Certification of proposed bail hearing class action denied

June 25, 2021

In *Cirillo v. Ontario*, the Ontario Court of Appeal upheld the denial of certification of a proposed class action alleging a systemic failure by the Crown to hold timely bail hearings for accused persons.

Background

The proposed representative plaintiff, Robin Cirillo, was arrested in May 2017 following a domestic altercation with her ex-spouse. Cirillo was detained overnight for a bail hearing. The hearing was subsequently delayed for various reasons until the following day, when she was released on consent.

Cirillo sought to certify a class action against the Crown in negligence, breach of fiduciary duty and breach of various *Charter* rights. The proposed class was defined as all persons who were arrested and detained for a period of more than 24 hours prior to any bail hearing "as a result of" five specified causes. The claim generally alleged that the Crown mismanaged the bail system, failed to commit adequate resources and promoted policies for prosecutors that had the effect of increasing the number of people in remand.

Superior Court decision

The motion judge denied certification on the basis that "(i) the pleadings did not disclose a cause of action in negligence as the claims are not justiciable; (ii) it is plain and obvious that the claims based on breach of fiduciary duty have no prospect of success; (iii) the appellant's claims for breach of *Charter* rights were not common to class members; and (iv) a class proceeding was not the preferable procedure for resolution of the class members' claims."

With respect to the claims in negligence and breach of fiduciary duty, the motion judge first concluded that there could be no cause of action against the Crown in its prosecutorial capacity, as the immunity of the Crown as prosecutor is "deeply entrenched" in law. The motion judge then considered the allegations aimed at the Crown's broader decisions related to staffing and resource allocation decisions. In that

regard, the motion judge found that the impugned actions were “core policy decisions”, which do not give rise to a private law duty of care. The motion judge also found that there were no common issues to be certified in terms of the breach of *Charter* claims because the analysis was so fact dependent. In particular, the motion judge highlighted the multiple potential causes of bail hearing delays and that those causes could be attributable to various non-parties. The *Charter* claims required an individualized assessment of each case and therefore, the proposed class action was not the preferable procedure. The motion judge also questioned whether there was an identifiable class.

Court of Appeal

On appeal, Cirillo argued that the claims in negligence were operational decisions, not policy choices, and thus the motion judge erred in finding that the statement of claim did not disclose a cause of action in negligence. Cirillo further argued that the motion judge erred in holding that there was no common issues for the *Charter* claims and that a class proceeding was not the preferable procedure in the circumstances. While the notice of appeal advanced arguments on the ruling on fiduciary duty, it appears this argument was ultimately abandoned.

In its decision, the Court of Appeal reiterated that the certification requirement under s. 5(1)(a) of the *Class Proceedings Act*, was the same as the test applied under r. 21.01 of the *Rules of Civil Procedure* to determine whether a pleading should be struck out for failing to disclose a cause of action. The Court affirmed the motion judge’s finding that it was plain and obvious that the claims “on their face” related to core policy decisions and could not form the basis of a negligence claim. The claims in negligence were determined to relate to “resource allocation for bail hearings and staffing” and clearly fell under the umbrella of policy decisions without a need for any further evidence on the issue. The Court noted that, in its view, the negligence claims would not satisfy the remaining criteria in ss. 5(1)(b) and (d) in any event, for the same reasons as the *Charter* claims.

While the Court of Appeal accepted that the *Charter* claims could satisfy the cause of action criterion (and chose not to address their viability), the Court affirmed the motion judge’s finding that they were not certifiable because they did not meet the identifiable class, common issue or preferability criteria. The Court found that the plaintiff, by defining the class as those who were detained “as a result of” certain specified causes, had brought a causation element into the class definition that was “inherently merit-based”. Accordingly, the class definition was incapable of objective determination.

In terms of commonality, the Court of Appeal articulated that there was no single course of conduct giving rise to the alleged *Charter* breaches and thus the proposed common issues required individualized and particularized assessments of each case. The Court distinguished the claim from other cases where courts had certified claims based on alleged *Charter* breaches. The Court found similarity in the analysis of the British Columbia Court of Appeal in *Thorburn v. B.C.*, 2013 BCCA 480, where the representative plaintiff had been arrested at a protest and strip-searched in accordance with a specific policy. The Court noted that an unreasonable policy alone did not necessarily translate into a *Charter* claim capable of common determination or a conclusion that a class proceeding would be a preferable procedure.

Takeaways

This decision adds helpful clarity to the operational/policy distinction in determining whether claims in negligence can be advanced. Moreover, the decision is noteworthy in highlighting that even a general finding of "systemic wrong" may not avoid the need for protracted individualized inquiries in to the circumstances of each class member. In such cases, a class action may not be the preferable procedure, if any true common issues exist at all. Finally, this case highlights the potential pitfalls of attempting to create an expansive claim through a broadly defined putative class.

By

Jonathan Thoburn, David Elman

Expertise

Class Action Defence, Disputes

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749