

## FLOWCHART OF THE ONTARIO LAWSUIT

### Does the Ontario Court have Jurisdiction to Hear the Case?

1. **Jurisdiction *Simpliciter*:** **Plaintiff:** Yes, basic application of *Van Breda* “real and substantial connection test” met here. Loblaw's does not argue that presumption of jurisdiction based on that test should be rebutted. **Defendant** argued that test does not apply to ‘absent foreign claimants’ [who have not attorned], relying on *Airia Brands* (2015, OSC). Plaintiff responds that *Airia Brands* is wrong, as affirmed by *Excalibur* (OCA, 2016).
2. Alternatively, Plaintiff claims that plaintiffs have attorned to jurisdiction of court by signing 3,879 Support Form Evidence forms. Defendant argued those forms are invalid because not clear or process not sanctioned by an Ontario court.

### Which Law Applies?

- **Basic Rule:** *lex loci* (where the wrongful activity occurred) ... *Tolofson* (requires ‘contextual analysis’ though, not mechanical application of rule ... may be ‘thorny issues’ warranting exceptions, especially in transnational context)
- Parties agree the harm occurred in Bangladesh, but Plaintiffs argue: (1) the wrongful acts occurred in Ontario; (2) (Experts) Ontario law should apply because Bangladesh law is incapable of proof owing to uncertainty, scarcity, and evolutionary nature of tort and fiduciary law; and (3) the “injustice” exception in *Tolofson* applies (uncertainty of Bangladeshi law would mean Ontario basically making foreign law; Sharia law would require unjust distribution of damages by requiring only half to women; lack of punitive damages in Bangladesh law).

### Is it “plain and obvious” that the action will fail (Rule 21.02)

- High threshold to have case dismissed.

### If Ontario Law Applies ...

- **Plaintiff** argues that Ontario is situs of tort and duty to care is Ontario, where Loblaw's made decision to retain Pearl/New Wave & BV; scope of audits agreed; breach of standard of care (failure to stop orders or to remedy violates of Codes/Law); conducts of conduct drafted and publicized); BV/Loblaw's contract made in Ontario
- On fiduciary duty, enrichment occurred in Ontario; contracts with Pearl made in Ontario and governed by Ontario law
- Fact that claim is novel not grounds to dismiss at motion stage: *Choc v. Hudbay*: not dismissed, possible that duty could be made out
- **Defendants** argued that plain & obvious no duty of care could be made out .. no court anywhere has recognized duty of buyer to employees of contractors .. Also, there are policy arguments against recognizing a new duty of care
- *Anns* test for recognizing a new tort: (1) foreseeability & proximity; (2) policy reasons to reject new duty
- Defendant does not address (1); focused on (2).

### If Bangladesh Law Applies ...

- **Limitation Period:** Is limitation period one year or 6 years? If one, then case is time-barred, except for exceptions (including minors? [*Delaware Lawsuit found it is one year*] [Experts])
- Battling Experts: No Bangladeshi law on point... Court would probably look to British and/or Indian law .. Experts disagree on what the precedent would be.
- **Plaintiff:** Not plain and obvious that a Bangladesh court wouldn't find a duty of care ... law is uncertain, evolving. **Defendants:** Experts claim that no recognized duty of care that would apply here under Bangladeshi law ... nor has any court anywhere recognizes such a duty