

Court File No. CV-10-406401

*ONTARIO*  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**COURT CANADA LTD.**

Plaintiff

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,  
REPRESENTED BY THE MINISTRY OF THE  
ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO**

Defendant

**STATEMENT OF DEFENCE**

1. The defendant, Her Majesty the Queen in right of the Province of Ontario ("Ontario") admits the allegations contained in paragraphs 2, 3, 4 with the exception that the potential pilot project was only to be operational in the Estates Courts, paragraphs 5, 6, 7 with the exception that access to the electronic booking system was limited to lawyers, the last sentence of paragraph 8, with the exception that the pilot project only applied to the Estates Courts in Toronto, paragraphs 9, 10, 11, the first sentence of paragraph 12, and paragraphs 13, 14, 16, 21 and 23 of the Statement of Claim.
2. Ontario has no knowledge or insufficient knowledge to enable it to plead to the allegations in paragraphs 18, 19 of the Statement of Claim.
3. Unless otherwise admitted, Ontario denies the remaining allegations in the Statement of Claim and puts Court Canada Ltd. ("Court Canada") to the strict proof thereof.

**BACKGROUND****ELECTRONIC CASE MANAGEMENT IN THE SUPERIOR COURT OF JUSTICE**

4. In 2002, the Court Services Division ("CSD") of the Ministry of the Attorney General (the "Ministry") began the phased-in introduction of an electronic case management system to be used in the Superior Courts of the Province of Ontario. The system is called FRANK.

5. FRANK is used to track a case in the Superior Court of Justice from its inception to conclusion, including the filing of pleadings, scheduling of motions, applications and pre-trial proceedings and trials.

6. In the FRANK system, in order to schedule a motion, a litigant must call, email or fax a request to the Court office or attend in person at the Court office.

7. The deployment of the FRANK system began in 2002 first in various Courts outside of Toronto, and in Toronto Courts in mid 2008.

8. At all material times, FRANK remained the main system of case management in the Superior Courts of Ontario.

**THE INTRODUCTION OF OSCAR IN THE ESTATES COURTS IN TORONTO**

9. FRANK was not in use in the Estates Court offices in the Toronto Region of the Superior Court of Justice.

10. In 2006, as a result of requests by the Estates Bar to have the capacity to book Estates Court matters electronically, CSD was asked to investigate the feasibility of such a system.

- 3 -

11. As a result of discussions between representatives of CSD and Court Canada in September 2006, Court Canada agreed to instigate a pilot project in the Estates Court by setting up a website where users could, for a fee payable to and collected by Court Canada, book applications and motions in the Court using Court Canada's Online System for Court Attendance Reservations ("OSCAR").

12. This electronic booking pilot project was to operate from October 15, 2007 to May 30, 2008.

13. OSCAR was completely voluntary. At all times, users of the Estate Court could continue to book matters in person at the Court office.

#### **THE REQUEST FOR PROPOSALS**

14. In March and April of 2008, the pilot project was evaluated and considered successful in the Estates Courts.

15. In the same period, the practitioners of the Commercial Court division of the Superior Court of Justice expressed an interest in using OSCAR in the Commercial Court as a process separate from and parallel to the FRANK system which would continue to operate in the Court.

16. As a result of the foregoing, CSD issued a Request for Proposals ("RFP") dated July 16, 2008.

17. The RFP was an invitation to submit proposals for the potential development, hosting and maintenance of a web-based Court scheduling and reservation system to be called the Court Scheduling System ("CSS").

18. In s. 1.3 of the RFP, the Ministry specifically advised proponents that it made no guarantee of the value or volume of work to be assigned to the successful proponent, that

- 4 -

the contract would not be exclusive to the proponent, and that the Ministry could obtain the same services from others or internally:

“The Ministry makes no guarantee of the value or volume of work to be assigned to the successful proponent. The Agreement executed with the successful proponent will not be an exclusive contract for the provision of the described Deliverables. The ministry may contract with others for the same or similar deliverables to those described in this RFP or may obtain the same or similar Deliverables internally”

19. Section 2.0 of the RFP stipulates that the potential use of the electronic booking services would be limited to the civil divisions of the Superior Court of Justice at two locations in Toronto – 393 and 330 University Avenue.

20. Section 4.1.5 of the RFP provides that neither the Ministry or its advisors made any representation or guarantee as to the accuracy of the information contained in the RFP, and that any quantities shown were estimates only and were for the sole purpose of indicating the general size of the work.

21. Pursuant to the provisions of s. 4.2.1 of the RFP, it was the responsibility of the proponents to seek clarification from the Ministry on any matters they considered to be unclear.

22. Contrary to the allegations in paragraph 12 of the Statement of Claim, s. 1.2 of the RFP provides that any contract awarded would be for a period of three (3) years. The Ministry had the exclusive option to extend the contract for 5 terms of one year each.

23. Court Canada knew at all material times that, pursuant to s. 8.03 of the Form of Agreement attached to the RFP as Appendix A, the Ministry reserved the right to terminate the Agreement on the provision of 30 days written notice of termination of the Agreement.

24. Ontario pleads and relies on the provisions of the RFP which were accepted by Court Canada.

25. Subsequent to the receipt of the RFP, Court Canada did not seek any undertaking or guarantee from the Ministry that it would have the right to deploy OSCAR in all divisions of the Superior Court of Justice. On the contrary, it was aware at all times that the provision of services was not exclusive to it and that the Ministry could obtain the same services elsewhere or provide them internally.

### **THE AGREEMENT BETWEEN COURT CANADA AND THE MINISTRY**

26. On December 24, 2008, Court Canada and the Ministry signed an Agreement for the supply by Court Canada to the Ministry of the services set forth in the Agreement and the RFP herein referred to. The expiry date of the Agreement was November 30, 2011.

27. Section 1.03 of the Agreement provides that:

“The Contract embodies the entire agreement between the parties with regard to the provision of Deliverables and supersedes any prior understanding or agreement, collateral, oral or otherwise with respect to the provision of the Deliverables, existing between the parties at the date of the execution of the Agreement.”

28. Section 1.5 of the Agreement further provides that, in the event of a conflict or inconsistency in any provisions in the Contract, the Agreement and its Schedules govern over the RFP and Proposal and the RFP governs over the Proposal.

29. Section 3.09 of the Agreement provides that:

- (a) the supply of services by Court Canada to the Ministry was on a non-exclusive basis;
- (b) the Ministry makes no representation regarding the volume of goods and services required;

- 6 -

- (c) the Ministry reserved the right to contract with other parties for the same services as those provided by Court Canada;
- (d) the Ministry reserved the right to obtain the same services internally.

30. Court Canada accepted the terms and conditions of the said Agreement and the documents incorporated therein. Ontario pleads and relies on the terms of the Agreement.

31. Ontario specifically denies the allegation in paragraph 15 of the Statement of Claim and states that Court Canada is prohibited by the terms of the Agreement and RFP as aforesaid, from relying on any estimated event volumes referred to therein.

32. Ontario denies the allegations in paragraphs 17 and 20 of the Statement of Claim and repeats and relies upon s. 1.3 of the RFP and sections 1.03, 3.06 and 3.09 of the Agreement.

### **THE USE OF OSCAR IN THE COMMERCIAL COURT**

33. As a result of the success of the OSCAR system in the Estates Courts, a decision was made to try the system in the Commercial Court, a Court with a relatively small population of users.

34. The OSCAR system began to operate in the Commercial Court in July 2009.

35. In the Estates Court all motions and applications booked in person were added to the OSCAR database.

36. A decision was made to add all matters which were booked by Commercial Court users on FRANK into the OSCAR database.

- 7 -

37. In the period from July 2009 to June 2010 only 52 matters, or 0.73% of all matters booked in the Commercial Court were reserved by lawyers using OSCAR. The balance was booked through the Court staff on FRANK.

38. Notwithstanding the apparent lack of interest by members of the Commercial Court bar in using OSCAR, staff of the Commercial Court continued to complete the "double entries" of matters booked through FRANK into OSCAR, thereby increasing staff time required to book a matter by approximately 50%.

39. Representatives of Court Canada were aware of the lack of interest by the Commercial Court bar in utilizing OSCAR and of the burden on Court staff of making the double entry of booked matters in OSCAR and FRANK.

40. Court Canada suggested that the Ministry cease using FRANK and was advised that FRANK was and would continue to be the Ministry application used province-wide and that it contains all of the case tracking and statistical information required by the Ministry.

#### **THE PROPOSED EXPANSION OF OSCAR INTO OTHER COURTS**

41. Ontario admits that members of CSD did meet with representatives of Court Canada to explore the issue of whether OSCAR could usefully be deployed to the Civil Motions Courts.

42. Discussions occurred over the spring and summer of 2009.

43. Ontario denies that the investigation by Court Canada into the operations of the Civil Motions Courts was completed as alleged in paragraph 25 of the Statement of Claim and states that Court Canada advised CSD that it wanted to return in the fall to do further work.

- 8 -

44. In the course of discussions, CSD staff advised Court Canada that if the scheduling of motions and applications in the Civil Motions Courts involved double entry into FRANK and OSCAR, such a system would not work due to the substantial volume of matters scheduled in Civil Motions Court as compared to the Estates and Commercial Courts.

45. Ontario denies that it instructed Court Canada to conduct any investigations into the operations of the Bankruptcy Court.

46. Ontario did not instruct Court Canada to conduct any investigation into the operations of the Small Claims Court. Ontario agreed to a request by Court Canada to meet with representatives of Small Claims Court but the representatives of Small Claims Court did not, at any time, indicate any scheduling problems or interest in using the OSCAR system.

47. In any event, the Agreement with Court Canada was limited to the potential use of OSCAR at 393 and 330 University Avenue Courts.

48. With respect to the allegations at paragraphs 27 and 28 of the Statement of Claim, Ontario states that no one on behalf of Ontario ever represented to Court Canada that it would be able to deploy OSCAR in any Courts other than Estates and Commercial Courts. If Court Canada expended funds in anticipation of such a deployment, it did so without any direction from Ontario at a time when it was well aware of the terms of its Agreement with Ontario.

49. With respect to the allegations in paragraph 29 of the Statement of Claim, Ontario states that on January 8, 2010, in response to a request from Court Canada to expand the operation of OSCAR to the Toronto Civil Motions area as well as the Newmarket and Brampton Courts, the Director of Court Operations advised Court Canada's representative that as a result of the changes to the Rules of Civil Procedure which took effect on January 1, 2010, Court staff were fully occupied in implementing the changes to

the Rules and that the Ministry would not be expanding OSCAR to the Civil Motions Courts at that time and further advised Court Canada's representative that the Agreement does not allow for expansion beyond the 330 and 393 University Avenue Courts.

50. With respect to the allegations in paragraphs 30 and 31 of the Statement of Claim, Ontario states that on February 12, 2010, Court Canada wrote to the Deputy Attorney General and alleged that it was being denied access to Courts other than Estates and Commercial Courts in order to expand the operation of OSCAR in violation of its Agreement with Ontario.

51. In a letter dated March 3, 2010, Ontario denied that Court Canada had any right to expand into other Court divisions and reminded Court Canada of the provisions of s. 3.09 of the Agreement and s. 1.3 of the RFP which specifically gave Ontario the right to decide whether to permit the deployment of OSCAR to other Courts.

52. Ontario admits that on March 24, 2010 it advised Court Canada that it did not intend to expand the operation of the OSCAR system beyond the Estates and Commercial Courts.

53. Ontario denies the allegations in paragraph 32 of the Statement of Claim and repeats the assertions in paragraphs 18, 19, 23, 27-29, herein.

54. Ontario denies the allegations in paragraph 33 of the Statement of Claim and states that they are false to the knowledge of Court Canada.

55. Prior to April 14, 2010, Court staff had, without any contractual obligation to do so, entered all matters booked through FRANK for the Commercial Court in the OSCAR system.

56. It subsequently became apparent to Commercial Court staff that matters reserved through OSCAR accounted for less than 1% of all Commercial list matters scheduled

- 10 -

with the result that the amount of time it took Court staff to double-enter all matters booked through FRANK into the OSCAR system was excessive and required staff to work over lunch hours, at night and on some weekends in order to cope with the workload. Court Canada was made aware of the problem.

57. As a temporary solution to the problem, Court staff continued to accept matters reserved through OSCAR but did not double-enter matters booked by the Court staff through FRANK into the OSCAR system. Court staff continued to update the Court's availability on OSCAR for counsel who wished to use the system by blocking off time as matters were booked through Frank. This ensured that the availability of Court time, as displayed in OSCAR, was up to date. The result was that staff time spent scheduling was reduced by approximately 50%.

58. All persons wishing to book on OSCAR were able to continue to do so and schedules containing those matters were published. No matters booked in OSCAR were deleted.

59. Court Canada representative Ed Demerci was advised of the proposed change in the booking process prior to implementation.

60. The new method of booking referred to in paragraphs 57-58 herein was in place for two days before staff resumed the practice of entering all matters booked in FRANK into OSCAR.

61. Ontario denies the allegations in paragraphs 34-36 of the Statement of Claim and puts Court Canada to the strict proof thereof.

62. In the alternative, if Court Canada has suffered any damages, which is denied, it failed to take any reasonable steps to mitigate the said damages, and is therefore barred from recovery of same.

- 11 -

63. Further in the alternative, Ontario states that any damages suffered are excessive, remote and unrecoverable.

64. Ontario seeks an Order dismissing this action with costs.

**DATE:** July 27, 2010

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**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF DEFENCE**

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