



SUPREME COURT OF CANADA

CITATION: 1688782 Ontario Inc. v. Maple Leaf
Foods Inc., 2020 SCC 35

APPEAL HEARD: October 15, 2019
JUDGMENT RENDERED: November 6, 2020
DOCKET: 38187

BETWEEN:

1688782 Ontario Inc.
Appellant

and

**Maple Leaf Foods Inc. and
Maple Leaf Consumer Foods Inc.**
Respondents

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Brown and Martin JJ. (Moldaver, Côté and Rowe JJ.
(paras. 1 to 96) concurring)

DISSENTING REASONS: Karakatsanis J. (Wagner C.J. and Abella and Kasirer JJ.
(paras. 97 to 168) concurring)

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1688782 ONTARIO v. MAPLE LEAF FOODS

1688782 Ontario Inc.

Appellant

v.

**Maple Leaf Foods Inc. and
Maple Leaf Consumer Foods Inc.**

Respondents

Indexed as: 1688782 Ontario Inc. v. Maple Leaf Foods Inc.

2020 SCC 35

File No.: 38187.

2019: October 15; 2020: November 6.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Torts — Negligence — Duty of care — Pure economic loss — Negligent misrepresentation or performance of service — Negligent supply of shoddy goods or structures — Proximity — Listeria outbreak at plant of exclusive meat supplier resulting in recall of meat products used by restaurant chain franchisees and causing

them economic loss — Franchisees not in contractual privity with supplier but bound to purchase meat products exclusively from it through chain of indirect contracts — Whether supplier owed duty of care to franchisees such that economic losses are recoverable in tort.

In 2008, a number of Mr. Sub franchisees were affected by the decision of Maple Leaf to recall meat products that had been processed in one of its factories in which a listeria outbreak had occurred. Following the recall, the franchisees experienced a shortage of product for six to eight weeks. At the time, the relationship between Mr. Sub and Maple Leaf was governed by an exclusive supply agreement pursuant to which Maple Leaf was made the exclusive supplier of ready-to-eat meats served in all Mr. Sub restaurants. To give effect to this arrangement, the franchise agreement between Mr. Sub and its franchisees required them to purchase ready-to-eat meats produced exclusively by Maple Leaf. No contractual relationship ever existed between the franchisees and Maple Leaf, each being linked to the other indirectly through separate contracts with Mr. Sub.

A class action against Maple Leaf on behalf of the franchisees was certified, in which the franchisees claimed to have suffered economic loss and reputational injury due to their association with contaminated meat products and advanced claims in tort law, seeking compensation for lost past and future sales, past and future profits, capital value of the franchises and goodwill. Maple Leaf unsuccessfully brought a motion for summary judgment dismissing these claims. The

motion judge held that Maple Leaf owed the franchisees a duty to supply a product fit for human consumption, and that the contaminated meat products posed a real and substantial danger, so as to ground a duty of care. The Court of Appeal allowed Maple Leaf's appeal, and found that no duty of care was owed to the franchisees. It determined that the motion judge's decision to allow these claims to proceed could not stand in light of the Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, which had been decided following the disposition of the motion for summary judgment.

Held (Wagner C.J. and Abella, Karakatsanis and Kasirer JJ. dissenting):

The appeal should be dismissed.

Per Moldaver, Côté, **Brown**, Rowe and **Martin** JJ.: Maple Leaf does not owe a duty of care to the franchisees in respect of these matters. Though the common law readily imposes liability for negligent interference with and injury to the rights in bodily integrity, mental health and property, it has been slow to accord protection to purely economic interests. Pure economic loss may be recoverable in certain circumstances, but there is no general right in tort protecting against the negligent or intentional infliction of pure economic loss.

Pure economic loss is economic loss that is unconnected to a physical or mental injury to the plaintiff's person, or physical damage to property. It is distinct from consequential economic loss, being economic loss that results from damage to the plaintiff's rights, such as wage losses or costs of care incurred by someone injured. To

recover for any type of negligently caused loss, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right.

The current categories of pure economic loss between private parties are: (1) negligent misrepresentation or performance of a service; (2) negligent supply of shoddy goods or structures; and (3) relational economic loss. The distinguishing feature among each of these categories is that they describe how the loss occurred. However, a duty of care cannot be established by showing that a claim fits within one of these categories, as they are but mere analytical tools. Invoking a category offers no substitute for the necessary examination that must take place into whether the parties were at the time of the loss in a sufficiently proximate relationship. Proximity is and remains the controlling concept.

In *Livent*, cases of negligent misrepresentation and negligent performance of a service were brought into accord with the duty of care framework laid out in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), and later refined in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. Previously, the duty analysis grounded a *prima facie* duty of care on mere foreseeability of injury. *Cooper* signalled a shift from that test by establishing the requirements of both proximity of relationship

and foreseeability of injury. Foreseeability alone was deemed to be insufficient, as a duty arises only where a relationship of proximity obtains. Duty in tort law is a general notion describing a class or type of case, not a particular fact situation. In particular, the inquiry into reasonable foreseeability of injuries asks whether the type of injury to the relevant class of persons could have been foreseen. As such, each component of the *Anns/Cooper* analysis supporting a *prima facie* duty raises questions of law reviewable under the correctness standard.

In cases of negligent misrepresentation or performance of a service, two factors are determinative of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance. The proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose. It is the intended effect of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff entitling it to its pre-reliance circumstance. But that entitlement operates only so far as the undertaking goes. Any reliance on the part of the plaintiff which falls outside of the scope of the undertaking falls outside the scope of the proximate relationship. That is because reliance that exceeds the purpose of the defendant's undertaking is not reasonable, and therefore not foreseeable. In the present case, the undertaking by Maple Leaf to provide ready-to-eat meats fit for human consumption was made to consumers with the purpose of assuring them that their interests were being kept in mind, and not to commercial intermediaries

such as the franchisees. The business interests of the franchisees lie outside the scope and purpose of the undertaking.

The parameters established in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, recognize that recovery for economic loss in cases of negligent supply of shoddy goods or structures is founded upon the defendant's negligent interference with a right to be free from injury to one's person or property. A breach of the duty laid out in *Winnipeg Condominium* exposes the defendant to liability for the cost of averting a real and substantial danger, but not of repairing a defect. The duty is based on the reasonable foreseeability of injury to other persons and property in the community, and the presence of danger is the linchpin of the analysis. Shoddy products, as opposed to dangerous ones, raise different questions which are better channelled through the law of contract. The potential injury to persons or property grounds not only the duty but also one's entitlement to the cost of putting the good or structure back into a non-dangerous state. Allowing recovery exceeding the costs associated with removing the danger goes beyond what is necessary to safeguard the right protected. The *Winnipeg Condominium* liability rule applies to products other than building structures, but in such cases the duty is narrow. What a plaintiff can recover will ultimately be confined by the duty's concern for averting danger, and will be determined by the feasibility of discarding the thing posing a danger. In assessing the possibility of discarding the thing, the plaintiff must show that it is effectively bereft of reasonable options. When applied to goods, such cases will be rare. Here, any danger posed by the supply of ready-to-eat meats could be a danger

only to the ultimate consumer, and not to the franchisees. Further, while the ready-to-eat meats may have posed a real and substantial danger to consumers when they were manufactured, any such danger evaporated when they were recalled and destroyed.

Developments to the law of negligence signify that claims under *Winnipeg Condominium* must now attend to an inquiry into the requisite element of proximity. Proximity informs the foreseeability inquiry and should be considered first, as the considerations that support a finding of proximity also limit the type of injury that may be reasonably foreseen to result from the defendant's negligence. Assessing proximity proceeds in two steps and requires asking whether, in light of the nature of the relationship at issue, the parties are in such a close and direct relationship that it would be just and fair having regard to that relationship to impose a duty of care in law. The court must first determine whether proximity can be made out by reference to an established or analogous category of proximate relationship. At this stage, the particular factors which justified recognizing that particular category should be scrutinized. As between parties to a relationship, some acts or omissions might amount to a breach of duty, while others will not. If the court determines that proximity cannot be based on an established or analogous category, it must then conduct a full proximity analysis. In so doing, all relevant factors present in the relationship must be examined, including expectations, representations, reliance, and the property or other interests involved. Under this step, the fact that the parties could have protected their interests under contract is a crucial consideration. Contractual silence will not automatically foreclose

the imposition of a duty of care, but courts must be careful not to disrupt the allocations of risk reflected in relevant contractual arrangements.

In the present case, proximity cannot be established by reference to a recognized category of proximate relationship, nor by conducting a full proximity analysis. Though the franchise agreement worked a vulnerability upon the franchisees, it did not have the effect of establishing a proximate relationship between them and Maple Leaf. The franchisees were not consumers, but commercial actors whose choice to enter into that arrangement substantially informed the expectations of their relationship with Maple Leaf. As there is no relationship of proximity between Maple Leaf and the franchisees under the *Winnipeg Condominium* rule, there is also no proximity for the purposes of recognizing a novel duty of care.

Per Wagner C.J. and Abella, **Karakatsanis** and Kasirer JJ. (dissenting): There is agreement with the majority that the franchisees' claim does not fall within an existing category of economic loss or an established or analogous relationship of proximity. However, it is just and fair to impose a novel duty of care on Maple Leaf in the circumstances, and the appeal should therefore be allowed.

Historically, the common law did not allow for recovery of losses in negligence that were not consequent to physical injury or property damage. Over the years, however, Canadian courts have repeatedly affirmed that there is no general bar against recovery of economic loss for negligence. As a cause of action, claims

concerning the recovery of economic loss are identical to any other claim in negligence in that the plaintiff must establish a duty, a breach, damage and causation.

The proper approach to assessing whether a duty of care exists is the two-step inquiry established in *Anns* and adjusted in *Cooper*. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises and the court considers whether any residual policy considerations negate that duty at the second stage. Where a case falls within or is analogous to a previously recognized category of proximity, and reasonable foreseeability is also established, then a *prima facie* duty may be found without a full analysis.

While specific types of economic losses have been identified, it is the duty of care and not the category of economic loss that dictates whether economic loss is recoverable in negligence. The existing categories can act as analytical tools, but the scope of allowable economic loss is not limited to them. In cases engaging a novel relationship and requiring a full *Anns/Cooper* analysis, courts should be attentive to the specific circumstances of the case, as the traditional policy concerns may not always arise. The core inquiry is the two-step analysis, responsive to the facts at hand.

In the present case, the franchisees' claim engages novel issues and a different set of policy considerations that should be considered through a novel duty of care analysis. The usual indication of proximity is foreseeability, and this can be a useful starting point. Assessing proximity first may be helpful in cases of negligent misrepresentation, but this will not always be the case for other types of tort claims.

The reasonable foreseeability inquiry requires the court to ask whether the type of injury to the plaintiff, or to a class of persons to which the plaintiff belongs, was reasonably foreseeable to someone in the defendant's position. It was foreseeable that the franchisees would be identified as a public-facing retailer of potentially tainted meats while the meats posed a real danger to public health.

Reasonable foreseeability of harm must be supplemented by proximity. In assessing proximity, the overarching question is whether the parties are in such a close and direct relationship that it would be just and fair having regard to that relationship to impose a duty of care in law. The factors to assess that relationship are diverse and depend on the circumstances of each case, but include the expectations, representations, reliance, and the property or other interests involved. In the present case, there was a proximate relationship between Maple Leaf and the franchisees such that Maple Leaf was under an obligation to be mindful of the franchisees' interests. It was clearly contemplated by the partnership agreement that the franchisees would be using and selling Maple Leaf products, and that they could enter into direct contact with Maple Leaf. Unlike other retailers of Maple Leaf products, the franchisees were bound to use Maple Leaf meats exclusively and were in a business that centred on such meats, placing them in a particularly dependent relationship. Thus, Maple Leaf established a close relationship with the franchisees.

In cases involving pure economic loss, the contractual matrix linking the parties can be an important factor in finding a lack of proximity. When considering

whether a plaintiff was able to contractually protect itself from the types of economic loss claimed, a realistic approach must be taken. An overly formalistic appeal to protection through contract risks failing to take into account the parties' actual circumstances, including their commercial sophistication and bargaining power. In the case at bar, the prospect of the franchisees protecting themselves by contract was illusory, placing them in a particularly dependent and vulnerable relationship with Maple Leaf. Far from negating proximity between Maple Leaf and the franchisees, the contractual matrix strengthens it.

In the context of this close and direct relationship, Maple Leaf was under a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods. Subject to the other requirements of negligence being met, it is fair and just to hold Maple Leaf responsible for the franchisees' direct economic consequences of being associated with unsafe Maple Leaf products while they posed a danger to consumer health. None of the residual policy considerations — that is, the risk of a negative impact on the marketplace by raising the spectre of indeterminate liability for manufacturers or of chilling effects on manufacturers issuing voluntary recalls — are sufficiently persuasive to oust the *prima facie* duty of care on Maple Leaf.

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By Brown and Martin JJ.

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[2007] 3 S.C.R. 129; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Blacklaws v. 470433 Alberta Ltd.*, 2000 ABCA 175, 261 A.R. 28; *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)*, [1947] A.C. 265; *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398; *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935); *Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, 2002 BCCA 324, 169 B.C.A.C. 261; *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Cardwell v. Perthen*, 2007 BCCA 313, 243 B.C.A.C. 135; *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 115; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Kamloops v. Nielson*, [1984] 2 S.C.R. 2.

By Karakatsanis J. (dissenting)

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Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85; *D'Amato v. Badger*, [1996] 2 S.C.R. 1071; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Donoghue v. Stevenson*, [1932] A.C. 562; *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, 2016 ONCA 324, 130 O.R. (3d) 161; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533; *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776; *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74.

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APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Rouleau and Fairburn JJ.A.), 2018 ONCA 407, 140 O.R. (3d) 481, 425 D.L.R. (4th) 674, 49 C.C.L.T. (4th) 28, [2018] O.J. No. 2417 (QL), 2018 CarswellOnt 12558 (WL Can.), setting aside a decision of Leitch J. Appeal dismissed, Wagner C.J. and Abella, Karakatsanis and Kasirer JJ. dissenting.

Earl A. Cherniak, Q.C., Peter W. Kryworuk and Jacob R. W. Damstra, for the appellant.

Elizabeth Bowker, Steven Stieber and Nicola Brankley, for the respondents.

The judgment of Moldaver, Côté, Brown, Rowe and Martin was delivered by

BROWN AND MARTIN JJ. —

I. Introduction

[1] This appeal is brought by 1688782 Ontario Inc., a former franchisee of Mr. Submarine Limited (“Mr. Sub”) and the class representative of 424 other Mr. Sub franchisees (“appellant” or “Mr. Sub franchisees”). The appellant says that class members were affected by the decision of the respondents (collectively, “Maple Leaf Foods”) to recall meat products that had been processed in a Maple Leaf Foods factory in which a listeria outbreak had occurred. Specifically, it says that they experienced a shortage of product for six to eight weeks causing economic loss and reputational injury due to their association with contaminated meat products. By this class proceeding, the appellant advances claims in tort law against Maple Leaf Foods, seeking compensation for lost past and future sales, past and future profits, capital value of the franchises and goodwill.

[2] The question for this Court to decide is whether Maple Leaf Foods (with which neither the appellant nor any other franchisee was in contractual privity, but rather linked indirectly through a chain of contracts) owed Mr. Sub franchisees a duty

of care, enforceable under the Canadian law of negligence. The appellant says that Maple Leaf Foods, as a manufacturer, owed a duty to Mr. Sub franchisees to supply a product fit for human consumption. More specifically, the appellant says that the circumstances of its claim fall within two categories of proximity that have been recognized in respect of two forms of pure economic loss: negligent misrepresentation or performance of a service, and the negligent supply of shoddy goods or structures. Further, the appellant says that the relationship between Maple Leaf Foods and Mr. Sub franchisees is analogous to an established category of proximity that has been previously recognized in the caselaw. Finally, and while it is unclear whether the appellant actually advances a novel duty argument before us, we note that Maple Leaf Foods takes the appellant as having done so, and that both the motion judge and our colleague Karakatsanis J. would recognize a novel duty in this case. In order to take the appellant's claim at its strongest, we therefore proceed on the basis that it also advances such an argument.

[3] Maple Leaf Foods says it owed no duty of care to Mr. Sub franchisees, and brought a motion for summary judgment dismissing these claims.

[4] The appellant successfully resisted summary judgment before the motion judge at the Ontario Superior Court of Justice, but failed before the Court of Appeal for Ontario. In the Court of Appeal's view, the motion judge's decision to allow these claims to proceed could not stand in light of this Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, which had been decided

since the motion judge’s judgment in the appellant’s favour. The Court of Appeal held that this disposed not only of the negligent misrepresentation claim, but also of the claim for negligent supply of dangerous or shoddy goods, since it followed from *Livent* “that the motion judge erred in her duty of care analysis” (2018 ONCA 407, 140 O.R. (3d) 481, at para. 87).

[5] For the reasons that follow, we would dismiss the appeal. Maple Leaf Foods does not owe a duty of care to Mr. Sub franchisees in respect of these matters.

II. Background

[6] As Clarke J. (as he then was) explained in *Cromane Seafoods Ltd. v. Minister for Agriculture*, [2016] IESC 6, [2017] 1 I.R. 119, at para. 66, like “chaos theory” in mathematics, “the true underlying difficulty [in the law of negligence] stems from the fact that we live in a highly interactive world, where each of our fortunes are constantly affected, sometimes trivially, sometimes significantly, by decisions made or actions taken or avoided [by others]”. So it is in this case. As in most modern commercial arrangements of even modest complexity, the parties here operated through a multipartite arrangement comprising a chain of contracts — in this case a contract between Mr. Sub and Mr. Sub franchisees that was typical of franchisor-franchisee relationships, and a contract of supply between Mr. Sub and Maple Leaf Foods. As we explain below, in the context of a claim brought in tort law as opposed to the law of contract, these are significant considerations.

[7] More particularly, at the material time, the relationship between Mr. Sub and its franchisees was governed by the Franchisee Renewal Agreement, dated February 1, 2006 (“franchise agreement”) (A.R., vol. II, p. 89).

[8] The relationship between Mr. Sub and Maple Leaf Foods was governed by an exclusive supply agreement — pursuant to which Maple Leaf Foods was made the exclusive supplier of 14 core Mr. Sub menu items: ready-to-eat (“RTE”) meats served in all Mr. Sub restaurants (“partnership agreement”, signed December 12, 2005, A.R., vol. II, at p. 12). In order to give effect to this exclusive supply arrangement, the franchise agreement between Mr. Sub and its franchisees required them to purchase RTE meats produced exclusively by Maple Leaf Foods (franchise agreement, art. 6.2). This was done *not* by way of direct dealings between Mr. Sub franchisees and Maple Leaf Foods; instead, the franchisees placed an order with a distributor, which would in turn place an order with Maple Leaf Foods. No contractual relationship ever existed between the franchisees and Maple Leaf Foods. Rather, each was linked to the other indirectly, through separate contracts with Mr. Sub.

[9] It is worth noting that, while their franchise agreement with Mr. Sub required Mr. Sub franchisees to purchase RTE meats exclusively from Maple Leaf Foods, the latter was under no obligation by the terms of its contract with Mr. Sub to *supply*. Further, the franchise agreement also provided that the franchisees could not sue Mr. Sub for delays in supply of RTE meats. Nor could they look to alternative

sources of supply without first seeking Mr. Sub's permission (franchise agreement, art. 6.2).

[10] On August 16, 2008, Maple Leaf Foods learned that one of its products had been found to contain listeria. It was required to recall that product, along with another. Several days later, it voluntarily recalled additional products, including two of the RTE meat products used by Mr. Sub franchisees. (These products were immediately destroyed, and it is unknown whether they were actually contaminated.) In early September 2008, Maple Leaf Foods released Mr. Sub from the exclusive supply arrangement. By mid-September 2008, an alternate supplier had been selected.

[11] There is no suggestion of wrongfulness in the decision to issue this voluntary recall. That said, it interrupted an important source of supply to the franchisees, leaving them without those products for a period of six to eight weeks. During that period, the franchisees did not take advantage of the clause in the franchise agreement allowing them to seek Mr. Sub's permission to find a different supplier.

A. *Ontario Superior Court of Justice, No. 60680CP (November 18, 2016), Leitch J.*

[12] The motion judge held that Maple Leaf Foods owed Mr. Sub franchisees a duty to supply a product fit for human consumption. In doing so, she accepted the appellant's argument that she should be guided by decisions in which other courts had recognized this duty, citing *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*,

2004 ABCA 309, 357 A.R. 137, 376599 *Alberta Inc. v. Tanshaw Products Inc.*, 2005 ABQB 300, 379 A.R. 1, and *Country Style Food Services Inc. v. 1304271 Ontario Ltd.* (2005), 200 O.A.C. 172 (S.C.J. reasons, at para. 40 (A.R., vol. I, at p. 54)). Further, she found that the contaminated RTE meats posed a “real and substantial danger”, described by this Court as grounding a duty of care in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (para. 53 (A.R., vol. I, p. 58)). She also concluded that a “special relationship” existed between the appellant and Maple Leaf Foods, grounded on foreseeability of reasonable reliance upon a representation (here, that the RTE meats were fit for human consumption), so as to ground a viable cause of action in negligent misrepresentation (para. 49 (A.R., vol. I, at p. 56)).

[13] In an abundance of caution, however, in adjudicating the accompanying certification motion (2016 ONSC 4233), the motion judge conducted her own duty of care analysis as if this were a novel claim. She recognized that this required her to apply the traditional foreseeability-based test from *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), as refined by this Court in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, so as to give greater prominence to the proximity, or “closeness and directness” of the relationship between the parties — a point which this Court has since confirmed in *Livent*, at paras. 25-31. Doing so led her to conclude the *Anns/Cooper* test was satisfied here. Mr. Sub franchisees’ losses were foreseeable (S.C.J. certification reasons, para. 61), and it was not plain and obvious that their relationship to Maple Leaf Foods was insufficiently proximate: “[the appellant and

other Mr. Sub franchisees are] within a known and readily identifiable category of persons. [Maple Leaf Foods] supplied to [the appellant], an entity it had a close and direct relationship with as an exclusive supplier, a defective product dangerous to public health, knowing that the product would be offered for sale to consumers who could be injured from consuming the product thereby causing economic losses to [the franchisees]” (S.C.J. certification reasons, at para. 70). No policy considerations negated or militated against liability.

B. *Court of Appeal for Ontario, 2018 ONCA 407, 140 O.R. (3d) 481, Sharpe, Rouleau and Fairburn J.J.A.*

[14] The Court of Appeal allowed Maple Leaf Foods’ appeal, and granted it summary judgment. The case authorities relied upon by the motion judge — *Plas-Tex*, *Tanshaw* and *Country Style* — were not truly analogous to the Mr. Sub franchisees’ claims (paras. 49 and 59), and the motion judge erred in finding that the facts in this case fell within a well-established category of duty to supply a product fit for human consumption. It was therefore necessary to review her conclusion under the *Anns/Cooper* framework regarding a novel duty of care (para. 59).

[15] The Court of Appeal noted that the alleged damages are substantially the result of the recall and the consequent publicity, including publicity of the illness and death of people who had eaten tainted meat (albeit not at a Mr. Sub restaurant) (para. 65). To recognize a duty here “would constitute an unwarranted expansion of a duty owed to one class of plaintiffs”, the consumers, and “bootstrap” it so as to “extend

it to the fundamentally different claim advanced by the franchisees” (para. 66). The motion judge’s conclusion regarding negligent misrepresentation is similarly unfounded. In concluding that the franchisees reasonably relied on Maple Leaf Foods’ representation that its meats were safe for human consumption, the motion judge failed to consider the *scope* of the proximate relationship between the parties (para. 80). The purpose of Maple Leaf Foods’s undertaking of responsibility was not to protect the business or reputational interests of the franchisees, but “to ensure that Mr. Sub customers who ate RTE meats would not become ill or die as [a] result of eating the meats” (*ibid.*). Accordingly, the loss suffered by the franchisees was not reasonably foreseeable (para. 84).

[16] Owing to what it saw as the motion judge’s erroneous duty of care analysis, the Court of Appeal did not consider whether the losses were recoverable as a consequence of the negligent supply of a dangerous or shoddy product (para. 87).

III. Analysis

A. *Pure Economic Loss in Negligence Law*

[17] As the lower courts recognized, the claims of the appellant and other Mr. Sub franchisees are for pure economic loss, in the form of lost profits, sales, capital value and goodwill. Pure economic loss is economic loss that is unconnected to a physical or mental injury to the plaintiff’s person, or to physical damage to property (*Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at para. 34;

D'Amato v. Badger, [1996] 2 S.C.R. 1071, at para. 13; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 23). It is distinct, therefore, from *consequential* economic loss, being economic loss that results from damage to the plaintiff's rights, such as wage losses or costs of care incurred by someone physically or mentally injured, or the value of lost production caused by damage to machinery, or lost sales caused by damage to delivery vehicles.

[18] To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right. As Cardozo C.J. explained in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right" (p. 99; see also *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 45; *Livent*, at para. 30; R. Stevens, *Torts and Rights* (2007), at p. 24). It is well established that the law imposes liability for negligent interference with and injury to the rights in bodily integrity, mental health and property (*Saadati*, at para. 23, citing A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252-53). Recovery for injuries to these rights is grounded in the duty of care recognized in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

[19] This explains why the common law has been slow to accord protection to purely economic interests. While this Court has recognized that pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss. For example, economic loss caused by ordinary marketplace competition is not, without something more, actionable in negligence (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31, citing *Mogul Steamship Company v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 (C.A.), at p. 614, aff'd [1892] A.C. 25 (H.L.)). Such loss falls outside the scope of a plaintiff's legal rights — the loss is *damnum absque injuria* and unrecoverable (E. J. Weinrib, “The Disintegration of Duty” (2006), 31 *Adv. Q.* 212, at p. 226; D. Nolan, “Rights, Damage and Loss” (2017), 37 *Oxf. J. Leg. Stud.* 255, at pp. 262-68). Indeed, the essential goal of competition is to attract more business, which may mean taking business away from others. Absent a contractual or statutory entitlement, there is no right to a customer or to the quality of a bargain, let alone to a market share. As Taylor J.A. wrote for the British Columbia Court of Appeal in *Kripps v. Touche Ross & Co.* (1992), 94 D.L.R. (4th) 284, at p. 297:

It seems possible that pure economic loss *simpliciter* accounts for the overwhelming majority of all loss suffered by one person as a foreseeable and proximate result of the acts or omissions of another This must necessarily be so in a free market for goods and services, employment and investment, and the continuing struggle for property, promotion and profit.

[20] Citing the work of Professor Feldthusen (B. Feldthusen, “Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow” (1991), 17 *Can. Bus. L.J.*

356, at pp. 357-58; B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (2nd ed. 1989), at para. 200 (currently in its sixth edition)), this Court has applied a classificatory scheme that identifies four categories of pure economic loss that can arise between private parties (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1049; *Winnipeg Condominium*, at para. 12).¹ In *Livent*, the Court effectively reduced the categories to *three*, by its treatment of two of the previously stated categories — negligent misrepresentation, and negligent performance of a service — as a single kind of pure economic loss. This made sense, because the considerations that inform the proximity analysis are identical for both. In particular, the same two factors — the defendant’s undertaking, and the plaintiff’s reliance — are in such cases determinative of the proximity analysis (para. 30), upon which we will elaborate below.

[21] The current categories of pure economic loss incurred between private parties are, therefore:

- (1) negligent misrepresentation or performance of a service;
- (2) negligent supply of shoddy goods or structures; and
- (3) relational economic loss.

¹ A fifth category, “the independent liability of statutory public authorities”, as the name makes clear, arises not between private parties but between a statutory public authority and private parties.

The distinguishing feature among each of these categories is that they describe how the loss occurred. Focussing exclusively upon how the loss occurs can, however, put strain on the analysis by obfuscating both fundamental differences and similarities among cases of pure economic loss (J. Stapleton, “Duty of Care and Economic Loss: A Wider Agenda” (1991), 107 *Law Q. Rev.* 249, at pp. 262 and 284). Further, it obscures the starting point in a principled analysis of an action in negligence, which is to identify what rights are at stake and whether a reciprocal duty of care exists (*Livent*, at para. 30). It is proximity, and not a template of how a loss factually occurred, that remains a “controlling concept” and a “foundation of the modern law of negligence” (*Norsk*, at p. 1152; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 25).

[22] Properly understood, then, these categories are simply “analytical tools” that “provide greater structure to a diverse range of factual situations . . . that raise similar . . . concerns” (*Martel*, at para. 45; *Design Services*, at para. 31). Organizing cases in this way was and is therefore done for ease of analysis in ensuring that courts treat like cases alike. The fact that a claim arises from a particular kind of pure economic loss does not necessarily signify that such loss is recoverable.² Where the loss *is* recoverable, however, this Court has clarified that the decided cases within these categories should be regarded as reflecting particular kinds of proximate relationships

² Indeed, this Court has said that relational economic loss is recoverable only in “exceptional” circumstances (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 44). And, as we make clear below, merely “shoddy” construction does not support recovery under tort law. Rather, the limited nature of the duty of care in such circumstances operates to confine recovery to the cost of removing *only* such defects that pose a *real and substantial danger* to persons or property.

(*Cooper*, at para. 36; *Livent*, at paras. 26-27). But to be clear, the invocation of a category, *by itself*, offers no substitute for the necessary examination that must take place “of the particular relationship at issue in each case” between the plaintiff and the defendant (*Livent*, at para. 28; see also *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (H.L.), at p. 1038). In other words, what matters is whether the requirements for imposing a duty of care are satisfied — and, in particular, whether the parties were at the time of the loss in a sufficiently proximate relationship. Where they are, it may be because the relationship falls within a previously established category of relationship in which the requisite qualities of closeness and directness were found, or is analogous thereto (*Livent*, at para. 26; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 5). Or, a plaintiff may seek to establish a “novel” duty of care after undertaking a full *Anns/Cooper* analysis.

[23] With respect, the appellant’s submissions reflect a misunderstanding of the significance of the categories of pure economic loss. The appellant argues that a duty of care in this case “is established through the application of two well-established categories of recovery for pure economic loss [of] negligent misrepresentation or negligent performance of a service, and negligent supply of dangerous goods” (A.F., at para. 50). Again, a duty of care cannot be established by showing that a claim fits within a category of *pure economic loss*. It is necessary to determine whether the appellant’s alleged loss represents an injury to a right that can be the subject of recovery in tort law and possesses the requisite factors to support a finding of *proximity* under that category.

We repeat: the manner in which pure economic loss is said to have occurred or how that loss has been catalogued within the categories of pure economic loss does not signify that the defendant whose negligence caused that loss owes the plaintiff a duty of care. The relevant “category” for the purpose of supporting a duty of care is that of *proximity of relationship*. Meaning, what is necessary to support a duty of care is that the relationship between a plaintiff and a defendant bear the requisite closeness and directness, such that it falls within a previously established category of *proximity* or is analogous to one (*Livent*, at para. 26; see also *Childs*, at para. 15; *Mustapha*, at para. 5).

B. *Standard of Review*

[24] Maple Leaf Foods argues that the standard of review to be applied to a motion judge’s decision on duty of care is that of correctness. As the question of whether Maple Leaf Foods owed the appellant a duty of care is a question of law, we agree (*Galaske v. O’Donnell*, [1994] 1 S.C.R. 670, at p. 690; *Rankin (Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 19; L. N. Klar and C. S. G. Jefferies, *Tort Law* (6th ed. 2017), at pp. 210-11 and fn. 60; A. M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at §6.2). Duty in tort law is “a general notion describing a class or type of case, not a particular fact situation” (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at §9.57). That this is so becomes readily apparent when one considers that the existence of a duty of care is a preliminary question, typically answered when “the facts are not yet known to a sufficiently specific degree because breach of the standard of care and causation have not been addressed”

(Linden et al., at §7.3). It follows that *each* component of the *Anns/Cooper* analysis supporting a *prima facie* duty — proximity of relationship and reasonable foreseeability of injury (*Livent*, at paras. 20 and 23) — raise questions of law (Klar and Jefferies, at pp. 210-11 and fn. 60).

[25] The implications of this standard of review for the duty analysis, and particularly for its constituent inquiry into reasonable foreseeability of injury, was considered by this Court in *Stewart v. Pettie*, [1995] 1 S.C.R. 131:

The question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct. . . . The point is made by Fleming, in his book *The Law of Torts* (8th ed. 1992), at pp. 105-6:

. . . In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. “Duty” is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation. . . . It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant’s conduct [Emphasis added; para. 32.]

[26] The proper inquiry is therefore *not* into whether *the loss* suffered by a *particular plaintiff* could have been foreseen, but whether *the type of injury* to a *class of persons, within which the plaintiff falls*, could have been foreseen (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R.

129, at paras. 32-33; *Livent*, at para. 78; Linden et al., at §7.4; *Galaske*, at p. 691). And again, *this* question is a question of law.

C. *The Appellant's Claims*

[27] As we have already recounted, the appellant says that it and other Mr. Sub franchisees are owed a duty of care by the manufacturer Maple Leaf to provide RTE meats fit for consumption, such that they may recover lost profits, sales, capital value and goodwill when their supply is disrupted by the recall of the meat products.

[28] Respectfully, we have found it somewhat difficult to pinpoint with precision the legal bases on which the appellant grounds this duty. In the circumstances, and to treat as fairly as possible the appellant's claim, we first of all assume that its arguments are concerned with categories of *proximate relationships* and not categories of *pure economic loss*. The appellant appears to propose, as we have also recounted, three different pathways to impressing Maple Leaf Foods with a duty of care: first, under the principles of *Livent* governing negligent misrepresentation and negligent performance of a service; secondly, under the parameters of the duty of care recognized in *Winnipeg Condominium* — and subsequent cases — involving the negligent supply of shoddy goods or structures; and thirdly, based on the recognition of a novel duty of care.

(1) Negligent Misrepresentation or Performance of a Service

[29] In *Livent*, this Court restated the analytical framework governing cases of negligent misrepresentation or performance of a service. In doing so, it brought the analytical approach in such cases into accord with the refined *Anns/Cooper* framework laid out in *Cooper*. Previously, the duty analysis had been stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, which grounded a *prima facie* duty of care on mere foreseeability of injury. *Cooper*, however, “signalled a shift from th[at] test” (*Livent*, at para. 22; see also para. 23).

[30] Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by the conjunction of proximity of relationship and foreseeability of injury. As this Court affirmed, “foreseeability alone” is insufficient to ground the existence of a duty of care. Rather, a duty arises only where a relationship of “proximity” obtains (*Cooper*, at paras. 22 and 30-32; see also *Livent*, at para. 23). Whether a proximate relationship exists between two parties at large, or inheres only for particular purposes or in relation to particular actions, will depend on the nature of the relationships at issue (*Livent*, at para. 27). It may also depend on the nature of the particular kind of pure economic loss alleged.

[31] A party may seek “to base a finding of proximity upon a previously established or analogous category” (*Livent*, at para. 28). But where no established proximate relationship can be identified, courts must undertake a full proximity analysis in order to determine whether the *close and direct* relationship — which this Court has repeatedly affirmed to be the hallmark of the common law duty of care —

exists in the circumstances of the case (*ibid.*, at para. 29; *Saadati*, at para. 24; *Cooper*, at para. 32).

[32] In cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (*ibid.*). "These corollary rights and obligations", the Court added, "create a relationship of proximity" (*ibid.*). In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose (P. Benson, "Should *White v Jones* Represent Canadian Law: A Return to First Principles", in J. W. Neyers, E. Chamberlain and S. G. A. Pitel, eds., *Emerging Issues in Tort Law* (2007), 141, at p. 166).

[33] Taking *Cooper* and *Livent* together, then, this Court has emphasized the requirement of proximity within the duty analysis, and has tied that requirement in cases of negligent misrepresentation or performance of a service to the defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff. Framing the analysis in this manner also illuminates the legal interest being protected and, therefore, the right sought to be vindicated by such claims. When

a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect — that is, where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement. That is, the plaintiff may show that the defendant's inducement caused the plaintiff to relinquish its pre-reliance position and suffer economic detriment as a consequence.

[34] In other words, it is *the intended effect* of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff. Having deliberately solicited the plaintiff's reliance as a reasonable response, the defendant cannot in justice disclaim responsibility for any economic loss that the plaintiff can show was caused by such reliance. The plaintiff's pre-reliance circumstance has become "an entitlement that runs against the defendant" (Weinrib, at p. 230).

[35] That entitlement, however, operates only so far as the undertaking goes. As this Court cautioned in *Livent*, "[r]ights, like duties, are . . . not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility — that is, of the purpose for which the representation was made or the service was undertaken — necessarily falls outside the scope of the

proximate relationship and, therefore, of the defendant's duty of care" (para. 31, citing Weinrib and A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 293-94). This "end and aim" rule precludes imposing liability upon a defendant for loss arising where the plaintiff's reliance falls outside the purpose of the defendant's undertaking. *Livent* makes clear, then, that considerations of undertaking and reliance furnish not only a principled basis for drawing the line in cases of negligent misrepresentation or performance of a service between duty and no-duty, but also for delineating the scope of the duty in particular cases, based upon the purpose for which the defendant undertakes responsibility. Reliance that exceeds the purpose of the defendant's undertaking is not reasonable, and therefore not foreseeable (para. 35).

[36] It follows from the foregoing that the allegations advanced on behalf of Mr. Sub franchisees of negligent misrepresentation require us to direct our attention to whether an undertaking of responsibility on the part of Maple Leaf Foods had the effect of inducing foreseeable, reasonable and detrimental reliance on the part of Mr. Sub franchisees.

[37] The appellant says that Maple Leaf Foods undertook to provide RTE meats fit for human consumption (and, relatedly, that these meats were safe). That this is so is supported, it says, by Maple Leaf Foods' reputation for product quality and safety, and by its public motto "We Take Care" (A.F., at para. 60; see also paras. 53 and 59).

[38] But as we have also canvassed (at paras. 32-34), it is not enough to show that a defendant made an undertaking. Again, an undertaking of responsibility, where

it induces foreseeable and reasonable reliance, is formative of a *relationship* of proximity between two parties. We must therefore consider whether this undertaking, if made, was made *to Mr. Sub franchisees*, and *for what purpose*. Reliance on the part of the franchisees which falls outside the scope and purpose of that representation is neither foreseeable nor reasonable (*Livent*, at para. 31) and therefore does not connote a proximate relationship. The appellant attempts to address this requirement by pointing *not* to Mr. Sub franchisees' *reliance*, but instead back to *the undertaking*, saying that the franchisees' reliance was "on the basis that customers could trust that [the] franchisees used . . . a supplier whose public motto is 'We take care'" (A.F., at para. 60).

[39] The reference to "customers" and a "*public motto*" is, in our view, telling, and supports the Court of Appeal's identification of the scope and purpose of Maple Leaf Foods' undertaking as being "to ensure that Mr. Sub customers who ate RTE meats would not become ill or die as [a] result of eating the meats" (C.A. reasons, at para. 80). That is, the undertaking, properly construed, was made *to consumers*, with the purpose of assuring *them* that *their* interests were being kept in mind, and not to commercial intermediaries such as Mr. Sub or Mr. Sub franchisees. Their business interests lie outside the scope and purpose of the undertaking.

[40] Further, and in any event, the appellant has failed to establish that Mr. Sub franchisees relied reasonably, or at all, on the undertaking that it says they received from Maple Leaf Foods. Bear in mind that detrimental reliance is manifested by the

plaintiff altering its position, thereby foregoing more beneficial courses of action that it would have taken, absent the defendant's inducement. The appellant offers no evidence of such a change in position by Mr. Sub franchisees, and indeed the evidence affirms that changing their position would not have been possible. As recalled earlier (at paras. 8-9), Mr. Sub franchisees were bound by their franchise agreement with Mr. Sub to purchase RTE meats produced exclusively by Maple Leaf Foods. While they were able to seek Mr. Sub's permission to find alternative sources of supply, there is no evidence that they did so. It follows that no undertaking on the part of Maple Leaf Foods, even had one been made to Mr. Sub franchisees, caused the franchisees to alter their position in reliance thereon. Generally, they were bound, and had no alternative courses of action to pursue; and, to the extent they had a course of action that was contingent upon the permission of Mr. Sub, they did not seek it. At bottom, there was no interference with the autonomy of Mr. Sub franchisees. Like many franchising arrangements, theirs had already restricted their autonomy in ways that foreclose their ability to sue for negligent misrepresentation.

(2) Negligent Supply of Shoddy Goods or Structures

(a) *The Correlative Right and Duty of Care in Winnipeg Condominium*

[41] Until this appeal, the sole occasion on which this Court has considered a claim for pure economic loss arising from the negligent supply of shoddy goods or structures is its judgment in *Winnipeg Condominium*. It is therefore worth carefully reviewing the liability rule that it established, with attention to the nature of the legal

right and correlative duty of care on which it is founded. Further, and as we will explain, subsequent developments to the law of negligence in *Cooper* and *Livent* signify that claims under *Winnipeg Condominium* must now account for the requisite element of proximity.

[42] In *Winnipeg Condominium*, the plaintiff condominium corporation sued the defendant builder for the cost of repairing exterior four-inch thick stone cladding on its 15-storey building. Approximately eight years after construction, the board of directors of the condominium corporation observed that some of the cladding had broken away and that cracks were developing in the remaining cladding. They retained engineers, who recommended minor remedial work, which was done. Seven years later, a storey-high section of the cladding fell from the ninth-storey level of the building to the ground below. Again, engineers were retained and they recommended removal and replacement of the cladding at substantial cost, for which the condominium corporation sued the builder. Not being in privity, the claim was brought in tort, raising the issue of whether the builder owed a duty to the condominium owners, as “subsequent purchasers” (meaning that they came *after* the original purchaser on the distributive chain).

[43] On that question, and for the Court, La Forest J. recognized a duty of care based on the reasonable foreseeability of injury to “other persons and property in the community” (para. 21). In doing so, he posited that the presence of *danger* was the linchpin of the analysis. As he emphasized, the building structure in this case was “not

merely shoddy; it was dangerous” (para. 12 (emphasis added)). Further, he added that “the degree of danger to persons and other property” created by the negligent construction is “a cornerstone” of the analysis that must be undertaken in determining whether the cost of repair is recoverable in tort (*ibid.* (emphasis added)). As opposed to merely substandard construction, only those defects that posed “a real and substantial danger to the occupants of the building” and had “the capacity to cause serious damage to other persons and property in the community” were actionable (para. 21). Returning to this point later in his reasons, he reiterated:

[T]he facts of the present case . . . fall squarely within the category of what I would define as a “real and substantial danger”. It is clear from the available facts that the masonry work . . . was in a sufficiently poor state to constitute a real and substantial danger to inhabitants of the building and to passers-by. The piece of cladding that fell from the building was a storey high, was made of 4” thick Tyndall stone, and dropped nine storeys. Had this cladding landed on a person or on other property, it would unquestionably have caused serious injury or damage. [Emphasis added; para. 38.]

Given the “reasonable likelihood that a defect in a building will cause injury to its inhabitants . . . if it poses a real and substantial danger”, the Court held that a builder owed a duty to take reasonable care in the design or construction of building structures to avoid creating a real and substantial danger to health and safety (para. 36).

[44] At first glance, the liability rule in *Winnipeg Condominium* may appear curious, since it appears as though liability is imposed *not* in respect of damage that *has* occurred to the plaintiff’s rights, but in respect of a real and substantial *danger* thereto. As a general principle, there is no liability for negligence “in the air”, for

“[t]here is no right to be free from the *prospect* of damage” but “only a right not to *suffer* damage that results from exposure to unreasonable risk” (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 33 (emphasis in original); *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 964).

[45] We maintain, however, that, properly understood, the liability rule in *Winnipeg Condominium* is consonant with that principle. In that case, the Court was clear about the source of the right to which the duty of care corresponds: *the plaintiff’s rights in person or property* (paras. 21, 36 and 42).³ Where a design or construction defect poses a real and substantial danger — that is, what Fraser C.J.A. and Côté J.A. described in *Blacklaws v. 470433 Alberta Ltd.*, 2000 ABCA 175, 261 A.R. 28, at para. 62, as “imminent risk” of “physical harm to the plaintiffs or their chattels” or property — *and* the danger “would unquestionably have caused serious injury or damage” if realized, given the “reasonable likelihood that a defect . . . will cause injury to its inhabitants”, it makes little difference whether the plaintiff recovers for an injury actually suffered or for expenditures incurred in preventing the injury from occurring (*Winnipeg Condominium*, at paras. 36 and 38; see also *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)*, [1947] A.C. 265 (H.L.), at p. 280; *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.), at p. 488, per Lord Oliver of Aylmerton). Thus, the economic loss incurred to avert the danger “is analogized to

³ While the plaintiff in *Winnipeg Condominium* was the condominium corporation itself, La Forest J. conceived of its position as akin to that of an occupier of a building. He reasoned that the defendant contractor’s negligence had “the capacity to cause serious damage to other persons and property in the community”, including potential damage to the corporation (para. 21).

physical injury to the plaintiff's person or property" (P. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D. G. Owen, ed., *Philosophical Foundations of Tort Law* (1995), 427, at p. 429). The point is that the law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property "outside the ambit of perceived danger" (*ibid*, at p. 440; see also *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), at p. 404).

[46] As we see it, then, recovery for the economic loss sustained in *Winnipeg Condominium* was founded upon the idea that, in the eyes of the law, the defendant negligently interfered with rights in person or property. We see this as having been La Forest J.'s point in *Winnipeg Condominium* where he explained:

If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building. [Emphasis added; para. 36.]

In our view, this normative basis for the duty's recognition — that it protects a right to be free from injury to one's person or property — also delimits its scope. This is because this basis vanishes where the defect presents no imminent threat.

[47] The appellant urges us to extend the liability rule in *Winnipeg Condominium* so as to recognize what La Forest J. refrained from recognizing

(para. 41), which is a duty owed to subsequent purchasers for the cost of repairing *non-dangerous* defects in building structures and products. But merely shoddy products, as opposed to *dangerous* products, raise different questions pertaining to issues such as implied conditions and warranties as to quality and fitness for purpose, and not of real and substantial threats to person or property (*Winnipeg Condominium*, at para. 42). In our view, those claims are better channelled through the law of contract, which is the typical vehicle for allocating risks where the only complaint is of defective quality (*Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, 2002 BCCA 324, 169 B.C.A.C. 261, at paras. 57-61). Further, and even more fundamentally, such concerns do not implicate a right protected under tort law. As Laskin J.A. explained in *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.), at para. 36 in identifying the limits of the duty, “compensation to repair a defective but not dangerous product will improve the product’s quality but not its safety.” Again, we observe that, absent a contractual or statutory entitlement, there is no right to the quality of a bargain.

[48] It follows that the normative basis for the duty not only limits *its* scope, but in doing so also furnishes a principled basis for limiting *the scope of recovery*. As La Forest J. explained, the potential injury to persons or property grounds not only the duty but also one’s entitlement to “the cost of repairing the defect”, that is, the cost of mitigating the danger by “fixing the defect and putting the building back into a non-dangerous state” (para. 36). In other words, allowing recovery exceeding the costs associated with removing the danger goes beyond what is necessary to safeguard the right to be free from injury caused to one’s person or property (see *Winnipeg*

Condominium, at para. 49). Like our colleague at para. 125, we note that, in making this point, La Forest J. relied on the dissenting reasons of Laskin J. (as he then was) in *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189.

[49] We *do* agree with the appellant, however, that this same normative force of protecting physical integrity in the face of a real and substantial danger *can* apply to products *other than* building structures — that is, to goods. That said, in applying the *Winnipeg Condominium* liability rule to goods, it must be borne in mind that, properly understood, it states a narrow duty. While, therefore, there is no principled reason for confining its application to dangerously defective *building structures*, what a plaintiff can recover, irrespective of whether the claim is in respect of a building structure or a good, *will* be confined by the duty’s concern for averting danger. The point is not to preserve the plaintiff’s continued use of a product; rather, recovery is for the cost of *averting a real and substantial danger* of “personal injury or damage to other property” (*Winnipeg Condominium*, at para. 35).

[50] It follows that where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff’s rights, along with the basis for recovery, falls away. The significance of this point is perhaps best appreciated by recalling that, in *Winnipeg Condominium*, La Forest J. cited an argument made by Lord Keith of Kinkel at the House of Lords in *Murphy*, at p. 465, that “[i]t is difficult to draw a distinction in principle between an article which is useless or valueless and one which suffers from a defect which would render it dangerous in use but which is discovered

by the purchaser in time to avert any possibility of injury. The purchaser may incur expense in putting right the defect, or, more probably, discard the article” (para. 39). On the facts of *Winnipeg Condominium*, which involved a residential structure, La Forest J. did not accept that this argument should apply:

[I]t is based upon an unrealistic view of the choice faced by home owners in deciding whether to repair a dangerous defect in their home. In fact, a choice to “discard” a home instead of repairing the dangerous defect is no choice at all: most home owners buy a home as a long term investment and few home owners, upon discovering a dangerous defect in the home, will choose to abandon or sell the building rather than to repair the defect. Indeed, in most cases, the cost of fixing a defect in a house or building, within the reasonable life of that house or building, will be far outweighed by the cost of replacing the house or buying a new one. This was certainly demonstrated in this case by the fact that the Condominium Corporation incurred costs of over \$1.5 million in repairing the building rather than choosing to abandon or sell the building. [Emphasis added; para. 40.]

[51] Whether, then, one is considering defects in a building structure or a good, it is the feasibility of discarding the thing as the means of averting the danger which will determine whether the plaintiff’s loss is recoverable. We agree that few homeowners or owners of other kinds of building structures can reasonably remove the real and substantial danger posed by a defect by walking away from the building structure. And we accept that, in *Winnipeg Condominium*, this Court held that, in such circumstances, no legally significant distinction could be drawn between the cost of removing the danger and the cost of repairing the defect or replacing the defective component. No party has asked us to reconsider that holding and, in the absence of full submissions, we would not risk clarity and certainty in the law by doing so here (*R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 858-59; *Canada (Minister of Citizenship and*

Immigration) v. *Vavilov*, 2019 SCC 65, at para. 20). In our view, however, Lord Keith of Kinkel's argument is more readily applicable in dealing with *goods*, and courts must be alive to this possibility. We reiterate that a breach of the duty recognized in *Winnipeg Condominium* exposes the defendant to liability for the cost of *averting a real and substantial danger*, and *not* of repairing a defect *per se*.

[52] An instructive example of a dangerously defective *good* which could not be feasibly discarded is provided by *Plas-Tex*, where the defendant Dow Chemical sold polyethylene resin to the plaintiffs, knowing that it would be used in the construction of 3000 miles of pipeline (1,700 miles of which was buried underground) used to transport natural gas, and knowing that it was dangerously defective (the resin tended to crack, allowing natural gas to escape, creating the risk of an explosion, and indeed had already caused an explosion). This dangerously defective product was so integrated with the plaintiffs' pipeline operation (and with the pipeline itself) that repair was the only feasible option. Indeed, discarding the pipeline without undertaking mitigation might well have *increased* the already real and substantial danger which Picard J.A. identified.

[53] There will, of course, be other goods containing defects which present real and substantial dangers, and to which La Forest J.'s observations in *Winnipeg Condominium* about the impossibility of discarding homes and other building structures may apply. To be clear, this is a high threshold that we do not anticipate will be regularly met. The plaintiff must, like most homeowners faced with a dangerously

defective home, be shown to be effectively bereft of reasonable options. When applied to goods, this describes the rare case.

[54] The foregoing kind of good stands in contrast to two other kinds of goods. First, and more commonly, there is the good whose dangerous defect *can* realistically be addressed by discarding it. This will, we expect, apply to most defective consumer goods. Again, the liability rule in *Winnipeg Condominium* protects a right to be free of a negligently caused real and substantial danger, not to the continued use of a product. If the danger can be removed without repair, the right is no less vindicated. (To be clear, if the plaintiff incurs a reasonably foreseeable cost in discarding the product — such as a regulatory disposal fee — that is recoverable as a cost of removing the danger).

[55] Secondly, there is the kind of good like the RTE meats, for which “repair” is simply not possible. The good must, therefore, also be discarded. While in such circumstances the plaintiff may recover any costs of disposal, that is the extent of its possible recovery under this liability rule. It must be remembered that, because the right protected by this liability rule is that in the physical integrity of person or property, recovery is confined to the cost of removing a real and substantial danger *to that right* — by, where possible, discarding it. Conversely, it does not extend to the diminution or loss of *other interests* that the appellant invokes here, such as business goodwill, business reputation, sales, profits, capital value or replacement of the RTE meats.

[56] We add this. We find ourselves in respectful disagreement with our colleague’s view that Laskin J.’s dissenting reasons in *Rivtow*, “which were explicitly

adopted in *Winnipeg Condominium*, at para. 36, suggest that additional economic losses may be recoverable under this class of duty” (para. 125). This is significant, she explains, because it suggests that courts ought not to restrict recovery to that which was allowed in *Winnipeg Condominium*, since “the *absence* of a claim for lost profits or other direct economic losses should not be read to preclude recovery of those losses in future cases” (para. 124 (emphasis in original)). In our respectful view, this overstates the breadth of Laskin J.’s dissent and of this Court’s adoption thereof in *Winnipeg Condominium*. In *Rivtow*, the Court was unanimously of the view that the lost profits of the charterer by demise of the defective cranes were recoverable due to the manufacturer’s breach of its duty to warn. Laskin J. dissented on one narrow issue: whether the cost of repairing the cranes was also recoverable. The reasoning of Laskin J., therefore, was directed — and applied by this Court in *Winnipeg Condominium* (at para. 36) — *only* to support the plaintiff’s claim for *those* costs. There is simply no suggestion, either in *Rivtow*, including Laskin J.’s dissent, or in *Winnipeg Condominium*, that “additional economic losses may be recoverable”. Rather, they suggest the opposite.

(b) *Whether the RTE Meats Created a Real and Substantial Danger to the Appellant*

[57] In our view, the appellant’s claim based on negligent supply of goods must fail for two reasons. First, a duty of care in respect of the negligent supply of shoddy goods or structures is predicated, as we have explained, upon a defect posing a real and substantial danger to the plaintiff’s rights in person or property. In this case, any danger

posed by the supply of RTE meats — which arose from the possibility that they were actually contaminated with listeria — could be a danger only to *the ultimate consumer*. No such danger was posed to the Mr. Sub franchisees. Even if the RTE meats posed a real and substantial danger to *consumers*, this offers no support for the franchisees' claim that the alleged loss of past and future sales, past and future profits, capital value and goodwill was the result of interference with *their* rights. Effectively, the Mr. Sub franchisees are seeking to bootstrap their claim to the rights of *consumers*. Further, *even if* the franchisees could have established an imminent risk to their own rights in person or property, the most they could have recovered would have been the cost of *averting* this danger.

[58] This leads us to our second reason why the appellant's claim must fail. While the RTE meats may have posed a real and substantial danger to consumers when they were manufactured, any such danger evaporated when they were recalled and destroyed. In other words, their dangerousness was in their latency (*Cardwell v. Perthen*, 2007 BCCA 313, 243 B.C.A.C. 135, at paras. 34-35). It bears repeating that removing a danger — whether in a product like the RTE meats that cannot be repaired, or in the case of goods that can — will in many (and, indeed, in most) cases be achieved by simply discarding the good at little or no expense. We therefore agree that, once that was accomplished in this case by way of the recall, the facts would not support a finding that the RTE meats posed a real and substantial danger thereafter to anyone — not to consumers, and certainly not to Mr. Sub franchisees, who can therefore show no injury to a relevant right protected under tort law.

(c) *Whether the Parties Were in a Relationship of Proximity*

[59] Nonetheless, even if the RTE meats *had* posed a real and substantial danger within the meaning of *Winnipeg Condominium* to Mr. Sub franchisees' rights and had not been discarded, our analysis would not end here. In *Winnipeg Condominium*, the duty of care analysis was undertaken in accordance with the then-prevailing test for recognizing a duty of care in Canadian negligence law: the *Anns* test, under which a duty of care would, *prima facie*, arise where injury to the plaintiff is a reasonably foreseeable consequence of the defendant's negligence. And so, La Forest J. concluded that a *prima facie* duty of care existed on the basis of foreseeability of "personal injury or damage to other property", without inquiring into whether the parties were in a relationship of proximity (para. 35).

[60] But just as the duty analysis to be applied in cases of alleged negligent misrepresentation and performance of a service had to be adjusted in *Livent* to account for its refinement in *Cooper* in the form of the *Anns/Cooper* framework, so too must the duty analysis in cases of negligent supply of shoddy goods or structures conform to that framework. As Professor Klar has observed, the Court's judgment in *Livent* "has implications for the application of the *Anns/Cooper* duty of care formula to all negligence actions and should not be confined merely to negligent misrepresentation cases" (L. Klar, "Duty of Care for Negligent Misrepresentation — And Beyond?" (2018), 48 *Adv. Q.* 235, at p. 238). While, therefore, *Winnipeg Condominium* remains binding authority governing the duty of care in respect of shoddy goods or structures,

the framework by which that duty is imposed must now distinguish more clearly between foreseeability and *proximity*.

[61] As we will explain, this provides a further reason to dispose not only of the appellant's claim under *Winnipeg Condominium*, but also of the arguments favouring recognition of a novel duty of care.

(i) Proximity

[62] As the Court explained in *Livent* (albeit in the context of negligent misrepresentation or performance of a service), proximity — which is “a distinct and more demanding hurdle than reasonable foreseeability” (para. 34) — informs the foreseeability inquiry, and should therefore be considered prior to assessing foreseeability of injury. As Professor Klar has explained, “[t]he existence of proximity depend[s] upon the nature of the relationship between the parties [which] in turn dictate[s] the type of injury which could flow from this relationship and hence the losses which could be considered to have been reasonably foreseeable” (p. 242). We agree: in *all* claims, including claims of dangerous goods or structures, the considerations that support a finding of proximity also limit the type of injury that may be reasonably foreseen to result from the defendant's negligence. (The result of doing so in this case is to render a foreseeability analysis unnecessary since, as we shall explain, the appellant cannot demonstrate a proximate relationship between itself and Maple Leaf Foods.)

[63] Assessing proximity requires asking whether, in light of the nature of the relationship at issue (*Livent*, at para. 25), the parties are in such a “close and direct” relationship that it would be “just and fair having regard to that relationship to impose a duty of care in law” (*Livent*, at para. 25, citing *Cooper*, at paras. 32 and 34). This assessment proceeds in two steps.

[64] First, the court must ask whether proximity can be made out by reference to an established or analogous category of proximate relationship (*Livent*, at paras. 26-28). This question comes first because “[i]f a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown” (*Livent*, at para. 26). Analogous categories of proximity step into a prior and continuing stream of legal development. They are, in other words, just that: *analogous*, in the sense of being *like* an established category, although different in scope. Applying an established category of proximity so as to recognize another is simply an instance of the inductive reasoning whereby the common law is developed and a duty recognized in one set of cases is applied to a similar set of cases.

[65] In determining whether proximity can be established on the basis of an existing or analogous category, “a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized” (*Livent*, at para. 28). This is because, as between parties to a relationship, some acts or omissions might amount to a breach of duty, while other acts

or omissions within that same relationship will not. Merely because particular factors will support a finding of proximity and recognition of a duty within one aspect of a relationship and for one purpose to compensate for one kind of loss does not mean a duty will apply to all aspects of that relationship and for all purposes and to compensate for all forms of loss. While, therefore, proximity may inhere between two parties at large, it may inhere only for particular purposes or for particular actions; whether it is one or the other, and (if the other) for which purposes and which actions, will depend, as we have already recounted, upon the nature of the particular relationship at issue (*Livent*, at para. 27) or the type of pure economic loss alleged. Ultimately, then, to ground an analogous duty, the case authorities relied upon by the appellant must be shown to arise from an analogous relationship and analogous circumstances (*ibid.*).

[66] Secondly, if the court determines that proximity cannot be based on an established or analogous category of proximate relationship, then it must conduct a full proximity analysis (*Livent*, at para. 29). In making this assessment, courts must examine all relevant factors present in the relationship between the plaintiff and the defendant — which, while “diverse and depend[ent] on the circumstances of each case” (*Livent*, at para. 29), include “expectations, representations, reliance, and the property or other interests involved” (*Cooper*, at para. 34).

[67] In a case of negligent supply of shoddy goods or structures, the claim may arise in circumstances in which the parties could have protected their interests under contract. Even without being in privity of contract, the parties may nonetheless be

“linked by way of contracts with a middle party”, as Maple Leaf and the Mr. Sub franchisees are linked by way of contracts with Mr. Sub (Stapleton, at p. 287). This is particularly the case in commercial transactions (as opposed to consumer purchases: *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 115, at para. 106). Taken together, those contracts may reflect a “clear tripartite understanding of where the risk is to lie” (Stapleton, at p. 287). We see this consideration as crucial here when considering the “expectations [and] other interests involved” that must be accounted for in analysing the nature of the relationship (*Cooper*, at para. 34).

[68] Given the possibility of an existing allocation of risk by contract, a proximity analysis must account for two concerns. First, the reasonable availability of adequate contractual protection within a commercial relationship, even a multipartite relationship, from the risk of loss is an “eminently sensible anti-circumvention argument” that militates strongly against the recognition of a duty of care (Stapleton, at p. 287; see also p. 286). As La Forest J., dissenting, recognized in *Norsk*, at p. 1116, “the plaintiff’s ability to foresee and provide for the particular damage in question is a key factor in the proximity analysis”. For example, a plaintiff may have been able to anticipate risk and remove, confine, minimize or otherwise address it by way of a contractual term (Linden et al., at §9.87). We agree with Professor Stapleton that the boundaries of tort liability should respect that “the principal alternative paths of protection which are theoretically available . . . are by way of contracts made directly with th[e] responsible party or indirectly with a middle party” (p. 271 (emphasis added)).

[69] This Court recognized as much in *Design Services*, where the defendant had launched a design-build tendering process for the construction of a building. The plaintiff subcontractors and the defendant were not in privity of contract, but each were linked to the other through a bid submitted by Olympic Construction Ltd., a prime contractor. Olympic's bid was unsuccessful, and the subcontractors sued alleging, *inter alia*, that they were in a relationship of proximity with the defendant and were owed a duty of care originating by reason of the defendant's "Contract A" obligations to Olympic that arose at the tendering stage.

[70] For this Court, Rothstein J. declined to impose a duty of care, because the plaintiffs could have arranged their affairs so as to submit a joint bid with Olympic (thereby making them a party to "Contract A" and entitling them to sue the defendant in contract for irregularities in the tendering process), yet had chosen not to do so. He considered that the plaintiffs' voluntary choice to forego this contractual protection was an "overriding" proximity factor that was fatal to the claim (paras. 54-56). Thus courts will not lightly impose a duty in tort to insure against pure economic loss, in circumstances where the parties could have but chose not to provide for such insurance in contract.

[71] The second concern is related to the first. If the *possibility* of reasonably addressing risk through a contractual term, even within a chain of contracts, presents a compelling argument against allowing a plaintiff to circumvent a contractual arrangement by seeking recognition of a duty of care in tort law, it follows that where

the parties *have done so*, this consideration weighs even more heavily against such recognition. As Professor Stapleton explains, this particular anti-circumvention argument arises “not only [where] alternative protection by way of an arrangement with [the middle] party [was] available, but was obtained” (Stapleton, at p. 287 (emphasis added)). Again, this Court’s decision in *Design Services* is instructive:

In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract. [Emphasis added; para. 56.]

[72] All this is not to say that contractual silence on a matter will automatically foreclose the imposition of a duty of care. Contractual silence on certain matters is inevitable, since it is impractical for even the most sophisticated parties to bargain about every foreseeable risk (Stapleton, at p. 287). Our point, rather, is that, in the case of defective goods and structures, commercial parties between or among whom the product is transferred before it reaches the consumer will have had a chance to allocate risk and order their relationship *via* contract. And in assessing the proximity of relations among those parties — that is, in evaluating “expectations, representations, reliance, and the property or other interests involved” — courts must be careful not to disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements.

[73] In sum, under the *Anns/Cooper* framework and its rigorous proximity analysis, the determination of whether a claim of negligent supply of shoddy goods or structures is supported by a duty of care between the plaintiff and the defendant requires consideration of “expectations, representations, reliance, and the property or other interests involved”, as well as any other considerations going to whether it would be “just and fair”, having regard to the relationship between the parties, to impose a duty of care. In particular, where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims. Courts must ask: is a party using tort law so as to circumvent the strictures of a contractual arrangement? *Could* the parties have addressed risk through a contractual term? And, *did* they? In our view, and as we will explain, these considerations loom large here.

(ii) Application

[74] As indicated in our review of *Livent*, the question of whether the parties were in a proximate relationship follows a two-step analysis. Accordingly, we first address the appellant’s arguments regarding an analogous category of proximity.

1. *Analogous Category of Proximity*

[75] The appellant argues that appellate and trial level case law support recognition of a duty of care owed by Maple Leaf Foods to Mr. Sub franchisees “for

economic losses arising out of negligent manufacture and supply of a dangerous product” — a duty that, as we have already explained, is grounded in the liability rule recognized in *Winnipeg Condominium* (A.F., at para. 51; see also para. 79). To establish that this duty is owed in its case, the appellant argues that the relationships of proximity recognized in those authorities — in particular, *Plas-Tex*, *Tanshaw* and *Country Style* — “are analogous to [the relationship between Maple Leaf Foods and] the franchisees” (A.F., at para. 51).

[76] In *Plas-Tex*, as already recounted, dangerously defective resin was knowingly supplied by the defendant to the plaintiffs. The pipes exploded, necessitating repairs and causing the plaintiff to suffer significant business losses. The Court of Appeal of Alberta held that Dow owed a duty “to take reasonable care not to manufacture and distribute a product that is dangerous” (*Plas-Tex*, at para. 90).

[77] This is not analogous to the basis for the duty which the appellant says was owed by Maple Leaf Foods to Mr. Sub franchisees. The post-delivery circumstances of *Plas-Tex* are entirely different than the circumstances of the appellant’s claim of interrupted supply. Specifically, the defect in the resin created actual physical damage, such that the resulting economic losses were not, as a matter of law, pure economic loss but consequential economic loss. Finally, and most significantly, the resin was not intended for human consumption — a central plank in the appellant’s posited analogous category.

[78] Nor is *Tanshaw* of assistance to the appellant. There, the “Back Alley” night club, owned by the plaintiff numbered company, held a “foam party”, an event at which bubbles were dispersed onto the dancefloor so that patrons could dance in the foam. When an altered chemical composition of the product used by the manufacturer Tanshaw to produce the foam resulted in some patrons suffering physical injury, the nightclub owner successfully sued Tanshaw and others for, *inter alia*, negligence.

[79] As in *Plas-Tex*, the fact that a dangerous product was actually supplied and that it caused physical injury, albeit to third parties, tends to undermine the appellant’s position that this case is analogous.

[80] Further, and in our respectful view, the trial judge in *Tanshaw* erred in her conclusion that the manufacturer owed a duty of care to the nightclub, or at least in relying upon the basis she identified for doing so. Correctly noting that *Donoghue v. Stevenson* stands for the proposition that “the manufacturer or distributor of a product that is defective or unfit for its intended use and the end user of the product is a relationship of sufficient proximity to found a duty of care”, she then held that it followed that Tanshaw was under an obligation to be “mindful of the interests of the Back Alley and its patrons” and therefore stood in sufficient proximity to *both* “the Back Alley and its patrons” and owed a “duty of care to the Back Alley and its patrons” (para. 148 (emphasis added)).

[81] The liability rule in *Donoghue v. Stevenson*, however, governs the relationship between manufacturers and the ultimate consumer who is physically

injured by the manufacturer's negligence; it does not speak to whether a manufacturer owes a duty to an intermediary for economic losses, even where those losses are alleged to arise from that same act of negligence. We say, again respectfully, that the trial judge erred by failing to conduct separate analyses of each duty alleged in that case — that is, the duty owed to the patrons, and the duty owed to the nightclub. As we have stressed (at para. 66), determining whether proximity is established requires examining all relevant factors arising from the relationship between the plaintiff and the defendant — which examination may entail highly case-specific factors including expectations, representations, reliance and other considerations. In failing to do so with respect to the specific relationship between Tanshaw and the night club, the trial judge effectively bootstrapped Tanshaw's liability *to the night club* to the duty which Tanshaw owed *to the patrons*.

[82] Finally, *Country Style* is a case concerning misrepresentations made by a landlord about a commercial space leased by the franchisor who in turn leased to the plaintiff franchisee in anticipation of using the space to house a donut franchise. The landlord held out that it would build according to a specific site plan and then proceeded to make changes to the plan. The imposition of liability by the Court of Appeal for Ontario on the landlord was simply in conformity with this Court's decisions in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, *Hercules* and *Kamloops v. Nielson*, [1984] 2 S.C.R. 2. It has nothing to do with, and is not remotely analogous to, the duty of care posited here to provide products fit for human consumption.

[83] Having concluded that proximity cannot be established by reference to a recognized category of proximate relationship, we must now conduct a full proximity analysis.

2. *Full Proximity Analysis*

[84] It follows — not only from *Cooper*'s emphasis upon proximity as a distinct inquiry from foreseeability, but also from *Livent*'s direction that proximity is to be assessed by examining the nature of the relationship itself — that the defendant's ability to reasonably foresee injury to a plaintiff is insufficient to ground a finding of proximity. We stress this, in view of the appellant's submissions on proximity. In describing Maple Leaf Foods' "proximate relationship with [Mr. Sub] franchisees" (A.F., at p. 8), it points to Maple Leaf Foods' knowledge, *inter alia*, that the franchisees "were prohibited from procuring RTE meats from another supplier because of the exclusive supplier arrangement"; of the importance of product supply to the franchisees' operations; and of the losses that would flow from an interruption of supply, including goodwill, reputation, sales and profits (A.F., at para. 21). Such knowledge would be unsurprising, given the particulars the appellant alleges of direct communications between Maple Leaf Foods and the franchisees to support their operations. For example, Maple Leaf Foods operated a dedicated toll free hotline available to the franchisees, and dispatched representatives to discuss with franchisees any concerns with its product (A.F., at para. 22). The appellant also points to evidence that Maple Leaf Foods not only *could* have foreseen, but *did* foresee the detrimental

impact of its voluntary recall of RTE meats and “took direct measures to assist [the franchisees]” (A.F., at para. 23).

[85] To the extent that these considerations are possibly relevant to the duty analysis, they go not to proximity, but to reasonable foreseeability of injury. But even when they are so considered, it bears recalling that, in *Livent*, this Court clarified that an injury or loss will be considered to be “reasonably foreseeable” only where it falls within the *scope* of a proximate relationship between the parties (*Livent*, at para. 34; see also *Klar*, at p. 242). This was, the Court explained, the effect of *Cooper* at its restoration of proximity to the duty analysis. *Cooper* “signalled a shift from the *Anns* test, which had grounded the recognition of a *prima facie* duty upon mere foreseeability of injury” (*Livent*, at para. 23 (emphasis added)). Henceforward, it would no longer be sufficient for the appellant to point to evidence that tends to show that Maple Leaf Foods could have *merely foreseen* the economic loss sustained by Mr. Sub franchisees, or even that Maple Leaf Foods’ representatives supported Mr. Sub in its operations, whether before or after the voluntary recall. The scope of reasonable foreseeability is “far narrower” than that: “[w]hat the defendant reasonably foresees as flowing from his or her negligence depends upon the characteristics of his or her relationship with the plaintiff” (*Livent*, at paras. 24 and 36). Regard must therefore be had to whether they were in a *proximate* relationship. And deciding that requires examining and accounting for *the nature* of that relationship, which informs the types of injury that could be reasonably foreseen. In our view, the pure economic losses the appellant seeks to recover do not fall within the scope of a proximate relationship and

cannot be considered a reasonably foreseeable consequence of Maple Leaf Foods' alleged negligence in supplying potentially contaminated RTE meats.

[86] Here, then, we recall that the appellant is a corporation that entered into a franchise agreement with Mr. Sub, which in turn was party to an exclusive supply agreement with Maple Leaf Foods. Taken together, these agreements required the appellant, and all Mr. Sub franchisees, to purchase *only* such RTE meats as were manufactured by Maple Leaf Foods. The relevant terms of the franchise agreement state:

6.2 Authorized Products and Services

The Franchisee acknowledges that it is in the interest of the Franchisee, the Franchisor and all other Mr. Sub Restaurant Franchisees that the uniform standards, methods, procedures, techniques and specifications of the System be fully adhered to by the Franchisee. Accordingly, the Franchisee shall offer for sale from the Premises only such Products and Services as may be authorized from time to time in writing by Franchisor in the Manual or otherwise.

The Franchisee further agrees to purchase or lease, as applicable, all Products, Ingredients, Equipment, Supplies and other items exclusively from the Franchisor or from sources or suppliers approved or designated in writing by the Franchisor (which sources or suppliers may include Affiliates of the Franchisor) at prices and charges, and upon the terms and conditions of sale in effect at the date of shipment, plus taxes and reasonable shipping and transportation charges. The Franchisor will not be liable for any direct or indirect loss or damage due to any delay in delivery, or inaccurate or incomplete shipments.

6.4 Group Purchasing and Rebates

The Franchisee shall have the right to participate, on the same basis as other Mr. Sub Restaurant franchisees, in any group purchasing programs for Products, Ingredients, Equipment, Supplies, services and other items

which the Franchisor may from time to time use, develop, sponsor or provide.

In short, franchisees were contractually restricted to using and selling only products authorized by Mr. Sub and supplied exclusively by Mr. Sub or by sources approved by Mr. Sub. As to those sources, the exclusive supply agreement between Maple Leaf Foods and Mr. Sub provided:

Product Listing

MR. SUB agrees to honor the exclusive supplier status of Maple Leaf Foodservice on the 14 core menu items for the 3 year period – January 1, 2006 to December 31, 2008. Maple Leaf Foodservice obligations hereunder shall be dependent upon maintaining the exclusive supply status.

List of Core Menu Items

...

The foregoing Menu items shall be exclusively supplied by Maple Leaf Foodservice.

...

Maple Leaf Foodservice will ensure that Mr. Sub will be offered “best pricing” on any exclusive products. For the purposes hereof “best pricing” shall be determined with reference to third parties acquiring similar goods (including similar quality and mix of goods) in similar quantities, for direct re-sale by them to consumers by means of a fast food format.

...

Continued Superior Customer Services

Maple Leaf Foodservice will continue to provide MR. SUB with the following elements of superior Customer Service:

- 1-800 line available to Franchisees on a National scale.
- National Sales representation country wide.

- Fast, accurate and timely handling of inquiries regarding product ingredients, handling, storage and quality.
- Direct Franchisee contact.

[87] Our colleague relies on such terms to support a finding of proximity between Maple Leaf Foods and the Mr. Sub Franchisees (at para. 138). But a finding of proximity does not depend on the existence of certain contractual terms that make specific reference to one party or another. In a multipartite commercial relationship such as this, the relevant contractual terms ought to be considered as a whole so as not to defeat the expectations of all parties as to their obligations and entitlements. Here, the Mr. Sub franchisees' relevant obligation to Mr. Sub under the franchise agreement was to purchase product only as it directed, and Maple Leaf Foods' relevant right as against Mr. Sub under the exclusive supply agreement was to be the exclusive supplier of RTE meats. Taken together, this arrangement operated to bind the franchisees to obtain and sell only RTE meats produced by Maple Leaf Foods.

[88] The appellant says that, as a result of the terms of the franchise agreement, it and the other franchisees were "vulnerable" and unable to protect themselves from Maple Leaf Foods' negligence. "In the franchisee-franchisor context governed by a standard form franchise agreement", it argues, it could not protect itself by negotiation, or at least not "on an equal footing" (A.F., at paras. 91-92). While we agree that the franchising agreement worked a "vulnerability" upon the appellant, we do not see its significance as the appellant does. It is this simple: instead of operating as an independent restaurant, the appellant chose to operate its business through a franchise.

In doing so, like any franchisee it secured advantages that it could not have obtained on its own, including the use of the franchisor's trademark (and the benefit of associated goodwill), an established and proven system of operation, training, co-operative advertising and marketing, and — significantly — the benefit of the franchisor's buying power to secure better pricing for supplies. This last benefit is precisely what Mr. Sub franchisees secured under art. 6.4 of the franchise agreement (“Group Purchasing and Rebates”), which provided them with the benefit of Mr. Sub's group purchasing program.

[89] Of course, like any franchisee, the appellant also assumed certain disadvantages by operating through a franchise, all of which are typically necessary to securing the advantages. For example, the success of the system of operations and the benefit of the franchisor's buying power depend upon maintaining a degree — and, depending upon the franchise, sometimes an *exceedingly high* degree — of consistency among all franchisees in all aspects of their operations. Operating systems must be followed, the same suppliers of products must be used, and employees must take the same training. This near-total loss of control by a franchisee over its business operations, including its suppliers, is enforced by another inevitable constraint that comes with entering into a franchise arrangement, which is, in this case, the terms of the franchise agreement which bound the franchisees to those operational systems and supply arrangements. Its terms are not extraordinary; as the appellant says, it is a “standard form franchise agreement”. The appellant also says the franchise agreement leaves franchisees “vulnerable” to interruptions in supply caused by the negligence of

suppliers, an observation echoed by our colleague (at paras. 147-151). As already indicated, we agree that it does. But this is not a basis for a tort law duty, but rather an unremarkable incident of the franchise model of business in which the franchisees operated. Further, such “vulnerability”, if sufficiently serious, could have been addressed by the appellant obtaining insurance — an option which, as confirmed to us at the hearing of this appeal, was not pursued.

[90] A finding of proximity between Mr. Sub franchisees and Maple Leaf Foods would sit uneasily with this state of affairs, linked as these parties were through Mr. Sub by a chain of contracts that reflected the typical arrangement between franchisee, franchisor and exclusive supplier. The appellant was not a consumer, but a commercial actor whose vulnerability was entirely the product of its choice to enter into that arrangement, and whose choice substantially informed the expectations of that relationship to which the proximity analysis must have regard. To allow the appellant to circumvent the strictures of that contractual relationship by alleging a duty of care in tort in a manner that undermines and even contradicts those strictures (in that the proposed duty would impose an obligation to supply upon Maple Leaf Foods whereas its agreement with Mr. Sub imposed no such obligation) would not only undermine the stability of such arrangements, but also of *the appellant's* particular arrangement, which was predicated upon an exclusive source of supply.

[91] While this is sufficient for us to conclude that the Mr. Sub franchisees and Maple Leaf Foods were not in a relationship of proximity, a related consideration also

furnishes an answer to our colleague's concern for vulnerability arising from the commercial arrangement linking Maple Leaf Foods, Mr. Sub and its franchisees. As already mentioned, under the terms of the franchise agreement, the appellant and other Mr. Sub franchisees *did* have means, albeit conditional upon obtaining Mr. Sub's permission, to avoid the risk of interrupted supply or to avoid actual interrupted supply where it occurred by seeking out alternative sources of supply. Specifically, art. 6.2 provided:

If the Franchisee wishes to purchase Products, Ingredients, Equipment or Supplies from sources or suppliers other than those approved or designated in writing by the Franchisor, or wishes to offer for sale products or services that have not been previously authorized in writing by the Franchisor, the Franchisee shall give Notice to the Franchisor that it is requesting the Franchisor's approval of such other source, supplier, product or service, as the case may be, and the Franchisor shall give its approval, or reasons for refusing such approval, within thirty (30) days of such Notice but in any event the Franchisor shall have the absolute right to disapprove of any such other source, supplier, product or service.

[92] It is not disputed that the appellant did not avail itself of this option for obtaining alternative supply sources, even after the listeria outbreak and the voluntary recall of RTE meats (Mitropoulos Cross-Examination, R.R., at p. 90).

[93] We acknowledge that Mr. Sub retained discretion to deny any such request, but we simply cannot infer that Mr. Sub would likely have done so (Karakatsanis J.'s reasons, at paras. 103 and 143). Having been entirely released from its obligations towards Maple Leaf Foods in September 2008 some two weeks after the recall, Mr. Sub was no longer under any obligation to Maple Leaf Foods to observe any such

minimum purchase requirements until 2010, when its partnership was renewed. In any event, Mr. Sub having itself found a new supplier, it does not seem as likely to us as it does to our colleague that Mr. Sub would have denied the franchisees' request to do the same. Nor would we assume that Mr. Sub would have exercised its discretion in a manner that would violated its obligation, under the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, s. 3(1), of fair dealing in the performance and enforcement of a franchise agreement.

[94] If the vulnerability that is typical in a multipartite contractual arrangement such as this is insufficient to ground a duty of care, it is *a fortiori* inadequate where an available means under the terms of that arrangement for avoiding or mitigating that vulnerability was not pursued. In this regard, the appellant's position is comparable to that of the plaintiffs in *Design Services*, whose failure to pursue the option under "Contract A" for a joint venture with Olympic was fatal to their tort claim.

3. *Novel Duty of Care*

[95] In any event, and as we have explained, the appellant cannot show that it and other Mr. Sub franchisees were in a relationship of proximity with Maple Leaf Foods. That is fatal not only to its argument under *Winnipeg Condominium*, but also to the argument for recognition of a novel duty in these circumstances, since the novel duty also depends, *inter alia*, on the appellant showing that requisite proximate relationship with Maple Leaf Foods. This is because, while a novel duty, being *novel*, starts with a blank slate, that slate is filled by applying the same *Anns/Cooper*

framework that, as we have just explained, operates to preclude recovery here under the liability rule in *Winnipeg Condominium*.

IV. Conclusion

[96] We would dismiss the appeal, with costs.

The reasons of Wagner C.J. and Abella, Karakatsanis and Kasirer JJ. were delivered by

KARAKATSANIS J. —

I. Introduction

[97] This appeal asks whether franchisees, bound by their franchisor to use an exclusive supplier for products that are integral to their business, are able to recover the economic losses they suffered as a result of that supplier putting unsafe goods into the market.

[98] The appellant, 1688782 Ontario Inc., is a former franchisee of the Mr. Submarine sandwich restaurant chain. The franchisor, Mr. Sub, entered into an agreement with Maple Leaf Consumer Foods Inc. (together, with Maple Leaf Foods Inc., the respondents), making Maple Leaf the exclusive supplier of certain menu items.

At the relevant time, Mr. Sub required its franchisees to purchase certain meats exclusively from Maple Leaf.

[99] In 2008, Maple Leaf issued a nation-wide recall of several products, including two used by Mr. Sub franchisees, after some of its products and production lines tested positive for listeria. During the recall, Mr. Sub was publicly associated with Maple Leaf and the franchisees' businesses declined. The appellant filed and obtained certification for a class action against Maple Leaf on behalf of the Mr. Sub franchisees, alleging that the franchisees had suffered economic losses due to Maple Leaf's negligence.

[100] This is an appeal from a summary judgment motion to determine whether a duty of care existed between Maple Leaf and the Mr. Sub franchisees. The ultimate success of the franchisees in proving their claim in negligence is not at issue before this Court.

[101] I agree with Brown and Martin JJ. that the main thrust of the franchisees' claim does not fall within an existing category of economic loss or an established or analogous relationship of proximity. However, I would find that it is just and fair to impose a novel duty of care on Maple Leaf in these circumstances and would, accordingly, allow the appeal.

II. Facts

[102] Maple Leaf is a manufacturer and processor of food products, including “ready-to-eat” sliced meats and deli meats produced for national distribution in retail and food service operations. In late 2005, Maple Leaf entered into a foodservice partnership agreement with Mr. Sub in which Mr. Sub agreed to purchase 14 core menu items, including sliced corned beef and sliced roast beef, exclusively from Maple Leaf until the end of 2008. Mr. Sub also agreed to purchase an annual minimum volume of Maple Leaf products. Maple Leaf, in turn, agreed to offer Mr. Sub “best pricing” on exclusive products, a signing bonus and “superior” customer service, which included a dedicated phone hotline for Mr. Sub franchisees and “Direct Franchisee contact” (A.R., vol. II, at pp. 14-15).

[103] The appellant was a franchisee of Mr. Sub and ran a family-operated location selling sandwiches and other items. In 2006, it renewed its franchise agreement with Mr. Sub for a five-year term. The franchise agreement was a standard form agreement used for all Mr. Sub franchisees. The agreement required the franchisees to purchase all products and ingredients “exclusively from the Franchisor or from sources or suppliers approved or designated in writing by the Franchisor” (A.R., vol. II, at pp. 109-10). The franchisees had the option of requesting to purchase ingredients from another source, but this was subject to Mr. Sub’s “absolute right to disapprove” of any proposed alternative, as well as a 30-day timeline and the franchisees paying the costs associated with Mr. Sub’s approval (p. 110).

[104] Mr. Sub specified to the franchisees that Maple Leaf would be the exclusive provider of certain ready-to-eat meats for their restaurants. The franchisees purchased their meats through a distributor and thus lacked contractual privity with Maple Leaf. While they were linked indirectly through separate contracts, Maple Leaf and the franchisees had direct contact through a dedicated phone hotline to deal with product inquiries and concerns.

[105] On August 16, 2008, the Canadian Food Inspection Agency (CFIA) informed Maple Leaf that one of its products had tested positive for listeria. On August 17, a “Health Hazard Alert” was issued by the CFIA and Maple Leaf issued a nationwide press release and recall of two products (neither used by the franchisees). On August 19, the CFIA informed Maple Leaf of more positive tests for listeria on certain production lines and issued another “Health Hazard Alert” (A.R., vol. IV, at pp. 72-75). That day, Maple Leaf recalled all products produced on the affected lines since June, including the roast beef and corned beef used by Mr. Sub. On August 23, the CFIA and Public Health Agency of Canada concluded that the strain of listeria matching that in Maple Leaf’s products was linked to widespread illness and several deaths.

[106] In the days following the expanded recall, Maple Leaf instructed distributors to visit Mr. Sub franchisee locations to remove and destroy the potentially contaminated meats. Six to eight weeks passed before the roast beef and corned beef were replaced by a different supplier, with the help of Maple Leaf.

[107] During the recall, Mr. Sub and other restaurants were publicly associated with Maple Leaf in news stories and in the CFIA's "Health Hazard Alerts", but Mr. Sub was unique among submarine sandwich restaurants for being identified as a purveyor of Maple Leaf products. Eventually, the franchisor Mr. Sub and Maple Leaf entered into a Supply and Settlement Agreement in which the exclusivity arrangement was relaxed in certain situations and Maple Leaf paid Mr. Sub "a one-time payment of \$250,000.00 to cover, among other things, the inconvenience caused to Mr. Sub by the recall" (A.R., vol. II, at p. 10).

[108] None of the appellant's patrons or employees were harmed by the affected products, but the appellant alleges that a significant decrease in sales and profits began during and continued after the listeria outbreak. The appellant closed its business in 2010.

III. Procedural History

[109] The appellant commenced a class action against Maple Leaf on behalf of the franchisees of the other 424 Mr. Sub restaurants across Canada. The action claims damages for disposal and destruction of the "ready-to-eat" meats; clean-up and mitigation costs; loss of past and future sales and profits, goodwill and capital value of their franchises and businesses; and special damages to dispose, destroy and replace the meats. The appellant brought a motion for certification of the action as a class proceeding, while Maple Leaf brought a motion for summary judgment seeking dismissal of the appellant's claim on the basis that it owed no duty of care to the

appellant. The appellant responded seeking an order for summary judgment in its favour.

[110] Leitch J. certified the action as a class proceeding with the appellant as the representative plaintiff (2016 [ONSC 4233](#)). In these reasons, Leitch J. concluded that it was not plain and obvious that the claim did not fall within a recognized duty of care or that it could not meet the requirements of the test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

A. *Ontario Superior Court of Justice, No. 60680CP (November 18, 2016), Leitch J.*

[111] Leitch J. dismissed Maple Leaf's motion for summary judgment and held in the franchisees' favour (S.C.J. reasons (A.R., vol. I, at p. 45)). She found that Maple Leaf owed a duty of care to the franchisees in relation to the production, processing, sale and distribution of the meats, and that Maple Leaf further owed a duty of care with respect to any representations that the meats were fit for human consumption. She rejected Maple Leaf's argument that the franchisees' claim was based on a narrow duty on Maple Leaf's part to continuously supply its products. Leitch J. further found that Maple Leaf was under an obligation to be mindful of the franchisees' legitimate interests and that it was reasonable, appropriate and foreseeable for consumers to avoid buying food from a restaurant whose supplier was under a recall due to problems that were not resolved for a significant period of time.

B. *Court of Appeal for Ontario, 2018 ONCA 407, 140 O.R. (3d) 481, Sharpe, Rouleau and Fairburn J.J.A.*

[112] The Court of Appeal allowed Maple Leaf's appeal. With regard to the alleged duty to supply a product fit for human consumption, Fairburn J.A., writing for the court, held that any duty aimed at public health was owed to the franchisees' customers, not the franchisees, and that the franchisees and Maple Leaf did not have the requisite proximity to ground a duty. Regarding the duty of care in relation to negligent misrepresentation, the Court of Appeal concluded that Leitch J. had erred in failing to consider the scope of the proximate relationship between the parties, as required under *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855.

[113] Fairburn J.A. noted Maple Leaf's acknowledgment that the franchisees had a *de minimis* claim for disposal, destruction and clean-up costs and that it did not contest that portion of Leitch J.'s order. She therefore set aside Leitch J.'s order finding a duty of care, except as it related to those costs.

IV. Analysis

[114] In these reasons, I consider one issue: did Maple Leaf owe a duty of care to the franchisees such that some or all of their economic losses are recoverable in tort?

A. *Recovery of Economic Losses in Negligence*

[115] The franchisees do not allege that they suffered any physical injury or damage to their property due to Maple Leaf's negligence. Their claim is thus for recovery of their "pure" economic loss.

[116] Historically, the common law did not allow for recovery of losses in negligence that were not consequent to physical injury or property damage. This so-called "exclusionary rule" against economic loss is often traced to *Cattle v. Stockton Waterworks* (1875), L.R. 10 Q.B. 453, in which the plaintiff contracted with a landowner to build a tunnel and then was denied recovery against a third-party defendant who negligently flooded the tunnel, thereby increasing the cost of performing the contract. Over time, the narrow rule established in *Stockton* was widened and was soon said to preclude recovery of all types of pure economic loss in negligence. It was not until the House of Lords decision of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, that recovery for certain forms of pure economic loss in negligence was recognized, in that case for negligent misrepresentation.

[117] Since *Hedley Byrne*, Canadian courts have repeatedly affirmed that there is no bar or broad exclusionary rule against recovery of economic loss for negligence in Canada (see, e.g., *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221, at p. 252; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at p. 239; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R.

1021, at pp. 1046-48 and 1054, per La Forest J., dissenting, and 1144-45 and 1155, per McLachlin J.; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, at paras. 28 and 32; *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, at paras. 27 and 39; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at para. 40). Over the years, various tests or limitations were proposed to deal with economic loss cases, “on the theory that, left to itself, recovery for pure economic loss would extend liability in the field of negligence beyond traditional limits” (*Hofstrand Farms*, at p. 235). Recovery for pure economic loss in negligence soon grew to be “perceived as complicated and ever-changing” (M. C. Awad and J. D. Rice, “When is a Negligent Party Liable for Pure Economic Loss? A Practical Guide to an Impractical Area of Law”, in T. Archibald and M. Cochrane, eds., *Annual Review of Civil Litigation 2004* (2005), 253, at p. 253).

[118] Nonetheless, this Court has affirmed that, “[a]s a cause of action, claims concerning the recovery of economic loss are identical to any other claim in negligence in that the plaintiff must establish a duty, a breach, damage and causation” (*Martel Building*, at para. 35). The proper approach to assessing whether a duty of care exists is, as in all cases of negligence, to follow the two-step inquiry established in *Anns* and adjusted in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (see, e.g., *Martel Building*, at paras. 46-47; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 26-27; *Livent*, at para. 16). “If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises” (*Cooper*, at para. 30), and the court considers whether any residual policy considerations negate that duty at

the second stage. However, where a case falls within or is analogous to a previously recognized category of proximity, and reasonable foreseeability is also established, then a *prima facie* duty may be found without a full analysis (para. 36).

[119] While many harms may be reasonably foreseeable to someone in the defendant's position, what is ultimately recoverable will be determined by the content of the duty, taking into account *both* foreseeability and proximity. *Cooper* did not, however, specify which of foreseeability and proximity must be assessed first. While this Court found that assessing proximity first was helpful in cases of negligent misrepresentation because "[w]hat the defendant reasonably foresees as flowing from his or her negligence [will depend in part] upon . . . the purpose of the defendant's undertaking" (*Livent*, at para. 24), this will not always be the case for other types of economic loss or for other claims in negligence more generally. For example, in *Design Services*, an economic loss case, Rothstein J. began by assessing reasonable foreseeability and explained that "[t]he usual indication of proximity is foreseeability" (para. 49). More broadly, I am not convinced that the approach in *Livent* must dictate the *Anns/Cooper* duty of care formula in all cases of negligence engaging economic loss. For instance, although the nature of the relationship is key to limiting the risk of indeterminate liability in negligent misrepresentation cases, in cases engaging the negligent supply of shoddy goods, the particular features of the relationship between the manufacturer or builder and their end-user may not be as pressing as the connection between the manufacturer or builder and the product they have negligently put into the marketplace. The *Anns/Cooper* analysis is meant to be responsive to different factual

scenarios, and I see no reason to remove these elements of flexibility from the analysis in all cases.

[120] I agree with Brown and Martin JJ. that while this Court has identified specific types of economic losses in negligence, it is the duty of care — and not the category of economic loss — that dictates whether economic loss may be recoverable in negligence in a given case. The case law surrounding each of the categories has helped to work through the policy considerations associated with the economic loss arising in a given category, thereby grouping the policy concerns that often arise in similar factual situations, alerting the parties and courts to those considerations and, in some cases, adopting a slightly modified analysis to account for the particular form of loss. I would emphasize, however, that since there is no longer a general bar to recovery of economic loss in negligence, the categories should not be viewed as being closed or otherwise have the effect of acting as additional hurdles for claims that meet the rigours of the *Anns/Cooper* analysis, which demands a careful consideration of the implications of allowing recovery for that economic loss. While the existing categories can act as analytical tools in the duty analysis (*Martel Building*, at para. 45), the scope of allowable economic loss in Canadian law is not limited to them.

[121] In cases engaging a novel relationship and requiring a full *Anns/Cooper* analysis, courts should look to decided cases for guidance but should be cautious of reflexively relying on oft-repeated policy considerations as conventional wisdom without examining the specific circumstances of the case. Much as not all economic

loss cases are the same, these traditional policy concerns may not arise in every case (Awad and Rice, at p. 255). For example, indeterminate liability can often be addressed by a robust stage one analysis (*Livent*, at para. 42); a plaintiff's commercial sophistication or ability to allocate risk by contract depends on the facts of the case (see *Norsk*, at p. 1125, per La Forest J., dissenting, and 1159, per McLachlin J.); and a plaintiff's ability to obtain insurance for the particular loss at issue must be viewed realistically (p. 1123). The core inquiry is the two-step analysis, responsive to the facts at hand.

B. *Existing Categories of Economic Loss*

[122] I agree with Brown and Martin JJ. that the appellant has not identified an undertaking that could form the basis for a duty to the franchisees within the category of negligent misrepresentation that encompasses the losses they are claiming. That said, I accept that, as a general proposition, an undertaking may be made concurrently to multiple recipients for different purposes. I would also disagree with my colleagues that the franchise agreement between the franchisees and Mr. Sub necessarily restricted the franchisees' ability to sue for negligent misrepresentation. As I will explain below, I take a different view of the contractual matrix in this case and the impact it has on the duty of care analysis.

[123] With regard to the negligent supply of shoddy or unsafe goods, I would find that the nature and scope of the franchisees' main allegations are not well-suited

to this category of economic loss and that this category has limited value as an analytical tool.

[124] While *Winnipeg Condominium* offers this Court's most recent discussion of economic loss arising from the negligent supply of shoddy goods and structures, I would caution against collapsing the entirety of this type of economic loss into the specific duty that was found on the facts of that case. In *Winnipeg Condominium*, the plaintiff claimed only for the costs of repair — but the *absence* of a claim for lost profits or other direct economic losses should not be read to preclude recovery of those losses in future cases that satisfy the *Anns/Cooper* analysis.

[125] Indeed, Laskin J.'s dissenting reasons in *Rivtow*, which were explicitly adopted in *Winnipeg Condominium*, at para. 36, suggest that additional economic losses may be recoverable under this class of duty. In *Rivtow*, Laskin J. explained that the rationale for *manufacturer's liability*, like that established in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), is what supports extending recovery for pure economic loss where physical injury or property damage has not yet occurred but is instead prevented (pp. 1218 and 1221). Laskin J. would have found that the defendant, who had negligently manufactured defective cranes, was liable for the plaintiff's economic loss from the "down time" of repairing the usually profit-generating cranes (at p. 1222) and that, liability for those lost profits "being established", the costs of the plaintiff's repairs could also be recovered (p. 1223; see also B. Feldthusen, "*Winnipeg Condominium*

Corporation No. 36 v. Bird Construction Co.: Who Needs Contract Anymore?” (1995), 25 *Can. Bus. L.J.* 143, at p. 145).

[126] I agree with Brown and Martin JJ. that the foundation of this class of duty is a manufacturer or builder’s duty to avoid *danger* towards the users of their product or inhabitants of their building. This was the driving force animating both *Winnipeg Condominium*, at paras. 12, 20-21 and 50, and Laskin J.’s reasons in *Rivtow*, at pp. 1219 and 1221-22; it was also found to significantly limit the class of plaintiffs to those who were foreseeably threatened by the dangerous product or structure.

[127] As Leitch J. found, the contaminated Maple Leaf meats posed a “foreseeable real and substantial danger” to the health and safety of consumers (S.C.J. reasons, at para. 53 (A.R., vol. I, at p. 58)). And, as the Court of Appeal noted, “there was a *risk* that the two core menu items supplied to the franchisees *could* compromise human health, given that they had been produced at the same plant as the tainted products” (para. 38). With respect to the costs of removing those potentially unsafe products incurred by the franchisees in this case, I would find that the rationale of protecting an end-user from the danger of a manufacturer’s negligence can also capture those intermediary actors who incurred economic losses in pursuit of that same goal. That is, an intermediary who incurs expenses in repairing or removing a dangerous item from the marketplace to protect the end-user, and who may be best-placed to take steps to avoid that danger, should similarly be able to recover from a negligent manufacturer. Tort law should not require that the danger be passed on to the end-user before the costs

of eliminating the danger can be recovered. The franchisees in this case would not themselves have been directly exposed to the danger of Maple Leaf's goods, but any clean-up or disposal costs that they incurred to protect consumers from the danger should be recoverable, being supported by a similar safety rationale as that in *Winnipeg Condominium* and Laskin J.'s reasons in *Rivtow*. Indeed, the duty that is extant under the Court of Appeal's order, uncontested by Maple Leaf — covering the franchisees' clean-up and disposal costs — is supported by this logic.

[128] However, while the franchisees' costs in eliminating the danger could fall within a duty under this category of economic loss, the category does not capture the thrust of their claim. The economic losses claimed in this case flowed largely from the franchisees' continued association with dangerous products. These losses engage a different set of policy considerations that has not been worked through in the case law dealing with this category of economic loss.

[129] I therefore find that the category of negligent supply of shoddy goods has little value as an analytical tool. But the fact that there are differences between the franchisees' circumstances and those in *Rivtow* and *Winnipeg Condominium* does not erect a barrier to the franchisees establishing a duty. Instead, it is more constructive to recognize that the franchisees' claim engages novel issues that should be considered through a novel duty of care analysis.

C. *Novel Duty of Care*

[130] As discussed above, “Canadian law recognizes that new categories where a duty of care is recognized may be established” by applying the analysis set out in *Anns and Cooper (Design Services)*, at para. 26). Here, Maple Leaf knowingly acted as an exclusive supplier of products integral to and closely associated with the franchisees’ businesses. Under these circumstances, Maple Leaf owed the franchisees a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods.

(1) Stage One: *Prima Facie* Duty of Care

(a) *Foreseeability*

[131] As mentioned, “[t]he usual indication of proximity is foreseeability” (*Design Services*, para. 49), and foreseeability can therefore be a useful starting point in assessing whether a novel duty of care exists. The reasonable foreseeability inquiry requires the court to ask whether the type of injury to the plaintiff, or to a class of persons to which the plaintiff belongs, was reasonably foreseeable to someone in the defendant’s position (*Rankin (Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at paras. 24, 26 and 53, per Karakatsanis J., and 77, per Brown J., dissenting). The question is thus whether someone in Maple Leaf’s position would reasonably have foreseen economic loss to the franchisees, or the class of plaintiffs to which they belong, as a result of their negligence. In my view, the answer is “yes”.

[132] Maple Leaf had been in a commercial relationship with Mr. Sub since 1989. When it entered into the 2005 food service partnership agreement as an exclusive supplier for Mr. Sub, it knew that Mr. Sub operated in a franchise structure. The partnership agreement made multiple references to Maple Leaf providing its “superior” customer service to Mr. Sub’s franchisees and Maple Leaf knew that it was the *franchisees* that would actually use the product and put it into the market for consumption.

[133] Importantly, Maple Leaf also knew about the centrality of its products to the franchisees’ business: the national account manager was aware that these meats were an integral and essential part of the franchisees’ business and that the quality of the meats supplied by Maple Leaf was essential to maintaining the franchisees’ goodwill and reputation. Indeed, the importance of such meats to the franchisees’ business is evident given that a Mr. Sub restaurant was primarily known as a place to purchase deli-style submarine sandwiches *with ready-to-eat meats*.

[134] It was thus foreseeable that the franchisees would be identified as a public-facing retailer of potentially tainted meats while the meats posed a real danger to public health. I agree with Leitch J. that it was “reasonable, appropriate, and foreseeable for consumers to avoid buying food from a restaurant where there had been a food recall arising from problems in the plant of its meat supplier which were not ‘resolved’ for a relatively significant period of time” (S.C.J. reasons, at para. 48 (A.R., vol. I, at p. 56)). In my view, it was reasonably foreseeable to someone in Maple Leaf’s position that

negligence in producing its meats would inflict economic harm on the Mr. Sub franchisees or the class of plaintiffs to which they belong — franchisees who were required to exclusively use some of the meats for products essential to their business.

(b) *Proximity*

[135] Reasonable foreseeability of harm “must be supplemented by proximity” (*Cooper*, at para. 31). In assessing proximity, the overarching question is whether the parties are in such a “‘close and direct’ relationship that it would be ‘just and fair having regard to that relationship to impose a duty of care in law’” (*Livent*, at para. 25, quoting *Cooper*, at paras. 32 and 34; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 25). The factors to assess that relationship “are diverse and depend on the circumstances of each case” (*Livent*, at para. 29), but include the “expectations, representations, reliance, and the property or other interests involved” (*Rankin’s Garage*, at para. 23, quoting *Cooper*, at para. 34). In my view, there was a proximate relationship between Maple Leaf and the franchisees such that Maple Leaf “may be said to [have been] under an obligation to be mindful” of the franchisees’ interests (*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24).

[136] Many products reach Canadian consumers through supply chains with multiple participants, which may be far-reaching and involve little to no contact between the suppliers and sellers down the line. However, when a manufacturer knows that it is the exclusive supplier of a product that is integral to and identified with its

recipient, a franchisee whose relationship with the supplier is dictated by its franchisor, the expectations and the dependency between the parties shift.

[137] As discussed above, Maple Leaf entered into its foodservice partnership agreement with almost two decades of experience working with Mr. Sub, knowing that Mr. Sub operated in a franchise structure. By contracting with Mr. Sub, Maple Leaf also entered into a relationship with the franchisees. Indeed, the central purpose of this partnership agreement was to provide franchisees with Maple Leaf meats.

[138] Various features of the partnership agreement point towards a proximate relationship between Maple Leaf and the franchisees. First, with Maple Leaf acting as Mr. Sub's exclusive supplier for 14 core menu items under the agreement, Mr. Sub's franchisees were bound to rely on Maple Leaf for a number of these meats. Second, the partnership agreement required Mr. Sub to purchase at least 5,000,000 lbs of Maple Leaf product annually, and this target could only be met by having the franchisees purchase Maple Leaf products. The Mr. Sub account was large enough that some of Maple Leaf's meats were delivered in boxes specifically labelled as a "Mr. Sub" product. Third, under the agreement Maple Leaf agreed to provide equipment support for panini grills, which Maple Leaf understood would be used by the franchisees in their restaurants. Finally, in outlining Maple Leaf's obligation to provide Mr. Sub with "superior" customer service, the partnership agreement made several references to supporting franchisees directly. This included a dedicated phone hotline for franchisees and "Direct Franchisee contact", which would allow the franchisees to communicate

their concerns and inquiries about product ingredients, handling, storage and quality with Maple Leaf directly in order to receive a “[f]ast, accurate and timely” response (A.R., vol. II, p. 15).

[139] The franchisees were clearly the actors that would be using and selling Maple Leaf’s products, and were at the heart of Maple Leaf and Mr. Sub’s contemplation in entering into the partnership agreement and providing for direct franchisee contact. In this context, Maple Leaf established a close relationship with the franchisees. And, unlike other retailers of Maple Leaf products who may have been at liberty to carry multiple brands of ready-to-eat meats, Mr. Sub franchisees were bound to use Maple Leaf meats exclusively *and* in a business that centred on such meats — placing them in a particularly dependent relationship with Maple Leaf. The effect of this arrangement was that Maple Leaf, as an approved supplier, and the franchisees, bound to use that supplier through an exclusivity agreement, were in a proximate relationship.

[140] My colleagues, however, suggest that proximity cannot be found between Maple Leaf and the franchisees because the franchisees could have foreseen and addressed their risk by contract, and in fact did. I disagree. The three-way contractual matrix between Maple Leaf, Mr. Sub and the franchisees only strengthens my conclusion that there is proximity.

[141] I agree that in cases involving pure economic loss, the contractual matrix linking the parties, if any, can be an important factor in finding a lack of proximity —

either because the parties have already ordered their affairs in contract and are attempting to circumvent that ordering through tort law, or because the plaintiff could have, but failed to, protect itself in contract (see, e.g., *Norsk*, at pp. 1125-26, per La Forest J., dissenting, and 1158-59, per McLachlin J.; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at paras. 26-27, per McLachlin J., dissenting in part, and 114-23, per Iacobucci J.; *Martel Building*, at para. 106; *Design Services*, at paras. 54-56).

[142] In this case, however, I see no provision within the contractual matrix contemplating the types of economic losses that the franchisees claim or suggesting that the parties had already allocated the risk of those losses. The question is “what the plaintiff has accepted as limits on [their] tort rights”, since a contractual matrix that is genuinely silent on the specific issue at hand would not preclude finding a duty of care (J. Stapleton, “Duty of Care and Economic Loss: a Wider Agenda” (1991), 107 *Law Q. Rev.* 249, at p. 287). Under the franchise agreement, Mr. Sub was explicitly not liable to the franchisees for “any direct or indirect loss or damage due to any delay in delivery, or inaccurate or incomplete shipments” of its mandatory products (A.R., vol. II, at p. 110). No provision addressed recovery for losses or damages arising from unfit or unsafe shipments.

[143] The franchisees did have the option to request to purchase ingredients from another source, subject to Mr. Sub’s “absolute right to disapprove” within a 30-day timeline and the franchisees paying the costs for that approval process. I would note

that, in light of the minimum supply requirement agreed to by Mr. Sub, approval of such requests would likely not have been commonplace. In any event, Leitch J. found that the franchisees are not claiming damages for the non-supply of Maple Leaf product — rather, their claim is based on a duty relating to their association with unsafe products.

[144] When considering whether the franchisees were able to, and should have, contractually protected themselves from the types of economic loss they claim, a realistic approach must be taken. In *Norsk*, for example, McLachlin J. considered various arguments to restrict recovery of economic loss and explained that “[t]he ‘contractual allocation of risk’ argument rests on a number of important, but questionable assumptions”, including that “all parties to a transaction share an equality of bargaining power which will result in the effective allocation of risk” (p. 1159). She later noted that the terms of a contract are an important consideration in determining whether economic loss is recoverable but that “the contract may tell only part of the story between the parties” (p. 1164). While La Forest J. dissented in the result in that case, he nevertheless agreed that “[i]nequality of bargaining power is in fact only one of a number of reasons why contract may not be a real alternative in a given case” (p. 1125; see also *Bow Valley Husky*, at para. 69, per McLachlin J., dissenting in part).

[145] An overly formalistic appeal to protection through contract therefore risks failing to take into account the parties’ actual circumstances, including their commercial sophistication and bargaining power. There is a “rational distinction . . .

between plaintiffs who do have *reasonably available* avenues of protection and those who do not” — a distinction that “is more likely to hinge on issues of bargaining power than on privity” (Stapleton, at p. 292 (emphasis in original); see also C. F. Stychin, “The Vulnerable Subject of Negligence Law” (2012), 8 *Intl. J. L. Context* 337, at pp. 346-48). If a plaintiff’s contractual “ability” to allocate risk is illusory, relief in tort may be arbitrarily and unfairly foreclosed. Thus, if the contractual allocation of risk is to be relied on to find that proximity does not exist, courts must ask: was the plaintiff *actually able* to allocate for *this* risk?

[146] I would conclude that the answer to that question is clearly “no” in this case.

[147] With no access to contractual privity with Maple Leaf, the franchisees contracted with their franchisor, Mr. Sub. Importantly, “the relationship between a franchisor and franchisee is one of vulnerability for the franchisee”, stemming from a fundamental power imbalance (*Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, 2016 ONCA 324, 130 O.R. (3d) 161, at para. 64). Put simply, “it is unusual for a franchisee to be in the position of being equal in bargaining power to the franchisor” (*Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 66; see also *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776, at paras. 38 and 56).

[148] Under a franchise arrangement, the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are associated with the

franchisor. Given their unique and typically well-established brand or operating structure, franchisors like Mr. Sub tend to already be in a position of power when encountering those who are seeking to operate one of their franchises, who are also often entering business for the first time (J. Sotos and F. Zaid, “Status Report on National Franchise Law Project”, August 2002 (online)); F. Zaid, “Manitoba’s New Franchises Act — Something Old, Something New — What to Expect” (2013), 13 *Asper Rev. Int’l Bus. & Trade L.* 77, at p. 98). This inequality has been of concern for some time, with the Ontario government commissioning a report approximately 50 years ago detailing the implications of the franchisee-franchisor relationship and identifying potential areas for regulation to attenuate the effects of this inequality (see Department of Financial and Commercial Affairs, *Report of the Minister’s Committee on Franchising* (1971)). In light of this power imbalance, franchise legislation across most of Canada now entitles franchisees to greater financial disclosure during the contracting process (including Ontario’s *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3), thereby alleviating some of the informational disparity between the franchisee and franchisor.

[149] The fact remains, however, that franchisees are generally unable to negotiate more favourable terms to govern their relationship with the franchisor. The franchise agreement is usually a contract of adhesion, drafted by the stronger party and “whose main provisions are presented on a ‘take it or leave it basis’” with no prospect for negotiation (*Shelanu*, at para. 58; see also J. C. Lisus and A. Ship, “Restrictions on Unilateral Termination of Franchise Agreements” (2010), 49 *Can. Bus. L.J.* 113; S.

Waddams, “Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism” (2012), 53 *Can. Bus. L.J.* 475). Indeed, this Court has highlighted the manner in which contracts of adhesion can exacerbate vulnerability and inequality of bargaining power in other contexts (see *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 89; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at paras. 52-57, per Karakatsanis, Wagner and Gascon JJ., and 98 and 114-16, per Abella J.). Further, the power imbalance that characterizes the start of the franchisor-franchisee contractual relationship continues to affect the relationship long after. Franchisors demand and exercise significant control over the operation and decisions of the franchisees, and thereby deeply affect the success of their businesses (*2176693 Ontario Ltd.*, at para. 38; *Shelanu*, at para. 66).

[150] These trends, well-known for decades, are borne out in this case: the appellant’s franchise agreement was a standard form agreement that was common to all Mr. Sub franchisees and no negotiations were held when the agreement was renewed. The franchisees’ vulnerability was sustained throughout their relationship with Mr. Sub. The prospect of protecting themselves by contract was essentially illusory for the franchisees and placed them in a particularly dependent and vulnerable relationship with Maple Leaf, their franchisor’s longstanding, exclusive business partner who supplied products integral to the identity and operation of their business.

[151] In my view, the fact that this power imbalance and loss of control is widespread in the franchise context does not make it any less acute or justify dismissing

it. Nor does it change that the franchisees were, for all intents and purposes, unable to protect themselves from the very loss they allege. The fact that there was a mutual exchange of *other* benefits in the franchise agreement, including a favourable pricing scheme for the franchisees, does not change that the franchise agreement was silent on the risk at issue in this case. I therefore cannot interpret the franchise agreement to mean that the franchisees accepted a limit to their rights in tort for the loss at issue in this case.

[152] I would therefore find that, far from negating the proximity that I have already found to exist between Maple Leaf and the franchisees, this contractual matrix points to a particular dependency and proximity in their relationship. In the context of an almost twenty-year relationship, Maple Leaf knowingly operated as an exclusive supplier to a restaurant operating as a franchise — a business arrangement in which the franchisee typically has almost no power to bargain for contractual protection, either with the supplier or the franchisor. Compounding this vulnerability, the franchisees' businesses were unusually dependent on Maple Leaf because Mr. Sub is known for selling submarine sandwiches with ready-to-eat meats. This contractual matrix, the history between Maple Leaf and Mr. Sub, the franchisees' vulnerability and Maple Leaf's direct line of contact with the franchisees establish that Maple Leaf and the franchisees were in a close and direct relationship.

(c) *Scope of Prima Facie Duty of Care*

[153] The recoverable losses in this case depend on the content of the duty between Maple Leaf and the franchisees, taking into account both foreseeability and proximity. Leitch J. found that the contaminated meats posed a “foreseeable real and substantial danger” to consumer health and safety and that it was reasonably foreseeable for consumers to avoid purchasing from a restaurant where there had been a food recall arising from unresolved problems in its meat supplier’s plant. The arrangement between Maple Leaf and the franchisees contemplated exclusive provision of safe products, a minimum purchase requirement and a close relationship and line of communication to deal with the franchisees’ product safety concerns directly instead of through the franchisor or the distributor. Since the proximity between Maple Leaf and the franchisees focused on the safety, handling and storage of specific products, so did Maple Leaf’s duty: there was no duty on Maple Leaf’s part to continuously supply its products, nor any expectation that Maple Leaf would take care to protect every aspect of the franchisees’ short and long-term economic success. Maple Leaf’s relationship of proximity to the franchisees did, however, contemplate the exclusive provision of a safe product that the parties understood to be integral to the franchisees’ operations and identity.

[154] As a manufacturer, Maple Leaf already owed consumers the well-established duty to take care to produce safe products — a duty which in my view is aligned with its duty to the franchisees. Here, the exclusivity arrangement and the franchisees’ unusually heightened dependence on Maple Leaf products set the franchisees apart from other retailers of Maple Leaf products, making them particularly

susceptible to consumer concerns about product safety. In the context of this close and direct relationship, Maple Leaf, as manufacturer, was under a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods.

[155] I would therefore conclude that, subject to the other requirements of negligence being met, it is fair and just to hold Maple Leaf responsible for the franchisees' direct economic consequences of being associated with unsafe Maple Leaf products while they posed a danger to consumer health. The duty is tied to losses resulting from reasonable consumer responses to an identifiable public safety risk, so the franchisees should be able to recover losses that they experienced as a result of consumers reasonably avoiding a restaurant whose essential ingredients were potentially unsafe. In particular, Maple Leaf should be liable to compensate for the lost profits, sales, goodwill and capital value that the franchisees can prove were caused by reasonable consumer reaction to the risk Maple Leaf products posed to consumer health. Maple Leaf's liability should also extend to any special damages relating to clean up and disposal of the meats that the franchisees had to incur to safely handle the tainted products and mitigate the effects of Maple Leaf's breach.

[156] Having found that Maple Leaf owed the franchisees a *prima facie* duty of care, I turn to stage two of the *Anns/Cooper* test.

(2) Stage Two: Residual Policy Considerations

[157] In the second stage, the court considers residual policy considerations. These are not concerned with the relationship between the parties, “but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally” (*Cooper*, at para. 37). I do not believe that the policy considerations in this case should negate the *prima facie* duty of care I have concluded exists.

[158] Maple Leaf submits that imposing a tortious duty of care in this case would have a negative impact on the Canadian marketplace, in that manufacturers would be liable for the economic losses of anyone in their supply chain upon a recall and thereby risk indeterminate potential loss. I disagree that this duty would so disrupt the marketplace and raise the spectre of indeterminate liability for manufacturers. The value and temporal scopes of the franchisees’ damages are limited to economic losses caused by reasonably foreseeable consumer responses to an identifiable safety concern about a particular type of product during a particular period of time. In my view, such a narrowly defined duty of care would remove the time and value indeterminacy that might otherwise arise for this type of claim. And, importantly, the class indeterminacy here is virtually eliminated. The duty does not capture any down-the-line merchant of Maple Leaf products, but rather a branded Mr. Sub restaurant in a context where Maple Leaf contracted with Mr. Sub. Put more generally, it captures franchisees bound to use an exclusive supplier for a product on which their business and identity is predicated.

[159] Maple Leaf suggests that the extent of a plaintiff’s losses under a duty of care found on these facts would depend on media coverage or on how a particular

product recall publicly unfolds. However, concerns about possible intervening causes or the “unusual or extreme reactions” of consumers in the face of a potentially unsafe product that are not already dealt with by the duty’s internal limits are properly considered as issues of causation or remoteness (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 15). They are not convincing reasons to negate a *prima facie* duty of care.

[160] Indeed, finding a duty of care in these circumstances should not be conflated with a guarantee that every possible economic loss being claimed will survive the rigours of the remaining requirements of a negligence claim. A franchisee’s claim that its business has collapsed due to an isolated and contained instance of manufacturer negligence will be met with proper scrutiny. Any award of damages will still be guided by the standard principles of negligence, such as the principle that a defendant need not place a plaintiff in a position better than its original position (*Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 32 and 35); that the plaintiff has an obligation to mitigate its losses (*Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at p. 163; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at paras. 106-7); and that some losses that are factually caused by the defendant’s negligence will be “too remote to be viewed as legally caused” by the defendant’s negligence (*Mustapha*, at para. 18). What can ultimately be proven at trial will depend on the franchisees meeting these causal, mitigation and remoteness requirements.

[161] An additional policy consideration, raised by both Maple Leaf and the Court of Appeal, is the risk that imposing a duty of care will result in a chilling effect on manufacturers issuing voluntary recalls, and thus conflict with duties owed to consumers or with public health objectives more generally. I do not find this argument compelling.

[162] First, food recalls are highly regulated in Canada. Food operators are already obligated to notify the Minister of Agriculture and Agri-Food when their food presents a risk of injury to human health, and a voluntary recall may be initiated by a food operator or when the CFIA requests that the company “initiate a voluntary recall” (Canadian Food Inspection Agency, *How we decide to recall a food product* (online); see also Canadian Food Inspection Agency, *Recall procedure: A guide for food businesses*, last updated September 25, 2018 (online); [Safe Food for Canadians Regulations, SOR/2018-108, s. 84](#)). In defining the scope of the recall, the food operator must determine whether, in addition to the food that is directly affected, any other food is affected; if so, the food operator is directed by the CFIA to include that food in their recall as well (Canadian Food Inspection Agency (2018)). In exceptional cases, food operators can also be subject to mandatory recalls by the Minister where they are unwilling or unable to recall their product (*Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, s. 19). In light of this scheme, it is inaccurate to suggest that a manufacturer independently determines the need for, or scope of, a recall. Indeed, even when a recall is voluntary, the CFIA exercises oversight over the recall to “ensure that recall activities are sufficient to the risk posed to consumers” (Canadian Food

Inspection Agency (2018); see also Canada, *Report of the Independent Investigator into the 2008 Listeriosis Outbreak* (online)). Imposing a duty will not result in a chilling effect on voluntary recalls, nor will it result in manufacturers issuing recalls that do not fully protect the health and safety of consumers.

[163] Second, voluntary recalls actually *help* negligent manufacturers to mitigate losses caused by risky products. If a negligent manufacturer declined to recall its products and obscured their potential danger, for example, and a franchisee's customer suffered an injury or died as a result, then the manufacturer's liability to both that customer and the franchisees for their economic losses would presumably be *more* extensive than its liability had it issued the recall. The notion that a duty would pull manufacturers in different directions here is not convincing.

[164] As a result, none of these residual policy considerations are sufficiently persuasive to oust or negate the *prima facie* duty of care on Maple Leaf in this case. I therefore find that Maple Leaf owed the franchisees a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods.

[165] In my view, there is minimal utility at this time in labelling the category of recovery for pure economic loss in negligence under which this duty falls. The existing categories originated from an attempt to classify cases in which courts had previously addressed the question of recovery for pure economic loss in negligence, and to consider whether certain situations “may invite different [analytical] approaches” to

recovery for pure economic loss (*Norsk*, at pp. 1048-49, per La Forest J., dissenting). Such an exercise is better taken retrospectively than prospectively.

V. Conclusion

[166] There was no appeal from the Court of Appeal's order that the franchisees were owed a duty of care by Maple Leaf with respect to their claim for clean-up costs and other costs related to the disposal, destruction and replacement of ready-to-eat meats.

[167] I find that Maple Leaf owed the franchisees a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods. The franchisees' economic losses, including lost profits, sales, goodwill and capital value, as well as any special damages related to removing those potentially unsafe goods, may be recoverable upon proving the other requirements of their claim in negligence.

[168] I would therefore allow the appeal, set aside the order of the Court of Appeal, and reinstate the summary judgment order of the Superior Court regarding the duty of care owed by Maple Leaf to the franchisees, with costs throughout.

*Appeal dismissed with costs, WAGNER C.J. and ABELLA, KARAKATSANIS
and KASIRER JJ. dissenting.*

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