Lost in Translation:
Rana Plaza, Loblaw, and the Disconnect Between Legal Formality and Corporate Social Responsibility

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Abstract

Canada's largest retailer was a major buyer from factories in Bangladesh's Rana Plaza when the building collapsed in 2013 killing 1,130 people. Most of the dead and injured were workers employed in factories that were never approved from garment production in a building not authorized for industrial production. Like other corporations sourcing from Rana Plaza, Loblaw had an impressive sounding corporate social responsibility (CSR) program that utterly failed to protect its supply chain workers from the largest industrial tragedy in history. This paper examines an interesting decision by an Ontario Court in a multi-billion dollar class action negligence lawsuit filed on behalf of Rana Plaza victims. The plaintiffs argued that, through its CSR program, Loblaw had accepted responsibility to take steps to protect workers in its supply chain from foreseeable harm and that it had failed to meet the standard of care required. In a lengthy decision, the Court dismissed the lawsuit on the basis that it was plain and obvious that the case was certain to fail. The paper explores how the Court's discussion of the concepts of 'responsibility' and 'control' contrast sharply with the meanings ascribed to those concepts in the logic and discourse of CSR. The Court's surprising conclusion that Loblaw should be commended for its CSR efforts, despite clear evidence that company ignored violations of its Code of Conduct, is explored and critiqued.

Introduction

Introduction

In the mid-2000s, Canada's largest retailer followed the lead of other large multinational corporations (MNCs) and adopted an impressive sounding corporate social responsibility (CSR) program. Loblaws'[1] program included a Supplier Code of Conduct (Supplier Code) that made clear that the company desired to do business only with suppliers whose practices were consistent with its ethics and principles, and included a long list of standards, including a requirement for all suppliers to "abide by all applicable laws and regulations", to maintain a "safe and healthy workplace", and to comply with "best practices for their industry".[2] Suppliers and subcontractors were expected to comply with the Supplier Code, and Loblaws could "take appropriate remedial action" in the event of a Code violation.

Loblaws was sourcing from a subcontractor called "New Wave" when the Rana Plaza building collapsed on April 23, 2013, killing 1,130 people and injuring 2,520 more.[3] New Wave operated out of factories on the illegally constructed fifth and seventh floors of Rana Plaza. Loblaws was aware of and approved of this subcontracting and Loblaws' reps had visited Rana Plaza on a number of occasions to meet with New Wave management. Many of those killed were New Wave employees, who had been ordered by New Wave management to return to work despite public warnings that the integrity of the building had been compromised and was unsafe. Many of the dead garment workers had been sewing garments for Loblaws' Joe Fresh line when the building collapsed.

Following the tragedy, Loblaws' Executive Chairman said that the Rana Plaza collapse, "was a senseless tragedy that should not have happened", that "the top floors of the building should never have been built", and that because "the scope of the audits that [Loblaws] undertake do not cover structural integrity… workers were exposed to unacceptable risk".[4] Loblaws had retained the auditing company Bureau Veritas (Veritas) to monitor compliance with its Supplier Code in Bangladesh. Loblaws could have ordered an audit that checked for structural integrity of the buildings that housed its supplier factories, but it opted instead for Veritas' "basic audit".

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[1] "Loblaws" is the name of a grocery store chain owned by the corporation Loblaw, Inc., however the Ontario Superior Court in *Das v. George Weston Limited* (2017) ONSC 4129 (CanLII) at 532 [hereinafter *Loblaws* Decision] refers to the corporate defendants as "Loblaws" in the lawsuit that is the subject of this paper and so I will use the same terminology.

[2] Loblaw Supplier Code of Conduct, 2012, filed as an Exhibit in *Loblaws* Decision, ibid., at 532.

[3] Loblaws sourced from two related companies operating out of Rana Plaza: New Wave Bottoms and New Wave Designs. In this paper, I will refer to both companies simply as "New Wave".

[4] *Loblaws* Decision*, supra* note 1 at para. 128.

As a result, Veritas never expressly reported on whether the Rana Plaza was structurally sound and safe for garment production, although it did note in its 2011 audit report to Loblaws that a seventh story was under construction and included photos of illegally constructed floors that were cantilevered over the original six-story office and retail building. In audits conducted at New Wave in 2011 and 2012, Veritas reported 30 violations of the Loblaws' Supplier Code, including some categorized by Veritas as "major non-compliance". One of these violations consisted of a failure or refusal by New Wave to produce a business licence to operate, contrary to the Bangladesh Factories Act, 1979. Loblaws did not follow up on or seek to remedy any of these violations.[5]

This paper examines a class action lawsuit filed in Ontario in 2015 alleging that Loblaws was negligent in its failure to take reasonable steps to protect New Wave employees from imminent and foreseeable harm at Rana Plaza.[6] In lengthy and complex reasons, the lawsuit was dismissed by a single judge of the Ontario Superior Court of Justice in 2017 on the basis that it was plain and obvious that the lawsuit was certain to fail (the Loblaws' Decision).[7] In a follow up ruling, the Court ordered the plaintiffs to pay $1,350,000 in costs to Loblaws and 985,601.60 to Veritas, which was also named as a defendant in the lawsuit.[8] This may be the largest cost award ever issued in Canada in a preliminary motion to dismiss without a trial.[9]

The decision will be of interest to experts in class action litigation, transnational tort law, and negligence law, particularly the Courts' discussion of the law governing the recognition of new duties of care and the Anns test as applied in Canada. It will take its place in the catalogue of cases involving creative attempts to hold multinational corporations liable for harm that comes to workers down through their supply chains.[10] Therefore, it is a useful contribution to the

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[5] *Id.* at para. 68.

[6] Ibid. A separate lawsuit filed in Delaware named as defendants the American corporations Walmart, Children's Place, and J.C. Penny. Space considerations prevent an examination of this lawsuit. The Delaware Court dismissed the lawsuit in a non-suit motion, finding that (1) Bangladesh law applied; (2) that the case was time-barred by a one-year Bangladesh limitations period; and (3) that, in any event, Delaware law would apply to the issue of whether there was duty of care, and applying that law, there could be no duty of care recognized by the defendant corporations to employees of a foreign third-party contractor. The Court wrote that the defendant corporations "could not be reasonably expected to take precautions against a building collapse when deciding to source garments from factories in Bangladesh": *Rahaman et al. v. J.C. Penny Corporation, Inc. et al,* C.A. No. N15C-07-174 MMJ (Delaware Superior Court) at 23..

[7] At the time of writing, this decision to dismiss was under appeal to the Ontario Court of Appeal.

[8] *Das v. George Weston Limited*, 2017 ONSC 5583 (CanLII), <http://canlii.ca/t/h689v>

[9] Email communication with plaintiff counsel.

[10] See discussions in: J. Smits, "Enforcing Corporate Social Responsibility Codes Under Private Law: On the Disciplining Power of Legal Doctrine," (2017) 24(1) *Indiana Journal of Global Legal Studies* ; M. Anner, J. Bair, J. Blasi, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks, (2013-14), 35 Comp. Lab. L. & Pol'y J. 1; B. Reinschmidt, "The Law of Tort: A Useful Tool to Further Corporate Social Responsibility?" (2013), 34(4) Company L. 103; H. Revak, "Corporate Codes of Conduct: Binding Contract or Ideal Publicity?" (2012), 63 Hastings L.J. 1645; D. Maryanov, "Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain (2010), 14 Lewis & Clark L. Rev. 397 (2010); B. Fisk, "Corporate Social Responsibility for Enforcement of Labor Rights: Are There More Effective Alternatives?" (2014) 4 Global Bus. L. Rev. 1; J. Hang,

academic literature to carefully explain the Court's reasons. Part III of this article will take on that task.

My interest in the Loblaws' Decision extends also beyond the fine details of the black letter law it engages to broader issues arising from the reasons that intersect at the crossroads of negligence law on one hand, and the logic and narrative of CSR in the realm of global supply chain labour issues, on the other hand. In particular, the Court engages with two central pillars of CSR theory—control and responsibility—in a manner deserving of closer inspection. The first breath of CSR and the broader movement to adopt supplier codes targeting labour practices beginning in the late 1990s involved corporate acceptance of a responsibility to workers engaged down through their global supply chains, including workers engaged by third party contractors and subcontractors. CSR represented a reluctant corporate response to the threat to corporate reputational harm posed by an emerging "anti-sweatshop" movement and investigative journalists looking into working conditions in factories supplying goods to the world's largest corporations. Corporate codes and code monitoring were tools adopted by corporations to persuade stakeholders that they were taking seriously an expanded scope of responsibility to care for workers in their supply chains.

CSR also assumes that corporations possess sufficient control, or influence, to persuade suppliers to comply with the standards imposed in their codes. When corporations publicize their CSR efforts, they signal not only their expectation that suppliers will comply with the rules in a supplier code, but also that they can in practice influence suppliers in order to produce compliance. The source of this influence is the threat to cancel or withhold orders, or the promise to place more orders—the stick and the carrot. Even if corporations genuinely believe in improving supply chain labour practices, if in practice they have no control over supplier behaviour and no means to ensure that CSR standards are adhered to, then CSR is an empty vessel. A MNC that admits it has no control over its suppliers' behaviour is at the same time admitting that it has no power to implement a CSR program targeting its third party suppliers. Therefore, a genuine CSR program involves both public acknowledgement by the corporation of a broad scope of responsibility to ensure supply chain workers are safe and treated decently when they are making the corporation's products, and also a capacity to control or influence how their suppliers behave.

The Court in the Loblaws Decision ruled that Loblaws had no responsibility to protect the New Wave employees from harm at Rana Plaza and that, in any event, Loblaws had no capacity to

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"Enforcement of Corporate Codes of Conduct: Finding a Private Rights of Action for International Laborers Against MNCs for Labor Rights Violations" (2000), 19 Wisc. Int.'l L.J. 41. Recent U.S. decisions have similarly dismissed negligence lawsuits filed against American corporations for failure to abide by corporate social responsibility documents applicable to their foreign suppliers: *Doe v. Wal-Mart,* 572 F. 3rd 677 (2009, C.A. 9th Circuit); *Nike v. Kasky,* 539 U.S. 654 (2003)*; Board of Regents of the University of Wisconsin System v. Adidas American, Inc.* No. 12CV2775 (Dane City Cir. Ct. 2012); *Rahaman et al. v. J.C. Penny Corporation, Inc. et al, supra* note 6.

control New Wave management or influence the conditions under which New Wave employees worked. These conclusions were no doubt helpful to Loblaws in its effort to defend the lawsuit. However, if Loblaws had no responsibility to its suppliers' employees, no means of controlling its suppliers' behaviour to ensure compliance with its Supplier Code, and no capacity to influence working conditions at supplier factories, as the Court finds, then what was the purpose and value of Loblaws' CSR program? Indeed, once the Court observed that Loblaws' had failed to take any steps to remedy 30 violations of its Supplier Code by New Wave management in the period preceding the Rana Plaza collapse, it seemed the story was complete: Loblaws' CSR program was a public relations exercise intended to convey that it was committed to protecting its supply chain workers when in practice it had no means to improve worker safety at all.

In CSR discourse, a company that adopts impressive sounding CSR language but then ignores violations of it is said to be engaged in 'window-dressing' CSR.[11] In an unexpected twist, the Court praises Loblaws for its CSR efforts, going so far as to rule that common law should develop in a manner that encourages companies to follow Loblaws' lead by adopting like CSR programs, apparently even if those programs are not enforced in practice. By setting such an low bar for what constitutes useful self-regulation of supply chain labour practices, the Court curiously presents window-dressing CSR as virtuous. This surprising conclusion flips the logic of CSR on its head. It makes sense only once we understand that the Court sees CSR as means of shielding corporations from liability for harm suffered by supply chain by workers employed by third party contractors, rather than as a vehicle for actually improving the safety of those workers.

The paper will proceed as follows. Part II sets the stage by describing conditions in Bangladesh leading up to the infamous Rana Plaza collapse in April 2013 and that form the factual background for the lawsuit. Part III summarizes the lengthy and complex 2017 decision of the Ontario Superior Court of Justice in Das v. George Weston Limited. Part IV switches gears and examines in closer detail the Court's reasons as they intersect with the logic and discourse of CSR. In particular, we consider the contested meanings of responsibility and control in negligence law and in CSR and how they influence the Court's reasoning. The paper argues that

[11] B. Haar & M. Keune, "One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in Bangladesh" (2014), 30(4) Int.'l J. Comp. Lab. & Ind. Rel. 5; M. Amazeen, "Gap (RED): Social Responsibility Campaign or Window Dressing?" (2011), 99(2) J. Bus. Ethics 167; S. Connors, S. Anderson-MacDonald, M. Thomson, "Overcoming the 'Window-Dressing Effect: Mitigating the Negative Effects of Inherent Skeptcism Towards CSR" (2017) 145(3) J. Bus. Ethics 599; D. Wells, "Too Weak for the Job: Corporate Codes of Conduct, NGOs, and the Regulation of International Labour Standards" (2007), 7(1) Global Social Policy 51; M. Baker, "Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?" (1992-93), 24 U. Miami Inter-AM L. Rev. 399; G. Aras & D. Crowther, "Corporate Sustainability Reporting: A Study in Disingenuity" (2009), J. Bus. Ethics 279; S. Banerjee, "Corporate Social Responsibility: The Good, the Bad, and the Ugly" (2008), 34 Critical Sociology 51; D. O'Rourke, "Smoke From a Hired Gun: A Critique of Nike's Labor and Environmental Auditing (San Francisco, Transnational Resource and Action Centre, 1997); P. Fleming & M. Jones, *The End of CSR: Crisis and Critique* (Sage Publications, 2013), at 87; J. Roberts, "The Manufacture of CSR: Constructing Corporate Sensibility" (2003), 10(2) Organization 249

the Court's reasons glamorize window-dressing CSR in a manner that supports long-standing claims by CSR critics that corporations cannot be trusted to protect supply chain workers.

I. Clear Warning Signs on the Road to Rana Plaza

The tragic saga of the Rana Plaza collapse and its aftermath, including the introduction and implementation of the Accord on Fire and Building Safety in Bangladesh that was a consequence of the disaster, has been explored exhaustively and therefore need not be reviewed at length again in this paper.[12] However, it is important to map put events preceding the collapse that provide the factual backdrop for the negligence claims asserted in the lawsuit. The lawsuit raises issues about what Loblaws knew about the safety risks in Bangladesh factories generally and factories in Rana Plaza specifically, and when it knew it; what steps it took to inform itself of those risks; and what actions it took to protect workers making its products from those risks.

The plaintiffs argued that the Rana Plaza collapse was both foreseeable and preventable, and that in their haste to exploit low pay and the virtual absence of regulation in pursuit of profits, Loblaws was wilfully blind to the risks of sourcing from Bangladesh. The collapse was predictable because an infamous and deadly history preceding it vividly demonstrated that absent close oversight and accountability checks, factory and building owners in Bangladesh could not be trusted to ensure the safety of workers there. Nor could it be presumed that Bangladesh government officials possessed the will and capacity to police the safety of ready-made garment (RMG) factories. Non-state actors—including NGOs, unions, and some corporations—had for years prior to Rana Plaza sought to fill this regulatory void through forms of private governance that would monitor building safety and work practices in the RMG sector.

The plaintiffs argued that Loblaws sourced from Bangladesh fully aware that workers producing their goods there were in danger. Only after Rana Plaza did some companies, including Loblaws, begin to take real steps to protect workers producing their goods in Bangladesh. Until then, all the talk of CSR, corporate codes of conduct, and factory monitoring amounted to little more than "window dressing", as one affiant deposed in support of the plaintiff's clam, intended to appease a mostly uninterested consumer base in the economically advanced nations.[13] The plaintiffs described a long history of abuse, injury, and death in Bangladesh in the years

[12] See the website of the Accord: http://bangladeshaccord.org. Commentary on the Accord includes: e.g. Haar & Keune, *supra* not 11; L. Blecher, "Codes of Conduct: The Trojan Horse of International Human Rights Law" (2016), Comp. Lab. L. & Pol'y J. 437 at 452-454; L. Backer, "Are Supply Chains Transnational Legal Orders?: What We Can Learn from the Rana Plaza Factory Building Collapse" (2015) U.C. Irvine J. Int'l, Transnational, Comp. L. 11; B. Evans, "Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions" (2014-15) 40 N.C.J. Int. L. & Com. Reg. 597; Zeenath Reza Khan & Gwendolyn Rodrigues, "Human Before the Garment: Bangladesh Tragedy Revisited Ethical Manufacturing or Lack Thereof in Garment Manufacturing Industry" (2015) 5:1 World Journal of Social Sciences 28; Nakib Muhammad Narullah & Mia Mahmudur Rahim, *CSR in Private Enterprises in Developing Countries: Evidence from the Ready-Made Garments Industry in Bangladesh* (Cham: Springer International Publishing, 2014) 135

[13] *Loblaws* Decision, supra note 1 at para. 71.

preceding 2013 that was due to corruption and a lack of oversight of construction, safety, and work practices by government officials, factory owners, employers, or sourcing corporations.[14]

This record included hundreds of deaths caused by fire due to shoddy construction and wiring, and two building collapses under conditions very similar to Rana Plaza, including: the collapse in 2005 of the Spectrum Sweater Factory in Savar which killed 65 garment workers and seriously injuring 80 more; and the collapse in 2006 of the five-storey Phoenix Building in Dhaka that killed 22 and injured 50 more. Like Rana Plaza, those multi-story buildings were constructed without proper permits and without the structural integrity to house garment factories.[15] These shocking events were pleaded in support of the plaintiffs' claims that Loblaws knew or ought to have known of the elevated risk of death and injury to workers in the RMG industry in Bangladesh, and to demonstrate that industry was extraordinarily dangerous for the workers who made clothing for western brands and fashion retailers.

It was widely known before 2013 that RMG factories housed in multi-story buildings like Rana Plaza posed a particularly acute threat. The Spectrum factory collapse in 2005 had focused attention on shoddy construction and the incompetent or corrupt inspectorate in Bangladesh. A report published after the Spectrum collapse by the central Bangladeshi trade union organization found that some 90 percent of garment factories in Bangladesh suffered from structural problems making them susceptible to collapse or were ill-equipped for garment production.[16] The organization lobbied for a joint committee of government, workers, and factory and building owners to investigate building integrity. Initiatives pushed by NGOs and international unions following the Spectrum disaster similarly demanded investigation of the structural integrity of factories, with a particular emphasis on factories in multi-story buildings.[17] A Charter of Demands prepared by the Bangladesh Garment Workers Union (BGWU) in 2006 included a demand for the government to conduct a strict safety inspection of ever factory and, importantly, to "relocate multi-storey factories to safe three-storey buildings and not allow any new multi-storey factories".[18]

Three years before the Rana Plaza collapse, the International Textile, Garment and Leatherworkers Federation union (ITGLF) began work with Bangladeshi unions to develop a

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[14] For backgrounds on some of these incidents, see: F. Hossain, "Dozens Die in Fire in Bangladesh Factory" (27 November 2000) *Guardian* https://www.theguardian.com/world/2000/nov/27/bangladesh; Clean Clothes Campaign, "Three Tragedies Hit Bangladesh Factories in One Week, Leaving Scores Dead, Wounded" (2 February 2006), https://cleanclothes.org/news/2006/02/27/three-tragedies-hit-bangladesh-factories-in-one-week-leaving-scores-dead-wounded; Workers Rights Consortium, "Recent Tragedies and Fire Safety in Bangladesh" (2 April 2010): http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2142&context=globaldocs.

[15] For a detailed account, see D. Miller, *Last Nightshift in Savar: The Story of the Spectrum Sweater Factory Collapse* (McNidder & Grace, 2012)

[16] *The Daily Star,* "90 Percent Garment Factory Buildings Vulnerable to Collapse" (15 June 2005): http://archive.thedailystar.net/2005/06/15/d50615060362.htm

[17] Miller, sn at 132-133.

[18] Miller, *supra* note 15 at 161.

policy on factory safety.[19] Several leading international labour NGOs joined the discussions, including Clean Clothes Campaign, International Labor Rights Forum, and Toronto-based Maquila Solidarity Network (MSN). The outcome of that collaboration was the April 2010 "Health and Safety Action Points for Buyers Sourcing from Bangladesh" ("2010 Action Points").[20] The number one item in that document was a requirement for buyers to "press the Bangladeshi government to undertake an urgent review of all multi-story buildings currently housing garment production facilities to ensure they may be safely used for this purpose". The 2010 Action Points document also called for a thorough review of all factories for structural and fire safety, public disclosure of all safety inspections and audits, publication of all factories that do not meet the specified standards, compensation for workers displaced due to upgrade renovations, and a system encouraging worker complaints.

The publication of the 2010 Action Points led to several meetings over the following year with the participating NGOs and trade unions, as well as representatives of some multinational (though no Canadian) buyers. However, little progress was made in terms of buyer participation or commitment. In December 2010, a fire at "That's It Sportswear", which produced for major buyers including Gap, VP Corporation, Target, and JC Penny, killed another 29 workers.[21] In April 2011, another meeting was convened in Dhaka of NGOs, Bangladeshi unions, buyers, the Bangladesh Garment Manufacturers and Exporters Association, and officials from the Bangladeshi Fire Safety and Building and Factories Departments. That meeting led to discussions about a new Memorandum of Understanding (2011 MOU) that included many similar provisions to those found in the Action Points document. However, most buyers lost interest as the spotlight from the "That's It Sportswear" fire faded.

In 2012, two companies, the giant American apparel company PVH Corp. (in March) and German retailer Tchibo (in September), signed a modified version of the 2011 MOU. This new document was eventually branded the "Bangladesh Fire and Building and Safety Agreement" (2012 BFBSA), and signatories included Bangladeshi unions, the ITGLWF, and the NGOs that had worked on the original 2010 Action Points. However, the 2012 BFBSA required at least four additional major buyers to sign before it came into effect. Efforts by the two signatory companies and the participating unions and NGOs to attract new buyer signatories proved unsuccessful.[22] Not even another tragic fire that killed 112 workers at the Tazreen Fashion

[19] Clean Clothes Campaign & Maquila Solidarity Network, "The History Behind the Bangladesh Fire and Safety Accord" (8 July 2013) [https://cleanclothes.org/resources/background/history-bangladesh-safety-accord] [hereinafter "Accord History"] at 1

[20] http://en.archive.maquilasolidarity.org/sites/maquilasolidarity.org/files/2010-04-MSN-CCC-ILRF-Health-Safety-Action-Points.pdf

[21] Clean Clothes Campaign, "That's It Sportswear fire: One Year On Workers Still Dying in Unsafe Buildings" (15 December 2011): https://cleanclothes.org/news/2011/12/15/thats-it-sportswear-fire-one-year-on-workers-still-dying-in-unsafe-buildings

[22] Ibid. at 3.

factory in Dhaka in November 2012 could persuade more buyers to pledge support for initiatives intended to monitor building safety.[23]

Rather than pledge support for the multi-stakeholder 2012 BFBSA, some major multinational corporations were busy developing an industry-led competing initiative. In December 2012, the Global Social Compliance Program, with the support of several large buyers, including Wal-Mart, Carrefour and Tesco, began work with the German agency, Deutsche Gasellschaft fur Internationale Zusammenarbeit (GIZ), to develop a "National Action Plan" (2012 NAP) to review safety standards in Bangladeshi factories.[24]In the months that followed, through early 2013, GIZ worked with buyers to develop the 2012 NAP and also began a dialogue with the NGOs and unions that had backed the 2010 Action Points and the 2012 BFBSA. From this dialogue came an agreement amongst GIZ, labour NGOs, some international buyers, and unions to meet to discuss the possibility of a unified initiative that would draw from the 2012 BFBSA while incorporating concerns raised by corporate backers of the 2012 NAP. The meeting was scheduled for April 29, 2013 in Geneva.[25] Five days before that scheduled meeting, Rana Plaza collapsed.

Rana Plana was a disaster waiting to happen.[26] It had all the tell-tale signs of peril that had been the focus of the efforts to prevent further carnage in the Bangladesh RMG industry just summarized. The Ontario Court described Rana Plaza as follows:

> Rana Plaza was constructed in 2006 as a six-floor commercial complex of four floors of 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. Rana Plaza was expanded by two additional floors, and in 2013, just before the collapse, construction of a ninth floor was nearing completion… Garment production in Rana Plaza was contrary to the zoning permit.[27]

On the morning of April 23, 2013 visible cracks were seen on structural columns of Rana Plaza, leading to an order by government officials to evacuate the building. Garment workers were sent

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[23] S. Nova & C. Wegemer, "Outsourcing Horror: Why Apparel Workers Are Still Dying, One Hundred Years After Triangle Shirtwaist" in *Achieving Workers' Rights in a Global Economy* (R. Appelbaum & N. Lichtenstein, eds) [hereinafter "Achieving Workers' Rights"] at 29.
[24] Accord History, *supra* note at 3.
[25] Ibid.
[26] R. Appelbaum & N. Lichtenstein, "Introduction: Achieving Workers' Rights in a Global Economy" in *Achieving Workers' Rights in a Global Economy* in Achieving Workers' Rights, *supra* note 23 at 1.
[27] *Loblaws* Decision, *supra* note 1 at para. 82-84. See also J. Seabrook, *The Song of the Shirt: Cheap Clothes Across Continents and Centuries* (Hurst & Company, 2015) at 66: "No permit had been granted for [Rana Plaza's] use as a manufacturing unit. It had, in any case, been constructed with substandard materials, and was also situated, like much recent building in Dhaka, on a former watercourse, which further destabilised the units."

home. However, later that day managers ordered employees to return after Sohel Rana, the owner of the building, announced that the building had been approved by engineers. Managers working for New Wave, Loblaws' supplier, ordered employees to return to work. The next morning, back-up diesel generators never authorized for use in the building were activated during a power outage on the upper floors causing extreme vibrations throughout the already structurally unsound building. Rana Plaza collapsed at approximately 9 a.m. on April 24, 2017 killing 1,130 people and injuring over 2500 more. Many of the victims were New Wave employees.

The Geneva meeting went ahead on April 29 with even greater urgency in the wake of Rana Plaza. It was attended by various international brands, NGOs, and unions, as well as representatives from the International Labour Organization (ILO). As planned, the attendees discussed the possibility of a new proposal that would merge concepts from the 2012 BFBSA and the GIZ backed 2012 NAP. However, those talks failed to produce an agreeable document, and on May 5, 2013, the labour NGOs, international unions IndustriALL and UNI Global Union, issued a revised version of the 2012 BFBSA, which they called the Accord on Fire and Building Safety in Bangladesh, or the Bangladesh Accord.[28] The Bangladesh Accord built on the earlier initiatives discussed above and included an enforceable system of monitoring and reporting on safety issues including the structural integrity of buildings housing garment factories. The Accord was a five-year agreement that expired in May 2018 but was renewed for a second five-year term.[29] Loblaws signed the Accord in May 2013.

II. Summary of *Aranti Rani et al. v. George Weston Limited et al.*

The class action lawsuit against Loblaws was filed in the Superior Court of Justice on April 22, 2015, two days short of the two-year anniversary of the Rana Plaza tragedy.[30] The representative plaintiffs included three garment workers injured in the building collapse, and Kashem Ali, whose two children and daughter-in-law were killed. The lawsuit was brought pursuant to Ontario's Class Proceedings Act, 1992.[31] The plaintiffs claimed general damages in the amount of $1.85 billion, punitive damages of $150 million, as well as special damages and an order of disgorgement of profits earned by Loblaws for the sale of Joe Fresh apparel between 2006 and 2013. The causes of action against Loblaws' included negligence[32], vicarious liability for the actions and omissions on the part of Pearl Global Apparel (Loblaws' Supplier) and New Wave (the contractor at Rana Plaza assigned work through Pearl)[33], and breach of fiduciary duty owed

[28] Accord History, *supra* note 19 at 4.
[29] See http://bangladeshaccord.org/2017/06/press-release-new-accord-2018/
[30] The plaintiffs also sued Bureau Veritas for negligence. The reasons dismissing that action are interesting in their own right, however due to space limitations, this paper will focus on the action against Loblaws.
[31] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.
[32] The negligence argument is summarized at para. 121-124 of the Ontario Lawsuit, *id.*
[33] The vicarious liability argument is summarized at para. 126 of the Ontario Lawsuit, *id.*

by Loblaws' to the plaintiffs.[34] Due to space restrictions, this paper will focus on the main negligence action against Loblaws.

A. Background Facts Relevant to the Lawsuit

Loblaw is Canada's largest retailer and largest private sector employer.[35] Its 2016 revenues exceeded $46 billion (CDN).[36] It owns the brand 'Joe Fresh', a clothing line sold in its Loblaws retail stores across Canada. Loblaws had sourced apparel for its Joe Fresh line from dozens of factories in Bangladesh since at least 2006, and had imported approximately 13.5 million garments from 73 Bangladeshi factories between 2007 and 2013.[37] Beginning in 2007, Loblaws' supplier, Pearl Global, subcontracted work to a Bangladesh manufacturer called New Wave Style and New Wave Bottoms, with Loblaws' knowledge and consent. The 2009 Vendor Buyer Agreement between Loblaws and Pearl designated New Wave as a Loblaws' supplier, although New Wave was not a party to that contract.[38]

Loblaws' Supplier Code was incorporated into Vendor Buyer Agreements and included a general obligation that all suppliers abide by "all applicable laws and regulations" and maintain "a safe and healthy workplace".[39] The Code clarified that all suppliers and "any subcontractor retained by a Supplier" (i.e. New Wave) were required to comply with the Code and that, "Loblaw reserves the right to take appropriate remedial action in the event that a supplier violates the Code". In Part IV, we will explore more fully the scope and meaning of "remedial action", but the parties agreed that it included the authority of Loblaws to cancel orders from Pearl and New Wave in the event of violations of the Supplier Code. As Justice Perell explained, "Loblaws' source of power or influence came from its purchasing power and the carrot and stick of making or not making purchase orders".[40]

By 2013, New Wave employed over 1600 garment workers at Rana Plaza, approximately 60 percent of all workers at Rana Plaza.[41] Loblaws' orders accounted for about half of New Wave's work at the time of the collapse.[42] This fact adds an unusual dimension to the Loblaws' Lawsuit, because Canadian companies rarely comprise a large share of a foreign suppliers' orders. The

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[34] The breach of fiduciary duty argument is summarized at para. 127, *id.* The court was not impressed by the plaintiff's breach of fiduciary duty and vicarious liability claims against Loblaws. Justice Perell described the fiduciary duty claim as "just the tort claim on anabolic steroids", "just a disguised negligence claim", and an "enormous stretch and contortion of fiduciary law". He ruled that the vicarious liability claim misapplies the key elements of vicarious liability under both Bangladesh and Ontario law: *Id.* at para. 459-498

[35] http://www.loblaw.ca/en/about-us.html

[36] J. Wells, "Loblaw Needs to Take Stock of Its Real Asset" *Toronto Star* (28 July 2017)

[37] *Loblaws* Decision, *supra* note 1 at para. 42

[38] *Id.* at para. 45

[39] Loblaws Supplier Code, *supra* note 2.

[40] *Loblaws* Decision supra note 1 at para. 49.

[41] The New Wave Bottoms factory employed 452 workers and New Wave Style factory employed 1,167: *Id.* at para. 85.

[42] *Id.* at para. 88.

fact that Loblaws was a major customer of New Wave would, in theory at least, confer on it a greater economic power to influence New Wave's actions than is often the case for Canadian companies. By 2007, New Wave had factories on the third and fifth stories of the original Rana Plaza structure as well as on the illegally constructed seventh story. At the time of the Rana Plaza collapse in 2013, a ninth story was under construction to accommodate New Wave's expanding business.[43]

Loblaws' representatives visited Rana Plaza and regularly spoke to owners of New Wave.[44] This was not a case of an unauthorized subcontracting, or of buyer ignorance of the identify of their subcontractors. Loblaws knew that New Wave was operating out of multiple factories in Rana Plaza, including on floors that had been constructed onto the original structure to accommodate garment production. However, Loblaws' representatives either were not aware or were not concerned that Rana Plaza had never been approved for garment production, let alone for production on the illegally constructed upper stories of a building built on a swamp without proper authorization or permits.[45] Nor did the decision in 2012 by the industry friendly certification organization Worldwide Responsible Accredited Production (WRAP) to deny certification of New Wave's factories at Rana Plaza for failing to meet the very low threshold requirements of WRAP's certification system raise red flags at Loblaws or cause it to curtail its orders from New Wave.[46]

In 2011, Loblaws contracted with Veritas for social auditing services. The contract was for Veritas' "basic social audit", requiring Veritas to audit for compliance with Loblaws' Supplier Code, a Veritas industry code, local employment and health and safety laws, and industry standards established by the ILO.[47] The cost of the basic social audit was US$1200, which was paid by the manufacturer being audited.[48] For an additional US$2000, Veritas offered an audit that includes checking building construction and structural integrity, but Loblaws opted for the less extensive basic social audit.[49]

Veritas conducted audits of New Wave at Rana Plaza in February 2011 and again in 2012. The Court noted that both audits found "that the factory license was missing, which was a failure to comply with Chapter IV of the Bangladesh Factories Rules, 1979, which requires that the

[43] *Id.* at para. 86.
[44] Id. at para. 47.
[45] Id at para. 84.
[46] Plaintiff's Fourth Amended Statement of Claim at 15. For a discussion of the industry-friendly WRAP, see: J. Esbenshade, *Monitoring Sweatshops: Workers, Consumers, and the Global Apparel Industry* (Temple U. Press, 2004), 132-134; D. Doorey, "Mapping the Ascendance of the Living Wage Standard in Non-State Global Labour Codes" (2015) 6(2) Transnational Legal Theory 435

[47] Id. at para. 53.
[48] Id. at para. 62.
[49] Id. at para. 54.

building permit be posted".[50] The absence of legally mandated business licenses was tagged as risk level "orange" by the Veritas auditors, which is the second highest level of risk in their ranking system. The 2011 audit identified 21 violations of Loblaws' Supplier Code and Bangladesh law, including multiple instances of non-compliance with health and safety rules, working hours rules, rules on record-keeping for employment practices, and compensation and benefits rules.[51] The 2012 audit by Veritas reported an additional nine violations under similar categories. As Justice Perell J. noted, "remediation of the deficiencies noted in the social audits was not followed up on by either Loblaws or Veritas".[52]

The Rana Plaza collapse in April 2013 created a serious public relations problem for Loblaws and other companies that had been sourcing from Rana Plaza. Six days after the collapse, Loblaws' social compliance personnel met with Veritas employees to discuss the expanded audits that it had previously eschewed in favour of the basic social audits.[53] At the company's annual general meeting on May 2, 2013, about one week after the collapse, the Executive Chairman of Loblaws, Galen Weston Jr., lamented on the decision by Loblaws' to adopt the narrow, basic social audit that ignored the structural integrity of the factories:

> 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.[54]

Had the lawsuit not been dismissed, Justice Perell would have struck the reference to this speech pursuant to the Ontario Apology Act and in the grounds that the pleadings relating to the speech amounted to allegations of evidence rather than allegations of fact.[55]

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[50] Id. at para 67.
[51] Id. at 22-23.
[52] Id. at para. 68. In January 2013, Loblaws canceled the contract with Veritas and shifted its auditing work to Intertek. Intertek was scheduled to perform its first audit of New Wave on the day of the Rana Plaza collapse.
[53] Affidavit of Jason Hill, Manager of Veritas Bureau, at 28.
[54] *Loblaws* Decision supra note 1 at 27.
[55] Id. at para. 590-594; *Apology Act, 2009,* S.O. 2009, c. 3.

B. Summary of the Court's Reasons

This section will summarize the lengthy reasons roughly in the order they are dealt with by the Court.

1. The Class Proceedings Certification Motion and Jurisdiction *Simpliciter*

The Court heard a series of preliminary motions over nearly two weeks, including the plaintiffs' motion seeking class certification and the defendants' motion to strike the lawsuit on the basis that it was plain and obvious that the lawsuit was certain to fail—the so-called Rule 21 motion to strike.[56] The plaintiffs sought certification of two classes of plaintiffs: (1) all persons in Rana Plaza at the time of the collapse who survived and who attorn to the jurisdiction of the Ontario Court; and (2) the estates of all persons who died in Rana Plaza and a class of family members of those who died who attorn to the jurisdiction of the Ontario Court.[57] The decision by plaintiff counsel to expand the class beyond victims working for New Wave, to include anyone who just happened to be in the building when it collapsed, did not much impress Justice Perell, who pointed to this decision on numerous occasions as an example of how the plaintiffs had overreached in their attempt to stretch the boundaries of the duty of care beyond recognition.[58] Our discussion will focus on employees of New Wave and their families.

Section 5 of the *Ontario Class Proceedings Act, 1992* includes a five-part test for certification. Step one requires that the pleadings "disclose a cause of action".[59] For reasons discussed below, the Court ruled that this step was not satisfied and therefore it rejected certification and dismissed the lawsuit. However, the other four steps were satisfied:

(1) There was an identifiable class of plaintiffs. However, the Court cautioned that the class could only include persons to whom a duty of care was owed by the defendants, which may be only New Wave employees and not everyone who just happened to be in the building at the time of collapse and employees of the other factories at Rana Plaza;

(2) There were common issues. Usually where the claim is in negligence, common issues arise in the question of duty of care, breach of the duty, and heads of damages;

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[56] Ontario Rules of Civil Procedure, RRO 1990, Reg 194, s. 21.
[57] *Loblaws* Decision, *supra* note 1 at para 177.
[58] See id., paragraph 76, and at paragraph 525: "…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."
[59] *Supra* note 31, s. 5(1)(a)

(3) The action satisfied the 'preferable procedure' criterion. The alternative of individual lawsuits filed in either Ontario or Bangladesh is not a preferable one;

(4) There were representative plaintiffs who can adequately represent the interests of the class without a conflict of interest and who have a workable litigation plan.[60]

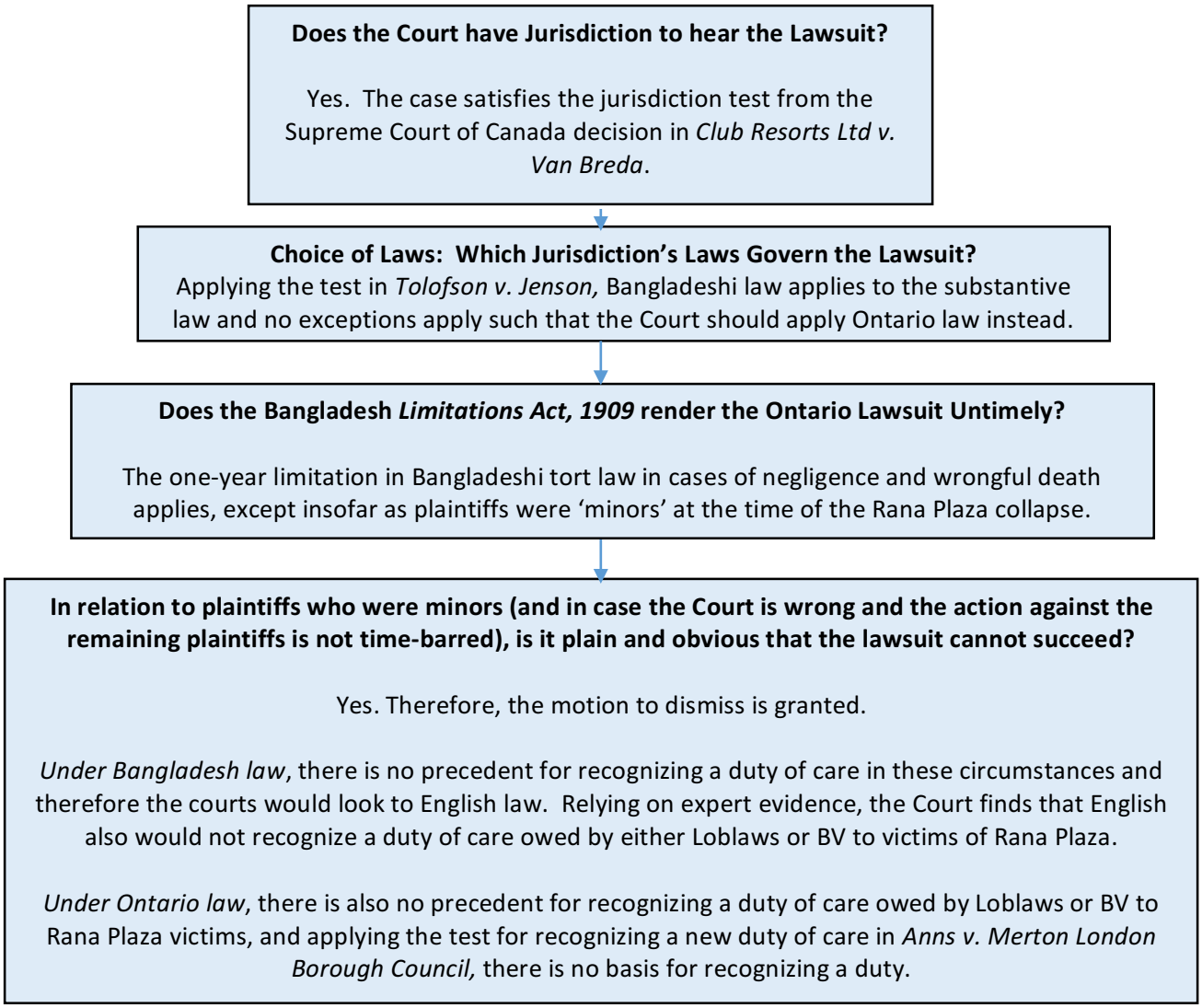
In addition to the motion to strike, Loblaws also moved to strike parts of the statement of claim. Of note, Loblaws asked the Court to strike pleadings that recounted the long history of building collapses and fires and explosions in Bangladesh apparel factories described earlier. Loblaws argued that the pleadings were irrelevant. The Court largely agreed, ruling that evidence of fires and accidents at Bangladesh factories predating Loblaws' arrival there in 2006 were irrelevant, and that in any event pleadings about fires and accidents were not "allegations of material facts" as required by the Rules of Civil Procedure. According to Justice Perell, the only "material fact is that Loblaws knew that Bangladesh had a history of building collapses".[61]

The motion to dismiss the lawsuit subsumed the vast majority of the Court's reasons. Table 1 provides a snapshot of the Court's reasons. The first hurdle for the plaintiffs was to persuade the Court that it had jurisdiction to hear a lawsuit filed by Bangladesh citizens relating to the collapse of a building in that country. The test in Canada required the Court to decide, firstly, whether it had "jurisdiction simpliciter" over the dispute, and if so then, secondly, whether the Court should nevertheless decline jurisdiction in favour of a more appropriate jurisdiction ("forum non conveniens").

The Supreme Court of Canada (SCC) explained the test for jurisdiction simpliciter in its 2012 decision in *Club Reports Ltd v. Van Breda*.[62] *Club Resorts* involved two lawsuits filed in Ontario against Club Resorts, a Cayman corporation that managed hotels in Cuba where one plaintiff was killed and another seriously injured while on vacation. In both cases, the plaintiffs were Canadian citizens and the accidents causing the harm occurred in Cuba. The defendants moved to have the lawsuit dismissed on the basis that the Ontario courts lacked jurisdiction to hear the cases or, in the alternative, that a Cuban court would be a more appropriate forum.

[60] For Justice Perell's discussion of these criteria, see *Loblaws* Decision, supra note 1 at para. 599-653.
[61] See discussion *id.* at para. 595.
[62] [2012] 1 SCR 572

Table 1: Flowchart of the Courts Reasons in the Negligence Actions in *Das v. George Weston, et al.* (2017)



The SCC explained that the first issue is whether an Ontario court possesses jurisdiction simpliciter. It confirmed the application of the "real and substantial connection test" as the appropriate common law test for the assumption of jurisdiction simpliciter by a Canadian court over a lawsuit involving a tort occurring outside of the court's jurisdiction:

> To recap, in a case concerning a tort, the following are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
> (b) the defendant carries on business in the province;
> (c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.[63]

The plaintiffs argued that, applying the *Van Breda* test, it was plain and obvious that the Ontario Court had jurisdiction *simpliciter*, because "all of the Van Breda presumptive factors (and not just one, as required) are met."[64] Loblaws conceded that applying the "real and substantial connection test" as described in *Van Breda*, the Court would have jurisdiction simpliciter over the defendant companies and the named plaintiffs. However, relying on a decision of the Ontario Superior Court called *Airia Brands v. Air Canada* which was released in late 2015 (after the Loblaws' lawsuit was filed), Loblaws argued that the *Van Breda* "real and substantial test" does not govern the question of whether an Ontario court can take jurisdiction over "Absent Foreign Claimants" (AFC) in a class action lawsuit.[65] AFCs included proposed class members who reside in Bangladesh, who suffered alleged injuries or losses in Bangladesh, and who have not sought to opt in to the proceeding or otherwise bring any related claim in Canada. Loblaws argued that the Court must decide separately whether it has jurisdiction over AFCs, who comprised everyone in the proposed class other than the named representative plaintiffs, and that the Van Breda test does not apply to them.

In light of the uncertainty created by the fresh *Airia Brands* decision, the plaintiff's counsel took the unusual and costly step of visiting Bangladesh for an extended time period to collect 'consent forms', or "support form evidence", from putative class members. They collected some 3,850 signatures on documents, translated into Bangla and, according to the plaintiff's lawyer who supervised the process, read to signatories who were illiterate. The support forms specified 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 action in Bangladesh against any of the companies being sued in Canada."[66]

Loblaws argued that the forms were unreliable and did not constitute a valid attornment to the Ontario Court. The Court rejected this line of argument. Firstly, the plaintiffs changed the class definition to an "opt-in" class rather than an "opt-out", and the Court ruled that putative class members could opt into the lawsuit after the class was certified pursuant to a Court sanctioned process of attornment. In this regard, Perell J. noted that plaintiff counsels' decision to go to Bangladesh to sign up class members, while well intentioned, was "wasted" time and effort given that the class action lawsuit ultimately was not being certified. Secondly, in a decision called *Excalibur Special Opportunities LP v. Schwartz, Levitsky, Feldman LLP* released after *Aria Brands* but

[63] Id. at para. 90. The SCC noted two provisos. Firstly, this list was non-exhaustive and that new factors could be recognized in later decisions. In considering whether to recognize a new presumptive factor, courts should consider, among other things, "treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness, and comity". Secondly, the presumption of jurisdiction arising from the presence of a "connecting factor" is rebuttable.
[64] Plaintiff's Responding Factum, at 5.
[65] *Airia Brands v. Air Canada* (2015) ONSC 5332 (CanLII)
[66] *Loblaws* Decision, *supra* note 1 at para. 150.

before the motions were argued, the Ontario Court of Appeal affirmed that the approach in *Van Breda* applies even to an opt-out class action lawsuit launched by foreign plaintiffs in a Canadian court.[67]

Having ruled that it has jurisdiction simpliciter over the lawsuit, the Court would normally have considered the second step of the Van Breda test: whether the Court should nevertheless decline jurisdiction in favour of a more appropriate jurisdiction (forum non conveniens). This part of the test was not argued by Loblaws in the motion. However, the Court noted that, depending on the outcome of the various other motions already filed, "Loblaws purports to reserve the right to bring a forum non-conveniens motion in the future".[68]

2. Choice of Laws: What Substantive Law Applies to the Lawsuit, Bangladesh or Ontario?

With the question of jurisdiction resolved, the Court turned to consider the issue of choice of laws.[69] Loblaws argued that Bangladesh law applies, hoping to take advantage of the short one-year limitation period in that country's *Limitations Act, 1908* which, if applicable, would render the lawsuit untimely. If on the other hand Ontario law applied, then the lawsuit was filed within that province's two-year limitation period. The SCC ruled in the 1994 decision *Tolofson v. Jensen* that the law of the place where the tort occurs governs (*lex loci deliciti*).[70] Loblaws argued that the "place" of the tort was Bangladesh, where the plaintiffs resided, where they suffered the alleged harms, where the social auditing took place, and where the Rana Plaza collapse occurred.

The plaintiffs countered that the key decisions, actions, and contracts that form the elements of the negligence took place in Ontario.[71] These included: the decision to source from Bangladesh with full knowledge of the notorious history of multistory building factory collapses, fires, worker injuries, and deaths in the RMG industry there; the decision to contract with Pearl and to permit subcontracting to New Wave in Rana Plaza; the decision to adopt a Code of Conduct in light of the acknowledged risk of sourcing from Bangladesh; the decision to contract with Veritas to conduct only the most 'basic social audit' rather than the slightly more expansive audit that would have checked for structural integrity; and the decision to take no remedial action in response to 30 violations by New Wave of the Loblaws' Supplier Code and Bangladesh law, including the absence of a factory licence. To find that Bangladesh was the place where the tort occurred would require the Court to wrongfully apply a "place of harm" test, rather than the place of the tortious activity.

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[67] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916 (CanLII)
[68] *Loblaws* Decision, *supra* note 1 at 179.
[69] The discussion of choice of laws begins at *id.* para. 207.
[70] *Tolofson v. Jensen,* [1994] 3 S.C.R. 1022 at para. 42.
[71] *Loblaws* Decision, *supra* note 1 at para. 234-235.

The plaintiffs pointed to the following words of Justice LaForest in *Tolofson* in support of its argument that the *lex loci deliciti* rule must not be applied rigidly:

> There 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. 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.[72]

The plaintiffs argued that this was a case that "raises thorny issues" arising from "transnational activity" and thus fell within the exception recognized by LaForest J.

Justice Perell disagreed. He ruled that clever pleading could not disguise the reality that the alleged tort occurred in Bangladesh:

> 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 my opinion, none of the Plaintiffs' arguments work, and the Defendants are correct in asserting that Bangladesh law is the choice of law.[73]

The plaintiffs made a series of alternate arguments why Bangladesh law should not govern the lawsuit, all of which were rejected by the Court.[74]

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[72] *Tolofson, supra* note 70 at para 42.

[73] *Loblaws* Decision, *supra* note 1 at para. 238-239.

[74] Firstly, the plaintiffs argued that Bangladesh mass tort negligence law is insufficiently developed and consequently is incapable of proof on a balance of probabilities: *Id.* at para 273-277. Secondly, in a related argument, they asserted Bangladesh mass tort law is so underdeveloped that a Canadian court applying that law would be forced to in effect "develop foreign law", which would be contrary to the principles of territoriality and comit: *Id.* at para. 281. Perell J. ruled that he need not "dignify" these arguments with an elaborate analysis, which he believed "insulted" Bangladesh courts, and that in any event Bangladesh tort law was sufficiently developed such that the plaintiffs would suffer no injustice by its application by a Canadian court: *Id.* at 275, 290. Thirdly, the plaintiffs argued that a Canadian court should decline to apply Bangladesh law on public policy grounds, namely that the discriminatory nature of Sharia law that would be applied to a damages award by a Bangladesh court was contrary to Canadian gender equality values. That law would require that "male heirs receive twice as much as female heirs." The Court agreed that "an Ontario court should not apply a law that would discriminate as between men and women", but after noting that the "offensive Sharia law" would likely affect only a small number of

3. The Limitations Period

The Court's finding that Bangladesh law applied to the substantive legal issues required that it receive expert evidence on the substance of that law. Both parties filed expert affidavits on the law of Bangladesh, including by two former justices of the Supreme Court of Bangladesh and two distinguished senior British law professors from Oxford and Cambridge. The first issue the experts addressed was the application of the *Bangladesh Limitation Act, 1908*. Even on this question, the experts disagreed.[75] Ultimately, the Court concluded that the lawsuit was statute-barred by the one-year limitation in tort cases for personal injury and wrongful death under that statute.[76] However, the Ontario Court accepted the plaintiff's argument that the limitation period was tolled in the case of plaintiffs who were minors at the time of the Rana Plaza collapse until they reached age of majority.[77] As a result, claims by plaintiffs who were born on or after April 22, 1996 were not statute-barred. Although it was not known how many people that might be, the Court noted that "there will be some because … in Bangladesh, 14 year-old persons may join the regular workforce."[78]

4. The Duty of Care and the Viability of the Negligence Claims

We finally arrive at the crux of Loblaws' motion attacking the negligence claim beginning at paragraph 390 of the decision. Justice Perell opens this discussion by referencing the famous dicta in *Donoghue v. Stevenson* in which Lord Atkins contrasts the broader concept of a moral duty to help those in need as demonstrated in the Good Samaritan parable from the Book of Luke from the narrower scope of the legal duty of care recognized in negligence law.[79] This opening reference to Lord Atkin foreshadowed Justice Perell's ultimate conclusion that, whatever moral duty could be attributed to Loblaws to take steps to protect workers down through its supply chain, it did not rise to the level of a legal duty of care. We will explore Justice Perell's frequent references to the Good Samaritan parable as it relates to the contrasting ideas of responsibility in tort law and in CSR in Part IV.

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potential class members, he ruled that the appropriate response was for an Ontario court to sever the application of that law when and if the issue arose: *Id.* at 298. Finally, the Court rejected the plaintiff's argument that it should decline to apply Bangladesh law because that country does not award punitive damages because it was not clear that this was actually the case, and that in any event the absence of punitive damages does not offend Canadian morality or fundamental values: *Id.* at 307.

[75] The discussion relating to the Bangladesh *Limitations Act* runs from, id., para. 310-389.

[76] Id. at para. 357.

[77] Id. at para. 375-376.

[78] Id. at para. 377.

[79] Id., beginning at para. 395. The full quotes are set out in full at the start of the decision: *Donoghue v. Stevenson,* [1932] AC 562.

The onus in the motion to dismiss was on Loblaws to establish that it was "plain, obvious, and beyond doubt that the plaintiffs cannot succeed in the claim".[80] Courts have cautioned that lawsuits should not lightly be disposed of at the motion stages merely because they raise novel claims, or engage unsettled law.[81] The Court first considered whether it was plain and obvious that a negligence claim was certain to fail under Bangladesh law. For this task, the Court again considered expert evidence from the Bangladeshi lawyers and British scholars. English negligence law was relevant because the experts agreed that the negligence action raised novel legal issues under Bangladesh law, and that a Bangladesh court confronted with a novel negligence claim would be influenced by English negligence law.[82] Therefore, Perell J. turned his attention to the question of whether it was plain and obvious that the negligence claim would fail under English law. [83]

a. Negligence Under Bangladesh and English Law

Ultimately, the Court concluded that it was plain and obvious that the negligence actions against Loblaws were certain to fail under both Bangladesh and English law.[84] The expert evidence on English law established that in order for a court to recognize a novel duty of care, the case must fit within one of three tests:

(1) the test from *Caporo Industries plc v. Dickman*, which requires foreseeability, proximity, and consideration of policy issues;[85]
(2) the assumption of responsibility test; and
(3) the incremental change test.[86]

In discussing the *Caporo* test, the Court emphasized that foreseeability alone is not a basis for finding a duty of care, especially in cases alleging nonfeasance and a duty to protect third parties from the wrongful acts of others.[87] The Court expressed doubt whether the "proximity factor" was satisfied, but principally focused on the third factor in the *Caporo* test in finding that there

[80] Id. at para. 194. Ontario Rules of Civil Procedure, Rule 21.02. See e.g. *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4) 257 (Ont. C.A.); *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.); *Choc v. Hudbay Minerals Inc.* (2013) ONSC 414 (CanLII)
[81] Id. at 195; *R. v. Imperial Tobacco Canada* (2011) SCC 42 (CanLII) at para. 21.
[82] Id. at para. 411.
[83] The review of English negligence law runs from para. 412-458, *id.*
[84] Justice Perell ruled as well that the vicarious liability and the breach of fiduciary duty actions against Loblaws would also fail under both Bangladesh and English law. See discussion id., paras: 459-498.
[85] *Caporo Industries plc v. Dickman* [1990] 2 AC 605 (HL)
[86] *Loblaws* Decision, *supra* note 1 at para. 412, 414.
[87] Id. at para. 434: "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."

were "substantial policy reasons to negate any duty of care, assuming the proximity factor was satisfied."[88]

Perell J. accepted that there were policy arguments that favoured recognizing a duty of care in this case. These included: "(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".[89] However, Justice Perell ruled that competing policy concerns outweighed these concerns.

In particular, he expressed concern that recognizing a duty of care would discourage corporations from engaging in the sort of responsible CSR behavior demonstrated by Loblaws. Perell J. wrote: "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."[90] In a similar vein, Perell J. commented that if a duty of care were recognized in this case, companies would learn that adopting CSR standards did not "insulate" them from liability but would instead "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".[91] Therefore, the concern that companies not be discouraged from adopting codes of conduct and sourcing from low wage countries outweighed the competing concern raised by the plaintiffs that companies be discouraged from publicly claiming that they are taking steps to protect supply chain workers, when in fact they are ignoring violations of their own standards. We will consider this controversial bit of reasoning again in Part IV.

The Court was also concerned about "indeterminate" and "disproportionate" liability being imposed on the defendants in light of their limited role in creating the risks and their inability to prevent the harm.[92] Plaintiff counsels' decision to define the class broadly to include anyone who just happened to be in Rana Plaza at the time of the collapse haunts them on the question of indeterminate liability. The Court ruled that, "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. [Loblaws] could not control the number of people coming to Rana Plaza nor … limit the duration or the amount of their exposure to liability."[93] A class more narrowly defined as New Wave employees would not likely face the same policy objection.

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[88] Id. at para. 435.
[89] *Id.* at para. 451. We explore the Court's weighting of these competing policy objectives further in Part IV.
[90] *Id.* at 452.
[91] *Id.* at para. 456.
[92] *Id.* at paras 450-457.
[93] *Id.* at para. 450

The Court was mostly concerned that recognizing a duty of care in this case would leave the defendants exposed to potentially huge damage awards when, in the Court's opinion, they had little control over the causes of the harm. Drawing on the themes of responsibility and control which we will discuss further in Part IV, Perell J. concluded 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."[94] There is no discussion in the decision about the possibility of apportioning liability between Loblaws and other contributing actors.

Finally, the Court ruled that the circumstances of the case did not fit within the "assumption of responsibility" test. That test creates an exception to the general rule that a person does not owe a duty of care to protect others from harm caused by a third party. In order to fit within the exception, the plaintiffs must establish that: (1) the defendant has both subjectively and objectively assumed responsibility for the plaintiff's safety; (2) the plaintiff relied on the defendant's assumption of responsibility; and (3) as a matter of legal policy, it would be fair and just to impose a duty of care on the defendants.[95] Relying on expert evidence, the Court ruled that the plaintiff's case failed all three components of the test.[96] In particular, the Court ruled that the plaintiffs did not rely on Loblaws to protect them:

> 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.[97]

The Court also ruled that the same policy reasons that negated recognizing a duty of care under the *Caporo* test applied in the case of the assumption of responsibility exception.

b. Negligence and the Duty of Care Under Ontario Law

Although it ruled that Bangladesh law governed, the Court also addressed whether it was plain and obvious that the negligence action against Loblaws was certain to fail under Ontario law.[98] In *Cooper v. Hobart,* the SCC held that once a duty of care has been recognized in other cases, it

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[94] *Id.* at para. 457
[95] *Id.* at para. 412(e), citing: *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
[96] *Loblaws* Decision, *supra* note 1 at para. 425-426.
[97] *Id.* at para. 437-438.
[98] The discussion of the negligence action under Ontario law begins at para. 501, *id.*

becomes an established duty of care.[99] However, when a duty of care had not previously been recognized, courts must apply the House of Lords test in *Anns v. Merton London Borough Council*.[100] Perell J. treated the negligence claims against Loblaws as raising novel duty of care arguments and therefore requiring the *Anns* analysis.[101]

In *Odhavji Estate v. Woodhouse*, the SCC explained three elements that must be established in order to recognize a novel duty of care applying the Anns test:

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;

2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and

3. that there exist no policy reasons to negative or otherwise restrict that duty.[102]

If the first two factors are satisfied, then a prima facie duty of care is established and the onus shifts to the defendant to persuade the court that there exist overriding policy concerns that should negate recognizing a duty of care.

The Court's analysis of the foreseeability element of the *Anns* test was surprisingly perfunctory. In deciding if harm is foreseeable, courts ask whether the harm resulting from the defendant's action (or inaction) was reasonably foreseeable.[103] It is enough, "if one could foresee in a general way the sort of thing that happened", and the "extent of damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensures is foreseeable."[104] In anticipating a lawsuit against a Canadian multinational corporation arising out of harm suffered by a supplier's employees, Madeleine Conway predicted that it would be "straightforward for a prospective plaintiff to establish foreseeability" if the corporation had "undertaken to protect human rights in its supply chain and has done so negligently" since, in those circumstances, "it is reasonably foreseeable that workers in its suppliers' factories could be harmed".[105]

Justice Perell disagreed. He ruled that the foreseeability factor was satisfied in the negligence action Veritas, but not in the claim against Loblaws.[106] Unfortunately, the Court's brief reasons

[99] *Cooper v. Hobart,* [2001] 3 S.C.R. 537; *Childs v. Desormeaux,* [2006] 1 SCR 643.
[100] *Anns v. Merton London Borough Council* [1978] A.C. 728 (HL)
[101] *Loblaws* Decision, supra note 1 at para. 521.
[102] *Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263 at para. 52
[103] *Loblaws* Decision, *supra* note 1 at para. 507; *Childs, supra* note 99 at para. 21-24.
[104] *Id.* at para. 507; *Bingley v Morrison Fuels, A Division of 503373 Ontario Ltd.* (2009) 95 O.R. (3d) 191 (Ont. C.A.); *Choc v/ Hudbay Minerals Inc.* (2013), ONSC 414 (CanLII), at para. 59.
[105] M. Conway, "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40(2) Queens L.J. 742 at 757.
[106] Id. at para. 523.

provide little insight into the rationale for this conclusion, which by no means is self-evident.[107] Justice Perell's reasons for rejecting the foreseeability factor in the Loblaws action appear in two brief paragraphs, beginning with this one:

> 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."[108]

This paragraph is awkwardly worded insofar as it appears to reverse the onus, suggesting that the plaintiffs must establish that it is plain and obvious that a duty "does or should" exist rather than the defendants demonstrating that it is plain and obvious that no such duty could exist.

In the second paragraph, the Court asks whether Loblaws foresaw when it adopted CSR standards that it could be held "culpable for the harm suffered by [New Wave] employees" if its CSR standards fell short.[109] This analysis suggests that the Court asked not whether the harm was reasonably foreseeable given all of the circumstances pleaded, but whether Loblaws foresaw that it could be held liable for any or all of that harm. The fact that the Court ruled that harm was foreseeable in the action against Veritas, the company Loblaws hired to monitor its Supplier Code, only adds to the uncertainty. On this point, no reasons at all are provided by the Court.[110]

The plaintiffs relied on the recent decision of a different judge of the same Superior Court of Justice in *Choc v. Hudbay Minerals Inc* in support of its argument that the foreseeability element was satisfied in the actions against Loblaws.[111] *Hudbay Minerals* dealt with three lawsuits arising out of related circumstances involving the actions of security personnel retained by subsidiaries of a Canadian-based mining company in Guatemala. The security staff engaged in atrocities against local Indigenous peoples in the course of securing a mine site against protests. The defendants moved in *Hudbay Minerals* to have the case dismissed on a non-suit motion. The Court applied the *Anns* test and refused to dismiss the case finding that the defendants had failed to established that it was plain and obvious that the lawsuit was certain to fail.

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[107] In his consideration of English law and the *Caporo* test reviewed above, Justice Perell appeared to assume that foreseeability was satisfied and focused instead on policy concerns associated with recognizing a duty of care. Therefore, there is little guidance in that part of the decision.
[108] *Id.* at para. 524.
[109] *Id.* at para. 525.
[110] The Court presumably found either that: (1) it was foreseeable that if Veritas did not properly conduct the Loblaws' audit that serious harm to New Wave workers could result, or (2) it was foreseeable that not conducting a more expanded structural audit, or at least not recommending that such an audit be done, could result in serious harm to the workers.
[111] *Choc v. Hudbay Minerals Inc., supra* note 104.

The Court in *Hudbay* ruled that the harms that occurred were a foreseeable consequence of the acts and omissions of the Canadian parent company given the factual context, which included that company's knowledge of: the risk of violence in Guatemala by security forces retained to evict aboriginal communities; problems with the Guatemalan criminal justice system such that many crimes go unpunished; the high numbers of violent crimes in Guatemala; and the fact that security personnel in Guatemala are often not well-trained and are prone to violent behavior.[112] These 'geo-political facts' contextualized the decisions made by the Canadian mining company; it was not simply the hiring of security forces to remove Indigenous peoples from their land that made the harms foreseeable, but the fact that the security forces were hired to do their work in Guatemala, where the sorts of problems that occurred have occurred before in similar circumstances.

Similarly, the plaintiffs in the Loblaws lawsuit argued that the decisions made by Loblaws cannot be separated from the geo-political context in which they were made. New Wave was operating unlawfully in an illegally built multi-story office building constructed on a swamp, in a country where other buildings had collapsed in similar circumstances, and where there could not be reasonable reliance on government inspectors to ensure that factories are safe and buildings are structurally sound for manufacturing. However, the Court concluded that any comparison between the circumstances in the Loblaws case and those in *Hudbay* "makes no sense".[113] Justice Perell distinguished *Hudbay* on the basis that it involved a parent company which had direct control over its foreign subsidiary whereas Loblaws had "no management or administrative control" over working conditions of its subcontractor New Wave.[114]

The Court's sparse reasons on the foreseeability element of the *Anns* test may be explained by Justice Perell's ultimate conclusion that, regardless of whether foreseeability is satisfied, it is plain and obvious that the negligence action was certain to fail the remaining elements of the Anns test: proximity and policy concerns. The proximity element focuses on the nature of the relationship between the parties and asks whether that relationship is sufficiently close that it would be fair and just to hold that the defendant owes the plaintiff a duty of care. On this point, Perell J. emphasized the distinction between misfeasance and nonfeasance, the latter being "a failure to act to prevent foreseeable harm to another".[115] Perell J. characterizes the negligence claim against Loblaws as one of nonfeasance, the plaintiff's argument being that Loblaws failed to take reasonable precautions to protect the New Wave employees from harm.[116] He emphasized that in the case of nonfeasance, foreseeability of harm is insufficient to create a duty of care. As explained by Chief Justice McLachlin in *Childs v. Desmormeaux*, "the mere fact that a

[112] *Id.* at para. 61-64.
[113] *Loblaws* Decision, *supra* note 1 at para. 540.
[114] *Id.*
[115] *Id.* at para. 512.
[116] *Id.* at 529.

person faces danger…does not itself impose any kind of duty on those in a position to become involved."[117]

In *Fullowka v. Pinkerton's of Canada*, the SCC ruled that the foreseeability and proximity elements were satisfied in a lawsuit filed against the government's mine inspectors and Pinkerton's, a private security company hired to guard a mine during a bitter labour dispute.[118] *Fullowka* involved an alleged failure of Pinkertons and the government to take reasonable steps to protect replacement miners from harm caused by striking miners. The SCC explained that in cases alleging an omission, the proximity inquiry involves assessing whether the facts, "show that the relationship between the plaintiff and the defendant was sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved."[119] Physical proximity is not required; it is sufficient that the relationship between the defendant and plaintiff is such that the defendant would know that the plaintiff would be directly affected by his acts.[120]

In *Fullowka*, proximity existed because the security company made representations that it would take reasonable precautions to protect the miners from harm in the mine, and the miners reasonably relied on those assurances.[121] Pinkertons did not have direct control over the person who planted the bomb at the mine, but it did have "a significant measure of control of the risk that his activities would kill miners".[122] On the issue of autonomy, the SCC ruled that the miners, "were aware that they faced risk and decided to accept it" in light of assurance that reasonable efforts were being made by Pinkerton's to protect them.

The plaintiffs argued that it was not plain and obvious that proximity did not exist. They pointed to a number of pleaded facts, including: Loblaws "maintained very close contract and direct communications from Ontario with Class Members working" at Rana Plaza; Loblaws' staff visited New Wave at Rana Plaza "on many occasions"; "Loblaws assumed direct and indirect responsibility and control over workers health, safety and working conditions and formulated a corporate response to such conditions through their suppliers"; Loblaws "developed and implemented CSR standards and included a supplier code of conduct in its supplier agreement"; and Loblaws retained Veritas to conduct audits of New Wave for safety on Loblaws' behalf.[123] Justice Perell was not impressed with this proximity argument. He ruled that the relationship between Loblaws and New Wave employees was "indirect at best and more of an

[117] *Childs,* supra note at para. 31.
[118] *Fullowka v. Pinkerton's of Canada Ltd.,* [2010] 1 SCR 132
[119] *Id.* at para. 26.
[120] *Id.*
[121] *Id.* at para. 30. See also discussion in Conway, *supra* note 105 at 759-766.
[122] *Id.* at para. 63.
[123] Plaintiffs Certification Factum, at 28-29.

association than a relationship".[124] Moreover, as he had noted earlier in the decision, there was no reliance by New Wave employees on Loblaws take precautions to protect them from harm.[125]

III. Responsibility, Control, and Window-Dressing CSR as a Virtue

For all of the reasons summarized above, the Court ultimately concluded that it was plain and obvious that the lawsuit was certain to fail. However, while Loblaws won the lawsuit, the reputation of its CSR program took a beating. As explored below, in its defense, Loblaws disparaged its own CSR program, arguing that, regardless of the messaging used in its CSR documents, in truth the company had no responsibility to New Wave workers and no means whatsoever to influence or control New Wave management. That Loblaws would sacrifice the reputation of its CSR program in this manner is not entirely surprising given the stakes in the lawsuit. This behaviour is consistent with the widely held expectation that when CSR comes into conflict with the economic motives of a corporation, CSR will be sacrificed.[126]

The Court generally accepts Loblaws' argument that it had no means to protect New Wave workers, and no responsibility to do so. He finds that nothing Loblaws could have done would have changed the working conditions of the plaintiffs.[127] This conclusion could lead one to ask an obvious question: If Loblaws had no capacity to improve the lives and safety of workers at New Wave, then what was the purpose of Loblaws' CSR program, which was clearly intended to suggest otherwise? However, Loblaws' impotent CSR program attracted no derision from the Court. To the contrary, Justice Perell strongly insists that Loblaws should be praised for its CSR efforts. He rules that the law should be careful not to discourage companies from following Loblaws' exemplary CSR lead and from sourcing from low-wage, high risk factories.[128] Justice Perell compares Loblaws to a good Samaritan and chastises the plaintiffs for accusing the company of not doing more than it had already done.

The curious result of this line of reasoning is that Justice Perell praises 'window-dressing CSR', the practice whereby a corporation makes public CSR promises that are not enforced in practice. He holds up Loblaws as a pillar of business ethics for publishing a Code of Conduct and retaining Veritas to audit it, even though the undisputed evidence was that Loblaws ignored the well-known and serious risk of building collapse at Rana Plaza and failed to take any steps to remedy Code violations once it learned of them, including the fact that New Wave lacked a business licence. By praising Loblaws' CSR program despite its obvious futility at Rana Plaza, Perell J. validated a long-standing critique that CSR is a cynical, meaningless public relations

[124] *Loblaws* Decision, *supra* note 1 at para. 528.
[125] *Id.* at para. 531.
[126] Nova & Wegemer, *supra* note 23 at 23.
[127] *Loblaws* Decision, *supra* note 1 at para. 532. See also discussion below.
[128] See discussion in Part V(C), below.

exercise. In doing so, he undermined the efforts of some CSR advocates and businesses to advance a genuine CSR program that effects real change for the benefit of supply chain workers.

Presumably, this was not Justice Perell's intention. He appears genuinely to believe that businesses should engage in CSR because it can help workers. However, he fails to appreciate the difference between genuine and window-dressing CSR, and between code monitoring on one hand, and enforcement and remediation on the other hand. This leads him to the erroneous conclusion that any cosmetic attempt at CSR is better than no attempt at all. But window-dressing CSR benefits no one but the company seeking to use it to mislead the public into believing supply chain workers are safer. Everyone else, including the workers and other businesses investing in genuine CSR, would be better off if the law produced clear disincentives to engaging in the practice of misinformation through window-dressing CSR. Justice Perell appears to believe that it is better for a company to publish a code of conduct and then ignore violations of it, than to not publish a code at all.

This conclusion does not rely on legal reasoning. Rather, it is a statement about the value of CSR as a program of self-regulation. Once Justice Perell leaves his comfort zone of negligence law and crosses into the logic and discourse of CSR, he loses his way. It was unnecessary for him to cross these disciplinary borders. It was possible for the Court to rely entirely on the complex logic of transnational negligence law to find reasons to dismiss the lawsuit without stumbling into the longstanding and contested debate over the supposed value of CSR programs in protecting supply chain workers. However, since the Court chose to join this debate, it is important to examine its arguments and conclusions. This is the task of the remainder of this paper. In particular, this discussion will zero in on the contrasting meanings, or scope, of the concepts of 'responsibility' and 'control' in CSR and in the legal reasoning applied by the Court in the Loblaws' decision, before we conclude with some thoughts on Justice Perell's surprising conclusion that the mere act of adopting a CSR program is somehow deserving of judicial praise and encouragement.

A. Responsibility

CSR envisions a theory of responsibility that is broader than the common legal liability model used in negligence law in two respects.[129] Firstly, it envisions corporations expanding their neighborhood of responsibility beyond their immediate direct community (including their own employees, consumers, shareholders) and beyond existing hard law obligations. The Loblaws' Supplier Code provides an example.[130] It required all suppliers to comply not only with formal legal rules, but also with "applicable guidelines and best practices for their industry" and other rules about accepting gifts, avoiding excess packaging, and promoting workplace diversity. The

[129] I. Young, "Responsibility and Global Labour Justice" (2004), 12 J. Pol. Phil. 365 at 368
[130] *Supra* note 2.

Supplier Code also applied to third party suppliers and "any subcontractor retained by a Supplier", thus extending the range of responsibility beyond parties with whom Loblaws had a direct contractual relationship. Loblaws' CSR program portrayed its commitment to an expanded idea of responsibility to its supply chain workers, regardless of who employed them, where they work, and the state of the regulatory regime where their employer is situated.

Secondly, contemporary CSR discourse emphasizes the 'root causes' of worker risk that permeate global supply chains. Root cause analysis tracks how the global supply chain model developed by, and for the benefit of lead companies directly contributes to elevated risks to supply chain workers. As Anner, Bair, and Blasi note, "the principal root cause of sweatshop conditions in international subcontracting networks is to be found in the sourcing practices of the brands and retailers that coordinate these supply chains."[131] Similarly, Dahan, Lerner, and Milman-Sivan, note that, "CSR points to [multinational corporations] as the primary agents who bear remedial responsibility for workers' rights within their production chains." [132] Jeff Vogt pointed to root cause issues in relation to Bangladesh's garment sector specifically:

> Some of the problems we see in Bangladesh are the direct result of the sourcing practices of garment brands, which demand orders be filled quickly and at the lowest possible price. The thin margins put tremendous pressure on manufacturing companies in Bangladesh to cut costs, leading to extremely low and at times unpaid wages and utter neglect for health and safety. The fast turn-around leads to excessive hours of work, with overtime typically unpaid. The situation is even worse at the level of subcontractors. The brands of course know this but have not changed their practices, nor have taken serious steps, until now, to address the safety issues. The garment industry needs to re-think its model.[133]

In a similar vein, an Apple executive explained: "You can set all the rules you want, but they're meaningless if you don't give suppliers enough profit to treat workers well…. If you squeeze margins you're forcing them to cut safety."[134]

The plaintiffs relied on a root cause analysis in arguing that Loblaws played a direct role in creating the risks at Rana Plaza, and that therefore their case was not based, or not completely based, on nonfeasance. They argued that the prices Loblaws paid to New Wave, "were so low that there was a reasonable risk that the subcontractors would be motivated to use substandard and unsafe facilities", and that Loblaws "knew or ought to have known about this increased risk".[135] They pointed to economic pressures on New Wave produced by the tight delivery

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[131] Anner, Bair, and Blasi, supra note 10 at 3. See also: R. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in the Global Economy* (Cambridge U. Press, 2013)
[132] Y. Dahan, H. Lerner, & F. Milman-Sivan, "Global Justice, Labor Standards, and Responsibility" (2011), 12 Theor. Inquiries in Law 439 at 461.
[133] J. Vogt, "Bangladesh and the Labour Law": https://www.ituc-csi.org/bangladesh-and-the-labour-law?lang=fr
[134] Cited in Fisk, *supra* note 10 at 7.
[135] Plaintiffs' Fourth Amended Statement of Claim, para. 198.

deadlines imposed by Loblaws and harsh penalties for failure to meet them. At the time of the Rana Plaza collapse, New Wave was "facing imminent delivery deadlines imposed by [Loblaws] to produce and deliver 24,000 pieces of boys pants" and missed deadlines could lead to lost orders, loss of "guaranteed payment for the shipment by the issuing financial institution of the Letter of Credit which provided money to purchase the raw materials to manufacture the garment shipment", and high shipping costs to ensure on time delivery.[136]

The plaintiffs argued that "these stringent deadlines imposed by Loblaws and the corresponding serious consequences of missing the deadline, effectively forced New Wave workers back into the building into unsafe and life-threatening working conditions."[137] In the plaintiffs' version of the story, the key question was not who is responsible for the collapse of Rana Plaza, but why were so many New Wave employees in the building when it fell, especially given that there had been clear and explicit warnings that the building was structurally unsafe. The answer, the plaintiffs' pleaded, was that New Wave management felt compelled to meet deadlines imposed by Loblaws.

The plaintiffs' argument that Loblaws had a responsibility to protect New Wave workers and that its actions contributed directly to the harms they suffered was consistent with positions long-advanced in CSR and business ethics literature. Scholars have argued for approaches to assigning responsibility for harm to workers in global supply chains that appreciate the institutional and economic forces that compel suppliers to take risks and cut corners on worker safety. Their proposals vary in their details, but share in common an awareness that it is wrong to assign responsibility solely to factory owners and local governments without consideration of the broader institutional, economic restraints in which those actors function in the global economy. As Iris Young observes, while factory owners and host governments should be held liable for their role in the creation and subsistence of oppressive working conditions, "when these agents claim that they operate under constraints beyond their control that give them few options to operate factories differently…there is some basis for their excuses."[138]

Kate Macdonald argues for a framework she labelled "spheres of responsibility" to address harm caused through the decisions of multiple actors in complex networks such as supply chains. This framework would recognize that harm in a network is often caused by actions of multiple actors and therefore we require principles to disaggregate responsibility among those actors according to the extent to which they contributed to the harm. Citing Tuebner's "network share liability" as an example, Macdonald advocates for a "legal concept of distributed liability applicable in contexts where multiple businesses

[136] Id. at para. 170.
[137] Ibid. at para. 171
[138] Young, *supra* note 129 at 370.

contribute to harms resulting from the operation of a broader supply chain system".[139] In her framework, firms would have a positive "duty of due diligence" to "avoid participation in wider collective practices from which human rights harms foreseeably result" and to recognize their potential contribution to processes that can result in harm and "take reasonable measures to avoid such sources of harm."[140]

Dahan, Lerner, and Milman-Sivan discuss four principles for allocating responsibility for injustice in global supply chains.[141] The first is 'connectedness', which can arise through physical proximity or community, or through participation in joint activity, such as a global production chain. The second is the "capacity" of actors to alleviate the unjust conditions. In the context of supply chains, lead companies such as Loblaws frequently stand in a position of power to influence positive change through the design of global sourcing models and control over incentives. The third principle is "beneficiary"; an actor is responsible for remedying injustice to the extent that they benefit from that injustice. As Barry notes, MNCs "more than subcontractors or managers of local factories in developing states, benefit from production that is carried out under unjust conditions" because the lion's share of profits go to the lead buyer.[142] The final principle for allocating responsible is 'contribution'. This refers to the extent to which an actor contributes to the unjust conditions by initiating, facilitating, and substantiating it.[143] This last principle looks to root cause analysis.

Young proposes a model of "political responsibility" to assign responsibility for labour abuses within global supply chains. She notes that the "sweatshop activists" who pushed MNCs to adopt CSR programs had in mind a broader understanding of responsibility than the liability model used in tort law.[144] Young argued that responsibility for harm to workers runs deeper than just the factory owners and local government inspectors because of the manner in which MNCs use structural and economic processes to constrain the range of actions available to the factory owners. In particular, focusing on a narrow concept of responsibility as direct liability "tends to restrict responsibility to what individuals themselves do, as opposed to what they fail to prevent"

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[139] K. MacDonald, "Re-thinking 'Spheres of Influence': Business Responsibility for Indirect Harm" (2011), 99 J. Bus. Ethics 549 at 557; G. Tuebner, "Hybrid Laws: Constituionalizing Private Governance Networks" in R. Kagan & K. Winston (eds), *Legality and Community* (California U. Press, 2000)

[140] Macdonald, id.

[141] See e.g. Dahan, Lerner, Milman-Sivan, *supra* note 132. These authors build on a model initially developed by C. Barry, "Global Justice: Aims, Arrangements, and Responsibilities" in *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (T. Erskine ed, 2003), 218. See also D. Miller, *National Responsibility and Global Justice* (Oxford U. Press, 2007), chapter 4; Young, *supra* note 127; Macdonald, *supra* note 137.

[142] Barry, id. at 462.

[143] Id. at 112; Dahan, Lerner, and Milman-Sivan, *supra* note 132 at 463.

[144] Young, *supra* note 131 at 368.

which in turn tends to direct responsibility to those in the most immediate proximity to the harm and away from actors that contribute to risks and harm more remotely.[145]

All of these models of assigning responsibility within global supply chains would find Loblaws responsible in some part for its contribution to the tragic story of Rana Plaza. However, Loblaws' legal position in respect of its responsibility to New Wave workers contrasted sharply with the narrative advanced in its CSR instruments of a company acting proactively to ensure the safety and decent treatment of its supply chain workers. Loblaws' argued in the lawsuit that it had no responsibly to New Wave workers because it did not employ them, it did not promise to monitor the structural integrity of Rana Plaza, it did not cause the building collapse, and in any event, it had no means to control or influence New Wave management at all. We will return to this last point about control below. For now, it is important to note that Loblaws' denied that it had any responsibility to New Wave workers and that it played any role in contributing to the risks New Wave workers faced or the decision of New Wave management to order workers back to work despite clear warnings that the building was in peril.

Justice Perell agreed with Loblaws' legal position. He brushed aside the plaintiffs' argument that Loblaws' was responsible for taking reasonable steps to prevent harm coming to New Wave workers, as well as the argument that Loblaws' actions played a role in that harm. He portrayed Loblaws as an innocent bystander that was not responsible in any manner for the harm and therefore could not be liable for it. To make his point, Justice Perell referred repeatedly to the parable of the Good Samaritan, which he cites in its entirety at the outset of his reasons. In the following passage, Justice Perell makes the point that even though Loblaws may have been aware of risks at Rana Plaza, it would be unfair and unjust to assign responsibility to it on the basis that it took no steps to intervene and protect its supply chain workers:

> 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?[146]

In this restatement of the parable, Loblaws is aware of the dangers threatening workers in its supply chain and of the grave risks faced by workers responsible for delivering its products from Jericho to Jerusalem. Presumably, therefore, those risks are foreseeable. Loblaws adopts CSR

[145] Id. at 373-374.
[146] *Loblaws'* Lawsuit, *supra* note 1 at para. *534.*

standards, although apparently for no particular reason other than to signal that Loblaws cares, since although the workers are making Loblaws' products, Loblaws has no control over the dangerous conditions faced by the workers and no ability to protect them. Loblaws knows of the grave risks faced by the delivery people, but it does nothing to reduce that risk since it is not responsible for the presence of robbers on the road to Jerusalem.

In this modified parable, Justice Perell characterizes the claim against Loblaws as nonfeasance (failing to do more to protect the traveler from a known and foreseeable grave danger while delivering Loblaws' products). The characterization of the case as one of omission only is important because it creates a heavier burden on the plaintiffs to meet than if Loblaws was accused of direct participation in the harm. As noted, the plaintiffs argued that this was not a case of pure malfeasance because Loblaws' decisions and actions contributed directly to the harm. A reworking of the parable that characterizes the plaintiffs' argument might read more like this:

> Imagine 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. Loblaws also knows that the road from Jericho to Jerusalem is fraught with danger; many people have been robbed and killed on this route, for many years. For relatively little cost, Loblaws could hire security to accompany the delivery people, but it chooses not to do so. Loblaws sources from the factory in Jericho because it pays its employees extraordinarily low wages compared to factories elsewhere. These low wages allow Loblaws and other MNCs to pay factory owners a very low price for garments. It helps too that the Jericho government does not effectively enforce its laws, which also keeps prices low. For example, Loblaws is told that that the Jericho factory cannot even produce a business license, and the building where the factory is located was never approved for garment production. Loblaws knows that the Jericho factory violates laws and some of Loblaws' own CSR rules.
>
> Loblaws orders thousands of garments from the Jericho factory with very detailed specifications and it demands that the factory meet Loblaws' strict delivery deadlines. If those deadlines are not met, Loblaws might stop using the factory and for a variety of other reasons, the feasibility of the Jericho factory would be threatened. Although the factory owner has been warned that there is a particularly high risk of robbery one day, he nevertheless orders his employee to make the journey to Jerusalem because he cannot risk missing Loblaws' delivery deadline. The employee is killed on route by robbers.

In this telling of the parable, like in Justice Perell's version, Loblaws does not cause the murder of the delivery man. However, nor would it be correct to conclude that Loblaws' actions played no role in the circumstances that led the factory owner to send the worker down the road that day knowing he could be robbed or worse. There is a story that explains how it is that the delivery

man came to harm that day, and Loblaws' business model plays an important role in that story. This is not to say that Loblaws "caused" the death of the delivery man, any more than it caused the collapse of Rana Plaza in the real story. The point is that the Court's characterization of this case as a pure instance of "non-feasance" blurs what in CSR and business ethics more generally is a much more complicated story about responsibility and root causes.

Justice Perell's main reason for relying on the Good Samaritan parable was to demonstrate the difference between a moral duty to help the vulnerable and the narrower legal duty of care recognized in negligence law. However, as Amartya Sen and others have noted, "the main point of the story as told by Jesus is a reasoned rejection of the idea of a fixed neighbourhood".[147] Jesus was not saying that people have a moral duty in the abstract to help everyone in need of assistance. Rather he was responding to the lawyer's question about the scope of neighborhood ("Who is my neighbor?") and responsibility. Amartya Sen makes this point in The Idea of Justice:

> Jesus does not, on this occasion, directly discuss the duty to help others—all others—in need, neighbours or not, but rather raises a classificatory question regarding the definition of one's neighbour. He asks the lawyer with whom he is arguing: 'Who was the wounded man's neighbour?' The lawyer cannot avoid answering, 'The man who helped him'. And that was, of course, Jesus's point exactly. The duty to neighbours is not confined only to those who live next door. In order to understand the force of Jesus's argument, we have to remember that Samaritans did not only live some distance away, but also were typically disliked or despised by the Israelites.
>
> The Samaritan is linked to the wounded Israelite through the event itself: he found the stricken man, saw the need to help, provided that help and was now in a relationship with the injured person. It does not matter whether the Samaritan was moved by charity, or by a 'sense of justice', or by some deeper 'sense of fairness in treating others as equals'. Once he finds himself in this situation, he is in a new 'neighbourhood'.[148]

Sen notes further that the "neighbourhood that is constructed by our relations with distant people is something that has pervasive relevance to the understanding of justice in general, particularly so in the contemporary world" in which we are linked with each other through trade, commerce and many other ties:

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[147] A. Sen, *The Idea of Justice* (Harvard U. Press, 2011), at 171.

[148] *Id.,* at 172. See also J. Waldron, "Who Is My Neighbor? Humanity and Proximity" (2003) 86(3) The Monist 333 at 343: "The Samaritan … was close enough to see that the man lying by the side of the road needed bandages and ointment for his wounds and money for his care and accommodation at the nearest inn. So it is wring to see the 'moral' of the parable as prescribing nothing but a diffuse and universal concern.. [What] it prescribed—and the reason it hangs on to the idea of 'neighbour'—is openness and responsiveness to actual human need in whatever form it confronts us. And what it prohibits is the action of those (like the priest and the Levite) who would come where the man and his need is, and look on him, and then pass by on the other side."

> [No] theory of justice today can ignore the whole world except our own country, and fail to take into account our pervasive neighborhood in the world today, even if attempts to persuade us that it is only our local neighbors we owe any help to overcome injustice. We are increasingly linked not only by our mutual economic, social, and political relations, but also by vaguely shared but far-reaching concerns about injustice and inhumanity that challenge our world...[149]

Sen is here developing a broader theory of justice than that with which we are concerned, but his comments inform our discussion of responsibility in CSR. CSR proselytizes a theory of justice that recognizes an expanded scope of 'neighborhood'. It announces a company's intention to treat its neighborhood as encompassing not just its own direct community (employees, shareholders, home nation), but also an extended neighborhood that includes people very far away, such as workers employed by third party contractors, whose life could be improved by the company's actions.

When the parable is perceived as a lesson on an expanded idea of responsibility and neighborhood, it becomes particularly salient to our discussion of CSR and the Loblaws' case. The Samaritan was a foreigner who finds himself in a position to help or not help an injured Israelite. There was no expectation on the part of the injured man that a Samaritan, of all people, would stop to help him. The Samaritan did not cause the man's injuries or participation in the creation of risks associated with walking from Jerusalem to Jericho. Yet the Samaritan did not defer to others who have a closer relationship to the injured man, including priests, Levites, or other locals, but rather he found himself in proximity and in a position to help a vulnerable man and, in sharp contrast to the priest and Levitte who turned and crossed the road, he acted.

As Jeremy Waldron has argued, understanding the good Samaritan parable as "an instance of focused concern for a particular person in a particular place…helps us think less abstractly about the issues of acts and omissions."[150] The priest and Levite may have been going about their business at the time the man was robbed, and therefore played no direct role in causing the harm, yet once they came upon the man, "their not helping is an intentional doing: a decision to cross the road, a choice to go out of their way to avoid the predicament".[151] The vision espoused by CSR is to cast the corporation in the role of the Samaritan.[152] A corporation that is a 'Good Samaritan' accepts responsibility for vulnerable people who are within the realm of its extended neighborhood, and does not turn a blind eye to obvious risks to those people when it is in a position to help.

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[149] Sen, id. at 173.
[150] Waldron, *supra* note 148 at 343.
[151] Id.
[152] G. Hastings, "CSR: The Parable of the Bad Samaritan" (2016), 22(4) Social Marketing Quarterly 280

However, the facts pleaded by the plaintiffs, which were assumed to be true for the purposes of the motion, described Loblaws doing just that. They described how Loblaws knew of the risks of building collapse when garment factories are put in multistory buildings in Bangladesh, and yet it ignored the fact that New Wave could not produce a business license, and it missed or ignored that Rana Plaza was built on a waterway and was not approved to house garment factories and that New Wave was operating on illegally constructed upper story additions to what was designed to be an office and retail building. Loblaws also ignored 30 violations of its own Supplier Code by New Wave. While through its CSR program, Loblaws cast itself in the role of a Good Samaritan, through its actions at Rana Plaza it played the role of the Levite and priest; it ignored obvious risks and foreseeable harm faced by its vulnerable supply chain workers and turned away.

Justice Perell responded to this line of argument by reiterating that negligence law, as developed in Lord Atkin's famous dicta in Donoghue v. Stevenson, does not condemn the Levite and priest for crossing the road and refusing to help the injured traveler.[153] The fact that Loblaws' CSR program contemplates a "moral duty" to the company's supply chain workers is irrelevant to the legal question of whether a duty of care exists in negligence law.[154] Justice Perell cited the famous words of Lord Atkin in Donoghue v. Stevenson, that "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."[155] In other words, a company can fail miserably to live up to its CSR promises without running afoul of a legal duty of care; it can market itself as being a Good Samaritan even when it acts like the Levite.

The difficulty with Justice Perell's approach in the Loblaws decision is not that he makes this long-standing distinction between a moral duty and a legal duty of care. He could have ruled that Loblaws did not have a legal duty of care to New Wave workers and left it at that. He could have ruled that while Loblaws' CSR program was clearly deficient, that deficiency did not present as a legal issue because that program is not intended to have any legal significance. However, Justice Perell elected instead to praise Loblaws for its CSR program which, as noted, the pleadings disclosed as being clearly deficient and of a 'window-dressing' variety as it was applied at Rana Plaza. In taking this step, Justice Perell crossed a disciplinary boundary from legal reasoning and into the world of CSR, where the claim that a company that has adopted a code of conduct has no responsibility to take act with due diligence to protect supply chain workers from foreseeable harm is nonsensical and runs counter the entire purported purpose of adopting a CSR program in the first place.

B. Control

[153] *Donoghue v. Stevenson,* [1932] AC 562
[154] *Loblaws* Decision, *supra* note 1 at 525.
[155] *Donoghue*, *supra* note 153 at 580, cited in the *Loblaws'* Decision, id. at para. 524.

The same can be said of the Court's approach to the issue of control in the Loblaws' decision. Early in his reasons, Justice Perell notes that the plaintiff's case depended on demonstrating that Loblaws' had control over the behaviour of its suppliers, Pearl and New Wave:

> …it is a critical part of the Plaintiff's and putative Class Members' claims, and an essential ingredient to establishing a duty of care, that Loblaws … 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.[156]

The idea of control is contested in the decision in ways that emphasize important differences in legal and CSR logic.

The plaintiffs' version of control aligned with that commonly depicted in CSR discourse. In this version, Loblaws possessed economic power to exert influence and control over suppliers down through its global supply chain. As a large and long-standing customer of New Wave, Loblaws stood in a position of influence over New Wave's behaviour.[157] This power derived from Loblaws' Supplier Code and the Supplier Agreement between Loblaws and Pearl, which incorporated the Supplier Code, and from Loblaws positon at the head of the supply chain. The Supplier Agreement and Code together required that suppliers (including subcontractors like New Wave) comply with a set of standards imposed by Loblaws, including maintaining a "safe workplace" and complying with local laws, and permitted Loblaws to monitor Code compliance, to cancel orders in response to violations, and to take "appropriate remedial action in the event a supplier violated the Code."[158]

The range of "remedial action" available to Loblaws is not expressly defined in the Supplier Code, but in the common vernacular of CSR, the range of remedial actions available to a buyer are well known, as explained by Herman:

> Faced with a monitoring report revealing a supplier's noncompliance, a [corporation] has essentially three options: discontinue its relationship with the supplier, require the supplier to take remedial action, or do nothing.[159]

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[156] *Id.* at para. 77. See also para. 76: "Control is a critical ingredient of the legal theory of the plaintiffs .. claims against the Defendants."

[157] J. Esbenshade, "Corporate Social Responsibility: Moving from Checklist Monitoring to Contractual Obligation?" in Achieving Workers Rights, *supra* note 23, 51 at 63, noting that brands have greater influence when they have longer term relationships with contractors, account for a higher percentage of output, and order regularly; S. Barrientos & S. Smith, "Do Workers Benefit From Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems" (2007), 28 Third World Quarterly 713; M. Baker, "Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise" (2001) 20 Wis. Int'l. L.J. 89

[158] Loblaw Supplier Code, *supra* note 2.

[159] A. Herman, "Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality" (2012) 52 Va. J. Int'l L. 445 at 468. Also: R. Ross, "The Twilights of CSR: Life and Death Illuminated by Fire" in *Achieving Workers' Rights, supra* note 23, 70 at 74.

The Court and Loblaws acknowledged that option one was available to Loblaws; it could have discontinued the supplier relationship with Pearl or New Wave in response to a single or repeated violations of the law and Loblaws' Supplier Code. The latter option—do nothing—was obviously available and, indeed, this was the option Loblaws chose when Veritas reported 30 violations of its Code in the two years preceding the Rana Plaza collapse.

The possibility that Loblaws could have exercised the second option, demanding remedial action to bring the factory into compliance prior to outright cancellation of all orders, is virtually ignored in the reasons. However, this is the response most commonly advocated for in the CSR world. Obviously, CSR advocates reject the 'do nothing' option exercised by Loblaws, since the entire point of CSR is to demonstrate that corporate buyers can 'do something' to improve working conditions in their supply chain. The practice of immediately cancelling orders upon learning of code or legal violations, sometimes referred to in CSR literature as "comply or die", is often criticized for being too blunt an instrument and counterproductive to the ultimate goal of protecting workers and improving supply chain labour practices.[160] It can result in workers at supplier factories losing their jobs as a consequence of cancelled orders whenever their employer violates a single code provision.[161] Corporations that have cancelled orders immediately upon being advised of labour violations have been condemned by labour activists and NGOS.

For example, in 2002, Canadian retailer Hudson's Bay Company (HBC) was named 'Sweatshop Retailer of the Year' by the NGO Maquila Solidarity Network when it cancelled orders from a Lesotho supplier found to have violated local labour laws and the HBC supplier code.[162] MSN wanted HBC to continue sourcing from the factory and to give the owners an opportunity and support to fix the problems and bring the factory into compliance. This is what is meant by 'remediation'. Remediation is not the same thing as discontinuance/cancellation of orders. It involves the sourcing corporation adopting a corrective action plan that explains what steps are required to bring the supplier into compliance within a certain time frame.[163]

The theory behind remediation is that suppliers will respond favorably to the opportunity to make changes if there is a commitment from the sourcing corporation to preserve orders during the corrective stage.[164] Many companies have adopted a "three strikes policy", or some variation

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[160] I. Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chains* (Geneva, ILO 204) at 215: "The 'comply or die' approach is the idea that factories will be eliminated from a supply chain if they fail to meet code standards during even a single inspection."
[161] Herman, *supra* note 159 at 468.
[162] See discussion in D. Doorey, "In Defense of Transnational Domestic Labor Regulation" (2010) 43(4) Vanderbilt J. Trans'l L. 953 at 985-986
[163] Mamic, *supra* note 160 at 217.
[164] See e.g. D. Teather, "Gap Admits to Child Labour Violations in Outsource Factories" *The Guardian* (13 May 2014): https://www.theguardian.com/business/2004/may/13/7, describing how The Gap was applauded for publicly reporting that it had discovered "widespread" violations of its Code of Conduct at supplier factories around the world. A Gap official explained that when they discovered problems, rather than cancel orders outright, the

of it, which gives suppliers an opportunity to correct problems before orders are cancelled.[165] The Bangladesh Accord, which Loblaws signed soon after the Rana Plaza collapse, establishes extensive remediation requirements in the event of code violations and requires corporations to help fund the remediation and to commit to suppliers for at least two years.[166] As Herman notes, "if improving labor standards is the goal of codes, requiring remedial action would be the ideal [corporation] response."[167]

Both option one on Herman's list (discontinuing orders) and option two (remediation to produce compliance) rely upon the same source of economic power, as Mamic explains:

> While a balanced approach is necessary to avoid the problems of a strict 'comply or die' approach, the fundamental power of buyers is their ability to eliminate suppliers from the global supply chain. Under certain circumstances, for instance where factories make no progress over time towards meeting acceptable labour practices, the elimination of the supplier must go ahead if codes are to have any real force and [corporations] are to demonstrate their genuine commitment to their code.[168] [emphasis added]

In arguing that large buyers like Loblaws possess de facto economic power to influence and control supplier behaviour, the plaintiffs coopted a fundamental theme found in CSR discourse. Corporations lack de jure power to regulate supplier behaviour, and therefore whatever control they do possess over their suppliers must derive from economic power relations residing in the buyer-supplier exchange.[169] Corporations and CSR advocates have long asserted that corporate self-regulation of supply chain labour practices is possible precisely because suppliers are motivated to comply with codes in order to attract new and more orders, and to preserve existing orders.

This is the "carrot and stick of making or not making purchase orders" that Justice Perell acknowledged to be the source of Loblaws' control over New Wave.[170] Provided that suppliers perceive the threat to cancel orders for code non-compliance as real, CSR theory predicts that a properly monitored and enforced code will incentivize and steer suppliers towards compliance. If the stick and carrot effects are not perceived by suppliers as real—because the buying corporation does not monitor code compliance or does not effectively remedy code violations, or because suppliers lack the capacity to comply or do not care whether or not they comply with a

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company would usually "work with management to try and resolve them as quickly as possible. We will stay with a manufacturer as long as we believe it is committed to making ongoing improvements."

[165] Revak, *supra* note 10 at 1653.

[166] Accord on Fire and Building Safety in Bangladesh: http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf ; Anner, Bair, Blasi, *supra* note 10 at 27-30.

[167] Herman, *supra* note 159 at 468.

[168] Mamic, *supra* note 160 at 217.

[169] See e.g. Haar & Keune, *supra* note 11.

[170] *Loblaws* Decision, supra note 1 at para. 49.

code—then this source of power evaporates and so too does the sole source of control upon which all of CSR relies. Therefore, to concede that large buyers lack any measure of control over how suppliers treat workers is to concede that which CSR critics have long alleged: that codes of conduct are at best an exercise in wishful thinking, or at worst, a public relations sham used by corporations to deflect criticism and government regulation, mislead consumers, and protect corporations from reputational and, perhaps, legal liability.[171]

Yet Loblaws made precisely this admission in its defence. Loblaws acknowledged that it had authority to cancel orders and require remediation of violations of its Supplier Code, but it claimed that this right conferred upon it no control whatsoever to influence its supplier New Wave in Rana Plaza. Loblaws argued in its factum:

> The issue of control is important in this case, because the agreement between the Loblaw Defendants and Pearl Global…only gives the Loblaws Defendants the right to rescind their orders if Pearl Global does not comply with the CSRs. It does not purport to give the Loblaws Defendants any right to control the actions of New Wave, which is not even a party to the agreement…[172] [emphasis added]

Loblaws argued that it had, "no power to control New Wave's operations in any way"[173], that while its CSR instruments "permitted Loblaws to perform site inspections of their suppliers' factories" they "did not require it to do so", and that it "never undertook to audit its suppliers."[174] Loblaws also argued that while its CSR instruments permitted Loblaws to cancel orders and to "take remedial action" if a supplier (including New Wave) violated its Supplier Code, Loblaws had no obligation to exercise that discretion.[175]

We can see what Loblaws has done here. It reverted to a formalistic, technical legal interpretation of control. Relying on contract privity, it argued that its contractual right to cancel orders from Pearl did not translate into any de facto control over the subcontractor New Wave. The image of economic power and control promoted in Loblaws' CSR documents and found in CSR nomenclature is dismissed in the name of expediency and legal formality in order to defend against the plaintiff's claim that Loblaw could have influenced New Wave to create a safer work environment, but failed to do so. We are left with the spectacle of Canada's largest retailer conceding that it was powerless to protect workers in its supply chain from even the the smallest

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[171] Locke, *supra* note 131at 5; Ross, *supra* note159; P. Fleming & M. Jones, *The End of CSR: Crisis and Critique* (Sage Publications, 2013), at 87; Roberts, *supra* note 11 at 250: "CSR is cheap and easy; a sort of prosthesis, readily attached to the corporate body, that repairs its appearance but in no way changes its actual conduct"; B. Sheehy, "Understanding CSR: An Empirical Study of Private Regulation" (2012), 38 Monash U. L. Rev. 103 at 114-115; Wells, *supra* note 11.
[172] *Loblaws* Decision, *supra* note 1 at para. 418.
[173] Factum of Loblaw Respondents, Court of Appeal for Ontario, Court of Appeal File No. C64146, at 6.
[174] Id. at 3.
[175] Id.at 3-4.

of safety violations, let alone the single greatest industrial disaster in history. Given the context of the lawsuit, this admission is perhaps not surprising. Indeed, it is consistent with the widely held view that the Rana Plaza disaster demonstrated the futility of self-regulating CSR as a project.[176]

Justice Perell agreed with Loblaws' argument that it was powerless to influence working conditions at New Wave.[177] This was the case even though Loblaws was a major customer of New Wave. Nor did Perell J. believe that workers in Loblaws' supply chain had any expectation that the existence of Loblaws' Supplier Code matters to their working conditions one way or another.[178] Justice Perell's opinion on the question of whether Loblaws could control the practices of subcontractors like New Wave is captured nicely in the following quotation: "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."[179]

This is a damning indictment of Loblaw's CSR program indeed. In this short passage, Justice Perell lays bare the hypocrisy of Loblaw's CSR program while he brushes aside the fundamental claim of CSR advocates (and Loblaws' CSR department itself) that corporate codes and remediation initiatives play an important role in improving working conditions down through supply chains. Given his finding that any attempt to influence New Wave would have been futile given Loblaws' lack of control, it is not surprising that Justice Perell glosses over Loblaws' failure to take any steps to remedy the 30 violations of its Supplier Code in 2011-2012.[180] The fact that Loblaws ignored serious violations of its Code is inconsequential to the decision, because Loblaws had no responsibility to do anything and, in any event, it had no control over New Wave so any action by Loblaws would have been futile anyways.

C. Window-Dressing CSR as Virtue

If Loblaws had no control over its suppliers' behaviour, as Loblaws argued; if Loblaws had no responsibility or duty to take steps to reduce risks workers face in its supply chain; if Loblaws took no steps to remedy violations of its Supplier Code; if workers in Loblaws' supply chain expected no benefit to come from Loblaws' CSR program and were not even aware of it; if ultimately Loblaws could "do nothing to change the working conditions" at New Wave factories, as

[176] See e.g. N. Lichtenstein, "The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime" in Achieving Workers' Rights, *supra* note 23, 95 at 109

[177] *Loblaws'* Decision, *supra* note 1 at para. 532.

[178] *Id.* at para. 437-438: "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."

[179] Id. at 532. See also at para. 435: "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."

[180] Id. at para. 68: "The remediation of the deficiencies noted in the social audits was not followed up on by either Loblaws or Veritas".

Loblaw's lawyers argued and the Court agreed, what then was the purpose and value of the program? Loblaws' CSR program was intended to convey publicly that the company accepted responsibility to protect the safety of its supply chain workers, including from risk caused by third parties, and that it had the means to do so. But Loblaws apparently knew that it could not make good on those CSR promises. Supplier Code violations were met with indifference.

Loblaws was engaged in window-dressing CSR, at least in relation to its supplier New Wave at Rana Plaza. It was not alone. As Lichtenstein notes, "…in Bangladesh, [corporate codes of conduct] had proven utterly ineffective, little more than public relations. … the vast majority of fires, as well as the Rana Plaza collapse, had taken place in a factory recently inspected and approved under a CSR code of conduct."[181] However, Justice Perell does not perceive Loblaws' CSR program as a failure at Rana Plaza. Rather he goes out of his way to commend Loblaws for its good deeds. The sentiment that the mere adoption of a CSR program, without any effective enforcement or remediation, is laudable and deserving of judicial encouragement appears at various points in the decision.

It appears in the Court's discussion of policy concerns that weigh against recognizing a duty of care in the Caporo test applied in English negligence law. Justice Perell explains that Loblaws should be applauded for "voluntarily" promulgated ethical purchasing practices, which he describes as "a good thing".[182] The theme is repeated in the discussion of the Anns test for foreseeability: "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."[183] Later, Perell J. notes that it "hardly seems fair that Loblaws, who did something by promulgating CSR standards" should be liable for not doing more, such as failing to mandate a broader audit.[184]

In these passages, Justice Perell presents 'window-dressing CSR' as virtuous and asserts that the law should develop in a manner that encourages companies to follow Loblaws' CSR leadership. Thus, in explaining why the plaintiffs' negligence action was "certain to fail", Justice Perell unnecessarily crosses disciplinary boundaries, moving from negligence law into the domain of CSR. Once he enters the world of CSR, he stumbles. By praising Loblaws for merely adopting rather than enforcing and remedying violations of CSR instruments, Justice Perell glamorizes the early generations of labour codes that long ago were discredited. Corporate codes targeting global supply chains emerged in the early 1990s as a corporate risk management response to a rash of negative publicity that had exposed abusive working conditions in factories supplying

[181] Lichtenstein, *supra* note 176 at 109.
[182] *Loblaws* Decision, *supra* note 2. at para. 456.
[183] *Id.* at para. 525.
[184] Id. at para. 533.

major western brands.[185] These early codes used vague and aspirational language, and rarely required monitoring or public reporting on the results of audits.[186] This 'first generation' of codes is noteworthy today only because, through the codes, corporations finally admitted responsibility for working conditions in the third-party factories where their products were made.[187]

The emergence of corporate 'self' regulation was met with criticism and suspicion by the media, academic commentators, the labour movement, and civil society organizations already engaged in the struggle to eliminate sweat shops.[188] Critics argued that codes were a corporate public relations ploy intended to dupe consumers into believing that effective steps were being taken by corporations to ensure their products were made under fair, safe, and decent working conditions, while in practice little or nothing was being done.[189] Early evidence confirmed these suspicions, as stories emerged of sweatshop conditions and child labour being used in the production of goods for companies that already had adopted impressive sounding codes.[190] Professor Lance Compa argued that the "first generation" of corporate codes "collapsed because of an inherent lack of credibility in corporate self-regulation."[191]

A second generation of codes was emerging by the late 1990s that introduced internal monitoring procedures and early forms of public reporting of audit results.[192] When critics dismissed self-monitoring, some corporations began to use external auditors, such as accounting firms with little or no labour standards training and a financial incentive not to offend the corporations paying their bills. Unsurprisingly, these auditors were criticized for their lack of arms-length distance from their corporate clients, and their reports were dismissed as misleading propaganda.[193] Some corporations then adopted third-party professional social auditors, such as Veritas, and auditing services offered by multi-stakeholder organizations such as the Workers' Rights Consortium, Social Accountability International, and WRAP, the industry-friendly monitoring organization that had declined to certify Rana Plaza before the building collapsed.

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[185] L. Compa & T. Hinchcliffe-Darricarrere, "Private Labor Rights Enforcement through Corporate Codes of Conduct" (1995), 33 Colum. J. Transnational L. 663; R. Jenkins, "Political Economy of Codes of Conduct" in R. Jenkins et al (eds), *Corporate Responsibility and Labour Rights* (London: Earthscan, 2002), 13; J. Esbenshade. "A Review of Private Regulation: Codes and Monitoring in the Apparel Industry" (2012) Sociology Compass 541 at 549; H. Arthurs, "Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law" in B. Bercusson & C. Estlund, eds, *Regulating Labour in the Wake of Globalization* (2008), 19

[186] A. Herman, "Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality" (2012) 52 Va. J. Int'l L. 445; Fung, A., O'Rourke, D., & Sabel, C., "Realizing Labor Standards" in A. Fung, D. O'Rourke, & C. Sabel (eds), *Can We Put an End to Sweatshops?* (Boston: Beacon Press, 2001), 3.

[187] Nova & Wegemer, *supra* note 23 at 22.

[188] Baker, *supra* note 157; R. Toftoy, "Now Playing: Corporate Codes of Conduct in the Global Theatre: Is Nike Just Doing It?" (1998) 15 Ariz. J. Int'l & Comp. L. 905

[189] Arthurs, supra note 184 at 38

[190] O'Rourke, *supra* note 11; Wells, *supra* note 11.

[191] L. Compa, "Trade Unions, NGOS, and Corporate Codes of Conduct" (2004) 14(1) Development in Practice 210 at 211.

[192] Arthurs, supra note 184; Herman, *supra* note 159 at 455.

[193] See e.g. D. O'Rourke, *supra* note 11; Wells, *supra* note 11; Herman, *id.* at 456

However, despite great attention and expense devoted to supplier codes, monitoring, and reporting, evidence still showed that absent effective remediation and enforcement, codes did not improve working conditions in supplier factories. Studies in the 2000s found that code adoption and monitoring alone had no significant effect on working conditions, as summarized by Wells:

> A recent MIT analysis of data from over 900 Nike apparel supply factories in 51 countries concludes that monitoring 'has no significant impact on the working conditions of these factories' (Locke, 2005). Richard Appelbaum, a sociologist specializing in the garment industry, reports there is 'no evidence, even in the college apparel sector, that the [monitoring] effort has made a difference' (Kauffman and Chedekel, 2004). And a recent study of monitoring in about 40 factories in eight countries found that 'with few exceptions, workers do not see real improvements in their situation even when regular auditing takes place'.[194]

These studies demonstrated that corporate codes, even if monitored, are of limited value if the goal is to protect workers rather than merely cast the corporation as a good corporate citizen. For codes and CSR programs to benefit workers, there must be a commitment to remediation of violations and enforcement. This commitment was wholly lacking in the evidence presented to the Court in the Loblaws' Decision.

Conclusion

Reasonable lawyers can debate whether the negligence lawsuit examined in this paper should have been dismissed in a preliminary motion on the basis that it was plain and obvious that the action was certain to fail. As described above, the law involved was wide-ranging and complex. However, by any reasonable standard of assessment, Loblaws' CSR program failed entirely to protect workers making garments for its Joe Fresh line when Rana Plaza collapsed. Even Loblaws' Chief Executive acknowledged as much. Yet the shortcomings of Loblaws' CSR program are given only passing reference in the reasons. The stronger message conveyed by the Court is that Loblaws' deserves praise for its CSR efforts and that courts should be careful not to discourage companies from adopting CSR programs like Loblaws had done. The lack of emphasis on the shortcomings of Loblaws' CSR efforts at Rana Plaza might be explained by Justice Perell's belief that CSR programs should shield corporations from liability, rather than create obligations to act with due diligence to implement CSR-related promises.

Critics of CSR and corporate codes have long argued that companies adopt codes, "not to protect workers, but to limit legal liability of global brands and prevent damage to their

[194] Wells, *supra* note 11 at 65. R. Locke, F. Qin, & A. Brause, "Does Monitoring Improve Labor Standards? Lessons from Nike" (2007), 61 Indus. & Lab. Rel. Rev 3

reputation".[195] Justice Perell appears to agree that the purpose, or at least an important purpose, for adopting a CSR program is to "insulate a business from liability" that could arise from sourcing from high risk factories. This sentiment is stated most clearly in the following enlightening sentence from late in his reasons:

> 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.[196] [emphasis added]

If adopting a CSR program does not insulate a company from liability if harm comes to a suppliers' workers, Perell J. wonders, then what would be the point of adopting one?

There is an obvious counter position to this line of reasoning. It is that the purpose of a CSR program should not be to insulate business from liability, but to improve protections for supply chain workers. This is after all what most CSR programs claim as their purpose. If we perceive CSR in this manner, then the argument that courts should recognize a duty of care on companies to act with due diligence to adhere to those standards to which they have publicly committed makes sense. However, Justice Perell is more concerned that recognizing a duty of care would result in companies like Loblaws that promulgate CSR standards being unfairly punished while companies without CSR codes would avoid liability. This is a fair point, however it can be taken only so far.

At present, virtually every corporation that sources from factories in developing countries claims that they are guided by CSR considerations. Many of these companies do nothing at all to put that promise into practice. By recognizing a duty on companies to take reasonable care to police their CSR promises, courts could: (1) help separate companies engaged in window-dressing CSR from those engaged in genuine efforts to enforce CSR standards; and (2) cause corporations to be more honest in their CSR-related claims. Some companies presently engaged in window-dressing CSR might remove their CSR documents from their websites for fear of attracting liability, others might up their CSR game by devoting more resources to compliance and remediation. Arguably, either outcome is an improvement over a system in which companies pass themselves off as actively engaged in protecting supply chain workers when in practice they fail to police and remedy infractions. Some companies might stop sourcing from high risk factories altogether.

[195] See e.g. Locke, Qin, & Brause, *id.* at 5.
[196] *Id.* at para. 456

However, if that drives the worst sweatshops out of the market or encourages factory owners to improve conditions, this too would be an improvement.

Therefore, there are strong policy reasons to support courts recognizing a duty to act with due diligence to enforce CSR promises. The plaintiffs made this point when they argued that recognizing a duty of care would encourage accountability by "Canadian corporations who enjoy substantial profits from holding themselves out as responsible corporate citizens".[197] However, Perell J. gave little weight to this argument. He ruled that encouraging companies to engage in CSR—even of the window-dressing variety—is a more pressing objective than discouraging companies from profiting off of empty CSR promises. For those who believe that CSR still holds promise as a project to improve the lives of vulnerable workers around the world, this reasoning is a step backwards. It is unhelpful for a Canadian court to praise Loblaws' CSR program in the absence of any evidence of a commitment to enforce the standards and to work with suppliers to remediate Code violations. By doing so, the Court reaffirmed all of the negative perceptions about the vacuousness of CSR.

The Court veered off course the moment it left the strict confines of legal reasoning in its analysis of negligence law and entered into an evaluation of the expediency of CSR as a worthwhile project. The Court's conclusion that the mere adoption of a CSR program without follow up enforcement and remediation is valuable to supply chain workers is highly controversial and unsupported by evidence before the Court. This is a relatively minor point in the full context of a decision running almost 700 paragraphs in length and spanning the laws of Bangladesh, India, Britain, and Canada. It remains to be seen what appellant courts think of the Justice Perell's decision to dismiss the lawsuit by way of preliminary motion. However, the Court's unwarranted and unhelpful commentary on the usefulness of empty CSR promises is a step too far that lacks appreciation for the decades long debates about whether a genuine commitment to self-regulation in the form of CSR programs could produce real benefits to the most vulnerable workers in the world. If these debates have produced a consensus on anything, it is that the CSR programs of companies sourcing from Rana Plaza utterly failed to protect workers from a tragic and preventable disaster. It would have been useful for the Court to acknowledge at least this much.

[197] *Id.* at para. 451.