CITATION: Mayotte v. Ontario, 2010 ONSC 3765
COURT FILE NO.: 09-CV-389686CP
DATE: June 30, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Michel R. Mayotte

Plaintiff

- and -

Her Majesty the Queen in right of Ontario

Defendant

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Allan D.J. Dick, David Sterns, and Vukica Djuric for the Plaintiff

Edmund Huang and Kevin Hille for the Defendant

HEARING DATE: June 18, 2010

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] This is a motion to certify an action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 5.

[2] The proposed members of the class are approximately 370 current and former independent contractors who have or had contracts with the Defendant Province of Ontario to issue driver's licences and vehicle registrations and to provide certain other services to the public. Under the contracts with Ontario, the proposed class members are or were paid for their services in accordance with a compensation formula that is unilaterally set by Ontario. The central grievance of the proposed class members and the alleged wrongdoing of Ontario is the allegation that it has unfairly and unreasonably under-compensated the private issuers since August 2003. Mr. Michel Mayotte, the

representative plaintiff, claims damages or seeks restitution in the amount of $75 million on behalf of the private issuers.

[3] Ontario resists the motion for certification and submits that none of the five criteria for certification have been satisfied. Its principal submission is that it is plain and obvious that the private issuers' claim cannot succeed because the proposed causes of action for breach of contract or for unjust enrichment are legally untenable.

[4] In particular, Ontario submits that there is no basis to imply the contractual terms, including the alleged duty of performing the contract in good faith, that are the necessary legal underpinning for the claims and that the implication of contract terms would be illegal as: (a) contrary to the express language of the contracts between the private issuers and Ontario; (b) contrary to the statutes authorizing the compensation scheme; (c) an usurpation of the Minister's express statutory authority; and (d) contrary to the anti-fettering doctrine under which a government cannot contract in a way that would fetter its legislative authority. Ontario also submits that many of the claims, if they existed, would be barred by limitation periods.

[5] For reasons that I will explain below, in my opinion, Mr. Mayotte's claims for breach of contract are adequate to satisfy the first criterion for certification. Ontario has strong arguments, but they are not strong enough at this juncture to prevent Mr. Mayotte from stepping over the low hurdle of showing a cause of action for his proposed class action.

[6] Further, with the cause of action criterion satisfied, it is my opinion that with clarification of the proposed common issue about the measure of compensation, the rest of the criteria for certification are satisfied. Accordingly, for the reasons that follow, I grant the motion and certify the action as a class proceeding.

Factual Background

[7] Since 1917, Ontario has outsourced to "private issuers" the service of issuing driver's licences and registering vehicles. The private issuers are independent contractors. They are not employees of Ontario. Although their relationship with Ontario might arguably qualify as a franchisee-franchisor relationship under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3, under s. 2 of the Act, Ontario is exempt from the Act.

[8] The network of private issuers (referred to as the "PIN") provides approximately 88% of all vehicles and 55% of all driver licensing transactions in Ontario. The rest of these transactions are provided by civil servants at government offices of Ontario's customer-service arm, ServiceOntario.

[9] The PIN is a diverse group. It is comprised of individual proprietorships, Chambers of Commerce, Boards of Trade, Municipalities and Associations such as the Canadian Automobile Association, and complex commercial entities (e.g. Canadian Tire, SERCO DES, and Canada Post). Approximately 100 private issuers carry on other

businesses. Mr. Mayette, who is the proposed representative plaintiff, was for many years, but is no longer, a private issuer.

[10] Obviously, for those private issuers that operate for profit as businesses, their performance and profitability are also diverse and will depend upon the many factors that influence the success of a business. Ontario disclosed that from 2003 to 2008, the lowest amount of gross commission paid to an individual private issuer was $69,105.09 and the highest amount was $4,644,048.

[11] The private issuers are not a homogenous group, but, as will be seen, for the purposes of this class proceeding, they are common issues and systemic concerns and the private issuers may have common cause to seek access to justice.

[12] Around 1961, the private issuers began collecting retail sales tax for the Ministry of Revenue. After 1982, private insurers expanded their services to include the issuance of photo licence cards and "Accessible Parking Permits," the distribution of materials, and the collection of fines, among other services.

[13] In 1982, Ontario introduced a standard Memorandum of Agreement for private issuers. Under the Memorandum of Agreement, Ontario determined the compensation payable to the private issuer. The memorandum provided, among other things, as follows:

> 2. The Issuer will comply with all legislation governing the issuance of permits and licences, with the Ministry's manuals, policies, instructions and directives, and with the Ministry's reporting requirements in a manner that allows immediate revenue reconciliation.
>
> 13. The issuer will not accept any compensation in respect of issuing vehicle permits and licences other than the compensation fixed by the Minister [of Transportation] or by the Ministry of Revenue or by the Ministry of the Attorney General and will not engage in any activity or business in which the issuer's interests will conflict with the interests of the Ministry.

[14] In addition to the Memorandum of Agreement (implemented in 1982), there have been three other forms of agreement between the Issuers and Ontario, namely: (1) the Private Issuer Agreement (implemented in 2002); (2) the Interim Memorandum of Agreement (implemented between 2007-2009) and (3) the Issuing Services Agreement (introduced in January 2010). Beginning in October 2009, as part of a "modernization strategy," Ontario terminated the agreements of a number of issuers and required all of the remaining issuers to either shut down or enter into the Issuing Services Agreement.

[15] There are substantial differences between the various agreements. The more recent ones are more sophisticated, elaborate, and comprehensive commercial agreements and the recent agreements address many issues and impose obligations that are not found in the older agreements. However, the arrangements for compensation and several other major elements are common to all of the agreements.

[16] I have noted above the compensation provision in the Memorandum of Agreement. The Private Issuer Agreement is similar and provides for compensation as follows:

> 18.1 For performance of the Services, the Service Provider shall receive compensation from MTO in accordance with the Issuer Commission Memorandum of MTO, as may be revised by MTO from time to time. Payment of compensation shall be made by MTO in accordance with procedures set out in the Manual.

[17] The Interim Memorandum of Agreement similarly provides for compensation as follows:

> 14. For performance of the Services, the Issuer shall receive compensation from Ontario in accordance with the Issuer Commission Memorandum of Ontario, as may be revised by Ontario from time to time. Ontario in accordance with procedures established by Ontario, shall make payment of compensation.

[18] The Issuing Services Agreement similarly provides for compensation as follows:

> 10.01 For performance of the Issuing Services, the Issuer shall receive compensation from MGS as set by MGS from time to time, and articulated in the Instructions of MGS and the Operational Directives. Payment of compensation shall be made by MGS in accordance with procedures set out in the Operational Directives.

[19] Under all the agreements, the issuers are appointed as agents of Ontario pursuant to the *Highway Traffic Act* R.S.O. 1990, c. H.8 for the purpose of providing services in accordance with the policies of the Ministry of Transportation. For all the agreements, the Ministry provides the training, installs and maintains any electronic equipment, and provides all official materials at the Ministry's own expense.

[20] Pursuant to all the agreements, issuers must comply with the manuals, policies and directives provided by Ontario. Ontario decides how many private and government issuing offices are to be operated and where they are to be located. Private issuers may advertise only in the manner permitted by Ontario. Although Ontario does not permit price competition from the private insurers, Ontario has an unfettered right to compete with the private issuers for the public's business. All the issuer agreements state that the private issuers voluntarily accept all risks and costs associated with the business, including the risk that Ontario may terminate the agreement before the private issuer has had an opportunity to recover all of its investment and costs.

[21] The agreements contain an entire agreement clause. The Memorandum of Agreement states that:

> The Issuer acknowledges and agrees that it has not received from the Minister, directly or indirectly, any representations, warranties, promises,

> assurances, undertakings, agreements or commitments (collectively, "Promises), verbally or in writing or otherwise, not expressly set out in this Agreement.

The other agreements have similar provisions.

[22] The fees for services are fixed by Ontario for all the agreements. The private issuers collect the fees and remit the revenues, retaining a transaction fee prescribed by Ontario. In this regard, ss. 7(21) and 32(6) of the *Highway Traffic Act*, permits issuers to retain a portion of the fees they collect, as determined by, and at the discretion of, the Minister. Section 7(21) states:

> Despite section 2 of the *Financial Administration Act*, any person who issues permits or provides any other service in relation to permits on behalf of the Minister, pursuant to an agreement with the Minister, may retain, from the fee paid, the amount that is approved by the Minister from time to time.

Subsection 32(6) states:

> 32 (6) Despite section 2 of the *Financial Administration Act*, any person who issues licences or provides any other service in relation to licences on behalf of the Minister, pursuant to an agreement with the Minister, may retain, from the fee paid, the amount that is approved by the Minister from time to time.

[23] In 1987, Ontario implemented its current approach to compensating private issuers. In a 1987 memorandum, signed by the Minister of Transportation and approved by Cabinet - which memorandum Mr. Mayotte relies on to support his claims and the theory of his case - Ontario informed the private issuers that the compensation formula would be changed to a basis that was fairer and more rational than the previous method. Mr. Mayotte contends that Ontario committed itself to compensating the private issuers in a manner that would be fair, rational, objective, and proportional to the effort required to do each transaction.

[24] The 1987 memorandum, stated that the private issuers would be compensated by a small annual stipend and by fees based on a time-based commission for each transaction (the "transaction compensation formula"). The formula would compensate the private issuers based on the time and complexity of the transaction.

[25] The formula introduced by the 1987 memorandum multiplied a standard transaction time by a base rate. According to the 1987 memorandum, compensation would be "proportional to the effort required to do each transaction", and "derived from an objectively determined standard time taken to do a transaction." The transaction standard time was based on an internationally recognized methodology to establish time standards, the Methods Time Measurement – Clerical standard, or MTM-C standard, which is designed specifically for measuring clerical activity. Ontario sets the base rate.

The rates were set out in a June 1998 memorandum sent to private issuers. The rate was and is set by the Minister.

[26] Apart from modest changes to the base rate, the compensation formula has remained unchanged. Until February 2010, the fixed annual stipend was $2,139, and it is now $6,000. A few issuers also receive a "top-up" payment of up to $20,000, if their compensation falls below certain thresholds for a one, two or three terminal office.

[27] The time study was conducted in 1985, and it has not been revisited. Mr. Mayotte submits that the nature of duties, however, has substantially changed due to: (a) additional work required because of privacy and security measures; (b) a larger proportion of complex transactions because the easier transactions are captured by the expansion of Service Ontario automated kiosks; and (c) problems with the Ministry of Transportations assistance hotline for the private issuers.

[28] The private issuers complain that their compensation has not kept pace with their increased expenses or with increases in the cost of living. Mr. Mayotte submits that Ontario has known for many years that the compensation for private issuers has been inadequate, and he submits the compensation is unfair and unreasonable and not comparable to compensation paid to private issuers in other provinces by their governments.

[29] Mr. Mayotte relies on the fact that in August 2003, after consulting with private issuers both in person and by correspondence, a parliamentary assistant to the then Minister of Transportation, delivered a report to the then Minister that concluded that the time study analysis was out of date and did not take into account changes in practices and procedures. The parliamentary assistant concluded that the compensation being paid to the private insurers was inadequate. Mr. Mayotte pleads in paragraph 23 of his Statement of Claim that:

> By virtue of the MTO Report, Ontario has been aware since on or about August 28, 2003 that the compensation rate paid to the Issuers is not fair, proportional, rational, or objective. Ontario has had an obligation to sufficiently increase compensation to the Issuers since that time and has failed to do so.

[30] Mr. Mayotte is a former Vice-President and former President of the Ontario Motor Vehicle Licence Issuers' Association. The executive of the OMVLIA supports this action and has provided evidence to assist Mr. Mayotte on this motion for certification of a class action. OMVLIA membership, however, only represents a portion of the private issuers, approximately 38% of the issuers operating as of January 2010.

[31] In January 2010, Ontario terminated its agreement with Mr. Mayotte. He had been a private issuer in Penetanguishene for over 21 years.

[32] Mr. Mayotte commenced this class action on October 23, 2009.

Analysis – Motion for Certification

[33] The discussion may now turn to whether Mr. Mayotte's proposed class action is certifiable in accordance with the criteria of s. 5(1) of the *Class Proceedings Act, 1992.*

[34] Under s. 5(1) of the *Class Proceedings Act, 1992,* the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[35] For an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[36] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[37] Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would be determined at a trial when the merits of the claims of class members are in issue: *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) at para. 82.

[38] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 28-9.

Cause of Action

[39] Mr. Mayotte's statement of claim asserts two causes of action: breach of contract, (claiming damages in the amount of $75 million) and, in the alternative, unjust enrichment, (claiming damages in the amount of $75 million).

[40] In his proposed class action, Mr. Mayotte pleads that the various agreements with the private issuers impose on the parties a common law duty of good faith in the exercise of their contractual powers. He asserts that the compensation formula forms part of the contractual relationship between the parties and that since August 2003 Ontario has breached its obligation by failing to update the two components of the formula to reflect the fact that the time study is seriously out of date. He alleges that the increases to the base rate have failed to keep pace with the private issuers' expenses. He alleges breach of contract and breach of a duty of good faith. He relies upon implied terms or obligations, which are not expressly stated in any of the written contracts. Mr. Mayotte submits that

Ontario should be held accountable for its contractual obligations and to contractual standards of good faith and commercial reasonableness that apply whenever one party's compensation is determined at the discretion of another. He submits that there is an implied term that the Minister will exercise his or her discretion reasonably and in good faith.

[41] For reasons that will become apparent when I come to discuss the class definition for the proposed class action, it is important to note that the theory of Mr. Mayotte's case is that Ontario breached its contractual obligations to the class members as of August 28, 2003. Thus, paragraph 28 of the Statement of Claim states:

> 28. Since August 28, 2003, Ontario has breached its duties under the Agreements by failing to increase, or, alternatively, failing to sufficiently increase, Issuer compensation to reflect:
>
> (a) duties imposed on Issuers for which no compensation is paid;
>
> (b) increased complexity and additional time required of Issuers to perform tasks;
>
> (c) the fact that an increasing number of simpler - and therefore more profitable - Services are being processed through ServiceOntario kiosks, leaving the more difficult and time-consuming tasks to be processed by the Issuers;
>
> (d) the increased wait times owing to the increased delays in obtaining advice and assistance from the MTO hotline;
>
> (e) and increased expenses and costs of living.

[42] My Mayotte relies on cases where he submits that courts have implied a term requiring that a contracting party upon whom a discretion has been conferred must exercise that discretion reasonably, honestly, and in good faith. See: *W.N. Hillas and Co. Ltd. v. Arcos Ltd*. (1932), 147 L.T. 503; *Foley v. Classique Coaches Limited*, [1934] 2 K.B. 1; *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd (the Product Star) (No 2)*, [1993] 1 Lloyd's Rep 397 (H.L.); *Canadian National Railway Co. v. Inglis Ltd.* (1997), 36 O.R. (3d) 410 (C.A.); *Salmon Arm Pharmacy Ltd. v. R.P. Johnson Construction Ltd.* (1995), [1995] B.C.J. No. 1933 (C.A.); *Hurley v. Roy* (1921), 64. D.L.R. 375 (Ont. C.A.); *Mason v. Freedman* (1958), 14 D.L.R. (2d) 529 (S.C.C.); *Dynamic Transport Ltd. v. Okay, Detailing Ltd.* (1978), 85 D.L.R. (3d) 19 (S.C.C.); *Gateway Realty Ltd. v. Arton Holdings Ltd. and La Have Developments Ltd. (No.3)* (1991), 106 N.S.R. (2d) 180 (S.C.T.D.), aff'd 112 NSR (2d) 180 (S.C. A.D); *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), leave to appeal ref'd 30 D.L.R. (4th) 768 (S.C.C.); J.D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at p. 100; J. D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2005), 29 *Advocates' Q*. 72; F. P. Morrison and H. Afarian, "Good Faith in Contracts: A Continuing Evolution" (2003) *Annual Review of Civil Litigation* 197.

[43] He relies on the evolving case law about duties of good faith in the performance of contracts. See: *Civiclife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (C.A.); *Shelanu Inc v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.); *978011 Ontario Ltd. v. Cornell Engineering Co.* (2001), 53 O.R. (3d) 783 (C.A.), leave to appeal to S.C.C. ref'd: [2001] S.C.C.A. No. 315; *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 1 (C.A.).

[44] And, he relies on cases that he submits support the proposition that courts will imply a term into a contract where necessary to give effect to the parties' presumed intention and to give business efficacy to the contract. See: *Civiclife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (C.A.) at paras. 44; *Canadian Pacific Hotels Ltd. v. Bank of Montreal* (1987), [1987] 1 S.C.R. 711 at paras. 53-4; *Salmon Arm Pharmacy Ltd. v. R.P. Johnson Construction Ltd.* (1995), [1995] B.C.J. No. 1933 (C.A.) at para. 4.

[45] For its part, Ontario characterizes Mr. Mayotte's breach of contract action "as a claim that Ontario breached its contractual obligations to the issuers when the Minister failed to exercise his or her statutory to discretion in their favour." Ontario then submits that interpreting the contracts in the way proposed by Mr. Mayotte would be contrary to statute, contrary to the law on public contracts, and contrary to the public interest.

[46] Further, Ontario submits that Mr. Mayotte's breach of contract claim depends upon implying terms that are extrinsic to the various agreements and that are inconsistent with the express terms. It submits that such an implication of terms would be legally impermissible and would usurp the Minister's statutory discretion, which again is not legally permissible. Ontario argues that interpreting the contracts in the way submitted by Mr. Mayotte would fetter the unqualified discretion of the Minister to determine fees having regard to the wider public interest.

[47] Ontario relies on authorities that establish the principle that governments cannot fetter their statutory discretion or legislative powers by contract. See: *Rederiaktiebolget Amphitrite v. R.*, [1921] All E.R. Rep 542; *Canada v. Dominion of Canada Postage Stamp Vending Co*. [1930] S.C.R. 500; *Perry v. Ontario* (1997) 33 O.R. (3d) 705 (C.A.); *Pacific National Investment (PNI) v. Victoria,* [2000] S.C.J. No. 64; *1597203 Ontario Ltd. v. Ontario*, [2007] O.J. No. 2349 (S.C.J.).

[48] Ontario also relies on the *parole* evidence rule and the principle that an implied term cannot be inconsistent with the express terms of a written contract. See: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] S.C.J. No 59; *Corey Development v. Eastbridge Developments.*, (1997) 34 O.R. (3d) 73 (Gen. Div.); aff'd [1999] O.J. No. 1788 (C.A.); *Vorvis v. Insurance Corp of British Columbia*, [1989] S.C.J. No. 46 at para. 13; *Toronto (City) v. Toronto Terminals Railway Co.*, [1999] O.J. No. 3734 (C.A.) at para. 29; *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd*., [1983] O.J. No. 3181 (C.A.) at para. 9.

[49] Moreover, Ontario submits that Mr. Mayotte's reliance on duties of good faith in the performance of contracts is misconceived and contrary to the authorities that show

that the implication of a duty of good faith cannot go so far as to create new and unbargained-for rights and obligations, and it cannot be used to alter the express terms of the contract reached by the parties. See *Transamerica Life Inc. et al v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.) at para. 53.

[50] For the purposes of this certification motion, it is not necessary and indeed would be inappropriate to comment further about the parties competing arguments. As noted above, on a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding. The standard for showing a cause of action under s. 5 (1), which parallels the approach taken on a motion under Rule 21 of the *Rules of Civil Procedure*, is low and in my opinion, Mr. Mayotte's statement of claim satisfies the standard. It is not plain and obvious that his breach of contract claim will fail. As I noted at the outset, in my opinion, Ontario's arguments are strong, but it will require a trial or a motion for summary judgment not a certification motion to test their merits.

[51] I can deal briefly with Mr. Mayotte's cause of action for unjust enrichment, which is founded on the allegation that Ontario has been unjustly enriched since August 28, 2003.

[52] The three elements of unjust enrichment are: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and the absence of juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at para. 38.

[53] In my opinion, once again Mr. Mayotte has adequately pleaded a claim for unjust enrichment that satisfies the first criterion for certification. Put somewhat differently, it is not plain and obvious that the private issuers do not have a basis for a restitutionary claim. I do note, however, that, practically speaking, the unjust enrichment claim may be redundant because if Mr. Mayotte succeeds on his contract claim, he would not need the unjust enrichment claim, and if Mayotte fails on his contract claim, the result would demonstrate that there is a juristic reason for any enrichment, which would defeat the unjust enrichment claim. In any event, should Ontario be successful, it would be in its interest to obtain a binding judgment dismissing the class members' claims however articulated.

[54] I conclude that the first criterion for certification has been satisfied.

Identifiable Class

[55] Mr. Mayotte proposes the following definition of the class for this proposed class action:

> All corporations, partnerships, chambers of commerce, boards of trade and individuals carrying on business as an agent of Ontario for, among other services, the issuance and processing of driver's licences and vehicle registrations at any time from August 28, 2003 to the date Notice to the Class is sent pursuant to an Order of the Court.

[56] This definition satisfies the three purposes of a class definition; namely: (1) identification of the persons who have a potential claim against the defendant; (2) identification of the persons who will be bound by the court's judgment on the common issues; (3) identification of those entitled to notice: *Bywater v. T.T.C.*, [1998] O.J. No. 4913 (Gen. Div.).

[57] However, in *Pearson v. Inco Ltd.*, (2006), 78 O.R. (3d) 641 (C.A.), the Court of Appeal held that a class must not be unnecessarily broad or over-inclusive, and Ontario submits that the class definition is overly broad because it includes private issuers whose claims have been extinguished by the expiry of the applicable limitation periods. Further, it submits that Mr. Mayotte's own claim is statute-barred.

[58] As may be noted, Mr. Mayotte defines membership in the class by reference to being a private issuer as of and after August 28, 2003, and Ontario submits that any claims that fall between August 2003 to January 2004 would be governed by the old *Limitations Act*, R.S.O. 1990, c. L 15 s. 45(1) and its six-year limitation period and claims arising after January 1, 2004 are subject to the two-year limitation period under the *Limitations Act*, S.O. 2002 c. 24, Sched. B, s. 4.

[59] Recalling that the statement of claim was issued on October 23, 2009, Ontario submits that class definition ought not to include: (a) private issuers who became private issuers between January 1, 2004 and presumably October 23, 2007, who would be subject to the two-year limitation period and (b) private issuers between August 2003 to January 1, 2004 who may have statute-barred claims under the 15-year ultimate limitation period of the new Act.

[60] Further, as already noted, Ontario submits that Mr. Mayotte's own claim is statute-barred because he admitted during his cross-examination that he believed that he was being under-compensated as of 1990. If 1990 is treated as the date when his cause of action arose, then his claim would be statute-barred in 1996 under the old Act and in 2005, under the 15-year ultimate limitation period of the new Act.

[61] Put simply, Ontario submits that private issuers, including Mr. Mayotte, whose claims are statute-barred should not be included in the class.

[62] Where a representative plaintiff has no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class and cannot be a representative plaintiff because the Act requires that the representative plaintiff have a stake in the proceeding and not be simply a nominee for others with a stake in the outcome: *Stone v. Wellington County Board of Education*, [1999] O.J. No. 1298 (C.A.) at para. 10, leave to appeal to S.C.C. ref'd [1999] S.C.C.A. No. 336.

[63] The theory of Mr. Mayotte's case is that Ontario breached its contractual duties to the private issuers as of and after August 28, 2003. Thus, there may be merit in Ontario's argument that many of the claims of the private issuers are statute-barred because Mr. Mayotte's proposed class action did not commence until over six years later on October 23, 2009.

[64] However, where the resolution of the limitations issue depends on a factual inquiry such as an inquiry about when the plaintiff knew or ought to have known the facts constituting the action, the limitations issue should not be resolved on the motion for certification: *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 38; *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Div. Ct.) at paras. 140-45. In this regard, it should be noted again that the theory of Mr. Mayotte's case as pleaded is that the breach of contract occurred as of August 28, 2003, whatever Mr. Mayotte feelings in 1990 about his compensation.

[65] In my opinion, the matter of the limitation period does not make the class definition over-broad, but rather it is a matter that may provide Ontario with defences to the individual claims of class members and perhaps a defence to Mr. Mayotte's own individual claim.

[66] It is not uncommon that a class will include members who as individuals may not have successful claims even if the representative plaintiff's succeeds on the common issues benefiting the class. For example, a representative plaintiff may succeed on a common issue about breach of a duty of care but individual class members may have to prove causation and damages at individual issues trials. In the case at bar, if Mr. Mayotte succeeds in showing a breach of contract, individual private issuers may or may not be met with a defence that their individual claims are statute-barred. That reality, however, does not mean that the class definition is over broad.

[67] In my opinion, the second criterion for certification has been satisfied.

Common Issues

[68] Turning to the third criterion, for an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18.

[69] The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.).

[70] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

[71] For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at paras. 39-40.

[72] The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 65, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Rumley v. Britich Columbia (sub. Nom. L.R. v. British Columbia),* [2001] 3 S.C.R. 184 at para. 33.

[73] Mr. Mayotte proposes the following common issues:

(a) Does the contractual relationship between Ontario and the private issuers include a duty on Ontario to ensure that Issuer compensation is, and remains fair, rational, objectively determined, and proportional to the effort required to do each transaction?

(b) Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensation:

(i) to adequately increase the standard commission rate table,

(ii) to update the time series analysis on which compensation was and continues to be based,

(iii) to take into consideration all steps required to perform the required transactions, and

(iv) to sufficiently increase the annual stipend?

(c) If so, has Ontario breached and is it continuing to breach any such contractual obligation?

(d) Was Ontario under a duty to increase compensation to the private issuers following the conclusions of the report of the Ministry of Transportation dated August 28, 2003?

(e) Has Ontario satisfied its duties by the increases in compensation which it has put into effect since August 28, 2003?

(f) If Ontario has not breached its contractual duties to the private issuers in respect of compensation, has Ontario been unjustly enriched by having under-compensated the private issuers?

(g) If Ontario has breached its contractual duties, or has been unjustly enriched, what is the appropriate measure of past damages or compensation, including pre-judgment and post-judgment interest thereon?

[74] Ontario challenges the commonality of the proposed common issues and submits that an allegation of an implied term cannot be established on a class-wide basis and rather would require individual findings of fact about the circumstances of each contractual relationship.

[75] I disagree with this submission. The record on this motion for certification shows that there is some basis in fact for concluding that the circumstances of the various private issuers with their several types of agreements with Ontario and with their various business experiences, nevertheless, involve many important collective or systemic elements that are common to all private issuers. The certification motion itself was argued by both sides focusing on the common contract terms and the commonalities of the experience of all private issuers. A trial judge might conclude that in the circumstances Ontario breached its contracts with all of the private issuers as of August 28, 2003 when it is alleged that Ontario knew that the compensation rate paid to the private issuers was not fair, proportional, rational, or objective.

[76] I add that a trial judge might also conclude that Ontario's systemic defences that all the contracts conferred a not-to-be-fettered discretion on the Minister and that all the contracts excluded promises not found in the various standard forms provide a negative answer to all of the class members' claims.

[77] I conclude, therefore, that proposed common questions (a) to (f) satisfy the third criterion for certification.

[78] Common question (g) is also satisfactory, it but must be clarified. If "what is the appropriate measure of past damages or compensation" means determining only what is the appropriate systemic formula or what is the appropriate factors to be included in the systemic formula used for all private issuers, then the question is satisfactory.

[79] Given, however, the fact that there may be limitation period defences that would preclude the application of the measure of compensation for individual private issuers, question (g) cannot be taken to mean that the court at the common issues trial can determine the total compensation payable by Ontario (assuming Mr. Mayotte was successful on the other common issues). Individual issues trials will still be required to determine the individual entitlements of class members. It remains to be determined how many, if any, of the 370 current and former independent contractors have statute-barred claims.

Preferable Procedure

[80] The next issue is whether the preferable procedure criterion has been satisfied.

[81] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[82] Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69,

leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[83] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[84] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[85] Ontario submits that Mr. Mayotte has not established that a class proceeding would be the preferable procedure. This submission largely rests on the argument, discussed above, that there is no commonality to the proposed common issues, which argument I have rejected.

[86] Ontario submits next that: (a) the issues that have been identified as common would be completely overwhelmed by the individual issues; and, (b) the determination of the common issues would not significantly advance the action. Ontario also submits that; (c) there is no evidence that any class member apart from Mr. Mayotte is interested in pursuing an action against Ontario.

[87] I will deal with Ontario's last objection first. At least insofar as the Ontario Motor Vehicle Licence Issuers' Association is concerned, there is some evidence that private issuers support this action, but more to the point, all the private issuers who are class members will have an opportunity to opt-out if they do not wish to be bound by the outcome of the class proceeding. If the number of opt-outs is significant, Ontario may then move to have the action decertified on the grounds that the class action is not the preferable procedure.

[88] With respect to the earlier objections raised by Ontario, I am satisfied that the common issues that have been certified would not be overwhelmed by individual issues and that the common issues would substantially advance the action. The action as framed is about a systemic grievance. Other than a class action, there is no meaningful way to have this grievance determined. A class action also provides Ontario with an opportunity to raise defences that might prevail over all the claims of all the class members.

[89] I conclude that a class action is the preferable procedure and that the fourth criterion for certification has been satisfied.

Class Representative

[90] Ontario submits that Mr. Mayotte is not a suitable representative plaintiff because: (a) his performance on his cross-examination reveals that he does not understand his own case; (b) his own claim is likely statute-barred; (c) he has not demonstrated an understanding of the responsibilities of a representative plaintiff; (d) he is no longer an issuer; (e) and his history as a past-President of an association representing only a small portion of the issuers does not count in his favour.

[91] During his cross-examination, Mr. Mayotte was asked some questions about the legal theory of his case and he botched the answers, badly. He, however, is not a lawyer, and he has retained class counsel to argue his case and its legal theory. His answers on his cross-examination about legal questions cannot be taken as factual admissions that would undermine his claims or the claims of the class members. In my opinion, his poor performance on the cross-examination is not a reason to disqualify him as a representative plaintiff.

[92] During his cross-examination, Mr. Mayotte was asked some questions about his understanding of the contracts, of the prevalence of the use of the various contracts, of Ministry policies and procedures, and the interrelationship of the operation of the private issuers with Ontario's policies and procedures in providing services to the public. He was also asked questions about the circumstances and positions of the proposed class members and about when he became aware that Ontario was being unfair to the private issuers. Once again, he did not do well in his answers, but, once again, I do not see why his poor performance on these largely factual matters should disqualify him as a representative plaintiff. The common issues trial is largely about what Ontario knew and did about compensating the private issuers. The evidence for the certification motion, and it may be anticipated the evidence for the common issues trial, will not be much about Mr. Mayotte's individual experience but rather it will focus on the collective circumstances of the private issuers and how Ontario treated them collectively. Mr. Mayotte does not have to show tat he is the best fact witness in order to qualify as a representative plaintiff.

[93] Ontario has another objection to Mr. Mayotte being representative plaintiff. Relying on *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.); aff'd [2003] O.J. No. 3918 (Div. Ct.), Ontario submits that Mr. Mayotte should be disqualified as a representative plaintiff because he has failed to provide evidence that he will be able to pay for any costs that may be ordered in the litigation or evidence that he will be able to bear the expense of funding the litigation if it moves forward as a class proceeding.

[94] I am not persuaded by this objection. The capacity of the representative plaintiff to fund the litigation is one factor in determining whether he or she can adequately represent the class, but there is no requirement that the representative plaintiff demonstrates that he or she has a specific funding arrangement in place: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at paras 95-96; *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.) at paras. 91-94. At the certification stage, a proposed plaintiff is not required to show that he or she has the

ability to satisfy a costs award: *Allen v. Aspen Group Resources Corp.* [2009] O.J. No. 5213 (S.C.J.) at paras. 155-158; *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.) at paras. 90 – 94; *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 95. As is apparent from the preparation and presentation of the certification motion, Mr. Mayotte has been able to move his action forward.

[95] Finally, Ontario submits that because he is no longer an active private issuer, Mr. Mayotte has potential conflicts with the class members. It was suggested that these conflicts might arise in the context of settlement negotiations. At this juncture of the class proceeding, this is mere speculation, and there are no conflicts that would disqualify Mr Mayotte as representative plaintiff.

[96] Ontario took no objection to Mr. Mayotte's litigation plan.

[97] I conclude that the fifth criterion for certification has been satisfied.

Conclusion

[98] For the above reasons, I conclude that this motion for certification should be granted.

[99] If the parties cannot agree on the matter of costs, they may make submissions in writing beginning with Mr. Mayotte within 20 days of the release of these Reasons for Decision to be followed by Ontario's submissions within a further 20 days.

[100] Order accordingly.

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Perell, J.

Released: June 30, 2010

CITATION: Mayotte v. Ontario, 2010 ONSC 3765
COURT FILE NO.: 09-CV-389686CP
DATE: June 30, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Michel R. Mayotte

Plaintiff

- and -

Her Majesty the Queen in right of Ontario

Defendant

REASONS FOR DECISION

Perell, J.

Released: June 30, 2010.