Toronto Law Journal

Cirillo v Ontario: Insufficient commonality defeats a certification motion

Madeline Torrie, Ministry of the Attorney General[1]

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.[2]

Could the proposed class members, as Morgan J. stated, "hold the provincial government accountable for the slow grinding wheels of Justice"?[3] 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.[4] 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.[5] 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

[1] Madeline Torrie is a summer student at Crown Law Office – Civil, and will be entering 3L at the University of Toronto. She was not involved in the *Cirillo* matter. The views expressed in this paper are those of the author and are not presented as the position of the Ministry of the Attorney General.
[2] *Report of the Criminal Justice Review Committee*, February 1999 at https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/crimjr/
[3] *Cirillo v. Ontario*, 2019 ONSC 3066, at para. 6 [*Cirillo*].
[4] *Ibid.*, para. 7.
[5] *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.[6] 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).[7]

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*.[8] 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.[9] 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,[10] 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."[11]

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.[12] Additionally, the causes of delay were so convoluted that they would be "impossible to pin down".[13] 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

---

[6] *Ibid.*, para. 29.
[7] *Ibid.*, para. 31.
[8] *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).
[9] *Cirillo,* para. 44.
[10] *Kalra v. Mercedes Benz*, 2017 ONSC 3795, para. 45.
[11] *Cirillo* at para. 49
[12] *Cirillo* at para. 59.
[13] *Cirillo* at para. 62.

stage.[14] 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.

[14] 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.

Toronto Law Journal

What Should You Know About the Coming Into Force of the *Impact Assessment Act*?

Stanley Berger, Partner, Fogler, Rubinoff LLP[1]

As of the end of August 2019, Canada has a new environmental assessment regime — the *Impact Assessment Act*.[2] Concurrent with the coming into force of the Act were two important regulations. The *Physical Activities Regulations*[3] designate proposed projects which the Impact Assessment Agency will have to consider for assessment. The *Information and Management of Time Limits Regulations*[4] sets out the information proponents must include in the initial and more detailed project description and the time frames during the initial planning phase and subsequent stages of the assessment. This description now specifically requires estimates of any greenhouse gas and other emissions and wastes associated with any phase of the project.

The government was faced with a dilemma. How to reinvigorate the assessment process so that trust was established with industry, non-governmental organizations (NGO's) and First Nation communities. Industry found the process inefficient and unpredictable particularly in bringing natural resources to market. NGO's and indigenous groups considered regulators with significant control of the assessment process captive to proponents and sought transparency.

The new legislation transfers greater oversight of the process to an independent Impact Assessment Agency (Agency). It formalises what should, in any event, be taking place behind the scenes, imposing more demands for information and consultation with the public, First Nations and other relevant governing jurisdictions through an initial planning phase, supervised by the Agency. The Agency uses the planning phase to determine whether an assessment is required and to identify issues, requisite information and studies and finally, set the scope of the assessment. Criteria for suspending time frames during the assessment phase have been narrowed, but practically, this may just transfer the time for obtaining additional information and study from the assessment phase to the initial planning phase. Uncertainty in the assessment process may prove to increase by the expansion of assessment and the decision-making process beyond significant adverse environmental effects. Now the Agency, Review Panel and ultimately the Minister of Environment and federal cabinet must consider in the assessment, review and approval process changes to health, social or economic conditions. The Act now explicitly requires in the case of designated energy projects regulated under the Nuclear Safety and Canadian Energy Acts, that the Review Panel consider the need for the project, alternatives to it, the extent to which the project contributes to sustainability, the

---

[1] This article was originally published on the Fogler, Rubinoff website and is republished here with the author's permission.
[2] S.C. 2019, c.28
[3] SOR/2019-285.
[4] SOR/2019-283.

extent to which the project hinders or contributes to Canada's ability to meet its environmental obligations and commitments in respect of climate change and the intersection of sex and gender with other identity factors.

The Act's preamble recognizes the Canadian government's commitment to implementing the *U.N. Declaration on the Rights of Indigenous Peoples* which has numerous clauses recognizing that Indigenous Peoples have a right to free, prior and informed consent. Section 3 of the new Act, however, states that nothing in the Act shall be construed as abrogating or derogating from the protection provided for the rights of the Indigenous Peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*. The Supreme Court of Canada in cases like the *Chippewas of the Thames First Nation v. Enbridge Pipelines,*[5] has emphasized that those rights involve the Crown's duty to consult to obtain consent, without imposing a duty to obtain consent. That said, throughout the planning phase, the assessment phase and the final decision-making public interest stage, the rights of indigenous peoples must be seriously considered.

With respect to transition between the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and the *Impact Assessment Act*, projects submitted for assessment under the former Act continue under CEAA 2012 with the caveat that if a decision as to whether or not an assessment is required before the *Impact Assessment Act* came into force, then the submitted project will be terminated and the project will be considered under the new *Impact Assessment Act*.

[5] 2017 SCC 41 at para. 59.

Toronto Law Journal

Life Insurance as Security for Support Obligations

Suzana Popovic-Montag & Nick Esterbauer, Hull & Hull LLP

Insurance professionals and other advisors are familiar with the concept of using life insurance to secure spousal support obligations. In a recent decision of the Ontario Superior Court of Justice, the court, on a motion for summary judgment, determined that a clause in a separation agreement requiring the deceased to obtain a life insurance policy for his former spouse's benefit was a "standalone" clause fully enforceable against the deceased's estate, and, furthermore, that it was not subject to the "clawback provisions" of Section 72 of the *Succession Law Reform Act*.[1]

Birnie v. Birnie

Mr. Birnie died in August of 2017 at age 61. Mr. Birnie had entered into a separation agreement with his first wife, Mrs. Birnie, in 2004. As part of their separation agreement, Mr. Birnie was required to take out a life insurance policy in the amount of $500,000, for which Mrs. Birnie was to be named the irrevocable beneficiary. Mr. Birnie, however, never obtained the life insurance policy.

Mr. Birnie had remarried by the time of his death and named his new spouse as estate trustee of his estate.

After the death of her ex-husband, Mrs. Birnie brought an application seeking $500,000, plus cost of living adjustments, from Mr. Birnie's estate.

Mr. Birnie's wife, Ms. Larmer, as estate trustee for Mr. Birnie's estate, responded that the life insurance policy was only intended to secure spousal support payable by Mr. Birnie pursuant to the terms of the separation agreement and that Mrs. Birnie was not entitled to the sum of $500,000, but instead to the portion of funds required to "secure" payment of spousal support, with the balance remaining assets of Mr. Birnie's estate. Furthermore, Ms. Larmer asserted that the $500,000 sought by Mrs. Birnie was subject to the claw-back provision of Section 72 of the *Succession Law Reform Act*, such that the amount would have been available to fund an award on an application for dependant's support.

The court applied general principles of contractual interpretation in analyzing the clause of the separation agreement pertaining to Mr. Birnie's obligation to obtain a life insurance policy benefitting Mrs. Birnie. It was clear to the court that, if it was indeed a standalone provision creating an obligation independent of the other terms of the separation agreement, Mrs. Birnie would be entitled to the sum of $500,000, without the estate receiving any interest in this amount for which life insurance ought to have been obtained by Mr. Birnie.

---

[1] *Birnie v. Birnie*, 2019 ONSC 2152.

Citing the Supreme Court of Canada's decision in *Consolidated-Bathurst v. Mutual Boiler*,[2] the court noted the importance of the intention of the parties entering into the separation agreement in interpreting the contract (at para 34):

> Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

In determining the intentions of Mr. and Mrs. Birnie, the court gave consideration to three key factors:

1) The absence of any language in the separation agreement expressing the intention that the insurance policy act simply as security for the support obligations;

2) The full and mutual release of rights in one another's estates, as Mr. and Mrs. Birnie wished to provide for the orderly and complete settlement of their affairs, including division of their property, at the time of separation; and

3) The absence of a "draw down" clause whereby Mr. Birnie could reduce the value of the life insurance that he was required to obtain as a result of his lifetime support obligations owed to Mrs. Birnie decreasing over time.

Whether the term of the separation agreement requiring Mr. Birnie to obtain life insurance was a "standalone" term or the life insurance was instead to act solely as security for support obligations was considered to be highly relevant to the issue of whether the sum of $500,000, if payable by the deceased's estate, was subject to the clawback provisions of the *Succession Law Reform Act* (at para 52):

> [I]n order to be subjected to *SLRA* clawback, an insurance clause in a Separation Agreement must be intended to act solely as “security”. A concession that the insurance is intended to act as “security” does not rise to the level of conceding that insurance is intended to act solely as security. Indeed, “stand alone” clauses can presumably have a variety of purposes including “security” for spousal support. … [W]hile it is clear that the insurance clause was intended by all to act in part as “security” … [the evidence] does not assist me in determining whether that was the “sole” purpose of same.

Summary judgment was considered to be an appropriate mechanism for the determination of the contractual relationship of the parties. Interpreting the insurance clause "as mere security" for spousal support, the court held, would have been inconsistent with the parties' intentions. Instead, it was determined that Mrs. Birnie was entitled to the full $500,000 for which Mr. Birnie

---

[2] [1980] 1 S.C.R. 888.

was contractually required to obtain life insurance pursuant to the separation agreement. As such, Mrs. Birnie was a protected creditor under Section 72(7) of the *Succession Law Reform Act* and, accordingly, the $500,000 payable to her was to be exempt from the clawback provision of Section 72(1)(f).

Toronto Law Journal

Document Production: If and when can productions be ordered in the Small Claims Court?

Caroline Gaikis, Dutton Brock LLP

Overview

In the Ontario Small Claims Court, there are often misconceptions surrounding a party's obligation with respect to documentary discovery. As we know, the purpose of the Small Claims Court is to provide expeditious and low-cost resolutions of monetary disputes.[1] The question becomes: when and to what extent can a non-party be compelled to produce documents?

This article will briefly outline the recent caselaw surrounding the Court's jurisdiction to order non-party productions pursuant to the *Rules of the Small Claims Court*.

Authority to Order Document Production Rests with Settlement Conference Deputy Judge

By way of overview, the caselaw is clear that only a Settlement Conference Deputy Judge can order the production of documents.

In *Petrykowski v. 553562 Ontario Ltd.* ("*Petrykowski*"), the Small Claims Court denied the Plaintiff's request for an Order compelling the Defendant to produce documents as well as the names and addresses of witnesses because the Court had no jurisdiction to make this order. Deputy Judge Winny held that the only exception to the absence of discovery rights is the power of a Settlement Conference Judge to make an order for the production of documents as between the parties, pursuant to Rule 13.05(2)(a)(vi).[2] Deputy Judge Winny opined:

> The basic process in this court has three steps: pleadings, settlement conference and trial. To inject an additional step in the form of discovery of documents motions would be inappropriate. If such a step were to be considered, that would be a matter for the Civil Rules Committee.[3]

Further, the Court concluded that Rule 1.03(2) of the *Rules of the Small Claims Court* cannot be used to create a procedure that does not otherwise exist and thus cannot be used to justify pretrial discovery. This Rule provides as follows:

> 1.03(2) If these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by analogy to these rules, by reference to the Courts of Justice Act and the Act

---

1 *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847 at para 9 [*Elguindy*]
2 *Petrykowski v. 553562 Ontario Ltd.*, [2010] O.J. No. 1048 at paras 9-12 (Ont. Sm. Cl. Ct.)
3 Ibid at para 6

> governing the action and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*.[4]

The above decision is confirmed by *Norquay Developments Ltd. v. Oxford County Housing Corp.* ("*Norquay*"). Here, the Court found there to be no provisions in the *Rules of the Small Claims Court* that afforded it the power to Order the production of documents. Rather, a motion for productions is only to be entertained by a Deputy Judge conducting a Settlement Conference; as a result, the motion for productions was dismissed.[5]

In the recent 2018 decision of *Fiuza v. Creekside Real Estate Group Inc.* ("*Fiuza*"), Deputy Judge Winny again reviewed and interpreted the conflicting caselaw on this issue. Consistent with *Petrykowski* and *Norquay*, it was held that the Small Claims Court does not have the jurisdiction to entertain productions motions and that same must be made at the Settlement Conference.[6] In this case, the motion was dismissed, and costs were awarded to the responding party.[7]

Production of Non-Party Documents

An order for the production of documents is not equitable relief; it is a procedural order, the jurisdiction for which arises out of the *Small Claims Court Rules*.[8] Upon analysis of the Rules, the Courts have recognized that the production of non-party documents cannot be ordered, including by a Settlement Conference Deputy Judge.

In *Lemont v. State Farm Mutual Automobile Insurance Co.* (*"Lemont"*), the Small Claims Court dealt with a motion for production of non-party documents under Rule 15 of the *Rules of the Small Claims Court*. The Deputy Judge ultimately dismissed the motion for several reasons, including:

1. That Rule 30.10 of the *Rules of Civil Procedure* does not apply in the Small Claims Court;

2. That both Rule 1.02(1) of the *Rules of Civil Procedure* and Rule 1.03(2) of the *Rules of the Small Claims Court* can only be applied where the *Rules of the Small Claims Court* fail to cover a matter adequately, which cannot be said in respect of discovery in the Small Claims Court; and

3. That in the context of a Settlement Conference, Rule 13.05(2)(a)(vi) cannot be interpreted to mean that non-party production motions are a proper part of the Settlement Conference process.[9]

---

4 *Rules of the Small Claims Court,* O. Reg. 258/98, Rule 1.03(2)
5 *Norquay Developments Ltd. v. Oxford County Housing Corp.,* [2010] O.J. No. 274 at para 11-12, 14 (Ont. Sm. Cl. Ct.)
6 *Fiuza v. Creekside Real Estate Group Inc.,* 2018 CanLII 6671 at paras 9-10, 15 (Ont. Sm. Cl. Ct.)
7 Ibid at para 18
8 *Elguindy* Supra Note 1, at para 12
9 *Lemont v. State Farm Mutual Automobile Insurance Co.*,[2011] O.J. No. 4601 at paras 9-10, 20-21 (Ont. Sm. Cl. Ct.)

As a result, the Court in *Lemont* concluded that the production of documents in Small Claims Court matters is solely under the power of a Settlement Conference Judge and limited only to parties to the action. In doing so, the Court provided the following comments which are worthy of consideration:

> Counsel also pointed out that to her knowledge, non-party production orders have been granted by one or more judges of this court in other cases. I have no doubt that is true, but no reasons were produced or cited and I am aware of none holding such a jurisdiction to exist…
>
> Despite my reasons in [*Polymer Distribution Inc. v. Rasmussen*, [2011] O.J. No. 1281 (Ont. S.C.J.)]… I have considered this subject afresh with the benefit of counsel's submissions. I conclude that Justice Sharpe's observation in 1995 continues to be true today: there is no discovery in the Small Claims Court. The power of a settlement conference judge to order the production of documents is limited to production of documents between the parties. This court has no jurisdiction to make pre-trial orders for the production of documents by non-parties, whether on motion or at a settlement conference.[10] (emphasis added)

In *Elguindy v. St. Joseph's Health Care London*, the Plaintiff commenced an action for damages arising from medical negligence but thereafter refused to produce records of his medical condition. A Deputy Judge of the Small Claims Court ordered non-party productions at the Settlement Conference. Specifically, the Endorsement ordered the Plaintiff to produce medical records from non-party hospitals; these records directly related to his alleged condition. The Plaintiff thereafter applied for judicial review on the basis that the Deputy Judge had no jurisdiction to make a non-party production order.[11]

In keeping with *Lemont*, Justice Pattillo, writing on behalf of the Superior Court, held that the Deputy Judge did not have jurisdiction to order the non-party production of the Plaintiff's medical records. Justice Pattillo remarked as follows:

> …I am in complete agreement with Deputy J. Whinny's reasons in *Lemont*. In the absence of discovery in the Small Claims Court, there is no gap in the SCC Rules which would permit incorporation of rule 30.10 of the Rules of Civil Procedure. Nor is there any provision in the SCC Rules for third party production orders, either on a motion or at a settlement conference. As noted, the only provision in the SCC Rules permitting an order for production of documents is SCC Rule 13.05(2)(a)(vi) which, in the context of a settlement conference, only permits an order for production by a party to the action as part of the settlement conference.[12] (emphasis added)

[10] Ibid at paras 14, 22
[11] *Elguindy* Supra Note 1
[12] *Elguindy* Supra Note 1, at para 23

Of noteworthiness, the Defendants in this case later moved to dismiss the Plaintiff's action on the basis that it was inflammatory, a waste of time, a nuisance or an abuse of the court process, pursuant to Rule 12.02(1)(c) of the *Rules of the Small Claims Court*. The action was dismissed.

The Plaintiff subsequently appealed the decision and the Defendants moved to dismiss the appeal on the basis that it was frivolous, vexatious, otherwise an abuse of process, or devoid of merit.[13] On hearing of the motion, the Court declined to dismiss or quash the Plaintiff's appeal but did strike parts of the Plaintiff's notice of appeal. Ultimately, however, the Court did dismiss the Plaintiff's appeal; the action remained dismissed.[14]

Concluding Remarks

As can be seen from the above, the Rules and caselaw can be used to shield one's own client from the excessive and unrealistic demands of an opposing party. On the other hand, the jurisprudence presents real and substantial challenges when requesting pertinent documentation from an opposing party, absent consent.

For the time being, motions such as those under Rule 12.02(1) provide relief which, to a certain extent, can be used to prevent abuse of the system. However, as the demands on our legal system become ever-increasing — and in contemplation of further increases to the Small Claims Court monetary limit — it remains to be seen what the future holds and whether the Rules surrounding documentary discovery will correspondingly be amended to reflect the most just, most expeditious and least expensive determination of every proceeding on its merits.

[13] *Elguindy v. St. Joseph's Health Care London*, 2017 ONSC 4247
[14] *Elguindy v. St. Joseph's Health Care London*, 2017 ONSC 5360