

Court File No.:

CN-09-389686
CPAO

**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*

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyers or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

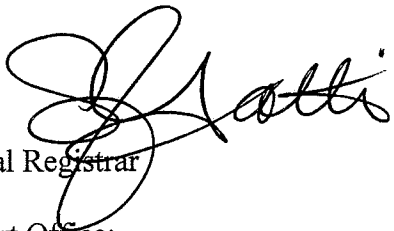
Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date: October 23, 2009

Issued by:


Local Registrar

Address of Court Office:
Superior Court of Justice
393 University Avenue
10th Floor
Toronto, Ontario M5G 2J6

TO: **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**
Crown Law Office-Civil
Ministry of the Attorney General
720 Bay Street, 8th floor
Toronto, Ontario M5G 2K1

CLAIM

1. The plaintiff claims:
 - (a) damages for breach of contract in the amount of \$75,000,000;
 - (b) in the alternative, compensation and restitution for unjust enrichment in the amount of \$75,000,000;
 - (c) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
 - (d) costs of this action on a substantial-indemnity scale, plus applicable goods and services tax; and
 - (e) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

The Parties and the Proposed Class

2. The plaintiff is an individual carrying on business in the Town of Penetanguishene, Ontario as an agent of the defendant, the Province of Ontario ("Ontario"), for, *inter alia*, the issuance of motor vehicle permits and the processing of driver's licences.
3. The plaintiff is a member of, and brings this action on behalf of, the following proposed class:

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

4. There are approximately 269 Issuers currently operating in Ontario. The number of Issuers no longer operating in Ontario is not known to the plaintiff.

5. The Issuers are appointed agents of Ontario pursuant to the *Highway Traffic Act*, R.S.O. 1990, c. H.8 to issue and process driver's licences and vehicle registrations and to provide other services to the public on behalf of Ontario (the "Services").

6. The Issuers are independently owned and operated private businesses located throughout Ontario. Each Issuer is solely responsible for its expenses and overhead.

7. Private issuers have been providing the Services to the Ontario public since 1907.

8. In addition to the network of private issuer offices, Ontario provides the same Services to the public through government-owned and operated offices, automated kiosks owned by Ontario ("ServiceOntario kiosks"), and other forms of alternate customer service such as the internet.

The contractual relationship between the parties

9. The Issuers are parties to one of two forms of agreements ("Agreements"): a Memorandum of Agreement ("MOA") or a Private Issuer Agreement ("PIA").

10. The MOA was the form of agreement used until 2001; the PIA was the form of agreement used from 2001 until recently. The majority of Issuers, including the plaintiff, are contractually governed by the MOA.

11. The Agreements set out the roles and obligations of the parties thereto and provide that in, addition to being bound by their Agreements, Issuers are required to comply with "manuals, policies, instructions and directives" of Ontario (s. 2 of MOA), and "the MTO [Ministry of

Transportation and Communications] manual” and “all Directions of MTO concerning the Services” (s. 3.1 of PIA).

Ontario introduces “time based system” of compensation

12. Although compensation is the *raison d'être* for the Agreements from the Issuers' perspective, neither the MOA nor the PIA states how compensation will be determined.

13. The formula used by Ontario to calculate Issuer compensation for the period in issue in this action and which continues to the present was introduced in 1987.

14. On September 21, 1987, Ontario sent a memorandum to the Issuers introducing compensation increases as well as a new method of compensation. The new method of compensation was to consist of two components: time-based commissions for transactions and an annual stipend.

15. The September 21, 1987 memorandum stated that the time-based commissions would be “fairer” and “more rational” than the then current method, which was to pay the same commission for transactions of varying complexity and duration.

16. The memorandum further stated that commission rates would be derived from the “objectively determined ‘standard time’ taken to do a transaction”, and would be “proportional to the effort required to do each transaction”.

17. The commissions were set out in an Issuer memorandum sent to the Issuers on June 29, 1988. That memorandum contained a standard commission rate table and formula used to calculate the standard commissions. The memorandum stated that the commission rates were

calculated by multiplying the standard transaction processing time by the established rate of complexity. The standard time was taken from a time series analysis conducted in 1981.

18. The objectively-determined times purported to take into consideration activities not specifically included in the commissions table but necessary to the completion of the tasks. These included: printing receipts and invitations to receive documents, waiting for customers to move away from the table, and calling the MTO hotline which assisted the Issuers in answering questions and processing non-standard applications.

19. The September 21, 1987 memorandum to the Issuers correctly described the criteria to be used by Ontario in fixing Issuer compensation under the Agreements. Namely, Ontario is required to ensure that Issuer compensation is, and remains, "fair", "rational", "objectively determined", and "proportional to the effort required to do each transaction". Further, such compensation was to reflect all steps necessary to provide the Services.

20. The new method of compensation came into force on July 1, 1988 and has remained the compensation formula to the present time.

Ministry of Transportation Report 2003

21. Following a comprehensive review of the private Issuers network and supporting government infrastructure, a Ministry of Transportation report dated August 28, 2003 ("MTO Report") concluded, and the facts were, that:

- (a) Issuer compensation was truly inadequate;
- (b) Issuers dealt with a large number of complex transactions;

- (c) Issuers had not received an increase in commission rates since 1997, at which time the increase was only 3.2%;
- (d) Issuers did not have sufficient resources to operate their businesses;
- (e) employees of Issuers were paid at a rate from \$7 to \$15 per hour and few Issuers were able to offer benefits packages to staff;
- (f) the introduction of ServiceOntario kiosks and other forms of alternate customer service was increasingly removing the simpler transactions from the Issuer offices, leaving Issuers with more complex and time-consuming transactions;
- (g) the 1981 time series analysis was out of date; and
- (h) the time estimates per transaction did not account for the interaction that takes place between the clerk and the customer, involves paperwork and explaining forms and processes, asking for identification, completing forms for those who cannot understand them, and entertaining customer inquiries.

22. The key recommendations of the MTO Report, which was based on fair, rational and objective criteria, were:

- (a) an immediate 12% increase in each and every transaction commission rate;
- (b) an update of the time series analysis to include real-time customer interaction, which should be in place for April, 2004; and
- (c) an increase in the annual stipend by \$8,000 effective April, 2004.

23. 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.

Auditor General reports on Issuer under-compensation

17. Two years after the MTO Report, the Auditor General of Ontario, in its annual report, cited the tension between Ontario and the Issuers over compensation and concluded that the lack of an increase in the commission rates since 1997 was the “single biggest source of [I]ssuer dissatisfaction”.

24. The Auditor General found, and the fact was, as was known to Ontario, that the Issuers were under-compensated. The Auditor General based his finding on the following factors:

- (a) expenses including rent, utilities, supplies and other costs had increased significantly without a corresponding increase in Issuer compensation;
- (b) labour costs had increased without a corresponding increase in the compensation;
- (c) simpler transactions, which were the most profitable, were increasingly being processed through alternative channels such as ServiceOntario kiosks leaving the Issuers with the more complex customer problems that require greater time and which were not correspondingly compensated;
- (d) extensive customer interaction for which the Issuers were not compensated; and
- (e) increasing hold times on MTO’s hotline.

25. As a result, the Auditor General recommended that Ontario conduct a review of its compensation arrangements. In addition, the Auditor General recommended that Ontario move from a fixed annual stipend per office to a variable stipend.

Breach of Contract

26. The Agreements impose on the parties a common law duty of good faith in the exercise of their contractual powers.

27. Because the Issuers have no ability to negotiate their compensation, and the Agreements prohibit them from accepting any compensation in respect of the Services other than the compensation fixed by Ontario, the Issuers have been and continue to be in a vulnerable position with respect to their income and the viability of their businesses. Ontario has a duty of utmost good faith or, alternatively, good faith, with respect to the setting of the Issuers' compensation under the Agreements.

28. Although there have been increases in commission rates from time to time, most recently in April, 2009, these have been marginal. Both the time-based commissions and the annual stipend have not increased at a rate sufficient to reflect the changing nature and complexity of the types of transactions performed by Issuers.

29. 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; and
- (e) increased expenses and costs of living.

30. The breach continues each day causing the Issuers damages in unpaid compensation to which they were entitled and which they ought to have received, the full particulars of which will be provided before trial.

Unjust Enrichment

31. In the alternative, if Ontario has not breached its duties under the Agreements (which is not admitted but denied), Ontario has been unjustly enriched since August 28, 2003 by virtue of the same facts pleaded above, and the additional fact that:

- (a) Issuers provide the Services to the public at a cost to Ontario far less than public-service employees;
- (b) Issuers pay all of their own overhead, and invest their own money in their offices, thereby relieving Ontario of this capital expenditure; and
- (c) Issuers have no collective bargaining rights, cannot strike and in fact have provided services to the public during public-service employee strikes.

32. Ontario's under-compensation of the Issuers has been to the direct detriment of the Issuers and without juristic reason.

33. Notice of this action was served on Ontario pursuant to s. 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 ("PACA") on August 19, 2009.

34. The plaintiff pleads and relies on s. 7(2) of PACA.

The plaintiff proposes that this action be tried at Toronto, Ontario.

DATE: October 23, 2009

SOTOS LLP

Barristers and Solicitors

Suite 1250

180 Dundas Street West

Toronto, Ontario M5G 1Z8

Allan D.J. Dick (LSUC # 24026W)

David Sterns (LSUC # 36274J)

Vukica Djuric (LSUC # 57395I)

Tel.: (416) 977-0007

Fax.: (416) 977-0717

Lawyers for the Plaintiff

MICHEL R. MAYOTTE

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

Defendant

Court File Number:

QJ 89-389686-
CPO

SERVICE OF A COPY
ADMITTED THIS 23rd DAY OF OCTOBER 2009

Crown Law Office (Civil Law)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO
Per Barbara Blake Time 3:15 P.M.
720 BAY STREET
TORONTO, ONTARIO M5G 1Z8

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

SOTOS LLP
Barristers and Solicitors
Suite 1250
180 Dundas Street West
Toronto, ON M5G 1Z8

Allan D.J. Dick (LSUC # 24026W)
David Sterns (LSUC # 36274J)
Vukica Djuric (LSUC # 57395I)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the plaintiff