CITATION: Mayotte v. Ontario, 2015 ONSC 4196
COURT FILE NO.: CV-09-389686
DATE: 20150629

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MICHEL R. MAYOTTE	)	*Allan D.J. Dick, David Sterns, Andy Seretis* and *Kirk M. Baert* for the Plaintiff
Plaintiff	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	*Leonard Marsello, Edmund Huang, Chantelle Blom,* and *Vanessa Glasser* for the Defendant
Defendant	)	
	)	**HEARD**: June 15 and 16, 2015

PERELL, J.

REASONS FOR DECISION

[1] The Plaintiff, Michel Mayotte, is a former "Private Issuer" of motor vehicle licences and registrations. In this certified class action, he seeks damages of $75 million for breach of contract and unjust enrichment on behalf of himself and approximately 367 current and former members of the Private Issuers Network ("PIN"), who signed contracts with the Defendant Her Majesty the Queen in Right of Ontario ("Ontario") between August 28, 2003 and August 5, 2010.

[2] It is now June 2015, and the action is scheduled for trial in two months' time, in September 2015, but notwithstanding the imminence of the trial, Ontario brings a summary judgment motion to have the Class Members' claims dismissed.

[3] Although Mr. Mayotte does not formally bring a cross-motion for summary judgment, he submits that there should be a summary judgment declaring that: (1) Ontario is required to set compensation in a commercially reasonable manner; (2) Ontario is bound by the duty of good faith when exercising its discretion to set compensation; and (3) the anti-fettering doctrine relied on by Ontario provides no defence.

[4] If Ontario's summary judgment motion were granted, it would be dispositive of the class action. If Mr. Mayotte's informal cross-motion for a summary judgment were granted, there would still have to be a trial: (1) about whether Ontario had breached its obligations to set compensation in a commercially reasonable manner or in good faith; (2) about limitation period defences; and (3) about the calculation of damages.

[5] For the following reasons, I dismiss Ontario's summary judgment motion and Mr. Mayotte's informal cross-motion. There are numerous genuine, novel, and profound issues for trial, and it is not in the interests of justice to determine this matter summarily for either side.

[6] In *Hryniak v. Mauldin*, 2014 SCC 7, although the Supreme Court of Canada commanded a very robust summary judgment procedure, it did not foreclose lower courts from simply dismissing the summary judgment motion and ordering that the action be tried in the normal course. Indeed, where there are genuine issues for trial and the lower court concludes that employing the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits, the court should not decide the matter summarily: *Mitusev v. General Motors Corp.*, 2014 ONSC 2342 at para. 79; *Gon (Litigation Guardian of) v. Bianco*, 2014 ONSC 65 at paras. 41-47; *Lopez v. Dr. M. Douris Dentistry Professional Corporation*, 2015 ONSC 3675.

[7] Because I think the case at bar is not appropriate for a summary judgment, I shall make no binding findings of fact, and, rather, I shall discuss the factual background very briefly and only so far as necessary to explain why I am dismissing the summary judgment motion and leaving it to a trial judge to determine the dispute between the parties.

[8] Since 1917, Ontario has contracted with independent businesses to issue driver's licences and register vehicles. Private Issuers are appointed as agents of Ontario pursuant to the *Highway Traffic Act*, R.S.O. 1990, c. H.8 for the purposes of: (1) providing services in accordance with the policies of the Ministry of Transportation ("MTO"); and (2) collecting fees from the public. Private Issuers are independent contractors who enter into contracts to process specific government service transactions. Private Issuers are not employees of the province. The Class Members compete with ServiceOntario offices, online services, and, until discontinued in 2012, ServiceOntario kiosks.

[9] Ontario decides what transactions are to be serviced and how those transactions are to be serviced by Class Members. Private Issuers must comply with the manuals, policies and directives provided by Ontario. Ontario directs the training, the hours of operation, and the advertising of services. Ontario decides how many offices are to be opened for Private Issuers and where those offices are located. The Private Issuers are free to provide non-government services to the public, but essentially, they earn a living from a portion of the transaction charges to the public. The charges and fees are fixed by Ontario without input from the Private Issuers. The Private Issuers collect the charges and remit them to Ontario, retaining the compensation set by Ontario. The fees are a Private Issuer's main source of revenue.

[10] Since 1982, there have been four versions of the standard form agreement between Ontario and the Private Issuers: (1) the 1982 Memorandum of Agreement; (2) the 2002 Private Issuer Agreement; (3) the 2007-2009 Interim Memorandum of Agreement; and (4) the 2010 Issuing Services Agreement. All four types of contract have similar provisions with respect to compensation for the Private Issuers. In the contracts, the Private Issuers acknowledge that compensation is strictly limited to the amounts fixed by the Minister.

[11] The 1982 Memorandum of Agreement states:

> 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.

[12] The 2002 Private Issuer Agreement states:

> 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.

[13] The 2007-2009 Interim Memorandum of Agreement states:

> 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.

[14] The 2010 Issuing Services Agreement states:

> 10.01 For performance of the Issuing Services, the Issuer shall receive compensation from [the Ministry of Government Services ("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.

[15] Ontario implemented its current approach to compensating Private Issuers in 1987. Apart from modest changes to the base rate, the compensation formula has remained largely unchanged.

[16] By 2003, if not before, and continually since 2003, Class Members have complained that the compensation has been unfair and that Ontario has not been acting in good faith. The Private Issuers complain that the nature of their assigned duties has substantially changed and that their compensation has not kept pace with their increased expenses or with increases in the cost of living. The Class Members submit that Ontario has known for many years that the compensation for Private Issuers has been inadequate, unfair, unreasonable, and not comparable to compensation paid to Private Issuers in other provinces that have a system similar to Ontario's.

[17] Mr. Mayotte commenced this class action on October 23, 2009. In January 2010, Ontario terminated its agreement with Mr. Mayotte. He had been a Private Issuer in Penetanguishene for over 21 years.

[18] On June 30, 2010, I certified the action as a class proceeding. See *Mayotte v. Ontario*, 2010 ONSC 3765. I certified 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 transactions?
>
> (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 obligations?

> (d) Was Ontario under a duty to increase compensation to the private issuers following the conclusion 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 undercompensated the private issuers?
>
> (g) Without prejudice to any individual limitation period defences which Ontario may have, if Ontario has breached its contractual duties, or has been unjustly enriched, what is the appropriate formula or the appropriate factors to be included in the formula to measure past damages or compensation, including pre-judgment and post-judgment interest thereon?

[19] In my opinion, in addition to the common issues that I certified for the common issues trial, there are genuine issues for trial about:

- whether Ontario is required to set issuer compensation in a commercially reasonable manner;
- whether Ontario is bound by the duty of good faith when exercising its discretion to set compensation;
- whether the anti-fettering doctrine relied on by Ontario provides a defence; and
- if Ontario is found to be required to set issuer compensation in a commercially reasonable matter or to act in good faith when exercising its discretion to set compensation in good faith, whether its obligations to set compensation in a commercially reasonable manner and in good faith have been breached.

[20] Likely animated by *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada's recent decision about good faith in contract performance, Ontario conceded during argument that the doctrine of good faith applied to the contracts between Ontario and the Class Members, but Ontario denied that the doctrine applied to the determination of compensation portion of the contracts with the Class Members. Ontario fervently insisted that: (1) the Class Members had got what they bargained for; and (2) in any event, there was no genuine issue for trial about Ontario's good faith performance of its contractual obligations.

[21] Mr. Mayotte just as fervently argued that the Class Members had not got what they bargained for and that Ontario had violated its contractual obligations and exploited the Class Members.

[22] Ultimately, this class action raises a profound rule of law question at the intersection of private and public law. At issue is the court's regulation of a contract between citizens in the private sector and the state that is the public sector. Both parties have reasonable arguments and passionately held convictions.

[23] Both parties seek a public vindication of their positions. The Class Members would paint Ontario as dressing bad faith in the costume of responsible governance of the public purse and Ontario would paint the Class Members as commercial actors asking the court to rewrite a contract they freely signed and to make it a better bargain for them without regard to Ontario's responsibility and its authority to govern in the public interest.

[24] The parties are ready for an imminent trial, and, in my view, it would not be in the interests of justice to decide this class action summarily.

[25] The point is not that the court cannot decide the dispute between the parties summarily and come to a fair and just result. The point is that the court cannot give the winner the vindication it seeks from access to justice, the loser the solace of having had its day in court, and the appellate court the evidentiary record it will need to determine the correctness of the decision by a summary determination of the dispute between the parties. And, because the court cannot deliver all of justice, the appearance of justice, and the catharsis of justice by a summary determination, therefore, the court ought to dismiss the competing requests for a summary judgment.

[26] Accordingly, I dismiss Ontario's summary judgment motion with costs in the cause.

Perell, J.

Released: June 29, 2015

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MICHEL R. MAYOTTE

Plaintiff

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REASONS FOR DECISION

PERELL J.

Released: June 29, 2015