Mr. Ali, of Savar, Bangladesh, had two sons Ujjal (27 years old) and Afzal (18 years old) and a daughter-in-law, Khadiza Begum (Ujjal's wife), who died in the collapse. All three worked at New Wave Bottoms. Mr. Ali claims that he and his wife were financially and emotionally dependent upon their relatives for income and support. Mr. Ali cannot read or speak English and cannot read Bangla.
- Affidavits of **Garrett D. Brown** dated February 26, 2016 and October 8, 2016. Mr. Brown, of El Cerrito, California, has a M.A. in public health (University of California at Berkeley) and is a Certified Industrial Hygienist in Comprehensive Practice. Mr. Brown was cross-examined.
- Affidavit of the Plaintiff **Arati Rani Das** dated January 13, 2016. Ms. Das, of Savar, Bangladesh, began work for New Wave Style on April 1, 2013. Her mother died in the collapse of Rana Plaza, and Ms. Das suffered serious injuries. Her right leg was amputated, and she remained hospitalized for many months. Ms. Das can read Bangla, but she cannot read or speak English. Ms. Das was cross-examined.
- Affidavit of **Richard Fentiman** dated October 5, 2016. Mr. Fentiman, of Cambridge, England, is Dean of Law and Professor of Private International Law at Cambridge University. He formerly practiced as a solicitor in the courts of England and Wales with Clifford Chance, a leading English law firm.

- Affidavit of **Obaidul Hoque** dated February 29, 2016. Mr. Hoque, of the City of Toronto, is an associate at the law firm of Rochon Genova LLP, lawyers for the Plaintiffs. He was born in Bangladesh.
- Affidavits of **Ajmalul Hossain**, Q.C. sworn on March 2, October 14, and December 15, 2016. Mr. Hossain, of Dhaka, Bangladesh, is Senior Advocate of the Appellate Division of the Supreme Court of Bangladesh and a lawyer practicing international arbitration and corporate law in Bangladesh, England, Wales, and Singapore. He has a law degree from Dhaka University and bachelor and master of laws degrees from King's College of the University of London. He was called to the bar in Bangladesh in 1977. He was appointed Queen's Counsel in England and Wales in 1998. Mr. Hossain was cross-examined.
- Affidavit of **Chief Justice (ret.) Tafazzul Islam** dated December 9, 2016. Chief Justice Islam, of Dhaka, Bangladesh, was a judge of the Supreme Court of Bangladesh and the Appellate Division of the Supreme Court until 2010, when he was appointed to the Permanent Court of Arbitration in The Hague, Netherlands. He was appointed to the High Court Division of the Supreme Court of Bangladesh in 1994 and elevated to the Appellate Division in 2003 and became Chief Justice in 2009. He formerly practiced law in England and in what was then East Pakistan. He was cross-examined.
- Affidavit of the Plaintiff **Rehana Khatun** sworn January 13, 2016. Ms. Khatun is a resident of Savar, Bangladesh. She began work for New Wave Style on March 10, 2013. She was seriously injured in the collapse. Both legs were amputated, and she will never be able to return to work. Ms. Khatun cannot read or speak English and has only limited proficiency in reading Bangla. Ms. Khatun was cross-examined.
- Affidavit of **Md. Sekender Ali Mina** dated February 15, 2016. Ms. Mina, of Dhaka Bangladesh, was hired by the Rana Plaza Claims Administration, which administered the Rana Plaza Donors Trust Fund.
- Affidavits of **Jonathan Morgan** dated October 6 and December 15, 2016. Dr. Morgan, of Cambridge, England, is Senior Lecturer of tort law at Cambridge University and formerly a lecturer in law at Oxford University. He has a B.A. and a M.A. from Oxford University and a Ph.D. from Cambridge University. He is a much-published author in tort and contract law. He was cross-examined.
- Affidavit of **Mahatab U. Shawn** dated February 25, 2016. Mr. Shawn, of Dhaka, Bangladesh, is a lawyer and a member of the Bangladesh Bar Council and practices before the Judges' Court of Dhaka and the Supreme Court of Bangladesh. He translated into English the affidavits of Mr. Alauddin, Mr. Ahmed, Mr. Ali, Ms. Das, and Ms. Khatun.

[9] Loblaws and Bureau Veritas delivered the following evidence:

- Affidavit of **Salahuddin Ahmad** dated November 8, 2016. Mr. Ahmad, of Dhaka, Bangladesh, has a 30-year career as an advocate of the Bangladesh Supreme Court. He formerly was the Attorney General for Bangladesh. He holds a B.Sc. (Econ.) from the London School of Economics and an LL.M. from Columbia University. Mr. Ahmad was cross-examined.
- Affidavit of **Adrian Briggs, Q.C**. dated March 11, 2016. Professor Briggs, of Oxford,

England, is a professor of private international law at Oxford University. He was one of the authors of *Dicey, Morris & Collins, The Conflict of Law* (15th ed.) (London: Sweet and Maxwell, 2016). He practices from chambers in the Middle Temple. He was cross-examined.

- Affidavits of **Jonathan Chen** dated March 9, August 4, and August 7, 2016. Mr. Chen is an associate lawyer with Borden Ladner Gervais, lawyers for Loblaws.
- Affidavits of **James Goudkamp** dated July 13, November 4, and November 11, 2016. Dr. Goudkamp, of London, England, is an Associate Professor of Law at Oxford University. He has a doctorate in law and is the author of *Tort Law Defences* and the co-author of *Winfield & Jolowicz on Tort* (19th ed.). He has held visiting appointments at universities around the world, including Harvard Law School. He is also a practicing barrister and maintains chambers in Temple, London. He clerked for Justice Kirby, a judge of Australia's highest appellate court. He was cross-examined.
- Affidavit of **Jason Hill** dated August 15, 2016. Mr. Hill, of Portland, Oregon, is the Manager, Social Accountability of Bureau Veritas Consumer Products Services, Inc., the United States subsidiary of Bureau Veritas. Mr. Hill was cross-examined.
- Affidavits of **Nihid Kabir** dated August 8, November 5, November 17, and November 19, 2016. Ms. Kabir, of Dhaka, Bangladesh, is an Advocate of the Bangladesh Bar practicing before the Supreme Court of Bangladesh and is the Senior Partner of Syed Ishtiaq & Associates. She was cross-examined.
- Affidavit of **Rokanuddin Mahmud** dated November 3, 2016. Mr. Mahmud, of Dhaka, Bangladesh has an over 40-year career as an advocate of the Bangladesh Bar and is a Senior Advocate of the Appellate Division of the Supreme Court of Bangladesh. He is a former Vice-Chairman of the Bangladesh Bar Council (its highest elected post). He holds an LL.M. from the Free University of Brussels in Belgium, and is a former member of the International Court of Arbitration of the International Chamber of Commerce in Paris. Mr. Mahmud was cross-examined.
- Affidavit of **Chief Justice (ret.) Latifur Rahman** dated January 9, 2017. Chief Justice Rahman, of Dhaka, Bangladesh, practiced law in Bangladesh and Pakistan for almost 20 years before becoming a judge. He served as a judge for over 20 years, first on the High Court Division of the Supreme Court of Bangladesh and then on the Appellate Division of that Court (which is the highest court in Bangladesh). From January 1, 2000 until his retirement in 2001, he served as the Chief Justice of Bangladesh. He was cross-examined.

[10] It is convenient here to note that during Ms. Das' cross-examination, she said for the first time that she was 17 years old at the time of the collapse. This evidence is inconsistent with her evidence in her affidavit delivered for the motions. Loblaws says that the contradiction calls into question the reliability of Ms. Das' evidence generally and raises the prospect that other Plaintiffs may not have understood their affidavits. I regard the inconsistency as simply a mistake upon which nothing turns.

C. Factual Background

1. Introduction

[11] In the description of the factual background that follows and for the motions now before the court, I shall make findings of fact based on the allegations contained in the Plaintiffs' Statement of Claim and based on a humongous evidentiary record of affidavits, experts' reports, transcripts, and documents.

[12] Before the court are the Plaintiffs' certification motion and the Defendants' multi-branched motions. Insofar as the certification motion is concerned, the Plaintiffs must show "some-basis-in-fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 16-26.

[13] As will become overbearingly apparent, much of the Defendants' motions concerned the questions of jurisdiction, foreign law, and whether the Plaintiffs had disclosed a legally viable cause of action, and at the heart of the Defendants' motions was Rule 21, and for those motions, there was affidavit and cross-examination evidence from all the parties and also facts from the Statement of Claim deemed as proven under Rule 21.

[14] On a Rule 21 motion, the court is entitled to consider any documents specifically referred to and relied on in a pleading: *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at paras. 160-162, aff'd 2013 ONSC 1169 (Div. Ct.); *Re*Collections Inc. v. Toronto-Dominion Bank*, 2010 ONSC 6560; *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), leave to appeal dismissed, [1999] SCCA No. 460; *Corktown Films Inc. v. Ontario*, [1996] O.J. No. 3886 (Gen. Div.).

[15] A statement of claim is deemed to include any statement or documents incorporated in it by reference and which form an integral part of a plaintiff's claim: *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 (Gen. Div.); *Weninger Farms Ltd. v. Canada (Minister of National Revenue)*, 2012 ONSC 4544 at paras. 11-12; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 32.

[16] With respect to the statement of Claim, under rule 21.01(1), the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof: *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (CA); *Folland v. Ontario* (2003), 64 OR (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 CPR (3d) 17 (Ont. Gen. Div.) at para. 9.

[17] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion under Rule 21: *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 (SCJ) at paras. 39-40, aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32.

[18] Pleadings that are irrelevant, argumentative, inflammatory, inserted only for colour, inserted only to disconcert or humiliate, or that constitute bare unfounded allegations should be struck out as scandalous: *Sequin v. Van Dyke*, 2011 ONSC 2566 (Master); *Dugal v. Manulife Financial Corp.*, 2011 ONSC 387; *Gardner v. Toronto Police Services Board*, [2006] O.J. No. 3320 (S.C.J.), var'd 2007 ONCA 489; *Williams v. Wai-Ping*, [2005] O.J. No. 1940 (S.C.J.), aff'd, [2005] O.J. No. 6186 (Div. Ct.); *Hodson v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 4378 (Div. Ct.).

[19] The court may strike a pleading even where it was relevant, if its marginal probative value is outweighed by its prejudicial effect: *Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.* (2008), 92 OR (3d) 347 (CA); *Asper v. Lantos* (2000), 51 OR (3d) 215 (Div. Ct.).

[20] Unfortunately, the Plaintiffs' Statement of Claim (and their factums) are bloated with conclusory statements that simply allege a cause of action as if it was a material fact or that provide opinions and speculations as if they were proven material facts. For example, the Plaintiffs baldly plead that Bureau Veritas owed a duty of care to the putative Class Members because Bureau Veritas' conduct gave rise to reasonably foreseeable harm to the garment workers and to the putative Class Members.

[21] However, for the purposes of a motion under Rule 21, the court is not obliged to accept as a proven material fact the conclusion that there is a cause of action or a duty of care. Rather, the court must examine whether the genuine material facts, which are not argument or conclusory statements, disclose a reasonable cause of action.

[22] There are numerous examples where the Plaintiffs plead conclusions or beg a question that the court must decide. To illustrate, the Plaintiffs plead the conclusion that Loblaws had control over Pearl Global and New Wave's workplace because Loblaws could take remedial steps under the agreements it had with them, which agreements required compliance with Loblaws' CSR standards. Thus, in their factum, the Plaintiffs submit that the court is obliged to decide this motion on the basis that if Loblaws and Bureau Veritas had taken action within their control, then the disaster at Rana Plaza would never have occurred. I disagree that I am obliged to decide a motion based on a tautological assertion.

[23] A nice example of conclusory, argumentative, rhetorical, tautological, inflammatory, and question-begging pleading is para. 16 from the Statement of Claim. In this paragraph, the Plaintiffs plead that Loblaws was negligent, incompetent, and deliberately white-washing its misdeeds. Paragraph 16 states:

> 16. The need for accurate and effective auditing and monitoring of building structural safety as part of both corporate social responsibility and facility health and safety audits and inspections in Bangladesh was well-known and frequently discussed by all stakeholders in global garment supply chains in the period of 2005 to 2013. The failure of Loblaws to conduct, or have conducted on its behalf, structural safety audits and inspections of the Rana Plaza building was negligent on behalf of Loblaws and demonstrated sheer incompetence, and as part of a corporate policy to present a comforting picture of workplace safety with all of its suppliers which was deliberately incomplete, misleading and inaccurate. The limited, inadequate and negligent audit and inspection which was performed by Bureau Veritas in the circumstances of Rana Plaza and which failed to inspect, monitor and audit for building structural safely amounted to nothing more than a "white wash".

[24] Another example of begging the question that the court must decide, and an important

one because it begs an important factor in the case against the Defendants, the Plaintiffs argue that I am obliged to interpret the contract between Loblaws and Bureau Veritas and the duty of care of a social auditor as necessarily including an obligation on Bureau Veritas to investigate the structural safety of Rana Plaza because the contracts included determining whether factory licenses and permits were posted at a factory's premises. This is an argument not a material fact, and I shall not accept allegations of this conclusory sort as a found fact for the purposes of the motions now before the court.

[25] Similarly, I also shall not accept as proven factual allegations that are argument. To illustrate, in the Statement of Claim, the Plaintiffs plead that the putative Class Members reasonably expected the social audits requisitioned by Loblaws to reduce risks to their safety because that was the expressly stated objective of the audits. Apart from the fact that this argument makes no sense because: around 60% of the putative Class Members are not employees of New Wave; a large portion of the putative Class Members are illiterate in English or of modest literacy in Bangla; and 100% of the putative Class Members never had an opportunity to read the CSR standards to determine what were the stated objectives of the social audits, this pleading of argument is not something I can or should assume to be true.

[26] In a similar vein, the Plaintiffs plead that the putative Class Members did not expect their own employers to ensure their safety but did expect that the auditors (Bureau Veritas) and the Western corporations who employed them (Loblaws) would ensure their safety through the audits and inspections conducted at New Wave. The expectations or absence of expectations of over 4,000 putative Class Members is a matter of argument and not a matter that I am obliged to take as a true material fact.

[27] In making findings of fact and in applying the law to those facts, I shall not accept as necessarily true allegations of fact that are rhetorical conclusions or that are inconsistent with common sense, the documents incorporated by reference, or incontrovertible evidence proffered by both sides for the purpose of the motions.

[28] As a further illustration, I shall not take as a proven fact the bald assertion that Loblaws adopted its CSR standards because of what it learned in Ontario about factories in Bangladesh. The evidence establishes that the CSR standards were adopted for Loblaws' domestic and international business dealings, which happened to include doing business in Bangladesh, among many other countries, some of whom like Bangladesh had manufacturing sectors that sold goods at cheap prices because of low salaries paid the workforce.

[29] However, this rejection of the Plaintiffs' factual allegation about why Loblaws developed and promulgated its CSR standards is not to say that Loblaws' adoption of CSR standards and its knowledge that workplaces in Bangladesh and other third or fourth world countries are dangerous and poorly regulated, which are undoubtable materials facts, are not relevant to determining whether Loblaws or Bureau Veritas had a duty of care to the putative Class Members. Sometimes buried in the Plaintiffs' arguments are relevant material facts, and I will base my analysis on pleaded facts that are genuine material facts as opposed to legal conclusions and opinions.

[30] In particular, in making findings of fact and in applying the law to those facts, I shall examine whether there are genuine material facts that have been pleaded that justify the conclusion that Loblaws and Bureau Veritas had a duty of care to the putative Class Members.

2. Bangladesh

[31] The People's Republic of Bangladesh is a country in South Asia that borders on India and Myanmar. In land size, Bangladesh is approximately twice as large as New Brunswick, but it is densely populated and is the world's eighth most populous country, approximately 170 million citizens. Muslims, who comprise 87% of the population, make the nation the world's third largest Muslim-majority country. Hindus comprise 12% of the population.

[32] Dhaka is Bangladesh's capital and its largest city, with a population of approximately seven million.

[33] Bangladesh was part of British India until India was partitioned in August 1947. With partition, Bangladesh was named East Pakistan, and it was part of the Dominion of Pakistan. What is now Bangladesh declared independence from Pakistan on March 26, 1971, and after the Bangladesh Liberation War of 1971, on December 16, 1971, it was recognized as a sovereign nation.

[34] Bangladesh is the world's second-largest manufacturer and exporter of garments. Its clothing industry employs four million workers, 80 percent of whom are women. Bangladesh's garment workers are amongst the lowest paid employees in the world, earning on average between 25 cents to 33 cents per hour. Approximately 13% of the population of Bangladesh lives below the poverty line with a daily income of $3.

[35] The age of majority is 18 years old in Bangladesh, but under Bangladesh's *Factories Act, 1965* (No. 4 of 1965), children can begin to work in factories at age 14.

[36] The World Justice Project ranked Bangladesh 90th out of 97 countries for regulatory enforcement. Bangladesh has an abysmal record of enforcing workplace safety standards and has allowed residential apartment buildings to be used for commercial and industrial purposes for which they are not suited.

[37] In the Statement of Claim, the Plaintiffs plead a long list of factory fires and collapses. Bangladesh has a sorry history of factory disasters resulting from poor structural design, expansion of buildings without the required permits, and the conversion of buildings built for residential or commercial use into industrial factories.

[38] The Plaintiffs plead that the Bangladesh government lacks the political will to enforce health and safety standards due to concerns that this would discourage foreign investment.

3. Loblaws and its Suppliers, Loblaws' Social Responsibility Standards, the Master Services Agreements, and the Social Audits

[39] Loblaws purchases merchandise from around the world. It developed, and has for some time promulgated and implemented, Corporate Social Responsibility Standards (CSR standards). The CSR standards were designed to oversee the operations of Loblaws suppliers and to protect the safety of employees in Canada and around the world that produce goods for Loblaws.

[40] The CSR standards were not developed specifically for the circumstances of Bangladesh, which was just one of the countries from which Loblaws purchased goods. The CSR standards set general standards and mandated that the suppliers comply with national and local laws and adhere to best practices for their industry.

[41] Although the CSR standards speak about workplace health and safety, Loblaws' CSR standards do not expressly address the structural integrity of buildings in which the suppliers may operate.

[42] Loblaws is the owner of the clothing brand Joe Fresh. Since 2006, Loblaws has been purchasing garments from manufacturers in Bangladesh. From 2007 to 2013, Loblaws imported approximately 13.5 million garments from 73 Bangladesh factories. Pearl Global was one of the leading suppliers.

[43] Loblaws retained Pearl Global to produce articles for the Joe Fresh line of clothing. Pearl Global, in turn, out-sourced some of work to New Wave, which was operating two factories on several floors of the Rana Plaza in Savar, Bangladesh. Loblaws does not own or manage Rana Plaza.

[44] Over the years, New Wave had expanded its operations at Rana Plaza, and the owner of Rana Plaza added additional floors to the building to accommodate the expansion of New Wave's business. At the time of the collapse, Rana Plaza was under construction. A ninth floor was being built to be occupied as expansion space for New Wave.

[45] The Vendor Buyer Agreement between Loblaws and Pearl Global dated February 23, 2009 designates New Wave Style as a supplier for Loblaws. Only Loblaws and Pearl Global are parties to the Vendor Buyer Agreement. The Vendor Buyer Agreement incorporates Loblaws' Supplier Agreement, which includes a Supplier Code of Conduct, which was derived from Loblaws' CSR standards.

[46] New Wave is not a party to the Supplier Agreement and did not sign the Vendor Buyer Agreement. Loblaws has no employer-employee relationship with the employees of Pearl Global or of New Wave. The Plaintiffs describe Pearl Global and New Wave as having an independent contractor relationship with Loblaws. Loblaws describes Pearl Global as a supplier and New Wave as a sub-supplier of goods.

[47] Loblaws began acquiring garments manufactured by New Wave in 2007, and the volume of business had grown to US$ 6 million annually. Yolanda Morrell, Vice President of Sourcing at Joe Fresh, visited Rana Plaza on multiple occasions, and Loblaws personnel regularly spoke with the owners of New Wave and New Wave regularly shipped clothing to Loblaws in Brampton, Ontario. It is alleged that Loblaws was New Wave's primary and predominant customer, but this is disputed.

[48] It is a hotly contested factual and legal issue between the parties whether Loblaws exercised control over New Wave and over the conditions in which New Wave's employees worked.

[49] The Vendor Buyer Agreement and CSR standards permitted Loblaws to perform site inspections of its suppliers' factories, but did not require Loblaws to do so. The Vendor Buyer Agreement and the CSR standards permitted Loblaws to end their business relationship with Pearl Global if it failed to comply with the CSR standards. However, Loblaws had no contractual right to control the supplier's operations or to order a supplier or sub-supplier to shut down. Loblaws had no rights to hire, supervise, or fire their supplier's or sub-supplier's employees. Loblaws had no control over access to the workplace. Loblaws was not the owner or occupier of Rana Plaza. Loblaws had no contractual rights with respect to the business of New Wave, a sub-supplier. Loblaws' source of power or influence came from its purchasing power and the carrot

and stick of making or not-making purchase orders.

[50] Turning to the relationship between Loblaws and Bureau Veritas, Bureau Veritas SA is a limited liability company. It is incorporated under the laws of France. Bureau Veritas offers testing, inspection, and certification services. It is headquartered in Neuilly-sur-Seine, France. It carries on business in Ontario, where it has 13 facilities, offices, and laboratories. Bureau Veritas Consumer Products Services Inc. is a subsidiary in the United States, and Bureau Veritas Consumer Products Services Ltd. is a subsidiary in Bangladesh that was incorporated under the laws of Bangladesh and which is headquartered in Dhaka, Bangladesh.

[51] The various Bureau Veritas corporations are in law separate legal entities but they were treated as a single legal entity for the purposes of the motions now before the court.

[52] Pursuant to a written contract, Loblaws retained Bureau Veritas to audit factories, including the New Wave factories to ensure compliance with Loblaws' CSR standard. More precisely, pursuant to a Master Services Agreement effective January 1, 2011, which was signed in Ontario and which is governed by Ontario law, Loblaws engaged Bureau Veritas' Bangladesh subsidiary, which had offices in Dhaka and Chittagong Bangladesh, to conduct "social audits."

[53] The term "social audit" refers to the practice of independently auditing an organization's compliance-related processes and controls, measured against self-imposed or external standards. In a social audit, Bureau Veritas evaluated a supplier's social compliance as against: (a) the client's code of conduct; (b) a code of conduct containing standard industry standards developed by Bureau Veritas to address specific hazards of an industry; (c) local laws and regulations related to employment practices and workplace health and safety; and (d) industry standards established by organizations such as the International Labour Organization.

[54] Bureau Veritas does offer other services beyond the scope of a basic social audit. For an additional cost of $1,200 (USD), a client may obtain Social Compliance Audit Services. For an additional cost of $2,000 (USD), a client may obtain a Safety Risk Assessment, which is a high-level assessment of electrical system, building construction and structural integrity. For a further additional cost of $2,000 (USD), a client may obtain an Electrical, Fire and Building Safety Assessment, which is a professional engineer's evaluation of facilities for compliance with applicable local laws and selected international standards and which evaluation includes a review of building permits and compliance with building codes. For a further additional cost of $0.30 (USD) per square foot, a client may obtain a Building Structural Integrity Assessment, which is a professional engineer's assessment of the structural integrity of a facility and includes a physical inspection of the building, comparison of the approved building design with existing building construction, structural analysis, plate load testing, and testing of structural elements.

[55] Loblaws' retainer of Bureau Veritas was a limited retainer for a basic social audit. The scope of the social audit for which Bureau Veritas was retained to perform for Loblaws was identical to the scope of Loblaws' CSR standards, which were incorporated into the Master Services Agreement between Loblaws and Bureau Veritas. Under the Services Agreement, the "services" were the "collection and analysis of facts, inspection, and issuance of reports regarding the factory's compliance with Loblaws' Standards for Suppliers."

[56] Pertinent provisions of the 2011 Master Services Agreement, with my emphasis added, are set out below:

MASTER SERVICES AGREEMENT

This master services agreement is made as of January 3, 2011 ("Effective Date") between Bureau Veritas Consumer Products Services, Inc., a Massachusetts corporation with its principal office at 100 Northpointe Parkway, Buffalo, New York, 14228 ("BV") and Loblaw Inc. an Ontario Company located at 1 President's Choice Circle, Brampton, Ontario LGY 5S5 ("Loblaw")

1.0 AGREEMENT STRUCTURE

1.1 This agreement merges all prior discussions, both oral and written, between the parties. Unless otherwise provided herein, **this agreement constitutes the only terms and conditions under which Loblaw will procure from BV product testing, inspection, factory audit, and related services (the "Services"), as further described in the applicable statement of work (SOW).** The terms and conditions of this agreement shall apply to the procurement by Loblaw, and performance by BV, with respect to any and all Services contemplated hereunder.

….

2.0 TERM AND TERMINATION

2.1 This agreement shall commence on the Effective Date and continue for a period of three (3) years (the "Initial Term"). …

….

3.0 PRICE, PAYMENT AND DELIVERY

3.1 Prices for the Services and additional payment items shall be set out in the applicable SOW.

….

4.0 PRODUCT REPORTS

….

4.5 Reports will reflect the findings of BV at the time of performance of the Services only, and **BV will have no obligation to update a Report after its issuance unless a Report is found materially inaccurate or deficient as determined by Loblaw in consultation with BV, acting reasonably**.

4.6 Reports will set forth the results of the Services performed by BV based upon the Protocols. Reports relate solely to the facts and circumstances received from Loblaw, and **BV is under no obligation to refer to, or report upon, any facts or circumstances which are outside the specific scope of its assignment or the Services requested**.

….

5.0 REPRESENTATIONS AND WARRANTIES

5.1 BV represents and warrants that: …

(g) **BV, its employees, agents, Subcontractors and representatives** will comply with the provisions of this agreement, the terms of the applicable SOW, and Loblaw's regulations, policies and procedures in effect from time to time, **including, but not limited to Loblaw's Code of Conduct attached hereto as "Exhibit A**";

….

7.0 LIMITATION OF LIABILITY AND DISCLAIMER

….

BV Disclaimer

7.5 Loblaw acknowledges and agrees that: (a) BV is neither an Insurer nor a guarantor of the Products, the Suppliers or their factory operations that BV may be assigned to test, audit or inspect; (b) except as otherwise expressly provided for in this agreement or a SOW, **BV does not undertake the obligations and responsibilities of Loblaw or its Subcontractors**, including Loblaw's authorized agents and Suppliers; and (c) except to the extent BV acts in contradiction of the foregoing without Loblaw's express authorization, BV disclaims any and all liability to the extent such liability is attributed to the foregoing.

….

12.0 GOVERNING LAW

….

12.12 Governing Law: This agreement is governed by and construed in accordance with the applicable law of the Province of Ontario and the federal laws of Canada (excluding any conflict of law rules or principle which might refer such construction to the laws of another jurisdiction) and is treated in all respects as an Ontario contract. The parties consent to the non-exclusive jurisdiction of the courts of the Province of Ontario for the purpose of any action or proceeding brought by either of them in connection with or arising out of this agreement. …

….

EXHIBIT A

CODE OF CONDUCT

[Loblaws] are committed to doing business in a legal, ethical and socially responsible manner. Reflecting this commitment, all directors, officers and employees are expected to comply with the Loblaw Code of Business Conduct in conducting their business relationships. To maintain these standards, Loblaw desires to do business with those suppliers, vendors and contractors (for the purposes of this Exhibit, collectively "Suppliers") whose practice are consistent with Loblaw's ethics and principles of business conduct. This Supplier Code of Conduct (as amended or modified from time to time, the "Code") sets forth the types of standards and practices that Loblaw expects of its Suppliers.

Compliance with laws. **Suppliers are expected to abide by all applicable laws and regulations including all federal, provincial and local laws regarding environmental matters, occupational health and safety, labour and employment practices, human rights, immigration, product safety, shipping and product labelling**. Loblaw also expects that their Suppliers will comply with applicable guidelines and practices for their industry.

…

No Child Labour or Forced Labour ….

….

Employment Practices of Suppliers. The procedures and policies of Suppliers should reflect the commitment of Loblaw to fair and reasonable labour and employment practices as well as diversity in the workplace. **Suppliers are expected to comply with all local and applicable labour laws and employment standards, such as compensating workers in compliance with all applicable wage, benefit, and employment standards laws and maintaining reasonable employee work hours and a safe and healthy workplace.** Suppliers are also expected to take reasonable efforts to promote and achieve diversity in the workplace. Loblaw expects that Suppliers shall not inflict, threaten to inflict or permit corporal punishment or other forms of physical, sexual, psychological or verbal abuse or harassment on any employee.

Food and Product Safety ….

….

> Application of Supplier Code of Conduct. This Code applies to all Loblaw Suppliers and should not be read in lieu of but in addition to the Supplier's obligations as set out in any agreements between Loblaw and/or its affiliates and the Supplier. …. **Loblaw reserves the right to take appropriate action in the event a Supplier violates the Code**.

[57] It should be noted that under the Agreement between Loblaws and Bureau Veritas, Bureau Veritas was not expressly required to investigate and report on the structural integrity of the premises in which it was conducting a social audit. The Plaintiffs allege, however, that the inspection of the structural integrity of the supplier's premises was a categorically necessary part of the audit to be performed by Bureau Veritas. This allegation is strenuously and persistently denied by the Defendants.

[58] Somewhat inconsistently, the Plaintiffs also allege that Loblaws was negligent in not contracting for a more comprehensive audit that would include an engineering inspection for the allegedly notoriously dangerous workplaces in Bangladesh. The allegations are somewhat inconsistent because the Plaintiffs allege both that Loblaws and Bureau Veritas were negligent for not doing the engineering investigations categorically required by the social audit and that Loblaws was negligent in not contracting for a social audit that did include the engineering investigations required to protect the workers at Rana Plaza.

[59] I find as a fact that Bureau Veritas had what the English legal expert's described as a "limited remit" or what I would describe as a "limited retainer" that did not include a Safety Risk Assessment, an Electrical, Fire and Building Safety Assessment, or a Building Structural Integrity Assessment.

[60] The 2011 Master Services Agreement between Loblaws and Bureau Veritas, which had a three-year term, replaced a 2008 Master Services Agreement. Under the 2008 Agreement, the services were the collection and analysis of facts, inspection, and issuance of reports regarding the factory's compliance with Loblaws Standards for Suppliers. The Agreements provided that audit reports relate solely to the facts and circumstances as observed and recorded by Bureau Veritas within the limits of instructions received from Loblaws, and, Bureau Veritas was under no obligation to refer to or report upon any facts or circumstances which are outside the specific scope of its assignments or the audits requested.

[61] Under the statements of work in the 2011 Master Services Agreement: (a) Bureau Veritas would perform services at third party factories that may produce products for sale by Loblaws; (b) the services included the collection and analysis of facts, inspections, and the issuance of reports regarding a factory's compliance with Loblaws' Standards for Suppliers; and (c) Bureau Veritas had to submit: a social audit report with scoring metrics, a signed corrective action plan factory acknowledgment, a corrective action plan, a factory assessment checklist, and a photo image report.

[62] The price for Bureau Veritas's services was US$1200 for an audit by either one person over two days or by two people over one day and US$700 for a one-day follow-up audit, exclusive of travel expenses if requested by Loblaws. Bureau Veritas would directly invoice Loblaws' supplier for payment for the services. In other words, the social audits were charged to Loblaws' suppliers.

[63] Mr. Hill of Bureau Veritas deposed that Bureau Veritas was retained to audit occupational health and safety issues and employment practices, such as forced labour, child labour, wages and benefits, hours of work, harassment, and workers' rights. He said it was not

hired to inspect the building's structural integrity. He said that social auditors are not trained engineers and do not investigate the structural integrity of buildings, or any other matters that require special qualifications and that are outside the scope of a social audit, even though those matters may affect workplace concerns.

[64] Between 2008 and 2013, Bureau Veritas completed 138 audits at 77 different factories in Bangladesh for Loblaws. Mr. Hill deposed that Bureau Veritas was never asked to audit and it never audited New Wave Bottoms, which operated on the third floor of Rana Plaza.

[65] Bureau Veritas did perform a social audit at the New Wave Style factory premises. Bureau Veritas's employees resident in Bangladesh conducted "social audits" of New Wave Style on February 28, 2011 and on April 12, 2012.

[66] At the time of the first audit, New Wave Style was on the sixth floor of Rana Plaza. The social auditors found 21 instances of noncompliance, including 11 instances related to health and safety issues. The health and safety issues audited by Bureau Veritas were matters such as machinery safety and use, clean drinking water, safety equipment training, chemical and hazardous materials training, fire alarm systems, emergency lighting and exits, first aid training, and food preparation and eating areas. There was no engineering audit and no mention of the structural integrity of the New Way Style premises in Rana Plaza.

[67] At the time of the second social audit in 2012, New Wave Style was on the sixth and seventh floors of Rana Plaza, and the social auditors found nine instances of non-compliance relating to safety equipment and job training, emergency exits, and eyewash facilities. Under the heading "Monitoring and Documentation" – i.e. not as a health and safety issue - the 2010 and the 2012 social audits noted that the factory licence was missing, which was a failure to comply with Chapter IV of the Bangladesh *Factories Rules, 1979*, which requires that the building permit be posted. Again, for the 2012 social audit, there was no engineering audit and no mention of the structural integrity of the New Way Style premises in Rana Plaza.

[68] The remediation of the deficiencies noted in the social audits was not followed up on by either Loblaws or Bureau Veritas. Bureau Veritas argues that it had no ability to schedule a follow-up audit because scheduling was within the sole discretion of Loblaws.

[69] Mr. Brown, who was retained by the Plaintiffs to provide an expert opinion about social audits, deposed that a reasonable audit of garment factories in Bangladesh, which has a history of factory fires and collapses from poor structural design or construction, should have taken this deplorable history into account in defining the scope of the audit. He opined that Loblaws should have commissioned an audit that would take into account the structural deficiencies that could cause factory collapses.

[70] I pause here to say that I was not much impressed with Mr. Brown's opinion. Mr. Brown had no experience doing social audits (either in Bangladesh or elsewhere) and no familiarity with Bureau Veritas's social audit process. He was not qualified from a legal perspective to interpret the meaning of the Master Services Agreement between Loblaws and Bureau Veritas. He conceded that an engineer would have to be retained if an audit included an investigation of the structural integrity of a building.

[71] Further, Mr. Brown expressed views that revealed that he had lost his expert's objectivity, and he had become a shill for the advocacy of the Plaintiffs. In this regard, there was no justification for him opining that Loblaws' social audits were no more than "a window

dressing, don't ask-don't tell-arrangement between Loblaws and Bureau Veritas." There was no justification for his opining that cost was not a factor in Loblaws' decision as to the scope of the audits and rather it is more likely that "... neither Loblaws nor Bureau Veritas wanted to know the results of that more detailed audit given the cost implications associated with either halting production and moving to a structurally stable building, or repairing the structural weakness of the Rana Plaza building itself."

[72] However, I also pause to say that for present purposes, not much turns on Mr. Brown's evidence or his opinion. In the main, his evidence would be relevant to the issue of whether Bureau Veritas met the standard of care or was negligent in performing a social audit. Mr. Brown's evidence offers no assistance in addressing the legal issues of interpreting the scope of the social audit that Bureau Veritas was actually retained to perform, the implications of Loblaws having CSR standards, whether Loblaws had assumed a duty of care to the putative Class Members, or whether Loblaws and Bureau Veritas had a duty of care to the employees of its sub-sub-supplier and a duty of care to everybody else who happened to be at Rana Plaza on the day that it collapsed. Those are legal issues for this court to decide.

[73] Returning to the factual background, in January 2013, Loblaws terminated its contract with Bureau Veritas. Loblaws instead retained Intertek Group plc, another inspection and auditing firm, to perform social audits in Bangladesh.

[74] Intertek never inspected Rana Plaza. Intertek was scheduled to conduct its first audit on April 24, 2013, the day that Rana Plaza collapsed.

4. Loblaws' and Bureau Veritas' Control over the Workplace at Rana Plaza

[75] Pausing here in the description of the factual background, it is helpful to flag an important issue of mixed fact and law that will feature prominently in the discussion later about the legal theory of the Plaintiffs' and the putative Class Members' claims against the Defendants. It is the issue of Loblaws' and Bureau Veritas' control over Loblaws' suppliers and sub-suppliers, over the employees and others in the vicinity of Rana Plaza, and over the workplace at Rana Plaza.

[76] As will appear, control is a critical ingredient of the legal theory of the Plaintiffs' and the putative Class Members' claims against the Defendants. In this regard, it should be noted that the Plaintiffs accept that Loblaws and Bureau Veritas were not the cause of the collapse of Rana Plaza, (described in next part of these Reasons), and thus to make the Defendants liable, the Plaintiffs accept that they need to establish a duty of care or a fiduciary duty, a breach of that duty, and causation of harm from the breach of duty all connecting the Defendants to the tragedy that occurred on April 24, 2013. The theory of the Plaintiffs' case posits that the Defendants' breaches of duty caused harm to the Plaintiffs and to the putative Class Members, which include not only the New Wave employees but also all the others, frequent or transient, who happened to be at Rana Plaza on the day of the tragedy. The matter of control is an important ingredient of the Plaintiffs' theory as to why the Defendants owned them a duty of care.

[77] To establish a duty of care, it is the legal theory of the Plaintiffs' case that Loblaws adopted its CSR standards because of: (a) the notoriety of the dangerous workplaces in Bangladesh; and (b) the dependence and vulnerability of the workers in Bangladesh, whom Loblaws as a responsible corporate citizen did not wish to be seen to be exploiting. It is the

Plaintiffs' legal theory that Loblaws breached its duty because although it had the ways and means to control the suppliers manufacturing goods at Rana Plaza through ensuring compliance with its CSR standards, it failed to protect the putative Class Members from an avoidable harm. Thus, as will appear more fulsomely in the discussion later in these Reasons for Decision, it is a critical part of the Plaintiffs' and putative Class Members' claims, and an essential ingredient to establishing a duty of care, that Loblaws and Bureau Veritas had some element of control over Pearl Global and New Wave and an ability to protect the Plaintiffs and the putative Class Members from the dangers of their notoriously unsafe workplace.

[78] As will appear from the evidence of the Plaintiffs' experts about the law of Bangladesh and from the Plaintiffs' argument about the law of Ontario, the Plaintiffs were acutely aware that as a matter of mixed fact and law, they must establish this control element. The Defendants were just as acutely aware of how critical the control element was to their exposure to liability. Thus, a great deal of argument and evidence was focused on attacking or defending the numerous allegations made in the Plaintiffs' Statement of Claim that Loblaws and Bureau Veritas could and should have exercised their control to do more than they did to protect the putative Class Members. There was also considerable controversy about the relationship between the vulnerability and dependency of the putative Class Members to the formulation of a duty of care.

[79] As already noted earlier in these Reasons for Decision, the Plaintiffs argued that the court was absolutely obliged to accept the allegations of control in the Statement of Claim as true. The Defendants' counterargument was to submit that to accept the Plaintiffs' submissions in respect of the degree of control that the Defendants exerted would be to ignore the contractual arrangements, which were incorporated as material facts in the Statement of Claim. Further, the Defendants submitted that to ignore these factors and others was to be blind to the reality of the situation and to conjure up a cause of action where none existed or could exist.

[80] I will return to the matters of control and vulnerability in the discussion of the law below, but for the present purposes of describing the factual background and for the later purpose of determining whether or not the Plaintiffs' have pleaded a reasonable cause of action, i.e., one known to law, I simply note that I do not accept as true bald allegations that Loblaws had control over the suppliers and sub-suppliers at Rana Plaza and over the Plaintiffs' workplace. Rather, I will examine whether the material facts that are not argument could constitute the direct or indirect control sufficient to establish a duty of care or a fiduciary relationship.

5. The Collapse of Rana Plaza

[81] Rana Plaza, named after its owner, Sohel Rana, was a nine-floor mixed commercial and industrial building in Savar, Bangladesh, which is an area with a population of approximately 1.4 million approximately 20 kilometers from Dhaka.

[82] Rana Plaza was constructed in 2006 as a six-floor commercial complex of four floors or retail and two floors of offices. It was built without proper approvals on a former pond. It was not designed for industrial use. As built, the building was not capable of supporting industrial uses. The structure was not strong enough to bear the vibration and weight of generators and industrial machinery used in garment factories.

[83] Rana Plaza was expanded by two additional floors, and in 2013, just before the collapse, construction of a ninth floor was nearing completion. The Plaintiffs allege that the three

additional floors were constructed without a building permit and that the whole building was built with shoddy materials, contrary to the building codes, and was not structurally capable of supporting industrial equipment.

[84] Rana Plaza's occupants included a bank, a shopping mall, and five garment manufacturers, including New Wave. The garment production in Rana Plaza was contrary to the zoning permit.

[85] New Wave Style and New Wave Bottoms operated the two largest factories with the most workers in Rana Plaza. At the time of the collapse, the 2,761 garment workers at Rana Plaza were distributed between the five factories as follows: 1,167 at New Wave Style; 452 at New Wave Bottoms; 438 at Phantom Apparels Ltd.; 254 at Phantom Tac Ltd.; and 450 at Ether Textile Ltd.

[86] New Wave Bottoms came to the building in 2007 to occupy premises on the third floor. New Wave Style already occupied space on the sixth and seventh floors, and, as already mentioned, it planned to occupy more space on the ninth floor.

[87] In April 2013, Mr. Alauddin, Ms. Das, and Ms. Khatun were employees of New Wave Style. Ms. Das and Ms. Khatun started work at Rana Plaza after the termination of Bureau Veritas agreement with Loblaws. Ujjal Ali, Afzal Ali, and Khadiza Begum were employees of New Wave Bottoms.

[88] In April 2013, approximately 50% of the work that New Wave was performing was for Loblaws and there was a large order under production for Loblaws at the time of the collapse.

[89] On April 23, 2013, cracks were discovered in three pillars of the structure of Rana Plaza. The Industrial Police, the City of Savar's Executive Officer, and a local engineer all attended at Rana Plaza. The site was ordered evacuated at 10:00 a.m., and the employees were sent home for the day. However, in the afternoon, New Wave's managers ordered the employees to return to work the following day.

[90] The discovery of the cracks in Rana Plaza and the police-enforced evacuation were publicized in the Bangladeshi Ekushey TV broadcast that aired in the early evening of April 23, 2013. The Plaintiffs allege that local agents of Loblaws or Bureau Veritas had ample time (approximately eight working hours) to relay the information of the imperiled building to representatives or employees of Loblaws in Ontario. The Plaintiffs allege that Bureau Veritas failed to relay to representatives or employees of Loblaws in Ontario that cracks were found in Rana Plaza, after becoming aware of the cracks from TV broadcasts.

[91] On April 24, 2013, Mr. Rana assured the media that his building was safe. He said that this had been confirmed by the engineer who had inspected the building.

[92] Mr. Alauddin, Ms. Das, and Ms. Khatun returned to work, and despite knowledge of the cracks in the structure, they re-entered the building. Mr. Alauddin said he re-entered out of fear of being fired. Ms. Das and Ms. Khatun respectively said that they re-entered because they had been ordered to return to work.

[93] In the morning of April 24, 2013, there was a power outage and the large back-up diesel engines on the upper floors of Rana Plaza became operational. There were substantial vibrations, and at around 9:00 a.m., the Rana Plaza collapsed. 1,130 people died and 2,520 were injured including Mr. Alauddin, Ms. Das, and Ms. Khatun. Among the dead were Ujjal and Afzal Ali,

and Khadiza Begum.

[94] As noted above, at the time of the collapse, 1,167 people were employed by New Wave Style in the Rana Plaza building. The balance of the injured and dead are the 452 employees at New Wave Bottoms, the 1,142 employees of other garment businesses operating out of Rana Plaza and 439 persons who unfortunately just happened to be in or around the building at the time of the collapse.

[95] The collapse of Rana Plaza is the deadliest accidental structural failure in world history.

[96] After the collapse of the building, criminal prosecutions were brought against Mr. Rana, the owners of the garment factories that operated in Rana Plaza, officials of the Department of Inspection for Factories, other public officials, municipal engineers, and certain construction contractors. Those proceedings are pending in Bangladesh.

[97] After the collapse of the building, two legal aid organizations brought public interest litigation against the Bangladesh Government, the Secretary, Ministry of Housing and Public Works, the Chief Inspector of Factories, other public officials, Mr. Rana, the garment factory owners, the Bangladesh Garment Manufacturers and Exporters Association and others. In the public interest litigation, it is alleged that the Bangladesh Government and the other defendants failed to ensure effective enforcement of applicable laws on building construction and workplace safety at Rana Plaza. The lawsuit seeks payment of compensation to the victims and their families as well as rehabilitation and medical treatment for the injured. The public interest litigation is pending in Bangladesh.

[98] After the collapse of the building, the High Court Division of the Bangladesh Supreme Court issued a show cause summons against the secretaries of the Ministry of Works and Housing, Ministry of Local Government and Rural Development, other local officials, officials of the police, the Bangladesh Garment Manufacturers and Exporters Association, the owner of the Rana Plaza building, and the factory owners. The respondents are to show cause as to why they should not be held liable for the collapse and be directed to pay compensation to victims and their families. Those proceedings are also pending in Bangladesh.

6. Victim Relief and the Rana Plaza Donors Trust Fund

[99] After the Rana Plaza tragedy, the Government of Bangladesh made available up to a total of 230 million Bangladesh Taka ($3.75 million, Cdn.) in compensation, plus additional assistance of 25 million Taka ($0.4 million) for funeral and other expenses.

[100] After the collapse, the Bangladesh Garment Manufacturers and Exporters Association paid out approximately 145 million Taka ($2.4 million) to victims of the collapse.

[101] After the collapse, Primark, another retailer that sourced products from New Wave paid nine months' wages to all injured workers and dependents of deceased or missing workers and also set up a separate claims program for New Wave workers.

[102] After the collapse, Loblaws paid three months' salary to employees of New Wave Style and contributed $1 million to Save the Children Bangladesh and the Centre for Rehabilitation of the Paralyzed.

[103] The International Labour Organization, a United Nations agency, established the Rana Plaza Donors Trust Fund to provide compensation to the victims and their families. While

denying any legal liability with respect to the collapse, Loblaws donated $3.5 million to the Fund.

[104] By June 2015, the Rana Plaza Donors Trust Fund had collected US $30 million in donations. Compensation was based upon the claimant's income at the time of the collapse. Totally disabled workers received 60% of their lifetime wages. The Fund provided payment of medical expenses.

[105] The Rana Plaza Donors Trust Fund is administered by a committee formed by various representatives from the Government of Bangladesh, the garment industry, trade unions, brands (including Loblaws), and non-governmental organizations, with the support of the International Labour Organization.

[106] The Plaintiffs submit that the amount of compensation received by the claimants was inadequate. For present purposes, I need not decide the point. I simply note that the Plaintiffs are claiming around $2 billion for the putative Class Members in the proposed Ontario class action.

[107] To receive compensation from the Rana Plaza Donors Trust Fund, a claimant signed a release discharging his or her rights to compensation for the heads of losses from the collapse. The release stated:

> I understand that by submitting this claim to the Rana Plaza Claims Administration, I consent to the review of my claim here; and that the award that will be issued and the payment(s) that may be made to me and members of my family in this regard will constitute a final decision on our claim and a full settlement of our rights to claim for compensation concerning the heads of losses claimed here.

[108] The Plaintiffs submit that for a variety of reasons, including illiteracy and the absence of independent legal advice, the releases are not enforceable. For present purposes, I need not decide whether the releases are enforceable.

[109] As of April 2015, the Rana Plaza Donors Trust Fund had authorized 2,839 claims for payment and disbursed approximately US $9.84 million to the victims and their families. The Plaintiffs submit that the Rana Plaza Donors Trust Fund falls well short of providing a valid procedural and substantive alternative to this class action in which they estimate that there are 8,000 putative Class Members.

[110] The Rana Plaza Donors Trust Fund paid Mr. Alauddin approximately four years' wages.

[111] Mr. Ali received charitable donations, but he does not know the amount.

[112] Anonymous donors provided Ms. Das with funds worth approximately two to three years' wages. The Rana Plaza Donors Trust Fund provided Ms. Das with funds worth approximately one to two years' wages. The Bangladesh Government paid her a monthly salary in excess of her prior salary. After a five year period, this monthly payment will mature into a principal amount equal to 15 to 20 years' wages.

[113] Ms. Khatun has received from the Rana Plaza Donors Trust Fund an amount equal to approximately 18 months' wages.

[114] Mr. Alauddin received one month's salary from a fund known as the Prime Minister's Fund. He received approximately four months' wages from Primark. He received almost four years' wages from the Rana Plaza Donors Trust Fund.

7. The Plaintiffs' Statement of Claim

[115] On April 22, 2015, the Plaintiffs commenced an action against Loblaws and Bureau Veritas.

[116] On October 2016, the Plaintiffs delivered their Fourth Amended Statement of Claim.

[117] In their Statement of Claim, the Plaintiffs plead that Loblaws is liable for negligence, and vicariously liable for the negligence of its suppliers and sub-suppliers. The Plaintiffs also allege that Loblaws is liable for breach of fiduciary duty. The Plaintiffs allege that Bureau Veritas is liable for negligence.

[118] The Plaintiffs claim general damages of $1.85 billion, punitive damages of $150 million, special damages, pre and post-judgment interest, costs on a substantial indemnity basis, and an order for disgorgement of all profits earned by the Loblaws from the sale of Joe Fresh apparel from 2006 to 2013.

[119] The Plaintiffs allege that the causes of action in negligence arise from the context in which Loblaws decided to have its garment products manufactured. The context is a decision by a major retailer to obtain goods for resale from manufacturers in a developing country notorious for highly unsafe factory conditions and the absence of legal and regulatory compliance. In this context, the Plaintiffs plead that Loblaws exposed garment factory workers to the risk of serious bodily harm and death.

[120] The Plaintiffs plead that the Defendants knew of the deplorable history of factory disasters in Bangladesh and that garment workers were exposed to serious workplace safety issues and needed protection. In this regard, the Statement of Claim particularizes 17 factory fire accidents occurring as far back as 2000 and two building collapses that the Plaintiffs allege that Loblaws would have been aware of. None of these accidents involved the Defendants, and Loblaws, with the support of Bureau Veritas, moves to have these paragraphs struck from the Statement of Claim.

[121] The essential legal theory of the Plaintiffs' tort case is that Loblaws, knowing of the notoriously dangerous workplaces in Bangladesh, voluntarily undertook the responsibility of ensuring that the buildings in which Joe Fresh garments were being manufactured by vulnerable employees, were safe and structurally sound. This theory is set out in paras. 12, 184, and 194-196 of the Statement of Claim, which state:

> 12. By adopting Corporate Social Responsibility Standards in Ontario, by visiting the New Wave factories and by directly or indirectly controlling the scope of audits and inspections performed by Bureau Veritas through its head offices in Ontario, Loblaws voluntarily undertook the responsibility to ensure that the buildings in which Joe Fresh garments were manufactured were structurally sound and met Loblaws' own publicly adopted minimum standards for worker and building safety. The vulnerable garment workers at New Wave Style and New Wave Bottoms had witnessed Loblaws' agents attend at New Wave factories, purportedly to assess safety and worker conditions and witnessed visits by Loblaws at the New Wave factories. These factors led the garment workers to reasonably rely on Loblaws to ensure that the buildings in which they produced Joe Fresh garments would be properly audited and inspected to prevent unreasonable risk of injury.
>
> ….
>
> 184. By adopting Corporate Social Responsibility Standards that delineate minimum safety standards for garment workers and factory buildings, and by directly or indirectly engaging

> Bureau Veritas to perform audits and inspections of the New Wave factories through Loblaws' employees and agents in Ontario, Loblaws undertook the responsibility to ensure that the Plaintiffs would not be exposed to an unreasonable risk of harm or death while working in Rana Plaza. Further, by directly or indirectly setting the parameters for the audits and inspections conducted by Bureau Veritas through Loblaws' employees and agents in Ontario, Loblaws represented to the industry, the public, and more importantly, to the garment workers at New Wave that it had the information and means necessary to ensure that New Wave and Rana Plaza were structurally sound and met the minimum safety standards that Loblaws itself voluntarily and publicly adopted.
>
> ….
>
> 194. The Loblaws Defendants had a commercial interest in the operations of Pearl Global and New Wave and in maintaining low cost contracts with them. The Loblaws Defendants were at all times, intent on maximizing profits by reducing the cost of production of its garments produced in Bangladesh. Given the objective of aggressively reducing costs, the Loblaws Defendants knew or ought to have known that in order to meet its costing targets, Pearl Global and/or New Wave would be forced to use sub-standard dangerous factories which fell far below any reasonable safety standard.
>
> 195. Loblaws owed a duty to ensure the safety of Class Members since they were vulnerable, had little or no education and, had very little money or employment alternatives. The vulnerability of the Class Members, the known Bangladeshi legal and regulatory vacuum described above and the vast power imbalance between the parties was such that the Loblaws Defendants had an enhanced responsibility to safeguard Class Members against injury and death while working on garments for Loblaws' Joe Fresh brand.
>
> 196. The harm caused to Class Members was reasonably foreseeable and a direct consequence of Loblaws' actions and omissions as described herein. Loblaws knew or ought to have known of the dangerous work and safety conditions in the New Wave factories and/or Rana Plaza and failed to take adequate steps to prevent a reasonably foreseeable building collapse that would cause foreseeable injuries to the Class Members.

[122] The Plaintiffs allege that Loblaws was careless and in breach of its own CSR standards and industry and international standards, when it failed to provide reasonable and adequate instructions to Bureau Veritas to ensure that the audits performed at New Wave were sufficient in scope to address the particular safety concerns that prevailed at the relevant time in Bangladesh.

[123] Further, the Plaintiffs plead that the Defendants knew about the history of serious industrial accidents, including garment factory fires and collapses and Loblaws was aware of the particular hazards at Rana Plaza given the ongoing construction of additional floors at the Rana Plaza to house factories to fulfill large orders placed by Loblaws.

[124] The Plaintiffs plead that Loblaws failed to promptly and adequately follow up on the Corrective Action Plans that identified major non-compliances by New Wave with health and safety issues.

[125] The Plaintiffs plead that Loblaws is vicariously liable for any negligence on the part of Pearl Global and New Wave because Loblaws exercised considerable direct and indirect control over New Wave's operations at the Rana Plaza, including reserving a right to terminate its commercial relationship with New Wave for non-compliance with both Loblaws' Supplier Code of Conduct and applicable local laws and regulations, which New Wave was required to observe.

[126] The theory of the vicarious liability cause of action is set out in paras. 232-239 of the Statement of Claim, which state:

> 232. Loblaws controlled and benefitted financially from New Wave and Pearl Global to produce

Joe Fresh clothing. Loblaws sub-contracted its garment work to Pearl Global and/or New Wave to benefit from the cheap low labour costs in Bangladesh. Through the use of the inexpensive garment labour, Loblaws significantly reduced its cost of garment production and increased its profit through the sale of Joe Fresh garments. By subcontracting its garments to New Wave, Loblaws created a risk which resulted in the injuries and deaths of Class Members.

233. Loblaws knew or ought to have known that Pearl Global and/or New Wave would fail to ensure worker safety and would further fail to provide environments that do not present risks of injury and death to garment workers. The risk of injury and death to the garment workers was obvious and foreseeable given that Loblaws chose to subcontract its garment production to a sub-contractor that had operated for years in factories housed in a multi-level building which was illegally constructed. Loblaws knew, or ought to have known, that neither Pearl Global nor New Wave would abide by applicable standards, codes, regulations and laws of worker safety. Loblaws failed to appropriately select manufacturers who would abide by applicable standards, codes, regulations and/or laws.

234. Loblaws is vicariously liable for the negligence of Pearl Global and/or New Wave because in these unique circumstances, Loblaws had a non-delegable duty to ensure the safety of the Class Members including the garment workers of New Wave at Rana Plaza.

235. Loblaws' own standards and Corporate Social Responsibility Standards, including its Supplier Terms and Conditions detailed Loblaws' duty to garment workers who produce Joe Fresh garments, to take reasonable care to ensure the health, safety and adequate working conditions of these garment workers. Such a duty is not discharged by delegating the work to Pearl Global or New Wave. This was a non-delegable duty which survived and remained the responsibility of Loblaws. Further, Class Members had a reasonable expectation that the duty to ensure their health and safety remained with the Loblaws Defendants and could not be delegated to New Wave or otherwise. The vulnerability of the Class Members underscored this principle.

236. The Loblaws Defendants were in control of the garment production by New Wave, in that Loblaws sub-contracted garment production to be performed by New Wave through Pearl Global. Loblaws was under a duty to ensure that any sub-contractor exercised reasonable care to ensure the garment workers' health and safety.

237. Further, Loblaws is vicariously liable for the negligence of Pearl Global and/or New Wave given the inherently dangerous risks which called for special precautions to be taken by Loblaws to ensure that reasonable measures were taken to ensure garment worker safety. Given the previous history of fires and collapses of garment factories in Bangladesh, it was evident that the garment industry was and is an inherently dangerous activity in that country.

228. Engaging Pearl Global and/or New Wave to produce the garments in no way relieved Loblaws from its duty to ensure worker safety to Pearl Global and/or New Wave. New Wave became the necessary means of carrying out such hazardous garment work and Loblaws cannot be relieved from its duty of care simply because it engaged Pearl Global and/or New Wave to produce garments for the Joe Fresh line.

239. It was patently obvious that had the Plaintiffs been Loblaws' employees, Loblaws would have had a duty to take all reasonable precautions to avoid such unusual and inherently dangerous risks to its employees. Loblaws should not be permitted to relieve itself of responsibility by the introduction of an intermediary.

[127] The Plaintiffs plead that Loblaws owed a fiduciary duty to them and the putative Class Members to ensure that it exercised its discretion to control and direct the scope of audits performed by Bureau Veritas reasonably and in the best interest of the Plaintiffs. The theory of the Plaintiffs' breach of fiduciary duty claim is set out in paras. 225-230 of the Statement of Claim, which state:

225. Loblaws also had a fiduciary duty to the Class Members to ensure that the audits and inspections performed at the New Wave factories were sufficiently comprehensive to identify,

address and remedy structural defects, so as to protect the garment workers from foreseeable bodily harm and death. Loblaws had discretion to affect the safety interests of the vulnerable garment workers who produced its Joe Fresh brand apparel.

226. Loblaws leveraged the low labour costs and wages of garment workers in Bangladesh to increase profit margins to reap the benefits of the legal and regulatory vacuum on worker protection and enforcement of safety standards. Loblaws knew, or ought to have known, that the dearth of legal and practical protections, including the inadequate enforcement of applicable laws, standards and regulations, exacerbated the vulnerability of the garment workers who produced its Joe Fresh brand apparel in Bangladesh. The Class Members were forced to operate in hazardous conditions that would never be tolerated in Canada, as is evident from the tragedies in garment factories noted above.

227. Within the context of this exploitative relationship, Loblaws initiated, undertook and voluntarily adopted Corporate Social Responsibility Standards and devised minimum safety requirements that would apply to all of its suppliers. The purpose of these minimum standards was ostensibly to protect garment workers from foreseeable and avoidable injuries and death that would result from the notoriously hazardous working conditions at New Wave and Rana Plaza. This purpose was confirmed by Loblaws' direct or indirect engagement of Bureau Veritas, Loblaws' onsite visits at the New Wave factories and constant communication with the garment workers as described herein.

228. Through this conduct, Loblaws represented to the garment workers, both expressly and impliedly, that it was acting in their best interest. The garment workers were particularly vulnerable to Loblaws' unilateral exercise of its discretion to determine the scope of the audits and inspections. They enjoyed little, if any, protection domestically when it came to their safety and work conditions. At the same time, they had substantial interests – their lives and personal security —that could have been, and that ultimately were, adversely affected by Loblaws' exercise of its discretion to direct and to limit the scope of the audits and inspections performed by Bureau Veritas.

229. Loblaws was in a position of power and had the means and authority to unilaterally determine the scope of the audits and inspections performed by Bureau Veritas. Loblaws knew or ought to have known that the garment workers reasonably relied on it to exercise its discretion for their best interest.

230. Loblaws violated the trust reposed in it by the garment workers by exercising its discretion to the detriment of the Class Members. Loblaws adopted minimum safety standards through its Corporate Social Responsibility Standards. It knew, or ought to have known, that those minimum safety standards could not be ensured and enforced without proper comprehensive audits. Loblaws circumvented and breached its own Corporate Social Responsibility Standards by directing Bureau Veritas to perform "white wash" audits that failed to include even the most basic structural audits of Rana Plaza. By doing so, it breached its fiduciary duty to the garment workers with respect to the audits and inspections of the factory buildings and the protection of their safety.

[128] In paras. 22 and 203, the Plaintiffs' plead that Loblaws has accepted responsibility for the collapse and that Loblaws admitted its responsibility for failing to protect putative Class Members from the deaths and injuries sustained in the Rana Plaza collapse. Paragraphs 22 and 203 state:

22. Despite these longstanding warnings and even when cracks developed in the structure of the building the day before the collapse, the garment workers were nonetheless forced to re-enter the building and resume work on April 24, 2013. In the words of the Executive Chairman of GWL, Galen Weston (Sr.), although the collapse was tragic it was "inevitable". The Executive Chairman of Loblaws Companies Inc., Galen Weston (Jr.), publicly accepted responsibility on behalf of Loblaws and stated that: "workers were exposed to unacceptable risk".

….

> 203. The Loblaws Defendants have publicly admitted their responsibility for failing to protect Class Members from the deaths and injuries sustained in the Rana Plaza collapse. In particular, at Loblaws Company's 57th annual general meeting, on May 2, 2013 in Ontario, the Executive Chairman of Loblaws Companies Inc., Galen Weston (Jr.), stated that Loblaws should have done more to ensure a safe working environment in Rana Plaza. Loblaws acknowledged that it adhered to a social responsibility regime that regularly inspected factories that produced and supplied Joe Fresh apparel:
>
> > This was a senseless tragedy and it should not have happened. Based on what we know, the top floors of the building should never have been built. Reports from the ground suggest that garment workers never should have been allowed back in the building after an evacuation was ordered. And we are asking ourselves what more should we have done to ensure a safe working environment in this facility?
> >
> > Over the last number of days, I've reviewed the available information in some detail and I have reflected at length. And I must tell you I am troubled. I'm deeply troubled. I'm troubled that despite a clear commitment to the highest standards of ethical sourcing, **our company can still be part of such an unspeakable tragedy**.
> >
> > Our Joe Fresh apparel business **adheres to a robust social responsibility regime that regularly inspects factories**. And I have reviewed several audits for the facility. And while nothing in those reports suggested a problem, the fact remains that the scope of the audits that we undertake do not cover structural integrity. And on this, **workers were exposed to unacceptable risk**. [Emphasis added in Statement of Claim]

[129] As part of its pleadings motion, Loblaws moves to have paras. 22 and 203 struck from the Statement of Claim as improper pleadings and as contravening the *Apology Act, 2009*.

[130] In a matter at the heart of the choice of law analysis below, the Plaintiffs plead and argue that the place of Loblaws' tortious and fiduciary misconduct is Ontario. This argument is set out in paras. 76-78 of the Plaintiffs' factum, which state:

> 76. The Plaintiffs do not dispute that Bangladesh is the place most significantly affected by the Defendants' wrongful conduct - 1,130 people died and at least another 2,520 people sustained serious injuries when the Rana Plaza collapsed in Bangladesh. However, the determination of *lex loci* requires a contextual analysis of the element that constitute the tort, particularly the acts and omissions that constitute breach of the standard of care, most of which occurred in Ontario. In the recent decision of this Court in *Thorne v. Hudson Estate*, 2016 ONSC 5507 at para. 30, Morgan J. observed that "just as 'there is no actionable wrong without the injury' ... there is no recoverable injury without the wrongful act". While the Plaintiffs' damages were suffered exclusively in Bangladesh, the pleadings allege that Loblaws had a duty of care and breached the applicable standard of care in Ontario. In particular, it is alleged that Loblaws:
>
> > (a) voluntarily adopted rigorous Corporate Social Responsibility Standards in Ontario
> >
> > (b) devised the Master Service Agreement, Loblaws' Supplier Agreement, including the Supplier Code of Conduct, and other policies with respect to its global suppliers including New Wave, in Ontario;
> >
> > (c) established minimum health and safety standards for its global suppliers from its offices in Ontario;
> >
> > (d) gained knowledge about the history of Bangladesh garment factory disasters, including collapses and fires, in Ontario;
> >
> > (e) gained knowledge about the regulatory and legal vacuum in Bangladesh with respect to worker health and safety from its offices in Ontario;
> >
> > (f) contracted out its garment production to Pearl Global/ New Wave from its offices in Ontario;

(g) undertook a duty of care toward the Plaintiffs and the putative class members from Ontario;

(h) controlled New Wave's production of its garments from its offices in Ontario;

(i) engaged Bureau Veritas to conduct audits of New Wave from its offices in Ontario;

(j) entered into the Master Service Agreement with Bureau Veritas in Ontario, which agreement is governed by the law of Ontario;

(k) determined the nature and scope of the audits that were conducted by Bureau Veritas from its offices in Ontario;

(1) arranged onsite visits of the New Wave factories from its offices in Ontario;

(m) provided directions and instructions to Bureau Veritas from its offices in Ontario;

(n) received and reviewed audit reports and Corrective Action Plans prepared by Bureau Veritas in Ontario;

(o) gained knowledge about New Wave's non-compliance with applicable Bangladesh laws and regulations in Ontario;

(p) decided not to suspend or terminate its contractual relationship with New Wave from its offices in Ontario;

(q) represented that it had the information and means necessary to ensure that New Wave complied with its Supplier Code of Conduct and met minimum safety standards required by Loblaws of its suppliers from its offices in Ontario;

(r) gained knowledge about the regulatory and legal deficiencies in its extensive manufacturing presence in Bangladesh from its offices in Ontario; and

(s) failed to require that New Wave comply with the Corrective Action Plans from its offices in Ontario.

77. There is no Canadian precedent for determining *lex loci* in a multi-jurisdictional mass tort claim where negligent conduct that occurred in Ontario resulted in large scale, grievous bodily injuries and death outside of the jurisdiction. While the basis for determining the place of wrongful conduct varies from tort to tort, the factors set out above demonstrate that the Plaintiffs' injuries and damages were the culmination of a complex series of negligent actions and omissions by Loblaws in Ontario.

78. The alleged negligence of the Defendants in the present case raises the sort of "thorny issues" alluded to by La Forest J. in *Tolofson* and by the Court of Appeal for Ontario in *Leonard v. Houle* that the *lex loci* analysis should heavily weigh in favour of the place where the Defendants' wrongful activity took place. As illustrated by the pleadings, the nature of the alleged tort is such that the breach of duty of care will almost always take place in Ontario, or other developed jurisdictions, where corporations that source from developing countries are located. In a global economy, an approach based on the place of damages shields corporations such as Loblaws from the laws of the place where their businesses are located and their profits are made. This risks exposing plaintiffs who reside in developing countries to a grossly asymmetrical and unjust application of tort law principle.

[131] With respect to Bureau Veritas, the Plaintiffs allege in the Statement of Claim that Bureau Veritas was negligent in failing to conduct proper and reasonable audits and inspections of the New Wave factories in accordance with industry and international standards and Bangladesh codes, laws and regulations.

[132] The Plaintiffs plead that Bureau Veritas failed to recommend that the structural safety of the New Wave factories and Rana Plaza be included as an integral part of the audits, and failed to report findings to Loblaws that the New Wave factories did not comply with the laws and

regulations of Bangladesh and that Rana Plaza was structurally deficient to a dangerous degree.

[133] The essential theory of the Plaintiffs' case against Bureau Veritas is set out in paras. 24-25, 213-214, 220-222 of the Statement of Claim, which state:

> 24. The Bureau Veritas Defendants had a duty to the Plaintiffs and Class Members to ensure that reasonable audits and inspections were conducted and that any issues of non-compliance with applicable codes, standards, laws and regulations were addressed and reported back to Loblaws so as to ensure that any safety violations were quickly remedied.
>
> 25. Bureau Veritas breached its duty to the Plaintiffs and Class Members by failing to ensure the safety of the garment workers in the Rana Plaza and in particular by failing to conduct audits and inspections in accordance with Bureau Veritas' own Code of Ethics, and failing to ensure that the New Wave factories and Rana Plaza were compliant with Loblaws' Corporate Social Responsibility Standards and, Bangladeshi laws and regulations. Considering the disproportionately high safety risk to workers at New Wave, and knowing of the well documented industry history of factory safety issues, collapses and fires, Bureau Veritas breached its duty to the class by failing to conduct adequate audits and inspections for structural issues at the New Wave factories and Rana Plaza.
>
> ….
>
> 213. Bureau Veritas knew or ought to have known that the garment workers in Rana Plaza would be in danger of injury and death if it failed to conduct the audit process in a reasonable and thorough fashion and if Bureau Veritas failed to take steps to include the structural safety of the building as part of the audit process. Despite this, Bureau Veritas failed to take any reasonable steps to keep these garment workers safe.
>
> 214. Bureau Veritas understood and reasonably foresaw that if they did not conduct proper audits and inspections, and report to Loblaws structural concerns and non-compliance with applicable standards, codes, laws and regulations, the lives and safety of the garment workers (and Class Members) who produced Joe Fresh apparel would be put at risk.
>
> ….
>
> 220. The Bureau Veritas Defendants owed a duty of care to the Class Members in that their conduct gave rise to reasonably foreseeable harm to the garment workers and Class Members. This duty arose from:
>
> > (a) the internal company standards adopted and made public by the Bureau Veritas Defendants as referenced herein;
> >
> > (b) the context in which Bureau Veritas audited and inspected companies such as New Wave in Bangladesh. This context included Bureau Veritas' extensive knowledge of the history of previous serious factory collapses and knowledge of the extremely unsafe working conditions for workers in the garment factories throughout Bangladesh and in particular, their extraordinary risk to Class Members working at garment factories such as New Wave which was constructed entirely illegally atop of a retail/commercial building;
> >
> > (c) the international and industry standards applicable to inspections and audits of industrial facilities to ensure workplace safety;
> >
> > (d) the international standards articulated by the United Nations Guiding Principles, the OECD Guidelines, the MNE Declaration and the ISO 26000; and
> >
> > (e) WRAP's [Worldwide Responsible Accredited Production] Production Principles and standards established in WRAP's certification process which indicated that structural audits and inspections were required pre-collapse.
>
> 221. The Plaintiffs allege that the Bureau Veritas Defendants breached their duty to take reasonable steps to protect the Class Members from the risk of physical injury and death by:

> (a) failing to conduct a structural audit and inspections or alternatively, any reasonable audits, assessments and/or inspections in accordance with the standards of the Loblaws Defendants and the Bureau Veritas Defendants, applicable industry standards and international standards, as referenced herein;
>
> (b) failing to take adequate steps to report to Loblaws any non-compliance of the New Wave factories and Rana Plaza with applicable standards, regulations, codes and/or laws, and specifically, failing to report any structural defects of the New Wave factories and Rana Plaza;
>
> (c) using inadequate policies and procedures to determine the factors that audits, inspections and assessments of factories should include; and
>
> (d) failing to ensure that the audits and inspections dealt with all aspects of worker safety including structural safety of the building and applicable standards, codes, laws and regulations.
>
> 222. Bureau Veritas was to audit New Wave for the purpose of ensuring safe working conditions at the New Wave factories. The Plaintiffs and Class Members witnessed Bureau Veritas inspecting their factories, were interviewed by Bureau Veritas regarding their safety, witnessed New Wave taking various corrective measures to prepare for the audits and inspections, to comply with the action plan of the audits and inspections, and through these actions created an overall expectation with the Class Members that the purpose of the audits and inspections was to ensure their safety. The Plaintiffs and Class Members reasonably expected the auditors of Bureau Veritas to take reasonable precautions to reduce risks to their safety and lives because that was the stated objective of the audits and inspections.

D. The Delaware Litigation

[134] In July 2015, a person injured in the Rana Plaza collapse and an estate representative of one of the persons who had died in the collapse brought a proposed class action in the Superior Court of the State of Delaware against J.C. Penney Corporation Inc., The Children's Place and Wal-Mart Stores, Inc., which were purchasers of goods manufactured by suppliers with factories in the building. The style of cause of the action was: *Abdur Rahaman as personal representative of Sharifa Belgum and Mahamudul Hasan Hridoy v. JCPenney Corporation, Inc., The Children's Place, and Wal-Mart Stores, Inc.*

[135] The defendants in the Delaware litigation are well-known U.S. retailers that were in the same position as Loblaws in the sense that J.C. Penney and Wal-Mart were major purchasers of goods from manufacturers operating out of Rana Plaza.

[136] The plaintiffs in the Delaware action alleged that the defendants failed to implement standards and oversight mechanisms, failed to monitor the construction of Rana Plaza, failed to properly inspect the building to ensure compliance with local code; and failed to take reasonable steps to implement policies, audits, or other oversight to ensure that workers were safe and healthy. Further, the plaintiffs alleged that: (a) the defendants knew or ought to have known of the safety risks occurring in Bangladesh garment factories; (b) the conditions present in the garment factories from which defendants sourced clothing presented a peculiar risk; (c) the defendants knew or ought to have known of the structural issues plaguing Rana Plaza; and (d) as a result, the defendants owed the plaintiffs a duty of care to ensure a safe workplace.

[137] Under a procedural rule (similar to Ontario's Rule 21), the defendants in the Delaware action successfully moved to have the action dismissed. Judge Johnson held that the limitations law of Bangladesh applied and that the claim was statute-barred for failure to meet the one-year

limitation period under the *Limitation Act, 1908* for commencing an action.

[138] Judge Johnson also concluded that there was no duty of care under the "peculiar risk" doctrine of the *Restatement (Second) of Torts,* because the plaintiffs were not employees of the defendants and because there was no "peculiar risk," Judge Johnson concluded that the inadequacies in the construction of Rana Plaza were not peculiar to the business in which the US defendants engaged and, accordingly, the defendants could not reasonably be expected to take precautions against a building collapse when deciding to source garments from factories in Bangladesh. And Judge Johnson concluded that the defendants' ethical sourcing statements did not by themselves create a duty to another's employees.

[139] In the Delaware action, there was no allegation that the defendants had assumed responsibility to the plaintiffs by the adoption of CSR standards. That allegation, however, was made in *Jane Doe v. v. Wal-Mart*, 572 F.3d 677 (9th Cir. 2009) a decision of the 9th Circuit of the United States Court of Appeal that refused to impose a duty of care on Wal-Mart to its suppliers' employees.

[140] The plaintiffs in *Jane Doe v. Wal-Mart* were employees of Wal-Mart's suppliers in third world countries, including Bangladesh. The plaintiffs alleged, among other things, that Wal-Mart owed them a duty of care in tort because: (a) Wal-Mart had CSR standards that specified basic labour standards that its suppliers were required to meet; (b) the standards were incorporated into Wal-Mart's supply contracts with foreign suppliers; (c) every supplier was required in the supply contracts to acknowledge that failure to comply with Wal-Mart's standards could result in cancellation of orders and termination of its business relationship with Wal-Mart; (d) under the supply contracts, Wal-Mart had a right to conduct on-site factory inspections to insure compliance with its standards; (e) Wal-Mart represented to the public that it improved the lives of its suppliers' employees and that it did not condone any violation of its standards; (f) Wal-Mart knew that its suppliers often violated the standards; and (g) the short deadline and low prices in Wal-Mart's supply contracts forced suppliers to violate Wal-Mart's standards to satisfy the terms of the contracts.

[141] There was a great deal of argument in the case at bar, in the factums and at the hearing of the motions, about the precedential value of the American case law to determine the issues in the case at bar.

[142] I see no purpose in engaging in the debate; for the purposes of the motions now before the court, I simply give no significance to the decisions in the United States.

E. Jurisdiction *Simpliciter*, the Attornment Program, and the Opt-in Class Definition

[143] The Plaintiffs and the Defendants have engaged in a battle about whether this court has jurisdiction *simpliciter* with respect to the so-called Absent Foreign Claimants. There never was any doubt that Ontario's Superior Court of Justice has jurisdiction *simpliciter* over the named Plaintiffs and the named Defendants, and the matter of controversy was whether the court had jurisdiction over the so-called Absent Foreign Claimants; i.e., the putative Class Members who are defined but not individually named parties to the litigation.

[144] Newly developing case law fueled the debate between the parties. After the Plaintiffs commenced this action as an opt-out global class action, Justice Leitch released her decision in *Airia Brands v. Air Canada*, 2015 ONSC 5332. In that decision, Justice Leitch held that insofar

as a proposed class action had foreign claimants, then for the court to have jurisdiction *simpliciter* over them, the foreign claimants had to have attorned.

[145] In other words, Justice Leitch concluded that jurisdiction *simpliciter* over foreign claimants could not be established just by the court having a real and substantial connection to the subject matter of the litigation, but she observed that jurisdiction could, nevertheless, be established by a formal act of attornment by the foreign claimant.

[146] In light of the *Airia Brands* decision and relying on it, the Defendants responded with their motions to challenge this court's jurisdiction *simpliciter,* and Loblaws also raised a constitutional issue.

[147] It was Loblaws' position that as a matter of constitutional law, it was *ultra vires* for an Ontario court to assert jurisdiction based on the real and substantial connection test set out in *Club Resorts Ltd. v. Van Breda*. To back up its position, it brought a constitutional challenge as a branch of the motions now before the court. In response to that part of the motions, it was Ontario's position (and the Plaintiffs' position) that a real and substantial connection with the dispute is sufficient for an Ontario court to assume jurisdiction over a global class action and over the claims of the Absent Foreign Claimants from Bangladesh, even if the court lacks personal jurisdiction over them.

[148] In turn, because in *Airia Brands,* Justice Leitch had suggested that the court would have jurisdiction *simpliciter* for a global class action if the foreign claimants attorned or consented to this court's jurisdiction, the Plaintiffs went ahead unilaterally to undertake and to implement an attornment program in Bangladesh. Put shortly, the Plaintiffs' lawyers and proposed Class Counsel, Rochon Genova LLP, went to Bangladesh to recruit putative Class Members.

[149] The process of obtaining signatures was supervised by Mr. Hoque, an associate lawyer with Rochon Genova LLP, who went to Bangladesh and procured 3,850 signatures allegedly from putative Class Members. Mr. Hoque, who was originally from Bangladesh, testified that those who signed the form told him that they were either injured at the Rana Plaza or they had family members who died in the tragedy. The form had been translated into Bangla, and the signers were given a fact sheet, a copy of the notice of action, and a copy of the Statement of Claim, all translated to Bangla.

[150] The consent forms collected by Mr. Hoque specify that the signatory wants to join the action in Toronto, Canada and consents to the claim going forward on his or her behalf and that he or she has not started any actions in Bangladesh against any of the companies being sued in Canada. The form indicates that the signatory hopes that the Ontario proceeding will provide a possibility to recover fair compensation from Loblaws.

[151] Loblaws, however, submitted that the attornment forms were obtained from many persons who were not New Wave employees and that the forms do not explain the consequences of attornment; i.e., that the claimants will be bound by the Ontario court's decision. Further, it submitted that the forms do not explain that putative class counsel will be extracting a contingency fee. Further still, Loblaws says that given the levels of illiteracy in Bangladesh, it is doubtful that the signatories knew what they were signing and that there is no evidence that the signatories were adequately advised about the legal consequences of attorning. Loblaws says that the reliability of the forms is suspect because: over 1,000 of the forms do not include a copy of the signatory's national ID, making it impossible to confirm the signatory's identity; over 300 of

the forms are missing a photograph to confirm that the signatory is the same person as on the National ID card; and over 250 of the forms are missing a signature from a witness.

[152] With Loblaws challenging the propriety of the recruitment process in Bangladesh and with *Airia Brands v. Air Canada* under appeal, the Plaintiffs undertook a second maneuver. They decided to change the class definition to transform the class definition from an opt-out class to an opt-in class.

[153] This maneuver by the Plaintiffs to switch to an opt-in class action was successful insofar as Loblaws agreed that opting-in would work to empower the court with jurisdiction *simpliciter* over foreign claimants. There was a consensus among the parties and their experts that Ontario's Superior Court of Justice has jurisdiction *simpliciter* over foreign claimants that opt-into an Ontario class proceeding.

[154] In *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at para. 74, leave to appeal to SCC ref'd. [2001] SCCA No. 21, the Court of Appeal for British Columbia held that through an opt-in process, non-residents can indicate that they accept the jurisdiction of the court such that they would be precluded by the doctrine of *res judicata* from later suing or benefitting from a suit brought in another jurisdiction.

[155] I agree with this consensus, which is no more than to recognize that Ontario courts have always had the jurisdiction to provide access to justice to foreigners in representative or joinder proceedings, especially in cases where the defendants reside or have a presence in Ontario or have attorned to the Ontario court's substantive jurisdiction, as is the situation in the case at bar.

[156] The parties being on common ground on the attornment point, the jurisdiction of the court and the constitutionality of the opt-out approach rejected in *Airia Brands v. Air Canada* became a moot point. The Defendants could not object that the Plaintiffs were attempting to certify a class that included the so-called Absent Foreign Claimants.

[157] Moreover, while the appeal in *Airia Brands v. Air Canada*, *supra*, was still pending, the Ontario Court of Appeal decided *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916, leave to appeal to the SCC ref'd [2017] SCCA No. 54. The *Excalibur Special Opportunities LP* case supports the proposition that an Ontario court can have jurisdiction *simpliciter* in a global opt-out class action in which the class members are non-residents and not present in Ontario.

[158] The *Excalibur* case is authority that the test to determine an Ontario court has jurisdiction *simpliciter* is based on the connecting factors from *Club Resorts Ltd. v. Van Breda*, *supra*. In *Excalibur Special Opportunities LP*, the Court of Appeal concluded that the *Van Breda* presumptive connecting factors applied to the claims of all putative class members, including those resident outside Ontario, and the court had jurisdiction *simpliciter* over the subject matter of the claim. In *Excalibur Special Opportunities LP*, the Court of Appeal certified a global class without any requirement that the foreign class members attorn prior to certification, relying on the principles established in *Van Breda*.

[159] However, Loblaws did not agree that an external attornment program was an alternative to an opt-in class action. Loblaws' position, rather, was that there was no longer any need for this court to decide whether or not to follow *Airia Brands v. Air Canada* and that the only issues were to decide when and how Class Members could properly attorn to this court's jurisdiction. The focus of the controversy was now Loblaws' submission that attornment must be established

before certification and that the forms in this case that Mr. Hoque had collected did not establish attornment.

[160] Loblaws insisted that a formal; i.e., court-approved pre-certification attornment process was required for a global class action. Thus, the attornment issue continued to fester.

[161] Loblaws filed expert evidence in respect of the jurisdiction *simpliciter* issue. It retained Professor Briggs, whose evidence was accepted in *Airia Brands v. Air Canada*, and it retained Ms. Kabir, whose evidence was accepted in the Delaware litigation, described above. Professor Briggs is a leading academic in private international law and a practicing lawyer, and Ms. Kabir is a practicing lawyer in Bangladesh. Taken together, it was Professor Briggs' and Ms. Kabir's opinion that under the principles of private international law, an Ontario judgment about the Rana Plaza tragedy would not be recognized in Bangladesh as binding against the putative Class Members, unless they were present in Ontario when the proceeding was commenced, had consented to the court's jurisdiction, or properly attorned (submitted) to the court's jurisdiction. Loblaws submitted that attornment had to come before the certification motion.

[162] Professor Fentiman, a renowned English academic and former practicing lawyer, provided expert evidence for the Plaintiffs. He agreed that for a court's jurisdiction over class members to be recognized in a foreign court, the class members would have to be persons who have submitted to the jurisdiction of the Ontario court either by agreement or conduct. He did not opine as to whether the attornment process in the immediate case that had been orchestrated by Mr. Hoque was satisfactory.

[163] Mr. Hossain, another expert witness for the Plaintiffs, testified that: (a) under Bangladesh law, a consent to jurisdiction will be recognized only if the consent is informed; (b) whether or not consent is informed is an individual question of fact; and (c) to determine whether any particular proposed class member has given informed consent to jurisdiction, someone would have to examine that person.

[164] As I view the matter, for this proposed class action, the Ontario court has jurisdiction *simpliciter* based on a combination of: (a) the traditional attornment factors for jurisdiction; (b) the connecting factors from *Club Resorts Ltd. v. Van Breda*, *supra*; and, (c) an opt-in definition for class membership.

[165] In my opinion, it is not necessary to decide whether the putative Class Members in Bangladesh who signed consent forms before the certification motion did attorn to this court's jurisdiction because they will be able to attorn by opting into the action in Ontario.

[166] In other words, had I certified the proposed class action, it would not have been necessary for the putative Class Members to have formally attorned before the certification motion and their attornment would have been achieved post-certification by a court supervised opt-in notice program. Thus, I see no purpose in conducting a procedural post-mortem of what occurred in Bangladesh. I will, nevertheless, address Loblaws' argument about the necessity or utility of Absent Foreign Claimants attorning pre-certification.

[167] Loblaws contends that the putative class members in an opt-in class action must attorn to the Ontario court's jurisdiction before the court decides whether or not to certify an opt-in action that would provide them with the opt-in choice. Loblaws' explanation for its position is that a court cannot affect the rights of the putative class members without their having already attorned to the court's jurisdiction.

[168] I disagree. The logical fallacy with Loblaws' argument is that pre-certification, the putative class members have no substantive rights that are being affected. They only have putative procedural rights and those rights are rather being created or augmented than affected by the class proceeding. A court order certifying an opt-in or an opt-out class action creates the right to opt-in or to opt-out and does not affect any pre-existing procedural rights of the putative class members, which do not yet exist. What is being determined by the certification process is whether the putative class members will have a right to participate in a class action. A class action certified in Ontario that includes Absent Foreign Claimants would merely serve as a procedural vehicle through which the common issues of many claimants could be adjudicated - if they wish to participate.

[169] Further, it should be noted that the *Class Proceedings Act, 1992* is a procedural statute which does not, by itself, create or modify substantive rights or confer or alter jurisdiction: *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 at paras. 17-19; *Union des consommateurs v. Dell Computer Corp.*, [2007] 2 S.C.R. 801 at para. 108; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 50-51.

[170] Just as there is no reason or purpose in giving domestic putative class members notice of the possible formation of a class, no purpose would be achieved by giving foreign claimants prior notice of the possible formation of a class.

[171] In the case at bar, the recruitment process for Ontario attornments in Bangladesh was well intentioned, but it should not be repeated in other cases of global class actions whatever the outcome of the pending appeal in *Airia Brands v. Air Canada, supra*. As it turns out, this class action will not be certified, and thus the time and effort, regardless of its efficacy or propriety, was wasted. If the class action had been certified, then the effort in Bangladesh would still have been wasted, because there would have been a court approved and court supervised opt-in program making what occurred in Bangladesh redundant.

[172] Thus, as explained above, as matters developed in the run up to the certification motion, there will be no Absent Foreign Claimants. Therefore, Loblaws' constitutional challenge motion is moot and should be dismissed without any ruling on its merits.

[173] If the Attorney General seeks costs, it may make submissions in writing within 20 days of the release of these Reasons for Decision. Loblaws shall have 20 days to provide responding submissions.

F. Procedural Background

[174] In this part of my Reasons for Decision, I shall describe the procedural background and the principles that are engaged in deciding the multi-faceted motions before the court.

[175] Because the motions involved expert opinion evidence about foreign law, how the court should treat this evidence was a very contentious issue that I shall discuss in this part. The parties also hotly debated what it means to prove the content of foreign law. How to integrate factual evidence that was proffered about the events in Bangladesh with the pleaded allegations of fact and foreign law was also much debated and thus the court's jurisdiction and the manner of its exercise will also be described in this part.

[176] The procedural background begins on April 22, 2015, when the Plaintiffs commenced a proposed class action against Loblaws and Bureau Veritas. As already noted above, the Plaintiffs

plead causes of action in negligence, vicarious liability, and breach of fiduciary duty against Loblaws. They plead a negligence action against Bureau Veritas.

[177] The Plaintiffs' action is brought on behalf of:

> All persons who were in Rana Plaza at the time of the Rana Plaza collapse and survived, and who attorn to the jurisdiction of the Ontario Superior Court of Justice by opting-in to this proceeding ("the Surviving Class Members").
>
> The estates of all persons who died as a result of the Rana Plaza collapse and all spouses, children, parents, brothers, sisters, grandparents, grandchildren or other dependants of persons who died or were injured as a result of the Rana Plaza collapse (the "Wrongful Death and Family Class Members"), provided that the Wrongful Death and Family Class Members attorn to the jurisdiction of the Ontario Superior Court of Justice by opting in to this proceeding

[178] Now before the court is the Plaintiffs' motion to have their action certified as a class action. The Defendants resist the Plaintiffs' certification motion, and the Defendants submit that none of the five criteria for certification have been satisfied. I will defer the discussion about the test for certification under s. 5 of the *Class Proceedings Act, 1992* until later in these Reasons for Decision.

[179] Also now before the court are motions by the Defendants. I parenthetically note but make no determination that depending on the outcome of these motions and any appeals, Loblaws purports to reserve the right to bring a *forum non-conveniens* motion in the future.

[180] There are four branches to the Defendants' motions. The first branch of the Defendants' motions, which is brought pursuant to rules 21.01(1)(a) and 21.01(3)(c) of the *Rules of Civil Procedure*, raises jurisdictional and constitutional issues because of the foreign elements of the litigation. However, as already noted in the immediately previous part of these Reasons for Decision, the first branch of the Defendants' preliminary motion has morphed from its original purpose.

[181] In its original form, Loblaws sought a declaration that this court does not have jurisdiction over the putative Class Members because they were "Absent Foreign Claimants;" i.e., persons who: (i) are resident outside of Ontario; and (ii) have not formally submitted or consented to the jurisdiction of the Ontario court. In its initial iteration, the Defendants submitted that a unilateral consent process that had been initiated in Bangladesh by the Plaintiffs' lawyers, who went there to collect signed consents from putative Class Members, did not count as a proper attornment, and then Loblaws sought a declaration that the common law's real and substantial connection test and ss. 27(3), 28(1) and 29(3) of the *Class Proceedings Act, 1992* are constitutionally inapplicable to Absent Foreign Claimants.

[182] As noted above, the constitutional aspects of the motion prompted the Government of Ontario (the Attorney General of Ontario) to intervene pursuant to s. 109(4) of the *Courts of Justice Act*, R.S.O. 1990, c. 43. However, as explained above, developments after the motion was launched made the constitutional point about Absent Foreign Claimants moot, and the only matter to decide is the manner of how and when the putative Class Members may attorn to this court's jurisdiction. This branch of the motion has been resolved above.

[183] The second branch of the Defendants' motion, pursuant to rule 21.01(1)(a), raises the issue of the choice of law for the determination of the Plaintiffs' claims against the Defendants. The Plaintiffs plead that Ontario law applies to the tort and breach of fiduciary duty claims. Because the Defendants rely on a Bangladesh limitations statute, they submit that the applicable

law is the law of Bangladesh. For the second branch of their motions, the Defendants move for a ruling on a point of law and for an order dismissing the action on the grounds that it is governed by the law of Bangladesh and is subject to the Bangladesh *Limitation Act 1908* and is, therefore, statute-barred.

[184] The third branch of the Defendants' motion, also pursuant to rule 21.01(1)(a), raises substantive issues about whether the Plaintiffs' causes of action under Bangladesh or Ontario law are legally viable. Practically speaking, for the third branch, the Defendants also move under rule 21.01(1)(b), which overlaps with the cause of action criterion of the test for certification, because the Defendants submit that the Plaintiffs have not pleaded a reasonable cause of action under the law of either Ontario or Bangladesh.

[185] Loblaws submits that the law of Bangladesh governs and that it has no duty of care to the putative Class Members under Bangladesh law, under English law, which may be persuasive in Bangladesh, or under Ontario law.

[186] Bureau Veritas submits that the law of Bangladesh governs and that it has no duty of care to the putative Class Members under Bangladesh law, under English law, which may be persuasive in Bangladesh, or under Ontario law. Bureau Veritas submits that if there is a duty of care, the duty of care is restricted to the New Wave employees before the termination of Bureau Veritas' contract.

[187] The fourth branch of the Defendants' motion, pursuant to rules 25.06(1) and (2) and 25.11 of the *Rules of Civil Procedure* challenges certain paragraphs of the Plaintiffs' Statement of Claim as improper pleadings, including the paragraphs that plead an apology.

[188] Turning to the court's jurisdiction to decide the various branches of the Defendants' motions, the rules that are engaged on the Defendants' four-branched preliminary motion are rules 21.01(1)(a), 21.01(1)(b), 21.01(3)(a), 25.06(1), 25.06(2) and 25.11, which state:

> WHERE AVAILABLE
>
> *To any Party on Question of Law*
>
> 21.01(1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs;
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> (a) under clause (1)(a), except with leave of a judge or on consent of the parties;
>
> (b) under clause (1)(b).
>
> *To Defendant*
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> *Jurisdiction*
>
> (a) the court has no jurisdiction over the subject matter of the action;
>
> *Capacity*

> (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;
>
> *Another Proceeding Pending*
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
>
> *Action Frivolous, Vexatious or Abuse of Process*
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.
>
> ….
>
> RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS
>
> *Material Facts*
>
> 25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.
>
> *Pleading Law*
>
> (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.
>
> ….
>
> STRIKING OUT A PLEADING OR OTHER DOCUMENT
>
> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

[189] Under rule 21.01(1)(a), evidence is not admissible except with leave of a judge or on consent of the parties. The issue of what is foreign law is a question of fact, and the parties filed 20 expert reports on the content of foreign law. There were ten witnesses that testified about foreign law; namely: (1) Chief Justice (ret.) Islam; (2) Chief Justice (ret.) Rahman; (3) Mr. Ahmad; (4) Professor Briggs; (5) Dean Fentiman; (6) Dr. Goudkamp; (7) Mr. Hossain; (8) Ms. Kabir; (9) Mr. Mahmud; and (10) Dr. Morgan.

[190] The decision to grant leave to admit evidence on a Rule 21 motion is discretionary and is exercised in the interests of justice, and the court may consider documents other than those incorporated into the pleading if the documents provide essential factual context: *Sheridan v. Ontario*, 2015 ONCA 303 at paras. 16-18, aff'g 2014 ONSC 4970 at paras. 10-13, 244; *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (C.A.) at para. 34.

[191] In an instance that it is better to ask forgiveness than to ask permission, in their factums, the Defendants sought the court's leave to admit the experts' evidence. As it turned out, the Plaintiffs consented to the admission of the evidence, but in any event, I granted the request.

[192] The admission of evidence in the immediate case was obviously necessary to determine the content of the foreign law, which is a question of fact to be proven, and the admission of evidence was also necessary to understand and to assess certain lynchpin allegations upon which

rested the theory of the Plaintiffs' novel tort claims; namely, the allegations that: (a) the Defendants assumed responsibility for the Plaintiffs' and the putative Class Members' safety; (b) the putative Class Members relied on the Plaintiffs' protection of them; and (c) the Defendants had the ways and means (control) to prevent or to protect the Plaintiffs from harm. As already noted above, much will turn on the allegations that the putative Class Members relied on the Defendants to safeguard them from harm in the workplace and that the Defendants had the ways and means to prevent the putative Class Members from harm.

[193] With some adjustments when evidence is admitted, a rule 21.01(1)(a) motion uses the same test as under a motion under rule 21.01(1)(b), where the court may strike out a pleading on the ground that it discloses no reasonable cause of action: *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.) at pp. 781-82; *Toronto-Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417 (Gen. Div.); *MacDonald v. Ontario Hydro* (1994), 19 O.R. (3d) 529 (Gen. Div.), aff'd 26 O.R. (3d) 401 (C.A.).

[194] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.).

[195] Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc., supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[196] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17-25, the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[197] On motions brought under the procedure to strike a claim or defence as untenable in law, leave to amend the pleading may and usually will be given, and leave to amend will only be denied in the clearest cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged and there is no reason to suppose that the party could improve his or her case by any amendment: *Mitchell v. Lewis*, 2016 ONCA 903 at para. 21; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72 at para. 16; *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*, 2012 ONSC 2752 at para. 46; *Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.*, 2010 ONSC 2441 at paras. 21-22; *Holdings Ltd. v. Toronto-Dominion Bank (c.o.b. TD Canada Trust)*), [2007] O.J. No. 2445 (C.A.) at para. 6; *Miguna v. Ontario (Attorney General)*, [2005] O.J. No. 5346 (C.A.); *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada* (1993), 14 O.R. (3d) 161 (Gen. Div.) at p. 173.

[198] A rule 21.01(1)(a) motion may be used to determine a question of law raised by a pleading where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs. A rule 21.01(1)(a) motion is a means to determine the choice of law to be applied by a court. The case of *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, much discussed below, is an example of Rule 21 being used for

this purpose. For another example, in *Craig v. Allstate Insurance Co. of Canada* (2002), 59 O.R. (3d) 590 (C.A.), the Court construed a statute of the State of Florida and concluded that it did not affect the cause of action that had been pleaded.

[199] In the context of a Rule 21 motion, a foreign law analysis proceeds in three stages: (1) the court decides under domestic choice of law principles which jurisdiction governs the claim; (2) if the substantive law of a foreign jurisdiction governs, the court determines the content of foreign law as a question of fact (on the usual balance of probabilities standard for fact-finding); and (3) the court considers the effect of the proven facts on the rights of the parties as a question of law; i.e., whether it is plain and obvious that the claim cannot succeed under established foreign law. See: *Craig v. Allstate Insurance Co. of Canada, supra*; *Foresight Shipping Co. v. Union of India*, 2004 FC 231 at para. 12, aff'd 2004 FC 1501 (C.A.).

[200] The content of foreign law is treated as an issue of fact that is proved by expert evidence: *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at p. 308; *Callpro Canada Inc. v. Prima Telematique Inc.*, [2001] O.J. No. 1474 (S.C.J.). A judge may not independently research the substance of foreign law and must rather determine its content based on evidence, typically expert evidence: *Bumper Development Corporation Ltd. v. Commissioner of Police of the Metropolis*, [1991] 4 All ER 638 (C.A.).

[201] However, that is not to say that a judge is precluded from examining the foreign law that is presented to him or her; if the evidence of the expert witnesses conflicts as to the effect of foreign law, the court may examine the sources itself and where the expert witness puts in materials as part of his or her evidence, the court is entitled to examine these materials, and where there is conflicting evidence as to the interpretation to be placed upon the materials, the court must scrutinize them and form its own conclusion on them. See: *Lyon v. Lyon*, [1959] O.R. 305 (C.A.); *Bausch and Lomb Optical Co. Ltd. v. Maislin Transport Ltd.* (1975), 10 O.R. (2d) 533 (H.C.J.); *Callpro Canada Inc. v. Prima Telematique Inc., supra*, paras. 70-74.

[202] When the experts on foreign law differ, the court is obliged to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to make up its mind on the question of foreign law and resolve the difference: *General Motors Acceptance Corp. of Canada v. Town and Country Chrysler Ltd.*, 2007 ONCA 904 at paras. 36-38; *Bumper Development Corporation Ltd. v. Commissioner of Police of the Metropolis, supra*, at p. 368; *Zapsibinvest Russian-American Joint Venture v. Raanani Estate*, [2003] O.J. No. 2244 (S.C.J.) at para. 48; *Rouyer Guillet v. Rouyer Guillet & Co.*, [1949] 1 All ER 244 (C.A.).

[203] The court is entitled to examine the authorities upon which the experts rely. In *Allen v. Hay* (1922), 64 S.C.R. 76 at para. 24, Justice Duff, as he then was, explained the intellectual process by which a court can determine a legal issue as an issue of fact. He stated:

> It is therefore incumbent upon him to prove the law of the State of Washington. This he must prove as matter of fact by the evidence of persons who are expert in that law. These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion.

[204] Because the content of foreign law is an issue of fact, a party seeking to have an issue resolved by foreign law must plead the material facts of his or her foreign law claim or defence and the onus of proof is on the party pleading the foreign law: *Yordanes v. Bank of Nova Scotia*

(2006), 78 O.R. (3d) 590 (S.C.J.); *Bank of Nova Scotia v. Wassef*, [2002] O.J. No. 4883 (S.C.J.) at para. 17; *Guarantee Co. of North America v. Mercedes-Benz Canada Inc.* (2005), 83 O.R. (3d) 316 (S.C.J.), aff'd (2006), 86 O.R. (3d) 479 (C.A.); *Triathlon Leasing Inc. v. Juniberry Corp.* (1995), 157 NBR (2d) 217 (C.A.); *Ontario Stone Corp. v. R.E. Law Crush Stone Ltd.*, [1964] 1 O.R. 303 (H.C.J.); *Bryant Press Ltd. v. Acme Fast Freight Inc.*, [1951] OWN 665 (H.C.J.).

[205] While proof of foreign law is a question of fact in the sense that the applicable law must be ascertained from the evidence of the witnesses, the effect and application of that law is a finding of law, and an appellate court will not defer to a trial judge's findings in respect of questions of foreign law, and it will make its own assessment of the merits of the legal arguments and the trial judge's findings about the content of foreign law: *General Motors Acceptance Corp. of Canada v. Town and Country Chrysler Ltd.*, *supra*, at paras. 28-35; *Bank of Nova Scotia v. Wassef*, *supra*, at para. 20.

[206] In the immediate case, that evidence is admissible on the rule 21.01(1)(a) branches of the motion is significant because it modifies the extent to which I must accept the allegations in the Plaintiffs' Statement of Claim about foreign law as true facts for the purposes of the motion. Although I must accept the pleaded facts to which the foreign law will be applied, I do not have to accept as true the Plaintiffs' pleaded articulation of the substantive content of the foreign law. Rather, applying the normal civil standard of proof on the balance of probabilities, I must determine the substantive content of the foreign law and then I should apply that law to the material facts to determine whether a reasonable cause of action under the foreign law has been pleaded: *Yordanes v. Bank of Nova Scotia*, *supra*, at paras. 14-19.

G. Choice of Law

1. Introduction

[207] Above, I conclude that the Ontario court has jurisdiction *simpliciter* to decide the Plaintiffs' and the putative Class Members' tort and breach of fiduciary duty claims. The next question to address is what is the choice of law for those claims. The Plaintiffs submit that the claims are governed by Ontario law, but as an aspect of their Rule 21 motion, the Defendants submit that the Plaintiffs' claims are governed by Bangladesh law.

[208] It is no secret that the Defendants' motivation for seeking a ruling that the action is governed by Bangladesh law is not driven by any great difference in the tort law in Ontario and in Bangladesh but rather is motivated by the circumstance that the Plaintiffs commenced their action more than one year after the tragic events at Rana Plaza. The Defendants argue that under Bangladesh law, the Plaintiffs' action comes too late and is statute-barred under Bangladesh's *Limitation Act, 1908*.

[209] The Plaintiffs' position is that their claims are timely under Ontario law, which is undoubtedly correct, and thus not surprisingly, the Plaintiffs' assert that the choice of law to resolve the tort and fiduciary duty claims is Ontario law.

[210] In this part of my Reasons for Decision, I shall examine the choice of law issues in the case at bar. I shall: (a) describe the law that governs how an Ontario court decides the choice of law question; (b) analyze the parties' competing arguments about the choice of law issues; (c) and determine the choice of law for the Plaintiffs' causes of action. I shall also address the Plaintiffs' arguments that there are reasons to oust Bangladesh law and to choose Ontario law

instead. To foreshadow the result of this part, I agree with the Defendants' submissions that the Plaintiffs' tort and breach of fiduciary duty causes of action are governed by the law of Bangladesh.

[211] In the next major section of these Reasons, I shall address the question of whether the Plaintiffs' claims are statute-barred under Bangladesh's *Limitation Act, 1908*. In later sections of these Reasons for Decision, I shall examine the legal viability of the Plaintiffs' causes of action under both Bangladesh and Ontario law on the assumption that their claims are not statute-barred.

2. Preliminary Points about the Choice of Law Issues

[212] I shall begin the discussion in this part of my Reasons for Decision, which will discuss determining the choice of law for tort cases, by making four preliminary points that affect how an Ontario court decides what law to apply in a lawsuit involving foreign parties, events in a foreign country, foreign law, or foreign court judgments.

[213] The first preliminary point is a matter of both terminology and substantive law. The domestic court (in the immediate case, Ontario's Superior Court of Justice) is known as the *lex fori*. A domestic court will always apply its own procedural law: *Tolofson v. Jensen*, *supra*, at para. 41. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum, the *lex fori*: *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.).

[214] There is sometimes an issue of what counts for procedural versus substantive law. Limitation periods and statute-bars are matters of substantive law: *Tolofson v. Jensen*, *supra*. Pre-judgment interest is a matter of substantive law: *Somers v. Fournier, supra*. Remoteness of damages and heads of damage are questions of substantive law, whereas the quantification or measurement of damages is a question of procedure governed by the *lex fori: Somers v. Fournier, supra*; *Wong v. Wei*, [1999] BCJ No. 768 (BCSC); *Metaxas v. Galaxias*, [1990] 2 FC 400 (TD). The cap on non-pecuniary general damages (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287) is a procedural matter. Costs are a procedural matter governed by the *lex fori*: *Somers v. Fournier, supra*.

[215] The second preliminary point is that a domestic court will apply its domestic law for both procedural and substantive law matters, unless the parties make an issue of the choice of law. The choice of law question does not arise unless one of the party raises the issue; if neither party makes an allegation about the choice of law, the domestic court resolves the dispute using domestic law, the *lex fori*: *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at pp. 853-54. It is presumed that the foreign law is the same as the domestic law unless the content of foreign law is proven as a factual matter.

[216] The third preliminary point is that the choice of law issue is an aspect of the body of law known as conflicts of law or private international law, and although this body of law addresses several related problems, care must be taken not to conflate the discrete rules of conflict of laws.

[217] Thus, conflict of laws addresses the jurisdiction *simpliciter* issue, the *forum conveniens* issue, the choice of law issue, and the enforcement of foreign judgments issue, and although the law for resolving these issues is rooted in common principles, values, and policies, historically

there has been no consensus about the doctrinal theory to explain conflict of laws. Over the centuries, around the world, there are many different theories and many different rules to respond to the conflict of laws issues, but the answers tend to involve discrete, but not necessarily doctrinally consistent rules, for determining jurisdiction *simpliciter*, *forum conveniens*, choice of law, and the enforcement of foreign judgments. Thus, in *Club Resorts Ltd. v. Van Breda*, *supra*, Justice LeBel stated at para. 16:

> 16. …. [T]he framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and *vice versa*. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others.

[218] However, because there is no consensus about the doctrinal theory that underlies the different branches of conflicts of law, while one can learn from a rule in one area of conflicts of law, one should not jump to the conclusion that the answers will be consistent or uniform. As will appear in the discussion below, in the case at bar, the location of the wrongdoing for the purposes of the choice of law rule was a source of confusion because the arguments conflated the location of wrongdoing for the purposes of determining whether a court has jurisdiction *simpliciter* from the location of the wrongdoing for the purpose of the choice of law rules.

[219] In *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at para. 7, discussed further below, Justice Dickson noted that it was a mistake not to distinguish between a court's jurisdiction and choice of law, and he held that the rules for determining the place of a wrongdoing for jurisdictional purposes need not be those which are used to identify the legal system under which the rights and liabilities of the parties are to be determined. Thus, for jurisdictional purposes, a wrongdoing may have more than one single *situs* (which explains why there may have to be a forum *conveniens* analysis), but there can only be one choice of law for the wrongdoing. In her text, *Castel & Walker Canadian Conflict of Laws* (6th ed.), (Toronto: LexisNexis Canada Inc., 2005) (loose-leaf, 2016), Professor Janet Walker at para. 35.8 points out that in a jurisdictional determination, there is no need to make an exclusive determination, but for a choice of law determination, there can only be one applicable law. In *Moran v. Pyle National (Canada) Ltd.*, Justice Dickson concluded that a manufacturer of a defective product could reasonably be expected to be sued in all of the jurisdictions in which its goods were distributed through normal channels of distribution, but Justice Dickson did not address the choice of law question in *Moran*.

[220] In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at p. 109, an enforcement of foreign judgments case, Justice La Forest stated: "it is simply anachronistic to uphold a ... single *situs* for torts or contracts for the proper exercise of jurisdiction." In *Club Resorts Ltd. v. Van Breda, supra* at para. 34, Justice LeBel stated that satisfying the real and substantial connection test does not require that the connections with the province taking jurisdiction must be the strongest ones possible or that they must all point in the same direction.

[221] The fact that there may be a real and substantial connection such as to satisfy the test for jurisdiction *simpliciter* does not determine the choice of law to be applied because the power of a court to exercise jurisdiction does not automatically include the authority to apply the law of its own jurisdiction, the *lex fori*: *Leonard v. Houle* (1997), 36 O.R. (3d) 357 (C.A.) at para. 12, leave to appeal to SCC refused, [1998] S.C.C.A. No. 19.

[222] The fourth preliminary point is that international private law and conflict of laws are

largely a pragmatic and rule-oriented regime designed to provide certainty and to avoid *ad hoc*, case-by-case decision-making based on what is fair and just for a particular case. In *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., 2002 SCC 78, the Supreme Court held that comity, order, and fairness are, at best, vaguely defined principles that inspire the interpretation of private international law rules, but are not themselves binding rules of law. In *Club Resorts Ltd. v. Van Breda, supra,* at para. 13, Justice LeBel stated:

> 13. …. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. ....

3. The Choice of Law for Tort Claims

[223] If a choice of law issue is raised, as it is in the immediate case, the domestic court undertakes a rules-based process to determine what law to apply. The choice of law rule will have an operative ingredient known as a connecting factor that will determine or designate the choice of law for the particular type of dispute. There are several different types of connecting factors such as the residence of the parties, the domicile of the parties, where the plaintiffs' claim is actionable (actionability); or the place where the wrongdoing occurred (*lex loci delicti commissi* or *lex loci*). Based on the connecting factor, the choice of law rule for the particular type of dispute might designate the *lex fori* (the law of the domestic court) or it might designate the law of a foreign jurisdiction.

[224] The rules-based choice of law process involves characterizing the dispute or disputes that are before the court and then applying the rule that applies to the type of dispute. Thus, there is a choice of law rule for: contract law, property law, matrimonial law, unjust enrichment, etc. It is a matter for the domestic court to characterize the dispute and then apply the associated rule for that kind of dispute.

[225] One of the features of the choice of law process is that the domestic court chooses the applicable law without determining the content of the law or the result. As already noted earlier in these Reasons for Decision, proving the content of foreign law is an evidence-based process, but, in contrast, the choice of law process is based on characterizing the dispute from the pleadings and then applying the domestic court's choice of law rule for the characterized type of case.

[226] The fact that different laws might apply to different defendants because of the differences in characterization of their disputes with the plaintiff does not, in and of itself, create sufficient reason to depart from the rule regarding choice of law for a characterized dispute: *Roy v. North American Leisure Group Inc*. (2004), 73 O.R. (3d) 561 (C.A.) at para. 13.

[227] In the immediate case, the choice of law issue has been raised by the parties, and thus the disputes between the parties must be characterized. This first step of the choice of law process, the characterization step, can be contentious, but it is not a matter of debate in the immediate case. The parties agree that the case at bar can be characterized as a tort case and as a breach of fiduciary duty case.

[228] Up until 1994 and the Supreme Court of Canada's decision in *Tolofson v. Jensen, supra,* which included its decision in the companion appeal of *Lucas (Litigation Guardian of Tina Lucas and Justin Gagnon) v. Gagnon,* Canada's common law provinces employed a choice of

law rule for tort based on English cases that involved double actionability connecting factors. For present purposes, I need not discuss the former choice of law rule for tort disputes. See: *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1; *Machado v. Fontes*, [1897] 2 Q.B. 231 (C.A.); *McLean v. Pettigrew*, [1945] S.C.R. 62; *Boys v. Chaplin*, [1971] A.C. 356 (H.L.).

[229] In *Tolofson v. Jensen*, the Supreme Court of Canada replaced the connecting factors of double actionability, which, generally speaking, privileged the *lex fori* as the choice of law with the connecting factor of *lex loci* which, generally speaking, privileges the law of the foreign jurisdiction. As will be noted in the passages from the judgment set out below, in *Tolofson*, the Supreme Court also discussed the prospect of exceptions to the *lex loci* rule that would redirect the choice of tort law back to the domestic court (the *lex fori*).

[230] The facts of the *Tolofson* case were that the plaintiffs were British Columbia residents who were injured in a car accident that occurred in Saskatchewan. They sued in British Columbia, where their negligence claim was timely, but the Supreme Court of Canada held that Saskatchewan law, the *lex loci*, the place of the wrongdoing, applied and thus the plaintiffs' claim was statute-barred under the law of Saskatchewan.

[231] The facts of *Lucas (Litigation Guardian of Tina Lucas and Justin Gagnon) v. Gagnon* were that the Gagnons were all residents of Ontario, and Mrs. Gagnon and her children Tina and Justin were passengers of a car driven by Mr. Gagnon that was involved in a car accident in Québec. Mrs. Gagnon and the children sued Mr. Gagnon in tort in Ontario, but the Supreme Court held that Québec's no-fault liability law applied and the plaintiffs' tort claim was statute-barred by the Québec law.

[232] In the immediate case, the parties fundamentally disagree about the application of *Tolofson v. Jensen* and its general rule - the *lex loci* rule - about the choice of law for tort cases, and thus it is necessary to examine precisely what Justice La Forest, who wrote the main judgment about the general rule (Justices Gonthier, Cory, McLachlin and Iacobucci, concurring) said about why the Court decided to establish a new Canadian approach for the choice of law in tort cases. Justice Major (Justice Sopinka concurring) wrote a concurring judgment in which he agreed about the general rule, but he was more liberal than Justice La Forest about occasions in which a court could depart from the general rule.

[233] Justice La Forest's judgment applies the *lex loci* rule strictly. For present purposes, the critical passages from Justice La Forest's judgment are paras. 35-36, 39-43, 45-46, 49, 55-56, which state, with my emphasis added:

> 35. What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed, in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. While that structural problem arises here in a federal setting, it is instructive to consider the matter first from an international perspective since it is, of course, on the international level that private

international law emerged.

36. On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.

….

39. As *Morguard* and *Hunt* also indicate, the courts in the various states will, in certain circumstances, exercise jurisdiction over matters that may have originated in other states. And that will be so as well where a particular transaction may not be limited to a single jurisdiction. Consequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.

40. To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 SCR 393; *Morguard*, *supra*; and *Hunt*, *supra*. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where, under the rule elaborated in *Amchem*, *supra* (see esp. at pp. 921, 922, 923), there is a more convenient or appropriate forum elsewhere.

41. The major issue that arises in this case is this: once a court has properly taken jurisdiction (and this was conceded in both the cases in these appeals), what law should it apply? Obviously the court must follow its own rules of procedure; it could not function otherwise; see *Chaplin v. Boys*, *supra*. …. I will here turn to the more common "choice of law" problem, and the principal issue in these appeals, namely, what is the substantive law that should be applied in considering the present cases?

42. From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, **it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong**. **Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity.** There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in *Phillips v. Eyre*, *supra*, at p. 28, "**civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law**. It is in that

law that we must seek its defining character; it is that law, too, that defines its legal consequences.

43. I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily **people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly**. **The government of that place is the only one with power to deal with these activities.** The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well-grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

….

45. There may be room for exceptions but they would need to be very carefully defined. **It seems to me self-evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.** The same considerations apply as between the Canadian provinces. What is really debatable is whether State A, or for that matter Province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.

46. It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v. Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. As well, if this approach were generally adopted, it would, in practice, mean that the courts of different countries would follow different rules in respect of the same wrong, and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would be even worse. Given the constant mobility between the provinces as well as similar legal regimes and other factors, forum shopping would be much easier.

….

49. What then can be said of the double actionability rule along the lines adopted in England in *Chaplin v. Boys*? I have already indicated, of course, that I view the *lex loci delicti* rule as the governing law. However, **because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.**

….

55. **The imputed injustice of applying the *lex loci delicti* in the seminal choice of law cases to which I have just referred arose from some aspect of the law of the *locus delicti* that the court considered contrary to the public policy of the forum, i.e., unfair**. …

56. I remain unconvinced by these arguments. These "public policy" arguments simply mean that the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt. These laws are usually enacted on the basis of what are often perceived by those who make them as reasonable, though they may turn out to be unwise. The residents of the jurisdiction must put up with them until they are modified, and one does not

> ordinarily ignore the law of the land in favour of those who visit. True, it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. **While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice. ….**

[234] In the case at bar, the Plaintiffs' submit that their claims in negligence and in vicarious liability are governed by the law of Ontario because although Bangladesh was the place most significantly affected by the alleged misconduct, the Defendants' wrongful conduct took place primarily "in Ontario", such that pursuant to the principle of *lex loci delicti,* the causes of action in negligence and vicarious liability are governed by the law of Ontario. In other words, in this proposed class action, the Plaintiffs argue that the wrongdoing occurred in Ontario notwithstanding that the collapse of the Rana Plaza with the attendant injuries and loss of life took place in Bangladesh and thus applying the *lex loci delicti* connecting factor from *Tolofson,* Ontario law governs the dispute.

[235] Indeed, as the Plaintiffs plead their tort action, all the wrongful activity took place in Ontario, where Loblaws assumed the responsibilities attendant on carrying on a commercial enterprise with an international supply chain and with knowledge that the employees of the suppliers from Bangladesh worked in dangerous factories and with the ability to control the employer and protect the imperiled workers from Ontario where Loblaws formulated its CSR standards.

[236] As the Plaintiffs would have *Tolofson v. v. Jensen* applied, the pleaded wrongdoing occurring in Ontario, then under the *lex loci delicti* rule, Ontario is the choice of law for the wrongdoing. However, I am not convinced by the Plaintiffs' argument. They have by a pleading artifice placed Loblaws' wrongdoing in Ontario, but as the genuine material facts of their Statement of Claim and as the discussion below will reveal, the formulation of any duty of care occurred in Bangladesh and Loblaws' wrongdoing was failing to protect the putative Class Members - who are located in Bangladesh, which is also the place where the consequences of Loblaws' wrongdoing occurred.

[237] The artificiality of connecting Loblaws' wrongdoing to Ontario is revealed by a close reading of the pleaded examples of the connection. The factors connecting their cause of action to Ontario include such activities as gaining knowledge about the history of Bangladesh factory disasters in Ontario, gaining knowledge about New Wave's non-compliance with Bangladesh regulations in Ontario and arranging visits to Bangladesh from Ontario. The fact that various contracts involving Loblaws' activities concerning Bangladesh were signed in Ontario is an inherently very thin connecting factor, and a pleading that Loblaws undertook a duty of care to the Plaintiffs and the putative Class Members - in Ontario - is just an another example of a purported material fact that is in reality a conclusion to a question-begging argument that is highly contentious and also inconsistent with the genuine material facts that indicate that the duty and the breach of it are more connected to Bangladesh than to Ontario.

[238] In the immediate case, Class Counsel have purposefully designed the Plaintiffs' proposed tort claims to make them look like they are within the general rule from *Tolofson,* or if that argument does not work, then the Plaintiffs submit that the case at bar falls within the "thorny situations exception" to the rule from *Tolofson*. Thus, the Plaintiffs, inconsistently or in the alternative, argue that if Ontario is not the *lex loci delicti,* the place of the wrongdoing, then the

case at bar is one of those "thorny situations" where the wrongful activity occurs in one place (Ontario) but the consequences are directly felt elsewhere (Bangladesh) and in such a case it would not be appropriate to apply the *lex loci delicti*. In a further alternative discussed below, the Plaintiffs argue that public policy factors should negate Bangladesh law as the choice of law.

[239] In my opinion, none of the Plaintiffs' arguments work, and the Defendants are correct in asserting that Bangladesh law is the choice of law.

[240] The conclusion that the choice of law for the tort claims against Bureau Veritas is the law of Bangladesh is even stronger. The fundamental allegation against Bureau Veritas is that the audits of the Rana Plaza performed by Bureau Veritas were inadequate for their purposes and also negligently performed. It is alleged that Bureau Veritas breached a duty of care to protect the putative Class Members. It is very difficult - even by clever pleading - to place Bureau Veritas' wrongdoing in Ontario. The social audit took place at a building in Bangladesh where a Bangladesh manufacturer was producing goods for export. The social auditors were residents of Bangladesh. The Plaintiffs rely on worker interviews that took place in Bangladesh. The persons injured by the collapse of Rana Plaza were and are in Bangladesh. The injuries and deaths occurred in Bangladesh. As will be seen later in the discussion about the cause of action against Bureau Veritas, the establishment of a duty of care very much depends upon the vulnerability and the expectations of the putative Class Members, who of course, all live in Bangladesh. No alleged act or omission by Bureau Veritas, apart from being retained by Loblaws, occurred in Ontario. The place of Bureau Veritas' wrongdoing is Bangladesh and under the choice of law rules, Bangladesh law governs.

[241] The jurisprudence stands against the Plaintiffs' argument that the torts in this case occurred in Ontario. In *Leonard v. Houle, supra,* a police vehicular chase began in Ontario but ended with a crash in Québec, and Justice Charron held at paras. 19-20 that the tort occurred in Québec for choice of law purposes; she stated:

> 19. In this case, it is uncontroverted that the car accident which resulted in Leonard's injuries occurred in the Province of Québec. In so far as the Hull Police Force is concerned, any tortious conduct on their part also occurred wholly in the Province of Québec. It is conceded that if the action involved no other defendants, the law of Québec would govern. Does the fact that the alleged tortious conduct of some of the defendants, the Ottawa police, commenced in Ontario change the *loci delicti* from Québec to Ontario?
>
> 20. In my view, it does not. While there may be situations where the issue of where the tort takes place will raise "thorny issues", and perhaps also raise issues of public policy, this is not such a case. It seems clear to me that the wrong occurred in the Province of Quebec because the injury occurred there. The plaintiffs are not suing because the Ottawa police breached their duty when they commenced a chase while they were in the Province of Ontario, nor are they suing because the Ottawa police failed to adequately warn the Québec police authorities of the ongoing chase. They are suing because Leonard was injured in the resulting car accident in the Province of Québec. The activity which took place in the Province of Ontario, even if found to constitute a breach of duty on the part of the Ottawa police, does not amount to an actionable wrong. There is no actionable wrong without the injury. The place where "the activity took place" which gives rise to the action is in the Province of Québec.

[242] In *Lilydale Cooperative Ltd. v. Meyn Canada Inc.*, 2013 ONSC 5313, the plaintiff alleged the defendant supplied a defective fryer, which caused a fire at the plaintiff's poultry processing plant in Alberta. The plaintiff argued Ontario law applied, because the defendant resided in Ontario, the contract for supply of the fryer was made in Ontario, and the defendant developed, assembled, tested, inspected, warehoused, and shipped the fryer from Ontario. Applying *Leonard*

v. Houle, supra, Justice Pollak applied Alberta law because that was the place where all the damage occurred and she dismissed the tort claims as statute-barred under Alberta's substantive law.

[243] The *lex loci delicti* rule is applied strictly and mechanically and typically involves not much more than choosing the law of the place where the sometimes tragic events occurred. In *Wong v. Lee* (2002), 58 O.R. (3d) 398 (C.A.), the plaintiff was an Ontario resident. He was a passenger in vehicle owned and insured in Ontario by an Ontario resident and driven by another Ontario resident. The vehicle was involved in a single car accident in New York State and no New York residents were involved. The Court of Appeal held that the motions judge erred in deviating from the rule that the proper law is the *lex loci delicti*, in that case New York law.

[244] In *Somers v. Fournier, supra*, the Somers, who were residents of Ontario were involved in a motor vehicle accident in New York State when their vehicle was struck by a vehicle driven by Steven Fournier, a New York resident, and owned by his father. The Somers brought an action against Fournier in Ontario, and the Court ruled that the substantive law of New York, where the accident occurred, applied. In *Somers*, Justice Cronk stated at para. 33:

> 33. The *lex loci delicti* rule applies in international litigation notwithstanding a high degree of connection between the litigants and the place of the forum. In *Wong v. Lee*, all of the parties to the accident were resident in the forum, and had no connection with the foreign jurisdiction where the wrong occurred (except that the accident occurred in the foreign jurisdiction). Even in those circumstances, it was held that, on proper application of the conflict of laws rule established in *Tolofson*, the *lex loci delicti* rule governed.

[245] In *Long (Litigation Guardian of) v. Dundee Resort Development LLC*, 2013 ONSC 4238, a claim by an Ontario resident against an Ontario corporation and individual ski coaches hired by the Ontario corporation for an injury sustained while skiing in Colorado was governed by the law of Colorado.

[246] Subject to the caution expressed at the outset of this part of my Reasons for Decision about exercising caution about the significance of a rule from one issue of the conflict of laws to another, the case law about the court's jurisdiction *simpliciter* suggests that the Plaintiffs are mistaken in locating the torts in the case at bar as having occurred exclusively in Ontario. The law about a court's jurisdiction *simpliciter* both before and after its recent re-articulation in *Club Resorts Ltd. v. Van Breda*, *supra*, uses the place of the tort as a connecting factor, and this case law suggests that the Plaintiffs are mistaken in ignoring or giving little weight to the place where the harm was suffered, which in the case at bar is the Rana Plaza in Bangladesh.

[247] In *Pyle v. National (Canada) Ltd.*, *supra*, Mr. Moran, a Saskatchewan electrician was fatally injured when removing a defectively manufactured light bulb. While unscrewing the bulb Mr. Moran touched the metal base and was electrocuted. Mr. Moran's widow sued Pyle, which was the Ontario company that manufactured the light bulb. She sued in Saskatchewan, where Pyle did not carry on business and had no property or assets. The question that reached the Supreme Court of Canada was whether the Saskatchewan court had jurisdiction to decide the claim, which would be the case, if the court decided that the place – or the places – of the tort included Saskatchewan. Justice Dickson, as he then was, decided that the Saskatchewan court had jurisdiction. For present purposes, two passages from his judgment, paras. 20 and 28 are pertinent. With my emphasis added, the paragraphs state:

> 20. **If the essence of a tort is the injury or wrong, a paramount factor in determining *situs* must be the place of the invasion of one's right to bodily security.** In a *Donoghue v. Stevenson*

> case, can carelessness in manufacture be separated from resulting injury? **The jurisdictional act can well be regarded, in an appropriate case, as the infliction of injury and not the fault in manufacture**. Pyle is being sued because Moran suffered harm, not because some unidentified employee of Pyle's was allegedly careless. As long ago as 1892 Bowen L.J. in *Ratcliffe v. Evans*, [1892] 2 QB 524 at 528 said: "... where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong", and Viscount Simonds in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*, [1961] AC 388 at 425, [1961] 1 All ER 404, said:
>
> > It is, no doubt, proper when considering tortious liability for negligence to analyse its elements to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. **It is not the act but the consequences on which tortious liability is founded**. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. ….
>
> ….
>
> 28. Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers'* case and again in the *Cordova* case a real and substantial connection test was hinted at. *Cheshire*, 8th ed., p. 281, has suggested a test very similar to this; the author says that **it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties**. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. **This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered.** By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

[248] In the immediate case, putting aside the pleading artifices of the Statement of Claim, it would be appropriate to regard Loblaws' wrongdoing as having occurred in Bangladesh, the country substantially affected by its acts or omissions and the country whose citizens suffered the consequences of the wrongdoing and whose law was in the reasonable contemplation of the parties and which law was referenced in Loblaws' CSR standards.

[249] In *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, the Supreme Court of Canada considered the location of the tort of failure to warn, which bears some affinity to the allegations made against Loblaws and Bureau Veritas in the case at bar. In *Air Canada v. McDonnell Douglas Corp.*, the Court concluded that while the action may be multijurisdictional in nature, the key to an obligation to warn is that it be delivered to the place where it will be effective. As Justice Gonthier expressed it, "The locus of a failure to warn is the place at which the warning ought to have been received, and that place may be either where the user is located or where the goods are used."

[250] The Plaintiffs rely on *Thorne v. Hudson Estate*, 2016 ONSC 5507, aff'd 2017 ONCA 208 to argue that the choice of law in the immediate case is Ontario. The facts of the *Thorne* case were that a plane, on a flight from Ontario to the State of Delaware, crashed in New York State. The estates of the pilots of the plane sued the companies that inspected and maintained the plane's engine and the manufacturer of the plane's engine. The action and cross-claims against the manufacturer were not a products liability negligence claim, but rather it was alleged that the manufacturer who built the plane in Pennsylvania made negligent misrepresentations in the repair instructions it periodically published. The misinformation was relied on by the repair company in Ontario. Relying on *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601, which holds that the location of a tort is the place where important elements of the tort were committed and that the tort of negligent misrepresentation occurs where the misinformation is received or acted upon, Justice Morgan held that the choice of law was Ontario. The case at bar, however, is not a negligent misrepresentation case, and *Thorne v. Hudson Estate* provides no insight as to what the choice of law would have been had the case been characterized as a products liability negligence claim or a claim more closely resembling the negligence claim in the case at bar.

[251] In my opinion, the reasoning in the *Thorne* case rather suggests that in the case at bar, the answer to the choice of law question is Bangladesh. In *Thorne*, the defendants' activities all took place in Pennsylvania, but Pennsylvania was not the place of the wrongdoing. This rather suggests that the Plaintiffs pleading that all of Loblaws' activities took place in Ontario does not make Ontario the place of the tort.

[252] The Plaintiffs rely on the jurisdiction *simpliciter* or *forum conveniens* cases of *Gulevich v. Miller*, 2015 ABCA 411 and *Éditions Écosociété Inc. v Banro Corp*., 2012 SCC 18, the companion case to *Club Resorts Ltd. v. Van Breda, supra,* in support of their argument that the torts in the immediate case occurred in Ontario. This reliance, which is misplaced, reflects the problems associated with my four preliminary points set out above.

[253] The facts of *Gulevich v. Miller* were that during the time that Ms. Gulevich lived in Ontario, the defendant, a diagnostic radiologist, reviewed a CT scan and negligently reported the results as normal. Unfortunately, he should have seen and reported the presence of a tumor. Ms. Gulevich moved to Alberta and the true diagnosis was discovered. Ms. Gulevich sued the radiologist in Alberta and the issue was whether the Alberta court had jurisdiction *simpliciter*. Overruling the motions court judge, who held that the tort had been committed in Ontario, where the breach of the standard of care occurred, the Alberta Court of Appeal held that the Alberta court had jurisdiction.

[254] In the immediate case, the Plaintiffs rely on *Gulevich v. Miller*, *supra*, because of comments in that case that indicate that a contextual analysis is necessary to locate the place of a tort. However, those comments need to be read in the context of what the Court of Appeal actually did and said in deciding the case. In *Gulevich*, the Court said that it was confronted with the question of how to locate a tort for the purposes of establishing jurisdiction when the breach of the duty of care occurred in Ontario and the injury manifested in Alberta. The Court of Appeal interpreted *Club Resorts Ltd. v. Van Breda, supra,* and *Éditions Écosociété Inc. v Banro Corp*., *supra*, as meaning that there can be no presumptive jurisdiction when a plaintiff has suffered an injury, left the jurisdiction and pain and inconvenience accumulates elsewhere, but the place where the injury manifested remained relevant to whether a jurisdiction had a real and substantial connection to the action because that injury might crystalize the place of the tort. Thus, Justices

Watson and Rowbotham stated at paras. 42-43:

> 42. In summary, we interpret the comments of LeBel J. as meaning that there can be no presumptive jurisdiction when a plaintiff has suffered an injury, left the jurisdiction and pain and inconvenience accumulates elsewhere. However, we do not read the passage as suggesting that the place where the injury (the compensable harm) occurred can have no real and substantial connection to the action. LeBel J. used the word "injury" as distinct from "pain and inconvenience". The use of the word "injury" juxtaposed with the words "pain and inconvenience resulting" from the injury implies a distinction between the initial injury, and mere lingering or continuing damage. LeBel J. was concerned that giving jurisdiction to a place where a plaintiff sustains pain and inconvenience creates uncertainty and opens the door to forums taking jurisdiction over tort actions that have little connection to the matter beyond the location of the plaintiff.
>
> 43. Accordingly, we decline to adopt a bright-line rule that arbitrarily locates the tort in the place where the negligent conduct occurred. "Crystallization" of the tort is what led in *Éditions Écosociété* to locate the tort in Ontario. Applying that to the facts of this appeal, when Ms. Gulevich's headaches increased and the prudent course of action would have been a craniotomy (all of which occurred in 2008), the tort crystallized. That injury is what locates this tort in Alberta.

[255] Applying *Gulevich* to the case at bar says nothing about the choice of law rules, but on the issue of whether to locate torts, the authority of *Gulevich* suggests that the torts would be located in Bangladesh where the torts crystallized with the collapse of Rana Plaza. The Plaintiffs, however, attempt to draw sustenance from what the Court of Appeal said in *Gulevich v. Miller* at paras. 44-49 of its judgment:

> 44. The appellants argue that [*Moran v. Pyle National (Canada) Ltd*.] was not overruled by the *Van Breda* trilogy and still governs the location of a tort for jurisdictional purposes. It is true that *Van Breda* did not explicitly overturn *Moran* and credited it as introducing the concept of "real and substantial connection" into Canadian law. In our view, if *Moran* is understood as grounding jurisdiction over a tort in the place most "substantially affected by the defendant's activities or its consequences", then it is reconcilable with jurisdiction in the *Van Breda* trilogy.
>
> 45. *Moran* explicitly rejected the arbitrary place of acting and place of damage theories and preferred not to use one of the tort's constituent elements to dictate *situs*. *Van Breda* clarified that the mere presence of a plaintiff in a forum or the continued accumulation of harm in a forum is insufficient to ground jurisdiction.
>
> 46. In our view, determining the place where the tort was committed can still be informed by the test in *Moran*: the place most substantially affected by the defendant's activities or its consequences.
>
> 47. This is borne out in cases that dealt with other torts. In the context of the tort of negligent misrepresentation, courts have made clear that the *situs* of the tort is the place where the misrepresentation or misinformation is received and relied on or acted upon: *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601, 117 O.R. (3d) 313.
>
> 48. In *Leonard v. Houle* (1997), 36 O.R. (3d) 357, 105 OAC 129, the court explained:
>
> > While there may be situations where the issue of where the tort takes place will raise 'thorny issues', but and perhaps also raise issues of public policy, this is not such a case. It seems clear to me that the wrong occurred in the Province of Quebec because the injury occurred there. The plaintiffs are not suing because the Ottawa police breached their duty ... [or] failed to adequately warn ... They are suing because Leonard was injured in the resulting car accident in the Province of Quebec. The activity which took place in the Province of Ontario, even if found to constitute a breach of duty ..., does not amount to an actionable wrong. There is no actionable wrong without the injury.

> *Support for the contextual test in secondary sources*
>
> 49. Support for a contextual test for determining a tort's *situs* is found in secondary sources. PM North & JJ Fawcett, *Cheshire and North Private International Law*, 11th ed. (London: Butterworths, 1987) at 538-544 rejected the fixed rules of the place of acting and place of harm for determining jurisdiction over a tort because it may not always be possible to localize a defendant's conduct or the ensuing harm to one location: p. 539-540. The authors interpreted *Moran* as adopting a jurisdictional test for torts in the place "substantially affected by the defendant's activities or its consequences and whose law is likely to have been in the reasonable contemplation of the parties": p. 540. The authors suggest that the "basis upon which the locus of the tort is determined varies from tort to tort": p. 541.

[256] In his concurring judgment, Justice O'Ferrall stated at paras. 58-59:

> 58. I concur in the result. Alberta can take jurisdiction over this claim.
>
> 59. However, I would have preferred to base that conclusion simply on the fact that a real and substantial connection exists between Alberta and the facts upon which the claim is based as contemplated by Rule 11.25(1) of the *Alberta Rules of Court*, AR 124/2010; 122/2012, governing the service of documents outside of Alberta. That is, I would have preferred not to base our decision that Alberta has jurisdiction because the claim relates to a tort committed in Alberta. In my view, it would be erroneous to treat the issue of where the tort was committed as being determinative of jurisdiction when the *situs* of the tort is only a presumptively connecting factor, albeit an important one. Also, where the *situs* of the tort is unclear or where the tort might fairly be characterized as a "multi-jurisdictional tort", it would be erroneous to put too much reliance on the *situs* of the tort in determining jurisdiction.

[257] While these comments from *Gulevich v. Miller* may support the Plaintiffs' idea that the place of harm, standing alone, may not determine the *situs* of a tort, because it may not always be possible to localize a defendant's conduct or the ensuing harm to one location, in the immediate case, the ensuing harm can be located in one place, Bangladesh, and Bangladesh is "the place substantially affected by the defendant's activities or its consequences and whose law is likely to have been in the reasonable contemplation of the parties." The appellate court's comment at para. 46 that a tort occurs in the jurisdiction substantially affected by the defendant's activities or its consequences points to Bangladesh. Thus, *Gulevich* does not assist the Plaintiffs' argument to place the torts in the immediate case in Ontario.

[258] The facts of *Éditions Écosociété Inc. v. Banro Corp., supra*, were that the Plaintiff, a Canadian mining corporation, had gold mines in the Democratic Republic of Congo. The plaintiff brought a defamation action in Ontario against Éditions Écosociété, the publisher of an allegedly defamatory book. Éditions Écosociété had printed 5,000 copies of the book, of which 93 copies were distributed in Ontario with the balance being distributed in Québec. Éditions Écosociété was unsuccessful in having the Ontario action stayed. The Supreme Court upheld the decision of the lower courts in Ontario that Ontario had jurisdiction *simpliciter* and was a *forum conveniens*. As part of its *forum conveniens* analysis, the Supreme Court concluded that the place of crystallization of the tort (publication in Ontario) meant the tort was committed in Ontario and, therefore, that Ontario law was the choice of law.

[259] In *Éditions Écosociété Inc. v. Banro Corp.*, Justice LeBel rejected the defendants' argument that Québec law applied because the most substantial publication of the book occurred in Québec. He said that there was substantial publication in Ontario, and, in any event, the English experience with using the substantial publication requirement as a choice of law factor had shown that it provided little guidance. Justice LeBel rather applied the approach from *Tolofson v. Jensen* and stated at paras. 50-51:

> 50. In *Tolofson v. Jensen*, [1994] 3 SCR 1022, La Forest J. established *lex loci delicti*, or the place where the tort occurred, as a general principle for determining choice of law for torts. However, La Forest J. also left room for the creation of exceptions to the general rule of *lex loci delicti* for torts such as defamation. The rationale for the rule is that in the case of most torts, the occurrence of the wrong constituting the tort is its most substantial or characteristic element, and the injury or consequences are typically felt in the same place. In establishing *lex loci delicti* as a general rule, however, La Forest J. also recognized that "[t]here are situations ... notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. ... Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity" (p. 1050).
>
> 51. La Forest J. suggested that in such cases, "it may well be that the consequences would be held to constitute the wrong" (*ibid.*). Significantly, La Forest J. went so far as to suggest without deciding that the tort of defamation may be just such a case: "[I]t could well be argued ... that, unlike a motor vehicle accident [the tort at issue in *Tolofson*], the tort of libel should be held to take place where its effects are felt" (p. 1042). La Forest J. thus left room for the creation of exceptions to the general rule of *lex loci delicti* for torts such as defamation.

[260] In *Éditions Écosociété Inc. v. Banro Corp.*, as Justice LeBel analyzed the situation, the tort of defamation had occurred in Ontario where the claim crystalized, and, thus, in accordance with the general rule from *Tolofson v. Jensen*, the *lex loci delicti* and the choice of law was Ontario. He further reasoned that if it was not clear where the tort occurred, then the choice of law would still be Ontario because the case would be one where the consequences, which occurred in Ontario, would constitute the wrong and would designate the choice of law. At para. 56 of his judgment, Justice LeBel noted that if instead of the *lex loci delicti* the rule for choice of law in defamation was the place of most substantial harm to reputation, then Ontario would once again be the choice of law.

[261] Putting aside the fundamental differences between the tort of defamation, which provides compensation for harm caused to a person's reputation, and the tort of negligence, which provides compensation for harm to a person's person, applying *Éditions Écosociété Inc. v. Banro Corp.* to the circumstances of the immediate case is the opposite of helpful to the Plaintiffs' argument that the law of Ontario applies. If the torts in the immediate case are examples of the thorny problem of the wrongdoing occurring in more than one place, then the consequences of the wrong were devastatingly and tragically experienced in Bangladesh and those consequences designate Bangladesh for the choice of law.

[262] In my opinion, the Plaintiffs misconceive or misunderstand the *lex loci delicti* connecting factor. As noted above, the full Latin articulation of the principle is *lex loci delicti commissi,* "the law of the place where the tort is committed" and the fuller articulation better connotes that the focus is on all the elements of the tort with perhaps some added emphasis on the place where the tragic event occurred.

[263] The elements of the tort of negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and (5) the damages are not too remote in law: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. In the case at bar, the Plaintiffs myopically focus on the duty of care element and have a blind spot to the other elements of the tort. In the immediate case, the Plaintiffs' focus on the Defendants' elements of the tort and more or less ignore that their own circumstances, as the victim of the wrongdoing, is part of the defining elements of the tort. As the Plaintiffs would have it, the duty of care element of the tort; i.e., a duty of care to by purchasers from Ontario of

supplies manufactured by workers in Bangladesh, was formed exclusively in Ontario. Why or whether a duty of care actually has a location is a nice question, but if a duty of care has a location, that a duty of care to persons in Bangladesh should be located exclusively in Ontario makes no sense.

[264] Further, the Plaintiffs would have it that the breach of the standard of care occurred exclusively in Ontario because the decisions about the extent of the social audit were made in Ontario, but, once again, why this element of the tort is being localized exclusively in Ontario raises the same problems as the duty of care element with the added problem that the Plaintiffs allege that it was an act of wrongdoing for Loblaws to not to have done more to stop the New Wave workers re-entering Rana Plaza, which is to say that Loblaws should have done something more in Bangladesh. Further still, in the immediate case, the effect caused by the Defendants' alleged misconduct in Ontario was undoubtedly experienced in Bangladesh, where the Rana Plaza collapsed, but that is ignored by the Plaintiffs in their argument about the location of the tort. And, the Plaintiffs' injuries and the deaths arising from the collapse of the building were suffered in Bangladesh, and while acknowledged, the damages element of the tort is essentially ignored by the Plaintiffs' argument about the place of the tort.

[265] Both the case law about the place of a tort for the purposes of the choice of law rule and also the case law about the place of a tort for the purposes of the jurisdiction *simpliciter* rules, indicate that the place of the torts in the immediate case is Bangladesh. In accordance with the choice of law rule, Bangladesh substantive law is the law that an Ontario court should apply in the immediate case.

4. Choice of Law for the Breach of Fiduciary Duty Claim

[266] The Plaintiffs submit that their breach of fiduciary duty claim is governed by the law of Ontario. This submission is opposed by the Defendants. I agree with the Defendants' argument and conclude, once again, that the law of Bangladesh governs the Plaintiffs' claims.

[267] Although I will undertake the analysis, I actually need not undertake a fulsome choice of law analysis about the choice of law for the alleged breach of fiduciary duty because later in these Reasons for Decision, I conclude that be it under the law of Bangladesh or the law of Ontario, there is no basis for a breach of fiduciary duty claim at all.

[268] That said, my analysis is that the breach of fiduciary duty claim is just the tort claim on anabolic steroids, and thus it is subject to a similar choice of law analysis. The *lex loci delicti* test has been applied to claims in equity, where, as in the case at bar, the equitable misconduct arose out of the same wrongdoing that was alleged to be tortious: *Den Haag Capital LLC v. Correia*, 2010 ONSC 5339; *Cresbury Screen Entertainment Ltd. v. Canadian Imperial Bank of Commerce*, 2004 BCSC 349, aff'd 2006 BCCA 27.

[269] Just as necessity is the mother of invention, the Plaintiffs plead the breach of fiduciary duty claim, which as will be seen is an enormous stretch and contortion of fiduciary law, because they are confronted with a limitation period bar for their tort claim. The Plaintiffs' breach of fiduciary duty claim is just a disguised negligence claim. The Plaintiffs purport to describe their claim as if it were an unjust enrichment claim. But the putative Class Members are seeking compensation for personal injuries not a retransfer of their wealth, of which none was ever transferred. An unjust enrichment claim involves three elements none of which is present in the

immediate case. The Defendants were not enriched at the expense of the putative Class Members.

[270] In any event, with respect to a breach of fiduciary duty claim, as such, once again, the Plaintiffs seem to focus on just the breach of the fiduciary duty element of the cause of action, which they plead as having occurred in Ontario. However, the constituent elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship; (2) a fiduciary duty; and (3) breach of the fiduciary duty: *Canadian Aero Services Ltd. v. O'Malley*, [1974] S.C.R. 592 at para. 616; *Hodgkinson v. Simms*, [1994] 3 S.C.R 377; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Galambos v. Perez*, 2009 SCC 48. When all the elements of the cause of action are included, it would appear that, as was the case with the tort claims, the breach of fiduciary duty took place in Bangladesh.

[271] The Plaintiffs rely on Rule 230(c) of *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.) (London: Sweet & Maxwell, 2012) to place the proper law of the breach of fiduciary duty claim in Ontario. Rule 230 is used to determine "the proper law of the obligation" and provides that: (a) if the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) if it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*); and (c) if it arises in any other circumstances, its proper law is the law of the country where the unjust enrichment occurs. In *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentina SA*, 2006 BCSC 1102, the Supreme Court of British Columbia adopted the principles set out in Rule 230(c) to make British Columbia law applicable to an unjust enrichment claim. In *Macmillan Inc. v. Bishopgate Investment Trust Plc & Others*, [1995] EWCA Civ 55, the Court of Appeal for England used Rule 230(c) for a breach of fiduciary duty claim.

[272] However, as I have already observed, there is no unjust enrichment claim in the circumstances of the above case. If the Plaintiffs have a breach of fiduciary duty claim, it is based on the various elements of such a claim, and it is a contortion of reality to submit that the place of the breach of fiduciary duty was Ontario. If the Plaintiffs have a genuine and viable breach of fiduciary duty claim, the wrongdoing occurred in Bangladesh and Bangladesh law would apply to it.

5. Ousting Bangladesh Law for Failure of Proof

[273] As an alternative argument to avoid Bangladesh law applying to their causes of action, the Plaintiffs submit that the Defendants have not discharged their burden of proving foreign law, and as a result, the court should apply the law of Ontario.

[274] The Plaintiffs submit that while Bangladesh's substantive law on negligence, breach of fiduciary duty, and vicarious liability "exists on paper," its application is highly unpredictable and discretionary, rendering it incapable of proof on a balance of probabilities. The Plaintiffs submit that in the case at bar, any attempt to prove foreign law would be riddled with challenges arising from lack of jurisdiction in the areas of tort law and breach of fiduciary duties. The Plaintiffs submit that there is no body of Bangladesh law that the Ontario court could analyze to arrive at a satisfactory conclusion.

[275] I need not dignify this argument and the one that follows, which insults the courts and

judges of Bangladesh, with an elaborate analysis and can simply say that: substantive law adequately and abundantly exists in Bangladesh; Bangladesh law is capable of proof; and the phalanx of experts who deposed and testified in the case provided adequate and abundant evidence about the content and quality of the law of Bangladesh, which was more than capable of addressing the Plaintiffs' claims.

[276] Further, I conclude that as a matter of evidence, the Defendants have discharged their burden of proving the content of Bangladesh law on a balance of probabilities and in accordance with the manner of proof described earlier in these Reasons for Decision.

[277] It follows that the Plaintiffs' argument to oust Bangladesh law for failure of proof fails.

6. Exceptions to the General Rule from *Tolofson v. Jensen*

(a) Introduction

[278] Although the Plaintiffs' main argument is that the wrongdoing occurred in Ontario, and, therefore, Ontario law governs, they make several alternative arguments to the end that should Bangladesh law govern, then the case at bar falls with the exceptional cases envisioned by Justice La Forest in *Tolofson v. Jensen*, *supra*, where he said that he was not adverse to retaining a limited discretion in the Canadian court to apply Canadian law to deal with circumstances where a rigid rule on the international level could give rise to injustice. The parties referred to this circumstance as the injustice exception to the general rule from *Tolofson v. Jensen*.

[279] Relying on the injustice exception, in the immediate case, the Plaintiffs argue that it would be unjust to apply Bangladesh law for three reasons; namely; (1) unsophisticated jurisprudence; (2) discrimination against women claimants; and (3) the absence of punitive damages.

[280] For the reasons set out below, I disagree with the Plaintiffs' arguments, and I persist in the conclusion that the dispute in the immediate case is governed by Bangladesh law.

(b) Ousting Bangladesh Law for Unsophisticated Jurisprudence

[281] The Plaintiffs submit that there is an absence of a developed body of Bangladesh law and this will impede the adjudication of their claims on their merits and force the court in Ontario to effectively develop foreign law, which is contrary to the principles of territoriality and comity which underlies the *lex loci* rule adopted in *Tolofson v. Jensen*, *supra*.

[282] Relying on *Hunt v. T & N plc*, [1992] BCWLD 2049, 34 ACWS (3d) 1194, the Plaintiffs argue that this court should not apply Bangladesh tort law because it is "in a nascent stage of development" and would lead to "substantial injustice to the Class Members", all of whom are residents of Bangladesh. Further, the Plaintiffs submit that the High Court Division's decision in *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter*, 62 D.L.R. 483 (2010), discussed in some detail in the next major part of these Reasons for Decision, is the first and only significant Bangladesh decision discussing tort law and reveals that tort law is nascent and underdeveloped in Bangladesh.

[283] I disagree with the fundamental premise of the Plaintiffs' argument. Their characterization of the law in Bangladesh as nascent is patently incorrect. The *Bangladesh*

Beverage Industries Ltd. v. Rowshan Akhter decision may be the first fulsome treatment by an appellate court in Bangladesh of the *Limitation Act, 1908* with comments about tort law generally, but Bangladesh has a fully developed tort law jurisprudence about personal injury claims and wrongful death claims.

[284] The bench and the bar in Bangladesh are well-educated, and there is the normal body of judicial literature comprised of reported judgments. As a matter of substantive law, the *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* decision reveals a sophisticated understanding of tort law reflecting the English common law roots of tort law in Bangladesh. Not surprisingly, the *Bangladesh Beverage* decision refers to numerous Bangladesh reported decisions about tort law.

[285] The factual background to the case at bar reveals that the Bangladesh courts were mobilized to address claims arising out of the collapse of Rana Plaza, and presumably there were claims arising from the numerous factory fires and building collapses copiously set out in the Plaintiffs' Statement of Claim. Bangladesh courts may have limited experience with class actions, but that is procedural law not substantive law. The administration of justice undoubtedly will be slow in a financially poor country with over 180 citizens but that does not mean that their corpus of law is nascent or underdeveloped.

[286] The existence of numerous tort cause of action and a developed case law is reflected in the *Limitation Act, 1908* itself, and Mr. Hossain in his affidavit said that the existence of tort claims goes as far back as 1871. He also said that the *Bangladesh Beverage* case revealed that vicarious liability in tort was a well-entrenched concept in Bangladesh. The judgments in the *Bangladesh Beverage* case reveal, not surprisingly, that the Bangladesh law of torts is essentially the common law of tort as it is known in England and Canada. This law is venerable not nascent.

[287] Doctrinally, how the law in Bangladesh may develop to respond to new types of claim is no different than how the law in Ontario and other common law jurisdiction develops, and it would appear that the core principles of tort law are very well developed in Bangladesh and adaptable to respond to the exigencies of life and the rule of law in Bangladesh. In his affidavit, Mr. Hossain stated that the common law as developed in Bangladesh has largely been consistent with developments in England and with other relatively more developed common law jurisdictions.

[288] As for the Plaintiffs' reliance on *Hunt v. T & N plc*, *supra*, to establish authority that the case at bar falls within the injustice exception of the choice of law regime described in *Tolofson v. Jensen*, the case does not support the Plaintiffs' argument. The factual background to the *Hunt v. T & N plc* litigation which made it to the Supreme Court of Canada, ultimately involved whether the Supreme Court of British Columbia had jurisdiction to consider the constitutional validity of a Québec blocking statute, and it ultimately is an important jurisdictional case about foreign law, but it never was a case about the choice of law rules, and the lower court decision in *Hunt v. T & N plc*, *supra* upon which the Plaintiffs rely, cannot be taken as supporting the proposition that a choice of law decision can be ousted because the designated law is undeveloped or underdeveloped, which is to say that the law of the *lex loci delicti* (Bangladesh) is immature and unsophisticated as compared to the *lex fori* (Ontario). The Plaintiffs' somewhat insulting proposition about the state of Bangladesh tort law, is the opposite of the notion of comity, which as Justice La Forest noted in *Tolofson v. Jensen, supra,* at para. 36, will have courts of one jurisdiction ordinarily respect the actions of another court and have them hesitant to

interfere with what another state chooses to do within its territory.

[289] In *Hunt v. T & N plc*, *supra,* a U.S. bankruptcy court order approved a reorganization plan for a Canadian company that faced many asbestos-related claims in the U.S. The plaintiff, a British Columbia resident, sued the Canadian company in British Columbia after he was diagnosed with mesothelioma, but the company sought to stay the proceeding and to force him to seek compensation from a trust fund set up under the U.S. reorganization process. The British Columbia court declined to order the stay because it could not determine whether the foreign order was meant to include claims from Canada. The court characterized the issue as whether to exercise jurisdiction over persons subject to its orders in aid of an order of a foreign court which has no jurisdiction over those persons and whether there was doubt about whether there had even been a request from the foreign court and whether the trust fund was available to the plaintiff. There is no choice of law question in *Hunt* and there is nothing in it that assists the Plaintiffs' argument in the immediate case.

[290] Under *Tolofson v. Jensen*, Ontario courts do not ask whether foreign law has attained a sufficient degree of development as a threshold requirement to a choice of law question. Further, and in any event, I do not find that Bangladesh law, based as it largely is on the same common law roots as Canada, is underdeveloped or unsophisticated and there would be no injustice in applying Bangladesh law to the circumstances of an enormous tragedy that occurred in Bangladesh.

(c) The Injustice Exception - Ousting Bangladesh Law on Grounds of Public Policy – The Discriminatory Nature of Sharia Law

[291] On grounds of public policy, a Canadian court will not apply foreign law that violates the essential morality and fundamental values of Canadian society: *Society of Lloyd's v. Meinzeri* (2001), 55 O.R. (3d) 688 (C.A.) at para. 48. The law in England is the same. In *Oppenheimer v. Catermole*, [1976] AC 249 (HL), the House of Lords declined to give effect to a Nazi law purporting to strip Jews of their German citizenship, holding at p. 278: "a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all."

[292] Based on the injustice exception recognized in *Tolofson v. Jensen*, *supra,* the Plaintiffs submit that if the Court finds that the Defendants' wrongful conduct is governed by the law of Bangladesh, then the court should exercise its discretion to apply Ontario law instead. The Plaintiffs submit that in the case at bar, the Ontario court should apply Ontario law because under the *Muslim Personal Law (Shariat Law) Application Act, 1937*, damages under the *Fatal Accidents Act* (Act No. XIII of 1855) are distributed unequally between men and women.

[293] The Plaintiffs submit that the mandatory asymmetrical treatment of the quantum of damages under Sharia law on the basis of gender is incompatible with the Canadian conception of essential justice and morality, including the equality of men and women under the law and, therefore, the Plaintiffs argue that Ontario law should be applied instead.

[294] Section 2 of the *Muslim Personal Law (Shariat Law) Application Act, 1937* provides that in cases of intestate succession, the provisions of Muslim personal law shall apply. Section 2 provides:

> 2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to

> agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. . . the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat).

[295] Under Sharia law, male heirs receive twice as much as female heirs. In an estate of one son and a daughter, the son would receive 2 shares of the estate (two-thirds of the estate) and the daughter would receive 1 share (one-third of the estate). In an estate of two sons and a daughter, the sons would receive 2 shares each (four-fifths of the estate) and the daughter would receive 1 share (one-fifth of the estate). The Plaintiffs' expert witnesses testified that the putative Class Members cannot avoid, save at the risk of social ostracism and possible serious physical harm, the application of Sharia law.

[296] I accept that an Ontario court should not apply a law that would discriminate as between men and women, but the first question to ask is whether in the case at bar this would ever be necessary. In this regard, it may be noted that the allegedly offensive Sharia law has no effect on the determination of liability of the Defendants, and it has no effect on the calculation of damages for the 2,520 Surviving Class Members who were injured but survived the collapse of Rana Plaza. The allegedly offensive Sharia law would have no effect on the Hindu members of the Wrongful Death and Family Class Members, approximately 10% of this class, and it would have no affect on the claims of the members of the class who were parents of the deceased. The allegedly offensive Sharia law would not affect male Family Class Members and would only affect female Family Class Members who are daughters of the deceased in cases in which they had a male sibling or siblings.

[297] One conclusion to draw from this analysis of the extent of the problem is that although it will not be an extensive problem, there will, nevertheless, be some putative Class Members affected by the allegedly offensive Sharia law, but a substantial number, including all of the Surviving Class Members, are not affected by Sharia law, and thus, there is no public policy reason to not apply Bangladesh law to the substantial number of Class Members who are not affected by Sharia law in the calculation of their compensation.

[298] In any event, continuing with the analysis and addressing the circumstances of the putative Class Members who are affected by Sharia law, I agree with the argument of the Defendants that the appropriate response of the court in Ontario is to sever the offensive Sharia law. I agree with the Defendants that the Ontario court should still choose Bangladesh law in accordance with the *lex loci delicti* rule but to not apply the Sharia law in the quantification of compensation if the case gets that far. In other words, assuming that Bangladesh law applies and assuming that the Class Members' have viable claims that are not statute-barred, then the appropriate response of the Ontario court is to apply the Bangladesh law but not the Sharia law. Notwithstanding the Plaintiffs' argument to the contrary, I conclude that the public policy exception to the choice of foreign law can be addressed in the immediate case by severing the offensive aspects of the applicable foreign law. Thus, I see no reason to employ the injustice exception recognized in *Tolofson v. Jensen, supra* on account of Sharia law.

[299] I have a second reason for not applying the injustice exception. As foreshadowed in the introduction to these Reasons for Decision and as explained below, if Bangladesh law is applied, then the claims of the putative Class Members are either statute-barred (save for minors) or not legally viable, and thus it is actually moot whether Sharia law applies. Ordering the development of the case in its natural and normal way, the application of Sharia law should not be used as an escape hatch from the reality that the Plaintiffs' claims are neither viable nor timely.

[300] A corollary to the last point is that the Plaintiffs' public policy argument is revealed to actually be motivated by a need to avoid the application of a Bangladesh limitation period and not by a genuine objection to the application of Sharia law, which will never occur. What the Plaintiffs' are genuinely concerned about is to avoid what happened to the plaintiffs in *Tolofson v. Jensen*; i.e., the application of a law that yielded a statute-barred claim. This is not a reason to not apply Bangladesh law based on the injustice exception from *Tolofson*.

(d) The Injustice Exception - Ousting Bangladesh Law on Grounds of Public Policy – The Absence of Punitive Damages

[301] Relying on *Zurich Life Insurance Co. v. Branco*, 2015 SKCA 71, leave to appeal to SCC ref'd [2015] SCCA No. 439, the Plaintiffs argue that since Bangladesh law does not provide for the remedy of punitive damages and thus conduct requiring punishment may go unpunished, Bangladesh law should be ousted in favour of Ontario law, where punitive damages are available. I disagree with this argument.

[302] My first reason for not ousting Bangladesh law on the grounds on the injustice exception because of the alleged absence of punitive damages is that as a factual matter on the balance of probabilities, I am not satisfied that punitive damages are not available in Bangladesh. Mr. Hussain's evidence was that there were no reported cases where a Bangladesh court had awarded punitive or exemplary damages. He did not say that Bangladesh law precluded an award of punitive damages. I note that aggravated damages, a remedial neighbour to punitive damages, were awarded in *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* and that, in general, the approach to damage calculations in Bangladesh is quite similar to the approach used in Ontario.

[303] My second reason for not ousting Bangladesh law on the grounds of the injustice exception is that I do not regard the absence of punitive damages as inimical to the essential morality and fundamental values of Canadian society in general or in the particular circumstances of the case at bar.

[304] In the particular circumstances of the case at bar, the possible absence of a claim of punitive damages is somewhat a red herring. The Plaintiffs will not be seeking to certify common issues in relation to aggregate, punitive, exemplary or aggravated damages and are leaving that issue to be dealt with after the common issues trial.

[305] The Plaintiffs, of course, do not concede that punitive damages would not be appropriate to sanction the Defendants' conduct, and granted it is very early days in the forensic process of a civil action, but if one removes the rhetorical excesses of the pleaded material facts, then the case for punitive damages for the acts and omissions of the Defendants in the case at bar seems modest.

[306] Punitive damages are very much the exception rather than the rule and are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour and where punitive damages are awarded, they should be in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant and having regard to any other fines or penalties suffered by the defendant for the misconduct in question. Punitive damages are generally given

only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and when they are awarded, they are given in an amount that is no greater than necessary to rationally accomplish their purpose. See *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595.

[307] As villainy goes, Loblaws' and Bureau Veritas' acts are more of omission than of commission, and their turpitude is at some considerable moral distance from the persons who built Rana Plaza without proper planning and building approvals and who ordered the employees to return to work when there were signs that the building was imperilled. And if the putative Class Members were successful and achieved their $2 billion compensatory award, it is rather doubtful that a court would also award punitive damages to send a message of retribution, deterrence and denunciation to Loblaws and others.

[308] But more to the point, the absence of punitive damages under Bangladesh law is not a policy decision that offends the essential morality and fundamental values of Canadian society.

[309] In *Zurich Life Insurance Co. v. Branco*, *supra* the Saskatchewan Court of Appeal held that, in the context of an insured versus an insurer, a law prohibiting punitive damages should be disregarded on public policy grounds. The factual context of that case is entirely different than that of the immediate case and in any event the case is not binding on me and I would neither adopt it nor follow it.

H. Are the Plaintiffs' Claims Statute-Barred under Bangladesh Law?

1. Introduction

[310] I have concluded that the Plaintiffs' tort claims are governed by the law of Bangladesh. The next question to determine is whether the Plaintiffs' tort claims are statute-barred under Bangladesh law. This question involves the substantive content of the law of Bangladesh, which, as discussed above, is a matter to be determined as a matter of fact based on the evidence proffered by the ten witnesses who testified about the foreign law, not all of whom discussed the limitations period issue.

[311] In this part of my Reasons for Decision, to resolve the issue of the operation of the *Limitation Act, 1908*, I shall first set out the relevant statutory provisions.

[312] Second, I shall briefly describe the administration of justice in Bangladesh. This description is necessary because the rules of *stare decisis* and the nature of precedent in Bangladesh is a factor in the analysis of how the *Limitation Act, 1908* applies to the case at bar.

[313] Third, I shall describe the lengthy judicial and procedural history of the *Bangladesh Beverage* case and the three judgments that were released in the case, the last of which came during the run up to Loblaws' motion and the Plaintiffs' certification motion.

[314] As will shortly become apparent, very much of the debate between the experts focused on *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter*, March 3, 2003 (District Court), varied 62 D.L.R. 483 (2010) (High Court Division), November 5, 2010, leave to appeal dismissed (Appellate Division), September 29, 2016. The *Bangladesh Beverage* case is the single Bangladesh appellate case to date that has considered the application of Bangladesh's *Limitation*

Act, 1908 to a case involving a wrongful death claim, tort law, and a vicarious liability claim.

[315] Fourth, I will discuss the expert evidence and explain my conclusions, which are that: (a) the putative Class Members' claims are subject to a one-year limitation period under Articles 21 and 22 of the *Limitation Act, 1908*; (b) the running of the one-year limitation period was not tolled by sections 7 and 13 of the *Act;* (c) under the law of Bangladesh, with an exception for putative Class Members who were born on or after April 22, 1996, hence minors at the time of the accident, the Plaintiffs and the putative Class Members' tort claims are statute-barred under the *Limitation Act, 1908;* and (d) therefore, the Plaintiffs' action should be dismissed as against all but the putative Class Members who were minors at the time of the collapse of Rana Plaza.

2. The Statutory Provisions

[316] There was agreement that if Bangladesh law applied, then the limitations statute applicable under the law of Bangladesh is the *Limitation Act, 1908*. The relevant provisions of that statute are as follows:

The Limitation Act, 1908

An Act to consolidate and amend the law for the Limitation of Suits, and for other purposes.

WHEREAS it is expedient to consolidate and amend the laws relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring possession of easements and other property; It is hereby enacted as follows:

….

PART II – LIMITATION OF SUITS, APPEALS AND APPLICATIONS

Dismissal of suits, etc., instituted, etc., after period of limitation

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

….

4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

….

Legal disability

6. (1) Where a person entitled to institute a suit or proceeding or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or proceeding or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefore in the third column of the first schedule or in section 48 of the *Code of Civil Procedure*.

….

7. Where one of several persons jointly entitled to institute a suit or proceeding or make an application for the execution of a decree is under any such disability, and discharge can be given without the concurrence of such person, time will not run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

….

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from Bangladesh and from the territories beyond Bangladesh under the administration of the Government shall be excluded.

….

THE FIRST SCHEDULE

Description of Fault	Period of Limitation	Time from which period begins to run
19. For compensation for false imprisonment	One year	When the imprisonment ends
….		
21. By executors, administrators or representatives under the *Fatal Accidents Act*, 1855	One year	The date of the death of the person killed
22. For compensation for any other injury to the person	One year	When the injury is committed
23. For compensation for malicious prosecution	One year	When the injury is committed
24. For compensation for libel	One year	When the libel is published
….		
36. For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specifically provided for	Two years	When the malfeasance, misfeasance or non-feasance takes place.
….		
120. Suit for which no period of limitation is provided elsewhere in this schedule	Six years	When the right to sue accrues.

[317] Article 21 of the First Schedule refers to the *Fatal Accidents Act, 1855*, which creates a cause of action for wrongful death. The *Fatal Accidents Act, 1855*, reads:

> An Act to provide compensation for families for loss occasioned by the death of a person caused by actionable wrongs
>
> WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong doer in such case should be answerable in damages for the injury so caused by him.

Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.

1. Whenever the death of a person shall be caused by wrongful act, neglect or death, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

2. Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in every such action the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses shall be divided amongst the before mentioned parties, or any of them, in such shares as the court by its judgment or decree shall direct.

Not more than one suit to be brought/ Claim for loss to estate may be added

2. Provided always that not more than one action or suit shall be brought for and in respect of the same subject-matter of complaint: Provided that, in any such action or suit, the executor, administrator or representative of the deceased person may insert a claim for and recover for any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

….

[318] Chief Justice (ret.) Islam, Chief Justice (ret.) Rahman, Mr. Hossain, Ms. Kabir, and Mr. Mahmud agreed that the reference to "other injury to person" in Article 22 means injury other than injuries referred to in Article 21.

3. The Administration of Civil Justice and the Rule of Law in Bangladesh

[319] Historically, the rule of law in Bangladesh has developed through three stages. The first stage was from 1858 to 1947, when what is now Bangladesh was ruled by the British Crown.

[320] Today, the decisions of the Indian Courts and the Privy Council of England during the first period are accepted as part of Bangladesh's *corpus juris*.

[321] The second period of law making in Bangladesh lasted from 1947, when India and Pakistan were separated into two states and Bangladesh was a part of Pakistan, until 1971, when Bangladesh became independent.

[322] Today, the reported decisions of the Pakistan Supreme Court during the second period are accepted as part of Bangladesh's *corpus juris*.

[323] The third period began in 1971 with Bangladesh's independence. In the third period, the decisions of the Supreme Court of Bangladesh continue the development of the rule of law.

[324] Today, the Bangladesh courts accept decisions of the supreme courts of other common law countries as persuasive but not binding authorities. Decisions of Indian and English courts are regularly cited in Bangladesh courts. Today, when confronted with novel tort claims, the courts of Bangladesh will consider authorities from England and Wales to be persuasive although not binding precedents.

[325] In Bangladesh, District Courts have the jurisdiction to decide civil claims. There is an appeal to the High Court Division, and with leave, there is a further appeal to the Appellate Division, which is Bangladesh's highest court.

[326] The High Court Division and the Appellate Division are divisions of the Supreme Court of Bangladesh, which is the country's highest court.

[327] Article 111 of the *Constitution of the Peoples' Republic of Bangladesh* provides that in the absence of an express finding to the contrary by the Appellate Division, the decision of the High Court Division shall be binding on all courts subordinate to it.

[328] The *ratio decidendi* of decisions of the appellate courts in Bangladesh are binding on lower courts. Unless expressly overturned by a higher appellate court, the fully considered *obiter dicta* of an appellate court is binding on lower courts.

[329] On a petition for leave, the Appellate Division may: (1) deny leave; (2) dispose of the petition with observations; or (3) grant leave and hear the appeal. On a leave petition, the observations of the Appellate Division are binding on lower courts.

4. ***Bangladesh Beverage Industries Ltd. v. Rowshan Akhter***

[330] In addition to the language of the *Limitation Act, 1908*, the Plaintiffs and the Defendants focus on *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter, supra* which began with a fatality in a 1989 car accident, to answer the question of whether the Plaintiffs' and the putative Class Members' claims in the immediate case are statute-barred under the law of Bangladesh.

[331] To determine as a matter of fact whose interpretation of *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* is correct; i.e., to determine the content of the foreign law about the limitation statute that applies to the Plaintiffs' and the putative Class Members' claims, it is necessary to undertake a detailed examination of the case's factual, procedural, and judicial history. In this part of my Reasons, I will undertake that examination, and I shall add some analytical commentary that will identify the position of the parties and the divide between them and their respective expert witnesses. I will also provide some of my own analysis and my conclusions about whether and to what extent, if any, the claims in the proposed class action are statute-barred. I will complete that analysis in the next part of these Reasons for Decision.

[332] Three judgments were released in *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter:* (1) a trial judgment in the District Court; (2) an appeal judgment of the High Court Division; and (3) a judgment by the Appellate Division dismissing a leave to appeal application.

[333] The essential position of the Plaintiffs is that the Appellate Division affirmed the decision of the High Court, whose decision the Plaintiffs submit is authority that the tort claims in the case at bar are subject to a six-year limitation period. The essential position of the Defendants is that the Appellate Division's decision is authority that the tort claims in the case at bar are subject to a one-year limitation period, which would make the claims statute-barred.

[334] To prepare for the analysis that will follow, it will be helpful to keep in mind that the Appellate Division, the ultimate appellate court in Bangladesh, varied the decision of the High Court Division, the penultimate court in the hierarchy of appellate civil courts, which intermediate appellate court had varied the judgment of a District Court, the trial level court. The resolution of the dispute between the parties is ultimately a matter of determining more precisely

what effect the Appellate Division's decision had on the High Court Division's decision. The Plaintiffs submit that the Appellate Division did not disturb the High Court Division's holding that tort claims are subject to a six-year limitation period. The Defendants' disagree with the Plaintiffs about what the High Court had decided and about the effect of the Appellate Division's decision.

[335] The factual background to *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* is that Mozammel Hossain Montu was a celebrated news reporter, journalist, broadcaster, poet, and playwright. On December 3, 1989, after purchasing cigarettes at a variety store, he crossed a street and was struck by a Bathurst Beverage delivery van. The vehicle was being driven by one of its employees. A few hours later, Mr. Montu died. At the time of the accident, he was 44 years old. He was survived by a wife and two minor sons.

[336] On January 1, 1991, which was one year and 29 days after the accident, Mr. Montu's wife and two sons sued. Here, it is to be noted that the District Court, the trial level court, was on vacation between December 1, 1990 and December 31, 1990, but s. 4 of *Limitation Act 1908*, set out above, provides that when the court is closed and the period of limitation expires within the period in which the court is closed, the suit may be instituted on the day in which the court reopens, which is what the plaintiffs did.

[337] The plaintiffs advanced a claim of 3,52,97,000 Taka. In the originating process, the plaintiffs named as defendants: (1) the driver of the vehicle; and (2) "Bangladesh Beverage Industries Limited represented by its Managing Director." The plaintiffs, however, did not expressly name Bangladesh Beverage as a defendant.

[338] After the commencement of the action, nothing seems to have happened for 10 years, and the suit was administratively dismissed on January 29, 2001. Subsequently, the action was restored, and on March 4, 2003, (over 13 years after the fatality), the plaintiffs moved to name Bangladesh Beverage as a defendant.

[339] Bangladesh Beverage was added, and it defended the action. It did not deny the accident had occurred, but it submitted that an inattentive Mr. Montu had walked into the delivery van and that the Bangladesh Beverage driver had done nothing wrong.

[340] At the trial, three witnesses called by the plaintiffs proved that the driver had been driving on the wrong side of the road and that it was Mr. Montu who had done nothing wrong. Bangladesh Beverage had no evidence to the contrary. On March 20, 2005, the District Court judge granted the plaintiffs a judgment of 3,52,97,000 Taka, the amount originally claimed by the widow and the children.

[341] Bangladesh Beverage appealed, and it advanced four grounds of appeal: (1) the driver was not at fault and had been acquitted in the criminal proceedings; (2) Bangladesh Beverage was not vicariously liable; (3) the damages were not calculable, i.e., not proven on proper evidence; and, (4) Bangladesh Beverage had been added as a defendant long after the period of limitation had run its course.

[342] On Bangladesh Beverage's appeal, the High Court Division concluded that the driver was negligent and that Bathurst Beverage was vicariously liable for the negligence of its driver.

[343] Expansively describing the common law's treatment of tort, the High Court's judgment contains a detailed examination of the principles of tort law and of the assessment of pecuniary and non-pecuniary damages in a personal injury claim. In the result, the High Court Division

affirmed the District Court's decision on liability and varied the calculation of damages to reduce the award to 2,01,47,068 Taka.

[344] On the question of limitation, the High Court Division stated at paras. 59-64:

> 59. On the question of limitation, [Bathurst Beverage] on reference to the *Fatal Accident Act, 1855* and Section 22 of *Limitation Act 1908,* i.e. effect of substituting or adding new plaintiff or defendant and Article 22; i.e. the period of limitation for compensation for any other injury to the person submits that the appellant having been impleaded long after the period of limitation so the suit is not maintainable against the plaintiffs.
>
> 60. The learned Advocate for the appellant submits that the suit was instituted after the period of limitation as prescribed under section 22 and Article 22 of the *Limitation Act*. …
>
> 61. The learned Advocates submits that, under this law the appellant may be allowed to be added as a party if the same is made within the period prescribed under Article 22 of the *Limitation Act*. Let us quote Article 22 of the *Limitation Act.* Article 22 prescribed compensation for any other injury to the person and the period prescribed is one year and it started from the date when the injury took place.
>
> 62. Mr. Md. Khalilui Rahman on the other hand submits that, the appellant did not raise this question of limitation at the time of filing of written statement, rather in written statement, he contested the suit ratifying the action of the driver as such, at this moment he cannot raise such question. Learned Advocate submits that Article 22 of the *Limitation Act* is not applicable on the facts of the given case as the instant suit for compensation was filed for life not for injury. Learned Advocate submits that the suit was filed on re-opening day on 3-12-1990 and last date was 3-12-1989 as such, as per section 4 of the *Limitation Act* the suit was within time. Since the suit was filed within time the appellant was added under order 1 rule 10 read with Order XXII of the *Code of Civil Procedure* as such, the question of limitation does not arise.
>
> 63. In the instant suit, the original suit was filed against the driver … on 1-1-1991. The accident took place on 3-12-1989. The District Judiciary was completely on holidays from first December to 31st December. Section 4 of the *Limitation Act* prescribed when Court is closed and period expires, the suit, appeal or application may be instituted, preferred or made on the day the Court re-opens. It appears that the period for limitation expired (one year prescribed under Article 22) on 3-12-1990, the last date filing suit having fallen during the vacation of the Court, as such, filing of the suit on 1st January, 1991; i.e., on re-opening day, was perfectly within time. Since the suit was filed within time, the appellant was impleaded as defendant No. 1 on 4-3-2003 by an application filed under Order I Rule 10 by amendment of the plaint under Order VI Rule 17 of the *Code of Civil Procedure* and the said application was allowed on 4-3-2003. Apparently after 13 years of institution of the suit, but there is no period of addition of party and also for amendment of the pleadings as it can be done at any point of time during continuation of the suit and appeal and while addition was made and plaint was amended, it relates back to the date of institution of the suit, as such, plea of limitation as raised by the appellant is not sustainable. Moreover, defendant appellant did not challenge the order dated 4-3-2003 in any forum. Defendant No. 1 appellant only contested the suit and filed written statement on 2-9-2003 and adduced evidence in support of the case made out in the written statement but no where this defendant-appellant challenged his implication in the suit.
>
> 64. We have gone through the law of tort and we do not find law of tort itself prescribe for any limitation. It is the acts under which occurrence took place, the legal proceeding is guided by that law. The parties agreed that the instant occurrence is tortuous liability and according to me, tortuous liability is a continuous compensatory liability can be brought within a reasonable time as there is no limitation prescribed under law of tort, as such, Article 120 of the *Limitation Act;* i.e., where there is no prescribed limitation, action can be brought within six years from the date of occurrence is applicable. Similar question was called to answer by the Appellate Division in the case of *Jamila Khatun vs Rustom Ali* wherein the Appellate Division held as "No such corresponding provisions exists in respect of suits filed by a Muslim for a corresponding relief." In our opinion, residuary Article 120 of the First Schedule, providing for a period of limitation of 6

> years from the time when the right to suit accrues in respect of a suit for which no period of limitation is provided elsewhere in the first schedule will be applicable to a suit for maintenance under Ordinance of 1985. As such, we are of the view that the submission of Mr. Sheikh Fazle Noor Tapash, learned Advocate is of no substance. This is not a case either under *Motor Vehicle Act* or under *Fatal Accident Act*, as such, Article 22 of the *Limitation Act* has no manner of application on the facts of the given case. The appellant was impleaded in the suit as per law.

[345] Pausing here, it was Mr. Hossain's and Chief Justice (ret.) Islam's opinion that the *ratio decidendi* of the High Court's decision is found in para. 64 and that the court held that an action for negligence has a six-year limitation period. They opined that pursuant to Article 111 of the *Constitution of the Peoples' Republic of Bangladesh,* the High Court Division's decision was binding authority that a tort claim has a six-year limitation period. However, it was Ms. Kabir's opposing opinion that that proper reading of the High Court's decision was that it was authority that a one-year limitation period applied to a personal injury claim.

[346] My own reading of the High Court Decision, which in some parts is scholarly but in other part is rambling, confusing, and ambiguous, is that the better reading of the case is Ms. Kabir's. I will return to the binding effect of the decision in the next section of these Reasons for Decision.

[347] Returning to the history of the case, Bangladesh Beverage sought leave to appeal to the Appellate Division. In its petition for leave, Bangladesh Beverage's grounds for leave included: (a) that the High Court Division erred in holding that there was a six-year limitation period under Article 120; (b) that the High Court Division erred in holding the case was not under the *Motor Vehicle Act* or the *Fatal Accidents Act*; and (c) that the High Court Division erred in not concluding that Articles 21 and 22 applied with the result that the plaintiffs' claims were statute-barred.

[348] What the Appellate Division did in disposing of the leave to appeal motion was a matter of much controversy. Some things are clear. The Appellate Division outlined the factual and judicial history of the case and commented about the decisions of the District Court and of the High Court Division.

[349] Then, the significance and effect of the Appellate Division's comments and operative directions becomes unclear and is much debated. As the Plaintiffs would have it, the Appellate Division dismissed the leave to appeal application with the result of affirming and adopting the decision of the High Court Division that there was a six-year limitation period. In contrast, as the Defendants would have it, the Appellate Division dismissed the leave application, but in doing so, it expressly agreed with some of the determinations of law made by the High Court Division and the Appellate Division but also made observations and modifications, including disagreements with other determinations of law made by the High Court Division. In particular, the Defendants submit that one of the observations, modifications, or clarifications of the Appellate Division was to conclude that the applicable limitation period for the tort claims in *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* was the one-year period under Articles 21 and 22. Put somewhat differently, the Appellate Division was clearing up any confusion about how the High Court Division's decision should be read.

[350] My reading of the decision reveals that the Appellate Division agreed with the holdings in the lower courts that the defendant driver of the Bangladesh Beverage delivery van was acting within the course of his employment and was driving negligently. The Appellate Division clearly agreed with the decisions of the courts below that there was no contributory negligence by Mr. Montu and that the driver was the sole cause of the accident. The Appellate Division clearly

agreed with the conclusions of the courts below that Bangladesh Beverage was vicariously liable for the negligence of the driver. The Appellate Division clearly agreed that the widow and the two sons were entitled to compensation, but differing from both the District Court judge and the High Court Division, the Appellate Division reduced the quantum of the plaintiffs' damages.

[351] The Appellate Division also held that there was no merit in the petition for leave to appeal of the lower court's decision that the suit was not statute-barred. Why the Appellate Division held that the action was not statute-barred, however, is the controversial point. On the limitation issue, the Appellate Division stated:

> As regards the question of limitation the High Court Division found that the suit was filed on 01.01.1991 and the accident took place on 03.12.1989. Admittedly, the Court was on vacation from the 1st of December to 31st December, 1989. Section 4 of the *Limitations Act* provides that when the court is closed and the period of limitation expires within the period in which the subordinate Court is closed, the suit, application or appeal may be instituted, preferred or made on the day in [sic] which the court reopens. ….
>
> In the instant case the limitation expired on 03.12.1990, the last date of filing the suit having fallen during the vacation of the court and as such filing of the suit on 1st January of 1991 i.e. on the re-opening day was perfectly within the period of limitation. Therefore, there is no merit in the submission of the learned Advocate for the petitioner that the suit is barred by limitation.

[352] Further on the matter of then limitation period, the Appellate Division dealt with the argument that Bangladesh Beverage had not been named as a defendant until thirteen years after the commencement of the action, which I observe was long after the longest of any limitation period under the *Limitation Act, 1908*. The Court had two answers to this problem. The first answer was that Bangladesh Beverage had been joined from the outset and the description in the original style of cause was a misnomer that was corrected with the result that the running of the limitation period was measured from the commencement of the action and not from the amendment made to the style of cause 13 years later. The second answer was that the driver had been joined from the outset and Bangladesh Beverage was vicariously liable for its employee's negligence.

[353] I shall explain my conclusions about the authority of *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* in the discussion that follows. I foreshadow to say that I agree with the Defendants' argument that *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* is authority that the putative Class Members' tort claims in the case at bar are statute-barred under the law of Bangladesh. As discussed next, in my opinion, the proper interpretation and application of the authority of *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* is that the claims in the case at bar have a one-year limitation period.

5. Discussion and Analysis

(a) The Limitation Period for the Tort Claims

[354] For the reasons that follow, I conclude as a finding of fact that save for Surviving Class Members who were born on or after April 22, 1996, hence minors at the time of the collapse of Rana Plaza, the tort claims of the putative Class Members are statute-barred under the law of Bangladesh.

[355] For the Defendants, Mr. Ahmad, Ms. Kabir, Mr. Mahmud, and Chief Justice (ret.) Rahman all opined that the Appellate Division's decision in *Bangladesh Beverage v. Rowshan*

Akhter upheld the decision of the High Court Decision to the extent that the Appellate Division agreed with the conclusion of the High Court Division that the widow's and son's claims were not statute-barred because the claims had a six-year limitation period.

[356] Conversely, the Defendants' experts opined that the Appellate Division did not agree that the claims survived because of a six-year limitation period. Rather, the Defendants' experts said the observations of the Appellate Division, which are treated as binding on lower courts, indicated that there was a one-year limitation period and the claims were timely because of the operation of s. 4 of the *Limitation Act, 1908*.

[357] I agree with the experts for the Defendants that there is a one-year limitation period for tort actions for compensation for personal injuries and for a wrongful death, and I agree with them that there would have been no reason for the Appellate Court to consider s. 4 of the *Limitation Act, 1908* if there had been a six-year limitation period.

[358] I appreciate that the Appellate Division's observations about the *Limitation Act, 1908* are brief, but reading the judgment in its entirety, the Appellate Division left no doubt that it was of the view that the tort claims in *Bangladesh Beverage v. Rowshan Akhter* (which are similar to the claims in the immediate case) were subject to Articles 21 and 22 and not Article 120 of the Act. This is not a matter of implying a conclusion that changes the authority of the High Court Division's decision. It is rather an express statement of the law by the Appellate Division as to what is the applicable limitation period for claims for personal injury or claims under the *Fatal Accidents Act of 1855*. That the Appellate Division was addressing claims under the *Fatal Accidents Act of 1855* is confirmed by the fact that the court addressed claims under this *Act* when considering the issues associated with calculating the quantum of the plaintiffs' damages.

[359] In my opinion, the Defendants' interpretation of what the Appellate Division did and the significance of what it did is the correct interpretation. I come to this conclusion easily because the Appellate Division concluded its decision by saying precisely what it did. The Appellate Division stated:

> …. In the instant case **the limitation expired on 03.12.1990, the last date of filing the suit having fallen during the vacation of the court** and as such filing of the suit on 1st January of 1991; i.e., on the re-opening day was perfectly within the period of limitation. …. In the result, the leave petition is disposed of with the observation and modification made in the body of this judgment and accordingly, the plaintiffs-respondents are entitled to get a decree of 1,71,47,008 Taka. [Emphasis added]

[360] I also agree with the evidence and the opinions of the Defendants' witnesses, Mr. Ahmad, Ms. Kabir, Mr. Mahmud, and Chief Justice (ret.) Rahman, who opined that on a plain reading of Schedule 1 to the *Limitation Act, 1908*, Articles 21 and 22 apply to all claims arising out of "the death of the person wronged" (Article 21) or "any other injury to the person" (Article 22), regardless of the nature of the alleged duty that has been breached resulting in the wrongful death or other injury.

[361] Further, Mr. Ahmad, Ms. Kabir, Mr. Mahmud, and Chief Justice (ret.) Rahman all concluded that since the claims in negligence, breach of fiduciary duty, and vicarious liability all arise out of wrongful deaths or personal injury, they are all subject to a one-year limitation period and all were statute-barred because no action was commenced within one year of the collapse of Rana Plaza. They noted that under the *Limitation Act, 1908*, a limitation defence does not have to be pleaded. I accept their evidence and agree with their opinion.

[362] I am persuaded by the Defendants' expert witnesses. Mr. Ahmad, Ms. Kabir, Mr. Mahmud, and Chief Justice (ret.) Rahman all opined that Articles 36 and 120 the *Limitation Act, 1908* apply only if Schedule 1 does not provide for a different limitation period in a different Article of the Schedule. Thus, Article 36 applies to torts that do not relate to fatal accidents or injury to the person, for which a one-year limitation period is "specifically provided for" in Articles 21 and 22. For the Defendants' experts, Article 120 is the residual default provision that provides a six-year limitation if no other Article applies. Once again, I agree with the Defendants' opinion on the operation of the Bangladesh limitation statute.

[363] I disagree with and do not accept the opinions of Dr. Hossain and Chief Justice (ret.) Islam who testified for the Plaintiffs. Relying on the High Court Division's decision in *Bangladesh Beverage v. Rowshan Akhter*, which they say was affirmed but not varied by the Appellate Division, Mr. Hossain and Chief Justice (ret.) Islam opined for the Plaintiffs that the tort actions in the immediate case would be subject to the six-year limitation period found in Article 120 of the *Limitation Act, 1908*. I disagree with their opinion for five reasons.

[364] First, as a matter of fact-finding on the balance of probabilities, I agree with the opinions of the Defendants' experts, which are more persuasive.

[365] Second, where the experts differ, as they did in this case, I am entitled to examine the authorities upon which they relied, weigh the competing opinions and make up my own mind on the question of foreign law to resolve any differences. An examination of the *Bangladesh Beverage v. Rowshan Akhter* decision reveals several weaknesses or problems about the Plaintiffs' experts' analysis of the case. In this regard, strictly speaking, the case does not address the limitation period for personal injury claims because the courts in the *Bangladesh Beverage* were considering a wrongful death claim not a discrete personal injury claim. Moreover, Chief Justice (ret.) Islam's opinion would give no meaning to Article 22. His opinion leaves Article 22 with no work to do.

[366] Third, I do not agree that the Plaintiffs' experts are correct in saying that it is clear that the High Court Division concluded that Article 120 applied. To the contrary, it is arguable that the High Court Division regarded Articles 21 and 22 as applying. There is much about the High Court Division's decision that is clear and cogent, but its explanation for concluding that the plaintiffs' claims were not statute-barred does not make clear what the actual limitation period was for the plaintiffs' claims. Because of the law associated with when a misnamed defendant is taken to have been joined to the litigation, the High Court Division was going to treat Bangladesh Beverage as a party defendant joined as of the issuance of the claim, and thus there would have been no purpose for it to discuss of s. 4 of the *Limitation Act 1908*, if it was of the view that only a six-year limitation period applied. A discussion of s. 4 was only necessary if the High Court Division understood Articles 21 and 22 as being engaged.

[367] My fourth reason for not accepting the Plaintiffs' experts' opinion is I disagree with Mr. Hossain's argument that Article 22 does not apply to the Plaintiffs' claims because it includes pecuniary losses albeit consequent upon injury to the person. The distinction he draws is not supported by authority, and the Defendants' experts' view and common sense indicated that a claim for personal injuries would include as heads of damages both non-pecuniary losses (general damages) and pecuniary (special damages including loss of income and property damage).

[368] My fifth reason for not accepting the Plaintiffs' experts' opinion is that I disagree with

their interpretation of the effect of the observations of the Appellate Division on the decision of the High Court Division. As already mentioned, the Appellate Division dismissed the leave petition with the observation and modification including the express observation that there was a one-year limitation period subject to the extension brought about by the District Court being closed for vacation. The Plaintiffs' efforts to preserve what they say is the holding by the High Court Division fails because it is not the case that the Appellate Court did not expressly deal with the High Court Division's ruling on what was the applicable limitation period. The Appellate Court, rather, stated that it was a one-year limitation period. This was not a matter of correcting an error in the High Court Division having wrongly decided that it was a six-year limitation period but rather it was the Appellate Court's way of affirming and removing any confusion that the proper reading of the High Court Division's decision was that there was a one-year limitation period for the wrongful death claim in *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter*.

(b) Section 7 of the *Limitation Act, 1908*

[369] I turn now to the Plaintiffs' arguments that rely on sections 7 and 13 of the *Limitation Act, 1908* to avoid the running of the limitation period for the tort claims.

[370] Beginning with s. 7, based on the evidence of their expert witnesses, the Plaintiffs submitted that the running of the limitation period was tolled.

[371] Section 7 of the *Limitation Act, 1908* tolls the limitation for minors and for persons under a disability in defined circumstances. In contrast s. 6 of the *Act*, which extends the limitation period for "a minor, or insane, or an idiot" for a commensurate period after the disability has ceased, s. 7 of the *Act* applies when persons are jointly entitled to sue and one of them is under a disability (a minor) but a (discharge) release of liability can be given with the disabled persons concurrence. Section 6 is the typical general provision that suspends the running of a limitation period while a person suffers from a disability, and s. 7 is a special provision that applies for circumstances of joint liability.

[372] In its factum, the Plaintiffs argued that s. 7 would apply in the case of Ms. Das, one of the Plaintiffs, because she was 17 years old at the time of the collapse. I do not know why the Plaintiffs relied on s. 7, which applies in defined circumstances when s. 6 would appear to be the more readily available section of the *Act*.

[373] Perhaps it was a feint to distract attention from s. 6, but before the hearing, the Defendants' Ms. Kabir was the only expert who addressed s. 7, and she was not cross-examined on this issue. Ms. Kabir explained that, by its plain wording s. 7 applies only, "where one of several persons jointly entitled to institute a suit or proceeding" is "under any such disability." She said that s. 7 does not apply: (a) to wrongful death claims, which are joint claims; or (b) to representative suits or class actions, in which the representation or certification order eliminates the "disability" of any particular class members to institute a proceeding.

[374] I accept Ms. Kabir's uncontroverted evidence and conclude that s. 7 does not apply to the circumstances of the immediate case.

[375] However, it appears to me that s. 6 of the *Act* applies to the circumstances of the immediate case, and during the hearing of the motions, apart from attacking Ms. Das' credibility, the Defendants had no argument to suggest otherwise.

[376] I, therefore, conclude that the claims, if any, of putative Class Members who were born

on or after April 22, 1996, hence minors at the time of the collapse of Rana Plaza, are not statute-barred.

[377] I do not know how many putative Class Members were minors but, it seems that there will be some because, as noted above, in Bangladesh, 14-year-old persons may join the regular workforce.

(c) Section 13 of the *Limitation Act, 1908*

[378] Turning to s. 13, it was Mr. Hossain's opinion that even if the Plaintiffs' claims are subject to a one-year limitation period, s. 13 of the *Limitation Act, 1908* stops the running of limitation periods while a defendant (i.e. Loblaws) is absent from Bangladesh. Relying on case law from India; namely *P.C.K. Muthiah Chettiar & Ors. v. V.E.S. Shanmugham Chettiar & Anr*, 1969 AIR 552 and also *Atul Kristo Bose v. Lym & Co.* (1887) ILR 14 Cal 457, he interpreted this section as tolling claims against foreign corporations who, like Loblaws, are outside the jurisdiction.

[379] The Plaintiffs rely on the fact that the 1887 case of *Atul Kristo Bose v. Lym & Co.* is part of the *corpus juris* of Bangladesh being a decision from when Bangladesh was part of British India. They assert that it has higher status that the post-1947 decisions of Indian courts which are persuasive but not binding.

[380] For the Defendants, Ms. Kabir, Mr. Mahmud, and Mr. Ahmad submitted that the *P.C.K. Muthiah Chettiar* case was distinguishable on its facts, and they the relied on different and more recent case law from India; namely: *Turner Morrison and Co., Ltd. v. Hungetford Investment Trust Ltd.*, AIR 1972 SC 1311 and *P.J. Johnson and Sons v. Astrofiel Armadorn S.A.* 1989 AIR Ker 53. The Defendants' experts opined that s. 13 did not preclude the running of the limitation period with respect to the claims against Loblaws.

[381] Here as a matter of fact finding about foreign law, I am persuaded by the Defendants' argument about s. 13 and not by the Plaintiffs' argument.

[382] One oddity of the Plaintiffs' argument is that it is discordant with their pleaded case, which is based on the theory that Loblaws committed its wrongdoing in Ontario. As it happens, some Loblaws' employees did visit Bangladesh, but the Plaintiffs' claims do not depend in any way on the physical presence of Loblaws in Bangladesh, and, therefore, it is odd for the Plaintiffs to discuss the "time during which the defendant has been absent from Bangladesh," when from the Plaintiffs' perspective Loblaws never was present in Bangladesh to perpetrate wrongdoing but rather perpetrated its wrongdoing from halfway around the world.

[383] In any event, I agree with the Defendants that the *P.C.K. Muthiah Chettiar* case, upon which the Plaintiffs rely, is not helpful to deciding whether s. 13 applies to the case at bar. The case did not involve a corporation, and in that case, the individual's wrongdoing occurred outside of the country, and he was only absent for a short period of time from the place where he was sued. In contrast, the Defendants cases are more closely aligned with the factual circumstances of the immediate case.

[384] In particular, *P.J. Johnson and Sons v. Astrofiel Armadorn S.A., supra* considered whether the Indian equivalent of s. 13 of the *Limitation Act, 1908* would apply to a corporation that had never been present in India. The Court held that a foreign corporation that had never been present in India could not be "absent" from India and, therefore, the limitation period

continued to run. *Turner Morrison and Co., Ltd. v. Hungetford Investment Trust Ltd., supra* is to the same effect.

[385] Moreover, even if the Plaintiffs' interpretation of s. 13 were accepted, that section would not toll the limitation period for the Bureau Veritas negligence claim because Bureau Veritas was physically present in Bangladesh and never absented itself.

(d) The Limitation Period for the Breach of Fiduciary Duty Claim

[386] Although for the reasons expressed below, it is my conclusion that the Plaintiffs do not have a breach of fiduciary duty claim, for the purposes of deciding the Defendants' motions, I will assume the opposite.

[387] With this assumption, the Plaintiffs' position, based on Mr. Hossain's opinion, is that since no limitation period is prescribed in the *Limitation Act, 1908* for breach of fiduciary duty claims, Article 120 would be the applicable provision, and, thus, the breach of fiduciary duty claim has a six-year limitation period.

[388] With the same assumption, that there is a breach of fiduciary duty claim, the Defendants' position, based on Ms. Kabir's opinion, is that Articles 21 and 22 apply to this claim, and thus there was a one-year limitation period. The explanation is that the breach of fiduciary duty claim at its heart is a personal injury claim.

[389] I am persuaded by Ms. Kabir's opinion, and, therefore, conclude that if the Plaintiffs' had a breach of fiduciary duty claim, then, it would be a claim for personal injuries arising from the breach of fiduciary duty and the save for the minor claimants, the Plaintiffs' claim is statute-barred.

I. The Legal Viability of the Plaintiffs' Causes of Action

1. Introduction

[390] In this part of my Reasons for Decision, I shall examine whether the Plaintiffs, who are also putative Class Members, have legally viable causes of action under the law of Bangladesh or under the law of Ontario.

[391] With respect to Bangladesh law, as a matter to be proven as an issue of fact, relying on the opinion evidence of Ms. Kabir and Dr. Goudkamp, the Defendants submit that it is plain and obvious that under the law of Bangladesh, the Plaintiffs do not have a reasonable cause of action in tort against either Defendant and that the Plaintiffs do not have a reasonable cause of action for breach of fiduciary duty as against Loblaws. Conversely, relying on the opinion evidence of Mr. Hossain and Dr. Morgan, the Plaintiffs submit that they have viable tort claims and a viable claim for breach of fiduciary duty under Bangladesh law.

[392] With respect to Ontario law (which is not proven as an issue of fact), as a matter to be resolved as an issue of law based on the factual allegations in the Statement of Claim being assumed to be capable of proof, the Defendants submit that it is plain and obvious that under the law of Ontario, the Plaintiffs do not have a reasonable cause of action in tort against either Defendant and that they do not have a reasonable cause of action for breach of fiduciary duty as against Loblaws. Conversely, as a matter to be resolved as an issue of law, the Plaintiffs submit

that they have viable claims under Ontario law.

[393] After this introduction, as a matter of organization, I shall analyze the viability of the Plaintiffs' several causes of action and the competing arguments of the parties and their experts in the following order: (1) preliminary observations about the duty of care, under the heading "And who is my neighbour?"; (2) an examination of the Plaintiffs' tort claims under the law of Bangladesh; (3) an examination of the Plaintiffs' tort claims under the law of Ontario; and (4) an examination of the Plaintiffs' breach of fiduciary duty claim against Loblaws under both the law of Bangladesh and also Ontario.

[394] I will examine the competing opinions and the competing arguments in considerable detail below, but as I have already foreshadowed above, my conclusion is that the Plaintiffs do not have a reasonable cause of action against either Defendant under either the law of Bangladesh or under the law of Ontario.

2. "And who is my neighbour?"

[395] Before, I begin the more detailed analysis of the legal viability of the Plaintiffs' claims in tort, it is useful to identify six points or themes, some of which will loom large and some of which will be important but which will be under the surface of the discussion that follows. To introduce these six themes, I return to the very outset of these Reasons for Decision, where the New Testament Parable of the Good Samaritan is juxtaposed with the famous paragraph from Lord Atkins's judgment in *Donoghue v. Stevenson*, *supra*.

[396] The first theme to note is that the viability of the Plaintiffs' tort claims depends upon the answer to the question "Who is my neighbour?", which is the question that the lawyer in the Gospel story posed to Jesus and that the parties to *Donoghue v. Stevenson* posed to Lord Atkin about the recognition of a duty of care. As will emerge, the matter of a duty of care in the case at bar is a legal question determined by legal principles and by the incremental development of the common law. Legal doctrine and moral sentiment, however, are not necessarily congruent or commensurate.

[397] The second theme to note, which is related to the first theme, is that there is a difference between the legal question "Who is my neighbour?", which was answered by Lord Atkin, and the ethical question "Who is my neighbour?", that was answered by Jesus. Philosophically, Lord Atkin's answer is an "is" answer, while Jesus' answer is an "ought" answer.

[398] Much of the Plaintiffs' arguments in their Statement of Claim and in their factums and much of the evidence and arguments of their experts is about what the answer to the question "Who is my neighbour" ought to be under the law of Bangladesh, England, and Ontario. Unfortunately, these arguments, be they characterized as eloquent or rhetorical or correct or incorrect do not answer the legal question posed and answered by Lord Atkin, who made it clear that the legal answer to the duty of care question is much more restricted and circumscribed than the ethical answer provided by Jesus to the "who is my neighbour" question.

[399] The third theme to note is that the legal question of "Who is my neighbour?" is a different and discrete question from other liability elements associated with a tort negligence claim; namely: the questions of: (a) What is the scope or standard of the duty of care? (b) Did the defendant breach the standard of care? and (c) Did the breach of the standard of care cause harm to be suffered by the plaintiff? In the case at bar, the focus of discussion is on the duty of care

element, and in this regard, it is important to keep in mind that one cannot reason backward from an alleged breach of the standard of care or from the fact that an innocent party suffered harm to conclude that there was a duty of care.

[400] The fourth theme to note, which is relevant to the proximity and the incremental change issues discussed below, is that the case at bar represents an extension of the "Who is my neighbour?" circumstances in the parable of the Good Samaritan or of the problem addressed by Lord Atkin in *Donoghue v. Stevenson*. In legal jargon, the case at bar is a novel case for all of Bangladesh, English, and Canadian law.

[401] Visualize, the neighbourly act of the Good Samaritan was to come to aid of the man travelling to Jericho who had been injured in a robbery. Jesus, however, did not suggest that the Good Samaritan had an ethical duty to prevent the traveler from coming into harm's way, and Lord Atkin did not ask the legal question of whether there was a duty of care to prevent harm from being caused by a third person. In the immediate case, Loblaws and Bureau Veritas, who did not own or construct Rana Plaza or cause it to collapse, are accused of having and breaching a duty of care by not taking steps to protect the employees and others at Rana Plaza from the villainy of third parties.

[402] The fifth theme, which is closely related to the fourth, is that in legal doctrine there is a difference between misfeasance, where a person actively breaches his or her duty of care, and nonfeasance, where a person breaches his or her duty of care by omission by not doing something positive. Generally speaking, as the case law discussed below will reveal, the common law is disinclined to impose positive duties to protect others and it may take legislation to impose a duty to take positive steps.

[403] The sixth theme to note is that frequently in their arguments about what the law is or what the law ought to be in Bangladesh, England, or Ontario, the Plaintiffs rely on the notion that the common law develops incrementally, and that it is not plain and obvious that the apparent extension of negligence law called for in the immediate case is not within the reach of an incremental extension of the common law. In these arguments, the Plaintiffs use the incremental development principle as if it were an expansive and liberal principle. Unfortunately for the Plaintiffs, the incremental growth of the law principle in application is a restrictive, conservative, and cautionary principle, and it is not used in the liberal way the Plaintiffs would have it used. The incremental development principle is used in the conservative way the Defendants would have it used.

3. The Tort Claims under Bangladesh and English Law

(a) The Duty of Care Claims

[404] Ms. Kabir's research revealed that there were no applicable Bangladesh statutes that imposed any duty of care on Loblaws and that there were no Bangladesh common law precedents to support the existence of a duty of care owed by Loblaws or by Bureau Veritas to the Plaintiffs. Her research indicated that there were no Pakistani or Indian decisions that supported the Plaintiffs' theory of an actionable cause of action. In her opinion, duties of care have been imposed on the workers' employers or on the owners of the premises, but these duties have not been imposed on any parties in the circumstances of Loblaws, which was a purchaser of goods, or Bureau Veritas, which was retained to conduct a social audit and not an inspection of

the structural integrity of the premises where the goods were manufactured.

[405] Given that the Plaintiffs' claims were novel and unprecedented under the law of Bangladesh and insofar as a Bangladesh court might adopt English law as a precedent to establish the law, Ms. Kabir agreed with Dr. Goudkamp's opinion. Dr. Goudkamp's opinion, which I will examine in more detail momentarily, was that a duty of care would not arise in the circumstances of the case at bar and that the Plaintiffs' claims would not succeed under English law.

[406] Testifying for the Plaintiffs, Mr. Hossain agreed with Ms. Kabir that the Plaintiffs' tort claims and breach of fiduciary duty claim were novel, but his opinion was that the claims were viable under Bangladesh law.

[407] Relying on *Bangladesh Beverage Industries v. Rowshan Aktar*, *supra*, Mr. Hossain opined that a Bangladesh court in the future, faced with the novel duty of care might choose to recognize a new tort. In his opinion, Bangladesh courts will apply first principles and consider the jurisprudence from other jurisdictions, particularly India and England, and will recognize new torts from time to time when doing so is consistent with the principles of justice, equity, and good conscience. He said that the contract between Loblaws and Bureau Veritas supported the proposition that the Defendants had assumed a duty of care to the putative Class Members.

[408] The Plaintiffs, through Mr. Hossain, relied on four cases as supporting the existence of a duty of care in the immediate case; namely: (1) *Jay Laxmi Salt Words (P) Ltd. v. State of Gujarat*, 1994 SCC (4) 1, which is a *Rylands v. Fletcher* type claim involving strict liability for the discharge of dangerous substances from the defendant's property; (2) *M.C. Mehta and Anr v. Union of India*, 1987 AIR 1086, a similar case, relating to the discharge of oleum gas from a fertilizer factory; (3) *Essoo Bhayaji v. The Steamship "Savilri"* (1886), ILR 11 Bom. 133, an admiralty case involving ships colliding at sea; and (4) *Jadu Nath Dandput v. Hari Kar*, (1909), ILR 36 Cal 141, a suit for compensation for the wrongful cutting and removal of crops.

[409] I can quickly say that none of these cases mentioned by Mr. Hossain bear any reasonable resemblance to the case at bar, and these cases are not helpful to establish a duty of care on the facts of the immediate case. In contrast, his reference to *Bangladesh Beverage Industries v. Rawshan Aktar*, *supra*, discussed again below with respect to the vicarious liability cause of action, is meaningful.

[410] I can also quickly say that putting aside for the moment, the vicarious tort liability claims advanced against Loblaws, as a matter of making findings of fact about the state of Bangladesh tort law, in my opinion, not much ultimately turns on the competing evidence of Ms. Kabir and Mr. Hossain.

[411] Apart from the opposite conclusions - to which they respectively quantum leap - their research and their methodologies do not much differ. They agreed that the Plaintiffs' claims are novel and unprecedented, and they agreed that the courts of Bangladesh would be much influenced by the development of the law in England, where once again, the claims would be regarded as novel and unprecedented. To the extent that they are opposites, Ms. Kabir's and Mr. Hossain's opinions tend to neutralize each other, and their opinions rather focus attention on what is the more decisive factual battleground of the legal opinions of the English academics, to which I now turn.

[412] Again, putting aside for the moment, the vicarious tort liability claim advanced by the

Plaintiffs against Loblaws, a summary of Dr. Goudkamp's legal opinion and his argument about the tort liability of the Defendants may be summarized as follows. It was Dr. Goudkamp's opinion that:

a. The Plaintiffs' tort claims are novel and unprecedented, and the question to be answered about them is whether any of the tests used by English law to determine whether a duty of care exists are satisfied. In this regard, there are three major tests; namely: (1) the test from *Caparo Industries plc v. Dickman*, [1990] 2 AC 605 (HL); (2) the assumption of responsibility test; and (3) the incremental change test.

b. The test from *Caparo* is that a duty of care exists when: (1) it is foreseeable that if the defendant failed to take reasonable care, the plaintiff would be injured by the acts or omissions of the defendant (the foreseeability factor); (2) there is a relationship between the plaintiff the defendant characterized by the law as one of "proximity" or of being "neighbours" one to another (the proximity factor); and (3) as a matter of legal policy it would be fair and just to impose a duty of care on the defendant (the policy factor). Under the *Caparo* test, all the elements must be satisfied and foreseeability of injury alone is not enough to create a duty of care. See: *Smith v. Eric S. Bush*, [1990] 1 AC 831 (HL); *Van Colle v. Chief Constable of Hertfordshire Police,* 2008 UKHL 50.

c. Under the *Caparo* test, relevant policy factors include: (1) the vulnerability of the plaintiff; (2) whether the imposition of liability would be fair having regard to the defendant's control over the risk of harm to the plaintiff; (3) whether the imposition of liability is disproportionate to the gravity of the wrong; (4) whether the imposition of liability would entail indeterminate liability in the sense that nature, duration, and number of claims could not be realistically predicted or determined; (5) whether the imposition of liability would flood the court with claims; (6) whether the imposition of liability would open up a wide area of claims; (7) whether the imposition of liability would encourage defensive practices; i.e., socially undesirable behaviour modification; (8) whether the plaintiff had alternative remedies to a lawsuit; (9) whether the imposition of liability would disturb the contractual allocation of risk; and (10) whether the imposition of liability would adversely affect international trade or comity between nations. See: *Pacific Associates Inc. v. Baxter*, [1990] 1 QB 993 (CA); *Murphy v. Brentwood District Council*, [1991] 1 AC 398 (HL); *Page v. Smith*, [1996] 1 AC 155 (HL); *Marc Rich & Co. v. Bishop Rock Marine Co. Ltd.*, [1996] 1 AC 211 (HL); *White v. Chief Constable of South Yorkshire Police*, [1999] AC 455 (HL); *McFarlane v. Taylorside Health Board*, [2000] 2 AC 59 (HL); *Barrett v. Enfield London Borough Council*, [2001] 2 AC 55 (HL); *Customs and Excise Commissioners v. Barclays Bank plc*, 2006 UKHL 28; *Sutradhar v. Natural Environmental Research Council*, 2006 UKHL *33; Mitchell v. Glasgow City Council*, 2009 UKHL 11; *Cramaso LLP v. Ogilvie-Grant*, 2014 UKSC 9; *Ultrararest Corporation v. Touche*, 174 NE 441 (1932).

d. In the case of the Plaintiffs' claims against Loblaws and Bureau Veritas, the negligence claims fail the *Caparo* test for a duty of care because even assuming forseeability and a proximate relationship, the policy factors favouring a duty of

care are very few and they are overwhelmed by the policy factors that negate a duty of care. Visualize, in circumstances where the Plaintiffs may have alternative remedies, the imposition of liability against the Defendants would: (1) impose an unfair liability given that the Defendants did not create the danger, had no control over the circumstances that were dangerous, and had no control over the employers or employees or other occupants of Rana Plaza; (2) impose an indeterminate, and disproportionate liability; (3) inundate the courts with an expansive range of claims; and (4) encourage other potential defendants to socially detrimental defensive practices that could disturb the contractual allocation of risk, adversely affect similarly situated plaintiffs, the economy, and international trade.

e. Turning to the assumption of responsibility test, in the case of the Plaintiffs' claims against Loblaws and Bureau Veritas, the claims fail all three branches of the assumption of liability test. Generally speaking, a defendant does not assume responsibility to protect the plaintiff from the civil or criminal wrongdoing of third parties, but under the assumption of responsibility test, a defendant will have a duty of care to the plaintiff where: (1) the defendant has both subjectively and objectively voluntarily assumed responsibility for the plaintiff's safety (the assumption of duty factor); (2) the plaintiff relied on the defendant's assumption of responsibility (the reliance factor); and (3) as a matter of legal policy, it would be fair and just to impose a duty of care on the defendant (the policy factor). See: *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] AC 465 (HL); *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp*, [1979] Ch 384; *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 AC 145 (HL); *Williams v. Natural Life Foods Ltd.*, [1998] 1 WLR 830 (HL); *Customs and Excise Commissioners v. Barclays Bank plc*, *supra*; *Mitchell v. Glasgow City Council*, *supra*; *X v. Hounslow LBC*, 2009 EWCA Civ 286; *Michael v. Chief Constable of South Wales Police*, 2015 UKSC 2.

f. In the case of the Plaintiffs' claim against Bureau Veritas, the limited remit of its engagement with Loblaws, which did not require Bureau Veritas to address the structural integrity of Rana Plaza, is highly significant in defining whether Bureau Veritas had a duty of care, and based on this limited remit, the argument that there was a duty of care to investigate and warn about dangers to the structural integrity is unsustainable. Unless Bureau Veritas was obliged to examine the structural integrity of the Rana Plaza, it was a mere bystander insofar as the risks posed by its structural integrity were concerned.

g. Turning to the incremental test for a duty of care, this test posits that the law of negligence should develop incrementally and by analogy to existing categories and not by massive or radical extensions of the scope of the duty of care. See: *Chandler v. Cape plc*, 2014 EWCA Civ. 525; *Thompson v. Renwick Group plc*, 2014 EWCA Civ. 635; *Michael v. Chief Constable of South Wales*, *supra*. In the case of the Plaintiffs' claims against Loblaws and Bureau Veritas, the negligence claims fail the incremental test for a duty of care.

[413] Again, putting aside for the moment, the vicarious tort liability claim advanced against Loblaws, a summary of Dr. Morgan's legal opinion and his argument about the tort liability of

the Defendants may be summarized as follows. It was Dr. Morgan's opinion that:

a. The Plaintiffs' claims were novel, and in novel cases of whether a duty of care exists, the determination of whether the law should impose a duty of care required balancing policy factors including proximity, assumption of responsibility, incremental development, fairness, justice, reasonableness, nature of the injury (personal injury, injury to property, economic harm), and means of the infliction of the harm (direct, indirect).

b. Based on the allegations in the Statement of Claim being true, the policy factors in this case strongly favored the imposition of liability on the Defendants. Although Loblaws had not created the dangerous situation, nevertheless, it contributed to a dangerous situation by negotiating tight margins with stringent deadlines that would compel the suppliers to cut corners on worker safety and to send them back into the visibly disintegrating Rana Plaza. Economic necessity compelled the New Wave workers to work in notoriously dangerous conditions, and the Class Members' vulnerability to physical harm and their heavy dependence on the Defendants as a means to protecting them against risk was a powerful factor in favour of the Defendants being liable. In the case of the collapse of Rana Plaza, a duty of care was strongly arguable based on the policy factors favouring the imposition of liability and based on the assumption of responsibility doctrine. The countervailing policy arguments were unconvincing.

c. Although, in general, there is no duty to take positive action to protect others for being injured by third parties, liability may be imposed where a defendant has assumed responsibility to protect an individual against such harm. Based on Loblaws knowing of the history of garment factory collapses in Bangladesh and based on Loblaws voluntarily assuming responsibility for the garment workers' safety by adopting CSR standards and Supplier Terms and Conditions and by undertaking safety audits, it was reasonably foreseeable that if the Defendants negligently performed the audits, serious injury and death could result not only to the New Wave garment factory workers but also to the postman or anyone else present at the collapse.

d. The circumstances of the immediate case placed it in the category of cases involving a voluntary assumption of responsibility for another. These cases accept that a duty of care will be imposed where the defendant can be said objectively to have voluntarily assumed responsibility for the care of the plaintiff and the plaintiff reasonably relied on the defendant's undertaking of responsibility. There is a strong version of reliance but weaker versions of reliance will justify a duty of care when a defendant assumes responsibility for the safety of the plaintiff. See: *Smith v. Eric S. Bush (a firm)*, *supra*; *White v. Jones*, [1995] 2 AC 207 (HL); *Spring v. Guardian Assurance plc*, [1995] 2 AC 296 (HL); *Welton v. North Cornwall District Council*, [1997] 1 WLR 570 (CA).

e. Thus, a duty of care to the Plaintiffs could be found to exist based on assumption of responsibility, presence of control over the suppliers, and the vulnerability of the employees of the suppliers who were dependent on Loblaws, which knew of the failures of the public authorities and of the employers to protect employees.

The Class Members were extremely vulnerable and dependent on the Defendants, and the Class Members expected that the auditors (Bureau Veritas) and the Western corporations who employed them, Loblaws, would ensure their safety through the audits and inspections conducted at New Wave. The Class Members expected Loblaws, which knew about their dependency, vulnerability, and exposure to risk due to the systemic regulatory failures of the public authorities in Bangladesh to use its considerable *de facto* control to protect them from the highly foreseeable harm of unsafe working conditions including unsafe building structures.

f. There were signs in the case law that a weak kind of reliance by the plaintiff would suffice to establish liability. A strong form of reliance occurs where the plaintiff would have done something differently but for the defendants' undertaking of responsibility, but reliance also occurs in circumstances where the plaintiff is vulnerable and dependent on the defendant acting with reasonable care. In the immediate case, Class Members were utterly dependent on Loblaws and Bureau Veritas taking reasonable care to implement its undertakings to inspect the premises.

g. The Class Members were *de facto* completely dependent on Bureau Veritas making a careful audit of the safety of the Rana Plaza factory, including its structural safety. Unless Bureau Veritas did so, there was no real prospect of the Plaintiffs' safety being adequately protected, given the unwillingness or inability of New Wave to meet satisfactory standards of safety, and the vacuum in protection from governmental agencies in Bangladesh. Given that Bureau Veritas had extensive experience in auditing factories in Bangladesh, it must have known these notorious facts about safety across the Bangladeshi garment industry, and thus appreciated the Plaintiffs' dependence on them.

h. Although there is no general duty on a defendant to protect a plaintiff against harm inflicted by a third party even when the defendant has the power to prevent the harm from happening and although where there is third party agency, liability is the exception not the rule; nevertheless, imposing liability was justified in the case law in certain exceptional cases including: where the defendant initially created the dangerous situation; where the defendant had a special degree of control over the third party that caused the harm to the plaintiff; and where the defendant assumed responsibility for protecting the plaintiff from harm. In the case of the collapse of Rana Plaza, there was a case for imposing liability based on the circumstances of the case. See *Smith v. Littlewoods Organization Ltd.*, [1987] AC 241; *Henderson v. Merrett Syndicates Ltd., supra*; *Customs and Excise Commissioners v. Barclays Bank plc, supra*; *Michael v. The Chief Constable of South Wales Police, supra*.

i. It would be an incremental step in the law, and one supported by policy factors, to impose a duty of care on Loblaws and Bureau Veritas in the immediate case.

j. There are four cases that by analogy show that it would be an incremental step in the law to conclude that there was a duty of care in the novel circumstances of the Plaintiffs and the Defendants; namely: (1) *Clay v. AJ Crump & Sons Ltd.*, [1964]

> 1 QB 533 (CA); (2) *Perrett v. Collins and others*, [1998] 2 Lloyd's Rep 255 (CA); (3) *Phelps v. Hillingdon London Borough Council*, [2001] 2 AC 619 (HL) and (4) *Watson v. British Boxing Board of Control*, [2001] QB 1134 (CA).

[414] It is an oversimplification of the analysis that follows, but insofar as I am making findings of fact about the law of Bangladesh, I can say that I was persuaded by Dr. Goudkamp's opinion and I was not persuaded by Dr. Morgan's opinion. Further, I agree with much of Dr. Goudkamp's criticism of Dr. Morgan's analysis of English law as applied to the circumstances of the immediate case. Conversely, I disagree with much of Dr. Morgan's criticism of Dr. Goudkamp's analysis of English law as applied to the circumstances of the immediate case. I agree with Dr. Goudkamp's criticisms that Dr. Morgan has unduly relied on the assumption of responsibility line of authorities and misunderstood and misapplied those authorities. I agree with Dr. Goudkamp and not with Dr. Morgan about the lessons to be learned from the *Caparo* test, the assumption of responsibility test, and the incremental test of a duty of care. I disagree with Dr. Morgan's analysis of the policy factors and his conclusion that the balancing of those factors supports a duty of care in the immediate case.

[415] The essayist H.L. Mencken said a judge is a law student who marks his own examination papers, and I would give Dr. Goudkamp the much higher grade about the law of England that likely would be followed in Bangladesh, and, I accept Dr. Goudkamp's opinion evidence as expressing the law that would be applied in Bangladesh. Much of Dr. Morgan's evidence supports Dr. Goudkamp's opinion, and where Dr. Goudkamp disagrees with Dr. Morgan, I prefer Dr. Goudkamp's view of the law.

[416] With respect to the law of Bangladesh, there are five major reasons why I give a lower grade, or to return to legal parlance, much lesser weight to the opinion evidence of Dr. Morgan.

[417] First, I give lesser weight to Dr. Morgan's opinion because in arriving at his opinion, he fell into the fallacy, discussed above, of not differentiating material factual allegations, which a court may accept as proven for the purposes of determining whether a reasonable cause of action has been pleaded, from pleaded arguments and opinions that a duty of care exists, which the court cannot accept and rather just beg the question of whether there is a reasonable cause of action. As I have explained above, the Plaintiffs' Statement of Claim is replete with arguments that beg or simply assert that a constituent material fact necessary for a duty of care exists or just asserts that a duty of care exists.

[418] An example of this weakness in his opinion may be seen in how Dr. Morgan treats the reliance factor in the assumption of responsibility test for a duty of care, which is a test that he relies on to conclude that there is a duty of care. Another example of Dr. Morgan assuming that a pleaded conclusion is a material fact is his treatment of the necessity of Loblaws having the ways and means (control) to carry out a duty to protect its suppliers' employees, which is a lynchpin to his opinion, but which factor he essentially just assumes to be satisfied as a matter of pleading. Thus, I agree with what Loblaws argues at para. 155(c) of its factum, where it states:

> 155(c) The issue of control is important in this case, because the agreement between the Loblaw Defendants and Pearl Global, which is incorporated by reference into the Claim, only gives the Loblaw Defendants the right to rescind their orders if Pearl Global does not comply with the CSRs. It does not purport to give the Loblaw Defendants any right to control the actions of New Wave, which is not even a party to the agreement (for example, by requiring it to remedy building defects or not order employees back to work). Even more self-evidently, it does not purport to give the Loblaw Defendants any power whatsoever to control the other businesses operating out of

> Rana Plaza, with whom they had no relationship. When Dr. Morgan was asked whether he agreed that the Loblaw Defendants had no ability to control the other businesses operating out of Rana Plaza, counsel for the plaintiffs refused to allow him to answer.

[419] Second, I give lesser weight to Dr. Morgan's opinion, because I agree with Dr. Goudkamp's criticism that Dr. Morgan has underappreciated the strength of the tort law principles that draw between misfeasance and nonfeasance and that do not generally impose a duty of care to intervene to protect another person from even a foreseeable risk of harm from third parties. I agree with Dr. Goudkamp that *Mitchell v. Glasgow City Council*, *supra* and *Michael v. Chief Constable of South Wales Police*, *supra*, discussed below, stands against and not for a duty of care existing in the immediate case.

[420] *Mitchell v. Glasgow City Council*, *supra* demonstrates the difficulties confronting the Plaintiffs in the immediate case in establishing that a person, even a person with whom the plaintiff has a relationship, has a duty of care to take positive steps to protect the plaintiff from even a foreseeable risk of harm from a third party.

[421] In *Mitchell v. Glasgow City Council*, the plaintiff Mitchell and one Drummond were neighbouring tenants in a public housing project managed by the defendant City of Glasgow. They had lived side-by-side from the mid-1980s. In 1995, Drummond responded to a request that he stop playing loud music by battering down Mitchell's door and smashing his windows. The police were called, and Drummond threatened to kill Mitchell. There were further incidents, and the City warned Drummond that they would take steps to evict him. There were still further incidents, and the City began eviction proceedings, and before those proceedings were completed, there was yet another incident. The City summoned Drummond to a meeting, which angered him further. After the meeting, Drummond murdered Mitchell. Mitchell's Estate sued the City for not alerting Mitchell that Drummond might retaliate against him. The Estate's case was that if warnings had been given, Mitchell would not have died. The House of Lords upheld the lower court decision dismissing the action against the City of Glasgow.

[422] Five judgments were delivered. In his judgment, Lord Hope of Craighead noted that there was a relationship, tenant and landlord, between Mitchell and the City, and Lord Hope made three legal points that are particularly pertinent to the duty of care issues in the case at bar; namely: (1) foreseeability of harm is not of itself enough for the imposition of a duty of care; (2) the law does not normally impose a positive duty on a person to protect others; and (3) the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability. Thus, Lord Hope stated at para. 15:

> 15. Three points made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care: …. Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 at 192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith v Littlewoods Organisation Ltd*. at 76, the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability: *Smith v Littlewoods Organisation Ltd*. at 77-83, per Lord Goff.

[423] In his judgment, referring to the Parable of the Good Samaritan and to Lord Atkin's judgment in *Donoghue v. Stephenson*, Lord Scott of Foscote reiterated the points made by Lord

Hope. Lord Scott drew the distinction between moral duties and legal duties to protect or come to the aid of another. At para. 39 of his decision, Lord Scott stated:

> 39. It is a feature of the common law both of England and Wales and of Scotland that liability in negligence is not imposed for what is sometimes described as a "mere" omission …. Yet it is accepted in both jurisdictions that the Pharisee who passed by the injured man on the other side of the road would not, by his failure to offer any assistance, have incurred any legal liability. A legal duty to take positive steps to prevent harm or injury to another requires the presence of some feature, additional to reasonable forseeability that a failure to do so is likely to result in the person in question suffering harm or injury. The Pharisee, both in England and Wales and in Scotland would have been in breach of no more than a moral obligation.

[424] In *Mitchell v. Glasgow City Council*, Lord Roger of Earlsferry could see no identifiable principle on which it would be appropriate to impose liability on the City for the loss and injury caused to Mitchell by Drummond's criminal act. Baroness Hale of Richmond agreed that the negligence claim should be dismissed, and she said that three points stood out; namely: (1) foreseeability of harm is not by itself sufficient to impose a duty of care; (2) foreseeability alone is not enough to impose a duty to safeguard a person from the criminal acts of third parties; and, (3) it is not fair, just and reasonable to impose a duty of care where perfectly proper actions are taken for the general good of the community but another person is provoked to commit a criminal act. Lord Brown of Eaton-under-Heywood wrote a short concurring judgment.

[425] Third, I give lesser weight to Dr. Morgan's opinion, because I agree with Dr. Goudkamp's criticism that Dr. Morgan has misunderstood and misapplied the assumption of responsibility test, and I agree with Dr. Goudkamp's opinion that this basis for liability, which is an exception to the major general principle of negligence law that a defendant does not assume responsibility to protect the plaintiff from the civil or criminal wrongdoing of third parties, does not apply to the circumstances of the immediate case.

[426] Dr. Morgan conceded: (a) that there were no cases in which a company had been held to owe a duty of care in negligence to employees of a supplier; (b) that none of the cases on voluntary assumption of responsibility discussed in his reports have a strong factual similarity to the Plaintiffs' claims in the immediate case; and (c) that there is no general duty to rescue persons or protect them from harm inflicted by a third party, even in cases where physical harm is foreseeable and the person is vulnerable. Dr. Morgan had to strain, contort, and stretch the existing law about the assumption of responsibility. Generally speaking, negligence law is disinclined to impose duties of a care on parties at extended degrees of proximity and negligence law recognizes the difference between modifying misfeasant or malfeasant behaviour and modifying nonfeasant behaviour.

[427] In *Michael v. Chief Constable of South Wales Police*, *supra* the facts were that Ms. Michael's partner had left their home after he found her with another man but threatened to return soon and kill her. She dialed 999 (England's equivalent to 911) and the call was taken by the Gwent Police, although she lived in the vicinity of the South Wales Police in Cardiff. The civilian call handler graded the call as an emergency requiring an immediate response and immediately contacted the South Wales Police, but, unfortunately and carelessly, he did not mention the urgency. The South Wales Police, which were five minutes away from Ms. Michael, graded the call as just requiring a response within 60 minutes. Meanwhile, Ms. Michael's partner returned and brutally killed her, orphaning her two young children. Ms. Michael's Estate and her two children sued both police departments for negligence. The Supreme Court of England upheld the decision of the Court of Appeal dismissing the negligence action. Lord Toulson (Lord

Neuberger, Lord Mance, Lord Reed and Lord Hodge concurring) wrote the majority decision. Lord Kerr and Lady Hale wrote dissenting judgments.

[428] Having regard to the outcome, it is difficult to see how *Michael v. Chief Constable of South Wales Police*, *supra* could be of assistance to the Plaintiffs in the immediate case in establishing that the Defendants owed them a duty of care.

[429] The Plaintiffs' difficulty is intensified by the additional circumstance that unlike purchasers of goods, police do, in law, owe a common law public duty of preserve the peace and to provide such protection as was necessary to prevent violence and crime. This is a public duty. However, police do not owe a private law duty of care to protect individual members of the public from the risk of violent crime. At para. 97 of his judgment, Lord Toulson noted that English law does not, as a general rule, impose liability on a defendant for injury or damage to person of property of a plaintiff caused by the conduct of a third party: *Smith v. Littlewoods Organization Ltd.*, *supra*.

[430] However, Lord Toulson noted that there were two well-recognized statutory exceptions, and it seems that the Plaintiffs in the case at bar take some sustenance from the two exceptions; i.e. first, where the defendant was in a position of control over the third party and should have foreseen the likelihood of the third party causing damage to somebody in close proximity if the defendant failed to take reasonable care in the exercise of that control; and second, where the defendant assumes a positive responsibility to safeguard [the plaintiff] under the *Hedley Byrne* principle. Thus, Lord Toulson stated at paras. 99-100:

> 99 The first is where D [defendant] was in a position of control over T [third party] and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. *Dorset Yacht* is the classic example, and in that case Lord Diplock set close limits to the scope of the liability. As Tipping J explained in *Couch v Attorney-General*, this type of case requires careful analysis of two special relationships, the relationship between D and T and the relationship between D and C [complainant/plaintiff]. I would not wish to comment on Tipping J's formulation of the criteria for establishing the necessary special relationship between D and C without further argument. It is unnecessary to do so in this case, since Ms. Michael's murderer was not under the control of the police, and therefore there is no question of liability under this exception.
>
> 100. The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v Guardian Assurance Pie*. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive. This principle is the basis for the claimants' main submission, to which I will come (issue 3). There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially.

[431] The problem for the Plaintiffs in the immediate case is that upon analysis, their case does not fall within the scope of either exception noted by Lord Toulson. With respect to the first exception, in *Dorset Yachts*, young offenders out in public under the supervision of prison authorities escaped and went on a rampage, which is not a comparable situation to Loblaws purchasing goods from a supplier subject to CSR standards, and as Lord Toulson notes, a full-scale duty-of-care analysis is required of the relationship between the plaintiff and the defendant. With respect to the second exception, it alludes to the assumption of liability doctrine, and that too requires a careful analysis to determine whether it might apply. On this point, Lord Toulson said at para. 138:

> 138. Mr, Bowen submitted that what was said by the Gwent call handler who received Ms. Michael's 999 call was arguably sufficient to give rise to an assumption of responsibility on the *Hedley Byrne* principle as amplified in *Spring v Guardian Assurance Pie*. I agree with the Court of Appeal that the argument is not tenable. The only assurance which the call handler gave to Ms. Michael was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond. She told Ms. Michael that they would want to call her back and asked her to keep her phone free, but this did not amount to advising or instructing her to remain in her house, as was suggested. Ms. Michael's call was made on her mobile phone. Nor did the call handler's inquiry whether Ms. Michael could lock the house amount to advising or instructing her to remain there. The case is very different from *Kent v. Griffiths* where the call handler gave misleading assurances that an ambulance would be arriving shortly.

[432] As for the judgments of the dissenting judges in *Michael v. Chief Constable of South Wales Police*, they are of no assistance to the Plaintiffs in the immediate case. Lord Kerr and Lady Hale reasoned that the time had come to extend the public liability of police officers to save and protect, in a limited way, into a private law duty of care. In the immediate case, the Defendants have no public law duties, and the claim against them remains a novel claim that requires its own duty-of-care analysis. The dissenting judges undertook that analysis adopting the *Caparo* analysis and concluded that the police forces owed Ms. Michael a duty of care. Lord Kerr stated at paras. 174-175:

> 174. As Lord Toulson states, English law has not generally imposed liability for the acts of a third party because of the traditional rule that the common law did not normally impose liability for pure omissions. A number of significant exceptions to that traditional rule have been recognised, however, as Lord Toulson has said. In particular, the assumption of a duty to take positive action is one such exception. As he has also pointed out, "assumption of responsibility" is in many instances a misnomer because this is in fact a duty imposed by the court.
>
> 175 In my view, the time has come to recognise the legal duty of the police force to take action to protect a particular individual whose life or safety is, to the knowledge of the police, threatened by someone whose actions the police are able to restrain. I am not convinced that this requires a development of the common law but, if it does, I am sanguine about that prospect. Certainly, I do not believe that rules relating to liability for omissions should inhibit the law's development to this point.

[433] In the case at bar, the Plaintiffs also rely on *Chandler v. Caple plc, supra*, where the English Court of Appeal recognized that in exceptional cases a parent company might owe a duty of care to the employees of one of its subsidiaries. However, the duty to the subsidiary's employees that was recognized in *Chandler v. Caple plc*, arose where the subsidiary was, practically speaking, a division of the parent company and the parent company had extensive knowledge of the dangerous working conditions and what to do about them. A duty of care to a subsidiary's employees was not found in *Thompson v. Renwick Group plc, supra,* where the parent corporation was just a holding company.

[434] In the case at bar, while Loblaws may have been aware of dangerous working conditions in Bangladesh, it was not an operating parent company carrying on the same business as the subsidiary whose workers were toiling in the dangerous workplace. The major point remains that the common law strongly holds that foreseeability of harm by itself is insufficient to create a duty of care and that, generally speaking, there is no duty to protect third parties from the criminal acts of others.

[435] Even more to the point, New Wave was not Loblaws' subsidiary; rather, it was a sub-supplier to one of Loblaws' subsidiaries and Loblaws had no direct control over New Wave and only limited indirect control over New Wave through its CSR standards and no control over the workplace and over the employees working there. Further, in addition to serious doubts that the

proximity factor of a duty of care was satisfied, there are substantial policy reasons to negate any duty of care, assuming the proximity factor was satisfied.

[436] Dr. Morgan's theory that the assumption of responsibility case law applied to the facts of the case and that it supported a duty of care was not persuasive. An analysis of the case law rather refuted his conclusions: (a) that the Defendants objectively assumed responsibility for the safety of a sub-supplier's employees and to proactively protect them from dangerous premises; (b) that even in the absence of what the law regards as actual reliance, the Plaintiffs relied in a legally meaningful way on the Defendants assuming responsibility for their safety; and (c) that the dependency and vulnerability of the Plaintiffs made it just and fair to be impose a duty of care on the Defendants and negated the policy factors that stood against a duty of care.

[437] I agree with Dr. Goudkamp and not with Dr. Morgan that the reliance element of the assumption of responsibility test has not been satisfied in the case at bar, and I agree with Dr. Goudkamp's critique that Dr. Morgan has misunderstood or misapplied cases in which a weak form of reliance has established a duty of care. I agree with Dr. Goudkamp that the cases are examples of strong reliance, or the cases are distinguishable from the circumstances of the case at bar. More to the point, weak or strong reliance presupposes some form of subjective expectation in the reliant person. With the possible exception of some New Wave employees, the persons who found themselves at Rana Plaza on the day of the collapse of the building would have no expectations or even knowledge of Loblaws' or Bureau Veritas' role in not preventing the tragedy arising from the collapse of the building.

[438] As for the New Wave employees, the idea of expectations and reliance on the Defendants is just a pleader's artifice. The Statement of Claim alleges that Bureau Veritas audited the New Wave factories to protect worker safety and interviewed New Wave's employees and thus it is alleged that the putative Class Members had an expectation that these audits would address health and safety concerns to minimize the putative Class Members' exposure to unreasonable risk of injury and death. With no disrespect intended, the New Wave employees, many of them illiterate in Bangla and in English, would not know about, depend upon, or be influenced by CSR standards, social audits, or the contractual arrangements between Loblaws, Pearl Global, New Wave, and Bureau Veritas in coming to work at Rana Plaza. They would have come to work regardless of Loblaws' CSR standards.

[439] If the expectations upon which reliance is allegedly based are built upon observing Bureau Veritas at work, then most of the New Wave employees could not have any expectation because Bureau Veritas never audited the premises occupied by New Wave Bottoms and some of the employees at New Wave Style were hired after the audits had occurred or for other reasons would not have been aware of Loblaws' or Bureau Veritas' role at Rana Plaza. Pleading that an employee was interviewed by a Bureau Veritas' auditor is not a material fact that could possibly lead to the conclusion that either subjectively or objectively, the employee would expect at all or reasonably believe that the Bureau Veritas auditor would undertake a structural inspection of Rana Plaza and assume a duty of care to protect the employee from entering into a dangerous building.

[440] Fourth, I give lesser weight to Dr. Morgan's opinion because Dr. Morgan's theory about the scope of the duty of care was neither reliable nor logically defensible. In his first report, in his opinion, the duty of care extended to the employees of New Wave, who were determinate at least in the sense that the employer would have a payroll to identify the employees, but in his

subsequent reports and in his cross-examination, Dr. Morgan had to stretch his theory of the ambit of the duty of care to putative Class Members who had very remote proximity to Loblaws, including the postman making deliveries to Rana Plaza. Further, Dr. Morgan would include within the ambit of the duty of care New Wave employees and employees of other manufacturers who knew nothing of Loblaws' and Bureau Veritas' involvement at Rana Plaza. Despite these vagaries about who could be identified as a putative Class Member, who actually could only be identified after the fact by being a victim of the collapse, Dr. Morgan persisted in saying that there was a determinate class size. His arguments appear to be just a stretch to maintain class size.

[441] I agree with Dr. Goudkamp that even if there was an assumption of responsibility upon which to base a duty of care, Dr. Morgan was wrong in extending this duty of care beyond the putative Class Members who were employed by New Wave. Regardless of what the Statement of Claim may allege as to the extent of the foreseeability of harm, proximity, and the Defendants' duty of care, Loblaws had no relationship with persons resident or transient to Rana Plaza based on the fact these persons were in the environs of a place where Loblaws was doing business by purchasing goods. It is inconceivable that the postman etc. and the workers on all but two floors of Rana Plaza would rely on Bureau Veritas social audit in deciding whether to come or go to work.

[442] Further, I agree with Dr. Goudkamp's criticism that even if Loblaws or Bureau Veritas could be said to have a duty of care to the Plaintiffs, then it does not follow that the scope of the duty would encompass the alleged wrongdoing in the case at bar, which concerns a responsibility to ensure that the workers are not imperilled by the structural defects of the Rana Plaza. Insofar as Bureau Veritas had a duty of care to some or all of the putative Class Members, the scope of that duty did not extend to keeping them safe or warning them about structural defects. Regardless of the cleverness, rhetoric, or artifice of the Plaintiffs' Statement of Claim, a review of the Bureau Veritas retainer reveals that it had no responsibility to inspect or to give warnings about the structural integrity of Rana Plaza.

[443] Here, an analogy is helpful. A public health inspector inspects a restaurant and fails to warn that the equipment in the restaurant is contaminated by bacteria. The public health inspector also fails to warn about a possible structural defect in a barring wall of the restaurant. A few days later, the restaurant's premises collapses and the patrons who happened to be in the restaurant are injured. The patrons sue the public health inspector and allege that the public health inspector owed them a duty of care. This allegation of a duty of care would be true insofar as any patrons suffered from food poisoning but not insofar as the patrons suffered injuries from the collapse of the restaurant's premises.

[444] *Clay v. AJ Crump & Sons Ltd., supra,* one of the four cases that the Plaintiffs say shows that their novel claim would be an acceptable incremental development in the law, rather demonstrates how a person in the position of Bureau Veritas, which has entered into a service contract, could be exposed to a claim by a third party for negligence in the performance of the contract under the current law in certain circumstances that do not apply to the case at bar. Bureau Veritas does not dispute the authority of *Clay v. AJ Crump & Sons Ltd., supra* and in oral argument acknowledged that if it had negligently performed some service within the ambit of its social audit and a New Wave Style employee was injured as a result, then Bureau Veritas would be exposed to liability. However, Bureau Veritas says it could not be negligent for failing to address matters associated with the structural integrity of Rana Plaza, which was outside its

contractual responsibilities.

[445] The facts of *Clay v. AJ Crump & Sons Ltd., supra*, were that a landowner hired an architect to plan and supervise the redevelopment of a site, and the architect ordered the demolition of the buildings on the site and prepared plans for a new building. However, the owner asked for a change in the plans. The owner wished to retain a wall from the old building. Without inspecting and confirming that construction could safety continue while keeping the wall, the architect changed the plans. Subsequently, the wall collapsed. A labourer working at the site was seriously injured. The labourer sued the architect, among others. The English Court of Appeal held that since the architect knew that building contractors were working on the site, it should reasonably have foreseen that if it left a wall standing it might fall and injure the building contractors' employees, and, accordingly, it was under a duty of care to the plaintiff.

[446] Bureau Veritas agrees with the authority of *Clay v. AJ Crump & Sons Ltd., supra* because the architect's liability arose out of his retainer. The architect changed the building plans, and it is just and fair that the architect should be liable for the injuries caused just as it would be just and fair to make them liable if the new building had collapsed because of a negligent design. In the case at bar, Bureau Veritas' point, with which I agree, is that although its duty of care may well extend to persons with whom it has no contractual relationship, the contract, in this case, a limited remit for a social not a structural audit, still remains relevant to determining the ambit of that duty of care. I will reiterate this point in my discussion of Canadian law later in these Reasons for Decision.

[447] Further still, I agree with the argument in Bureau Veritas' factum that even if it had a duty of care, it could not have lasted in perpetuity and certainly not long past the termination of its retainer. I note, as did Bureau Veritas, that during his cross-examination, Dr. Morgan was asked if Bureau Veritas could have owed a duty after the contract was terminated, and he agreed that it could not with regard to the action to be taken on April 23, 2013.

[448] Fifth, I give lesser weight to Dr. Morgan's opinion because Dr. Morgan's arguments about the policy factors that bear upon the duty-of-care analysis is not persuasive nor is the Plaintiffs' argument that the policy factors debate should be left to be decided at trial. I agree with Dr. Goudkamp's criticism that Dr. Morgan has wrongly written out policy factors from the assumption of responsibility test and has understated them in general and specifically in regard to the *Caparo* test.

[449] As I shall explain again in my discussion below of the law in Ontario, the policy factors, both as a matter of English law and as a matter of Canadian law, negate the existence of a duty of care in the immediate case.

[450] In particular, I disagree with Dr. Morgan's conclusion that indeterminate liability is not a policy factor in the immediate case because the liability in the immediate case is not indeterminate. In the immediate case, there is no principled basis upon which to draw the line between those to whom a duty of care is owed and those to whom it is not. Neither Loblaws nor Bureau Veritas control or could control the number of people coming to Rana Plaza nor could they limit the duration or the amount of their exposure to liability. Further, I agree with Dr. Goudkamp's criticism that Dr. Morgan has unjustifiably privileged the fact that the Plaintiffs are vulnerable as a policy basis for imposing a duty of care. While the plaintiff's vulnerability is a policy factor, the mere fact that a plaintiff is vulnerable does not entail that he or she will be owed a duty of care by any particular defendant. Proximity and the idea of fairness remain

factors even for the vulnerable. To return to the Good Samaritan parable, the victim on the side of the road was vulnerable, but that in and of itself will not determine whether he is owed a duty of care under the law.

[451] While I agree with the Plaintiffs that there are policy considerations in favour of recognition of a novel duty, including: (a) accountability by Canadian corporations who enjoy substantial profits from holding themselves out as responsible corporate citizens; (b) preventing Canadian corporations from exploiting the regulatory vacuum in developing countries, particularly when doing so places vulnerable workers at risk of death or grave bodily harm, and (c) advancing the common law duty of care in a manner that reflects the globalized economy in which Canadian entities participate; however, I part company from the Plaintiffs and with Dr. Morgan in being dismissive of the competing policy factors that would negate a duty of care in the circumstances of the immediate case.

[452] I agree with Dr. Goudkamp that the negative policy factors displace any duty of care in the case at bar. I also agree with Dr. Goudkamp that the liability sought to be imposed in the circumstances of the immediate would be disproportionate and would inundate the court with claims. And I agree that the imposition of liability would encourage other potential defendants to adopt socially detrimental defensive practices that would adversely affect similarly situated plaintiffs and the economies of their nations. Even if I am wrong and Dr. Morgan is correct that there is no indeterminate liability in the circumstances of the immediate case because after the fact, the number of dead and wounded can be counted, the other policy factors, including the fairness aspect of the proximity test and the law's hesitancies to impose liability for nonfeasance and to impose a duty of care to protect the plaintiff from harm caused by a third party, overwhelm any *prima facie* duty of care.

[453] In *Customs and Excise Commissioners v. Barclays Bank plc*, *supra*, Brightstar Systems and Doveblue Ltd. owed the Customs and Excise Commissioners large sums of unpaid VAT (value added taxes). Concerned that Brightstar and Doveblue might dissipate their assets to defeat judgments that the Commissioners were likely to obtain, they obtained a *Mareva* injunction, a freezing order. The order was served on Barclays Bank which within hours negligently authorized a £1.2 million payment out of Brightstar's account and a £1.0 million payment out of Doveblue's account. The Commissioners subsequently obtained a judgment of £2.2 million against the judgment-proof Brightstar and a judgment of £4.0 million against the judgment-proof Doveblue. The Commissioners then sued Barclays for negligence for the payments it ought not to have made in the face of the freezing order. Restoring the judgment of the motions judge, the House of Lords dismissed the action on the basis that Barclays Bank did not owe the Commissioners a duty of care.

[454] In *Customs and Excise Commissioners v. Barclays Bank plc*, the principal reasons for dismissing the action were that there was no case law that supported a duty of care and neither the *Caparo* test nor the assumption of responsibility test were satisfied. All of the Law Lords concluded that it would not be just and fair to impose liability on the bank. In this regard, Lord Bingham of Cornwall stated at para. 23 of his judgment and Lord Mance stated at para. 111 of his judgment:

> 23. Lastly, it seems to me in the final analysis unjust and unreasonable that the Bank should, on being notified of an order which it had no opportunity to resist, become exposed to a liability which was in this case for a few million pounds only, but might in another case be for very much more. For this exposure it had not been in any way rewarded, its only protection being the

> Commissioners' undertaking to make good (if ordered to do so) any loss which the order might cause it, protection scarcely consistent with a duty of care owed to the Commissioners but in any event valueless in a situation such as this.
>
> ….
>
> 111. There is no analogy between any of these cases and the present. The recognition of a duty of care in the present case would not be closely incremental upon any existing duty. Here, the bank has not been entrusted by statute or otherwise with the provision of any public service. It has simply been notified of an order made by the court in favour of a claimant, and warned that it will be liable for contempt if it knowingly assists or permits a breach of that order. In a case of contempt, the court has control of the situation and a discretion which enables it to match the appropriate penalty to the seriousness of the particular contempt. It may be said that, if the court can revoke the bank's contractual mandate from its customer and can impose on the bank a potential liability for contempt in a case of knowing assistance in or permission of a breach, the court may also go further and impose a duty on the bank towards the claimant to take care to avoid any disposition of the defendants' frozen assets contrary to the freezing order. But that would be to impose a liability on an involuntary third party which would be outside the court's control, and which might be measured in very large sums, even for quite venial fault. The amounts caught by a freezing order can be very large, even though one would usually expect a third party notified of such an order to be able to ascertain quite quickly, from the order itself and from its own records, how much is actually caught by such an order. Nor does it seem to me that such a liability is required to maintain standards or ensure good practice. In practice, banks must and will try to do their best to ensure compliance with freezing orders, while their clients are, as this case shows, likely to try to evade them. Problems are, as here, most likely to arise at the very outset of such orders, when assets have not been fully ascertained or all possible avenues of evasion have not been closed.

[455] Returning to the immediate case and the policy factors, it is difficult to dispute that Loblaws' liability would be disproportionate to its nonfeasance and that a holding that there is a new category for negligence claims would prompt a deluge of similar cases based on an assumption of responsibility, and it is difficult to imagine that Loblaws would continue to do business with any manufacturer in a country like Bangladesh in the future.

[456] In the case at bar, Loblaws purchased approximately $6 million of goods from Pearl Global, just a small amount of its business in Bangladesh, since it purchased from approximately 70 other manufacturers, but Loblaws is now exposed to a potential liability of over $2 billion just from its trading with Pearl Global. Loblaws' liability is based on it voluntarily assuming a duty of care by developing and promulgating ethical purchasing practices (CSR standards,) which one would like to think is a good thing, but from an exposure to liability perspective, Loblaws would have been far better off if it had not developed and promulgated its CSR standards, and in the future it and others would be far better off not doing business with Bangladesh rather than relying on CSR standards, which as demonstrated by the case at bar, do not insulate a business from liability but rather attract claims, including allegations that the duty of care was breached because the CSR standards were inadequate to protect a supplier's or sub-supplier's employees.

[457] In considering the policy factors, I also agree with Dr. Goudkamp that the imposition of liability is unfair given that the Defendants are not responsible for the vulnerability of the plaintiffs, did not create the dangerous workplace, had no control over the circumstances that were dangerous, and had no control over the employers or employees or other occupants of Rana Plaza.

[458] Thus, putting aside the vicarious liability claim, considered next, I conclude that under the law of Bangladesh the Plaintiffs have not disclosed a reasonable cause of action in tort

against either Defendant.

(b) The Vicarious Liability Claim against Loblaws

[459] Turning to the vicarious tort liability claim advanced against Loblaws, it is convenient to address together the legal viability of this claim under the law of Bangladesh and under the law of Ontario. The laws of both jurisdictions have roots in English common law and for all practical purposes and for present purposes the law to be examined is identical.

[460] Ms. Kabir opined that under the law of Bangladesh, there was no support for the argument that Loblaws would be vicariously liable for the acts or omissions of Pearl Global or New Wave, which were independent contractors and not employees of Loblaws.

[461] With respect to the vicarious liability claim against Loblaws, Dr. Goudkamp's legal opinion and his argument is as follows:

a. Under English tort law, vicarious liability is imposed in specified circumstances, including liability for the wrongdoing of employees, but subject to rare exceptions, vicarious liability is not imposed on defendants for the conduct of their independent contractors. See: *Black v. Christchurch Finance Co. Ltd.*, [1894] AC 48 (PC); *Honeywill and Stein Ltd. v. Larkin Brothers (London's Commercial Photographs Ltd.*, [1934] 1 KB 191 (CA); *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 AC 375 (PC); *Biffa Waste Services Ltd. v. Machinenfabrk Ernst Hese GmbH*, 2008 EWCA Civ. 1258; *Various Claimants v. Catholic Child Welfare Society*, 2012 UKSC 56, *Woodland v. Swimming Teachers Association*, 2013 UKSC 66.

b. In the immediate case, there is no basis to impose vicarious liability on Loblaws for the conduct of Pearl Global and New Wave.

[462] Relying on *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter*, *supra*, which is an example under Bangladesh law of a vicarious liability claim against Bangladesh Beverage for the dangerous driving of its employee during the course of his employment, Mr. Hossain opined - and this point is not disputed - that Bangladesh law includes the idea of vicarious liability for the torts of others in some situations, most especially in situations of an employer-employee relationship. It was Mr. Hossain's opinion that the Plaintiffs' claims came within the law of Bangladesh, notwithstanding that there was no employment relationship between Loblaws and Pearl Global much less between Loblaws and New Wave.

[463] In his cross-examination, Mr. Hossain explained that in the absence of authority directly on point, Bangladeshi Courts will look to the decision of the Supreme Court of India. He relied on *M.C. Mehta and Anr v. Union of India, supra.* In that case, the Supreme Court of India departed from the approach set out in English authorities and found that a non-delegable duty may be imposed on enterprises engaged in a hazardous or inherently dangerous industry that poses a threat to the health and safety of the persons working in the factory and residing in the surrounding area.

[464] With respect to the vicarious liability claim against Loblaws, Dr. Morgan repeated his argument that liability could be imposed based on the assumption of responsibility, even if the defendant was not directly responsible for the care, control or custody of the plaintiff. In particular, Dr. Morgan relied on *Woodland v. Swimming Teachers Association*, *supra*, and he

said that the Plaintiffs' case at bar was one those rare cases where it would be appropriate to impose vicarious liability on a defendant for the wrongdoing of an independent contractor because of a non-delegable duty of care.

[465] Thus, the Plaintiffs allege that Loblaws is vicariously liable for the negligence of Pearl Global and New Wave, because (a) Loblaws controlled and benefitted financially from New Wave and Pearl Global by sub-contracting to them to reduce the costs of goods; (b) its subcontractor engaged in an inherently dangerous activity such as garment production in Bangladesh; and (c) Loblaws had a non-delegable duty to ensure worker safety in these circumstances. The Plaintiffs plead as a material fact that the garment industry in Bangladesh is inherently dangerous given the widespread violations of applicable laws and regulations, perpetual construction of additional floors without requisite permits, and the absence of regulatory oversight or compliance.

[466] The Plaintiffs submit that the absence of an employment relationship between Loblaws and New Wave or Pearl Global is not determinative of the analysis of vicarious liability. Relying on the ideas of inherently dangerous activities and non-delegable duties of care, the Plaintiff submits that if a principal grants authority to an independent contractor to deal with the principal's legal rights, then an agency relationship is created and the principal will be liable for the wrongful acts of the agent though the agent is an independent contractor provided that the agent is acting within the scope of his or her actual, apparent, or usual authority.

[467] In advancing this argument, the Plaintiffs rely on both English and Canadian authorities; namely: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2011 SCC 59*; Straus v. Decaire*, 2011 ONSC 1157, aff'd 2012 ONCA 918; *Combined Mechanical Services Inc. v. Flesch*, 2011 ONCA 764; *Jans v. Ducks Unlimited Canada*, 2008 SKCA 113; *K.L.B. v. British Columbia*, [2003] 2 SCR 403; *B.(M) v. British Columbia*, [2001] 5 WWE 6 (BCCA); *Attorney-General of Canada v. Diamond Waterproofing Ltd.* (1974), 4 OR (2d) 489 (CA); *Savage v. Wilby*, [1954] SCR 376; and *McEown v. Roy-L Canadian Fuels Ltd.*, [1949] 2 DLR 773 (Ont. HCJ); *Honeywill v. Larkin*, [1934] 1 KB 191 (CA).

[468] Upon analysis, it is plain and obvious that the Plaintiffs' theory that Loblaws is vicariously liable for the misconduct of Pearl Global is fallacious, and it is plain and obvious that the Plaintiffs have not and could not disclose a reasonable cause of action against Loblaws based on vicarious liability.

[469] There are many reasons why the Plaintiffs' theory of vicarious liability falls apart; namely:

a. Pearl Global, and even more so New Wave, were not agents or employees of Loblaws.

b. As I shall explain below, Pearl Global and New Wave were not even independent contractors of the sort that can trigger vicarious liability; i.e., they were not providing a service or task that could have been performed internally by Loblaws' employees; New Wave was selling goods not services or tasks that were part of Loblaws' enterprise.

c. There is no rationale for treating the employers of the 438 employees of Phantom Apparels Ltd.; the 254 employees of Phantom Tac Ltd., the 450 employees of Ether Textile Ltd., and the employers of the 439 persons who unfortunately just

happened to be in or around the building at the time of the collapse as employees, agents, or independent contractors of Loblaws.

d. Loblaws had no duty of care much less a non-delegable one for all the reasons expressed above in discussing the law of England and for all the reasons expressed below in the discussion of the law of Ontario.

e. Loblaws did not create the dangerous activity of garment manufacturing in Bangladesh, and garment manufacturing is not a dangerous activity of the type meant to be captured by the rare exception to the rule that vicarious liability is not imposed on defendants for the conduct of their independent contractors, which none of the employers of the putative Class Members were in any event.

f. The Plaintiffs have reasoned backwards from a dangerous industry, injured employees, employers breaching a duty of care to keep their employees safe, a contractual relationship between the negligent employers and Loblaws, to a conclusion that Loblaws had a non-delegable duty of care. But Loblaws never had a duty of care to the employees and so this backwards reasoning does not work. Loblaws did not delegate its responsibility for the safety of the employees of New Wave because it had no such responsibility.

g. The exceptional circumstances in which an enterprise can be vicariously liable for the misdeeds of independent contractors are not extant in the case at bar. Loblaws is not an enterprise engaged in a hazardous or inherently dangerous industry; Loblaws is a retailer that sells food, drugs, and consumer goods. It is a retailer not a manufacturer of garments. Loblaws had no control over how Pearl Global and New Wave carried on their manufacturing business or treated their employees.

h. There are no cases that support the Plaintiffs' theory of vicarious liability in England, in Canada, or in Bangladesh where *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter, supra,* is no more than a classic example of an employer being vicariously liable for its employee, who during the normal course of business while driving a delivery van, struck and killed a pedestrian.

i. *Bangladesh Beverage* has nothing to say about exceptional cases or about vicarious liability of independent contractors.

[470] The explanation for why the Plaintiffs' vicarious liability claim is untenable may begin by examining the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc., supra* which provides the legal context for the Plaintiffs' vicarious liability claim. The facts of this case were that for over 30 years, Canadian Tire purchased seat covers from Design Dynamics. This stopped when Sagaz Industries hired Stewart Landow of American Independent Marketing Inc. to market its seat covers. Mr. Landow bribed an employee of Canadian Tire who switched suppliers to Sagaz, putting Design Dynamics out of business. Design Dynamics sued Sagaz, among others, and the case against Sagaz was that it was vicariously liable for the bribery of Mr. Landow. Reversing the Ontario Court of Appeal, the Supreme Court dismissed the claim for vicarious liability.

[471] Justice Major delivered the judgment for the Supreme Court (Chief Justice McLachlin, Justices Bastarache, Binnie, Arbour, and Lebel concurring). Justice Major explained that vicarious liability is a theory of strict liability that makes a person, who may be innocent of

wrongdoing, responsible for the misconduct of another. This liablity is imposed for legal policy reasons based on the relationship between the wrongdoing and the person vicariously liable being such as to justify imposing liability on one person for the wrongs of another. The paradigm relationship for which the law imposes vicarious liability is the relationship between an employer and its employee and liability is imposed for the employee's activities performed during the course of his or her employment.

[472] Justice Major explained that the rationale for vicarious liability is that the employer puts in the community an enterprise that carries with it risks and it should bear the responsibility for the loss when the risk ripens into harm. Subject to certain exceptional cases, a person is, however, not responsible for the acts of an independent contractor who provides services that an employee could have provided. The explanation is that since the person who engages an independent contractor does not control the activities of the independent contractor, it would, therefore, not be just and fair to impose a strict liability for somebody else's wrongdoing.

[473] According to Justice Major, in cases about vicarious liability, it will be necessary to determine whether the wrongdoer is an employee acting during the course of his or employment or an independent contractor for services. Various tests are designed to differentiate employees from independent contractors but no one test is definitive. Ultimately, a key determination is whether or not the wrongdoer is engaged to perform services in business on his or her own account. In making that determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[474] Justice Major explained the policy rationale behind vicarious liability at para. 35 of his judgment, where he stated:

> 35. Explained another way, the main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harms (*B. (P.A.), supra*, at para. 29). Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as an employee to reduce accidents and intentional wrongs by efficient organization and supervision. Each of these policy justifications are relevant to the ability of the employer to control the activities of the employee, justifications which are generally deficient or missing in the case of an independent contractor. As discussed above, the policy justifications for imposing vicarious liability are relevant where the employer is able to control the activities of the employee but may be deficient in the case of an independent contractor over whom the employer has little control. However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. For the reasons discussed below, a reliance on control alone can be misleading, and there are other relevant factors which should be considered in making this determination.

[475] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*, the Supreme Court decided that American Independent Marketing was an independent contractor in business on its own account. It followed that Sagaz was not vicariously liable for the misdeeds of its independent contractor because the case did not fall into the rare category of cases where there is vicarious liability for an independent contractor.

[476] The Plaintiffs rely on *Savage v. Wilby*, *supra* as an example of vicarious liability involving an independent contractor. The facts of this case were that Savage operated a restaurant in premises leased from Wilby. Savage hired DeLong, an independent contractor, to strip the paint and repaint the restaurant premises. DeLong used an inflammable chemical to remove the old paint. The means chosen to remove paint was ordinary in the trade but required special precautions, which DeLong did not take, and he set the premises ablaze. DeLong was negligent in that he failed to take adequate precautions to prevent the creation of a spark in the room in which the work of paint removal was proceeding. Wilby sued DeLong for negligence and Savage for vicarious liability. The Supreme Court of Canada upheld the decision that both DeLong and Savage were liable.

[477] In finding Savage vicariously liable for DeLong's negligence, the Supreme Court applied a venerable rule of law that when a person orders work to be executed from which in the normal course of things injurious consequences to his or her neighbour's person or property must be expected to arise unless safeguards are taken, the person is bound to see that those safeguards are taken to prevent the mischief and the person cannot relieve himself of the responsibility by employing an independent contractor. See: *Grote v. Chester and Holyhead Ry. Co.* (1848) 2 Ex. 251; *Bower v. Peate,* (1876) 1 Q.B.D. 321; *Penny v. Wimbledon Urban Council* (1899) 2 Q.B. 72; *Jans v. Ducks Unlimited Canada*, 2008 SKCA 113.

[478] In *Savage v. Wilby*, Justice Rand explained the rationale for the rule and stated:

> In such circumstances, inherent in the work itself are unusual risks which call for special precautions; and since they result from the act of setting the work on foot, a duty on the person so acting arises as a concomitant of the work, towards interests within the range of the risks, to see that reasonable measures are taken against them. The employment of an independent contractor does not discharge that duty, and if through his negligence there is a failure in it, the owner or person employing him incurs liability. Considerations supporting the rule are not far to seek. If the lessee had owned the premises he would have been remitted to the responsibility of the contractor; why then should he be relieved from dependence on that by transferring it to the landlord where he is dealing with or affecting the latter's property? Since he has, in fact, imposed the dangerous agencies and their hazards on that property, it would be repugnant to principle that he should be permitted to relieve himself of responsibility by the introduction of an intermediary. This circumstance is not significant to the ordinary case since the risk there encountered is related to the actor and not the work, and as a matter of policy the promotion of such works is not to be discouraged by extending the liability of those for whom they are done to the delinquent conduct of other persons who have become virtually the necessary means of carrying them out. But such a breach is to be distinguished from that negligence in the course of the work which has been called "collateral", that is, collateral to the risks annexed to the work itself.

[479] Justice Kellock (Justice Fauteux concurring) described the rationale behind the rule as follows:

> As stated by Anglin J. in [*St. John v. Donald* [1926] SCR 371 at p. 383], vicarious liability arises where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that "to any reasonable well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable." It is therefore not enough that the appellant himself did not know of the danger. So long as the means employed was one commonly employed, he is taken to know what, to the person reasonably well-informed as to the nature of the work, would have been obvious.

[480] Justice Cartwright (Justice Estey concurring) explained the rationale behind the rule as follows:

> For the appellant it is argued that as DeLong was an independent contractor selected without negligence and employed by the appellant to do a lawful act the appellant is not liable for his negligence. Assuming this to be a correct statement of the general rule, it is a rule to which there are exceptions, one being that where the act which the independent contractor is employed to do is one which in its nature involves a special danger of injury to the property of another a duty is imposed upon the party employing the independent contractor to take special precautions to prevent such injury and he cannot escape liability for failure to discharge such duty by delegating its performance to another. I do not find it necessary to review the many authorities which were discussed on the argument for while it may not be easy to reconcile all the statements which they contain none of them appear to cast doubt on the existence of the exception to which I have referred.
>
> I am in respectful agreement with the majority in the Appeal Division that the facts of this case bring it within the exception mentioned. In my view the appellant ordered the doing of work which, if done by the usual method, would create a danger of fire in the respondent's building and he thereupon came under a duty either to provide that the dangerous method be not used or to provide that if it were used all necessary precautions against fire be taken, and he could not escape liability for the non-performance of such duty by delegating its performance to DeLong.

[481] In my opinion in the case at bar, it is plain and obvious that Loblaws' conduct does not fall within the sphere for which it is vicariously liable for the misconduct of another. Loblaws did not engage in garment manufacturing and rather contracted with Pearl Global to supply garments, which is not to order work to be done that in the normal course of things would be injurious. Pearl Global and New Wave were independent and different business from Loblaws.

[482] Garment manufacturing is not a dangerous activity for which precautions must be taken unless the manufacturing occurs in a dangerous place, unlike say mining which is a dangerous activity in a dangerous place for which precautions must be taken. In *Biffa Waste Services Ltd. v. Maschinenfabrik Ernst Hese GmbH*, [2009] QB 725 (CA) at para. 78, England's Court of Appeal held that an activity is inherently dangerous only if it is exceptionally dangerous whatever precautions are taken. Unlike mining, garment production is not an inherently hazardous activity and garment manufacturing in Bangladesh is not inherently hazardous in the sense that it cannot be performed safely if appropriate precautions are taken. In any event, the point to emphasize is that Loblaws is a purchaser and is not engaged in manufacturing garments.

[483] Loblaws' legal position was <u>not</u> similar to Savage's. Rather, its position is comparable to a restaurant patron of Savage's restaurant. Loblaws was not imposing an intermediary to do its own work, which was retailing goods; it was the purchaser not the manufacturer of goods. It was Pearl Global who, like Savage, contracted for work to be done. Pearl Global and New Wave were supplying goods, not services, to Loblaws. New Wave was not engaged in the activities of Loblaws which was selling, not manufacturing, goods. Apart from not doing business with them, Loblaws had no control over how Pearl Global and New Wave could reduce accidents, negligence, and intentional wrongs of Pearl Global and New Wave. Acquiring goods from a manufacturer of them does not put in the community an enterprise that carries with it risks. Loblaws was not itself the creator of any hazard, and it had no control over the conditions of the workplace at Rana Plaza.

[484] Further, in my opinion, it is also plain and obvious that Loblaws did not have a non-delegable duty of care. In this regard, in positing a non-delegable duty, the Plaintiffs rely on *K.L.B. v. British Columbia*, *supra* to make the points that there is no single common law concept of non-delegable duty and that non-delegable duties arise within a spectrum of a variety of legal duties that might give rise to an employer's liability for the negligence of an independent

contractor.

[485] I agree that *K.L.B. v. British Columbia* makes these two points, but the case is otherwise of little or no assistance to the Plaintiffs, and indeed rather supports Loblaws' defence that it had no non-delegable duties to the putative Class Members. Further, the *K.L.B.* case undermines the Plaintiffs' arguments based on vicarious liability altogether.

[486] The issue in *K.L.B. v. British Columbia* was when can a government be held liable for the tortious conduct of foster parents toward children whom the government has placed under their care. *K.L.B. v. British Columbia* was heard together with *M.B. v. British Columbia*, 2003 SCC 53, and *E.D.G. v. Hammer*, 2003 SCC 52.

[487] The facts of *K.L.B. v. British Columbia* were that four siblings were placed together in foster homes where they were abused and one of them, K.L.B., was sexually assaulted. The British Columbia Court of Appeal found that: (a) the siblings' claims were statute-barred, with the exception of K.L.B.'s claim for sexual assault' (b) the government had not breached its fiduciary duty to the children; and (c) but for the limitation defence, the government would have been vicariously liable and in breach of a non-delegable duty of care in the placement and supervision of the children.

[488] The siblings appealed and submitted that: (a) their claims were not statute-barred; (b) the Court of Appeal erred in failing to find a breach of fiduciary duty; and (3) the trial judge had erred in her approach to damages. The Crown did not cross-appeal the Court of Appeal's holdings on the issues of vicarious liability and breach of a non-delegable duty.

[489] In the Supreme Court, because all of the tort doctrines were at issue in the companion cases, Chief Justice McLachlin felt it was desirable to consider the doctrines of negligence, vicarious liability, non-delegable duty, and fiduciary duty in a coordinated and systematic way. In the result, the Supreme Court concluded that: (a) the Court of Appeal's conclusion that the claims were statute-barred should be upheld; (b) but for the limitations defence, the government would have been liable on the basis of direct negligence; (c) the case for vicarious liability between governments and foster parents had not been established; (d) the case for breach of fiduciary duty had not been established; (e) there was no basis for imposing a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents; and (f) the trial judge's assessment of damages was correct.

[490] On the matter of vicarious liability, at para. 18, Chief Justice McLachlin (Justices Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ concurring; Justice Arbour wrote separate concurring reasons) explained that liability is imposed on the theory that the person may properly be held responsible where **the risks inherent in his** or her enterprise materialize and cause harm, provided that liability is both fair and useful (my emphasis added).

[491] The Chief Justice explained at para. 19 of her judgment that to make out a successful claim for vicarious liability, the plaintiff must demonstrate: (1) that the relationship between the tortfeasor and the person against whom vicarious liability is sought to be imposed is sufficiently close as to make a claim for vicarious liability appropriate; and (2) that the tort is sufficient connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise of the person against whom vicarious liability is to be imposed. The rationale for the imposition of vicarious liability is that if an enterprise creates a risk and that risk materializes and causes injury, it is fair that the person or organization that

creates the enterprise and hence the risk should bear the loss.

[492] Chief Justice McLachlin went on to conclude that the relationship between the foster parents and the government was not sufficiently close to establish vicariously liability. She noted that where the tortfeasor is too independent of the organization for the organization to be able to take measures to prevent misconduct, vicarious liability would not be imposed and hence the relationship of employer to independent contractor does not generally give rise to vicarious liability. She said that it was inherent in the nature of foster care that foster parents are in important respects independent, and that the government cannot exercise sufficient control over their activities for them to be seen as acting on account of the government. These conclusions were reached notwithstanding that the government provided instruction, training, funding, and periodic monitoring of the foster parents.

[493] Pausing here to return to the case at bar, Loblaws' enterprise is selling food, drugs, and clothes, and the risks inherent in that enterprise are not the same as the risks inherent in the businesses of the manufacturers who sell their produce and goods to Loblaws and Loblaws has not control over how those manufacturers do business other than not doing business with them. Providing instruction, training, funding, and periodic monitoring were insufficient to establish control in *K.L.B. v. British Columbia,* and the control manifested through the CSR standards in the case at bar is modest in comparison if it exists at all. The relationship between Loblaws and the tortfeasors Pearl Global and New Wave is not close, and their wrongdoing is not connected to any task assigned by Loblaws because it did not assign tasks; it purchased goods from the taskmaster.

[494] For another case where there was not a sufficiently close relationship between the government and insufficient control to justify the imposition of vicarious liability, see *Kassian Estate v. Canada (Attorney General)*, 2015 ONCA 544.

[495] Returning to Chief Justice McLachlin's judgment in *K.L.B. v. British Columbia,* she addressed the matter of whether the government had a non-delegable duty and therefore was responsible for the misconduct of the foster parents. She noted that the idea that a person who delegates work to another person may be held responsible for the torts committed by another in executing the work was distinct from vicarious liability of the type discussed above. Thus, at paras. 30-31 of her judgment she stated:

> 30. The appellants argue that the government is liable for their losses on the basis of the doctrine of non-delegable duty. The idea that a person who delegates work to another person may be held responsible for torts committed by that person in executing the work on grounds other than vicarious liability has been discussed for some time. More than 50 years ago, Denning L.J. stated in *Cassidy v. Ministry of Health*, [1951] 2 KB 343 (CA), at p. 363: "where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services".
>
> 31. It may be that there is no single common law concept of non-delegable duty. Instead, the phrase seems to have been used to describe a number of situations in which special, non-delegable duties arise. If this is correct, then rather than seeking to state the doctrine in terms of a single principle, we should look to the different situations in which such duties have been found -- an approach consonant with the traditional methods of the common law. In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 SCR. 1145, at para. 20, Cory J. suggested that these different situations comprise a "spectrum of liability", and that "[w]ithin that spectrum there are a variety of legal obligations which may, depending on the circumstances, lead to a principal's liability for the negligence of an independent contractor."

[496] In in *K.L.B. v. British Columbia,* the starting point for non-delegable duties was the statute authorizing the foster parent regime in British Columbia. The issue was whether the *Protection of Children Act* placed a non-delegable duty on the government to ensure that foster children are kept safe while in foster care. Chief Justice McLachlin analyzed the statutory regime and concluded that the doctrine of non-delegable duty did not assist the siblings in their claim against the government.

[497] Returning once again to the case at bar, the issue becomes where does one find the source of any non-delegable duty, and for all the reasons discussed above with respect to the law of Bangladesh and discussed below about the law of Ontario, there is no source of a non-delegable duty. The alleged basis of Loblaws having a non-delegable liability is that it purchased goods from a manufacturer in a country notorious for dangerous factories, but if that was sufficient to be the source of a non-delegable duty of care, then it would absurdly follow that because Loblaws sells salt mined at Goderich, Ontario, then it would have a non-delegable duty of care to the miners because mining is a notoriously dangerous activity and the mine runs for six miles at a depth of a third of a mile under Lake Huron. The point is that there is no source of any duty and thus it is meaningless to speak of any vicarious liability. Loblaws did not delegate any duty of care to Pearl Global or New Wave and there is no basis for Loblaws to be vicariously liable for their civil and criminal wrongdoing.

[498] It is plain and obvious that the Plaintiffs have no claim for vicarious liability against Loblaws, and I conclude that under the law of Bangladesh and also under the law of Ontario, the Plaintiffs have not disclosed a reasonable cause of action against Loblaws for vicarious liability.

4. Conclusion

[499] For the above reasons, and on the assumption that the Plaintiffs' claims are governed by the law of Bangladesh, I conclude that under the law of Bangladesh, the Plaintiffs and the putative Class Members do not have any legally viable claims in tort law against the Defendants.

[500] Under Bangladesh law it is plain and obvious that no tenable cause of action is possible on the facts as alleged and since there is no reason to suppose that the Plaintiffs could improve their case by any amendment to the pleadings, I would dismiss the tort claims.

5. The Tort Claims under Ontario Law

(a) Who is my Neighbour under Canadian Negligence Law?

[501] I turn now to consider whether the Plaintiffs and the putative Class Members have legally viable causes of action on the assumption that Ontario law applies. I have already dealt with the vicarious liability claim and so shall now consider the negligence claims against Loblaws and Bureau Veritas.

[502] The Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions adapting and explaining the House of Lord's decision in *Anns v. Merton London Borough Council*, [1978] AC 728 (HL) and derived from the seminal *Donoghue v. Stevenson, supra*. See: *Haig v. Bamford*, [1976] 1 SCR 466; *Kamloops (City) v. Nielsen*, [1984] 2 SCR 2; *Rothfield v. Manolakos*, [1989] 2 SCR 1259; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 SCR 165; *Ingles v. Tutkaluk*, 2000 SCC

12 *Cooper v. Hobart*, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Childs v. Desormeaux*, 2006 SCC 18; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Design Services Ltd. v. Canada*, 2008 SCC 22; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5; *R. v. Imperial Tobacco Canada Ltd., supra*.

[503] The first element of a tort claim for negligence is a duty of care. As Lord Esher stated in *Le Lievre v. Gould*, [1893] 1 QB 491 (CA) at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them". The contemporary Canadian analysis of whether a duty of care exists begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new category of claim. If the claim falls within an established category, then precedent will have established that there is a duty of care associated with the relationship between the parties: *Childs v. Desormeaux, supra,* at para. 14.

[504] If the case does not come within an established category, it is necessary to undertake a duty of care analysis. In *Anns v. Merton London Borough Council, supra*, the House of Lords adopted a two-step analysis to determining whether there was a duty of care between a plaintiff and a defendant: (1) Is there a sufficiently close relationship between the plaintiff and the defendant such that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff?; and (2) Are there any considerations that ought to negative or limit (a) the scope of the duty; (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?

[505] As developed by the case law in Canada, the two-step analysis became a four-step analysis. The first step is to determine whether the case falls within a recognized category of case. In Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying the three requirements of the next three steps: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficiently close *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeabilty and proximity.

[506] Thus, in a new category of case whether a relationship giving rise to a duty of care exists depends on foreseeability, moderated by policy concerns: *Anns v. Merton London Borough Council, supra; Mustapha v. Culligan of Canada Ltd., supra*, at para. 4.

[507] To determine the foreseeability element, the court asks whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act: *Cooper v. Hobart, supra* at para. 30. A reasonable foreseeability analysis requires only that the general harm, not its manner of incidence, be reasonably foreseeable: *Bingley v. Morrison Fuels, a Division of 503373 Ontario Ltd.*, 2009 ONCA 319 at para. 24.

[508] Proximity focuses on the type of relationship between the plaintiff and defendant and asks whether this relationship is sufficiently close that the defendant may reasonably be said to owe the plaintiff a duty to take care not to injure him or her: *Donoghue v. Stevenson, supra*; *Eliopoulos v. Ontario (Minister of Health & Long Term Care)* (2006), 82 OR (3d) 321 (CA),

leave to appeal to SCC ref'd [2006] SCCA No 514. Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests: *Odhavji Estate v. Woodhouse, supra,* at para. 49; *Hercules Managements Ltd. v. Ernst & Young, supra* at para. 24.

[509] The proximity inquiry probes whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between the defendant and the plaintiff: *Syl Apps Secure Treatment Centre v. D. (B.), supra*, at para. 26. The focus of the probe is on the nature of the relationship between victim and alleged wrongdoer and the question is whether the relationship is one where the imposition of legal liability for the wrongdoer's actions would be appropriate: see *Hill v. Hamilton-Wentworth Regional Police Services Board, supra* at para. 23.

[510] The proximity analysis involves considering factors such as expectations, representations, reliance, and property or other interests involved: *Cooper v. Hobart, supra,* at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board, supra,* at para. 23; *Odhavji Estate v. Woodhouse, supra,* at para. 50. Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed: *Hill v. Hamilton-Wentworth Regional Police Services Board, supra,* at para. 29.

[511] It needs to be emphasized that the proximity analysis of the first stage of the duty of care test involves policy issues because it asks the normative question of whether the relationship is sufficiently close to give rise to a legal duty: *Cooper v. Hobart, supra,* at paras. 25-30.

[512] The proximity inquiry recognizes a distinction between misfeasance, which is an overt act that may be foreseen to cause harm to another, and nonfeasance which is the failure to act to prevent foreseeable harm to another. Where the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care. See: *Design Services Ltd. v. Canada,* [2008] 1 S.C.R. 737; *Childs v. Desormeaux, supra*. See also: *Kim v. Thammavong,* [2007] O.J. No. 4769 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 4908 (Div. Ct.); *Irvine v. Smith,* [2008] O.J. No. 547 (S.C.J.). Where the allegation is that the defendant failed to prevent harm, the law requires close examination of the question of proximity and is concerned whether the case discloses factors that show that the relationship between the plaintiff and the defendant is sufficiently close and direct to give rise to a legal duty of care: *Fullowka v. Pinkerton's of Canada Ltd., supra* at para. 26.

[513] The proximity aspect of the formulation of a duty of care was examined in *Childs v. Desormeaux, supra,* which was the case that examined whether a social host has a duty of care to a stranger who is injured by an inebriated guest who drives away from the social host's party and causes a motor vehicle accident. In this case, Chief Justice McLachlin noted at para. 31 that: "[W]here the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care." This qualification recognizes that action that causes harm to another and inaction that fails to prevent harm being caused to another have different qualities of moral and legal culpability. Thus, in *Childs v. Desormeaux*, Chief Justice McLachlin stated:

> 31. Foreseeability without more may establish a duty of care. This is usually the case, for example, where an overt act of the defendant has directly caused foreseeable, physical harm to the plaintiff. ... However, where the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant,

> the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger or has become a danger to others does not itself impose any kind of duty on those in a position to become involved.

[514] In *Childs v. Desormeaux*, without intending to establish rigid categories, the Chief Justice identified three situations where there may be a relationship giving rise to a duty of care and liability for failure to act: (1) where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls; (2) where the parties have relationships of supervision and control, such as those of a parent and a minor child, or a teacher and student; and (3) where the defendant either exercises a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.

[515] At paras. 38-40, Chief Justice McLachlin identified several recurrent themes running through the situations where the law will impose a duty of care and liability for failure to act to prevent the harm suffered by the plaintiff; namely: (1) the defendant's involvement in the creation of a risk or in controlling a risk to which others have been invited may justify imposing an obligation to minimize the risk; (2) respect for the plaintiff's autonomy may justify a defendant standing by and not intervening to prevent or minimize the risk to the plaintiff because the law accepts that competent people have a right to engage in risky activities; and (3) where the defendant creates or invites others into a dangerous situation, the defendant may reasonably expect that the persons invited can rely on the defendant to ensure that the risk is a reasonable one or to take appropriate rescue action if the risk materializes. In *Childs v. Desormeaux*, the Chief Justice explained (para. 39) that: "the law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene."

[516] With respect to these themes, Chief Justice McLachlin stated that where the public provider of services undertakes a public service, it must do so in a way that appropriately minimizes associated risks to the public and that there is a reasonable expectation on the part of the public that a person providing public services will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.

[517] Moving on to the final stage of the duty of care analysis, if the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it: *Childs v. Desormeaux, supra*, at para. 13. Policy concerns raised against imposing a duty of care must be more than speculative, and a real potential for negative consequences must be apparent: *Hill v. Hamilton-Wentworth Regional Police Services Board, supra*, at paras. 47-48; *Fullowka v. Pinkerton's of Canada Ltd., supra*, at para. 57.

[518] The final stage of the analysis is not concerned with the type of relationship between the plaintiff and the defendant. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the plaintiff and the defendant such that the imposition of a duty would be fair: *Cooper v. Hobart, supra,* at para. 37; *Odhavji Estate v. Woodhouse, supra,* at para. 51. The final stage of the analysis is about the effect of recognizing a

duty of care on other legal obligations, the legal system and society more generally: *Cooper v. Hobart, supra,* at para. 37; *Odhavji Estate v. Woodhouse, supra*, at para. 51.

[519] Particularly, but not exclusively, in cases of pure economic losses a prominent policy factor is the avoidance of the imposition of an indeterminate liability. Justice Cromwell discussed this policy factor in *Fullowka v. v. Pinkerton's of Canada Ltd., supra* at para. 70 and stated:

> 70. …. This policy consideration has often held sway in negligence claims for pure economic loss. But even in that context, it has not always carried the day to exclude a duty of care. The concern is that the proposed duty of care, if accepted, would impose "liability in an indeterminate amount for an indeterminate time to an indeterminate class", to use the often repeated words of Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444. At the root of the concern is that the duty, and therefore the right to sue for its breach, is so broad that it extends indeterminately. In this sense, the policy concern about indeterminate liability is closely related to proximity; the question is whether there are sufficient special factors arising out of the relationship between the plaintiff and the defendant so that indeterminate liability is not the result of imposing the proposed duty of care: see, e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021, at p. 1153. What is required is a principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not: see, e.g., *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210, at para. 64, per McLachlin J. (as she then was).

(b) Analysis: The Negligence Claims against Loblaws and against Bureau Veritas

[520] Applying the Canadian duty of care analysis to the material facts of the immediate case, the case against Loblaws is unquestionably a claim that does not fall within the category of cases in which the law recognizes a duty of care, and thus a duty of care analysis is required.

[521] The case against Bureau Veritas also requires a duty of care analysis. The Plaintiffs make novel claims against both Defendants but, in Bureau Veritas' case, there is an existing category involving public sector actors that bears a resemblance to the case being brought against Bureau Veritas in the private sector and, thus, this case law must be factored into the duty of care analysis, but as the parties conceded, the claim against Bureau Veritas is a novel claim and requires a duty of care analysis.

[522] Relying on: *Bevan Investment Ltd. v. Blackhall & Struthers (No. 2)*, [1978] 2 NZLR 45, varied as to damages [1978] 2 NZLR 97 (CA); *Surrey (District) v. Carroll-Hatch & Associates*, [1979] 6 WWR 289 (CA), leave to appeal allowed (1979), 10 CCLT 226 (BCCA); *Kamloops (City) v. Nielsen, supra*; *Ingles v. Tutkaluk Construction Ltd., supra*; *Musselman v. 875667 Ontario Inc.*, 2010 ONSC 3177; *Benoit (Litigation Guardian of) v. Banfield*, 2012 BCSC 265; and *Quinte v Eastwood Mall Inc.*, 2014 ONSC 249, the Plaintiffs submit that the claim against Bureau Veritas is analogous to cases in which a duty of care by those inspecting premises has been found to be owed to parties with whom the inspector had no contractual relationship and, therefore, the Plaintiffs submit that it is not plain and obvious that the Plaintiffs' negligence claim has no prospect of success.

[523] In undertaking a duty of care analysis, the first element to consider is foreseeability in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct. In the case at bar, in my opinion, the first element is satisfied with respect to Bureau Veritas but not with respect to Loblaws.

[524] It certainly is not plain and obvious that a purchaser of goods does or should have a legal duty of care to the employees of the manufacturer of those goods. Loblaws may have had an ethical obligation to the employees, but to quote Lord Atkin in *Donoghue v. Stephenson*, "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief."

[525] The Plaintiffs rely on the fact that Loblaws was aware of the notoriously dangerous workplaces in Bangladesh and that Loblaws promulgated CSR standards. The Plaintiffs submit that these facts demonstrate that the foreseeability element of a duty of care was satisfied because it shows that Loblaws did contemplate or ought to have contemplated that the putative Class Members would be affected by its conduct. However, it is does not follow that because a person contemplates a moral duty that he, she, or it also contemplates a legal duty. Further, in an instance of no good deed goes unpunished, it does not follow that Loblaws foresaw that its conduct in promulgating CSR standards entailed that it was foreseeable that its conduct of not doing more, including requiring more comprehensive CSR standards, would make it culpable for the harm suffered by the employees of New Wave. Moreover, the fact that Loblaws promulgated CSR standards does not explain how foreseeability is established for the 1,142 employees of other garment businesses operating out of Rana Plaza and for the 439 persons who unfortunately just happened to be in or around the building at the time of the collapse.

[526] Moving on in the analysis, assuming that I am wrong in concluding that the foreseeability factor is unsatisfied for Loblaws but that I am correct in concluding that this factor is satisfied for Bureau Veritas, the first element of the duty of care analysis can be taken as satisfied. The analysis then turns to the proximity factor. In my opinion, it is plain and obvious that the proximity factor is not satisfied for either Defendant.

[527] The relationship between the Defendants and the putative Class Members is not sufficient to *prima facie* give rise to a duty of care. There is indeed no relationship at all between the putative Class Members comprised by the 1,142 employees of other garment businesses operating out of Rana Plaza and the 439 persons who unfortunately just happened to be in or around the building at the time of the collapse.

[528] As for Loblaws' relationship with the balance of the class comprised of the employees of New Wave, it was indirect at best and more of an association than a relationship. Apart from the assumption of responsibility theory, there is little to connect Loblaws to the employees of a sub-supplier of goods in Bangladesh any more than there would be to connect Loblaws to the farm workers of a farmer exporting food from the tropics for sale by Loblaws. It is only the assumption of responsibility theory that makes any connection of proximity, but, as I shall explain again below, and as has already been explained in the context of the law of Bangladesh above, it is plain and obvious that the assumption of responsibility theory does not work to impose a duty of care on Loblaws.

[529] In the circumstances of this case, it needs to be recalled that given that Loblaws and Bureau Veritas did not themselves inflict harm on the putative Class Members, the nature of the alleged duty of care is a duty to protect the putative Class Members, and the alleged breach of duty is an act of omission; i.e., in not doing more to protect them or to warn the putative Class Members of the dangers of Rana Plaza. However, apart from the assumption of responsibility theory, the association between the foreign garment workers (or foreign farm workers) is not so close that Loblaws may reasonably be said to owe the foreign workers a duty to protect them

from injury caused by third parties.

[530] As noted in *Syl Apps Secure Treatment Centre v. D. (B.), supra*, at para. 26, the proximity inquiry probes whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between the defendant and the plaintiff. In the case at bar, it would not be fair to impose a duty on Loblaws to protect the putative Class Members from the harm caused by their employers or by the owner of Rana Plaza.

[531] Apart from artifices of their pleading, the putative Class Members would have no subjective or objective expectation that they were under the protection of Loblaws and Bureau Veritas. Loblaws did not create the risk and did not invite the workers at New Wave much less the workers for other garment manufacturers to the dangers of Rana Plaza. As demonstrated by the Plaintiffs' pleading of decades of fires and building collapses that occurred before Loblaws starting doing business in Bangladesh, it was not Loblaws who invited them to Rana Plaza. The fact that Loblaws decided to do business in Bangladesh in accordance with CSR standards cannot be said to have raised expectations of New Wave's employees being protected from fires and building collapses. Loblaws had no direct and personal dealings with the employees. Bureau Veritas' interaction with the employees was to interview several of them and to be seen making a social audit by some others. And any such expectation would be unreasonable given that the Defendants were not the cause of the dangers at Rana Plaza nor in position to ameliorate those dangers.

[532] As Chief Justice McLachlin noted in *Childs v. Desormeaux*, the mere fact that a person faces danger typically does not itself impose any kind of duty on those in a position to become involved to prevent the danger. And, in any event, all that Loblaws could do is decline to do business with Pearl Global, which would do nothing to change the working conditions of the putative Class Members. Bureau Veritas had no control over Pearl Global or New Wave and had undertaken a limited retainer with respect to its audit of the premises and it had no control over whether it should undertake follow-up inspections.

[533] The Plaintiffs rely on the assumption of responsibility theory to make a case for a duty of care in the circumstances of this case. However, for all the reasons set out above in the discussion of their claim under English law, it would not be just and fair to recognize a duty of care in the immediate case. As the law currently stands, other purchasers of goods from New Wave who had not promulgated CSR standards, who just as much as Loblaws would have known about the dangerous working conditions in Bangladesh, would have no duty of care and that being the state of the law it hardly seems fair that Loblaws, who did something by promulgating CSR standards, should be liable for, to quote the Plaintiffs' factum, "failing to mandate a broader audit to include an electrical, fire, and a building (structural integrity) assessment."

[534] At this juncture another analogy may be helpful. To return to the parable of the Good Samaritan, imagine that an employee of New Wave is the man going down from Jericho to Jerusalem to make a delivery of garments, and imagine that Loblaws is the purchaser of those garments. Loblaws has CSR standards because it knows that the garment workers in Jericho work in unsafe premises, but Loblaws does not control the employers and employees and all it can do is not do business with Jericho manufacturers. In terms of proximity would it be just and fair for the New Wave employee to have a cause of action against Loblaws for failing to do more (non-feasance) in its CSR standards to protect the travelling employee from highway robbers on

the road from Jericho to Jerusalem, which is another risk that Loblaws may have known about but was not responsible for creating?

[535] I agree with what Bureau Veritas states at para. 95 of its responding factum in the certification motion; that is:

> 95. Ontario law does not apply. But even if it does, the plaintiffs would be required to show proximity between [Bureau Veritas] and each proposed class member based on "expectation that these audits would address health and safety concerns". The claim as against Bureau Veritas is novel in Ontario. No previous case considers whether a social auditor owes a duty to protect factory workers from structural integrity problems. Cases cited by the plaintiffs regarding proximity in government inspection cases are not analogous. Canadians who enter a building may reasonably expect that government inspectors performed statutorily mandated structural inspections, but that expectation cannot be reasonably extended to private social auditors. The plaintiffs must show a basis for a reasonable expectation that social auditors were to inspect for structural integrity in the entire building. Since Bureau Veritas was under no obligation to inspect for structural integrity, the claim is based in nonfeasance. To establish liability in nonfeasance, the plaintiffs must demonstrate that they had a special relationship with [Bureau Veritas], based in "reasonable reliance". Those injured in the collapse of Rana Plaza but not employed by New Wave Style had no direct relationship with [Bureau Veritas], did not know about [Bureau Veritas] or the social audits, and could not reasonably expect that the social audits would address structural integrity.

[536] Moving on in the analysis to the policy stage, in the immediate case, numerous policy factors, negate the existence of a duty of care. First, there is the prospect of indeterminate liability because there is no principled way to draw a line between those to whom the duty if owed and those to whom it is not. Apart from the Plaintiffs capping their liability by making a claim for around $2 billion, the amount of the liability is indeterminate, the temporal exposure to liability is indeterminate, and the range of claimants is indeterminate extending beyond those who were on New Wave's payroll. Second, there is the prospect of a massive extension of liability imposed on purchasers who would become responsible for the safety of their supplier's employees in foreign lands. Third, imposing a duty of care would encourage undesirable defensive tactics that would, from a behaviour modification and a social utility perspective, make the situation of the Plaintiffs worse not better. As explained above in the context of the discussion of the law of Bangladesh, there is nothing speculative about these policy factors.

[537] In my opinion, it is plain and obvious that a duty of care analysis leads to the conclusion that the Defendants did not have a duty of care to the Plaintiffs and the putative Class Members. The above conclusions are supported by the case law, to which I now turn.

[538] In their case against Loblaws, the Plaintiffs rely on Justice C.J. Brown's decision in *Choe v. Hudbay Minerals Inc.*, 2013 ONSC 1414. They rely on this decision as demonstrating that the claim against Loblaws is not doomed to failure and that they have disclosed a reasonable cause of action. Apart from the circumstances that *Choe v. Hudbay Minerals* involved a Canadian company alleged to have caused harm by how it carried on business in a foreign country, there is very little in the case that supports that Loblaws had a duty of care to the putative Class Members.

[539] The facts of *Choe v. Hudbay Minerals* were that subsidiaries of Hudbay Minerals, a Canadian mining company, were developing a mine in Guatemala. The subsidiaries, at the direction of their parent Hudbay Minerals, engaged security personnel. Hudbay Minerals publicly acknowledged responsibility for the security forces and made a public commitment to adhere to local and international law and to the Voluntary Principles of Security and Human

Rights. However, to gain control of the mining site, the security personnel assaulted, torched, gang rapped, and killed the locals, who were indigenous Mayan Q'eqchi' asserting an ownership claim to the mining site. There was a strong case to be made for piercing the corporate veil and for treating Hudbay Minerals and its subsidiaries as one entity. Indeed, the plaintiffs who were the victims of the atrocities did sue to pierce the corporate veil. They also sued Hudbay Minerals for vicarious liability and for negligence in not supervising and controlling its subsidiaries. Hudbay Minerals brought a motion to have the action against it dismissed for failing to disclose a reasonable cause of action, and, not surprisingly, Justice Brown dismissed the motion.

[540] In the case at bar, there is no basis for piercing the corporate veil and treating Loblaws, Pearl Global and New Wave as one enterprise. In the case at bar, analogizing a Canadian retailer having a duty of care to ensure that the employees of a foreign sub-supplier, over whom the retailer has no management or administrative control, be protected from working in dangerous premises to the circumstances of a Canadian mining company having a duty to care to ensure that the security forces of its subsidiaries, over whom the parent company had direction and management control, not rape and kill the indigenous population makes no sense. *Choe v. Hudbay Minerals* does not prove that the Plaintiffs' case is tenable or arguable. *Choe v. Hudbay Minerals* does not disprove that it is plain and obvious that the Plaintiffs' claims are doomed to failure.

[541] The Plaintiffs also rely on the decision of Justice Abrioux in *Araya v. Nevsun Resources Ltd.,* 2016 BCSC 1856 to argue that it is not plain and obvious that their negligence claim is doomed to failure. *Araya v. Nevsun Resources* was a representative action (similar to but different from a class action) involving the activities of a Canadian corporation in a foreign country. Justice Abrioux dismissed the representative action, but the Plaintiffs in the case at bar rely on his decision that it was not plain and obvious that the plaintiffs had not shown a reasonable cause of action.

[542] The facts of *Araya v. Nevsun Resources* were that Nevsun Resources Ltd., a British Columbia mining company, entered into an agreement with the State of Eritrea to develop the Bisha gold mine in Eritrea. The government of Eritrea built the mine using forced labour, a form of slavery. The Eritrean government, under threat of torture, compelled the plaintiffs to work at the mine.

[543] The plaintiffs and the putative plaintiffs by representation were not residents of British Columbia, but they sued Nevsun Resources in British Columbia for what it did in Eritrea with its mining partner. The plaintiffs advanced claims for conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress. These claims – and I emphasize the point – were not challenged as not showing a reasonable cause of action. However, in addition to their unchallenged claims under the common law of British Columbia, the plaintiffs advanced under the umbrella of "customary international law," which they submitted was incorporated into the law of Canada, a variety of new torts. Under customary international law, the plaintiffs sued for: the use of forced labour, torture, slavery; cruel, inhuman or degrading treatment, and crimes against humanity.

[544] Nevsun Resources asked that the customary international law claims be struck out in the interests of judicial efficiency and fairness, to allow the court and the parties to focus on the real issues in the action. Justice Abrioux concluded, however, that it was not plain and obvious that the novel claims under customary international law were doomed to failure. Justice Abrioux,

however, also dismissed the action for not being a properly constituted representative action under the law of British Columbia.

[545] Once again, given the material facts of that case, Justice Abrioux's decision about novel claims under customary international law possibly being incorporated into the law of Canada is not surprising, but it makes no sense to analogize those facts with the facts of the case at bar. In *Araya,* it even appears that the defendant Nevsun did not regard what they did in Eritrea as raising a novel tort claim and did not challenge the legal viability of the common law tort claims.

[546] Turning to the case law about the negligence claim against Bureau Veritas, as noted above, the Plaintiffs rely on a series of cases including *Kamloops (City) v. Nielsen*, *supra*; *Ingles v. Tutkaluk Construction Ltd., supra* and *Quinte v. Eastwood Mall Inc. supra,* that recognize a duty of care and a claim for negligent inspection by a government authority. The issue in those cases arises in the context that the public authority already has a statutory, which is to say a public law duty to inspect, and the issue is whether they also owe a private law duty of care to perform such inspections in a non-negligent manner.

[547] There are two fundamental problems in the Plaintiffs' reliance on this case law as demonstrating that their claim against Bureau Veritas is not doomed to failure. First, the starting point in those cases is that the public authority had a statutorily prescribed duty that defined the ambit of their task. In other words, the issue in those cases is whether private law duties to individuals fit with public law duties. The answer to this question is in large part an issue of statutory construction. The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant: *Fullowka v. Pinkerton's of Canada Ltd., supra* at para. 39; *Syl Apps Secure Treatment Centre v. B.D., supra* at paras. 26-30. The issue in the case at bar involves no pre-existing statutory duty and the public policy analysis is totally different.

[548] Second, all of the public authority cases involve the public authority negligently performing its defined statutory obligation, which is to say that none of the cases involve any debate about the scope of the inspection tasks assigned to the public official, which is the fundamental issue in the case at bar because a review of Bureau Veritas' retainer or remit is that it was not hired to perform an electrical, fire, or structural integrity assessment. To return to the analogy above of a public health inspector inspecting a restaurant for cleanliness and not reporting a structural defect in the restaurant, none of the cases are of that nature; rather, the cases involve an inspector charged to inspect structural defects as a matter of a public duty and who negligently performs his or her assigned task and an individual is harmed.

[549] *Quinte v. Eastwood Mall Inc. supra* actually illustrates the point. In that case, the province unsuccessfully challenged the claim against it as not disclosing a reasonable cause of action. Justice Belobaba disagreed. But in *Quinte*, the representative plaintiffs, restaurant owners injured when the mall's roof collapsed and who Justice Belobaba described as not surprisingly suing everyone involved in the planning, construction, inspection, ownership, and maintenance of the shopping centre, did not sue the public health officials who would have inspected their restaurant and who would have known about the notorious leaking roof at the mall.

[550] The Plaintiffs also rely on private sector cases where architects, builders, surveyors, engineers have been liable to third parties with whom they did not contract for negligently performed inspections. See *Bevan Investment Ltd. v. Blackhall & Struthers (No. 2), supra*; *Surrey (District) v. Carroll-Hatch & Associates, supra*; *Musselman v. 875667 Ontario Inc.*,

supra; *Benoit (Litigation Guardian of) v. Banfield*; and *Quinte v. Eastwood Mall Inc., supra*. However, an analysis of these cases reveals that in none of them was the defendant's negligence outside of the terms of the inspector's retainer. Thus, none of these cases provide a basis for making a social auditor with a defined or limited retainer that did not include a structural inspection liable for negligence in how it conducted the social audit. Bureau Veritas did not provide engineering services, did not hold itself out as providing engineering services, and did not contract to provide engineering services. Loblaws did not expect that Bureau Veritas would inspect Rana Plaza's structural integrity and there is no basis for the putative Class Members, most of them who would be unaware of Bureau Veritas' retainer, to have any expectation that Bureau Veritas would protect them from the risk that their workplace was dangerous.

[551] The cases cited by the Plaintiffs regarding proximity in government inspection cases are not analogous to the case at bar. Persons who enter a building may reasonably expect that government inspectors performed statutorily mandated structural inspections, but that expectation cannot be reasonably extended to private social auditors inspecting for other purposes. Bureau Veritas was under no obligation to inspect for structural integrity, and the Plaintiffs' claim is based in nonfeasance but to establish liability in nonfeasance, the Plaintiffs must demonstrate that they had a relationship with Bureau Veritas based on reasonable reliance. The putative Class Members could not reasonably expect that the social audits would address structural integrity.

[552] The Plaintiffs also rely on: *Fullowka v. Pinkerton's of Canada Ltd., supra* and *Rayner v. McManus*, 2016 ONSC 422, but upon analysis, none of these cases supports the analysis that the Plaintiffs' claims are not doomed to failure. The cases are factually at some considerable factual distance on the issues of foreseeability, proximity, and policy issues involved in the case at bar.

[553] *Rayner v. McManus*, which is a case about a motion by the plaintiff to amend his claim in a defamation action to advance a negligence claim against a new party; i.e., the psychiatrist who received the defamatory statements via email, is obviously distinguishable from the circumstances of the immediate case, and moreover was reversed on appeal by the Divisional Court (after this motion was argued); see *Rayner v. McManus*, 2017 ONSC 3044 (Div. Ct.), where Justice Fregeau stated at para. 25:

> 25. In my opinion, it is plain and obvious that a *prima facie* duty of care did not exist between Dr. Marshall and the Plaintiff. I accept the motion judge's assertion that the novelty of a cause of action is not determinative and that a "generous approach" is appropriate at the pleading stage. However, in this age of scarce judicial resources and systemic delay within the judicial system, it is not appropriate to place diminished emphasis on the required critical analysis and allow an untenable claim to proceed.

[554] But there are lessons to learn from *Fullowka v. Pinkerton's of Canada Ltd., supra*, particularly with respect to the Plaintiffs' claim against Bureau Veritas.

[555] The facts of *Fullowka v. Pinkerton's of Canada Ltd.* were that pursuant to a collective agreement, Mr. Fullowka was employed as a miner at the Giant Mine in Yellowknife N.W.T. The miners went on strike, and the owner of the mine hired replacement non-union miners. The strikers responded with mayhem. There were riots and explosions damaging mine property. The mine's security forces were overwhelmed, and the mine owner hired Pinkerton as a security force. Pinkerton was hired specifically to restore order, and it knew that the strikers had used explosives in the past and it had information that they intended to do so again. Pinkerton, nevertheless, gave assurances to the replacement workers that they would be safe in coming to

work. The replacement workers relied on those assurances, and it was reasonable for them to do so given that the whole point of Pinkerton's presence was to secure the site so that the mine could continue to operate. Pinkerton was successful for a time in restoring order but one Roger Warren, one of the striking miners, snuck into the mine and set an explosive trap and nine replacement workers were killed. Warren was convicted of murder.

[556] Mr. Fullowka, who was traumatized by discovering the bodies, the estates of the deceased miners, and others sued for damages. Among the defendants were Pinkerton and the NWT government's inspectors. Disagreeing with the lower courts, in a judgment written by Justice Cromwell, the Supreme Court of Canada held that Pinkerton had a duty of care to undertake reasonable safety precautions and that the government's inspectors had a duty of care to use its statutory powers to order the mine closed until it could be safely operated. However, Justice Cromwell concluded that the duty of care had not been breached, and the actions against Pinkerton and the government inspectors was dismissed.

[557] In addressing the duty of care issue, Justice Cromwell noted that the issue was whether Pinkerton and the government inspectors in relation to another's wrongdoing had a duty of care and failed to meet the standard of care imposed on them and thereby caused the ultimate harm. He noted that in the case of the government's inspectors, the existence of proximity turned mainly on the statute establishing the regulatory powers. He noted that the inspector's statutory duties directly related to the conduct of the miners. Justice Cromwell concluded that all of the foreseeability, proximity and policy factors were satisfied such that Pinkerton and the government inspectors respectively had a duty of care.

[558] The case at bar is not comparable to *Fullowka v. v. Pinkerton's of Canada Ltd*. The government inspectors failed in both their public duty and in a private law duty of care and the Pinkerton security force failed in their private duty of care. Their failures were associated precisely with what they were retained to do; i.e. within the ambit of what they were retained to do and it was reasonable and expected that the replacement workers would rely on the government inspectors and Pinkerton's to do what was expected of them. In the case at bar, the putative Class Members, over half of whom had no relationship or even association with Bureau Veritas, were injured as a result of a building collapse, and could have had no expectation that Bureau Veritas' social audit was designed to protect them from the dangers of an illegally and negligently constructed building.

[559] I conclude that under the law of Ontario, it is plain and obvious that the Plaintiffs' tort claims are doomed to failure.

6. <u>The Breach of Fiduciary Duty Claim under Bangladesh or under Ontario Law</u>

[560] The law of Bangladesh and the law in Canada about the existence of a fiduciary relationship are very similar given that both are derived from English courts of equity, and given that, as noted above, in the absence of domestic case law, English law would be persuasive in Bangladesh, it is, therefore, convenient to address together the Plaintiffs' breach of fiduciary duty claim under Bangladesh law and under Ontario law.

[561] The Plaintiffs allege that within the scope of CSR standards, Loblaws undertook to protect the vulnerable Plaintiffs' health and safety, and thus Loblaws had a fiduciary duty to act in the best interest of the putative Class Members to ensure that their interests, health and

physical safety, were protected. The Plaintiffs allege that Loblaws unilaterally undertook to ensure that the audits performed at the Rana Plaza were sufficiently comprehensive so as to identify and remedy unreasonable risk of harm and death.

[562] In both England and Canada, certain relationships, such as trustee-beneficiary, lawyer-client, parent-infant/child, agent-principal, partner-partner are categorically fiduciary, but if a relationship does not fall within one of the categories, the law may recognize an *ad hoc* fiduciary relationship if the features of the particular relationship create circumstances that evoke the scrutiny of equity.

[563] See: *Boardman v. Phipps*, [1967] 2 AC 46 (HL); *Canadian Aero Services Ltd. v. O'Malley*, *supra*; *Guerin v. R.*, [1984] 2 SCR 335; *Frame v. Smith*, *supra*; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 SCR 534; *Norberg v. Wynrib*, [1992] 2 SCR 335; *Hodgkinson v. Simms*, *supra*; *Bristol & West Building Society v. Mothew*, [1998] Ch 1 (CA); *Arklow Investments Ltd. v. Maclean*, [2000] 1 WLR 594 (PC); *Galambos v. Perez*, *supra*; *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24; *Vivendi SA v. Richards*, 2013 EWHC 3006 (Ch.).

[564] The existence of an *ad hoc* fiduciary relationship is a question of fact to be determined by examining the specific facts and circumstances of each case: *Galambos v. Perez*, *supra* at para. 48; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra* at p. 648.

[565] The categories of fiduciary relationships are not closed, and fiduciary relationships may arise on an *ad hoc* basis if the relationship demonstrates the indicia of a fiduciary relationship. In *Hodgkinson v. Simms*, *supra* at para. 35, Justice La Forest stated that the existence of a relationship 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.

[566] A fiduciary obligation can arise categorically or *ad hoc* by statute, agreement, or express or implied undertaking by the fiduciary to exercise its discretionary power in the interests of the other party: *Galambos v. Perez*, *supra; Guerin v. R.*, *supra* at p. 384. In *Norberg v. Wynrib*, *supra* at p. 273, Justice McLachlin, as she then was, said that fiduciary relationships are always dependent on the fiduciary's undertaking to act in the beneficiary's interests.

[567] If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it: *K.L.B. v. British Columbia*, *supra*, at para. 40; *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (S.C.J.) at para. 28, aff'd (2002), 58 O.R. (3d) 417 (C.A.) at para. 73, rev'd on other grounds, 2003 SCC 39.

[568] The indicia of a fiduciary relationship are vulnerability arising from the relationship between the parties and: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) 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: *Elder Advocates of Alberta Society v. Alberta*, *supra* at para. 36.

[569] Vulnerability alone is insufficient to support a fiduciary claim, and the vulnerability must arise from the relationship between the fiduciary and the beneficiary in the sense that the beneficiary is at the mercy of the fiduciary holding the discretion or power: *Elder Advocates of*

Alberta Society v. Alberta, supra at para. 28; *Galambos v. Perez, supra* at para. 67.

[570] Dr. Goudkamp opined that the relationship between the Plaintiffs and the Defendants was not categorically fiduciary and there was no proximate relationship between the parties that resembled or entailed a fiduciary relationship or the taking on of fiduciary obligations. He said that an *ad hoc* fiduciary duty would not arise because the relationship between the Defendants was not a confidential one and in the commercial context was acting in self-interest without loyalty to the Plaintiffs. As for the vulnerability component of a fiduciary relationship, while the Plaintiffs could be said to be vulnerable, their vulnerability did not arise from the exercise of the Defendants' discretion.

[571] Ms. Kabir opined that there were no Pakistani or Indian decisions that would support the Plaintiffs' claims. She stated that a court in Bangladesh would treat the authorities relied upon by Dr. Goudkamp as highly persuasive and would conclude that the Plaintiffs' claims for breach of fiduciary duty are not actionable under the law of Bangladesh.

[572] Although he stated that he was not aware of any Bangladeshi authority or authority from other common law countries that had found a fiduciary obligation in the circumstances of the case at bar, and although he conceded that fiduciary duties are imposed more rarely than duties of care in negligence., Mr. Hossain's opinion was that the breach of fiduciary duty claim was viable under the law of Bangladesh and had a reasonable prospect of success.

[573] Mr. Hossain said that Bangladeshi courts would recognize an equitable claim in breach of a fiduciary duty on the basis of Loblaws' commercial relationship with entities that were notorious for breaching safety standards. He said that the courts in Bangladesh would adopt the common law approach (he ought more correctly to have said equity's approach) to the recognition of fiduciary obligations, which recognized certain relationships as fiduciary but that fiduciary obligations could be recognized on a case-by-case basis. Mr. Hossain opined that a fiduciary duty can be based on moral or personal responsibility due to superior knowledge or training as compared to the beneficiary of the duty. To explain the viability of the breach of fiduciary duty claim, at paras. 38, 80, and 81 of his affidavit, he stated:

> 38. …. As the employer of the garment workers, New Wave had a direct statutory and a fiduciary obligation to prevent and mitigate the unreasonable risk of bodily harm and death to which the workers were exposed in the normal course of employment. Loblaws knew or ought to have known that New Wave was in breach of its statutory obligations; yet it continued to conduct business with New Wave, reaping the financial benefits of the latter's breach of its obligations. It is reasonably arguable that Loblaws would be found liable on the basis that the Class Members were vulnerable to its exercise discretion and reasonably and legitimately relied on Loblaws to ensure that the audits performed on its behalf by Bureau Veritas were sufficiently comprehensive to detect and address the structural defects that exposed them to unreasonable risk of injury and death.
>
> ….
>
> 80. The Loblaws Defendants were directly or indirectly engaged in business with the employers of the garments workers who were manufacturing Loblaws, Joe Fresh apparel in Rana Plaza. These employers were under statutory obligations relating to the health and safety of the Class Members. The Loblaws Defendants were aware that the employers were bound by such obligations, and, therefore, had an obligation to enquire about the compliance of the employers with these statutory obligations. The Loblaws Defendants should have conducted proper due diligence in this respect by ensuring that appropriate audits were conducted at the Rana Plaza. Indeed, the Loblaws Defendants commissioned audits of the New Wave factories and allegedly directed the scope of the audits in accordance with their own guidelines and policies.

> 8l. In my opinion, the obligation to do proper due diligence and adequate audits would be regarded as a fiduciary obligation even though the parties were not in a status-based fiduciary relationship. To my knowledge, breach of fiduciary obligations has not been argued in Bangladesh except in the statutory contexts that I have outlined above. However, in my opinion, there is scope for development of the law of fiduciary obligations to the extent pleaded in the Claim. In this regard, Bangladeshi courts would look to the law of fiduciary obligations in other common law jurisdictions, including England, Canada, Australia, and New Zealand.

[574] As appears, Mr. Hossain essentially replicated the argument for a common law duty of care and described it as giving rise to an equitable relationship with attendant common law and fiduciary duties.

[575] Dr. Morgan's opinion was that there was an arguable cause of action for breach of fiduciary duty. He came to his conclusion notwithstanding conceding that: (a) this would be a novel fiduciary duty with no close precedents in the case law; (b) employers (and Loblaws was not an employer of the putative Class Members) generally do not owe fiduciary duties to their employees; (c) fiduciary duties are rarely imposed in the commercial context; and (d) fiduciary duties are imposed more rarely than duties of care in negligence.

[576] It is plain and obvious that there is no fiduciary relationship between the putative Class Members and Loblaws. As a factual matter, I am persuaded by Dr. Goudkamp's opinion and not by Dr. Morgan's or Mr. Hossain's.

[577] Once again, there are many problems with this claim, beginning with the fundamental one that there is no legal connection between Loblaws and the putative Class Members. This emphatically is the case with respect to the 1,142 employees of other garment businesses operating out of Rana Plaza and 439 persons who unfortunately just happened to be in or around the building at the time of the collapse.

[578] There is no case law in Bangladesh, England, Canada, common law countries, or the United States, that has recognized a fiduciary duty by a purchaser to a sub-supplier's employees.

[579] In my opinion, there is no legally significant relationship between Loblaws and the putative Class Members and their connection is what might be called an association and not a relationship. For the reasons expressed above there is no common law duty of care relationship and for the following reasons there is no equitable relationship between Loblaws and the putative Class Members.

[580] From a proximity perspective, it is doubtful whether even New Wave had a fiduciary relationship with its employees, because typically there is a common law contractual relation between employer and employee, but not an equitable relationship between employer and employee: *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Gen. Div.) at para. 64, aff'd [1997] O.J. No. 123 (C.A.); *Guilleman v. ECL Carriers LP*, [2008] O.J. No. 291 (S.C.J.) at para. 13, but Loblaws association is more remote, and it was not an employer of the putative Class Members. The relationship between Loblaws and its sub-suppliers is not a relationship that is categorically fiduciary. In *Canada (Attorney General) v. Confederation Life Insurance Co., supra*, about the more proximate employer-employee relationship, Justice R.A. Blair stated:

> 64. The employer-employee relationship is not *per se* fiduciary. It is not the sort of relationship which by itself has as its essence the kind of discretion, influence over interests, and inherent vulnerability arising out of the inherent purpose of the relationship which creates a rebuttable presumption that one party has a duty to act in the best interests of the other party. A further

> question has to be asked if a fiduciary element is to be found in the employer-employee relationship: was it within the reasonable expectation of the parties that the employer would forsake its own interests and oblige itself to act solely in the interests of the employee in relation to the matter in question? The answer in this case had to be "no". The evidence did not support a finding that there was a mutual understanding that the employee benefits would be pre-funded or secured, and there was nothing upon which to base a finding that the employees had any reasonable expectation that C Co. had undertaken to subordinate its own interests, and those of its policyholders, to those of the employees and retirees with respect to the establishment of such benefits. C Co. did not stand in a fiduciary relationship towards the claimants in relation to the provision of employee benefits, and was not in breach of fiduciary obligations in failing to pre-fund or secure the benefit plans.

[581] Imposing an *ad hoc* fiduciary duty in the circumstances of this case is contrary to well-established principles of equity, pursuant to which fiduciary duties are not typically found in commercial relationships, unless those relationships involve confidentiality, trust, and loyalty so that the fiduciary is bound to act altruistically for the beneficiary. Loblaws' association with the putative Class Members was not such a relationship. Bereft of arguments and conclusory allegations, the genuine material facts do not form the basis for any expressed or unilateral undertaking by Loblaws to protect the putative Class Members to ensure that the audits performed at the Rana Plaza were sufficiently comprehensive so as to identify and remedy unreasonable risk of harm and death. There is neither an express or implied undertaking to act in the beneficiary's interests.

[582] If the source of Loblaws' fiduciary duties is the CSR standards, then similar to the situation where a public authority's fiduciary duties arise from a statute, the language in the CSR standards should clearly support a fiduciary obligation, but the CSR standards do not assume any fiduciary duties to the putative Class Members and rather operate at a commercial and not a fiduciary level.

[583] *Galambos v. Perez, supra,* reveals why the Plaintiffs' breach of fiduciary duty claim is doomed to failure. The facts were peculiar, but they provide a laboratory microscope to reveal some aspects of the law of fiduciary duties.

[584] Ms. Perez was the law office manager of Mr. Galambos and a client for a mortgage transaction and a will. Over a course of time, to keep the floundering law firm from financial failure, Ms. Perez, without having been asked to do so, lent it $200,000. She expected to be repaid when the firm's fortunes turned for the better. That never happened and Mr. Galambos and the law firm went bankrupt, and the now unsecured creditor, Ms. Perez, sued for negligence, breach of contract, and breach of fiduciary duty. Justice Rice dismissed the action but was reversed by the British Columbia Court of Appeal on the basis that Mr. Galambos had breached his fiduciary duty to Ms. Perez. Justice Cromwell for the Supreme Court of Canada restored the trial judgment.

[585] Justice Cromwell concluded that the Court of Appeal had erred by extending the law with respect to *ad hoc* fiduciary relations. He said that the Court of Appeal erred in three respects; namely: (1) by holding that there was a power-dependence relationship between Ms. Perez and Mr. Galambos and his law firm; (2) by holding that in the case of a power-dependence relationship, a fiduciary relationship may arise even in the absence of a mutual understanding that one party would act only in the interests of the other; and (3) by concluding that an *ad hoc* fiduciary relationship had arisen in the case of the relationship between Ms. Perez and Mr. Galambos and his law firm.

[586] In matters most pertinent to the case at bar, in *Galambos v. Perez*, Justice Cromwell stated that it was not necessary to determine whether a mutual understanding is necessary for a fiduciary relationship, it was fundamental to *ad hoc* fiduciary duties that there be an express or implied undertaking of loyalty by the fiduciary, i.e., that he or she will act in the best interests of the other party.

[587] What is required in all cases of *ad hoc* fiduciary obligations is that there be an undertaking on the part of the fiduciary to relinquish self-interest and to exercise a discretionary power in the interests of the other party (paras. 76-79). Justice Cromwell said that the law looks at the consequences of the understanding between the parties and that the focus was on the vulnerability and dependency arising from the understanding between the fiduciary and the beneficiary and not on pre-existing vulnerability, which may not have existed. And, he said that a discretionary power over the other person was a necessary element to a fiduciary relationship. Thus, Justice Cromwell stated at paras. 68-70, 84 of his judgment:

> 68. The first is that fiduciary law is more concerned with the position of the parties that results from the relationship which gives rise to the fiduciary duty than with the respective positions of the parties before they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: "It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength... . In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement" ("The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.
>
> 69. The second is that a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J. in *Norberg*, at p. 273, when she said that "fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests". See also *Hodgkinson*, per La Forest J., at pp. 404-7.
>
> 70. Underpinning all of this is the focus of fiduciary law on relationships. As Dickson J. (as he then was) put it in *Guerin v. The Queen*, [1984] 2 SCR 335, at p. 384: "It is the nature of the relationship ... that gives rise to the fiduciary duty... ." The underlying purpose of fiduciary law may be seen as protecting and reinforcing "the integrity of social institutions and enterprises", recognizing that "not all relationships are characterized by a dynamic of mutual autonomy, and that the market-place cannot always set the rules": *Hodgkinson*, at p. 422 (per La Forest J.). The particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other: see, e.g., *Frame v. Smith*, [1987] 2 SCR 99, per Wilson J., at pp. 136-37; *Norberg*, per McLachlin J., at p. 272; Weinrib, at p. 4, quoted with approval in *Guerin*, at p. 384.
>
> ….
>
> 84. The nature of this discretionary power to affect the beneficiary's legal or practical interests may, de-pending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, e.g., *Lac Minerals* and *Hodgkinson*. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the

existence of such a duty.

[588] Applying the law from *Galambos v. Perez*, to the circumstances of the immediate case, the following conclusions that all negate a fiduciary relationship follow: (1) the vulnerability of the putative Class Members existed before and was not caused by any understanding the putative Class Members may have had with Loblaws; (2) if a mutual understanding is required, the point not decided in *Galambos v. Perez*, then, but for a few putative Class Members who might have some expectation because they saw Bureau Veritas conducting a social audit, there was no mutual understanding; (3) even for the few who saw the Bureau Veritas social audit, it is doubtful that they had an understanding of the requisite type; (4) Loblaws neither expressly or impliedly undertook to be loyal to the putative Class Members and to act only in their best interests and this undertaking is a prerequisite for a fiduciary relationship; and (5) Loblaws did not have a discretionary power over the putative Class Members arising from its relationship with them.

[589] I conclude that whether under the law of Bangladesh or under the law of Ontario, it is plain and obvious that the Plaintiffs have not disclosed a claim for breach of fiduciary duty.

J. The Pleadings Motion

(a) The *Apology Act* Pleadings

[590] Loblaws challenges the propriety of the Plaintiffs' Statement of Claim insofar as it contains: (a) allegations about the apology uttered by Galen Weston Jr.; and (b) extensive allegations about fires and other accidents that occurred at various factories in Bangladesh. Loblaws seeks to strike out paras. 22, 79-83, 174, 197(a) and 203 of the Statement of Claim.

[591] Loblaws submits that the pleading of the apology violates the *Apology Act*. I agree with Loblaws' arguments against which the Plaintiffs had no argument save the assertion that the pleadings were relevant, material, integral, and important to their case and their novel cause of action.

[592] In *Coles v. Takata Corporation*, 2016 ONSC 4885, I considered in some detail the law about the *Apology Act*, and I shall incorporate by reference that analysis for these Reasons for Decision.

[593] For present purposes, I can briefly add that the primary reason that the impugned paragraphs of the Plaintiffs' Statement of Claim should be struck is that assuming that the allegations are relevant, material, integral, and important to the Plaintiffs' case, they are still just allegations of evidence and not allegations of material facts.

[594] Rule 25.06 (1) of the *Rules of Civil Procedure* provides that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. In the case at bar, the impugned allegations are not concise statements of the material facts but they are evidence by which material facts are to be proved. The pleading of the apology uttered by Galen Weston Jr. should be struck out.

(b) The Major Accidents Pleading

[595] In the Statement of Claim, the Plaintiffs make extensive allegations about fires and other accidents that occurred over two decades at various factories in Bangladesh that Loblaws is alleged to have known about. Visualize, paras. 80-83 state:

> 80. In the past two decades, at least 16 other major accidents have occurred at apparel factories in Bangladesh which have killed 468 garment workers and seriously injured 840 more. Two very significant factory collapses in Bangladesh were well known in the years leading up to the Rana Plaza collapse, including devastating factory collapses in Dhaka. The Loblaws and Bureau Veritas Defendants were well acquainted with the history of these collapses and the overall poor workplace safety history in the Dhaka region of Bangladesh in the months and years preceding the Rana Plaza collapse. These accidents are described below.
>
> **(a) Spectrum Sweater Factory Collapse**
>
> 81. On April 11, 2005, the Spectrum Sweater factory, located in Savar, collapsed killing 65 garment workers and seriously injuring 80 others. It became widely known that the factory had degraded cement in its supporting pillars. The Spectrum factory had five illegally constructed floors which were added to the original four-story structure to accommodate increased business from Western corporations. It was also widely known that the Spectrum building had been constructed contrary to numerous applicable Bangladeshi laws, regulations and codes including violations of its construction permit. The corporations sourcing garments from the factories in the Spectrum building failed to adequately monitor the safety of the building so as to protect the garment workers. The collapse brought global media attention to the lack of building safety in Bangladesh, specifically in regard to the garment industry. At the time, the Spectrum building collapse was one of the worst industrial accidents in history.
>
> **(b) Phoenix Building Collapse**
>
> 82. On February 25, 2006, the five-story building which housed Phoenix Garments in Dhaka, collapsed trapping more than 300 individuals. The collapse killed 22 people and injured 50 others. Similar to the Spectrum collapse, the Phoenix building was found to have breached numerous applicable laws, regulations and codes including violations of its construction permit. This information became publicly known. The corporations sourcing garments from the factories failed to adequately monitor the safety of the building and the garment workers.
>
> **(c) Other Bangladesh Garment Factory Building Tragedies**
>
> 83. There were a total of 213 factory fires from 2006-2009 in Bangladesh. The serious building code violations which led to these horrendous fires were well known to the Loblaws Defendants and the Bureau Veritas Defendants. These disasters, included dozens of lethal fires, claimed the lives of hundreds of individuals. These Bangladeshi garment factory disasters include the following:
>
> (a) on November 25, 2000, approximately 51 garment workers died and approximately 100 others were injured in a fire at the Choudury Knitwear factory, Bangladesh;
>
> [(b) – (o)]

[596] Only two of the seventeen previous incidents involved building collapses, the others were factory fires or explosions. None of the incidents involved the Defendants.

[597] Much of these pleadings is irrelevant. Given that the Plaintiffs also plead that Loblaws first began purchasing goods in Bangladesh in 2006, any probative value to the proof of the Plaintiffs' case, which concerns Rana Plaza, of the details of accidents in Bangladesh apparel factories over two-decades is doubtful and marginal at best.

[598] The Plaintiffs' case certainly does not remotely depend on proving these allegations and, in any event, none of these allegations are material facts. The material fact is that Loblaws knew that Bangladesh had a history of building collapses. The pleading of allegations about fires and other accidents in Bangladesh should be struck out.

K. Certification

1. Introduction

[599] For the reasons discussed above, the Plaintiffs do not have a legally viable cause of action or their causes of action are statute-barred. It follows that the Plaintiffs do not satisfy the cause of action criterion for certification and, therefore, their action cannot be certified as a class action.

[600] However, given the possibility of an appeal, I shall assume that my conclusions about the legal viability of the Plaintiffs' causes of action are incorrect, and I shall assume that they have satisfied the cause of action criterion for certification. Based on that assumption, I shall then go on to determine whether the Plaintiffs' action satisfies the remaining four criteria for certification as a class action under the *Class Proceedings Act, 1992*.

[601] I have already foreshadowed my conclusion that if there were legally viable claims, then with some qualifications or adjustments, the Plaintiffs' proposed class action satisfies the criteria for certification.

2. General Principles

[602] The court is required to certify an action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[603] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[604] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, *supra* at para. 16.

[605] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534 at paras. 26 to 29; *Hollick v. Toronto (City), supra* at paras. 15 and 16.

[606] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City), supra* at paras. 28 and 29. However, the plaintiff must show "some-basis-in-fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action: *Hollick v. Toronto (City), supra* at paras. 16-26.

[607] In particular, there must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140. In order to establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members: *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.

3. The Cause of Action Criterion

[608] As discussed above for the purposes of the certification motion, I shall assume that the Plaintiffs have satisfied the cause of action criterion.

4. Identifiable Class Criterion

(a) General Principles

[609] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[610] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

(b) Discussion and Analysis

[611] The Plaintiffs propose the following class definition:

> All persons who were in Rana Plaza at the time of the Rana Plaza collapse and survived, and who attorn to the jurisdiction of the Ontario Superior Court of Justice by opting-in to this proceeding ("the Surviving Class Members").
>
> The estates of all persons who died as a result of the Rana Plaza collapse and all spouses, children, parents, brothers, sisters, grandparents, grandchildren or other dependants of persons who died or were injured as a result of the Rana Plaza collapse (the "Wrongful Death and Family Class Members"), provided that the Wrongful Death and Family Class Members attorn to the

jurisdiction of the Ontario Superior Court of Justice by opting-in to this proceeding.

[612] The Plaintiffs indicated in their reply factum that they intend to carve out from the class definition any New Wave managers who required employees to return to work on the day of the collapse and their family members. I agree with that revision.

[613] Depending on the outcome of any appeal of my decision that there are no viable causes of action against the Defendants, further revisions to the class definition may be in order.

[614] The current definition is based on the assumption that all of the putative Class Members are owed a duty of care, but, arguably, the class definition is overbroad because it includes persons who arguably have no viable claim. It is possible to define the class more narrowly to include only New Wave employees or just New Wave Style employees. The class could be defined to not include employees from other garment manufacturers and other putative Class Members who had the ill fortune to coincidentally be present at Rana Plaza when disaster struck.

[615] The Plaintiffs submit, however, that the current definition is not overbroad, and they argue that it is not proper to have a merits-based definition of the class and it is not objectionable that the proposed class definitions may include persons who may eventually be determined not to have a successful claim.

[616] It is true that a class definition should not be merits-based, and it is also true that not every class member need have a provable claim. However, each class member must have a legally viable cause of action and thus there must be a common duty of care owed to each class member, and in the case at bar, it is arguable while there may a common duty of care to some permutation of New Wave employees, there is no duty of care to the balance of the class as it is currently defined.

[617] For present purposes, it is not necessary to say anything more that should an appellate court reverse my decision that there is a duty of care in the case at bar, then the class definition may have to be refined to accord with the scope of the duty of care.

5. Common Issues Criterion

(a) General Principles

[618] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City), supra* at para. 18.

[619] With regard to the common issues, success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class. See: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] SCCA No. 512; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at para. 183.

[620] In *Pro-Sys Consultants v. Microsoft*, *supra* at para. 106, the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding, which is that

individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[621] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General), supra,* at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to SCC refused [2010] SCCA No. 348.

[622] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General), supra*. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp*., 2000 BCCA 605, aff'g [1996] BCJ No. 734 (SC), leave to appeal to SCC ref'd. [2001] SCCA No. 21.

[623] In the context of the common issues criterion, the some-basis-in-fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class: *Hollick v. Toronto (City), supra*; *Fullawka v. Bank of Nova Scotia*, 2012 ONCA 443; *McCracken v. Canadian National Railway Company, supra*; *Williams v. Canon Canada Inc., supra*; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *Dine v. Biomet*, 2015 ONSC 7050, aff'd 2016 ONSC 4039 (Div. Ct.).

(b) The Proposed Common Issues

[624] The proposed common issues are:

> (a) Did Loblaws owe a duty of care, at the material time, to the Class Members to ensure that the manufacture of its *Joe Fresh* brand garments in Rana Plaza took place in a safe and lawfully constructed factory and/or building?
>
> (b) If the answer to (a) is "yes", what was the appropriate standard of care of Loblaws? Did Loblaws breach that standard of care? If so, when and how?
>
> (c) Is Loblaws vicariously liable for the conduct of Pearl Global and/or New Wave?
>
> (d) Did Bureau Veritas owe a duty of care to the Class Members, at the material time, to conduct reasonable and thorough audits of the New Wave factories and the Rana Plaza and/or to notify Loblaws of safety concerns relating to the New Wave factories in Rana Plaza?
>
> (e) Did Bureau Veritas owe a duty of care to the Class Members to advise Loblaws that a structural audit of New Wave and/or the Rana Plaza was necessary to safeguard the Class Members' safety?
>
> (f) If the answer to (d) or (e) is "yes", what was the appropriate standard of care of Bureau Veritas? Did Bureau Veritas breach that standard of care? If so, when and how?
>
> (g) Did Loblaws owe a fiduciary duty to the Class Members to design and conduct audits and inspections of the New Wave factories in Rana Plaza in a manner that ensured the safety of the Class Members?
>
> (h) If the answer to (g) is "yes", did Loblaws breach its fiduciary duties to the Class Members? If so, when and how?
>
> (i) Are the Defendants liable to the Class Members for damages? If so, on what basis?

(c) Discussion and Analysis

[625] In my opinion, on the assumption that the cause of action criterion has been satisfied, then the proposed questions that correspond to the certifiable causes of action also satisfy the common issues criterion.

[626] In a class action founded on negligence, it has become normal to certify as common issues, the question of duty of care, breach of the duty of care, and heads of damages.

[627] Notwithstanding the Defendants' arguments to the contrary, the common issues in the immediate case are standard and normal for this type of case. In my opinion, the common issues criteria is satisfied.

6. Preferable Procedure Criterion

(a) General Principles

[628] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City), supra*.

[629] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different Class Members.
>
> 3. Different remedies are sought for different Class Members.
>
> 4. The number of Class Members or the identity of each Class Member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

[630] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General) supra* at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[631] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank*, *supra* at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City), supra*.

[632] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after

determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.).

[633] The court must identify alternatives to the proposed class proceeding: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City)*, *supra* at para. 28. The proposed representative plaintiff bears the onus of showing that there is some-basis-in-fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative: *AIC Limited v. Fischer*, *supra* at paras. 48-49.

[634] In *AIC Limited v. Fischer*, *supra* at paras. 24-38, the Supreme Court of Canada reiterated that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the Court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[635] In *AIC Limited v. Fischer*, Justice Cromwell pointed out that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare?

[636] In considering the preferable procedure criterion, one should consider the type or genre of class action, because in terms of access to justice, the needs of plaintiffs suffering personal injuries are different than the needs of plaintiffs suffering a purely economic loss, and the needs of those suffering economic losses are different depending upon whether the loss is a deprivation or a missed expected financial gain.

[637] The type of remedy being sought be it declaratory, compensatory, or restitutionary may also make a difference to whether a class proceeding is the preferable procedure for the resolution of the class members' claims. Providing injured parties with access to justice cannot be divorced from ensuring that the ultimate remedy provides substantive justice where warranted: *AIC Limited v. Fischer*, *supra*, at para. 24; F. Iacobucci, "What Is Access to Justice in the Context of Class Actions?" in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17 at p. 20.

[638] And one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the part of the

preferable procedure analysis that considers whether the claimants will receive a just and effective remedy for their claims.

(b) Discussion and Analysis

[639] But for the question of alternatives to an Ontario class action by the Plaintiffs commencing individual or class proceedings in Bangladesh or individual actions in Ontario, in my opinion, the Plaintiffs' proposed class action satisfies the preferable procedure criterion.

[640] As for the alternative of individual actions in Ontario or Bangladesh, they are decidedly not preferable. A class action is the optimum vehicle for efficient access to justice for a mass tort claim, and it maximizes the avoidance of a multiplicity of proceedings and minimizes the prospects of inconsistent results. Apart from the individual issues trials that a class action in a mass personal injury tort action entail, a class action optimizes every party's investment in their claim or defence, which is prepared and presented once rather than presented over and over again.

[641] Although there are limits to the court's ability to award aggregate damages that would further optimize the utility of the common issues trial, the resources of s. 25 of the *Class Proceedings Act, 1992* go some distance to introducing economies for individual issues trials, and, like most litigation, there is also the prospect of settlements in which damages can be aggregated and distribution schemes developed.

[642] As for the alternative of proceedings in Bangladesh, there are two alternative perspectives. The first perspective, based on the evidence of the Plaintiffs' expert Mr. Hossain, is that the administration of justice in Bangladesh has no experience or expertise in class actions and it would take decades for either class proceedings or individual proceedings to provide access to justice to the putative Class Members. Based on Mr. Hossain's evidence, the argument becomes that proceedings in Bangladesh are not a genuine alternative to a class action in Ontario.

[643] The second perspective is to accept that the Bangladesh courts provide a genuine alternative to a class action. Based on that perspective, which is the one I shall adopt, the question becomes whether a class action in Ontario is the preferable procedure to proceedings in Bangladesh.

[644] To a certain extent, adopting this perspective transforms the preferable procedure question into a quasi-*forum conveniens* analysis in a case in which Class Counsel for the Plaintiff and one Defendant, Loblaws, are located in Ontario, while the other Defendant, Bureau Veritas, the Plaintiffs, and the putative Class Members are located in Bangladesh, where the disaster occurred.

[645] Other major ingredients in this mix are that Ontario has *jurisdiction simpliciter,* and as far as the common issues trial is concerned, there would be no overwhelming difficulty having the common issues decided in Ontario (as demonstrated by the multi-motions now being decided). In contrast, there is, however, no evidence that there is Class Counsel that would be prepared to take on the class action to have the common issues decided in Bangladesh. Another ingredient is that the Court of Appeal's decision in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, supra* suggests that Ontario courts should be prepared to have claims whose only major connection to Ontario is the defendant's presence in Ontario heard in Ontario if the foreign

plaintiffs commence action in Ontario.

[646] Looking forward, assuming that the Plaintiffs were successful after a common issues trial, it would certainly be preferable – for the Class Members – to have their individual issues trials heard in Bangladesh. Conversely, I do not see how the Defendants can complain if there were a common issues trial in Ontario followed by individual issues trials in Ontario for those Class Members who are prepared to venture to Ontario to prove their claims. In this regard, given that the travelling Class Members will no longer be immune from a costs order should their claims fail in Ontario, practically speaking, the Defendants' exposure to claims is reduced by the circumstance of the individual issues trials taking place in Ontario.

[647] In all these circumstances, and having regard to the factors the court must consider in determining the preferable procedure criterion, I am satisfied that the Plaintiffs satisfy the preferable procedure criterion in the case at bar.

7. Representative Plaintiff Criterion

(a) General Principles

[648] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[649] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

[650] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact*: Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc*., [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Outdoor v. Pfizer Canada Inc*., [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp*., [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[651] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton, supra* at para. 41.

[652] The critical ingredients or factors for the determination of the representative plaintiff criterion are the competence of counsel and on the qualification of the plaintiff as reflected in the litigation plan, which in a sense is a synthesis of the other certification criteria: *Shah v. LG Chem Ltd.*, 2015 ONSC 3257 at para. 32.

(b) Discussion and Analysis

[653] On this last criterion, I can be brief and simply say that the Plaintiffs, the proposed representative plaintiffs, satisfy all the aspects of the representative plaintiff criterion.

8. Conclusion on Certification

[654] For the above reasons, I dismiss the certification motion. Although four of the five criteria for certification are satisfied, the Plaintiffs have no viable cause of action and there is nothing to certify.

L. Conclusion

[655] For the above reasons, I dismiss this action.

[656] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days from the release of these Reasons for Decision, followed by the Plaintiffs' submissions within a further 20 days.

_____

Perell, J.

Released: July 5, 2017

CITATION: Das v. George Weston Limited, 2017 ONSC 4129
COURT FILE NO.: CV-15-526628CP
DATE: 20170705

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ARATI RANI DAS, REHANA KHATUN, MOHAMED ALAUDDIN and KASHEM ALI

Plaintiffs

– and –

GEORGE WESTON LIMITED, LOBLAWS COMPANIES LIMITED, LOBLAWS INC., JOE FRESH APPAREL CANADA INC., BUREAU VERITAS – REGISTRE INTERNATIONAL DE CLASSIFICATION DE NAVIRES ET D'AERONEFS SA, BUREAU VERITAS CONSUMER PRODUCT SERVICES, INC. and BUREAU VERITAS CONSUMER PRODUCTS SERVICES (BD) LTD.

Defendants.

REASONS FOR DECISION

PERELL J.

Released: July 5, 2017

TAB 4

See page 7-8

CITATION: Fortress Real Developments Inc. v Franklin, 2018 ONSC 296
COURT FILE NO.: CV-17-580252
DATE: 20180116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
FORTRESS REAL DEVELOPMENTS INC., JAWAD RATHORE and VINCE PETROZZA	*Jonathan C. Lisus, Andrew Winton and Larissa Moscu* for the Plaintiffs
Plaintiffs	
– and –	
DAVID FRANKLIN	
Defendant	*James Wortzman and Karey Dhirani*, for the Defendant
	HEARD: December 6 and 11, 2017

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] The plaintiff Fortress Real Developments Inc. ("Fortress") carries on business in the development of real estate projects, and in particular condominium buildings. According to Fortress, it either (a) acts as the sole or co-developer of projects through an affiliate, or (b) acts as a development consultant for the projects.

[2] The plaintiffs Jawad Rathore ("Rathore") and Vince Petrozza ("Petrozza") are Fortress' President/CEO and COO respectively.

[3] The defendant David Franklin ("Franklin") is a lawyer licensed to practice law in the province of Ontario. Franklin is counsel to three parties who loaned funds to syndicate mortgages associated with Fortress projects.

[4] According to Franklin, Fortress is directly involved in offering syndicated mortgages to investors for its projects. Fortress denies Franklin's contention, maintaining that as a development

consultant on certain projects, it assists with tasks such as designing the financing which may or may not include a syndicated mortgage.

[5] Franklin is 100% convinced that his assessment of Fortress' involvement in syndicated mortgages is correct. From November 2015 through September 2017, Franklin delivered a series of emails to various recipients, the contents of which the plaintiffs maintain are clearly defamatory and untrue.

[6] The plaintiffs commenced this proceeding on August 24, 2017 seeking general, aggravated and punitive damages for defamation together with interim, interlocutory and permanent injunctive relief restraining Franklin from "repeating or publishing, in any manner whatsoever, any statements about the plaintiffs, directly or indirectly."

[7] On August 18, 2017, Franklin consented to an interim order prohibiting him from stating that the Law Society of Upper Canada ("LSUC"), or any individuals associated with the LSUC have determined that mortgages on title to Fortress projects are "frauds or a Ponzi scheme". This interim relief was granted pending the determination of the plaintiffs' interlocutory motion.

[8] On October 8, 2017, Franklin gave a further undertaking (again, on a without prejudice basis to the disposition of the plaintiffs' interlocutory motion) prohibiting him from stating that: (a) any regulatory or law enforcement authority is investigating any of the plaintiffs or has determined that mortgages on title to Fortress projects are frauds or a Ponzi scheme and (b) the plaintiffs are criminals, engaged in organized crime or other unlawful, unprofessional, or unethical conduct, or that any professional advisor acting for the plaintiffs is a "dupe" or involved in such organized crime or other unlawful conduct.

[9] The plaintiffs' interlocutory motion proceeded before me over a two day hearing. The interlocutory relief requested by the plaintiffs was further narrowed down to a request that the defendant be prohibited from stating that:

(a) the LSUC or any individual with the LSUC, or any other regulatory or law enforcement authority, is investigating any of the plaintiffs or has determined that mortgages on title to Fortress projects are frauds or a Ponzi scheme;

(b) the plaintiffs are criminals or are engaged in organized crime or other unlawful, unprofessional or unethical conduct; and

(c) any lawyer or other professional advisor acting for the plaintiffs is a "dupe" or involved in organized crime or other unlawful, unprofessional or unethical conduct.

[10] The plaintiffs' motion was argued over a two day hearing. At the conclusion of argument, I took my decision under reserve.

[11] These are my reasons.

Interlocutory Injunctions in Defamation Cases

[12] The traditional test for an interlocutory injunction is well known and established by the Supreme Court of Canada in *R.J.R. MacDoanld v. Canada (Attorney General)* 1994 CanLII 117 (SCC). A moving party must present evidence to allow the Court to assess the following three elements:

(a) Is there a serious question to be tried?

(b) Would the moving party seeking the injunction suffer irreparable harm if the relief is not granted?

(c) Which party would suffer the greater harm from the granting or refusal of the relief (i.e. the balance of convenience)?

[13] Both parties agree that in defamation cases, the first element of the governing test is to be applied far more stringently. This is especially so when a defendant in a defamation proceeding seeks to justify the allegedly defamatory statements, which Franklin clearly does in this proceeding.

[14] In *Canada (Human Rights Commission) v. Canadian Liberty Net* 1998 CanLII 818 (SCC), the Supreme Court of Canada held that in defamations cases, the traditional *R.J.R.* test ought to be modified. This is because the *R.J.R.* test was primarily created to apply in a commercial context, and as such "it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in s. 2(b) of the *Charter*." As the majority in *Liberty Net* stated:

> "The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of case – where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. Given the value we place on freedom of expression, particularly in matters of public interest, that guiding principle has much to recommend it.
>
> These cases indicate quite clearly that the Cyanamid test is not applicable in cases of purse speech and, therefore, the appellants are misguided in presuming that this test does apply. As Griffiths L.J. points out in *Herbage v. Pressdram*, supra, such a test would seldom, if ever, protect controversial speech…"

[15] As such, an injunction to restrain future defamation should only be granted in the rarest and clearest of cases, and where the words are so clearly defamatory and impossible to justify that the claim would almost certainly succeed.

[16] How does the Court ascertain whether a defamatory statement will be "impossible to justify"? In *Kerridge v. Sun Media Corp et al.* 2015 ONSC 518 (CanLII), Justice Wright held that the impugned words must be "so obviously defamatory that anything other than a verdict in favour of the plaintiff would have to be regarded as perverse."

[17] In *Asselin v McDougall* 2013 ONSC 1716 (CanLII), Justice Toscano-Roccamo held that a moving party must establish the impugned statements to be so "manifestly defamatory" that a reasonable jury's conclusion in favour of the plaintiff would be "inevitable".

[18] In *Upper Canada District School Board v. Gilcig* 2017 ONSC 2904 (CanLII), Justice Leroy stated that "although the test to obtain an injunction to restrict free speech is high, it is not insurmountable … the plaintiff must show the case at trial is close to ironclad."

[19] No doubt these decisions share a common theme; namely, that Fortress must discharge an onerous burden, as the relief it seeks is no less than exceptional. Fortress acknowledges this onus, but points to the decision of Justice Corbett in *Peoples Trust Company v. Atas* 2016 ONSC 5911 (CanLII), and in particular the following excerpt:

> "In cases where the plaintiffs seek to restrain speech, the test on the merits is more stringent. Where a defendant has pleaded the defence of justification, appellate courts have held that the plaintiff must establish a high degree of certainty that it will succeed on the issue of liability. The precise formulation of the test is not entirely clear, with some dicta going so far as to suggest that only where it is "impossible" for the defendant to justify the words that they should be restrained on an interlocutory basis.
>
> This requirement has been interpreted contextually in some of the cases, and in my view that approach is the correct one: all of the circumstances of the case must be considered in order to decide if the plaintiff's case is strong enough to warrant an interlocutory injunction."

[20] I take no issue with Justice Corbett's contextual approach, and agree that all of the circumstances of the case ought to be considered by the Court. That said, in *Peoples Trust* Justice Corbett was asked to restrain a notorious "repeat offender" defendant from publishing defamatory statements about the plaintiff's pending trial. This defendant was, at one time, allegedly legally incapable to represent herself in that proceeding, and was the subject of a pending vexatious litigant application under section 140 of the *Courts of Justice Act*. The defendant had been made subject to case management to "reduce the burdens on the Court" caused by "unwieldy litigation". The defendant had published a myriad of defamatory statements about the plaintiffs, and Justice Corbett found that he was not in a position to assess whether "each and every one of the impugned statements is impossible to justify", as he could not realistically make a preliminary determination of the fair meaning of each and every one of the thousands of those impugned statements.

[21] Accordingly, while I agree that all of the circumstances of this case must be considered, in my view that does not alter the lens through which I am to assess Fortress' request for injunctive relief, and I must still be satisfied that Fortress' claim will almost certainly succeed.

The Impugned Emails

[22] As previously stated, Fortress is seeking to restrain Franklin from making specific statements that fall into three separate categories. Fortress points to 18 separate emails delivered by Franklin to various recipients between November 2015 and September 2017, with the bulk of those emails being sent in the summer of 2017.

Category #1 The alleged LSUC investigation

[23] Approximately 10 of the 18 emails fall within the first category. In virtually all of these emails, Franklin states as a fact that mortgage transactions arranged by Fortress were or are under investigation by the LSUC and, on occasion, the Royal Canadian Mounted Police ("RCMP") or Financial Services Commission of Ontario ("FSCO"). In some of these emails, Franklin goes as far as to state that a "senior LSUC mortgage fraud investigator" has found the mortgage transactions to be frauds or part of a Ponzi scheme.

[24] The various recipients of these Category #1 emails were:

- Bruce Millburn, a lawyer representing Morris and Financial Mortgage Corporation, a company which assisted Fortress with financing for the purposes of purchasing a real estate project;
- Ildina Galati, the principal broker of Building and Development Mortgages Canada ("BDMC"), a company that Fortress works with when it develops a real estate project;
- Various lawyers at Norton Rose, who have and continue to be retained by Fortress as counsel;
- Paul Taylor, the president of Mortgage Professionals Canada which operates as a national mortgage broker industry association;
- Various lawyers at Fogler Rubinoff and Robins Appleby, law firms which act for Fortress generally but not in any current litigation;
- Various lawyers at Polley, Faith, a law firm which acts for FMP Mortgage Investments, a company which Franklin alleges is not an arm's length from Fortress; and
- Mike Pearce, a lawyer at Doldlen, Wallace Follick, whose firm acts for BDMC.

[25] I note that at the outset of the hearing, Franklin agreed on an interlocutory basis to refrain from making any statements regarding any determination having already been made by the LSUC that Fortress mortgage transactions are a fraud or Ponzi scheme. What remains to be determined on this motion with respect to Category #1 is whether Franklin is to be restrained from stating that the LSUC or any other regulatory or law enforcement authority is investigating Fortress with respect to its mortgage transactions.

[26] In support of his position that Fortress and its mortgage transactions are being investigated by FSCO, the RCMP and/or the LSUC, Franklin filed a nine volume responding record. Within that extensive record, Franklin relies upon various statements and documents attributed to third parties. At their highest, those statements and documents seem to implicate Fortress, albeit in a very general sense. Franklin has tendered, *inter alia*, the following documents in support of his position:

- An LSUC Notice to the Profession published on October 24, 2017 to warn lawyers in Ontario about syndicated mortgages and to caution lawyers against being "dupes" (a fact relevant to category #3 set out hereinafter).

- A FSCO newsletter published on November 23, 2017 to mortgage brokers about syndicated mortgages and the necessity of preventing fraud associated with those mortgages.

- News articles published by Reuters on November 30, 2017 (and in turn the Financial Post and the Globe and Mail) which stated, *inter alia*, that senior FSCO investigators rejected or ignored compliance officers' recommendations that FSCO investigate or take steps to reign in the "marketing and sales of Fortress syndicated mortgages." These articles also reported upon FSCO opening investigations into whether Fortress syndicated mortgages were fraudulent, or in effect, a Ponzi scheme. Documents referenced in the articles infer that the RCMP may have launched its own investigations into Fortress.

[27] In addition to taking the position that the contents of all of his emails are true, Franklin submits that these emails are protected by the doctrines of absolute and/or qualified privilege as they have been sent to regulatory authorities. Franklin further argues that the emails delivered to the lawyers who acted for Fortress cannot be defamatory as they were not "published", but simply delivered to Fortress' authorized agents.

[28] Franklin has also tendered the opinion evidence of Krista Zingel and William Vasiliou, who both gave evidence that (a) Fortress does not comply with applicable legislative and regulatory standards, (b) FSCO and the Ministry of Finance are acting improperly by failing to shut Fortress down, and (c) mortgages associated with Fortress projects were frauds and part of a Ponzi scheme. I will have more to say about this evidence later on in these Reasons.

Category #2 Plaintiffs are criminals and/or engaged in organized crime

[29] There are 8 emails sent by Franklin which fall within category #2. These various emails state that either:

(a) Fortress takes 35% of the investor's funds as its fee, and that the Fortress documents setting out this fee are not provided to the investors;

(b) Fortress is engaged in "white collar crime";

(c) Fortress defrauds its investors; or

(d) the organized crime section of the Criminal Code is applicable to Fortress.

[30] These 8 emails were sent by Franklin to the following recipients:

- Marshall Zehr, an individual who assists developers in obtaining financing with whom Fortress has business dealings;

- Alan Hoffman, the president of CE-Credits.ca, a company which provides courses for mortgage brokers;
- Jeremy Devereux and Walied Soliman, partners at Norton Rose, counsel to Fortress; and,
- Taylor.

[31] In support of his position that the category #2 emails are true, Franklin has produced Fortress Commitment Letters in relation to certain real estate projects. Franklin points to page 1 of a letter dated December 21, 2011 relating to the Harmony Village real estate development. That letter appears to state that Fortress intends to deduct 35% of its investors' funds as a non-refundable advance on a share of "project profits". If the project does not generate any profits, then Fortress would still be allowed to keep the 35% fee.

[32] Fortress points to pages 2-4 of the Commitment Letters which states that Fortress' share of project profits is to be reduced by, *inter alia*, a deferred lender fee paid to investors. That deferred lender fee is deducted from Fortress' share of project profits and is to be measured by the actual net profit of Phase 1 of the project. Fortress maintains that it is contractually required to contribute at least a half of the 35% fee to arms/length third parties, and it is defamatory for Franklin to claim otherwise.

Category #3 Fortress' lawyers are "dupes"

[33] There are really only 3 emails which fall within category #3, and those emails were sent by Franklin to law firms who have acted for Fortress. In those emails, Franklin states that Jennifer Teskey ("Teskey", a lawyer who acts for Fortress) is Fortress' "dupe", and that firms acting on behalf of Fortress cannot continue to act as they are "involved in organized crime".

[34] It was Franklin who filed a complaint with LSUC against Teskey. By letter dated August 8, 2016, the LSUC confirmed its review of Franklin's complaint and supporting documentation, and concluded that "the information reviewed does not meet the test requiring a reasonable suspicion that Teskey may have engaged in a professional conduct". As a result, the LSUC closed its file.

[35] There is no other relevant evidence in the voluminous record before me that Teskey is under investigation by the LSUC, other than Franklin taking the position in this proceeding that the LSUC is unwilling to investigate Teskey and other lawyers representing Fortress because they are part of "large law firms".

Expert Evidence

[36] Both parties are in substantial agreement with the governing jurisprudence. As recently held by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.* 2015 SCC 23 (CanLII), the Court is to determine the admissibility of expert opinion evidence through a two-step analysis:

(a) the proponent of the evidence must establish the threshold *Mohan* requirements of admissibility (relevance, necessity, absence of an exclusionary rule and a properly qualified expert), and

(b) the Court then balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.

[37] Relevance at the first stage refers to logical relevance. Both relevance and necessity remain threshold requirements.

[38] As stated in *White Burgess*, the second stage "balancing exercise" requires the court to be satisfied that the expert evidence is "sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence."

[39] As held by the Court of Appeal for Ontario in *Carmel Federal Family Trust (Trustee of) v. Pirsanti* 2012 ONCA 297 (CanLII):

> "When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court."

[40] In reviewing the opinion evidence of both Zingel and Vasiliou, I find them to be of no assistance to the Court on this motion. Zingel has retained Franklin as her own lawyer, and that obvious conflict of interest was not disclosed in her affidavit. Prior to the commencement of this proceeding, Franklin, Zingel, and Vasiliou had worked together as a "team" to determine, in their own minds, that Fortress was a criminal organization that was defrauding the public. Both Zingel and Vasiliou have admitted a collective desire to ensure that Franklin's position is proven.

[41] On cross-examination, Zingel even admitted that by August 2016 she had formed the opinion that Fortress "threw money around to pay lawyers to shut down critics of his business", and that such behaviour was "disgusting".

[42] Vasiliou, in his personal capacity, went to the RCMP with Franklin in November 2016 to complain about Fortress. In fact, Franklin never asked Vasiliou to give opinion evidence in this proceeding. It was Vasiliou who volunteered to do so.

[43] I do not accept the opinion evidence of either Zingel or Vasiliou, and find that their respective affidavits should be struck out. I have placed no reliance on either of their affidavits in my disposition of this motion.

Irreparable Harm

[44] Both parties agree that even if Fortress satisfies its stringent onus described above, it must still prove that in the absence of obtaining the injunction it will suffer an irreparable harm that cannot be compensated for by a damaged award.

[45] Fortress submits that as Franklin is on a smear campaign, in the absence of injunctive relief he will continue to make false statements which will lead the public to believe that Fortress is being investigated by the LSUC, RCMP and FSCO, and is engaged in fraudulent criminal activity.

[46] According to Fortress, success in the real estate development industry is difficult if not impossible without "good relationships with developers, architects, construction companies, trades, municipalities, mortgage brokers and banks." Allegations that the core of Fortress' business is fraudulent or part of a Ponzi scheme are extremely damaging to both Fortress' reputation and its ongoing and future relationships within the industry. While Fortress has not provided any specific evidence with respect to the potential impact upon present and future development opportunities, it believes that such opportunities could be lost if Franklin is not restrained.

[47] Franklin argues that Fortress has not produced any documents or particulars of experiencing (a) any alleged difficulties in securing construction financing or (b) damage to its relationships with key third parties in the industry. As irreparable harm cannot be inferred, but must be established by clear and compelling evidence, Franklin argues that Fortress' motion must be dismissed for this reason alone.

Decision

a) Category #1

[48] While I am ordering that Franklin refrain from making any statements regarding any determination having already been made by the LSUC or other regulatory or law enforcement authority that Fortress mortgage transactions are a fraud or Ponzi scheme (as Franklin has agreed to this relief), I cannot conclude on the record before me that Franklin's statements that Fortress is under investigation by the LSUC, RCMP or any other regulatory or law enforcement authority will be impossible to justify at trial.

[49] While I agree with Fortress that, on the record before me, the defence of absolute privilege and qualified privilege will very likely fail (as the privilege attaches to the occasion when the statement is made, and not to the statement itself), it is simply too early in this proceeding to conclude on the evidence that Franklin's attempts to justify the category #1 statements will be rejected by a judge or jury at trial.

[50] Franklin relies heavily upon the recent Reuters article. Fortress argues that the article is hearsay and does not disclose any sources rendering it unreliable and inadmissible evidence. The

article was published on November 30, 2017, mere days before Fortress' motion was argued before me. The article, while lacking in specified sources, is certainly detailed in its story that Fortress was investigated by FSCO, and may be under investigation by the RCMP. Presumably, Franklin will pursue the information contained in the Reuters' article, and I am not prepared at this stage to dismiss it as simply "fake news".

[51] Further, counsel for the LSUC stated during Franklin's examination of Stephen McClyment (an LSUC senior investigator) that the LSUC is apparently investigating Fortress as of November 2017. While the release of the LSUC's Notice of Profession about independent legal advice and syndicated mortgages may just be a contemporaneous coincidence, Fortress' case against Franklin with respect to the category #1 statements is simply not ironclad enough to warrant the exceptional injunctive remedy it seeks.

[52] As such, Fortress' request to restrain Franklin from making the (balance of the) category #1 statements is dismissed.

b) Category #2

[53] In my view, on the evidence before me it will be impossible for Franklin to justify his statements that the plaintiffs are "criminals or engaged in organized crime". There is no evidence that Fortress or the individual plaintiffs have been charged with any criminal activity relating to the subject matter of Franklin's complaints. To be frank, while I am not even sure what being a "criminal or engaged in organized crime" actually means in the context of Franklin's emails, there is likely no worse allegation to be made against a business entity, and there is simply no evidence that criminal conduct or participation in organized crime has occurred. At most, if Franklin's statements and beliefs are true then Fortress will be liable for civil wrongs and, perhaps, breach of statutory and/or regulatory obligations.

[54] Franklin himself has already agreed to cease making any statements that the LSUC or any other regulatory or law enforcement authority has determined that Fortress mortgages are frauds or a Ponzi scheme. If Franklin has agreed to cease making such statements, what grounds would there be to continue to allege that Fortress is participating in criminal conduct?

[55] I cannot find any reasonable defence on the merits to justify such category #2 statements continuing to be made against Fortress. This may well be Franklin's subjective belief, but that, in and of itself, does not amount to a defence.

[56] As such, I am granting Fortress' request to restrain Franklin from making the category #2 statements.

c) Category #3

[57] I also find on the record before me that it will be impossible for Franklin to justify his statements that Fortress' lawyers or other professional advisors are dupes or involved in organized crime or other unlawful and/or ethical conduct.

[58] There is no evidence that any of Fortress' lawyers or other professional advisors have known or have been willfully blind to any alleged dishonest, criminal or unethical conduct on

behalf of Fortress. When Franklin filed his complaint with the LSUC to try and secure such evidence, his efforts were rebuked. While he remains otherwise convinced and dissatisfied with the LSUC's actions and conclusions, that does not permit Franklin to continue to voice his displeasure at the expense of Fortress and its lawyers and/or professional advisors when the evidence clearly does not support his position.

[59] As such, I am granting Fortress' request to restrain Franklin from making the category #3 statements.

[60] With respect to the second part of the *R.J.R.* test for injunctive relief, in *Liberty Net* the Supreme Court of Canada held that the main reason that the traditional *R.J.R.* test is inappropriate to use in defamation cases is due to the fact that the irreparable harm and balance of convenience components of the traditional test would almost always favour the moving party. Specifically, the Court held:

> "The speaker usually has no tangible or measurable interest other than the expression itself, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non/commercial speaker where there is no tangible, immediately use utility arising from the expression other than the freedom of expression itself. (emphasis underlined in original)"

[61] While damages in defamation cases are at large, I accept that irrevocable damage to a business reputation can constitute the type of irreparable harm that may not be quantifiable in monetary terms. While Fortress' evidence on irreparable harm could have been better particularized and substantiated, in my view the injunctive relief I have ordered is necessary to protect Fortress' ongoing business actives, which even according to Franklin remain consistent and pressing through the use of numerous consultants, lenders and other third parties (to whom Franklin has himself sought to contact with his statements). Accordingly, I find that Fortress has met the second element of the *R.J.R.* test.

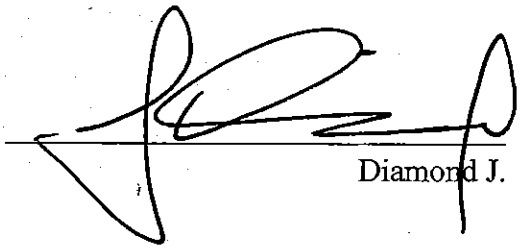
[62] With respect to the balance of convenience, given the fact that Franklin continued to deliver emails in the face of the interim consent orders made by this Court while this motion was pending, and that there was some initial delay on the part of Franklin in taking the necessary steps to ensure that this motion be heard promptly, I find that the balance of convenience favours Fortress.

Costs

[63] In my view, success has been divided on this motion. If parties take a different view, I would first urge them to exert the necessary efforts and try and resolve the costs of this motion, including all of the interim steps and attendances leading up to the hearing.

[64] If those efforts prove unsuccessful, Fortress may serve and file written costs submissions (totaling no more than four pages including a Costs Outline) within 10 business days of the release of these Reasons.

[65] Franklin shall thereafter serve and file his responding costs submissions (also totaling no more than four pages including a Costs Outline) within 10 business days from the receipt of Fortress' costs submissions.



Diamond J.

Released: January 16, 2018

CITATION: Fortress Real Developments Inc. v Franklin, 2018 ONSC 296
COURT FILE NO.: CV-17-580252
DATE: 20180116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

FORTRESS REAL DEVELOPMENTS INC., JAWAD RATHORE and VINCE PETROZZA

Plaintiffs

– and –

DAVID FRANKLIN

Defendant

REASONS FOR DECISION

Diamond J.

Released: January 16, 2018

TAB 5

See pages 29-33

CITATION: Alfano v. Piersanti, 2012 ONCA 297
DATE: 20120509
DOCKET: C52738

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., LaForme J.A. and Cunningham A.C.J. (*ad hoc*)

BETWEEN

Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, Trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano, Trustee of the Ulti Alfano Family Trust, and Ulti Alfano

Plaintiffs (Respondents)

and

Christian Piersanti, Piersanti and Co. Barristers and Solicitors, Gold Financial Corp., Osler Paving Ltd., 758626 Ontario Limited now known as Diligent Financial Corporation, 1281111 Ontario Limited, 1269906 Ontario Limited, 1281632 Ontario Limited, 1212700 Ontario Limited, Terry Piersanti also known as Terry Scatcherd, 1281038 Ontario Limited, and 3964400 Canada Inc.

Defendants (Appellants)

AND BETWEEN

Christian Piersanti, Diligent Financial Corporation, and 1212700 Ontario Limited

Plaintiffs by Counterclaim (Appellant)

and

Bertina Alfano, Italo Alfano, Ultimino Alfano, Joe Alfano, 815748 Ontario Limited, Power Contracting Limited, Puslinch Investments Inc., and 1026864 Ontario Limited

Defendants by Counterclaim (Respondents)

AND BETWEEN

Gold Financial Corp.

Plaintiff (Appellant)

Puslinch Inv. Inc., Invar Building Corporation, Invar Aggregates Limited, 1212700 Ontario Limited, 1026864 Ontario Limited, Peter Lamanna, 2016411 Ontario Limited, Steven Bellissimo Barrister and Solicitor, Ontario Power Contracting Limited, 2012746 Ontario Limited, 2026474 Ontario Limited, Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, Trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano, Trustee of the Ulti Alfano Family Trust, and Ulti Alfano

Defendants (Respondents)

V. Ross Morrison and Samantha Chapman, for the appellants

Kevin Sherkin and James F. Diamond, for the respondents

Heard: November 8 and 9, 2011

On appeal from the judgment of Justice Ellen M. Macdonald of the Superior Court of Justice, dated September 3, 2010, with reasons reported at 2010 ONSC 4853, [2010] O.J. No. 3787.

O'Connor A.C.J.O.:

[1] This is an appeal from the judgment of Ellen M. Macdonald J. of the Superior Court of Justice dated September 3, 2010. The trial judge made a declaration that the respondents, the Alfano Family Trusts (the "Alfano Trusts"), owned 87 percent of the

equity in 758626 Ontario Limited ("758"), which owned 100 percent of the shares in Osler Paving and Construction Limited ("Osler").

[2] The trial judge also ordered the appellants, Christian and Terry Piersanti, to pay the respondents $20 million in damages for improperly placing Osler in bankruptcy as part of a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler. In addition, she ordered Christian Piersanti to pay the respondents $250,000 in punitive damages.

[3] The trial judge further ordered the appellant, 1281632 Ontario Limited ("128"), a Piersanti controlled company, to pay $2.5 million into court to the credit of the respondents. Finally, the trial judge made a declaration that the respondent, Ulti Alfano, had a one-twelfth interest in the 1995 value of certain properties referred to as the "MAP" properties.

[4] The overarching issue with respect to liability is whether the trial judge's finding that the Piersantis improperly placed Osler in bankruptcy is supported by the evidence.

[5] The appellants raise a number of issues with respect to damages. The most significant issue is whether the trial judge erred in refusing to permit the appellants' expert to testify on the ground that the expert lacked independence.

[6] I would not interfere with the trial judge's declarations that the Alfano Trusts indirectly owned 87 percent of the equity in Osler, nor with her finding of liability against the appellant, Christian Piersanti ("Mr. Piersanti"). In my view, the trial judge's finding

of liability against Terry Piersanti ("Ms. Piersanti") is not supported by the evidence and must be set aside.

[7] I would not interfere with the trial judge's decision to exclude the evidence of the appellants' expert witness. I would, however, make three adjustments to the damages award. I discuss those below.

FACTS

[8] I will set out a brief overview of the facts. I will discuss the facts in more detail, as required, when I address the various grounds of appeal.

[9] For years, the Alfano family owned and operated Ontario Paving Company Ltd. ("Ontario Paving"), a successful paving business. Following the economic downturn in the early 1990s, Ontario Paving declared bankruptcy. Between the years 1993 and 1995, each of the four Alfano brothers involved in the business (Italo, Frank, Carmen and Ulti) declared personal bankruptcy. In time, three of them were discharged. Carmen, who died in 1996, had not been discharged at the time of his death.

[10] In early 1993, the Alfanos, with the assistance of their lawyer, Mr. Piersanti, incorporated Osler to continue the paving business. Mr. Piersanti was made president of Osler and was given a 10 percent ownership interest. In 1993, with Mr. Piersanti's assistance, the Alfano brothers established four family trusts, one for each brother's

family. The brothers were trustees and their family members were the beneficiaries of the trusts. Each trust held a 22.5 percent interest in Osler.[1]

[11] Prior to his death in 1996, Carmen Alfano was primarily responsible for the management of Osler. After Carmen's death, Mr. Piersanti took over the management of Osler's financial affairs. The remaining Alfano brothers were responsible for operations.

[12] In 1997, Frank Alfano wished to withdraw from the business. The trial judge found that his family trust transferred its shares of Osler to the others who had interests in Osler. As a result, the remaining three family trusts each held 29 percent of the equity in Osler for a total of 87 percent. Mr. Piersanti owned the remaining 13 percent.

[13] In 2001, the relationship between the Alfano family and Mr. Piersanti began to deteriorate. Mr. Piersanti told Ulti and Italo Alfano that Osler was experiencing cash flow difficulties. The Alfano brothers could not understand this given the amount of business that Osler had been generating in recent years.

[14] In the first half of 2002, matters came to a head. At a meeting on June 11, 2002, Mr. Piersanti asserted for the first time that he owned all of the businesses in which he was involved with the Alfano family. This included Osler. He said the Alfanos were "just workers". This came as a shock to the Alfanos who believed they owned the majority of the equity in Osler.

[1] The trusts' interests were held by way of options to purchase shares at a price of $1 a share. I will discuss the options structure in paras. 44 to 46 below.

[15] Mr. Piersanti then locked the Alfanos out of the businesses, including Osler. He listed Osler's premises at 340 Bowes Road, Concord for sale. Mr. Piersanti removed the hard drives and a computer from the Osler business premises.

[16] On or about June 17, 2002, the respondents commenced this action seeking, *inter alia*, declarations that the Alfano Trusts owned 87 percent of Osler through their interests in 758. They also sued Mr. and Ms. Piersanti for damages. On June 17, 2002, Mr. Piersanti assigned Osler into bankruptcy without consulting the Alfano family members.

[17] On June 18, the respondents brought a motion to set aside the assignment of Osler into bankruptcy. The respondents also sought a Mareva injunction preventing Mr. and Ms. Piersanti from removing assets from Osler and other companies in which the Alfano family claimed an interest. On June 18, Molloy J. granted the Mareva injunction. The injunction remained in force at the time of the trial. One of the grounds of appeal relates to an alleged breach of that injunction.

[18] In response to the motions brought by the respondents on June 18, Mr. Piersanti took the position that he was the sole owner of Osler. He appended to his affidavit a unanimous shareholders' agreement (the "Piersanti USA") dated June 17, 1993 relating to the shares of 758, the company that owned Osler. Pursuant to the Piersanti USA, all of the issued shares of Osler were owned by Mr. Piersanti. The Alfano Trusts were given options to purchase 90 percent of the shares at fair market value. The options were exercisable within a period of five years and only upon fulfilling certain conditions,

including having Mr. Piersanti released from guarantees of the debts of Osler and 758. Mr. Piersanti took the position that because the Alfano Trusts had not exercised their options, he was the sole owner of Osler.

[19] On July 12, 2002, the respondents' efforts to have the bankruptcy stayed were unsuccessful. Their action against the Piersantis proceeded.

[20] At the time they commenced the action, the respondents did not have a copy of a unanimous shareholders' agreement relating to 758 or Osler. In the autumn of 2002, the respondents obtained a copy of a different version of the unanimous shareholders agreement ("the Alfano USA") from the lawyer who had acted for Frank Alfano in 1997 when his family trust sold its interest in Osler.

[21] The parties to the Alfano USA were the same as the parties to the Piersanti USA. The agreements were both dated June 17, 1993. The signatures were also the same. However, the content of the Alfano USA was different than the Piersanti USA in several important respects. While both agreements contemplated that all of the issued shares of 758 would initially be held in Mr. Piersanti's name, the Alfano USA provided the Alfano Trusts with options to purchase 90 percent of the shares from Mr. Piersanti at a price of $1 per share. In the Piersanti USA, the option price was fair market value. In addition, unlike the Piersanti USA, the Alfano USA did not contain any preconditions to the exercise of the options. Nor did it set out a time limit within which the Alfano Trusts could exercise the options.

[22] Between 1993 and 2002, Mr. Piersanti acted as legal counsel to Osler and to the Alfano family members. Significantly, he advised the Alfano family members in the creation of the Alfano Trusts and in preparing a unanimous shareholders agreement with respect to 758 and Osler.

[23] From 2002 until October 2008, when the trial of this matter began, Mr. Piersanti refused to take a position in this litigation as to which of the two versions of the USA was valid. Moreover, he did not provide a credible explanation at trial as to why there were two significantly different agreements dealing with the shareholdings of 758 and Osler.

[24] At trial, Mr. Piersanti accepted that the Alfano USA was probably the correct version.

[25] This case has had a tortuous history. The Piersantis brought many motions before the commencement of trial. The flavour of the pre-trial proceedings can be gleaned from an order made by Spence J. on September 19, 2006. He prohibited the Piersantis from bringing any further motions without first obtaining leave of the court. The trial judge commented on this history saying "in the disposition of these motions [the pre-trial motions], the Piersanti defendants were frequently admonished for the use of delaying tactics".

[26] The Piersantis also failed to produce documents in a timely manner. Mr. Piersanti had possession of most of the relevant documents. He managed Osler's financial affairs.

The trial judge found that Mr. Piersanti was also Osler's lawyer as well the lawyer for the Alfanos. He removed the hard drive and a computer from Osler's premises in June 2002 when the dispute underlying this action erupted.

[27] In her reasons, the trial judge commented that "shortly after the opening of the trial, I was advised that Mr. Piersanti had recently sworn a supplementary affidavit of documents … [t]here had been ample opportunity to deliver these documents prior to the commencement of trial." Indeed, there had been six years. The newly produced documents comprised approximately 3,000 pages. The trial judge observed:

> This late delivery of this affidavit was one of many episodes throughout the trial wherein there were issues about the quality of disclosure from the Defendants.
>
> …
>
> The duty to make full disclosure was largely ignored by the Defendants in this case. They chose the documents that they would disclose.

[28] The trial lasted nine months with breaks for holidays and health issues. There were 49 witnesses. Ulti Alfano testified for 14 days and Mr. Piersanti for 22 days. During the trial, there were many motions, including a three-day *voir dire* on the admissibility of the evidence of the Piersantis' expert witness on damages and misappropriation.

[29] The trial judge reserved judgment for 14 months and then released 41-page reasons for judgment.

THE REASONS FOR JUDGMENT

[30] The trial judge made clear and strong findings of credibility adverse to the Piersantis. She rejected the evidence of both Mr. and Ms. Piersanti. She found that as the trial progressed, the Piersantis "were on a path to deliberately confuse the court on relevant issues". She did not believe the evidence of either of them.

[31] The trial judge accepted, by and large, the evidence of Ulti and Italo Alfano and their witnesses. She specifically found that "Ulti was a credible and reliable witness".

[32] The appellants do not challenge the trial judge's findings of credibility.

[33] The relevant findings of the trial judge with respect to liability arising from the bankruptcy of Osler are as follows:

i. the Alfano Trusts owned 87 percent of 758, which owned 100 percent of Osler;
ii. Mr. Piersanti engaged in a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler;
iii. as part of the fraudulent scheme, Mr. Piersanti concocted a unanimous shareholders agreement effectively eliminating the Alfanos' interest in 758 and Osler;
iv. also as part of the scheme, Mr. Piersanti improperly assigned Osler into bankruptcy;
v. prior to the bankruptcy, the Piersantis misappropriated monies from Osler;

vi. as a result of the bankruptcy, the respondents suffered damages; and

vii. Mr. and Ms. Piersanti were liable to the respondents for damages resulting from the Osler bankruptcy.

[34] The trial judge fixed damages in the amount of $20 million.

[35] The trial judge also ordered Mr. Piersanti to pay $250,000 as punitive damages because of his fraud with respect to the unanimous shareholders agreement.

[36] In addition to her findings with respect to the bankruptcy of Osler, the trial judge made two additional orders that are challenged on appeal:

i. she ordered 128, a Piersanti controlled company, to pay $2.5 million into court to the credit of the respondents; and

ii. she made a declaration that Ulti Alfano has a claim to the 1995 value of a one-twelfth interest in the MAP properties.

ISSUES

[37] I have organized the appellants' arguments into seven issues:

1) Did the trial judge err in finding Mr. Piersanti liable for damages resulting from the bankruptcy of Osler?

2) Did the trial judge err in finding Ms. Piersanti liable for damages resulting from the bankruptcy of Osler?

3) Did the trial judge err in excluding the evidence of the appellants' expert witness on damages and misappropriation?

4) Did the trial judge err in awarding $20 million for damages to the respondents caused by the Osler bankruptcy?

5) Did the trial judge err in awarding punitive damages against Mr. Piersanti?

6) Did the trial judge err in ordering 128 to pay $2.5 million into court to the credit of the respondents? and

7) Did the trial judge err in concluding that Ulti Alfano had a claim to the 1995 value of a one-twelfth interest in the MAP properties?

ANALYSIS

[38] As indicated above, the trial judge made strong findings of credibility adverse to Mr. and Ms. Piersanti. She also made several findings of fact that go to the heart of the issues raised on appeal. Although trite, it is important to observe that this appeal is not a second trial and this court will interfere with the trial judge's findings of fact only if she has made a palpable and overriding error: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 10.

(1) Osler Bankruptcy – Mr. Piersanti

[39] I will address Mr. Piersanti's arguments with respect to the trial judge's finding of liability against him under four headings.

(a) Sufficiency of evidence

[40] Mr. Piersanti argues that there was insufficient evidence to found liability against him for damages arising from the Osler bankruptcy. I disagree. In my view, there was a strong case that Mr. Piersanti assigned Osler into bankruptcy as part of a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler.

[41] The trial judge made a number of findings that are directly relevant to this issue. First and most critically, she found that the Alfano Trusts owned 87 percent of 758 and indirectly of Osler at the time of the bankruptcy in 2002. She made declarations to that effect.

[42] This finding was supported by the evidence of the two Alfano brothers, Ulti and Italo, who testified at trial. This trial judge accepted their evidence. This finding was also supported by the Alfano USA, which the trial judge found to be the true version of the agreement. While the agreement is structured in the form of options to the Alfano Trusts to purchase 90 percent of the shares of 758, those options are exercisable on the payment of $1 per share without conditions. There is no time limit within which the Alfano Trusts were required to exercise the options. This structure is consistent with and supports the evidence of Ulti and Italo Alfano that the intention throughout was that the

Alfano Trusts were to be the owners of 90 percent of 758 and Osler (87 percent after Frank Alfano's departure).

[43] Mr. Piersanti argued that s. 8.05 of the Alfano USA contains preconditions to the exercise of the options. Section 8.05 provides that a person acquiring shares in 758 must endeavour to obtain releases from all guarantees made by the vendor of the shares. Mr. Piersanti argues that as the Alfano Trusts had not caused the Osler's creditors to release him from loan guarantees, their interests in the shares had not been realized.

[44] I do not accept this argument. In my view, a better interpretation of the Alfano USA is that s. 8.05 does not apply to shares acquired by exercising the options. Even if the obligations contained in s. 8.05 do apply to those shares, the section is not a precondition to the exercise of the options.

[45] In my view there was ample evidence to support the trial judge's conclusion that the Alfano Trusts owned 87 percent of 758 and therefore Osler in 2002.

[46] The trial judge's finding of liability against Mr. Piersanti was founded in an action for fraud. In para. 2 of her reasons, the trial judge framed the claim as follows:

> The Alfanos are claiming damages in excess of $25 million on the basis that Osler failed due to a series of dishonest and deceitful acts by the defendants Christian and Terry Piersanti.

[47] Throughout her reasons, the trial judge made a number of findings that taken together reveal a series of fraudulent acts by Mr. Piersanti designed to appropriate for

himself the interests of the Alfano Trusts in Osler. These fraudulent acts culminated in Mr. Piersanti voluntarily assigning Osler into bankruptcy without authority or even the knowledge of the Alfano family members.[2]

[48] The most telling of Mr. Piersanti's fraudulent acts was relying on the Piersanti USA to assert 100 percent ownership of 758 and therefore Osler. In para. 60 of her reasons, the trial judge found that:

> Mr. Piersanti created the second version of the USA to gain control of the Osler company when he knew that, particularly after Carmen's death, the remaining brothers, Italo, Ulti and Frank had little or no interest in the details of the legal documentations such as the USA.

[49] In relying on the Piersanti USA, Mr. Piersanti took advantage of his position as Osler's lawyer and the lawyer for the Alfano family. He abused that position when he asserted that the Alfano Trusts no longer had any interest in 758 and Osler.

[50] The trial judge found that Mr. Piersanti locked the Alfanos out of the Osler business premises and listed the Osler building for sale without informing the Alfanos. Moreover, she found that Mr. Piersanti caused Osler to make a voluntary assignment into bankruptcy.

[2] The Alfano family trusts also plead a breach of fiduciary duty, conversion and conspiracy. In addition, they argued at trial that the trial judge could find oppression under the *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, and fashion a remedy under that statute. The trial judge's findings of fact could support a finding of liability for breach of fiduciary duty, conversion and oppression. However, her conclusions seem to focus most directly on a claim in fraud. Accordingly, I will proceed to discuss the case on the basis of the fraud claim.

[51] When the Alfanos moved to set aside the assignment into bankruptcy, Mr. Piersanti relied upon the Piersanti USA to assert that he was the sole owner of 758 and Osler.

[52] In addition, on June 20, 2002, as part of his fraudulent scheme, Mr. Piersanti asked Osler's controller, Chriss Smith, to alter Osler's financial records for April 2002 to show a loss rather than a profit. Mr. Smith refused, considering such a change to be unethical. Notably, Mr. Piersanti solicited Mr. Smith's help after the Alfanos had challenged Piersanti's assignment of Osler into bankruptcy.

[53] Mr. Piersanti argues that there was no advantage for him personally from the Osler bankruptcy. The difficulty with this argument is that it depends on what Mr. Piersanti knew or intended at the time he carried out the fraudulent acts described above. He had access to all of Osler's financial records. He was in the best position to determine what might occur in a bankruptcy and whether in the end there would be value for him if he was the sole owner of Osler. He might well have considered that the bankruptcy was an expedient way of getting rid of the interests of the Alfano Trusts. In addition, he was the guarantor of some of Osler's debt. If the Osler assets were to be liquidated for more than the outstanding debt, he stood to gain. All of that said, it is not necessary to decide what Mr. Piersanti considered his upside to be. The facts, as found by the trial judge and supported by the evidence, lead inevitably to the conclusion that Mr. Piersanti placed

Osler in bankruptcy as part of his fraudulent scheme to deprive the Alfanos of their interest in Osler.

[54] Mr. Piersanti also argues that Osler would have failed whether or not he placed it in bankruptcy. Thus, he argues his actions did not cause the Alfano Trusts any damages.

[55] I do not accept this argument. There is evidence to support the trial judge's conclusion that Osler would have continued as a profitable company if Mr. Piersanti had not placed it in bankruptcy.

[56] In May 2002, Mr. Piersanti assured the Royal Bank of Canada (RBC), one of Osler's secured creditors, that Osler's affairs had been improving ahead of schedule for the past two years and that Osler had $6 million work on hand for the coming year.

[57] On June 11, 2002, Mr. Piersanti locked the Alfanos out of Osler and to their surprise took the position that he owned all of the company. On June 14, in response to Mr. Piersanti's unilateral action, the Alfanos' counsel wrote RBC informing it of the ownership dispute and directing the bank to only accept cheques signed by the Alfanos.

[58] Not surprisingly in these circumstances of disputed ownership, on June 17 RBC called its loan and began the process of appointing a receiver. Later on the same day, Mr. Piersanti voluntarily assigned Osler into bankruptcy.[3]

[3] I do not think that anything turns on the fact that RBC called its loan before the assignment into bankruptcy. RBC called the loan after the Alfanos' lawyer, quite properly as it turns out, put RBC on notice of Mr. Piersanti's improper conduct in attempting to appropriate all of the ownership of Osler to himself.

[59] In his evidence, Tom Strezos, the Alfanos' damages expert, opined that, assuming Mr. Piersanti had wrongfully misappropriated funds and assigned the company into bankruptcy, it appeared that Osler would have continued as a profitable going concern but-for Mr. Piersanti's misconduct. In reaching this conclusion, Mr. Strezos considered the history of Osler, its financial statements, and the state of the construction industry in the years following 2002.

[60] Mr. Strezos pointed out that Osler had made significant investments in capital assets from 1996 to 2001 as a result of an optimistic outlook for its business. The company was forecasting lower cash outlays for capital expenditures and moderate to high growth in the paving industry after 2001, which would lead to significant annual net cash flows.

[61] Moreover, Mr. Strezos said that Osler's financial statements did not present the picture of a failing company. Osler's 2001 financial statements showed a net profit of $216,684. The 2011 statements showed equity of $2,693,800 and an EBITDA[4] of $1,219,313.[5]

[62] In 2002, Osler's monthly income statements showed net income increasing from a loss of $1,870 in the year to January 31, 2002 to a profit of $155,377 in the year to March 31, 2002.

[4] Earnings before income tax, depreciation and amortization.
[5] I note that the financial statements did not take into account any monies Mr. Piersanti had misappropriated from Osler.

[63] The trial judge recognized that a number of economic factors could affect the profitability of Osler and that Ulti and Italo Alfano were responsible for the economic risks faced by Osler. However, the trial judge accepted Mr. Strezos' evidence. Her findings of liability and damage were premised on a conclusion that but for the bankruptcy, Osler would have continued as a profitable growing concern. This finding was open to the trial judge on the evidence. I see no basis to interfere.

(b) Misappropriation of Osler Funds

[64] At trial, the Alfano Trusts asserted that over the years, Mr. Piersanti had misappropriated funds from Osler. They did not sue for recovery of the misappropriated monies. Rather, they alleged that the misappropriations were part of Mr. Piersanti's fraudulent scheme to appropriate Osler to himself at their expense.

[65] The allegations relating to Mr. Piersanti's misappropriations were difficult to run to ground at trial because of the problems the respondents and the court experienced in requiring Mr. Piersanti to make full and timely production of documents. Indeed, he continued to make disclosure as the trial progressed. The result was that allegations of misappropriation evolved as documents were produced.

[66] At one point prior to trial, Morawetz J. ordered that the respondents' allegations of misappropriation should be confined to those being made at that point in time. After that order, Mr. Piersanti made further productions, by then long overdue. In these

circumstances, it was open to the trial judge to consider all of the evidence with respect to the alleged misappropriations. Given Mr. Piersanti's disregard for his obligations to produce documents, it would have been unfair to limit the Alfano Trusts to the misappropriations referred to in Morawetz J.'s order.

[67] The trial judge found that Mr. Piersanti misappropriated funds. Her reasons on this issue were brief.

[68] In addressing the issues of misappropriation, the trial judge referred to one chart which detailed certain alleged misappropriations in the amount of $1,077,438. She also referred to other calculations of alleged misappropriations by the Piersantis for their own purposes to the detriment of the financial stability of Osler. The trial judge accepted these calculations noting "they are supported by the various witnesses who testified on accounting matters".

[69] In his evidence, Mr. Piersanti offered explanations for some, or perhaps all, of the transactions relating to the alleged misappropriations. However, the trial judge did not accept any of his evidence. Rather, she found that he had embarked upon a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler. Several of the impugned transactions resulted in a benefit to Mr. Piersanti or a company related to him and did not take into consideration the fact that the Alfano Trusts had an interest through 758 of 87 percent of the equity of Osler.

[70] Although the trial judge did not address the impugned transactions individually, it is implicit in her reasons, read as a whole, that she was satisfied that the amount improperly appropriated by Mr. Piersanti exceeded $1 million. I would not interfere with this finding.

[71] Finally, it is worth repeating that the trial judge's findings of liability and her damages award are not directed at compensating the respondents for misappropriated funds. Rather, they are directed at Mr. Piersanti's fraud in assigning Osler into bankruptcy. Indeed, even if the trial judge had not found misappropriations, there was ample evidence to support the trial judge's finding of liability with respect to the Osler bankruptcy.

(c) The Order of July 12, 2002

[72] On July 12, 2002, Epstein J. refused the respondents' request to set aside the assignment of Osler into bankruptcy. Mr. Piersanti argues that this order operates as a bar based on *res judicata* to the trial judge's finding of liability with respect to the bankruptcy.

[73] I do not accept this argument. The order of July 12, 2002 was based on incomplete and incorrect facts. At the time Mr. Piersanti asserted he was the sole owner of Osler. He had produced the fraudulent version of the USA. While the respondents took the position that the Family Trusts were the majority shareholders, they had not yet

found what turned out to be the true version of the USA. On July 12, the court was not aware that the assignment into bankruptcy was part of Mr. Piersanti's fraudulent scheme to deprive the Alfanos of their interests in Osler.

[74] The order of July 12 cannot operate as a bar to a claim that the bankruptcy was the result of a fraud that had not been exposed at the time.

(d) The Personal Bankruptcies of the Alfanos

[75] Mr. Piersanti argues that the Alfano brothers lost their interests in 758 and Osler because they failed to disclose those interests to their trustees in bankruptcy when they declared personal bankruptcy in the 1990s.

[76] Osler was incorporated in 1993. Mr. Piersanti was the sole shareholder. Under the Alfano USA, the four Alfano Trusts each had an option to buy 22.5 percent of the shares of 758 for $1 per share. After the transfers from the Frank Alfano Trust in 1997, the three remaining Alfano Trusts each had an interest in 29 percent of 758.

[77] Carmen, Ulti and Italo Alfano each declared personal bankruptcy between 1993 and 1995. Ulti and Italo were discharged in 1995 and 1996. Carmen was not discharged at the time of his death in 1996. None of the Alfanos disclosed an interest in 758 or Osler during their personal bankruptcies.

[78] Mr. Piersanti's argument is based on the principle that all of the assets of a bankrupt person vest in the trustee whether disclosed or not: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 40(1), 71(2). Thus, the argument goes, the Alfano brothers lost their interests in Osler at the time of their bankruptcies and therefore, had no basis on which to bring this action.

[79] I would not give effect to this argument.

[80] To start, the argument was not pleaded. Had it been pleaded, the parties may have led evidence and conducted the trial differently.

[81] Moreover, it does not appear that the Alfano brothers, in their personal capacities, had an interest in 758 or Osler at the time of their bankruptcies. Their family trusts did. The brothers were trustees of those trusts. Section 67(1) of the *Bankruptcy and Insolvency Act* as it was at the time of the Alfanos' personal bankruptcies provided that "[t]he property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person": see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended by S.C. 1992, c. 27. The trial judge did not make findings concerning the identity of the beneficiaries of the Alfano Family Trusts, and I am not prepared to conclude, on this record, that the property held by the trusts did not fall under s. 67(1)(a).

[82] In any event, it seems counter-intuitive that if there is a problem, as Mr. Piersanti now asserts, that Mr. Piersanti should be the beneficiary of that problem. If there is a problem, it was the creditors of the Alfano brothers at the time of their bankruptcies who were affected, not Mr. Piersanti.

[83] That said, there is one matter with respect to this issue arising from the trial judge's reasons that warrants comment. Throughout her reasons, the trial judge repeatedly held that the Alfano Trusts owned 87 percent of 758 and, therefore, of Osler. She made declarations to that effect. However, in para. 150 of her reasons she makes two comments that could be interpreted as being inconsistent with her core finding about the Alfano Trusts' interests. She said:

> Even if the Piersantis stole monies from the Alfanos through the Osler company, the Alfanos' claims would fail because their interest in Osler and MAP Properties vested in their trustees on bankruptcy. The trustees acquired all legal and equitable rights of the Alfanos.
>
> …
>
> The Alfanos' shares in Osler vested in their trustees on the day of bankruptcy.

[84] It is important to consider the trial judge's comments in para. 150 in the context in which she made them. The comments were made in a section of the reasons in which the trial judge addressed Ulti and Italo Alfano's claims to an interest in the MAP properties. Those claims were made by Ulti and Italo in their personal capacities, not as trustees.

Indeed, the trial judge began the discussion at para. 145 by saying: "These submissions are relevant to the claims of Ulti and Italo in their interest in the MAP properties." Ulti and Italo Alfano did not disclose their interests in the MAP properties to their trustees in bankruptcy. The trial judge found that their interests vested with the trustees.

[85] In her reasons, prior to para. 150, the trial judge had clearly decided that the Alfano Trusts owned 87 percent of the shares of 758 and, therefore, of Osler. The trial judge's comments about the Osler shares in para. 150 were made as an aside in the course of a discussion about the Alfano brothers' personal interests in the MAP properties. In para. 150, the trial judge did not analyze the issue of the interests of the Alfano Trusts in Osler. Whatever prompted the trial judge to make the comments in para. 150, it is clear from her reasons, read as a whole, that she did not intend to find that the Alfano Trusts did not own 87 percent of the shares of 758 and Osler because of the personal bankruptcies of the Alfano brothers.

[86] In the result, I would not give effect to Mr. Piersanti's argument with regard to the effect of the Alfanos' personal bankruptcies on the claim by the Alfano family trusts against him for fraud.

(2) Terry Piersanti

[87] The trial judge found that Ms. Piersanti was liable for damages resulting from the Osler bankruptcy.

[88] In my view, this finding cannot stand. The trial judge made no finding linking Ms. Piersanti to the bankruptcy.

[89] The respondents argue that the trial judge found Ms. Piersanti liable as a co-conspirator with her husband in the fraudulent scheme to place Osler into bankruptcy.

[90] The difficulty is that the trial judge did not find a conspiracy. Nor did she make any factual findings linking Ms. Piersanti to the fraudulent scheme that led to the bankruptcy. She did not find that Ms. Piersanti was involved in concocting the fraudulent USA, in deciding to lock out the Alfanos from the Osler business, in asking the controller to alter the financial statements, or in making the assignment into bankruptcy.

[91] The trial judge found that Ms. Piersanti was involved in misappropriating funds from Osler. Accepting for the sake of discussion that there was evidence to support that conclusion, the trial judge does not find that Ms. Piersanti's involvement in the misappropriations was part of a scheme or conspiracy by which Mr. Piersanti would place Osler in bankruptcy in June 2002. Indeed, all but one of the alleged misappropriations took place in the 1990s, at a time well removed from the bankruptcy. There is no evidence to suggest that Mr. Piersanti had formulated his scheme to put Osler in bankruptcy before June 2002.

[92] A finding that Ms. Piersanti was involved in misappropriations from Osler at some time prior to the Osler bankruptcy falls short of establishing that she was a co-conspirator in the fraudulent act of placing Osler into bankruptcy.

[93] At trial, the respondents alleged that Ms. Piersanti was involved in using mortgage money from the MAP properties in violation of the Mareva injunction (an issue I will discuss below). Even if the trial judge had found that this to be the case that finding had nothing to do with the Osler bankruptcy.

[94] In summary, while the trial judge may have been of the view that Ms. Piersanti was liable to the respondents for certain causes of action, she did not make any findings that would link her actions to the bankruptcy of Osler which was the triggering event for the damages award.

[95] Thus, I would set aside the trial judge's finding that Ms. Piersanti is liable for damages based on the claim that she was a co-conspirator with her husband in placing Osler into bankruptcy.

(3) The Appellants' Expert Witness

[96] The appellants submit that the trial judge erred in her mid-trial ruling refusing to admit the evidence of their expert witness, Ronald Anson-Cartwright, on the basis that Mr. Anson-Cartwright lacked independence and objectivity. The reasons for this ruling are reported at [2009] O.J. No. 1224.

[97] The appellants proposed to call Mr. Anson-Cartwright to give expert evidence with respect to issues of forensic accounting and the Alfanos' damages claim. Mr. Anson-Cartwright prepared two reports.

[98] Shortly after receiving the first report, counsel for the respondents indicated that they would be objecting to the admissibility of Mr. Anson-Cartwright's evidence. They alleged that Mr. Anson-Cartwright and his associate had assumed the role of advocates and were not acting independently or objectively in preparing the report. When Mr. Anson-Cartwright's second report was delivered approximately four months later, counsel for the respondents raised the same objection.

[99] During the course of the trial, counsel for the respondents requested production of certain parts of Mr. Anson-Cartwright's files. The request was refused. After a mid-trial motion, the trial judge ordered the production of email correspondence that had been referred to in Mr. Anson-Cartwright's time dockets. The emails were largely exchanged between Mr. Anson-Cartwright and Mr. Piersanti. After the emails were produced, the trial judge conducted a three-day *voir dire* to determine whether she would admit Mr. Anson-Cartwright's evidence. Mr. Anson-Cartwright was called as a witness and cross-examined at length. In a written ruling, the trial judge refused to admit his evidence.

[100] In her ruling, the trial judge set out the legal principles that guided her decision. She concluded that Mr. Anson-Cartwright "based his analysis of the defense position on the theories advanced by Mr. Piersanti". She said that Mr. Anson-Cartwright "was

committed to advancing the theory of the case of his client, thereby assuming the role of an advocate". His role as an independent witness was secondary to the role of "someone who is trying their best for their client to counter the other side". She found that Mr. Anson-Cartwright became a spokesman for Mr. Piersanti. She said Mr. Anson-Cartwright's reports were "tainted by the lack of impartiality that is clearly apparent from the content of the e-mails".

[101] The appellants argue that the trial judge erred in not admitting Mr. Anson-Cartwright's evidence. They argue that any lack of independence goes to the weight of the evidence, not its admissibility. They argue that Mr. Anson-Cartwright's reports were impartial and objective. They submit that the reports properly outline the basis and sources on which his opinions were formed.

[102] The appellants also argue that the trial judge erred in considering the email exchanges in coming to her conclusion that Mr. Anson-Cartwright's evidence lacked independence. According to the appellants, the trial judge should have confined her analysis to Mr. Anson-Cartwright's reports and his evidence concerning the content of the reports.

[103] Expert evidence is an exception to the general rule barring opinion evidence. In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court of Canada set out the four criteria for the admissibility of expert evidence: 1) relevance, 2) necessity in assisting the trier of fact, 3) the absence of any exclusionary rule, and 4) proper qualification. The party tendering

expert evidence has the burden to satisfy the four *Mohan* criteria on a balance of probabilities.

[104] In discussing the second criterion at pp. 23, 24 of *Mohan*, the Supreme Court referred to the concept of helpfulness to a trier of fact. The court concluded that the appropriate test for necessity is whether the expert is capable of assisting the trier by providing information likely to be beyond the trier's knowledge and experience.

[105] In determining whether an expert's evidence will be helpful, a court will, as a matter of common sense, look to the question of the expert's independence or objectivity. A biased expert is unlikely to provide useful assistance.

[106] Courts have taken a pragmatic approach to the issue of the independence of expert witnesses. They have recognized and accepted that experts are called by one party in an adversarial proceeding and are generally paid by that party to prepare a report and to testify. The alignment of interest of an expert with the retaining party is not, in and of itself, a matter that will necessarily encroach upon the independence or objectivity of the expert's evidence.

[107] That said, courts remain concerned that expert witnesses render opinions that are the product of their expertise and experience and, importantly, their independent analysis and assessment. Courts rely on expert witnesses to approach their tasks with objectivity and integrity. As Farley J. said in *Bank of Montreal v. Citak*, [2001] O.J. No. 1096,

"experts must be neutral and objective [and], to the extent they are not, they are not properly qualified to give expert opinions."

[108] When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court."

[109] The report of the Goudge Inquiry, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General: 2008), at p. 503, noted the importance of expert witness independence, quoting the principles described by the Court of Appeal of England and Wales in *R. v. Harris and others*, [2005] EWCA Crim 1980, at para. 271:

> (1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

> (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.
>
> ...

[110] In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of the admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.

[111] That said, the court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 91. If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.

[112] In considering the issue of whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a *voir dire* and have regard to any relevant matters that bear on the expert's independence. These may include the

expert's report, the nature of the expert's retainer, as well as materials and communications that form part of the process by which the expert formed the opinions that will be the basis of the proposed testimony: see *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594, at p. 607 (S.C.).[6]

[113] An appellate court will accord deference to a trial judge's decision to exclude evidence of an expert on the basis that the proposed evidence lacks independence. On reviewing such a decision, an appellate court will look to whether the trial judge applied the proper legal principles and whether the trial judge's conclusion was supported by the evidence. Absent such an error, an appellate court will not interfere.

[114] I would not interfere with the trial judge's decision in this case. The trial judge had regard to the appropriate legal principles and there was ample evidence to support her conclusion that Mr. Anson-Cartwright's proposed evidence lacked independence.

[115] I have reviewed Mr. Anson-Cartwright's reports. In general terms, they are repetitious and argumentative in tone. Parts of Mr. Anson-Cartwright's reports read like the appellant's counsels' written argument. In places, the reports go beyond the areas in which Mr. Anson-Cartwright is qualified to give expert evidence and address factual issues that properly fell within the purview of the trial judge.

[116] In addition, the reports opine on matters of law. By way of example, at p. 19 of his October 3, 2008 report, Mr. Anson-Cartwright concludes that the Alfanos' counsels'

[6] In making these comments, I do not suggest that matters subject to privilege need be disclosed or considered.

letter of June 14, 2002 interfered with contractual relations. He also says, at p. 22, that the Alfanos' claim for damages for loss of profits of Osler was derivative. In addition, he says, at p. 43, that there is no evidence that the Alfanos owned 87 percent of the equity in Osler. This latter conclusion involves questions of fact and law and was a central issue at trial. In offering his opinion on the ownership of Osler, Mr. Anson-Cartwright did not have the benefit of all of the evidence at trial. Indeed, the evidence to which he referred was not only incomplete, but inaccurate in some respects.

[117] The trial judge reviewed the reports. She also had the benefit of hearing Mr. Anson-Cartwright testify in the *voir dire* and of reviewing a series of emails between Mr. Piersanti and Mr. Anson-Cartwright that related to the preparation of Mr. Anson-Cartwright's first report. I note that in exchanging emails, Mr. Piersanti was not acting as a lawyer. He was a party and was represented by counsel.

[118] The emails reveal a pattern of Mr. Anson-Cartwright attempting to craft his report to achieve Mr. Piersanti's objectives in the litigation. Each draft of Mr. Anson-Cartwright's report was delivered to Mr. Piersanti for review, revision and approval. A few examples of the emails sent by Mr. Anson-Cartwright show the concern the trial judge had:

- "Further I wanted the plaintiff to admit that there is no executed lease with Ontario Power to bolster your position that the occupation rent should be a fair market rent

not the rent paid by a non-arms length party … so yes, I'm trying to make them look bad"

- "Could you please explain how the Alfanos rationalize that they had an 87 percent interest in Osler and 87 percent interest in Puslinch? Can you tell me succinctly why they are wrong?"
- "I find the critique of Deloitte's[7] cash flow analysis to be not as powerful as it could be. Try to prioritize the "killer" points, otherwise a judge might be overwhelmed by a series of small technical points. What are the three to five points which destroy or invalidate the Deloitte loss of cash flow estimate?"

[119] The purpose of this review is not to pick apart Mr. Anson-Cartwright's reports on an item-by-item basis. Rather, it is to point out the problems with the reports and the flaws in the process that led to their preparation.

[120] In my view, there was ample basis for the trial judge to conclude that Mr. Anson-Cartwright's evidence should not be admitted. The trial judge was in the best position to determine the significance of the demonstrated lack of independence and the extent to which the benefit of that evidence was thereby diminished. I would not interfere with her conclusion.

[7] Deloitte & Touche LLP was the damages expert for the Alfanos.

(4) Damages

[121] The trial judge awarded the respondents $20 million in damages resulting from the bankruptcy of Osler. The appellants raise a number of arguments with respect to this award.

[122] By way of background, after Mr. Piersanti placed Osler in bankruptcy, the respondents, either directly or through a newly incorporated company called Southview, purchased the security interests and assets of Osler from Osler's secured creditors in order to continue in the paving business. In 2003, the respondents began operating the Osler business in Southview. Between June 30, 2002 and June 30, 2008, the respondents and Southview incurred significant debt to purchase the assets and security from Osler's secured creditors and to finance Southview's capital and operating expenditures. The transition of the business from Osler to Southview was expensive. The Osler bankruptcy caused reputational damage to the Alfano family. It was several years before Southview operated at a level of profitability similar to that which Osler would have achieved had it continued. As part of their efforts to finance Southview, the respondents were required to dilute their interests in Southview by 25 percent.

[123] The trial judge based her damage award on the report and evidence of Mr. Thomas Strezos, the respondents' damages expert. There is no issue about Mr. Strezos' qualifications as an expert to give opinion evidence on the matters on which he testified. The trial judge accepted Mr. Strezos' report and his evidence, as she was entitled to do.

[124] Mr. Strezos calculated the losses arising from the "improper 'winding-up' of Osler by [Mr.] Piersanti, on or about June 30, 2002." The triggering event for Mr. Strezos' damages calculation was the Osler bankruptcy.

[125] Mr. Strezos assumed the Alfano Trusts held an 87 percent interest in Osler. He also assumed that Mr. Piersanti had misappropriated $1.25 million from Osler prior to its bankruptcy. He was not asked to comment on or verify the alleged misappropriation.

[126] Mr. Strezos was asked to calculate damages for the period from July 1, 2002 (the approximate date of bankruptcy) until June 30, 2008, a date after which Southview was expected to increase its profitability.

[127] Mr. Strezos' overall approach to assessing the damages was to use the "lost opportunity" methodology in calculating the losses from the winding-up of Osler. This methodology calculates the losses suffered by the respondents to be the amount that would place them in the same financial position they would have been but for the winding-up.

[128] Mr. Strezos calculated the damages under four separate headings:

i. Loss of net cash flows in Osler – the respondents' loss of projected net cash flow in Osler for the period from July 1, 2002 to June 30, 2008.
ii. Additional debt – the debt incurred by the respondents through Southview to finance the Southview operations and to carry the newly incurred debt.

iii. Loss of 25 percent interest in the CN lands – the losses resulting from the respondents' loss of a 25 percent ownership interest in the CN lands. The lands had been owned by Osler and were acquired by Southview after the bankruptcy.

iv. Loss of interest in proceeds from the sale of the Puslinch property – the loss of the Alfanos' share of Osler's 50 percent interest in the Puslinch property. The receiver/manager of this property sold it and allocated Osler's proportionate share of the proceeds to Southview. The proceeds were used to pay down Southview debt. Had Mr. Piersanti not placed Osler into bankruptcy, the respondents would have been entitled to the benefit of 87 percent of these proceeds.

[129] Mr. Strezos calculated the economic losses suffered by the respondents as a result of the Osler bankruptcy to be in the range of $18,730,000 and $21,780,000 depending on the assumed projected growth of Osler after the bankruptcy. His medium projected growth rate was 10 percent per annum. The trial judge appeared to accept the medium growth forecast: it seems that her award of $20 million in damages was the result of rounding down Mr. Strezos' medium calculation of $20,210,000. That was reasonable and I will only refer to the medium projections in my discussion below.

[130] In his report, Mr. Strezos calculated the components of loss for his medium projection as follows:

- Loss of projected net cash flow in Osler - $6,353,000;
- Additional debt resulting from Osler bankruptcy - $11,180,000;

- Loss of 25 percent in the CN and lands - $1,562,000;
- Loss of share from sale of Puslinch property - $766,000;
- Total losses - $20,210,000.

[131] Mr. Strezos pointed out that there should be deducted from the calculated damages the proceeds from the sale of Osler's assets that continue to be held by the receiver/manager.

[132] I will address the appellants' arguments with respect to the damages under seven headings.

(a) Derivative Claim

[133] Mr. Piersanti argues that the loss of projected net cash flow in Osler is a derivative claim and, as such, could only be asserted by Osler. Thus, the respondents are not in a position to claim recovery of those losses.

[134] I reject this argument. First, the respondents' claims were based in fraud. The damages claim results from Mr. Piersanti's fraudulent acts in depriving the Alfano Trusts of ownership interests in Osler. Significantly, Mr. Piersanti's fraud was directed at the Alfano Trusts, not at Osler. His intent was to appropriate to himself the value, present and future, of the Alfano Trusts' 87 percent interest in Osler.

[135] The Alfano Trusts are entitled to a damages award that would put them in the financial position they would have been had the fraud not occurred – in this case had the

Osler bankruptcy not occurred. In my view, it was open to the trial judge to calculate the loss of value of the Alfano Trusts' interests in Osler by looking to the loss of projected cash flows that Osler would have realized had Mr. Piersanti not put it into bankruptcy.

[136] It is also worth noting that if the Alfano Trusts had sought leave to bring a derivative claim in 2002, they would no doubt have encountered exactly the same argument from Mr. Piersanti that they did in this litigation. He would have asserted that the Alfano Trusts did not have an interest in Osler as he, Mr. Piersanti, owned 100 percent of the equity. Thus, in a derivative action, it would have been necessary to litigate the same ownership issue as arose in this litigation.

[137] As it turned out, seven years after this litigation began, the court determined that the Alfano Trusts had an 87 percent interest in 758, which owned 100 percent of Osler. By that time, Osler had been in bankruptcy for seven years, all of its assets had been liquidated and its creditors paid. The practical effect was that there was no company left through which the Alfano Trusts could have asserted a derivative claim.

[138] Thus, in my view, the respondents were entitled to assert a claim for damages based in part on the projected cash flows of Osler for the period following the bankruptcy. I reject the derivative claim argument.

(ii) Remoteness

[139] Mr. Piersanti argues that the trial judge's damage award for additional debts incurred by the respondents resulting from the Osler bankruptcy are too remote from the bankruptcy and, as such, are not properly recoverable as damages resulting from that bankruptcy.

[140] The trial judge's finding of liability giving rise to this head of damages is based in fraud. In my view, there is ample evidence to connect these damages to Mr. Piersanti's fraudulent acts of placing Osler in bankruptcy.

[141] It was foreseeable that the respondents would take steps to recover the Osler business and continue operating what they considered to be their family business. The Alfano family had a history of continuing their paving business after bankruptcy. It makes sense, as Mr. Strezos pointed out, that given the bankruptcy of Osler, the costs of financing the operations of Southview would be higher than normal because the loss of reputation resulting from the bankruptcy would be a drag on the profitability of the ongoing business.

[142] I see no basis to interfere with the trial judge's award of damages with respect to the additional debt other than by making the adjustments that I will discuss below.

(iii) Failure to Mitigate

[143] Mr. Piersanti argues that the trial judge erred in not reducing the damage award because the respondents failed to mitigate their losses. The nub of this argument is that some of the losses experienced by Southview after the bankruptcy resulted from poor management by the Alfano family.

[144] The appellants made the same argument at trial. This argument is entirely fact based. The issue is whether the respondents took reasonable steps to mitigate their losses. Implicitly, the trial judge concluded that they did.

[145] There is evidence to support the trial judge's conclusion. Ulti and Italo Alfano testified at trial. Their evidence explained the difficulty they encountered in operating the Osler business through Southview after the bankruptcy. It was open to the trial judge to accept their evidence. I see no error.

(iv) Adjustments

[146] During his testimony, Mr. Strezos made a number of adjustments to the calculations set out in his report. However, in awarding damages in the amount of $20 million, the trial judge appears to have relied upon the calculations in the report without regard to the adjustments made by Mr. Strezos at trial.

[147] After reviewing Mr. Strezos' evidence, I would make the following three adjustments to the trial judge's award of damages:

[148] The first adjustment relates to Osler's projected net cash flows. In his report, Mr. Strezos calculated this amount to be $6,700,000 in the medium scenario. In his evidence, he said that this amount should be reduced to $6 million because of a calculating oversight in relation to the projected EBITDA for Osler: see Strezos examination-in-chief, February 9, 2009, at pp. 57-70. I note that this adjustment was made in handwriting to the typed report that was entered as an exhibit at trial.

[149] The second adjustment is with respect to the debt resulting from the Osler bankruptcy. In the summary of losses table included as Schedule 1 to his report, Mr. Strezos showed this amount to be $11,180,000. This amount included $3,118,193 in additional debt incurred by the respondents and Southview to purchase the Osler security and assets. Mr. Strezos listed this amount as "debt incurred to purchase bank security and certain assets of Osler" in Schedule 3 of his report. However, in Schedule 3.1 to the report, entitled "summary of the debt and carrying costs incurred by the Alfano family and related parties *as a result of the bankruptcy*" (emphasis added), Mr. Strezos backed out the amount $3,118,193 from the total debt incurred subsequent to the Osler bankruptcy. On cross examination, Mr. Strezos agreed that the security and assets purchased by Southview after the bankruptcy were free and clear of debt. Prior to the Osler bankruptcy, those assets had been encumbered. Thus, the respondents did not incur additional debt for the purchase of those assets that could be reasonably viewed as a loss suffered as a result of the bankruptcy: Strezos cross-examination, February 10, 2009, at pp. 110-112. Mr.

Strezos therefore agreed that the Alfanos' recovery for debt incurred after the bankruptcy should be reduced by $3,118,193.

[150] The third adjustment also relates to Mr. Strezos' calculation of the debt resulting from the Osler bankruptcy. Mr. Strezos testified that the amount to be awarded for debt incurred after the bankruptcy set out in his report should be reduced by a further $2 million. The basis for this reduction was that the $2 million was incurred to purchase an asset – a gravel pit near Orillia – that Osler had not owned before the bankruptcy. Thus, he said, it is not fair to attribute this debt as a debt resulting from the bankruptcy. This adjustment was reflected in a handwritten entry made to Schedule 3.1 of the typed report entered as an exhibit at trial.

[151] On the basis of the above-mentioned adjustments, I would reduce the damage award as follows:

Medium Projection	$20,210,000
Adjustment to cash flow	($700,000)
Adjustment for debt repurchase	($3,118,193)
Adjustment for gravel pit acquisition	($2,000,000)
TOTAL:	($5,818,193)
Amount of Award	$14,391,807

(v) Credits

[152] During the oral argument on appeal, the respondents conceded that the damage award should be credited with the respondents' share of the proceeds from the sale of the Bowes Street property. It appears that the amount of $877,000, being proceeds from the sale of Bowes Street, was paid to the respondents' solicitors as a result of a mid-trial ruling by the trial judge. It is agreed by the parties that the damage award should be credited with that amount.

[153] Although it is not entirely clear from the record, it appears that there may be an additional amount being held by the receiver/manager from the sale of Bowes Street. If and when further monies are paid to Southview or the respondents, that amount should also be credited against the amount of the damage award.

[154] Crediting these amounts against the damage award is consistent with Mr. Strezos' report. In that report, at p. 23, he indicated that there should be a deduction from any damage award for the "expected proceeds after dissolution of the receiver manager (2016411 Ontario Ltd.)".

[155] To the same effect, the trial judge observed at para. 144 of her reasons that "Mr. Strezos pointed out that once the case is decided, the Alfanos may receive money from the receiver. This would be deducted from their losses calculated above."

(vi) CN Lands

[156] Mr. Piersanti argues that the trial judge erred in awarding damages to the respondents for loss of interest in the CN lands.

[157] Osler leased the CN lands and had an option to purchase for $1. Southview purchased the lease from the secured creditors of Osler after the bankruptcy. Southview then exercised the option. However, because the respondents had to give up 25 percent ownership interest in Southview as part of its financing program after the bankruptcy, the respondents suffered a loss of 25 percent of the value of the CN lands that they would have had had it not been for the bankruptcy. Mr. Strezos opined that this loss amounted to $1,562,000. The trial judge accepted that evidence. I see no basis to interfere.

(vii) Sale of Puslinch Lands

[158] Mr. Piersanti argues that the trial judge erred in awarding $766,000 as damages resulting in the loss of the respondents' share in the proceeds from the Puslinch property. The Puslinch property was owned by Osler.

[159] The receiver/manager sold the Puslinch property in 2006. The respondents' share of the proceeds of the sale was $766,000. Those proceeds were paid to Southview and used by Southview to pay down its debt. That debt had been incurred by Southview to cover operating and capital losses as well for carrying costs for monies borrowed. Mr. Piersanti argues that Southview and, therefore, the respondents received the benefit of

this money and, therefore, this amount should not have been included in the damage calculation.

[160] I do not accept this argument. Mr. Strezos testified that the $766,000 was netted out of the loss calculation for additional debt incurred by the respondents and Southview after the Osler bankruptcy: Strezos cross-examination, February 10, 2009, at pp. 115-17. Put another way, had Southview not received the $766,000 and paid down the debt, Mr. Strezos would have increased the recovery for a debt incurred after the bankruptcy by that amount. In the result, I would not give effect to this argument.

(5) Punitive Damages

[161] Mr. Piersanti argues that the trial judge erred in awarding the respondents punitive damages in the amount of $250,000. The trial judge made the award as the result of Mr. Piersanti's fraud in altering the unanimous shareholders agreement.

[162] Mr. Piersanti's only challenge to the punitive damage award is on the basis that it was not pleaded in the Fresh as Amended Statement of Claim. While that is correct, punitive damages were sought at trial. The issue was joined and argued before the trial judge. The evidence to support the punitive damage award was central to the respondents' claims of fraud and was pleaded with particularity.

[163] Mr. Piersanti had adequate notice of the punitive damage claim; there was no surprise. While it would have been preferable if the respondents had sought to amend their pleading to assert the claim when it was raised and argued, I see no prejudice. As the Supreme Court of Canada noted in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 88, "[w]hether or not a defendant has in fact been taken by surprise by a weak or defective pleading will have to be decided in the circumstances of a particular case." In this case, Mr. Piersanti had an adequate opportunity to respond to the claim.

[164] I would not interfere with the punitive damage award.

(6) The Payment into Court of $2.5 Million

[165] The appellants argue that the trial judge erred in ordering 128 (a Piersanti related company) to pay $2.5 million into court.

[166] The respondents sought the payment into court on the basis that Ms. Piersanti had caused 128 to pay out approximately $2.5 million in breach of the Mareva injunction granted on June 18, 2002.

[167] I would set aside this order.

[168] The trial judge gave very brief reasons for making the order. At para. 105, she said the following:

> I have concluded that $2,500,000 shall be paid into court to the credit of the Plaintiffs within 30 days of the release of the reasons. *This will not cause any hardship to the Piersanti Defendants and will be some security for the Plaintiffs* who will most likely encounter great difficulty in enforcing any judgment given by this court in regard to their damages for losses in Osler. [Emphasis added.]

[169] While it is not entirely clear, it appears that the trial judge made this order to provide security for the damages award she made against the Piersantis in favour of the respondents.

[170] Her comment that this will not cause any hardship to the Piersanti defendants suggests that in her mind the $2.5 million is part of, not in addition to, the damages award. The purpose the trial judge made the $2.5 million award was apparently so that that amount would be paid within 30 days, thereby providing some security for the overall damages award.

[171] In para. 105, the trial judge did not link the award to the breach of the Mareva injunction. Notably, she did not make any finding of contempt, nor give any indication that the $2.5 million award was being ordered for punitive or denunciatory purposes. On the contrary, she appears to have considered the payment of $2.5 million as a downpayment against her damage award.

[172] 128, the party ordered to pay the $2.5 million, was not a defendant in the claim for fraud related to the Osler bankruptcy that gave rise to the judgment against Mr. Piersanti. The trial judge did not make any findings that would render 128 liable to pay the damage award for the fraud claim.

[173] In the result, I would set aside this order. To be clear, I do not conclude that there was no basis for a finding that the Piersantis breached the Mareva injunction. Rather, I am not satisfied that the trial judge, in her reasons, made that finding. That being the case, the trial judge's reasons and these reasons should not be read as finally disposing of that issue.

(2) Ulti Alfano's One-Twelfth Interest – MAP Properties

[174] The trial judge found that Ulti Alfano had a claim to a one-twelfth interest in the MAP properties, limited to the 1995 value of these properties. She directed a reference to determine the value of this interest, which she awarded to Ulti Alfano's personal bankruptcy trustee subject to the assignment agreement between Ulti Alfano and the trustee. Ulti Alfano apparently obtained permission from his trustee to pursue this claim.

[175] The Alfanos' interest in the MAP properties was held through a holding company, CIFU safe. The appellants allege that CIFU Safe went bankrupt in 1993. The trial judge did not make any findings to explain why Ulti Alfano (or his trustee in bankruptcy) had a claim to an interest in the MAP properties 14 years later.

[176] With respect, I am not able to glean from the trial judge's reasons why she made the order and structured it as she did. Without more, I do not think that the order can stand. I would set it aside. I would not direct a new trial on this issue. I would, however, say that in the event that there is other litigation that addresses this issue, these reasons should not be read as deciding the merits of this claim relating to the MAP properties.

DISPOSITION

[177] I would allow the appeal in part as follows:

a. I would set aside the judgment against Ms. Piersanti (para. 6 of the judgment);
b. I would reduce the damage award to $14,391,807 (para. 6 of the judgment);
c. I would set aside the order that 128 pay $2.5 million into court (para. 8 of the judgment); and
d. I would set aside the order relating to Ulti Alfano's interest in the MAP properties (paras. 9, 10 and 11 of the judgment).

[178] The damage award should be credited with the amounts discussed in paras. 151 to 154 of these reasons.

[179] In all other respects, I would confirm the judgment below.

[180] We are told that the trial judge has not yet made a costs order with respect to the costs of the trial. Apparently, the trial court will address those costs after the release of this judgment. I, therefore, make no comment on the issue of costs of the trial.

[181] There has been mixed success in this appeal. I would make no order as to costs.

RELEASED: "DOC" "MAY 09 2012"

"D. O'Connor A.C.J.O."
"I agree H.S. LaForme J.A."
"I agree J.D. Cunningham A.C.J.S.C.J."

TAB 6

See para. 96

CITATION: Lockridge v. Director, Ministry of the Environment, 2012 ONSC 2316
DIVISIONAL COURT FILE NO.: 528/10
DATE: 20120607

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
ADA LOCKRIDGE and RONALD PLAIN Applicants	*Justin Duncan, Kaitlyn Mitchell, Margot Venton*, for the Applicants
– and –	
DIRECTOR, MINISTRY OF THE ENVIRONMENT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF THE ENVIRONMENT, THE ATTORNEY GENERAL OF ONTARIO and SUNCOR ENERGY PRODUCTS INC. Respondents	*Jack Coop, Jennifer Fairfax, Lindsay Rauccio*, for the Respondent, Moving Party, Suncor Energy Products Inc. *Lise Favreau, Kristin Smith, Robin Basu, Matthew Horner*, for the Respondents, Director, Ministry of the Environment, Her Majesty the Queen in right of Ontario, as represented by the Minister of the Environment and the Attorney General of Ontario
	HEARD at Toronto: January 31, February 1, February 2 and March 5, 2012

REASONS FOR DECISION

Harvison Young J.

Overview

[1] The applicants, Ada Lockridge and Ronald Plain, have commenced an application in which they seek judicial review of a decision made by the Director of the Ministry of the Environment (the "Director") under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "EPA"), in April 2010, respecting the sulphur output of Suncor's Plant #4 Sulphur Recovery Unit

in Sarnia. At the heart of their application is their claim that the failure of the Director to conduct a cumulative effects assessment prior to making his decision infringed the applicants' s. 7 and s. 15 *Charter* rights, as well as their rights to procedural fairness.

[2] The government respondents include the Director, Ministry of the Environment, Her Majesty the Queen in right of Ontario, as represented by the Minister of the Environment and the Attorney General of Ontario. They will be referred to collectively as the Government respondents in these reasons.

[3] The respondents have brought two motions in respect of this application. First, the respondent Suncor Energy Products Inc. brings a motion to strike the application as a collateral attack on earlier approvals granted to it pursuant to the EPA regime. It submits that the applicants' claims, in raising alleged health and emissions issues which predated the April 2010 Decision, constitute collateral attacks on earlier decisions, and particularly, the approvals relating to the construction of the sulphur production facility in 2004. For the reasons that follow, I would dismiss the motion to strike the application.

[4] Second, the respondents (the Government respondents as well as Suncor) bring a motion to strike some or all of the affidavit evidence filed by the applicants. They argue that as the issues in this application only relate to the April 2010 Decision, much of the evidence filed by the applicants respecting emissions that were not the subject of that decision, or the health effects allegedly flowing from those emissions, is irrelevant. In addition, they seek to strike considerable amounts of the evidence on the grounds that it constitutes improper opinion evidence, inadmissible hearsay, argument or speculation. This consumed the majority of the 4 days of oral argument taken for the three motions. As the following reasons set out, I have concluded that some portions of the evidence should be struck, although I would dismiss the motion with respect to much of it, without prejudice to the respondents' right to argue the admissibility issues before the panel hearing the application on its merits.

[5] Finally, the applicants have brought a motion for a protective costs order insulating them, absent improper conduct during this litigation, from adverse costs if their application for judicial review is ultimately successful. For the reasons I set out below, I would dismiss this motion.

Background

[6] The applicants are members of Aamjiwmaang First Nation who have commenced this application in their individual capacities. Ms. Lockridge is a resident of Aamjiwmaang First Nation. Mr. Plain has lived there for much of his life but now lives in Sarnia. The applicants claim that the Decision violates their rights to procedural fairness, to life, liberty and security of the person pursuant to s. 7 of the *Charter of Rights and Freedoms*, and to equality pursuant to s. 15 of the *Charter of Rights and Freedoms*. The applicants claim that, because pollution surrounds their reserve community and has a significant impact on them, the Director should not have approved additional pollutant releases without considering the cumulative effects of all of the pollution.

[7] The applicants seek various relief, including declarations that the Decision violated their ss. 7 and 15 *Charter* rights and that the "Minister's failure to apply the [*Environmental Bill of Rights, 1993*, SO 1993, c. 28 (the "EBR")] in a manner that ensure that cumulative effects were considered and minimized when the Director made the Decision infringed the Applicants' rights…".

[8] Both the motion to strike the application and the motion to strike the evidence are grounded in the respondents' submission that the application is, in substance, a challenge to the regulatory framework and, in particular, the absence of a cumulative effects assessment as part of the regular emissions approval processes. The application is not, they assert, really a challenge to a particular administrative decision at all. To the extent that it is, it essentially impugns administrative approvals granted long before the April 2010 Decision to the extent that they allegedly contribute to the cumulative effects complained of. The applicants have been quite frank in acknowledging before the court that the general absence of cumulative effects assessment from the approvals process under the EPA framework is their driving concern.

[9] All the respondents argue that this systemic issue is not properly the subject of a judicial review application. Suncor seeks the dismissal of the application, arguing that in raising issues of pollution and emissions that predate the April 2010 Decision, it is essentially a collateral attack on approvals that Suncor had previously obtained in full compliance with the regulatory requirements, and upon which approvals it has relied since.

[10] The Government respondents do not seek the dismissal of the application, but do, along with Suncor, seek to strike the evidence filed which, they argue, goes far beyond the narrow scope of the judicial review of the 2010 Decision. They seek to have the evidence circumscribed or "scoped" to reflect the proper scope of a judicial review application.

[11] The issues raised in both Suncor's motion to strike the application and the motion to strike the affidavit evidence overlap to some extent. I will address the two motions in turn, but it will be helpful to set out the April 2010 Decision and its context at the outset.

The April 2010 Decisions

[12] The applicants challenge two related decisions made by the Director under the EPA in April 2010 respecting the sulphur output of Suncor's Plant #4 Sulphur Recovery Unit in Sarnia. These are (1) Director's Amending Order No. 1131-7DJ25B-A ("Amending Order") dated April 1, 2010, and (2) the Director's Notice of Revocation of the Ordered Items in the Amending Order dated April 30, 2010. These are collectively referred to as the "Decision" or as the "Director's Decision".

[13] The Director's Amending Order and Notice of Revocation modified an administrative order which had been issued on April 15, 2008 ("the 2008 Order"), in response to the flaring from Plant #4. Emergency flaring is required in order to prevent quantities of hydrogen sulphide from being discharged into the atmosphere. The "flaring" converts the hydrogen sulphide into sulphur dioxide with the goal being to prevent the release of hydrogen sulphide directly into the atmosphere. This flaring, occurring shortly after the sulphur recovery units commenced

operations in 2007, was necessitated by "process upsets", which included unexpected failures of newly installed equipment, fabrication problems, design problems and a lack of operational experience (see affidavit of Peter Lynch, at para. 65-66). According to Suncor's predictive modeling, these flares caused "exceedances" in the predicted level of sulphur dioxide from Plant #4. As a result, the 2008 Order capped sulphur production from Plant #4 at 145 tonnes/day. This was a reduction from the rate of 250 tonnes/day that had been approved under the Certificate of the Approval, which had been issued in 2004 ("Certificate of Approval"). These decisions were concerned exclusively with the production of sulphur at the Plant and with two substances emitted by the Plant: sulphur dioxide and hydrogen sulphide.

[14] The 2008 Order specifically directed that Suncor take action to ensure compliance with sulphur dioxide and hydrogen sulphide emissions standards following the flaring incidents. It did not address any other emissions from Plant #4, or any other facility.

[15] On April 1, 2010, the Director issued the Amending Order to amend the 2008 Order. That order recognized certain improvements made by Suncor since the flaring incident and directed Suncor to take extra measures to monitor and report to the Ministry with regard to the operations of Plant #4 to ensure compliance with government standards. The Director informed Suncor that when certain parts of the Amending Order were fully complied with, the Director would exercise his discretion and revoke the pre-amendment requirements of the 2008 Order. This would in effect permit an increase in sulphur production to 180 tonnes/day. Again, the Amending Order addresses only the issues of sulphur production and sulphur dioxide and hydrogen sulphide emissions from Plant #4.

[16] On April 30, 2010, the Director revoked the original 2008 Order but left certain portions of the Amending Order in effect, thereby authorizing an increase in sulphur production to a level of 180 tonnes/day at Suncor's Plant #4. The two orders that comprise the impugned decisions are directed at ensuring that sulphur dioxide and hydrogen sulphide emissions are limited during both regular operation and acid gas flaring events at Suncor's Plant #4.

[17] The Director did not purport to amend the Certificate of Approval (Air) for Plant #4, which had been issued on November 25, 2004. This Certificate of Approval allowed Suncor (subject to any prevailing orders) to produce 250 tonnes/day of sulphur from hydrogen sulphide in Suncor's process streams.

[18] In short then, Suncor's Certificate of Approval granted in 2004 had authorized sulphur production of 250 tonnes per day. This was superseded by the 2008 Order, which reduced the sulphur production to 145 tonnes/day. The Director's Decision of April 2010 approved an increase to 180 tonnes/day, still within what Suncor refers to as the "envelope" that had been approved in 2004. Suncor's position is that the 2008 Order was a temporary measure designed to control excess sulphur dioxide emissions while Suncor remedied the problems which had necessitated the emergency flaring.

[19] The applicants argue that the failure to consider the cumulative effect of the production increase authorized by the April 2010 Decisions in the circumstances constituted breaches of

their ss. 7 and 15 *Charter* rights. The Application also alleges that the impugned decisions lacked appropriate jurisdiction under the EPA and that they were procedurally unfair, particularly because the applicants were not given notice of the 2010 Decisions.

I. THE MOTION TO STRIKE THE APPLICATION

[20] The respondent Suncor seeks to strike the application, in whole or in part, as an improper collateral attack and an abuse of process. In the alternative, it seeks to quash or stay the application on the grounds of laches and undue delay.

[21] As Mr. Coop for Suncor readily acknowledged at the outset, the collateral attack argument is at the core of Suncor's motion to strike the application. The abuse of process argument rests on the submission that the passage of time since the earlier approvals, as well as the fact that Suncor complied with the regulatory process in place in obtaining them, combine to render the application, to the extent that it is a collateral attack on prior approvals granted, an abuse of process. Similarly, the laches argument is not raised with respect to the April 2010 Decision, but with respect to the earlier decisions which Suncor submits are being collaterally attacked by the application.

[22] At the heart of Suncor's motion to dismiss the application is the argument that, despite their claim that they are only challenging the April 2010 Decision, the wide-ranging evidence adduced by the Applicants challenges all of the contaminants emitted by both the Sulphur Plant and Suncor's Sarnia Refinery as a whole. Suncor submits that their evidence questions the very right of the Sarnia Refinery to exist/operate at all without a cumulative effects assessment, and that, in light of this, it is disingenuous for the applicants to claim that they are only challenging the 2010 Decision.

[23] In substance, Suncor maintains, this application constitutes: (1) a collateral attack upon the Director's decision in November 2004 approving Suncor to build and operate the Sulphur Plant; and, (2) a collateral attack upon all fifty of the refinery approvals granted by the MOE to Suncor over the past 30 years. Suncor also argues that despite multiple opportunities since November 2004 to initiate a challenge to the Environmental Review Tribunal ("ERT") regarding the absence of a cumulative effects assessment, the Applicants have not done so. Suncor argues that the applicants had numerous opportunities to challenge the approvals that have been granted from 2004 forward. It argues that "lying in the weeds" until this point, and commencing this application as an "excuse" to undo the 2004 approvals, constitutes an abuse of process that should not be permitted by this Court. Suncor emphasizes, in particular, that its 2003 application (culminating in the Certificate of Approval) was posted on MOE's Environmental Registry so as to provide the public with statutorily required notice of the project and a 30 day comment period. No comments were received from any members of the public. It submits that the April 2010 Decision simply reinstated a production level within an envelope that had been approved in 2004 after an extensive process, and with respect to which the applicants had not commented or objected at all despite having been notified of the issues at the time.

[24] The applicants counter that they do not seek to shut down Suncor's entire refinery or any part of it. They submit that the relief sought is forward looking, stating that "Ada and Ron want their health to be protected when the government approves pollution". At para. 33 of their factum on the Motion to Strike the application, they state,

> [i]f Ada and Ron are successful in striking the Decision, the result will be the reinstatement of the 2008 officer's control order that limited sulphur production at the Suncor refinery to 145 tonnes per day. Although it is conceded that the officer's control order did not involve an assessment of cumulative effects, it is anticipated that Suncor will seek either a new Amending Control Order or an amendment to its certificate of approval from the Director and that the Government Respondents will then apply their discretion under the EPA in a manner consistent with the *Charter*.

The application also states that "in quashing the specific Decision at issue in this application, they seek to have such a process begin".

[25] On a motion to strike an application, the threshold is a high one. Under Rule 21.01(3)(d), the moving party must show that it is plain and obvious that the application cannot succeed, particularly where a question of constitutional or *Charter* rights is concerned: see *Miguna v. Toronto (City) Police Services Board*, 2008 ONCA 799, 2008 CarswellOnt 7120, at para. 31; *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON S.C.).

[26] Moreover, such a motion may not be turned into an evidentiary disposition. Suncor submitted that as it was also seeking a stay on the basis of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the "plain and obvious" test as set out pursuant to Rule 21.01(3)(d) does not apply. It argued in the alternative that, even if this test applied, it had met the test.

[27] The test for a stay is also a high threshold to meet: see, e.g., *Miguna*, at para. 21; *Certified General Accountants Assn. of Canada v. Canadian Public Accountability Board*, [2008] O.J. No. 194 (Div. Ct.), at para. 39; *Schreiber v. Canada (Attorney General)*, 52 O.R. (3d) 316 (C.A.), at para. 4, leave to appeal refused at [2002] S.C.C.A. No. 74.

[28] As I advised the parties in the course of the hearing, I am not satisfied that grounds for striking the application have been made out. The application on its face confines the review application to the April 2010 Decision, submitting that the Decision infringes the applicants' s. 7 *Charter* rights to life, liberty and security of the person and their equality rights pursuant to s. 15 of the *Charter*. It seeks declarations under s. 24(1) of the *Charter* with respect to both, and an order setting aside the Decision. It also submits that the Decision violated the applicants' rights to procedural fairness in that it was made without notice.

[29] In the alternative, the application seeks an order quashing the Decision on the basis that the Director lacked jurisdiction under the EPA, and in the further alternative, that his failure to require an assessment of cumulative adverse health effects of pollution when making the Decision was unreasonable.

[30] Initially, the applicants also sought an order under section 52 of the *Constitution Act, 1982*, Sched. B to the *Canada Act 1982* (UK), 1982, c.11, declaring that certain sections of the EPA are inoperative "in so far as they allow for the additional discharge of contaminants to air in Chemical Valley absent an assessment and minimization of the cumulative effects of pollution on the Applicants' health." The application has now been amended to exclude this claim, apparently in recognition of the fact that such relief is not available on an application for judicial review. As will be discussed further below, the evidentiary record was filed before the amendment to the application was made.

[31] The amended application, without the s. 52 claim, does not necessarily amount to a collateral attack upon earlier approvals or decisions apart from the April 2010 Decision. In oral argument, Mr. Duncan for the applicants conceded that it is not open to them to challenge the regulatory regime on a judicial review application, and that they are only entitled to attack the exercise of the decision making power in April 2010.

[32] The April 2010 Decision permitted a 25% increase in sulphur production by Suncor's sulphur plant, though within the envelope which had been approved in 2004. It also became clear in argument that there was some confusion in the applicant's materials concerning the relationship between this increase and the overall production at the oil refinery. The only evidence in the materials filed by the parties on this issue is that the increase in sulphur production had no effect on the overall production levels of the refinery, but only on the cost of production, because with a higher sulphur production, lower quality (cheaper) crude may be used in the process. The application itself does not distinguish clearly between sulphur plant production and overall refinery production. Suncor submitted that all the emissions from its refinery had been approved previously and should not be subject, in effect, to renewed scrutiny. It argues that a cumulative effects assessment, which considers previously existing emissions would necessarily undermine earlier approvals. It cited the references in the application and the evidence to previously approved chemical emissions, such as benzene, as support for its argument that this is really a collateral attack.

[33] This is not, in my view, a basis for striking the application. It remains open to the applicants to challenge the 2010 Decision approving an increase in sulphur production, and to argue that their ss. 7 and 15 *Charter* rights were violated by the failure to consider the cumulative effects of that increase. It may well be that some of the grounds in the application which related to chemicals not affected by the Decision will not be made out, but that is not a basis for striking the application at this preliminary stage. As will be discussed below, evidence filed that is irrelevant to the proper scope of the application as it relates to the Decision increasing the sulphur production may be struck, either at this stage or by the panel hearing the application on its merits. That does not, however, render the application as a whole a collateral attack or an abuse of process.

[34] Suncor argues, in effect, that any cumulative effects assessment would reopen earlier approvals because it by definition looks at emissions already in the air, which have already been approved. This is a question that should, in my view, be left to the panel hearing the application as it is very closely related to the merits of the application.

[35] The motion to strike the application is dismissed.

II. MOTION TO STRIKE AFFIDAVIT EVIDENCE

[36] In support of the application, the applicants have filed five volumes of application materials, containing 13 affidavits, including the affidavits of Ada Lockridge, Ronald Plain, Wilson Plain, Dr. Elaine Macdonald, Dr. Michael Gilbertson, William M. Auberle, Dr. Henry S. Cole, Dr. Peter Infante, Dr. Margaret Keith, and Dr. David Carpenter.

[37] Both respondents take issue with much of the evidence filed. To indicate the scale of this motion, one or both respondents take issue with approximately 86 paragraphs of Ms. Lockridge's 226 paragraph affidavit, some 71 of Ronald Plain's 162 paragraph affidavit, and some 57 paragraphs of Wilson Plain's affidavit. The parties very helpfully filed charts with the court providing easier reference to the challenged portions and cross-referencing the grounds upon which they challenge them.

[38] The respondents argue that portions of, or in some cases the entirety of, these affidavits contain evidence that goes beyond the scope of the decision at issue and are therefore irrelevant to these proceedings. They also argue that portions of the affidavits are also inconsistent with the rules of evidence. The Government respondents argue that the offending portions of the evidence filed should be struck.

[39] Suncor submits that the deficiencies with the affidavits are so numerous that rather than excising the problematic portions of the Affidavits, they should be struck out in their entirety.

[40] The respondents submit that much of the evidence filed should be struck for the following reasons:

(a) **Irrelevance**: The respondents argue that much of the evidence has no bearing upon the facts at issue in the application. More particularly, the applicants have filed irrelevant evidence in support of their application that was not before the Director when making the April 2010 Order, that is beyond the scope of the Director's decision-making power under the EPA and that impugns contaminants that were not addressed by the April 2010 Order. This irrelevant evidence has no probative value, and is plainly prejudicial.

(b) **Hearsay**: The respondents submit that much of the evidence contains hearsay statements related to highly contentious matters from unidentified individuals, and double hearsay statements that are inadmissible under any circumstances.

(c) **Unqualified opinion evidence**: The respondents submit that some of the evidence is opinion evidence from unqualified lay witnesses, which is plainly inadmissible.

(d) **Argument and speculation**: The respondents also submit that much of the evidence is argumentative and speculative in nature, and therefore, inadmissible.

[41] The applicants make a number of arguments in response. First, they submit that the respondents' position on relevance is overly narrow in light of the fact that the application is focused on the failure to consider the cumulative impact of the emissions approved in the April 2010 Decision. The existing state of the air quality prior to the 2010 Decision is relevant and necessary to any assessment of the cumulative effect of an additional or proposed emission. Second, they argue that the questions of admissibility are best left to the panel hearing the Application to determine in light of the complete record. Third, they take issue with the substance of the evidentiary arguments raised by the respondents.

[42] Despite their position on this, the applicants have agreed to modify certain portions of the affidavits in response to the objections raised by the respondents.

[43] Given the volume of material in issue, the parties were agreed before me that I would deliver a decision relating to the categories of evidentiary issues, with illustrative examples on the various points.

[44] The first issue to be considered is the extent to which it is appropriate that a motions judge make such determinations.

Sierra Club and case law

[45] The respondents submit that this case falls squarely within the ambit of the decision in *Sierra Club v. Ontario*, 2011 ONSC 4086, [2011] O.J. No. 3071 (Div. Ct.). In the circumstances of this case, in which the applicants have filed five volumes of material, including 13 affidavits, and in which they seek broad-ranging constitutional relief, the respondents argue it would be just and appropriate for this Court to strike the impugned portions of the record on this preliminary motion. The respondents submit that, pursuant to *Sierra Club*, a failure to define the appropriate evidentiary case that the respondents must meet, and thus to define the appropriate record, encourages the proliferation of collateral issues, and can result in unnecessarily complicated, expensive and lengthy proceedings. It is preferable for such issues to be decided at a preliminary motion so as to properly define the issues and record prior to the hearing of the application for judicial review.

[46] On the other hand, the applicants argue that all the evidentiary issues raised by the respondent are issues best left to the panel hearing the application. They submit that the *Sierra Club* decision does not apply to the present case, because that case involved an administrative law challenge where the applicants had sought to file evidence that was not before the decision-maker at first instance. The applicants argue because this Application raises a *Charter* challenge, the rules of evidence are much different and broader, and thus, *Sierra Club* is essentially inapplicable.

[47] The respective positions of the parties reflect the two principles which run through the jurisprudence on the subject. On one hand, courts are generally reluctant to deal with issues of admissibility and relevance of evidence in advance of the hearing on the merits: see *Hanna v. Attorney General for Ontario*, 2010 ONSC 4058, [2010] O.J. No. 3081 (Div. Ct.); *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R.

(4th) 741, 2002 CanLII 41606 (C.A.), at paras. 49 and 53; *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.* (1997), 37 O.R. (3d) 70 (Gen. Div.); *Elementary Teachers' Federation of Ontario v. Ontario (Minister of Labour),* [2008] O.J. No. 662 (Div. Ct.) at paras. 22-23.

[48] On the other hand, this court has recently endorsed the practice of resolving issues about the admissibility of affidavit evidence before a motions judge prior to the hearing before the Divisional Court panel. In *Sierra Club*, the Court stated, at paras. 7 to 8,

> [w]e are of the view that this motion should have been brought prior to the hearing by the panel, in order to clarify the contents of the record prior to factums being filed. Proceeding in such a manner would have enabled the parties to define the issues for the hearing based upon properly admissible evidence. I note that this was the procedure followed in the decision of *Hanna v. Ontario (Attorney General)*, 2010 ONSC 4058 (Div. Ct.). If the motion judge is unsure about the relevance of certain material, those issues may be left to be determined by the panel hearing the judicial review.
>
> To fail to define the appropriate record for the Court before the hearing encourages the proliferation of collateral issues, as occurred in this application. Filing material by one party inevitably precipitates a response from the opposite party. The consequence of failing to define the record is a proceeding before this court that becomes unnecessarily complicated, expensive and lengthy. For the parties and for the court, the ground is continually shifting, and the core issues may be eclipsed by the procedural issues.

[49] In *Chopik v. Mitsubishi Paper Mills Ltd.* (2002), 26 C.P.C. (5th) 104 (ON S.C.), Justice Shaughnessy struck out, on a preliminary motion, a number of paragraphs from two affidavits submitted in support of a motion for certification under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, on the basis that responding to the irrelevant evidence would amount to needlessly wasted resources:

> Where it is clear in law that evidence is inadmissible, to leave the evidence on the record is embarrassing and prejudicial to the fair hearing of the motion or application. A party should not be put to the needless expenditure of time and resources in responding to evidence which can have no impact on the outcome of the proceeding. [at para. 26.]

[50] These two principles, considered within the context of the present case, are by no means irreconcilable. Defining the record appropriately in advance of the hearing enhances the panel's ability to determine the merits, and is thus in the interests of justice. As I will discuss below, there is material contained within the affidavit material that is clearly inadmissible and should be struck. On the other hand, this court must take care not to usurp the role of the panel in

determining the merits. In case of doubt concerning the admissibility of affidavit material filed, it should not be struck.

[51] I do not agree with the applicants that the fact that there are *Charter* claims advanced in the present case undermines the position articulated in *Sierra Club*. The fact that an applicant advances *Charter* arguments (or natural justice arguments) may well affect the admissibility of particular sorts of evidence, such as, for example, evidence not before the original decision-maker: see *Hollinger Farms No. 1 Inc. v. Ontario (Minister of the Environment)*, [2007] O.J. No. 2405 (Div. Ct.). But this does not undermine the principles articulated above. For example, improper opinion evidence that is clearly inadmissible is not rendered admissible because the underlying application raises *Charter* issues.

[52] The sheer volume of evidence in an application such as this one increases the importance of having a properly defined record for the reasons set out in *Sierra Club*, as quoted above. I do not agree with the applicants' submission that *Sierra Club* is inapplicable to this matter because there was no hearing held in the present matter. The principle that a record should be appropriately defined before the hearing is particularly important in an era of limited resources within the judicial system as well as the high cost of litigation to the litigants. Having said this, the parallel principle is that evidence should not be struck at this stage unless it is clearly inadmissible. These two principles will guide the following analysis.

[53] Suncor argues that much of the evidence is not admissible on the application for judicial review because it was not before the initial decision maker:

> The summary nature of applications for judicial review dictates that, in general, evidence should be limited to the information that was before the original decision-maker or which the decision-maker could have taken into consideration, except where necessary to prove error going to jurisdiction that cannot be proved on the record.
>
> In addition to evidence that was not before the original decision-maker, expert reports and studies that post-date the decision under review are inadmissible. Courts have furthermore emphasized that they are not academies of science which seek to provide a forum to debate environmental science:
>
> > It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. [citations omitted.]

[54] The difficulty with Suncor's argument on this point is two-fold. First, the nature of the applicants' submissions fall within to the exception to the general rule that evidence not before the initial decision maker is not admissible on an application for judicial review. The applicants assert that the Decision breached their ss. 7 & 15 *Charter* rights. As Dambrot J. recently stated in *AlGaithy v. The University of Ottawa*, 2011 ONSC 5879, [2011] O.J. No. 4479 (Div. Ct.), at para. 29,

> …as with an allegation of a breach of natural justice, affidavit evidence must also be permissible to supplement the record to demonstrate a validly raised allegation of constitutional error (see *Rafieyan v. Minister of Citizenship and Immigration*, 2007 FC 727, [2007] F.C.J. No. 974 at para. 20). I emphasize that the constitutional issue must be validly raised. The mere labelling an issue as a constitutional one will not of itself open the door to the admission of otherwise inadmissible evidence.

[55] Second, as the applicants point out, they did not have prior notice of the decision and could not have put this issue before the Director.

[56] In my view, the *Charter* and procedural fairness arguments are at the core of the applicants' application and are arguments that must be assessed by the panel hearing the application. I would not strike any of the evidence on the sole basis that it was not before the decision maker at this point, because to do so would risk pre-judging the merits of the application.

Relevance

[57] The largest and most wide-ranging challenge to the evidence filed is based on the submission that much of it is irrelevant. The respondents challenge dozens of paragraphs of the Lockridge and Plain affidavits, as well as the entire affidavits filed by Dr. Michael Gilbertson, Dr. Elaine Macdonald and Dr. Margaret Keith on this ground. Many paragraphs are also challenged on other grounds.

[58] With respect to the "hybrid" affidavits of Drs. Gilbertson, Keith and Macdonald, the central objection is that they constitute improper expert opinion and should be struck in all or in part on that basis alone. I will address the hybrid affidavits below in relation to improper expert opinion evidence.

[59] With respect to Ada Lockridge's affidavit, the Government respondents assert as follows at para. 18 of their factum:

> In her affidavit, Ms. Lockridge gives evidence on issues that are irrelevant to this judicial review, including: (a) the feelings of individuals on reserve other than the applicants (paragraphs 25, 71, 177); (b) sources of spills and pollution other than those which are the subject of the impugned decision (which are irrelevant to the determination of this application for the reasons set out below at paras. 45-47 and 53-56) (paragraphs 33, 43, 52, 152, 167, 179, 186); (c) personal health conditions unrelated to the emissions or facility at issue (paragraphs 89, 90, 102, 104-9, 129, 130, 132, 135); (d) personal health conditions and community statistics unrelated to air quality (paragraphs 89, 90, 102, 104-9, 132, 135); (e) the availability of social services on reserve (paragraph 100); (f) the effects of generalized pollution on animals, plants, water, and soil (paragraphs 153, 154, 161, 164, 165, 167-9,

217); and (g) the traditional activities and practices of the community (paragraphs 152, 153, 155, 158, 160, 162, 171-4, 176).[1]

[60] With respect to Ronald Plain's affidavit, the Government respondents submit as follows at para. 23 of its factum:

> In his affidavit, Mr. Plain gives evidence that is irrelevant to this judicial review, including: (a) the community's reaction to sirens and other views or feelings of individuals on reserve other than the applicants (paragraphs 20, 79, 92); (b) generalized exposure to pollutants other than those at issue in the impugned decision (which are irrelevant to the determination of this application for the reasons set out below at paras. 45-47 and 53-56) (paragraph 32); (c) personal health conditions unrelated to the emission source at issue (paragraphs 35, 48, 93, 100, 101, 114); (d) personal health conditions and community statistics entirely unrelated to air quality (paragraphs 35, 93, 100, 101); (e) the availability of social services on reserve (paragraph 42); (f) the traditional activities and practices of the community (paragraphs 72, 74-77); (g) the manner in which individuals in the community make plans and lock doors (paragraph 78); (h) the community's trust in outsiders (paragraph 80); (i) the number or proportion of older people on reserve (paragraph 81); (j) educational experiences of his father (paragraph 86); (k) historical land disputes (paragraphs 87-91); (l) funding sources for environmental workers (paragraphs 98, 99); (m) sources of spills and pollution other than those which emerge from the emission source at issue (paragraphs 102-4, 111); (n) an unrelated road blockade (paragraphs 109, 110); and (o) his opinion as to the government's methods of regulation (paragraphs 148-50, 152).[2]

[61] Wilson Plain, who is not a party to the application, also filed an affidavit. The Government respondents submit that paras. 9-17, 20-4, 32, 35-40, 44-6, 48-50, 52, 54, 63-5, 70-4, 76-8, 81, 85, 91, 94, 95, and 99 are irrelevant to the application, stating at para. 28 of their factum that,

> [i]n his affidavit, Mr. Plain gives evidence that is irrelevant to this judicial review, including: (a) sources of spills and pollution other than those which emerge from the emission source at issue (paragraphs 32, 52, 81); (b) PCBs, benzene emissions, and other contaminants which are unrelated to the decision at issue on this application (paragraphs 39, 63-5, 73, 74); (c) his personal health conditions, including those unrelated to the emission source at issue (paragraphs 63, 64, 91);

---

[1] Suncor takes issue with generally, though not completely, the same paragraphs. Suncor challenges paras. 25, 33, 43, 52, 71, 89, 90, 100, 102, 104, 105-109, 122, 129, 130, 132, 135, 136, 152, 153-55, 158, 160-62, 164-65, 167-69, 171-74, 176-77, 179, 186 and 217 of Ms. Lockridge's affidavit.

[2] Suncor objects to paras. 20, 32, 35, 42, 48, 72, 74, 75, 76-94, 98-104, 108-111, 114, 127 and 148-52 on the ground of relevance.

> and (d) the health conditions or diagnoses of others in the community, including conditions and statistics unrelated to air quality (paragraphs 65, 70-2, 76).[3]

[62] In addition to the affidavits filed by the applicants and Wilson Plain, the applicants filed a number of affidavits by scientists. As will be discussed below, the respondents challenge some or all of these on a number of grounds in addition to relevance, submitting in particular that they constitute improper expert opinion evidence, at least in part.

[63] The applicants also filed an affidavit from Dr. Elaine Macdonald, a scientist employed by Ecojustice Canada. The Government respondents challenge the relevance of some of her affidavit as follows at para. 34 of their factum:

> Dr. Macdonald also gives evidence on issues that are, as discussed below at paras. 45-47 and 53-56, irrelevant to this judicial review, including: (a) emissions of "toxics" (paragraph 33) (b) sex ratio disparities (paragraph 34); (c) emissions of PM2.5, benzene and other volatile organic compounds (VOCs) that are unrelated to the decision being reviewed or the emission source at issue (paragraphs 39, 45, 46, 51); (d) air pollution standards under Regulation 419/05 (paragraphs 51, 58-60); and (e) proposed certificates of approval for facilities other than the one at issue (paragraph 51).[4]

[64] Dr. Michael Gilbertson, a biologist filed another affidavit. The respondents object to this affidavit on the ground that it contains improper expert opinion, and that, to the extent that it provides evidence within his personal knowledge, such evidence is irrelevant to the issues in this judicial review application. By way of example, the Government respondents submit that his description of his interpretation of the 1996 report on soil and sediment, and the content of that report are irrelevant to the decision at issue in this application, which concerns a 2010 decision in respect of air emissions. Moreover, they argue, there is no allegation of any link between the sulphur dioxide emissions that were the subject of the 2010 Decision and the sex ratio disparities alleged by Dr. Gilbertson at paras. 12, 13, 16, 18 and 19 of his affidavit.[5]

[65] The application record also contains an affidavit from Dr. Margaret Keith. Again, the respondents submit that her affidavit should be struck in its entirety for reasons similar to those it advances in the case of Dr. Gilbertson. With respect to the relevance issue, the Government respondents submit at para. 41 of their factum that,

---

[3] Suncor objects to paras. 9-17, 20-24, 32, 35-40, 44-46, 48-50, 52, 54, 63-65, 70-74, 76-78, 81, 85, 91, 94, 95 and 99 on the ground of relevance.

[4] Suncor takes issue with paras 33-34, 39, 45-46, 51 and 58-60 on the grounds of relevance.

[5] Suncor submits that the entirety of the Gilbertson affidavit should be struck on the basis that it constitutes improper opinion evidence, and is in any event, irrelevant to the issues in this judicial review application.

> [t]o the extent that Dr. Keith provides fact evidence within her personal knowledge, this evidence is not relevant to the decision at issue in this judicial review. Historical emissions of benzene from sources other than the relevant plant (paragraphs 4, 7), and discussions with community members about their health concerns (paragraphs 7-10, 12, 22) are not relevant to the determination of this application. Moreover, there is no allegation of any link between the sulphur dioxide emissions (the subject of the decision being reviewed here) and the sex ratio disparities alleged by Dr. Keith (paragraphs 12, 28-31, 34).

[66] The applicants have also put forward a series of expert reports regarding industrial emissions, their effect on air pollution, and the effects of pollution on human health. These include the reports of William M. Auberle, Dr. Henry S. Cole, Dr. Peter Infante and Dr. David Carpenter. For the purposes of this motion the respondents do not challenge the qualifications of the witnesses that the applicants have put forward as experts. However, they submit that significant portions of all of these experts' reports should be struck on the basis that they provide evidence that is not relevant to the decisions at issue or the determination of the application for judicial review.

The Respondents' Submissions on Relevance

[67] The respondents submit that much of the evidence filed is irrelevant to this application as a judicial review of the April 2010 Decision. The overly broad evidence results largely, they submit, from two factors. First, they argue, supported by the uncontested affidavit of Dr. Peter Lynch, Director of Suncor's Environment, Health and Safety Department, that the application and much of the evidence filed in support confused sulphur production levels with the overall processing capacity of the refinery. He states at para. 16 of his affidavit that,

> …there is no change in the volume of the product produced by the Sarnia Refinery (i.e. gasoline, diesel and jet fuels) despite variances in the level of sulphur production from 145 tonnes per day to 180 tonnes per day. The only change is the blend of crude oils processed, which vary only by their sulphur content. For example, if Suncor was granted a notional increase in sulphur processing capacity from 145 tonnes per day to 180 tonnes per day, there would be no corresponding increase in the amount of fuel products created. Rather, the increase in sulphur processing capacity would enable Suncor to utilize more sour crude. Conversely, if the Ministry of the Environment ("MOE") ordered Suncor to process only 145 tonnes of sulphur per day, there would be no corresponding decrease in the amount of fuel products created. Suncor would instead purchase more expensive, sweeter crude.

[68] Thus, the respondents submit, only evidence relating to the increase in sulphur production, as opposed to overall product production by the plant, is relevant to this application. They concede that the evidence filed contains some evidence indicating that increase in sulphur production authorized by the 2010 Decision could increase emissions of sulphur dioxide and hydrogen sulphide. However, there is no evidence whatsoever to indicate that the increased

sulphur emissions would increase other emissions, such as benzene. Moreover, they submit, there is no evidence on the record to suggest that the approved emissions would have synergistic or cumulative effects with other existing emissions. They argue, therefore, that only evidence relating to the effects of sulphur dioxide and hydrogen sulfide could be relevant to any consideration of cumulative effects of this application. Accordingly, for example, Ada Lockridge's reference to a "loss of boys" i.e., a skewed sex ratio on the reserve suggesting that this is caused by pollution exposure (see para. 109 of her affidavit), is irrelevant to this application in the absence of any casual link between the April 2010 Decision and this pre-existing harm, or indeed, any such harm or risk of harm in evidence.

[69] Second, the respondents submit that because the evidence was filed before the application was amended to delete the s. 52 claim, the evidence includes evidence that is irrelevant to the more narrow judicial review challenge to the 2010 approval itself. They submit, in effect, that the applicants may not indirectly challenge the regulatory framework through the guise of a judicial review application, and that it is therefore appropriate for this court to strike any evidence that is not relevant to the properly scoped issue. They emphasize that the *Charter* relief sought on a judicial review application must relate to the purported *exercise* of statutory power and not to the statutory power itself, citing *Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al.*, [1984] O.J. No. 3360 (C.A.), *Keewatin v. Ontario (Minister of Natural Resources)*, [2003] O.J. No. 2937 (S.C.), and *Falkiner v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 3737 (Gen. Div.), in support of this point.

[70] The respondents submit that, in order to establish that their s. 7 or 15 *Charter* rights have been violated in this case, the applicants must establish a causal connection between the harm or risk of harm asserted and the 2010 Decision. As the evidentiary record indicates that this decision could only have affected sulphur dioxide and hydrogen sulphide, and does not suggest any synergistic effects of these particular emissions on other emissions, evidence about the health effects of benzene or the general state of pollution in the area are entirely irrelevant to this application and should be struck.

[71] The respondents argue, accordingly, that portions of the applicants' and Wilson Plain's affidavits that describe existing pollution are irrelevant to this application as they have nothing to do with the 2010 Decision.

[72] At para. 43 of their factum, the Government respondents summarize the basis of their position (which is shared by Suncor) that much of the expert evidence should similarly be struck as irrelevant:

> In particular, the applicants' experts provide extensive evidence regarding the emission of, and the health effects of benzene, 1,3-butadiene, other volatile organic compounds (VOCs) and PM2.5 in the Sarnia region. Dr. Infante's report, for instance, deals exclusively with the potential link between benzene exposure and disease, without any evidence regarding the nature of exposure in the applicants' community or providing any link between the decisions at issue and

benzene emissions or the effects thereof. None of the applicants' evidence provides such a link.

The Applicants' Submissions

[73] The applicants acknowledge that the application as amended is limited to a challenge of the Director's decision. They argue, however, that the question of relevance turns on the issue of whether he was required to conduct a cumulative effects assessment and if so, of what. These, they submit, are questions that go to the merits, and excluding such evidence (relating, for example, to existing cultural effects of pollution in the area) effectively prejudges the merits and risks creating a record that does not reflect the applicants' views on the issues.

[74] The applicants also argue that the risk of harm they assert in their ss. 7 and 15 *Charter* claim is the risk of exacerbating the preexisting harms created by pollution on the area. The state of "Chemical Valley" before 2010, they submit, is relevant to this issue and goes to the argument of fundamental justice because, the applicants argue, it is contrary to the principles of fundamental justice to approve further emissions without a cumulative effects assessment.

[75] In addition, they cite *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 in support of its argument that this evidence is necessary to have in the record to set the context for their s. 15 argument that the 2010 Decision created a disparate impact upon the applicants.

Analysis of Relevance

[76] There are a number of general points to be made at the outset. First, I am satisfied that there was some confusion on the applicants' part between the production of sulphur and the overall production by the refinery. The uncontested evidence before the court in the application record is that the 2010 Decision affected the former and not the latter. In addition, the evidence indicates that while this increase might affect production of sulphur dioxide and hydrogen sulphide in some circumstances, there is no evidence that the 2010 Decision would have synergistic effects on any other contaminants such as benzene.

[77] Having said this, however, I am not satisfied that any references to preexisting pollution and its effects on those living in the area should be struck at this stage.

[78] With respect to its s. 7 claim, the applicants must establish that the 2010 Decision has created a risk to their physical or psychological health, or affects their ability to make fundamental life choices. They must also establish that such deprivation took place in a manner that did not conform to the principles of fundamental justice. They assert that the exclusion of the applicants from the decision-making process, the consequent deprivation of a right to be heard, and the failure to consider cumulative effects constituted a violation of the principles of fundamental justice.

[79] With respect to s. 15, the applicants must establish that the Director's Decision has had a disproportionate impact on the applicants on the basis of an enumerated or analogous ground,

and that the disproportionate impact has created a disadvantage by perpetuating historical disadvantage.

[80] For the reasons advanced by the respondents in this motion, it may well be the case that the applicants are unable to establish any causal connection between the 2010 Decision and the harms or risks of harms asserted that will be sufficient to "trigger" ss. 7 and 15 of the *Charter*. I agree with the respondents that only evidence relating to the 2010 Decision and any synergistic effects of the increase in sulphur production authorized by it are relevant for that purpose, and not any earlier approvals or preexisting contaminants in the absence of evidence of synergistic effects with the increased level of sulphur production.

[81] However, if a panel were to determine that the exercise of statutory power did create a harm or risk of harm that triggered the applicants' *Charter* rights, the broader context of the disproportionate impact on the applicants as members of the Aamjiwmaang community would be an issue. A decision to exclude all such evidence would thus risk prejudging the merits of the application relating to the general levels of pollution and its effects on the area, the applicants and their community. I would not, for this reason, strike any of the paragraphs of the applicants' or Wilson Plain's affidavits on the basis of relevance. Because these affidavits are filed by the applicants and Wilson Plain who is also a resident of the area and a member of the Aamjiwmaang community, their perceptions of preexisting conditions may be relevant to the impact of the 2010 Decision upon them and, therefore, to the disparate impact argument. In these circumstances, it would be problematic to separate these issues from portions of the affidavits that might be clearly irrelevant.

[82] However, as will be discussed below, some passages of these affidavits must be struck on the basis of improper opinion evidence or unattributed hearsay.

[83] The expert's reports are reviewed below. With the exception of Dr. Infante's report, which I would strike in its entirety, portions of all of them are relevant or at least potentially relevant to this judicial review application. All of them contain portions that are not confined to the issues of this application as "scoped". Having said that, however, I have determined not to strike those portions so that the panel may consider the full reports within the context in which they were actually prepared. The panel may conclude that it is appropriate to strike or disregard various portions of these reports, but in my view, it should be able to consider the context of the reports as originally drafted in making such determinations.

Dr. Auberle's Report

[84] The respondents object to Dr. Auberle's report to the extent that it opines on the emissions of benzene and 1,3 butadiene and other pollutants which are not in issue in this application. He does, however, in the course of his brief report, articulate a relevant question, which is, "is the decision to allow Suncor to increase its production of sulphur likely to increase pollutant emissions from the facility?". He discusses the emissions of sulphur dioxide and hydrogen sulphide in the course of sulphur processing, which is clearly relevant to this application. Paragraphs 2.2 and 2.3 refer to pollutants emitted from the facility "during regular

operations" but does not tie them (with the exception of nitrogen oxide and ultra-fine particulate matter) to sulphur production. He also opines that "current regulatory practices do not address such emissions and effects adequately".

[85] While this report may be overly broad in light of the issues on this application, I would be concerned that striking portions of it could affect the application judge's ability to properly assess it and determine the appropriate weight to be attributed to the relevant parts of it. The respondents are, of course, entitled to make full argument on these issues to the panel hearing the application, but it would, in my view, be premature to strike it at this point.

Dr. Cole's Report

[86] Similarly, Dr. Cole's report clearly appreciates the fact that the impugned decision affected sulphur production. His report is critical of the general regulatory framework, and thus his report is overly broad. One of the questions he addresses is whether "Suncor's emissions have increased the exposure of Applicants and other people residing in the Aamjiwmaang First Nation area to elevated exposures of pollutants known to cause adverse health effects". He refers to benzene and other chemicals. It is not clear from his report whether this comment relates to sulphur production or overall refinery production. Striking this statement could distort the evidence, and it should therefore remain at this point. His report also reviews general sources of air pollution in relation to the Aamjiwmaang First Nation community. As discussed above, this could be relevant to disparate impact issues.

[87] It would be premature to strike any part of this report. This is a matter that should be left to the panel to consider in the context of the issues properly before it.

Dr. Infante's Report

[88] In my view, Dr. Infante's report is in a different category. It concerns the relationship between leukemia and benzene. This report does not add anything to the other reports and has no link whatsoever to the 2010 Decision. In my view, it is irrelevant to this application and should be struck.

Dr. Carpenter's Report

[89] This report considers pollution and its effects in the Sarnia/Aamjiwmaang community in comparison to the average Ontario community. It also opines on Ontario standards for various contaminants (including sulphur dioxide) relative to those existing in the United States.

[90] Again, while the scope of the report appears to be broader than that which is relevant to the application, in that it discusses pollutants that do not seem to be affected by the 2010 Decision, significant portions of it relating to general pollution in the area could be relevant to the disparate impact argument and it would thus be premature to strike it at this point. While, in my view, the affiant's opinions on the adequacy of the regulatory requirements in Canada relative to those existing in the United States are clearly irrelevant to the judicial review of the

2010 Decision, the decision about deleting portions of it should be left to the panel to determine in the context of the issues properly before it.

The reports of Dr. Jackson, Dr. Reimer and Dr. Mitchell

[91] Suncor submits that these reports are irrelevant to the Decision under review and should be struck.

[92] While these reports, which address anthropological, cultural and psychological effects of pollution upon First Nations peoples, do not concern the harm or risk of harm allegedly caused by the Decision under review, they could be relevant to a consideration of the impact of any harm that a court found to have been created by the 2010 Decision. They may be relevant to the s. 15 disparate impact argument. A decision to exclude this evidence at this stage would prejudge the merits of this application and is therefore premature. Accordingly, I would not strike them at this stage.

Improper Opinion Evidence

The Hybrid Affidavits Dr. Macdonald, Dr. Keith and Dr. Gilbertson

[93] The applicants have also filed a number of affidavits from scientists, which are not proffered as expert evidence. These include the affidavits of Dr. Macdonald, Dr. Keith and Dr. Gilbertson. I conclude that these reports should be struck in their entirety. In essence, these affidavits are proffered for the scientific value of the opinions they express. They do not qualify as expert evidence and should therefore not be admitted. In addition, portions of the applicants' and Wilson Plain's affidavits constitute improper opinion evidence and should be struck.

[94] Opinion evidence may only be tendered through the evidence of a properly qualified expert. Unqualified expert opinion is impermissible and should be struck: see *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, [2010] O.J. No. 4057 (S.C.), at para. 101; *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2009] O.J. No. 428 (S.C.), at para. 110, varied on other grounds, 2010 ONCA 310; *R. v. Mohan*, [1994] 2 S.C.R. 9, at paras. 17 and 27; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 4.1.01(1).

[95] The importance of this principle and the role of the court as gatekeepers to exclude such improper evidence was recently underlined in the course of the inquiry by Mr. Justice Goudge concerning the forensic pathology work of Dr. Charles Smith.[6] At pp. 499-500 of his report, Goudge J.A. noted the importance of trial judges determining the scope of admissible expert evidence, including by defining the precise subject area of expertise for which a witness is qualified to give evidence and ensuring that expert evidence is only admitted within the narrow scope for which the witnesses has been properly qualified:

---

[6] Ontario, Inquiry into Pediatric Forensic Pathology in Ontario, Report: Policy and Recommendations, vol. 3 (Toronto: Queen's Printer, 2008) ("The Goudge Report").

> A final outcome from the admissibility process is a clear definition of the scope of the expertise that a particular witness is qualified to give. As discussed in the earlier part of this chapter, it will be beneficial to define the range of expertise with as much precision as possible so that all the parties and the witness are alerted to areas where the witness has not been qualified to give evidence. . . . As I earlier recommended, the trial judge should take steps at the outset to define clearly the proposed subject area of the witness's expertise.... These steps will help to ensure that the witness's testimony, when given, can be confined to permissible areas and that it meets the requirement of threshold reliability.

[96] In my view, the entire affidavits of both Dr. Michael Gilbertson and Dr. Margaret Keith are effectively expert opinion. They are both scientists, have both done research in fields related to the claims advanced which they discuss and with respect to which they opine in their affidavits. They have not signed an acknowledgement of the expert's duty form, nor do they claim to be neutral, unbiased or non-partisan in their evidence, as required by the *Rules of Civil Procedure* and by common law principles governing the role of expert witnesses. They have taken on the role of advocates. As these witnesses are not tendered as qualified experts, their affidavits putting forward opinion evidence are improper and should be struck in their entirety: see *Rules of Civil Procedure*, R. 53.03(2.1); *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd. ("The Ikarian Reefer")*, [1993] 2 Lloyd's L.R. 68 (Q.B. (Com. Ct.)) at 81; *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 388, [2009] O.J. No. 1879, at para. 85; *Bedford v. Canada*, at paras. 100-3; *Gutbir (Litigation guardian of) v. University Health Network*, 2010 ONSC 6394, [2010] O.J. No. 4982, at paras. 21-24.

[97] Much of the affidavit of Dr. Elaine Macdonald is also expert opinion. She has not signed an acknowledgement of expert's duty form and has not claimed to be neutral, unbiased or non-partisan in her evidence. Her evidence shows that she is an advocate for the position of the applicants. As Dr. Macdonald is not qualified to provide expert opinion, the numerous portions of her affidavit where she has provided expert opinion (as set out in Schedule A to the Notice of Motion) are inadmissible and should be struck. While there are portions of her affidavit that do reflect personal experience, these portions do not add to other material already before the Court, particularly in the absence of those portions that effectively constitute improper opinion evidence.

[98] In concluding that the Report of Dr. Macdonald should be struck in its entirety, I also note that she was mistaken as to the effect of the Decision, and appears to have assumed that the increase in sulphur production also affected the overall fuel production at the Suncor refinery. This increases the risk that much of her affidavit is irrelevant to the effects of the 2010 Decision, in any event.

[99] One of the fundamental duties of the expert witness in a civil case is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise. An expert witness should not assume the role of advocate. Dr. Gilbertson, Dr. Keith, and Dr. Macdonald each provide argumentative and speculative

statements in their affidavits that are put forward in support of the applicants' position. While there are, as indicated above, some portions of these affidavits that do reflect personal experience, these are greatly outweighed by the potentially prejudicial effect that improper opinion evidence may have. This risk is exacerbated when the affiants are scientists as opposed to laypersons such as Ms. Lockridge, Ronald Plain, and Wilson Plain.

[100] Their evidence is inconsistent with the rules for putting expert opinion before the court and should, accordingly, be struck.

The opinion evidence of Ada Lockridge, Ronald Plain and Wilson Plain

[101] The applicants Ada Lockridge and Ronald Plain, as well as Wilson Plain, another fact witness, provide opinion in their affidavits on a wide range of topics which relate in particular to the effects of pollution from the refineries on their community. These witnesses are not qualified to provide expert opinions on these topics. Their opinion evidence is inadmissible and should be struck. While Ada Lockridge, for example, may give evidence as to studies she has participated in and what she has done, she may not give expert evidence as to the results or import of such studies. For example, at para. 79 of her affidavit, she refers to her involvement in some investigation into the sex ratio issue:

> In our study, we recognized that further study was necessary to pin-point the cause of the skewed birth ratio and to further study our findings but we pointed out that an issue existed and that maybe pollution could be the cause.

[102] This paragraph constitutes improper expert opinion, as does a considerable part of the Lockridge affidavit relating to empirical work that Ms. Lockridge has been involved with. It goes far beyond a statement that Ms. Lockridge was aware of and concerned about the sex ratio issue and worried about the cause. The applicants have agreed to delete the following passage which was the final sentence of para. 79:

> Despite the need for additional study, my own personal view given the comparison between Aamjiwmaang and the control group is that there is only one difference in lifestyle and that is the fact that we live in Chemical Valley and its pollution.

[103] Having said that, the applicants' evidence relating to the fear or uncertainty as to, for example, cancer rates and statements like "I worry that…", etc., are potentially relevant to harm or perception of harm and to disparate impact arguments. Similarly, many of the paragraphs the respondents object to as "unqualified opinion" are arguably relevant to psychological impact of the Decision. One such example is found at para. 23 of Ronald Plain's affidavit:

> The effects of long-term cumulative exposure to pollution from all the different exposure to pollution from all the different sources in Sarnia may be killing me slowly like death by a thousand cuts, but I can't point to anyone single source of pollution or type of pollution that has to stop to protect my health. The fact is that all of the emissions contribute in a cumulative manner to the health risks to which

> my family, friends, and I are exposed. Adding to the existing pollution burden in our community increases these risks. Not knowing what specifically is being emitted and whether the air pollution poses serious health risks at a given time or location is hugely stressful. Suncor's increase in production which is at issue is one of many examples.

[104] To the extent that the content in this paragraph is understood to be opinion evidence relevant to establishing the state of pollution in the area, I would agree with the respondents that it is improper. The central point of this paragraph, however, relates to the psychological effects of pollution in general and uncertainty. It is not feasible to segregate out statements that should be excluded from those that are arguably admissible, and so it is appropriate that the paragraph should remain, and the respondents may argue about the issues of admissibility and weight before the panel.

[105] Not all expressions of opinion are inadmissible on the part of lay witnesses: see *Graat v. R.*, [1982] 2 S.C.R. 819, 31 C.R. (3D) 289 at p. 305; David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed., (Toronto: Irwin Law, 2008).

[106] In considering whether a lay opinion will be admitted, a judge will consider,

> …whether the conclusion is one that people with ordinary experience are able to make. Persons of ordinary experience may be able to estimate the speed of a motor vehicle, for example, but not the speed of an airplane. A judge will also consider whether the particular witness has the "experiential capacity" to form the relevant opinion. A young child will not likely have the ordinary experience needed to comment even on the speed of a motor vehicle. [Paciocco & Stuesser, at p. 187.]

[107] In my view, the affiants who reside in the area have the requisite experiential capacity to opine, for example, on matters like the apparent increase in air pollution when the wind is blowing from the refineries, subject, of course, to the rules of relevance. They do not have the requisite capacity to opine, for example, on the effects of particular contaminants on various health or environmental conditions. Such evidence may only be adduced through proper expert evidence.

[108] In sum on this issue, the evidence that is clearly improper opinion evidence should be struck from these affidavits. To the extent that the affidavits refer to fears or uncertainty about effects of pollution that may be relevant as discussed above, the issue should be left to the panel hearing the application. Similarly, not all the opinions expressed by these affiants are inadmissible as some of them are, at least arguably, within their experiential capacity.

Unattributed Hearsay Evidence

[109] In an application, an affidavit may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact

of the deponent's belief in the information are specified in the affidavit: see *Rules of Civil Procedure*, R. 4.06(2) & 39.01(5).

[110] However, statements in affidavits for use on an application that touch on a contentious matter and do not state the source of the affiant's information and belief should be struck. It is essential to the adversarial process that evidence submitted by affiants be under oath or affirmation, and that the affiant is available to be cross-examined in order to test the reliability of the evidence. This rule is well established, and "in the face of an objection being taken the Court may not waive the irregularity": see *Cameron v. Taylor* (1992), 10 O.R. (3d) 277 (Gen. Div.), at para. 24; *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3394 (S.C.), at paras. 33 and 50; *Ontario (Attorney General) v. Paul Magder Furs Ltd.*, [1990] O.J. No. 63 (H.C.J.), at para. 21.

[111] The applicants argue that such evidence, however, may still be admissible under the principled exception to the hearsay rule, citing *R. v. Starr*, [2000] 2 S.C.R. 144, at para. 106; *R. v. Khelawon*, [2006] 2 S.C.R. 787, at paras. 56-63.

[112] The affidavits of Ada Lockridge, Ronald Plain, and Wilson Plain contain instances where the affiants do not attribute the source of hearsay statements in respect of contentious facts. These paragraphs are set out in Schedule A to the Notice of Motion. This evidence is inadmissible, and should be struck: see *Canadian Blood Services v. Freeman*, [2004] O.J. No. 4519 (S.C.), at para. 19.

[113] In general, the respondents argue that these paragraphs should be struck on a number of grounds in addition to unattributed hearsay, such as irrelevance. For example, Ms. Lockridge states at para. 179 that,

> I remember several evacuations from Aamjiwmaang when I was young due to spills to air. I remember in the early 1970s that there was a massive spill from the Dow chemical plant, but at that time I didn't know what had been released or from where. […] That specific Dow release killed some of the workers at Suncor and burned a patch through the bush at Aamjiwmaang. People saw a haze and it was coming through their windows. Some people stayed home because they didn't have a ride or because they refused to leave. When I started doing environmental work people would tell me about incidents over the years and many people spoke about that spill from Dow as something that stuck in their minds.

Paragraph 20 from Ronald Plain's affidavit states as follows:

> The sirens scare my kids; my understanding is that they scare all the kids that go to the daycare because the sirens are right in front of the daycare. There really is no way to react to them because there is no way to know what a siren means.

[114] The respondents object to these passages on the basis that they contain unattributed hearsay relating to matters that are contentious, and that are irrelevant as well.

[115] At para. 38 of his affidavit, Wilson Plain provides the following statement:

> To my knowledge, only a handful of people on reserve continue to hunt animals such as deer. These activities are more and more uncommon because of concerns about contamination of animals from industrial pollution. In the past decade, several studies have been conducted of contamination levels on our land and in the reserve. We have actually been warned by our own hunters, like my brother Gerald Plain, as well as researchers following one of these studies, not to eat deer that have spots on their livers, which our own hunters were starting to find.

[116] The respondents submit, and I agree, that these passages contain improper opinion evidence as well as unattributed hearsay, and that they should be struck for this reason.

[117] The combination of the fact that these statements are unattributed hearsay and that they have nothing to do with the April 2010 Decision makes the respondents' arguments that much stronger. Although I am inclined to generally resolve questions of relevance in these affidavits, as discussed above, in favour of the applicants, the combination of factors satisfy me that the paragraphs set out in Schedule A to the Notice of Motion in relation to unattributed hearsay should be struck.

Speculative evidence

[118] The respondents submit that a number of paragraphs of the affidavits of Ada Lockridge, Ronald Plain, Wilson Plain and Dr. Elaine MacDonald contain speculation that should be struck on the basis that statements that speculate as to the existence of facts that are outside the scope of the deponent's information or knowledge are impermissible in an affidavit: see *Rules of Civil Procedure*, R. 4.06(2) & 39.01(5); *Desjardins v. Mooney*, [2001] O.J. No. 697 (S.C.), at para. 4.

[119] The applicants submit that these statements fall into two categories:

> First are statements that are not tendered to prove the truth of what they aver, but rather the fact of the speculation itself. For example, in paragraph 122 of Ada's Affidavit, she states: I don't know if there is any correlation between my health problems and the pollution but I often wonder about that. My daughter Felicia and I are currently participating in a study with University of Michigan professor Nils Basu, testing my body for contamination. They took samples of my hair, blood, urine and nails. They also took samples of dust from my house, soil samples outside my house, and my samples of my drinking water, and my pet bird's feathers. They haven't given me the results yet and I am scared what they might find.
>
> The second category of statement to which the Respondents object are those that are tendered to prove the truth of the conclusions therein, which the Applicants submit are not speculation but permissible lay witness opinion evidence based on personal observation and experiential capacity. [Applicant's Factum on the Motion to Strike the Affidavit Evidence, at para. 68-69.]

[120] With respect to the first category, I agree with the applicants that some of the impugned passages, such as the one at para. 122 of Ms. Lockridge's affidavit, are not proffered for the truth of the contents of the premise but as evidence of uncertainty and fear. Another example is the Ronald Plain's statement that "my fear became a reality in 2010 when I learned that the Ministry allowed Suncor to increase its production again" (Ronald Plain's Affidavit, at para. 139). The point of this passage is the fear of increased pollution.

[121] Other passages, however, such as para. 96 of the Lockridge affidavit, do contain inadmissible speculation. Although the applicants have agreed to delete the last sentence of this paragraph, the entire paragraph speculates that certain studies may not have continued as a result of government funding decisions. Speculation as to the health impacts of industry in the area are also inadmissible, except to the extent that the references are made for the purpose of establishing fear or uncertainty that relates to the 2010 Decision (and/or the disparate impact argument).

[122] In my view, however, the respondents' objections on this category are overly broad. For example, the respondents object to Ms. Lockridge's statement that some people don't visit her because of the pollution as inadmissible speculation as to the reason people do not come to visit her. While this is true, it could be understood as simply reflecting her interpretation. In my view, such speculation on the part of a lay witness is likely to be harmless and, properly considered, may be relevant to the arguments related to desperate impact. This is the sort of objection that can be best assessed by the hearing panel, in light of the determinations made on relevance to particular issues at that point.

Argument

[123] It is inappropriate for a witness to provide evidence, whether opinion or otherwise, that constitutes argument in support of that party's position on the issues that are to be decided by the court: see *Coote v. Zellers*, [2008] O.J. No. 809 (Div. Ct.), at para. 22; *Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters*, [2001] O.J. No. 750 (Div. Ct.), at paras. 21, 26. The respondents submit that there are many paragraphs (approximately 80) in the affidavits of the applicants and Wilson Plain that contain argument that should be struck.

[124] The applicants submit that a statement is only improperly argumentative when it contains "a mere statement" of the law, legal opinion, or both. Lay witness opinion evidence based on personal observation is not, in their view, argument. They also submit that some of the impugned paragraphs are intended to support arguments about the psychological state of the applicants, which may be relevant to the issue of disparate impact.

[125] The applicants have, however, agreed to amend many of the paragraphs to which the respondents agree on this ground in their affidavits and that of Wilson Plain. These deletions or alterations are clearly set out in the chart appended to their factum.

[126] Although the respondents have objected to many of the paragraphs they claim contains impermissible argument on other grounds as well, my review of these paragraphs indicates (as does the applicants' factum) that the amendments they propose have been made largely in

response to the impermissible argument submission. I would not strike any additional paragraphs on the sole basis that they constitute impermissible argument. Some of the paragraphs which the respondents identify, however, may constitute improper opinion evidence or impermissible hearsay and should be struck on those grounds, as discussed above.

[127] In coming to this conclusion on this point, I take into consideration the applicants' submissions that some of these paragraphs may be relevant to the psychological state of the applicants or the impact of existing pollution on their community. One example is para. 13 of Ronald Plain's affidavit, which states that "I am compelled to deal with this huge threat to the future of the community". While such a statement is clearly argument (that there is such a threat), it is more of a statement of belief and determination. Such statements are not, in my view, prejudicial to the respondents because a court is unlikely to rely on such a statement in determining issues (other than psychological state and disparate impact, to the extent that it considers them to be relevant). I also take into account the fact that the impugned statements are made in the lay affidavits. There is little or no danger, in my view, that a court will be influenced by such impermissible argument.

[128] In *Ontario Federation of Anglers and Hunters*, the impugned affidavit argument which the court struck was filed by as expert evidence. In *Coote*, the affidavit evidence was filed by the self-represented party and accordingly may be understood to have represented a real risk that the line between evidence and legal argument would be confused. This is not the case in the present case. Moreover, many of the impugned paragraphs are also challenged on other grounds such as relevance which may be raised again before the panel.

Conclusion on the Motion to Strike Affidavit Evidence

[129] In the foregoing discussion, I have concluded that some of the evidence tendered is inadmissible and should be struck, although the decisions on admissibility and weight with respect to much of it should be left to the panel for the reasons I have set out.

[130] While I have real doubts as to the admissibility of much of the evidence on many of the grounds raised, especially relevance, striking the affidavits to the extent the respondents request would disrupt the narratives set out in the affidavits, making it harder, not easier, for the panel to understand the evidence. This is particularly true with respect to the affidavits submitted by the applicants themselves, and Wilson Plain as members of the community allegedly affected. In addition, general context and narrative is permissible, and this line is difficult to draw in a preliminary motion.

[131] One must keep the dual principles emerging from *Sierra Club* and similar cases in mind. On the one hand, it is important to define the scope of the application properly to avoid the proliferation of issues, and to ensure the record filed reflects the issues properly before the court. On the other hand, it is not for a motion judge to usurp the role of the hearing panel in determining the merits of the application. Where there is doubt concerning the admissibility of some or all of a given affidavit, it is best to err on the side of caution and not strike the material from the record.

[132] Moreover, as I have outlined, it will be necessary to make some determinations on the merits in order to finally determine the relevance of much of this evidence. For example, the determination of whether the applicants can establish sufficient risk of harm caused by the 2010 Decision to trigger the *Charter* violations they allege will, in turn, affect the relevance of significant quantities of the evidence that the applicants argue is relevant to issues of disparate impact.

[133] The applicants ask for leave to amend their affidavits with respect to the portions struck. The applicants rely on Rule 25.11 of the *Rules of Civil Procedure*:

> The court may strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

[134] The applicants submit that any delay or prejudice to the respondents will not be significant because they have yet to file their responding material to the application (as opposed to the considerable material they filed on these motions). The respondents strenuously object on the basis that such amendments, at this stage, will only serve to extend and further complicate an already unwieldy (and, they argue, misconceived) proceeding.

[135] I would grant leave to amend only to the extent that the applicants have set out such amendments in the chart attached to their responding factum to the Motion to Strike Affidavit Evidence. Some of these are amendments, and some are deletions. I see no need to grant leave to amend the affidavits beyond this.

[136] Permission to amend, or to file additional material at this stage, beyond those which the applicants had already agreed to, will only serve to protract and complicate an already protracted and complex proceeding.

III. PROTECTIVE COSTS ORDER

[137] The applicants move for a protective costs order insulating them, absent improper conduct during this litigation, from adverse costs if the application for judicial review is ultimately unsuccessful. They submit that the application,

> …is a public interest case that raises important questions regarding the application of the *Charter*, protection of human health from exposure to cumulative emissions of contaminants associated with serious health risks, and the manner in which the Government Respondents approve releases of contaminants to air under the [EPA].

[138] They argue that the nature of this case is one with significant implications for other Ontario communities located in industrial pollution "hot spots". They also submit that their claims are *prima facie* meritorious in nature and that these considerations, along with their limited financial means and the disparity in means between them and both respondents, justifies a protective costs order in their favour.

[139] The applicants also submit that the non-financial costs of pursuing this application compound the impacts they have already suffered from living in Chemical Valley, and in particular, maintain that the possibility of an adverse costs award contributes to their already high level of stress and anxiety caused by living in Chemical Valley. The applicants argue that the test for obtaining a costs immunity order should be less stringent than that applicable to an interim or advance costs order as it is less drastic.

[140] The respondents counter that no Ontario court has made a protective costs order, citing *Farlow v. Hospital for Sick Children*, 2009 CanLII 63602 (ON S.C.), and they argue that the circumstances in this case do not warrant such an exceptional award. In particular, they submit that this is not a case where, absent such an order, access to justice will be impaired, because Ecojustice is representing the applicants *pro bono*, and so the application may proceed whether such an order is granted or not.

[141] In addition, they submit that the applicants have not established that the case is one of sufficient *prima facie* merit to justify the relief sought. They also submit that because the application, properly scoped, concerns only the April 2010 Decision, it is unlikely that the case will have much useful precedential value in other cases. They also point to the fact that this application has been brought in the personal capacities of the applicants and not by the Aamjiwmaang First Nation, and there is no evidence that band members or the Band Council support the application.

[142] The respondents also argue that, unlike the case of *British Columbia v. (Minister of Water, Land and Air Protection) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, there are no special circumstances that justify such an exceptional award. They emphasize that a protective costs order as sought would mean that the applicants would have little incentive to ensure that the litigation proceeds in an efficient and just matter. While the order as sought would only apply "absent improper conduct", it is appropriate for courts to use costs to discourage unnecessary steps or conduct that unnecessarily complicates the litigation even if not rising to the level of being "improper": *Fellowes, McNeil v. Kansa General Insurance Co*, [2006] O.J. No. 5130 (S.C.). By way of example, the Government respondents submit that it is not appropriate to insulate the applicants from costs associated with the filing of large amounts of material which, they allege, is irrelevant to the determination of the application.

[143] The Government respondents state that while they are not prepared to undertake not to seek a costs award, they will not seek to collect on any cost award other than an award ordered for improper or clearly unnecessary steps in the proceeding of the sort that would attract a cost award under Rule 57.01(1)(e), (f) and (g).

[144] Suncor submits that it is a private litigant "who has been dragged into this litigation despite its best efforts to comply with the existing law…" and argues that it is unfair that it should effectively be punished with such an order.

The Law

General Principles

[145] In the usual case, costs are awarded to the prevailing party after judgment has been given. It has long been recognized that this general rule reflects a number of policy considerations, which include but are not restricted to the principle of indemnification of a successful party:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps. [Mark M. Orkin, *The Law of Costs*, 2nd ed., (Aurora, Ont.: Canada Law Book, 1987) (loose leaf), at p. 2-24.2.]

[146] It is clear that the court has jurisdiction to order costs that do not follow this general rule, and there are many illustrations of cases where such costs awards have been made and upheld, see, e.g., *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. There, the applicants, who were Jehovah's Witnesses, had unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. The intervening Attorney-General was ordered to pay the applicants' costs despite succeeding in the application.

[147] As the Supreme Court of Canada has ruled in cases such as *Okanagan* and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, one of the exceptional orders that may be available which derogate from the general costs rule is an advance or interim costs award. In *Little Sisters*, Bastarache and LeBel JJ. (at para. 40) noted that creative costs awards, such as adverse costs immunity, may be available in special circumstances.

[148] Although no Ontario court appears to have issued a protective costs order, there is a limited practice in England of doing so. In *R. (on the application of Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 4 All E.R. 1 (D.A. (Civ. Div.)), the Court of Appeal indicated that such an order could be appropriate in exceptional circumstances where the court is satisfied that:

(a) The issues raised are of general public importance;

(b) The public interest requires that those issues should be resolved;

(c) The applicant has no private interest in the outcome of the case;

(d) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and

(e) If the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

[149] In *Corner House*, the applicant sought judicial review of a decision of the Secretary of State for Trade and Industry amending the procedures of the Export Credits Guarantee Department ("ECGD") of the Department of Trade and Industry, and the ECGD's standard forms relating to bribery, corruption and money laundering. The applicant was an educational, research and campaigning organization with a particular interest and involvement in the role of export credit agencies in the prevention of corruption and bribery in international business transactions. The grounds for the claim were, inter alia, that the defendant had failed to consult the claimant or other interested organizations before effecting far-reaching changes to the ECGD's anti-bribery and anti-corruption procedures, although it had consulted with its corporate customers and their representatives. Corner House claimed that the failure to consult was a serious breach of basic public law standards of fairness and the ECGD's own published consultation policy.

[150] In *Farlow*, Herman J., having reviewed Ontario case law on the point, noted that there is no specific provision in Ontario providing for Costs Protection Orders, and continued as follows at para. 89 of her reasons:

> However, a review of the more recent cases, in particular, and the references by the Supreme Court and the Ontario Court of Appeal to the availability of a costs immunity award, as well as a consideration of the court's broad costs discretion, leads me to conclude that the granting of costs immunity, while exceptional, may be considered in an appropriate case.

[151] In considering what an appropriate case might be in Ontario for such an award, Herman J. suggested that the criteria that the Supreme Court of Canada has established for advance or interim costs award may be useful. In *Okanagan*, the Court set out the following conditions at para. 40:

(a) The party seeking interim costs genuinely cannot afford to pay for the litigation and no other realistic option exists for bringing the issues to trial;

(b) The claim is *prima facie* meritorious; it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means; and

(c) The issues are of public importance and have not been resolved in previous cases.

[152] These conditions were further refined in *Little Sisters*, at paras. 39 to 44, as follows:

(a) The injustice that would arise if the application is not granted must relate to both the individual applicant and to the public. This does not mean, however, that every case of interest to the public will satisfy the test.

(b) An advance costs award must be an exceptional measure. The applicant must be able to demonstrate attempts to obtain private funding and, if not impecunious, must commit to making a contribution. The court should also consider different kinds of costs mechanisms.

(c) There would be no injustice if the issue could be settled or the public interest satisfied without an advance costs award.

(d) If an advance costs order is made, the litigant must relinquish some control over how the litigation proceeds.

[153] The criteria in the U.K., as well as Nova Scotia and Newfoundland, where protective costs award are provided for in the rules of court, suggest other factors to be taken into account as well:

(a) Whether the applicant's financial circumstances are such that the applicant would probably not proceed absent such an order;

(b) The extent to which the public has an interest in the issues being litigated; and

(c) The potential impact of such an award on the other parties. [*Farlow*, at para. 95-96.]

Analysis

[154] At the outset, I am satisfied that the considerations articulated by the Supreme Court of Canada in *Okanagan* and *Little Sisters*, as well as the additional factors set out by Herman J. in *Farlow*, are useful guidelines to be considered with respect to protective costs orders.

[155] The applicants submitted that the *Okanagan* and *Little Sisters* considerations should not be applied to a protective costs order because such an order is less onerous on the party subject to the order. *Corner House* and *Farlow* both recognize the similarity in principle between interim costs orders and protective costs orders, although the considerations as set out above are modified to some extent. The overarching point, repeatedly emphasized in all the case law, is the exceptional nature of such orders. While a protective costs order does not require the immediate outlay of cash, it does have the effect of undermining the usual incentive on the party obtaining such an order to consider the prospects of success in making decisions in relation to the litigation. The particular considerations or guidelines, in part, serve to reinforce this point.

[156] In my view, the three considerations articulated in *Farlow* do incorporate the appropriate guidelines or considerations articulated in *Okanagan* and *Little* Sisters. These considerations do not support the costs order sought by the applicant in this case for the following reasons.

[157] First, I am not satisfied on the evidence that the applicants' financial circumstances are such that they would probably not proceed if the costs order sought is not granted. Ecojustice is representing the applicants *pro bono*. While there is no doubt that the applicants are of modest means, this is not a case in which the applicants do not have access to justice in the sense that they cannot afford to continue the litigation without the order.

[158] The applicants argue, however, that they are unable to bear the risk of an adverse costs order in the event that they are unsuccessful, and submit further that the anxiety surrounding such a possibility compounds the psychological stress to which they are also subject. They also submit that the respondents are better able to absorb the costs associated with this litigation. From a financial perspective, that is no doubt true as a relative matter.

[159] However, the Government respondents indicate that while they would seek a costs award if successful, they would not "seek to collect on any cost award against the applicants in this application, except an award ordered for improper or clearly unnecessary steps in the proceeding…" (emphasis in original). While I do not doubt that the possibility of an adverse costs order vis-a-vis Suncor is stressful, this is not, in itself, sufficient to satisfy this consideration on these facts. Moreover, the argument that the stress the applicants suffer in this regard compounds the effects of living in Chemical Valley begs the question of whether or why Suncor should bear the costs, when no determination has been made in the merits of the argument whether there is or can be any link between the 2010 Decision involving Suncor's sulphur plant, and the harm or risk of harm about which the applicants complain.

[160] Second, the court must consider the extent to which the public has an interest in the litigation. This involves a consideration not only of whether there are public interests at stake in a general sense, but whether it is in the public interest that the litigation be pursued: see, for example, *Friends of the Greenpeace Alliance v. Ottawa (City)*, 2011 ONSC 472, 2011 CarswellOnt 315 (Div. Ct.). The question of whether the claim has *prima facie* merit is related to this, because it cannot be in the public interest to pursue clearly groundless litigation that is doomed to fail. The issues of public interest, public importance, and *prima facie* merit are thus relevant to the overall question of whether an injustice would result if the case could not be litigated.

[161] There can be no question that this case involves issues of public interest. Having said that, however, the fact that a claim asserts *Charter* rights or involves matters of some public interest does not necessarily satisfy this criteria: see *Farlow*. The matter must be of public importance.

[162] The issue in this judicial review application is very narrow. It concerns an administrative decision concerning sulphur production within an envelope of production that had previously been approved following public consultation. The level of sulphur production authorized by the April 2010 Decision had already been approved in 2004 following a process that had involved public consultation (with respect to which the applicants had, though notified, not participated). The consequences of success would be the quashing of the April 2010 Decision and would not affect general emissions from the refinery, and could not generally impose a cumulative effects

assessment into the regulatory process, though the applicants and Ecojustice advocate on behalf of such change.

[163] This is very different, for example, from the *Corner House* decision of the English Court of Appeal. There, the applicants sought judicial review of a decision which had imposed far-reaching changes to the ECGD's anti-bribery and anti-corruption procedures. The consequences of quashing such a decision as that carry very important public interest effects.

[164] Similarly, in *Okanagan*, the issue was whether the four respondent Bands had aboriginal title to the land and were entitled to log them, as they had begun to do. The Bands filed a notice of constitutional question challenging ss. 96 and 123 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, as conflicting with their constitutionally protected aboriginal rights after the after the Minister of Forests issued stop work orders and commenced proceedings to enforce the orders. The issues, and the direct results of the litigation, were of public interest and of great importance to the applicants. The issue there was a logging regime vis-à-vis the Bands.

[165] I would also note that it is not clear to me that this case is *prima facie* meritorious in the sense that the Supreme Court of Canada discussed this issue in *Little Sisters*, although it is not, in my view, a frivolous application. As discussed earlier in these reasons in relation to the applications to strike, the applicants must show a causal connection between the impugned Decision and the harms or risks of harm they allege that they have suffered. Without prejudging the hearing of the application on its merits, it is not immediately clear on a *prima facie* basis that the relevant evidence before the court on this issue can establish that.

[166] This point illustrates the reason for considering both public importance and merits as part of the considerations for exceptional costs orders such as the one sought here. The order sought here would undermine one of the fundamental policies which underlie the usual costs order, which is to create an incentive for litigants to consider the merit of the cases they bring.

[167] In this case, while the issues are of public interest in broad sense, the narrow nature of the impugned decisions and the limited remedy available in a judicial review application lead to the conclusion that the application does not have sufficient public importance to justify such an exceptional costs order. It cannot be said, in my view, that an injustice would result if this case could not be litigated.

[168] In addition, the fact that the applicants are not bringing this judicial review application in a representative capacity is relevant to the public interest consideration. There is no evidence as to the position of the Band or of the members of the community as a whole with respect to this particular application. While I would not consider this factor, in itself, to be fatal to this motion, it would in general be easier to meet the public interest and public importance components of the test if it were clear that the community which is, according to the application, so profoundly affected, supported it. This is in no way a reflection on the individual applicants, who have clearly worked tirelessly on the broader issues underlying this application with the entire community in mind.

[169] The third consideration mentioned in *Farlow* particular to protective costs orders is the potential impact on the other parties.

[170] While the Government respondents oppose the order sought, the impact upon it would arguably not be great because it has undertaken not to enforce a costs order, absent unreasonable conduct on the applicants' part as discussed above.

[171] Suncor, however, is in a different position. It is a private party, as was the hospital respondent in *Farlow*. Suncor submits that it,

> …has been dragged into this litigation despite its best efforts to comply with the existing law, and has been threatened with irreparable harm and the closure of its refinery. Suncor had conducted itself in a reasonable manner throughout. It is unfair that Suncor should be punished with a costs order. [Suncor, Protective Costs Order Factum, at (para. 4(f).]

[172] Suncor argues that the application is based upon extensive irrelevant and inadmissible evidence, and the erroneous assumption that the April 2010 orders permitted Suncor to increase production of fuel products (and related contaminant emissions) from the refinery.

[173] As discussed earlier, I have concerns about the admissibility of a considerable amount of the affidavit evidence filed, but have concluded that much of it should be left for the hearing panel to determine. In the meantime, Suncor (and the Government respondents) have not yet filed their responding material to the application. The issues in this application, and particularly the extent to which they may involve earlier approvals upon which Suncor has relied over the years, are very important to it. While Suncor has not filed evidence relating to its anticipated costs in this application, the indications, based on this application, are that they will be considerable.

[174] The consequences of the order sought would be to force Suncor, a private party, to bear a large part of the costs of this litigation, no matter what the outcome on the merits. This is not justified as a preliminary decision in the present circumstances. There is no allegation whatsoever of wrongdoing on its part, as the applicants themselves note. The applicant's real concern is with the fact that the regulatory framework does not require the consideration of cumulative effects. As Suncor notes, it has been required to defend this application although the relief is not sought directly from it.

[175] In these circumstances, there are other alternatives to the traditional costs award that could be considered at the end of the litigation. A court might not grant costs to the respondents, even if they are successful. It might grant costs to the respondent only with respect, for example, to costs increased by the filing of material it concluded to be irrelevant or otherwise improper. On the other hand, as *B.(R.)* demonstrates, it would be open to a court to order either or both respondents to pay the applicants' costs even if it was not successful. The point, however, is that this determination is most properly made following the resolution of the application so that the court may consider all relevant factors. I note that a number of the cases upon which the applicants rely in support of exceptional costs orders are cases in which such orders have been

made at the end of the litigation: see e.g. *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (S.C.).

[176] In sum, the fact that the applicants have *pro bono* representation, the public interest considerations as I have outlined them, as well as the potential effect of this award on Suncor, satisfy me that this is not a case that warrants such an exceptional award. The risk that the applicants will decide not to proceed does not justify undermining the usual costs incentive on litigants to carefully consider the merits of their claims and the particular manners in which they are made. I am unable to conclude that an injustice would result if this case could not be litigated. Moreover, such an award in these circumstances would not justify the impact that it would have on Suncor, irrespective of the ultimate results of the litigation. This is particularly so when the court, following the hearing of the application, will have ample discretion to fashion an award that is fair and appropriate, and which considers at that time, all the policies underlying costs awards.

[177] For these reasons, the application for a protective cost order is dismissed.

IV. CONCLUSION

As set out above, the motion to dismiss the application is dismissed. The application to strike evidence is allowed to the extent set out in these reasons above, and otherwise dismissed without prejudice to the respondent's right to contest the admissibility before the hearing panel. The motion for a protective costs order is dismissed.

V. COSTS

If the parties are unable to agree as to the costs at these motions, they may file written submissions with the court within 45 days on a timetable to be agreed upon by themselves, failing which they may seek further direction from the court.

_____

Harvison Young J.

Released:

CITATION: Lockridge v. Director, Ministry of the Environment, 2012 ONSC 2316
DIVISIONAL COURT FILE NO.: 528/10
DATE: 20120607

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:

ADA LOCKRIDGE and RONALD PLAIN

Applicants

– and –

DIRECTOR, MINISTRY OF THE ENVIRONMENT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF THE ENVIRONMENT, THE ATTORNEY GENERAL OF ONTARIO and SUNCOR ENERGY PRODUCTS INC.

Respondents

REASONS FOR DECISION

Harvison Young J.

Released: 20120607

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC., et al.
Applicants

Court File No. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE RESPONDENT, DS (BAY) HOLDINGS INC. (MOTION RETURNABLE MAY 1, 2018)

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Fax: 416 598 3730

Lawyers for the Respondent, DS (Bay) Holdings Inc.