

## Focus On Fairness In The Face Of Pre-certification Disclosure Requests

July 31, 2018

The Court denies the extensive disclosure requests of defendant's counsel

In *Cirillo v. Ontario*, Justice Morgan of the Ontario Superior Court of Justice focused on fairness in dismissing the motion of defendant's counsel for disclosure of the representative plaintiff's financial and medical information, and production from the plaintiff's expert of handwritten notes and draft publications listed in her CV.

The underlying class action was brought on behalf of all persons in Ontario who, since January 2000, were arrested and detained for more than 24 hours prior to a bail hearing being available. The motion followed cross-examination on the affidavits filed by the plaintiff in support of the upcoming certification motion in the class action.

The Court held that the financial status of the representative plaintiff was irrelevant to whether a class action was the preferable procedure, noting that "a wealthy person and a poor person have the same rights" and that the information already provided - the plaintiff's annual income and amount in savings - was more than enough for the defendant's needs. Regarding the defendant's request for medical disclosure, the Court noted that the class action was not a medical case, and that the statement in the plaintiff's affidavit that she was "troubled" by her two nights in jail was an insufficient basis to request production of her medical records.

The defendant also sought production of handwritten notes made by the plaintiff's expert witness while observing bail hearings, despite these notes not being relied on in her report. The Court denied the request, and the request for production of all the draft publications listed in her CV. In denying these requests, the court emphasized that experts under cross-examination on an affidavit are not subject to exploratory discovery.

The Court reminded the parties that the "guiding principle" when it comes to production is fairness: the defendant must have all the information it needs to meet the case, and the plaintiff is not permitted to hold back information that the defendant could require. Here, the defendant had everything it needed to address the expert report and respond to the certification motion. Asking for more frustrated the timely and cost-effective adjudication of the dispute. The decision provides helpful guidance on the scope of disclosure that defendants can require plaintiffs to make prior to certification.

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