

## *Cirillo v Ontario*: Insufficient commonality defeats a certification motion

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In *Cirillo v. Ontario*, 2019 ONSC 3066, Justice E.M. Morgan denied a certification motion for the approval of a class action, where the class was defined by plaintiff’s counsel as “persons denied timely bail” since 1999. That year, the Locke, Evans and Murray *Report of the Criminal Justice Review Committee* identified difficulties administering the bail system, which noted that approximately one third of detained persons seeking pre-trial release appear in court three or more times before a ruling is made, and stressed that “additional resources are urgently needed to address this problem.”<sup>2</sup>

Could the proposed class members, as Morgan J. stated, “hold the provincial government accountable for the slow grinding wheels of Justice”?<sup>3</sup> The plaintiff asserted a cause of action in negligence, breach of fiduciary duty, and breach of *Charter* rights, but Morgan J. denied the motion for two reasons: first, because there was no viable cause of action for the claims of negligence and breach of fiduciary duty; and second, because there was insufficient commonality between the proposed class members.

### Fiduciary duty and negligence claims

Morgan J. found that there were no causes of action for claims of negligence and breach of fiduciary duty. The plaintiff claimed that delays in the bail system constituted a breach of fiduciary duty by the Crown, but this was rejected on the basis that a Crown prosecutor cannot owe a fiduciary duty to an individual coming before a bail court. A fiduciary duty requires a person to put the interests of the beneficiary before all other persons, and therefore Morgan J. concluded it would be odd for Crown counsel in a bail hearing to put the accused’s interests above all others, including those of the prosecution.<sup>4</sup> While acknowledging there may be a *Charter* requirement to provide reasonable bail, there can be no fiduciary obligation.

The court also rejected the negligence claim on a similar basis. While Crown attorneys may consider the public at large, the criminal process takes place in an adversarial system, where no duty of care in negligence can be owed to the other side.<sup>5</sup> The plaintiff’s claim instead focused on the Crown’s role beyond its prosecutorial capacity, but also in terms of the adequacy of resources in the criminal justice system. However, this claim, which touched on the adequacy

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<sup>2</sup> *Report of the Criminal Justice Review Committee*, February 1999 at <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/crimjr/>

<sup>3</sup> *Cirillo v. Ontario*, 2019 ONSC 3066, at para. 6 [*Cirillo*].

<sup>4</sup> *Ibid.*, para. 7.

<sup>5</sup> *Ibid.*, para. 17.

of court space, the allocation of court time, and the availability of interpreters, inevitably addressed the Government of Ontario's resource allocation decisions, and was therefore non-justiciable.<sup>6</sup> Ultimately, Morgan J. concluded that both of the claims were "doomed to fail," and it was plain and obvious that these causes of action had no prospect of success, and therefore they failed to meet the criteria of s. 5(1)(a) of the *Class Proceedings Act* (CPA).<sup>7</sup>

### Charter Claims

Morgan J. concluded that the only actions which could possibly survive s. 5(1)(a) of the CPA are the claims for breach of *Charter* rights, as there are no Crown immunities for breaches of the *Charter*. Section 11(e) of the *Charter* provides that bail will not be denied without just cause, and unreasonable denial of bail impugns the presumption of innocence in s. 11(d) of the *Charter*.<sup>8</sup> Plaintiff's counsel also identified s. 7 liberty interests and the s. 12 right not to be subjected to cruel and unusual treatment as the constitutional rights at stake.<sup>9</sup> Moreover, s. 24(1) of the *Charter* provides appropriate remedies for *Charter* breaches. However, in the context of a class action, the *Charter* rights must be defined in such a way to ensure that the commonality requirement of the CPA was met.

While there is a low threshold for the test for common issues in a class action where only "some evidence of commonality" is required for each claim,<sup>10</sup> Morgan J. held that the class proposed by the plaintiff still lacked sufficient commonality. First, he considered that the right to bail is inevitably tempered by reasonableness, both in the *Criminal Code* and in the *Charter*, so where there is a reasonableness assessment, the analysis is necessarily fact dependent. Further, he emphasized that a *Charter* analysis must necessarily take into account the impact suffered by a particular claimant and cannot be made in a "factual vacuum."<sup>11</sup>

Morgan J. noted that even in the representative plaintiff's own case, there were a number of actors who may have contributed to the delay of a bail hearing, including municipal police and defense counsel.<sup>12</sup> Additionally, the causes of delay were so convoluted that they would be "impossible to pin down".<sup>13</sup> Ultimately, he held that the common issues required individual assessment, and therefore lacked "overall commonality."

### Conclusion

While class action certification motions are meant to be screening devices, the threshold for certification in Ontario is low, which makes resisting a class action difficult at the certification

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<sup>6</sup> *Ibid.*, para. 29.

<sup>7</sup> *Ibid.*, para. 31.

<sup>8</sup> *Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 11(e); s. 11(d).

<sup>9</sup> *Cirillo*, para. 44.

<sup>10</sup> *Kalra v. Mercedes Benz*, 2017 ONSC 3795, para. 45.

<sup>11</sup> *Cirillo* at para. 49.

<sup>12</sup> *Cirillo* at para. 59.

<sup>13</sup> *Cirillo* at para. 62.

stage.<sup>14</sup> Moreover, during the certification stage of a class action the court does not consider the merits of the case and only evaluates whether there is a properly pleaded cause of action. Even with this low threshold, while Morgan J. did not dispute the plaintiff's concerns regarding the availability of bail hearings in Ontario, he found that there would be no reasonable prospect of success, and that the plaintiff was unable to demonstrate "some evidence of commonality." This case demonstrates how failure to meet the commonality requirements of s. 5(1)(c) of the CPA, particularly within a large and varied class, results in the defeat of a certification motion. At the time of writing, the certification decision is under appeal.

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<sup>14</sup> Gordon McKee and Nicole Henderson, "Class Action Reform: The Law Commission of Ontario Review of the Class Proceedings Act", *Defense Counsel Journal*, Jan 2016: 83:1.