CITATION: Mayotte v. Ontario, 2016 ONSC 1233
COURT FILE NO.: CV-09-389686-CP00
DATE: 20160219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MICHEL R. MAYOTTE	)	*Allan D.J. Dick, David Sterns, Adrienne Boudreau* and *Andy Seretis*, 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	)	
	)	
	)	
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD:** September 28, 29, 30, October 1, 2, 5-9, 13 and 26, 2015

GANS J.

Introduction

[1] If you took a poll of Ontarians who have had occasion to frequent the ServiceOntario outlets that dot the Province, there is little doubt that the overwhelming majority would hold the view that the operations were "government" owned and operated. Nothing could be further from the truth.[1]

[2] The fact is that most ServiceOntario "stores" are owned and operated by a whole array of business enterprises, composed of sole proprietorships, corporations and every manner of organization in between, including chambers of commerce, boards of trade and even sporting goods stores. Who knew?

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[1] The "government" will be referred to throughout the judgment as "Ontario", "the Ministry", "the MTO", or "HMQ", as the case may be. The terms will be used interchangeably.

[3] Approximately 381 of these operators and former operators, otherwise known as "Private Issuers", and globally referred to as members of the private issuers network ("PIN"), were certified as a class by Perell J. in June 2010,[2] the trial in respect of which was heard by me this past Fall. They argue that Ontario has breached one of several contracts signed by members of the PIN from and after 2003.

[4] In particular, they argue that the remuneration they received for the services they performed for and on behalf of the Ministry of Transportation (MTO) and the Ministry of Health (MOH), to name but two, from and after August 2003, the start of the class period,[3] was woefully inadequate and constituted a breach of the PIN agreements with Ontario in that the government failed to act reasonably and in good faith when setting the issuer (operator) compensation.

[5] Putting the matter otherwise, it is the plaintiff's position that because Ontario had a unilateral discretion to set issuer compensation, it had a concomitant duty to exercise that right in a fair and reasonable manner.[4]

Background[5]

[6] Ontario has been contracting out a portion of retail vehicle licensing and related services to the Private Issuers since the dawn of our century-old dependence on the automobile, in 1917. The relevant governing statute covering the appointment of these contractors, the provision of services in accordance with the policies of the MTO and the collection of fees, is the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

[7] At its simplest, while no Private Issuer is an employee or franchisee of the MTO, many of whose administrative functions have now been taken over by the Ministry of Government and Consumer Services ("MGCS"), Ontario dictates the nature and type of the transactions and services delivered by members of the PIN, and the manner in which such are to be performed. For example, the government directs and implements issuer and issuer staff training, determines the hours of outlet operation, signage, municipal location, the number of outlets, and approves all manner of forms utilized in the process. Putting it otherwise, while an issuer is entitled to conduct or 'partner' with another business at a ServiceOntario outlet so long as it does not

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[2] See 2010 ONSC 3765, [2010] O.J. No. 2831 ["Mayotte Certification Order"].

[3] Definition of class period from certification judgment and summary judgment motion.

[4] Throughout the course of the trial, the plaintiff employed as part of its argument terms such as "fair and reasonable" or "commercially reasonable", or alternatively "commercially unreasonable", which terms I took to be interchangeable and of no meaning other than what is employed in standard usage.

[5] The parties, after some not-so-gentle trial management, prepared a 23-page Agreed Statement of Facts and Chronology, which was filed as exhibit 3. In addition, they agreed to stipulate, as it were, most of the facts set out by Perell J. in his Summary Judgment motion endorsement found at *Mayotte v. Ontario*, 2015 ONSC 4196, [2015] O.J. No. 3432 ["Mayotte Summary Judgment"]. I have paraphrased much of the material upon which agreement has been reached in this section of the judgment.

compete or conflict with its function as a 'licensing' bureau, Ontario dictates everything from soup to nuts in respect of the day-to-day functioning of the outlet.

[8] In addition, in what is the root of this action, all charges and fees levied on vehicle permits and drivers' licence holders are fixed by the Province without input from the PIN. All funds collected are thereafter remitted to the Treasurer of Ontario, after the deduction of the prescribed "commission", the rate in respect of which is set by the Province.

[9] Since 1982, there have been four versions of the standard form agreement between Ontario and the Private Issuers: (1) Memorandum of Agreement (MOA) implemented on January 1, 1982; (2) Private Issuer Agreement (PIA) implemented on January 1, 2002; (3) Interim Memorandum of Agreement (IMA) broadly implemented on January 1, 2007; and (4) Issuing Services Agreement (ISA) implemented on February 1, 2010, which includes Addendum No. 1.

[10] All four of the above-mentioned agreements have similar, but not identical, provisions in respect of the compensation for the Private Issuers.

[11] The 1982 MOA states:[6]

> 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 PIA states:[7]

> 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 IMA states:[8]

> 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.

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[6] "Sample Memorandum of Agreement and Three Addendums" (HMQ003199; MAY000471), at para. 13.
[7] "Private Issuer Agreement" (MAY000342), at para. 18.1.
[8] "Interim Memorandum of Agreement" (MAY000395), at para. 14.1.

[14] The 2010 ISA states:[9]

> 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.[10]

Compensation Model

[15] Prior to 1988, Ontario paid the Private Issuers two different flat fees per transaction, depending upon the complexity of the transaction. In the Fall of 1987, after some study, Ontario changed the methodology for compensating the Private Issuers. This model was based on two components: a time-based commission predicated upon an internationally recognized industrial time and motion study for clerical tasks; and an annual stipend.[11] The Private Issuers were permitted to retain the time-based portion of the fees collected, called the base rate of commission, which was fixed by Ontario. It was intended that the new method of compensation, which was implemented in the Spring of 1988, would ostensibly "...address the disparity in compensation previously paid to different issuers".[12]

[16] In part, because increases in commissions and stipends suggested by any particular ministry needed Management Board and ultimately Cabinet approval, the MTO hired a well-respected consulting firm to develop a business case and methodology for determining PIN commissions and compensation levels on a go-forward basis after 1988.[13, 14]

[17] The parties are in agreement that the Private Issuers received annual increases in either the base rate of commission or the annual stipend for the period 1988-1993, until the 'dark days' of the Rae Government descended on the provincial paymasters for most, if not all, of the Ministries. The Private Issuers suffered the same fate as did other government employees and service providers. The then MTO Minister advised the PIN that because of "tight fiscal constraints and the effects of a recessive economy"[15], no increases would be received by the

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[9] "Issuing Services Agreement" (HMQ003202), at para. 10.01.

[10] The compensation provision was further amended as of February 1st, 2010, after the commencement of this lawsuit, to which reference will be made later in these reasons.

[11] "The 1988 Compensation Model". See "Memorandum to the Ministry of Transportation and Communications Driver and Vehicle Licence Issuers", Sep. 21, 1987 (MAY000007).

[12] "Agreed Statement of Facts, Chronology, and Indexes", Oct. 2, 2015 (Exhibit 3), at para. 18.

[13] "The Woods Gordon Report", May 31, 1989 (HMQ000523). The Woods Gordon Report recommended the adoption of a "Weighted Compensation Index", a term that I refer to below.

[14] One of the benefits of a sitting judge of the Superior Court comes from the fact that one gets to hear evidence about how businesses and governments function, what red-tape is involved in the approval process and, basically, how our day-to-day lives are impacted by such processes. In this case, much evidence was provided about the 'budget-approval' process, which though fascinating in and of itself, particularly for a jurist who is result and not process oriented, it was evidence, which in the final analysis was of some moment.

[15] "Ministry of Transportation Letter to Issuers", Sep. 17, 1993 (HMQ000469).

Private Issuers for either the stipend or base rate of commission. This proscription ran from fiscal years 1992-1995. In fact, although in 1997, the MTO recommended an increase retroactive to July 1996, the proposed raise did not make it through Cabinet, a phenomenon that occurred at least one more time before the commencement of this trial.

[18] Modest increases in Private Issuer compensation were approved by Cabinet for the fiscal years 1997-1998, but there were no increases under either compensation prong from fiscal 1998-2006.

[19] In the meantime, there were at least five studies conducted for and on behalf of the MTO, or by the Auditor General, underscoring the importance of the PIN, both in respect of the efficient and cost beneficial provision of services to the public, and the significant net revenue generated by the PIN for public coffers.[16]

[20] There is little doubt on the evidence that members of the PIN complained to and at all levels of the MTO, up to the then Ministers, who were seemingly changed on an annual basis, that the level of compensation was inadequate. The parties are further in agreement that from and after 2003, at least, the PIN additionally asserted the position that Ontario was not "acting in good faith" and 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".[17]

[21] In November 2006, the MTO made a business case as part of its proposal to the Treasury Board[18] for a wholesale increase to not only the base rate commission, but to the stipend, which included a compensation 'floor' for operators, who were generally servicing small, if not more remote communities. I have excerpted a portion of the proposal, which I find to be instructive:

> **APPROVE** a two pronged compensation increase for private issuers operating under contract with MTO, as follows:

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[16] "MTO Issuer Financial Analysis" prepared by Resolutions Management, July 1997 (MAY001062); "Private Issuing Network Assessment" prepared by Wave Innovations Inc., Dec. 5, 2000 (MAY001087); "Private Issuers Network Consultation Process 2003", Aug. 28, 2003 (HMQ000210)("Maves Report"); "Review of the Private Issuers Network", Sep. 3, 2004 (HMQ000601)("Parsons Report"); "2005 Auditor General's Report, ch. 3.05: Ministry of Transportation – Driver Vehicle Private Issuing Network", Dec. 5, 2005 (MAY001157) ("2005 Auditor General's Report") (collectively referred to as the "PIN Reports").

[17] Mayotte Summary Judgment, para. 16.

[18] I understand that since 2005 there has been an effective merger of Management Board and Treasury Board, although technically they may be distinct entities. The government now refers to the "Treasury Board / Management Board of Cabinet", and they have the same Chair and membership: see https://news.ontario.ca/committees/en/treasury-board-management-board-of-cabinet.

a) **APPROVE** a 5% increase, effective December 1, 2006, to the per minute base-commission rates from current $0.5575/minute to 0.5854/minute (estimated financial impact of $2.115M annually);

b) **APPROVE** the 5% compensation increase retroactively to October 1, 2006 (estimated financial impact of $1.057M in 2006-07); and,

c) **APPROVE** an annual "breakeven top-up", up to a maximum of $20,000 based on earnable commissions to support the viability of smaller issuers that have been operating under contract in whole or in part within the previous calendar year.

- For 2006-2007 fiscal, top-up is prorated for half of the year, based on 2005 earnings.[19]

[22] In late November, 2006, Ontario announced a 5% increase to the base rate commission, retroactive to October 1st, and introduced a "top-up" of up to $20,000 for eligible Private Issuers, which effectively provided a revenue floor for the above-mentioned smaller operators. Subsequent modest increases were provided to members of the PIN over the next two fiscal years.[20]

[23] In the Fall of 2008, Ontario commissioned yet another study of the PIN ("Michael Report"),[21] which recorded and reviewed many of the same complaints on compensation, even though increases had been received in the previous fiscal periods. The continued dissatisfaction of the members of the PIN was, to say the least, palpable and bears excerpting from this Report:

2.1 Compensation

- Issuers expressed dissatisfaction with the current model of per-minute base rate for the transactions completed, indicating that the amount of time to complete transactions is underestimated. They cited uncompensated tasks such as answering phones, cumbersome paperwork, time required to educate the public about new requirements, and inadequate support from ServiceOntario (e.g. Hotline).
- Private issuers noted how it was difficult to recruit and retain staff given their inability to pay them to market standards.

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[19] "Addressing Immediate Private Issuing Network (PIN) Compensation Needs", Nov. 2, 2006 (MAY002150) ("2006 Treasury Board Proposal").

[20] The top-up was subsequently phased-out and ended around the time that the ISA was introduced in 2010: Evidence of Jennifer Gayle, Oct. 8, 2015, pp. 137, 144-147.

[21] "Private Issuers Network Consultation: September 9-30, 2008", Oct. 2008 (MAY000030) ("Michael Report").

- There was concern regarding competition by government kiosks.
- Private issuers indicated that other provinces paid private issuers higher rates than Ontario…
- Respondents suggested the following, with the first four items expressed most often:
    - Re-evaluating the rate based on the "real", not "ideal" time transactions take,
    - Payment based on the measured time of transactions,
    - A stipend based on the number of terminals per location,
    - A stipend based on a percentage of the annual commission,
    - Doubling the compensation per minute and adding a user fee,
    - Payment as per other franchise models,
    - A flat fee for telephone time and personalized service,
    - Compensation linked to cost of living/operating expenses,
    - Charging customers a premium for service outside of core hours,
    - Group insurance rates,
    - Compensation that increases with years of service,
    - Pay for performance,
    - Subsidization for training new employees, and
    - Compensation when systems are down.[22]

[24] I digress to observe that many of the 'complaints' referenced in the aforesaid Michael Report, excerpted above, were repeated by the PIN witnesses at the trial. These witnesses testified to some or all of the itemized matters as continuing and ongoing issues, which, in large measure, are rooted in the complaint of overall under-compensation.

[25] Perhaps in the wake of the Michael Report or the matters identified in the five reports cited above that came before it, in the summer of 2009 Ontario undertook a modernization strategy which, in addition to rebranding the PIN as the Service Provider Network ("SPN") and moving the ServiceOntario operation from the MTO to the MGCS, called for the termination of

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[22] Michael Report, p. ii.

some of the Private Issuer offices and the consolidation of others. Ontario terminated, failed to renew, or replaced by consolidation or otherwise, 60 Private Issuers. Each of those remaining in the PIN was 'offered' and was obliged to sign a new form of contract, namely the ISA and its various addenda.

[26] One of the casualties of this new strategy was the representative plaintiff, Michel Mayotte, who, until the termination of his contract in 2010, operated the ServiceOntario outlet in the Town of Penetanguishene. Not to denigrate his current position, and his over 21 years' of service as a Private Issuer and as a member of the executive the Ontario Motor Vehicle Licence Issuers Association ("OMVLIA"), Mr. Mayotte is now employed as the manager of the nearest outlet to his now shuttered Penetanguishene location, in Midland.

[27] As indicated, the remaining service providers were mandated to sign the new ISA, effective as of February 1, 2010, the original term in respect of which expired in late 2015.[23] An Addendum to the ISA was prepared subsequent to the commencement of the instant action. The relevant compensation provision, found in Addendum No. 1, is excerpted in its entirety below:

> **10.01 Compensation for Issuing Services**
>
> For performance of the Issuing Services, the Issuer shall receive compensation from MGS in the following manner:
>
> (a) a per-transaction commission rate that is based on a per-minute commission rate (the "Per Minute Base Rate") multiplied by the average time, in minutes, required to complete a transaction that forms part of the Issuing Services (the "Average Transaction Time"); and
>
> (b) an annual payment in the amount of six thousand dollars ($6,000), paid in two (2) semi-annual instalments of three thousand dollars ($3,000) each, which shall be pro-rated to reflect the actual number of days that the Issuer delivered the Issuing Services in the event that the Effective Date of the Agreement is during the six-month period immediately preceding each payment; and
>
> (c) any other additional compensation identified by MGS and as set by MGS, in its sole discretion, from time to time;
>
> all as articulated by MGS in the Instructions of MGS and the Operational Directives. For avoidance of doubt, the Per Minute Base Rate and the Average Transaction Time shall be determined by MGS, at its sole discretion, but at no time during the Term shall the Per Minute Base Rate be less than $0.6149, which

[23] There is some confusion about the expiry date of the original terms of the ISA, not relevant to the matters at issue, because the sample in evidence (HMQ003202) defines an expiry date in late 2016 rather than late 2015.

is the Per Minute Base Rate in effect on the Effective Date. Payment of compensation shall be made by MGS in accordance with the processes and procedures set out in the Operational Directives. [Emphasis added.]

[28] Addendum No. 1 also amended Article 10 of the compensation provision as follows:

10.04 Compensation Review

At least once during the original term, MGS shall conduct a review of the manner of compensation described in **Section 10.01 (Compensation for Issuing Services)** and shall provide the Issuer with a reasonable opportunity to submit information to MGS for consideration in such review. As a result of any review conducted in accordance with this **Section 10.04**, MGS may, at its sole discretion, modify the manner of compensation described in **Section 10.01 (Compensation for Issuing Services)**. Such modifications shall be articulated in the Instructions of MGS and the Operational Directives. [Emphasis added. Bold text in original.]

Recent History

[29] The Auditor General published a report at the end of 2013, from which I have extracted the following information, which describes, more or less, the PIN as of the date of the trial:[24]

- the 207 members of the PIN process roughly 20 million transactions per annum;
- these transactions yield the Province something close to a $1 billion in revenue;
- the cost per transaction of the highest volume item, the renewal of a licence plate sticker, is almost double at an MGCS outlet compared to a private issuer outlet;
- the Auditor General was critical that more transactions were not being done over the Internet, which would result in significant cost savings to the government.

[30] In the summer of 2014, Ontario conducted a series of interviews and discussions with a group of 11 Private Issuers as part of the compensation review mandated by the ISA, the majority having been chosen by the OMVLIA executive and the others chosen by the ServiceOntario staffers.[25] While Ministry officials took the position at the outset that there would be 'no new money' for the PIN, in the final analysis, it did recommend a 2% increase in the base rate compensation, which was rejected at the deputy minister's level.

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[24] "2013 Auditor General's Report, ch. 3.09: Ministry of Government Services – ServiceOntario", Dec. 10, 2013 (HMQ003278) ("2013 Auditor General's Report"). The problem with extracting information from the 2013 Auditor General's Report stems from the fact that it covers services undertaken by MGS-operated outlets not covered by the private operators, such as *Personal Property Security Act* registrations, land registrations, searches and title services, by way of example. The members of the PIN continue to provide services under the MTO driver's licence and vehicle registration programs and the issuance of Health Cards.

[25] The "Compensation Review".

The Nub of the Action and the Narrowing of the Issues

[31] The nature and complexity of lawsuits change during the ramp up to trial and, more importantly, at trial. The common issues established by Perell J. during the certification motion and subsequently during the summary judgment motion heard close to the eve of trial were as follows:

Ontario v. Mayotte, Certification Order by Perell J. on June 18, 2010[26]

1. 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?

2. Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensations:

    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?

3. If so, has Ontario breached and is it continuing to breach any such contractual obligations?

4. Was Ontario under a duty to increase compensation to the private issuers following the conclusion of the report to the Ministry of Transportation dated August 28, 2003?

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

6. 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?

7. 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?

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[26] 2010 ONSC 3765, [2010] O.J. No. 2831 ["Mayotte Certification Order"].

Ontario v. Mayotte, 2015 ONSC 4196, [2015] O.J. No. 3432

1. Whether Ontario is required to set issuer compensation in a commercially reasonable manner?

2. Whether Ontario is bound by the duty of good faith when exercising its discretion to set compensation?

3. Whether the anti-fettering doctrine relied on by Ontario provides a defence?

4. 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?

[32] Thus, but for the issues surrounding the calculation of damages, if any, arising from a finding of Crown liability, when all was said and done, most of the common issues either disappeared or were distilled into but one, not so simple, question: was HMQ, as a matter of law, under an obligation to perform the applicable private issuer agreements reasonably, honestly and in good faith, and if so, did they breach this obligation?

[33] As a subset to this question, because HMQ exercised a discretion in the fixing of Private Issuer compensation during the class period, which discretion was not absolute and subject to challenge, I was asked to define the indicia of the breaches of reasonableness, honesty and good faith that have to be applied in all the circumstances and to determine whether Ontario was in breach of these agreements. Or, as the HMQ articulated it in its written argument: "Did the Province breach the compensation provisions of the Contracts by running afoul of a duty to perform its contractual obligations in good faith or by otherwise exercising Ministerial discretion improperly"?[27]

[34] Several issues fell away at the time of argument. These included the plaintiff's position, among other things, that I was obliged to import other terms into the agreements which mandated Ontario to provide an annual increase to the Private Issuer compensation or ensure that the issuer compensation was commercially reasonable in all respects having regard to the scope and nature of the assigned tasks to the operators.[28] But for the disappearance of these issues, it would have been necessary to consider oft-litigated principles of contractual interpretation, the parole evidence rule, four-corner clauses and implied terms of contract.

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[27] HMQ's Closing Submissions, para. 50.
[28] Statement of Claim, para. 28; Mayotte Certification Order, para. 41.

[35] On the flip-side of the ledger, Ontario all but abandoned any notion that the 'anti-fettering doctrine' applied strictly speaking to the facts of this case, which argument dropped away during final argument, although referenced in HMQ's closing written submissions.[29]

[36] Finally, neither party argued that the exercise of the discretion in fixing compensation, at least under the ISA, was or was not absolute, having regard to the current wording reproduced in Addendum No. 1 above. It was assumed by both sides during the course of argument that the discretion in fixing compensation was not absolute and was not unqualified.

The Contractual Duty of Good Faith in the Performance of Contracts

[37] In that respect, the law applicable to the matters at hand was first articulated in *Greenberg*,[30] further developed in *CivicLife.com*[31] and ultimately clarified by the Supreme Court in *Bhasin*,[32] the latter of which case I will now distill.

[38] In *Bhasin*, the Supreme Court of Canada brought clarity to the often confounding debate as to when and under what circumstances a court could import a contractual duty of good faith or a duty of honest performance even in the face of an entire agreement clause. Cromwell J., speaking for a unanimous court, summarized in some 60 pages, a survey of the Anglo-Canadian jurisprudential discourse on the aforesaid duty, which included its history and development. Without descending into the details of the contractual instances and relationships in which a duty has or has not been imposed, Cromwell J. summarized his review as follows:[33]

> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
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> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

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[29] See HMQ's Closing Submissions, para. 69. Briefly, the anti-fettering doctrine refers to the notion that a contractual term cannot directly or indirectly restrict the exercise of a legislative power: see *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at paras. 59-74.

[30] *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), leave to appeal ref'd, [1985] 2 S.C.R. ix (note) [*Greenberg*].

[31] *CivicLife.com Inc. v. Canada (Attorney General)*, [2006] O.J. No. 2474 (Ont. C.A.) [*CivicLife.com*].

[32] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 [*Bhasin*].

[33] *Bhasin*, at para. 93.

[39] With this general organizing principle in mind, the burden of the task of deciding the remaining common issues has been reduced. By way of example, I need not analyze the language of the operative agreements to determine whether the ISA creates a situation or circumstance which, as was found by the trial judge in *Bhasin*, amounted to a contract analogous to an employment or franchise agreement, notwithstanding the clear wording of the ISA that neither employment nor franchise principles of law are applicable to the Private Issuer relationship with Ontario. While I am of the view that the circumstances of the relationship between the members of the PIN and the government, where the latter retains a discretion to set the compensation, places these contracts on the same footing as those in which the duty of good faith is all but axiomatic to its performance, I need not walk down that path in light of the new common law duty articulated in *Bhasin.*

[40] That said, however, I am mindful of the further 'explanatory' notes contained in Cromwell J.'s judgment, which I reproduce below, rather than doing a disservice to the parties by attempting to paraphrase the same:

> [60] Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties...
>
> ...
>
> [65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.
>
> [66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and

where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

...

[70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of economic self-interest... Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency... The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

...

[74] There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law... I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

[75] Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it...

...

[86] The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. ...

[Emphasis added.]

[41] In my view the above excerpted paragraphs help inform my task in considering whether or not Ontario discharged its duty of good faith in the manner and fashion in which it considered and ultimately approved compensation increases, or not, as the case may be, to the members of the PIN during the Class Period.

The Plaintiff's Argument about Substantive Commercial Unreasonableness

[42] One of the points of departure between the parties revolved around the identification of the indicia of the breaches of the reasonableness, honesty and good faith obligations imposed by *Bhasin*. Unlike in *Bhasin*, the plaintiff did not argue, nor suggest, that Ontario acted dishonestly in any respect or was in breach of any specific term of the operative agreements. Indeed, there was not a shred of evidence that supported either proposition.

[43] Originally, at least in argument, the plaintiff advanced the position that the duties of reasonableness and good faith applied to outcome and not to process. In other words, reasonableness was to be assessed on the basis of the objectively-determined adequacy of the amount of compensation received by the members of the PIN during the class period. That argument was primarily rooted in the evidence of their forensic accountant, Errol Soriano, who attempted to demonstrate in a reasonably precise fashion that the increases in compensation provided historically to the PIN fell below or did not keep pace with acceptable comparators that he identified in his Reports,[34] including the benchmark established in the Woods Gordon Report in 1988, namely, the Weighted Compensation Index.[35]

[44] Throughout the course of the argument, the plaintiff returned to the PIN Reports that purported to underscore the conclusions that the PIN compensation was either inadequate, because it was not keeping pace with expenses, or was not sustainable because the compensation was not commercially reasonable. This refrain was repeated continuously throughout the course of the argument, both in written and oral form, and is captured at paras. 29 and 30 of the plaintiff's written argument:[36]

> Each of the private issuers who testified stated that they expected regular increases to the compensation rates to reflect the increased costs of doing business. The issuers' expectations of regular increases in compensation were reasonable given that:

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[34] Mr. Soriano's Reports consisted of the following: "*Michel R. Mayotte v. Her Majesty the Queen in Right of Ontario*: Review of Particular Aspects of The Plaintiffs' Claim of Financial Loss", Dec. 18, 2013 (MAY002287) ("Soriano Report #1"); "*Michel R. Mayotte* (the 'Private Issuers' or the 'Class') *v. Her Majesty the Queen in Right of Ontario* ('Ontario')", Sep. 10, 2015 (MAY002270), and "Expert's Letter", Sep. 30, 2015 (HMQ003679).

[35] The Weighted Compensation Index is "the weighted average of several benchmark values for costs relevant to the operations of a Private Issuer including labour, rent, utilities, maintenance, office supplies, auto costs, and other services": see Soriano Report #1, at para. 6.27.

[36] Plaintiff's Closing Submissions. The same concept was repeated several times in the Closing in varying forms, but all to the same effect.

(a) the issuers have no ability to raise the price of their services; only Ontario can;

(b) even when the prices paid by the public are increased, the private issuers do not receive any share of the increase;

(c) the issuers cannot bargain their compensation with Ontario because Ontario refuses to bargain with them; and

(d) the issuers have to pay expenses, in particular employee wages that can dramatically increase from one year to the next as a result of increases to minimum wage, for instance.

These business realities and the basic understanding that costs generally rise over time amply support the reasonableness of the issuers' expectations. The agreements should be interpreted in that light.

[45] When push came to shove, however, plaintiff's counsel was unable to direct me to a case where the "reasonableness" obligation was tethered to the outcome as opposed to process or performance. Indeed, all the cases to which my attention was directed, starting with *Greenberg* and ending with *Bhasin*, interspersed with a decision of McLachlin J.A., as she then was, in *Jack Wookey*[37], belies this argument.

[46] In any event, I am not persuaded that the amounts paid to the members of the PIN during the Class Period were commercially unreasonable for the following reasons:

- As Appendix A below demonstrates, the total annual compensation paid to the Private Issuers increased in the aggregate between 2003 to 2014 by $13.5 million;[38]

- While admittedly the offices operating in small-town Ontario had difficulties fully covering their overhead since the commissions earned from the small number of transactions processed by any one such operator was often not sufficient, there was not the mass exodus from the ranks of the PIN as was projected when the guaranteed minimum compensation (the "top-up") was phased out;

- It is nevertheless safe to conclude that small operators (one-terminal locations) were able to make ends meet either because they were functioning as part of a 'co-location', where they or others were operating a companion business at the outlet, or operators were themselves carrying on other personal service businesses to augment their global income and defray some of the overhead expense;

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[37] *Jack Wookey Holdings Ltd. v. Tanizul Timber Ltd.* (1988), 27 B.C.L.R. (2d) 221 (B.C.C.A.), at paras. 19-20.
[38] HMQ's Closing Submissions, at para. 24.

- There was evidence to suggest that certain multiple location outlets, such as those owned by the Dotzert family, by way of example, were able to 'draw' more than a merely modest salary after expenses. Indeed, the Dotzert's return on investment was shown in cross-examination to be anything but modest or commercially unreasonable;

- Furthermore, the Dotzert financial statements seem to suggest that in most of the years under review, their smaller and mid-size offices were showing a modest profit after expenses;

- If circumstances were so difficult, as was testified to in evidence, the numbers of those exiting from the PIN should have exceeded the annual average attrition rate of but 3% per annum, which percentage amount includes retirees and people leaving the PIN for reasons other than global remuneration. The fact is that despite their fiscal complaints, the Private Issuers did not leave the system;

- Indeed, there was evidence to suggest that at least 40% of the members of the PIN, including most of the plaintiff's witnesses, had been ServiceOntario operators for in excess of 20 years, a fact which belies the severe operating hardship about which I heard complaints;

- Others, such as the Dotzerts, have been pre-cleared to participate in a bidding process by way of a request for proposals (RFP) in the event that a new location is opened by Ontario or a change in operator becomes necessary for one reason or another, which begs the question—why would any businessperson want to bid on a new or additional location if the operation of a Private Issuer outlet was not commercially reasonable?

[47] The fact of the matter is that none of the members of the PIN from whom I heard suggested that they were unaware of the financial circumstances attendant to the operation of their particular location before they either signed on as ServiceOntario operators, at first instance, or renewed their contracts most recently. For example, Joyous Bragg, a small town operator who has been, personally, in the PIN for about 10 years, worked for the predecessor operator in her town for decades before taking over the location. Indeed, she was that operator's bookkeeper and can be presumed to have had full disclosure of the revenue and expenses of that location well before she took it over.

Unreasonable Exercise of Discretion

Plaintiff's Position

[48] That, however, does not end the matter since it is clear that HMQ's ultimate decision regarding compensation is not dispositive of a reasonableness finding. Indeed, whether the Ministerial discretion in fixing compensation was exercised reasonably must be assessed in the particular commercial context with reference to the intention of the parties.

[49] The plaintiff's argument, even in respect of the unreasonableness of the exercise of Ontario's discretion, vacillated between outcome and process, and back again. This dialectic was undertaken to give support to the proposition that the process in compensating the members of the PIN during the Class Period was unfair and unreasonable.

[50] Again, the starting point is founded on the fact that the members of the Class were at all material times parties to adhesion contracts which the plaintiff argued they had not negotiated and which concurrently provided Ontario with discretion to mete out compensation.

[51] While at times in its factum the plaintiff seemed to suggest that Ontario had an obligation after the introduction of the 1988 Compensation Model to provide PIN members with annual reviews, if not increases, that argument gave way to the ultimate proposition that Ontario had an obligation to "...set compensation reasonably and to do so from time to time", whatever that term was meant to imply.[39]

[52] On this aspect of the plaintiff's argument, it had resort, yet again, to the PIN Reports to underscore its position that various government operatives, including the Auditor General, held the view that the compensation was inadequate for the important work being undertaken by the PIN.

[53] Furthermore, the plaintiff argued that the ServiceOntario operators were not only the collectors of licence fees, which were on the increase during the Class Period, but were denied the right to share in the increased revenue generated from the increased fee structure. They also argued that they were not compensated by way of 'catch-up' for the years in which they had been red-circled, primarily during the Rae years, and were not provided with alternatives to the revenue losses occasioned from the elimination of certain compensable transactions, or the introduction of kiosks or internet purchases which diverted transactions to different forms of providers. The plaintiff further argued that at no time did Ontario consider whether the compensation received during the Class Period was reasonable and commercially sustainable as each of the PIN Reports arguably suggested.

[54] In addition, the plaintiff asserts that Ontario never undertook a wholesale review of the original time and motion analysis put in place after the 1988 Compensation Model was introduced. This absence of review, the plaintiff suggests, is but another example of the unfairness in the process since it is indicative of the fact that Ontario was not being responsive to the complaints of the PIN in a fundamental job-related way.

[55] Finally, while not amounting to bad faith, *per se,* the plaintiff argued the compensation review prescribed in the ISA, and which was mandated to be undertaken before the expiration of that agreement, was never properly undertaken or not undertaken reasonably if not in good faith.

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[39] Plaintiff's Closing Submissions, at para. 26.

In this respect, the plaintiff argued that Ontario's opening position that there would be "no new money" for compensation increases precluded a fair and reasonable review process since it presaged the end result without consultation.

HMQ's Position

[56] Ontario first argued that I was obliged to view the agreements with members of the PIN through the lens of a contract that had at once both a public and private aspect. It was suggested, at least in oral argument, that these agreements were in a class of their own. Hence, overarching any obligation of HMQ under the ISA, by way of example, is a duty on the part of the responsible Ministry to exercise its discretion in the public interest, which necessarily involves a balancing between governmental priorities.

[57] The proposition expressed by Ontario, respectfully, in my opinion merges several concepts, and not always correctly. First, none of the evidence of the HMQ witnesses supports the notion that the PIN contracts were or are some form of hybrid instrument. That notion was not expressed by any Ontario witness, nor do the documents support it. As was expressed by Lederer J. in *Ontario First Nations*, there is "...an appropriate and natural expectation that government...will abide by the agreements that they have made".[40] In fact, Ontario witnesses acknowledged that when embarking upon annual budget preparation, one of the first matters to be accounted for are the obligations specified by continuing and ongoing contracts.

[58] Furthermore, the cases cited by Ontario do not give support to the notion of hybrid agreements. What they do say is: (1) that when exercising a discretion, a "...Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith";[41] or (2) put otherwise, allocation decisions in respect of limited public funds are part of the public-policy making function of HMQ and while generally not subject to judicial review, the supervisory role of the judiciary is at play in instances of bad faith or where decisions are made for an improper purpose.[42]

[59] In my opinion, these concepts do not detract from, and are indeed perfectly consistent with, the principles expressed by Cromwell J. in *Bhasin*, namely that Ontario must be shown to have acted unreasonably or in bad faith when exercising its discretion in fixing the PIN compensation during the relevant period of time.

[60] In addition to referring to the global compensation increases shown in Appendix A, Ontario also argued that there were individual and important annual increases to compensation during the Class Period:

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[40] *Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)*, 2013 ONSC 7141, 118 O.R. (3d) 356 [*Ontario First Nations*], at para. 74.
[41] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at 14.
[42] *Huron-Perth Children's Aid Society v. Ontario (Ministry of Children and Youth Services)*, 2012 ONSC 5388, [2012] O.J. No. 4982 (Div. Ct.), at paras. 51-52.

(i) 5% in commission rates in 2006, 4% in 2008 and 1% in 2009;

(ii) the annual stipend increased by 4% in 2008 to $2,139 and then to $6,000 in 2010;

(iii) the $20,000 Annual Top-Up Program was introduced in 2006 to support smaller rural/remote issuers; and

(iv) a Minimum Compensation Guarantee Program introduced in 2005 for issuing offices whose annual commissions were below $10,000.[43]

[61] HMQ also argued that while it did not undertake a top-to-bottom review of the task time studies in the years subsequent to the introduction of the 1988 Compensation Model, it did conduct isolated time studies when it added new transactions from time to time to the PIN line of products, such as Health Cards and Ontario Photo Cards, providing new sources of revenue for the Private Issuers, or amended the tasks.

[62] In addition, HMQ pointed out that the members of the PIN were permitted to deliver ancillary products and services, offer third party commercial advertising on premises, and co-locate with other complementary businesses all of which initiatives, HMQ argued, helped the Private Issuers generate additional revenue and/or reduce overhead during at least the Class Period.

Conclusion on the Exercise of Discretion

[63] My own view on the question of the reasonableness of the government's exercise of discretion generally accords with the HMQ's argument. While certain aspects of the ISA give credence to the argument that the members of the PIN function under a form of adhesion contract, other non-compensation provisions were introduced into the ISA at the behest or request of the OMVLIA, including a new right of contract assignment, longer terms for the contract, reduction in operating hours, and the ancillary revenue generation concessions described above. Indeed, I was told that the genesis of Addendum No. 1 to the ISA came from counsel for the members of the PIN to which, in certain respects, Ontario acceded.[44]

[64] Further, while it is true that Ontario made it clear at the commencement of the Compensation Review that there would be "no new money" and that the compensation package would be aimed at fiscal neutrality, in point of fact, as indicated above, the ServiceOntario representatives to the Compensation Review Committee attempted to persuade the responsible Deputy Minister to increase PIN commission by 2%, which request while not approved, was dismissed with at least the explanation that increases would have to await a balanced budget.[45]

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[43] HMQ's Closing Submissions, at para. 35.
[44] Evidence of Jennifer Gayle, Oct. 8, 2015, pp. 156-158.
[45] "E-mail from Frank D'Onofrio to Melinda Gibson", Dec. 1, 2014 (HMQ003682).

Put otherwise, assuming Ontario can ever function under a balanced budget, compensation for members of the PIN may change.

[65] I make two observations about the Compensation Review provided for in Addendum No. 1 to the ISA: first, it was not suggested by the plaintiff witnesses, of whom two sat on the Review Committee, that the process was a sham as a result of the statements asserted by the functionaries at the outset; secondly, there were three meetings during which many issues were discussed and attempts were made to strike some form of balance in spite of the budgetary constraints. I do not believe that Colleen Caselton or Jane Dotzert, each of whom participated as OMVLIA appointees, testified that the review was a complete waste of time, a position neither expressed at the time or in evidence.

[66] Furthermore, with respect to both observations, since the parties were well along the way in respect of the instant litigation at the time of the review in the summer of 2014, it seems that the path of least resistance would have been for the responsible Deputy Minister to have accepted the recommendation of the ServiceOntario representatives, if only to anticipate and counter a PIN argument that the former had acted unreasonably in 2014. I am therefore inclined to the view that the overarching concerns of dealing with limited financial resources drove the agenda, an agenda into which, on the case law, I am not permitted to second-guess.[46]

[67] I would note parenthetically that while the Compensation Review was undertaken as a matter of contract, meetings between PIN members (or the OMVLIA) and Ministry representatives, if not the Minister or his or her deputies directly, historically took place at least annually. Putting the matter otherwise, it was not as if Ontario did not attempt to maintain lines of communication or otherwise turned a deaf ear to the complaints or urgings of the PIN.

[68] The members of the PIN knew or ought to have known the levels of compensation that each was receiving for the outlets being bid upon or operated at all relevant times. While I accept the fact that none had an obligation to 'quit' as an independent operator if only to mitigate actual and prospective damages, I am not persuaded that any member had a reasonable expectation that compensation would be increased on a more regular basis than what was being experienced during the Class Period, let alone during the full period after the 1988 Compensation Model was introduced.

[69] Furthermore, because this lawsuit was not founded on any form of representation or warranty in respect of compensation levels,[47] it cannot be argued that, while the desired compensation levels suggested in the action were not achieved, there was any basis for the view

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[46] I am not persuaded that *O'Neill v. General Motors of Canada Ltd.*, 2013 ONSC 4654, [2013] O.J. No. 3239, where GM sought to suspend its contractual obligations to pay annual benefits to retired employees during its imminent bankruptcy, is applicable to the instant case. The instant case does not deal with a suspension of compensation, but a suspension, as it were, of discretionary increases to the compensation package, a different concept which gives rise to different contractual obligations.

[47] *Andrew v. R.*, 2013 ONSC 5123, at para. 15.

that they were unexpected. Indeed, there is nothing in any of the PIN Reports to suggest otherwise.

[70] I think it is reasonable to conclude, as well, that the members of the PIN would have known from discussions with representatives of the Ministry that budgeting for "asks", a process where bureaucrats attempt to obtain extra money for projects or operations within their divisions, was most difficult and was beset with obstacles. In other words, in the budgeting process, balancing scarce resources and competing public policy demands is no mean feat; a fact which I believe would have been communicated to the executive of the OMVLIA, even if not fully appreciated.

[71] On balance, I am not persuaded that the plaintiff has established that Ontario acted unreasonably and in bad faith as a matter of substance or as a matter of the proper exercise of discretion in not providing increases to the compensation package under the 1988 Compensation Model to the levels that the PIN would have wanted.

Unjust Enrichment

[72] I now turn to the plaintiff's alternative claim in unjust enrichment. To succeed in unjust enrichment, the plaintiff must prove: (1) that HMQ was enriched; (2) that Private Issuers were correspondingly deprived; and (3) no juristic reason exists to deny recovery for HMQ's enrichment.[48]

[73] In the Mayotte Certification Order, Perell J. noted that if the plaintiff's claim in contract was to fail, the unjust enrichment claim would also fail because contract is a juristic reason to deny recovery.[49] As a result of my conclusion above that HMQ did not breach its contractual obligation to the Private Issuers, I need not engage in an assessment of enrichment and corresponding deprivation.

[74] I would therefore dismiss the plaintiff's claims in contract and unjust enrichment with costs about which I will comment momentarily.

Assessing Damages on an Aggregate Basis

[75] The question now in issue is whether, in the event that I am incorrect in not finding HMQ in breach of its agreements with members of the PIN, I should weigh in and fix an aggregate amount in respect of damages allegedly suffered by the PIN, consider whether aggregate damages is even part of the common issues submitted for trial or decline to consider the matter of damages at all in light of, among other things, the conflict in the evidence between the two forensic experts.

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[48] See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at para. 30 [*Garland*].
[49] Mayotte Certification Order, paras. 52-53. See also *Garland*, at para. 44.

[76] At the conclusion of argument on liability, and in the interests of time having regard to the fact that I was poised to start another trial momentarily thereafter, I asked counsel to brief these issues in subsequently delivered *facta*.

[77] I have since received and reviewed the submissions of counsel, the Endorsement of Perell J., including the common issues as described in para. 31 above, certain of the case law with which I have been provided, and of significance, the reports of Messrs. Soriano and Dyson, the forensic experts proffered on behalf of the parties and some of the evidence that I heard on this issue at trial.

[78] On balance, I am of the view that I would benefit from further representations of counsel on this subject rather than considering the issues in a vacuum.

[79] First, when I observed to counsel during the course of argument that I was having some misgivings about the economic evidence and my ability to fix the aggregate damages in accordance with my mandate as described under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and as discussed by Belobaba J. in *Ramdath*[50] and again in *Baroch*,[51] neither counsel, nor I, had in mind the actual question that Perell J. had defined on the issue of damages, which casts this question in a totally different light. Indeed, the final written submissions of both counsel delivered before argument led me to assume that I was being called upon to decide the issue of the actual amount of the damages claimed, assuming liability, based on the evidence of the forensic experts. Put otherwise, neither counsel directed me to the actual issue set out by Perell J. on the certification motion argued in 2010.

[80] Initially, the question submitted by plaintiff's counsel for consideration by the certification Judge was:

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

[81] Perell J. in his reasons for decision apparently was less than convinced that this was an appropriate common issue in light of certain misgivings he had about the monetary aspect of the claim, which he described as follows:

> [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.

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[50] *Ramdath v. George Brown College*, 2014 ONSC 3066, 375 D.L.R. (4th) 488 rev'd in part on other grounds, 2015 ONCA 921, 2015 CarswellOnt 19814.
[51] *Baroch v. Canada Cartage*, 2015 ONSC 40, 66 C.P.C. (7th) 72 at para. 63.

> [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.

[82] He then went on to define the question as set out above. To repeat, the common issue submitted for consideration in respect of damages was set out as follows:

> 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?

[83] When counsel briefed this matter subsequent to the trial proper and the initial argument, they both twigged to the fact that the question for my consideration was as set out above. They then made suggestions on what course I might follow in setting up at least a case conference to move this matter on to the next stage, if in the final analysis, such becomes necessary.

[84] However, the plaintiff, for his part, took the position that I was obliged as part of the common issues to make a determination on whether the approach in calculating damages hypothesized by his expert, Mr. Soriano, was appropriate in all the circumstances. In that respect, he argued, if I understood his written submission correctly, that the approach taken in Mr. Soriano's Report, which involved comparing the actual increases in issuers' Variable Compensation to the projected increases in what was referred to as the MTO Weighted Compensation Index/CVPL Calculated MTO Index and applying the delta or gap to the issuers' total compensation during the class period, was the appropriate formula for assessing damages.[52] In other words, under the plaintiff's theory of damages, the index accounts for the increased expenses incurred by private issuers in providing the contracted services and represents what he argued was a commercially reasonable compensation level for members of the PIN, a theory which I rejected above.

[85] The plaintiff went on to suggest that HMQ's expert, Mr. Dyson, was in agreement with at least the notion that a weighted benchmark was an appropriate damage calculation tool, although Mr. Dyson did not agree that the Soriano-fashioned benchmark set out above was satisfactory in the circumstances because it wasn't tied to enough relevant data sufficient to vouchsafe its reliability.

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[52] The index fashioned by Mr. Soriano is an updated version of the Weighted Compensation Index utilized by Woods Gordon in 1988.

[86] That said, it is worthy of note that Mr. Dyson did not provide me with an alternative suggestion on what benchmark, at least of the four put forward by Mr. Soriano, might be the most appropriate in the circumstances.

[87] Respectfully to both sides, I am unable to say on the evidence presently before me, even on a balance of probabilities, what the appropriate formula should be in the circumstances of this case.

[88] To repeat, Mr. Soriano hypothesized that the financial loss sustained by the Private Issuers should be based on the difference between "[t]he revenues that would have been earned by Private Issuers during the Loss Period assuming that the rate of increase in Variable Compensation had kept pace with the rate of increase implied by the CVPL Calculated MTO Index ...and ... [t]he actual revenues earned by the Private Issuers during the Loss Period".[53] He then moved from the specific to the general in his report and suggested that the loss would be equal to the delta between what was received and the rate of increase founded on the various benchmarks which he reviewed, not limiting his proposal to what he called the CVPL Calculated MTO Index.

[89] While I accept the argument that assuming a finding of liability – which is clearly the threshold question – some benchmark should be adopted in calculating the economic loss, I am not persuaded that the loss should not take into consideration any stipend received by the Private Issuers in the relevant time period or any form of top-up that was paid to some of the issuers for some of the period.

[90] Furthermore, I am also not persuaded that the period for consideration should be limited to the Loss Period, as defined. Such a limitation would skew the results since there were years before the Loss Period where the Private Issuers' compensation outstripped any of the proposed benchmarks, in some instances by significant amounts. In other word, there were several years in which the increases to the variable compensation, without factoring in the stipend, outstripped amounts that would have been generated under any of the proposed benchmarks. Indeed, as I recall, Mr. Soriano acknowledged in evidence that those "positive" years should be factored into the equation.

[91] Finally, if some reckoning has to be undertaken, I would suggest that before the parties launch into a further analysis of the appropriate formula or benchmark, additional evidence be provided to the consultants, if available. To this end, I would propose convening a case conference with counsel to discuss what if any further evidence might be available either from Ministry or OMVLIA sources. While I am not pre-judging the matter in any respect, I would think that a larger sampling of Private Issuer financial statements both in terms of years and numbers be considered and ultimately reviewed if only to lend credence to the conclusions expressed by Mr. Soriano on the reliability of his thesis that his propounded benchmark is the

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[53] Soriano Report #1, at p. 28.

most suitable in the circumstances. Alternatively, the Ministry might want to consider providing better information on the costs of operating government "owned" outlets. Since HMQ-operated outlets perform many of the same tasks as the PIN outlets, I am surmising without knowing that this data may arguably reveal a more suitable if not accurate comparator.

[92] Again, I am only putting these suggestions out to counsel for discussion purposes in the event that the damages issue needs to be revisited.

[93] Putting the matter simply, I do not think I have enough evidence or information even to fashion an appropriate formula for damages as seems to be mandated in Perell J.'s common issue.

[94] Finally, since the issue was not argued in any meaningful fashion, I would like to understand exactly how the limitation period defences would impact the damages asserted under the claim. For an example of my confusion, which was not addressed in evidence and only obliquely referenced in the written submissions, if any of the Private Issuers is found to have a statute-barred claim, are those revenues to be deducted from the aggregate amount sought or are they to be treated in some other fashion?

Conclusion

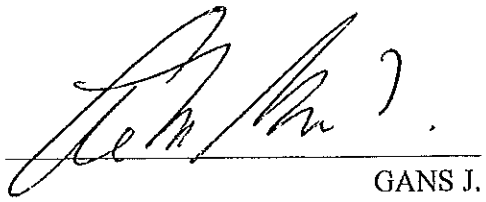
[95] As is evident from the foregoing, the action is hereby dismissed. I am presuming that HMQ is seeking its costs. If that assumption is correct, and the parties cannot settle costs without my assistance, then HMQ will have one month from the date of the release of these reasons to prepare and deliver a Bill of Costs set out in the same form and fashion as the former High Court of Justice.

[96] In other words, the Bill should be divided into benchmark events representative of the litigation process, included in which will be a listing of the hours worked by counsel and clerks etc. at each of the relevant stages. Counsel may provide brief submissions on costs as well to augment the Bill of costs if deemed necessary. The submissions are limited to but three pages.

[97] Counsel for the plaintiff will have an additional 30 days to prepare a mirror image Bill of Costs which should be reflective of their reasonable expectations for costs had they been successful. Plaintiff's submission may include a brief argument as well, limited to three pages.

[98] I will leave it to counsel to prepare the requisite formal judgment reflective of these reasons in advance of the submissions on costs if such is necessary to preserve any rights of appeal.

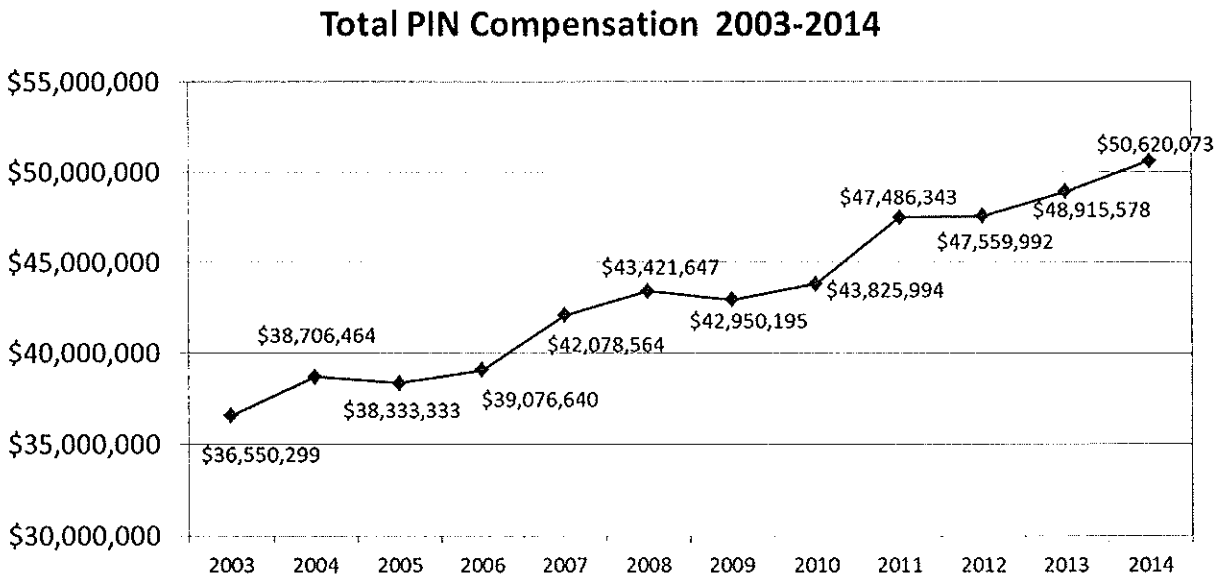
[99] Finally, I would like to take this opportunity to thank the parties and counsel for the manner in which this case was presented.



Released: February 19, 2016

GANS J.

Appendix A – PIN Compensation[54]



[54] HMQ's Closing Submissions, at para. 24.

CITATION: Mayotte v. Ontario, 2016 ONSC 1233
COURT FILE NO.: CV-09-389686-CP00
DATE: 20160219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHEL R. MAYOTTE

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR JUDGMENT

GANS J.

Released: February 19, 2016