Certification denied in proposed class action for individuals jailed pending bail

July 31, 2019

In *Cirillo v. Ontario*, Justice Morgan of the Ontario Superior Court of Justice dismissed the plaintiff's motion for certification of an action against the provincial Crown on behalf of persons allegedly denied timely bail hearings. The Court focused on two parts of the five-part test required to certify a class action under the *Class Proceedings Act, 1992*: (1) whether the pleadings disclose a cause of action (s. 5(1)(a)); and (2) whether the claims of the class members raise common issues (s. 5(1)(c)).

Do the pleadings disclose a cause of action?

The plaintiffs alleged three distinct legal bases for the claim against the Crown: breach of fiduciary duty, negligence and breach of the *Canadian Charter of Rights and Freedoms*.

The Court found that a Crown prosecutor or Crown attorney's office cannot owe a fiduciary duty to a person coming before a bail court. In particular, the Court found that for a fiduciary duty to exist, the person who owes the duty must be required to place the claimant's interest above those of all others. This could not apply to the Crown, which cannot put the accused's interests above those of all others, including the prosecution.

The Court similarly confirmed that counsel could not owe a duty of care in negligence to the opposing side in litigation, given the adversarial nature of the criminal process. Imposing a duty of care upon Crown Attorneys would be especially problematic since, in addition to having an adversarial role vis-à-vis the defendant, they are also vested with extensive discretion and decision-making authority to carry out their functions (citing the Supreme Court of Canada's decision in Proulx v. Quebec (Attorney General)).

The Court concluded that, since fiduciary duties and duties of care in negligence could not apply to the Crown's actual handling of bail prosecutions, causes of action based upon those duties must logically be aimed at the overall resource allocation, staffing, building, and management of the criminal justice system. In this regard, the Court found that any potential cause of action involving the reasonableness (or lack thereof) of the bail system would necessitate a fulsome examination of funding and resource

allocations, an exercise for which there would be no judicially manageable standard. The Court noted that: "the oversized evidentiary and investigative requirements entailed in the Plaintiff's claim start to resemble the task of public inquiry more than a legal rights adjudication," and pointed to prior case law finding that issues about funding and resource allocation cannot by their extensive nature lead to the creation of a duty of care.

However, the Court did find that there might be a cause of action in relation to the alleged *Charter* breach. Specifically, a *Charter* breach allegation is more specifically aimed at the role of the Crown in the bail process itself, and not at government more generally.

Are there Common Issues?

Despite finding that an alleged *Charter* breach could give rise to a cause of action, the Court denied that there were common issues relating to that cause of action that were suitable for certification. The Court explained that the right to bail is tempered by reasonableness, which is a difficult standard to assess as a common issue. This would require a fact-dependent analysis turning on the particular circumstances of the each individual case. Furthermore, it would be difficult to identify the actual source of a delay in any given bail case (*e.g.* the delay might be a result of police, defence counsel, the judge's orders etc.). The Court concluded that despite the relatively low bar for establishing the existence of suitable common issues: "[t]he proposed common issues pertaining to the *Charter* claims require individualized and particularized assessments of each case. They are not amenable to the kind of universal and generalized analysis that the Plaintiff would ascribe to them". There being no common issue to certify under s. 5(1)(c) of the CPA, the Court dismissed the plaintiff's motion for certification.

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