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Applying Foreign Law in Canadian Class Actions: A Novel Application of Old Principles in Das v George Weston Limited

On December 28, 2018, the Ontario Court of Appeal released its decision in the case of *Das v George Weston Limited*. At 114 pages, the Court's decision is thoroughly reasoned and substantive. It also deals with important issues that are significant to all class action practitioners. For those who don't want to wade through the full sets of reasons—and there's a lot there—here's our summary of the key take-aways from the Court of Appeal's decision.

Background

The background to this case was the collapse of the Rana Plaza building in Bangladesh on April 24, 2013. The Rana Plaza collapse made headlines around the world, as thousands were killed and injured. Many of those who had been killed were factory workers making garments for international export. A significant percentage of those who died were workers who were making garments for Joe Fresh Apparel Canada Inc., a brand that is owned and controlled by Loblaws Companies Limited.

Following the collapse, the Plaintiffs started a proposed class action in Ontario against Loblaws, as well as Bureau Veritas, a company that Loblaws had contracted to conduct an audit of the premises where the garments were manufactured.

The Plaintiffs moved for certification of the proceeding as a class action. In response, Loblaws and Bureau Veritas brought a motion under Rule 21 of the *Rules of Civil Procedure* to dismiss the actions on the basis that it was plain and obvious they could not succeed. The Defendants' position was that Bangladeshi law applied and that: 1) the case was statute-barred because it was commenced after the expiry of a one year limitation period in Bangladesh; and 2) in any event, it was plain and obvious that, as a matter of Bangladeshi law, neither Loblaws nor Bureau Veritas owed a duty of care or were otherwise legally responsible to the victims of the collapse.

The motion judge accepted Loblaws and Bureau Veritas' arguments and dismissed the action. The motion judge also

made a significant costs award against the Plaintiffs, totalling approximately $2.2 million in the aggregate.

The Plaintiffs then appealed that decision to the Ontario Court of Appeal. The Court of Appeal dismissed the Plaintiffs' appeal on the merits. However, it reduced the costs payable to the Defendants by 30% in light of the public interest considerations.

The case is remarkable for a number of propositions.

The Procedure Below

At the outset, it is worth noting that the procedure used by the Defendants here was somewhat unusual for class actions. Typically, there is no inquiry on the merits at the time of the certification motion. While the Plaintiffs must establish that the pleadings disclose a reasonable cause of action as part of the certification test, no evidence is admissible on those issues. Rather, the allegations set out in the pleadings are taken as true.

As the courts have routinely stated, a certification motion is procedural and not intended to be an initial analysis of the merits. Here, the Defendants brought their motion under Rule 21.01(1)(a) of the *Rules of Civil Procedure* for a determination of law: namely, whether Bangladeshi law applied, whether the limitation period had expired, and whether it was in any event plain and obvious that the claims pled disclosed a cause of action.

It was necessary for the Defendants to bring a motion in this fashion as it was critical for them to be able to lead evidence of Bangladeshi law. The content of foreign law is a question of fact that must be proved on admissible evidence, so the Defendants could not have advanced their position simply based on the pleadings and legal argument. The motion judge raised no concerns about the Defendants using this procedure, and the Court of Appeal similarly endorsed it. While this approach will not be appropriate in every case, it does highlight that there are some circumstances where such a procedural approach will be appropriate to resolve a matter on the merits at an early stage.

Choice of Law in Class Proceedings

The Plaintiffs argued that Ontario law applied in respect of the claim. Both the motion judge and the Court of Appeal rejected this argument, concluding that Bangladeshi law applied, including both substantive tort law as well as the applicable limitation period (which the Supreme Court of Canada has held to be a matter of substantive law).

The choice of law question was resolved in the typical matter

for such cases. Applying settled law of the Supreme Court of Canada in *Tolofson v Jensen*, the Court of Appeal held that the applicable choice of law was the *lex loci delicti*, that is, the law of the place where the tort occurred.

The Supreme Court of Canada had left open the possibility in *Tolofson* that there might be exceptional circumstances where a law other than the *lex loci delicti* might apply, and the Plaintiffs argued that this was an appropriate case where *lex loci delicti* did not apply. They argued that because: 1) punitive damages were unavailable under Bangladeshi law and 2) Sharia law could mandate differences in damages between men and women in certain circumstances and would therefore discriminate against female claimants, Ontario law should therefore apply. Both the motion judge and the Court of Appeal rejected these arguments and applied the standard *lex loci delicti* approach to choice of law in torts.

In the Court of Appeal, the Plaintiffs also argued that the *lex loci delicti* principle should not apply because there had been a change in Bangladeshi law that would result in the Bangladeshi case being barred by the applicable limitation period. The Court of Appeal rejected this argument as well.

The Court of Appeal's decision stands as a good reminder of the need to be sensitive to choice of law issues. The mere fact that a case is brought in Canada does not mean that substantive law to be applied is Canadian law. In many cases, that foreign law may be more advantageous to defendants than is Ontario law, either by more favourable substantive rules or by a shorter limitation period.

It is also noteworthy that while the Court is obligated in such cases to accept the factual allegations in the Statement of Claim as true, the Court is not obligated to accept the Plaintiffs' characterization of where the tort had occurred. The Court of Appeal held that this was a conclusion based on pleaded facts. The Court noted that the judge is only obligated to accept factual pleadings, not legal conclusions. Consequently, the Plaintiffs could not immunize themselves from a Rule 21 motion by pleading that the torts occurred in Ontario rather than Bangladesh.

The Interpretation of Foreign Law

After concluding that Bangladeshi law applied to the Plaintiffs' claims, both the motion judge and the Court of Appeal held that it was plain and obvious that Bangladeshi law did not provide the Plaintiffs with a cause of action. Interestingly, because Bangladeshi law was relatively undeveloped on this point, and because English law is treated as persuasive within

Bangladesh, both the expert witnesses and the Court conducted analyses of the relevant English law. Based on that analysis, the Court concluded it was plain and obvious that there was no duty of care owed in these circumstances by Loblaws as a parent company for the health and wellbeing of the workers of the Rana Plaza Factory.

Interesting to note is that the Court was willing to consider certain English cases which were not referred to in the evidence of the expert witnesses called by the parties. The Court reasoned that both experts agreed the Bangladeshi court would turn to English law as persuasive authority in deciding whether to recognize a duty of care. The Court noted that "Canadian courts routinely consider English jurisprudence when applying domestic law in the absence of expert evidence on the English jurisprudence". Consequently, the Court felt capable of interpreting and applying additional English law without expert evidence from those witnesses, as would typically be required to prove foreign law.

This was a somewhat unusual development. While it is true that Canadian courts interpret English law as persuasive for the purpose of determining unresolved questions of Canadian law, it is an entirely different matter for the courts to interpret English law as a means of determining the content of foreign law, as is the case here. The Court of Appeal's decision seems to suggest some flexibility for courts to consider and apply English law uniquely on such issues without the need for expert evidence to interpret it. While this holding seems somewhat unusual, it may be that this interpretation will be limited to the facts of this case.

Costs in Public Interest Class Proceedings

While Justice Feldman wrote the majority decision, Justice Doherty wrote a concurring decision addressing the motion judge's costs order. He ultimately decided to reduce the costs order by 30% to reflect the public interest component of the claim.

Section 31(1) of the *Class Proceedings Act* specifically empowers the court to consider whether the class proceeding is a test case, raises a novel point of law, or involves the public interest in deciding on the appropriate quantum of costs to order. The Court of Appeal noted that in the context of the claim by a successful Defendant for costs, the factors identifying s. 31(1) may mitigate the costs the losing Plaintiff may be ordered to pay. In some cases, they may result in a no costs order.

The motion judge here held that the claim had no public interest component. The Court of Appeal overturned this decision and

in doing so, provided additional clarity to the term “public interest” within the meaning of s. 31(1).

The Court held that public interest can refer to seeking access to justice through class proceedings by persons or groups who have historically faced significant disadvantage in seeking legal redress for alleged wrongs. It can also refer to the subject matter of the claim, including claims that raise issues that transcend the immediate interests of the litigation and engage broader concerns of significant importance.

The Court of Appeal noted that in this case, as in many others, the Class Proceedings Committee had decided to award funding to Plaintiffs’ counsel. The Court noted that the relevant regulations governing the Committee’s decision provide that the Committee may consider the extent to which the proceedings affect the public interest. The Court then noted that, “If the Fund properly follows its mandate and properly concludes that the litigation involves a matter of ‘public interest’, the Fund can reasonably expect that the motion judge or trial judge also conclude that the litigation involves a matter of ‘public interest’, that ‘public interest’ will mitigate to some extend the costs for which the fund may be liable.”

Justice Doherty went on to hold that this case was in the public interest from the perspective of promoting access to justice to a historically disadvantaged group. While Loblaws argued that public interest within s. 31(1) can only include promotion of access to justice brought on behalf of Ontario residents, the Court rejected that approach. Justice Doherty noted there was nothing in s. 31(1) that would justify limiting access to justice concerns for claimants who reside in Ontario.

Justice Doherty also held that the fact that when the Plaintiffs had a monetary motivation for advancing their claim, it eliminated any public interest component. Rather, he noted that both seeking the monetary compensation and the public interest component can exist together in a class action.

In light of all those circumstances, Justice Doherty directed that the costs payable be reduced by 30%.

Justice Doherty’s decision sheds significant light on the interpretation of public interest within s. 31(1) of the *Class Proceedings Act*. It confirms that public interest litigants can expect some form of discount in costs to reflect the public interest nature of those cases. Yet it also confirms that the public interest nature of a case will not immunize unsuccessful plaintiffs entirely from cost consequences.