



Court File No. 01-CV-221919CP

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

RICHARD PRENDIVILLE

Plaintiff

- and

407 INTERNATIONAL INC., 407 ETR CONCESSION COMPANY LIMITED,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (Minister for Privatization)
and ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. 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 plaintiff's 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 LEGAL AID OFFICE.

Issued DATE: December 12, 2001

Issued by: 
Local Registrar

Address of court office:

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A. Overview

1. This a proposed class action for damages and other relief arising from late payment penalties charged in connection with the use of Highway 407. When “customers” fail to pay the toll charges and other fees within 90 days of the date of invoice, they are charged a \$30 late payment penalty. Such penalties constitute “interest” within the meaning of the criminal interest rate provisions of the *Criminal Code*. In virtually all cases where such penalties are charged, the effective rate of interest substantially exceeds the annual “criminal rate” of 60%. The effective annual rate of interest charged to the plaintiff in this case surpassed 300,000% (three-hundred-thousand per cent). Consequently, all legislative action by the Provincial Government authorizing such penalties is *ultra vires*. Further, all customers of Highway 407 who have paid late payment penalties are entitled to restitution.

B. The Claim

2. The plaintiff claims:
 - (a) a declaration that late payment penalties (“LPPs”, as described below) imposed by the defendants 407 International Inc. (“407 Inc.”), 407 ETR Concession Company Limited (the “Concessionaire”) and Her Majesty the Queen in Right of Ontario (the “Province”) violate s. 347 of the *Criminal Code*, are illegal and void, and do not have to be paid by the Class (defined below);
 - (b) an accounting of the LPPs paid by members of the Class and an order against the defendants on a joint and several basis to pay corresponding restitutionary damages;
 - (c) a declaration that ss. 13 to 26 of the *Highway 407 Act*, 1998, S.O. 1998, c.28, as amended (the “407 Act”) are *ultra vires* to the extent those provisions authorize or permit the charging of interest in excess of the criminal rate in the *Criminal Code*;

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- (d) an interim, interlocutory, and permanent injunction restraining 407 Inc. and the Concessionaire from imposing LPPs that violate the Criminal Code;
 - (e) pre-judgment interest in accordance with the *Courts of Justice Act*;
 - (f) post-judgment interest in accordance with the *Courts of Justice Act*;
 - (g) the costs of this action on a solicitor and client basis; and
 - (h) such further and other relief as may seem just.

C. The Parties

3. The plaintiff is an individual residing in Waterloo, Ontario. He is a customer of the defendant, 407 Inc. and the Concessionaire (collectively, the "407 Group"). His account number is 149 651 144.
4. The plaintiff brings this action under the *Class Proceedings Act, 1992* on behalf of a class consisting of all persons who (a) used Highway 407 or will use Highway 407; and (b) paid, or have been charged, or will pay, or will be charged LPPs at any time between June 7, 1997 and the date of judgment in this matter (the "Class").
5. 407 Inc. (formerly 407 ETR International Inc. and prior thereto, 1346292 Ontario Inc.) was incorporated on March 17, 1999 under the *Ontario Business Corporations Act*, under the initiative of SNC-Lavalin Inc. ("SNC-Lavalin") and Cintra Concesiones de Infraesturas de Transporte, S.A. ("CINTRA"), for the purpose of submitting a bid to the Government of the Province of Ontario (the "Province") for the purchase from the Province of all of the issued and outstanding shares of the Concessionaire. This bid was accepted. The purchase was completed on May 5, 1999.

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6. The Concessionaire was established by the Province in 1993 as a Crown agency under the name Ontario Transportation Capital Corporation ("OTCC") to oversee the design, construction, operation, maintenance, management and financing of Highway 407. On April 6, 1999, OTCC was continued by the Province as a share capital corporation under the *OBCA* under the name 407 ETR Concession Company Limited. It then entered into a 99-year concession and ground lease agreement (the "Concession Agreement") with the Province. Together with the *407 Act*, this agreement establishes the Concessionaire's principal rights and obligations with respect to Highway 407. In November 1999, the Concessionaire acquired all the shares of 1054381 Ontario Inc. (formerly Canadian Highways Management Corporation), and on January 1, 2000, the Concessionaire amalgamated with 1054381 Ontario Inc. under the provisions of the *OBCA* to continue as 407 ETR Concession Company Limited.
 7. 407 Inc. has no direct or indirect subsidiaries other than the Concessionaire and the Company's sole business is conducted through the Concessionaire. 407 Inc. is the ultimate beneficiary of all revenues received by the Concessionaire, including the LPPs.
 8. The business of the 407 Group is the operation, maintenance and management of Highway 407.
 9. Her Majesty the Queen in Right of Ontario is a defendant in this proceeding because it has administered the *407 Act* at all material times, and, through the Minister of Privatization, has entered into agreements with the Concessionaire, which enable the 407 Group to charge the illegal LPPs.

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10. The Attorney-General for the Province of Ontario is a defendant in this proceeding because the plaintiff challenges the *vires* of certain provisions of the *407 Act*, and other legislative authorizations which enable the charging of the LPPs.

D. The Establishment of Highway 407

11. Highway 407 is the world's first all-electronic, open access toll highway. It traverses the Greater Toronto Area (the "GTA"). It spans 108 kilometres and consists of three segments: the 69-kilometre Highway 407 Central; the 24-kilometre Highway 407 West Extension; and the 15-kilometre Highway 407 East Partial Extension.
12. Highway 407 was incorporated into the planning of major transportation and land use decisions for the GTA starting in the 1950s. Over the next three decades or so, the Province engaged in the lengthy planning process, assembled the necessary contiguous land parcels, and obtained environmental permits and all other requisite municipal and provincial approvals.
13. Finally, in 1993, the Province was ready to establish Highway 407, in order to alleviate the congestion on Highway 401 and the Queen Elizabeth Way, which together had served as the principal commercial and commuter traffic arteries traversing the densely populated and industrialized corridor stretching from Windsor, Ontario in the southwest to the eastern extremities of the GTA, as well as alleviating congestion on municipal roads within the Highway 407 corridor. The Province intended Highway 407 to serve as an alternative transportation corridor for both current users of the existing highway and municipal roadway network, and for future users in the growth areas of the GTA.

14. The Province decided to develop Highway 407 as a “user pay” or toll route. A new Crown agency, OTCC, was created to complete the highway quickly by working in partnership with the private sector. The development unfolded as follows:
- Construction of Phase I, from Highway 410 to Highway 404, was completed in four years. This first 36-kilometre stretch, from Highway 410 in Brampton to Highway 404 in Markham, opened for traffic on June 7, 1997 and commenced tolling as the world’s first all electronic, open-access toll highway in October 1997.
 - A 13-kilometre westerly extension, from Highway 410 to Highway 401, opened in December 1997.
 - A further seven-kilometre stretch, from Highway 404 to McCowan Road, opened in February 1998, bringing the length of the Highway to 56 kilometres.
 - The final central extension, from Highway 401 to Highway 403, opened on September 4, 1998, bringing the Highway to a total of 67 kilometres.
 - The remaining two-kilometre segment of the central section, from MacCallum Road to Markham Road, opened June 24, 1999.
 - On June 17, 2001, a six-kilometre extension opened to the West, from Highway 403 to Neyagawa Boulevard.
 - On June 29, 2001, a five-kilometre extension opened to the west from Neyagawa Boulevard to Bronte Road.
 - On July 18, 2001, an eight-kilometre extension opened to the west from Bronte Road to Dundas Street.
 - On July 30, 2001, a six-kilometre extension opened from Dundas Street to the Q.E.W., thus completing the 407 ETR West Extension.
 - On August 30, 2001, the 15-kilometre East Partial Extension opened from Markham Road in Markham to Highway 7 just east of Brock Road in Pickering.

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15. While Highway 407 was being developed, the Province created the business and legislative structures that currently control the highway's operation.
 16. On February 20, 1998, the Province announced its decision to sell OTCC and thereby privatize Highway 407. The Province subsequently enacted the *407 Act* to authorize and facilitate the privatization. Under the provisions of the *407 Act*, OTCC and the Province entered into the Concession Agreement which, in combination with the *407 Act*, authorizes the Concessionaire to establish, collect and enforce payment of tolls.
 17. 407 Inc. participated in the competitive bid process established by the Province for the sale of Highway 407 rights. Following 407 Inc.'s selection as the successful bidder, on April 12, 1999, the Province, 407 Inc., Grupo Ferrovial S.A. ("Grupo Ferrovial"), SNC-Lavalin and CINTRA entered into a share purchase agreement pursuant to which 407 Inc. acquired all of the issued and outstanding shares of the Concessionaire for a purchase price of \$3.113 billion.

E. The Operation of Highway 407

18. Highway 407 is a highway within the meaning of the *Highway Traffic Act* and is designated as a Class A Highway in regulations made under that Act, and treated as a controlled-accessed highway as described in the schedules under that Act.
19. There are three primary instruments that together govern the operation of Highway 407: (1) the *407 Act*; (2) the Concession Agreement; and (3) the Tolling, Congestion Relief and Expansion Agreement (the "Tolling Agreement").
20. The *407 Act* received Royal assent on December 18, 1998. It was enacted to engage the private sector in improving transportation, infrastructure, reducing traffic

congestion, creating jobs and stimulating economic activity through the sale by the Province of rights related to Highway 407.

21. The *407 Act* conferred upon the Minister of Privatization the power, on behalf of the Crown, to transfer, directly or indirectly, all or any part of the Highway 407 lands, except title in fee simple, and other assets comprising or relating to Highway 407. Further, s. 5 of the Act empowered the Minister, among other things, to establish terms and conditions relating to the management of Highway 407. In addition, s. 6 of the Act conferred upon the Minister the power to enter into any agreement that he or she considers necessary or expedient for carrying out the purposes of the Act.
22. Section s. 5(2) of the *407 Act* deemed the OTCC to be an agent of the Crown in right of Ontario, at all times until its shares were transferred to the Concessionaire.
23. Under s. 12(5) of the *407 Act*, the Concessionaire must provide access to Highway 407 to the public.
24. Sections 13 and 14 of the *407 Act* work together to authorize the Concessionaire to charge money for use of the highway. Section 13 requires that "a toll and any related fee and interest payable under this Act for the operation of a vehicle on Highway 407 shall be paid to the Concessionaire. Section 14(1) authorizes the Concessionaire, among other things, to (a) establish, collect and enforce payment of tolls with respect to the operation of any vehicle or class of vehicles on Highway 407; (b) establish, collect and enforce administration fees based on such criteria as it considers appropriate, (c) establish interest rates to be charged on unpaid tolls and fees, and collect interest charged at those rates".

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25. Section 14(2) of the *407 Act*, however, limits the exercise of all powers by the Concessionaire under section 14(1). The Concessionaire can only exercise its powers in accordance with the terms of an agreement entered into with the Minister for Privatization, that is, the Concession Agreement.
 26. Section 15 of the *407 Act* mandates that a toll or fee is payable on the day an invoice for it is mailed or otherwise delivered, and permits interest on the toll or fee to accrue and become payable 35 days after the invoice to the toll or fee is mailed or otherwise delivered.
 27. Finally, the *407 Act* furnishes the Concessionaire with a powerful tool to induce prompt payment of invoices. Section 22 provides that if tolls remain unpaid for longer than 90 days after notice of non-payment is given, the Concessionaire may notify the Ontario Registrar of Motor Vehicles of non-payment and the Registrar will deny the renewal of Ontario license plates for the vehicle in question.
 28. The Concession Agreement between the Province and the Concessionaire became effective on or about April 6, 1999. It governs the Concessionaire's rights and obligations with respect to Highway 407 and regulates the relationship between the Province and the Concessionaire. The Concession Agreement generally authorizes the Concessionaire to charge and collect tolls, administration fees and interest in connection with Highway 407, including the LPPs. All such toll-based revenues are the property of the Concessionaire. The Concession Agreement is a secret document. Neither the Province nor the 407 Group will allow members of the public to read the Agreement.
 29. The Tolling Agreement also became effective as of April 6, 1999. It sets out the range and scope of the tolls, which may be charged by the Concessionaire, and

permits tolls to be raised without limit in certain circumstances. The Tolling Agreement's primary purpose is to regulate toll levels in relation to traffic flow, allowing for toll increases provided certain traffic thresholds are met. The Province provides in the Tolling Agreement for a maximum toll each calendar year (the "Toll Threshold"). If actual toll rates end up surpassing the Toll Threshold, the Concessionaire must pay penalties to the Province. The LPPs are not part of the Toll Threshold.

30. Highway 407 is a busy highway and is becoming busier. The average workday number of trips exceeds 300,000. A new one-day traffic record of 350,536 trips was recorded on October 5, 2001. In the six months ended June 30, 2001, Highway 407 users took approximately 39.6 million individual trips on the highway. In the first nine months of 2001, users took over 62.6 million individual trips on the highway. There are now over 465,000 transponders in circulation.
31. Highway 407 is a lucrative highway. Its annual revenues exceed \$200 million. Most recently, it reported third quarter 2001 revenues of \$69.6 million, up 24% from the comparable quarter of 2000. Year to date revenues have increased 23% over the same period last year, from \$139.6 million to \$171.5 million. Year to date earnings before interest, taxes, depreciation and amortization totalled \$122.2 million compared with \$95.5 million over the same period of 2000, a 28% increase.
32. The 407 Group utilizes five components for its electronic toll collection technology:
 - i) vehicle transponders;
 - ii) a vehicle classification system;
 - iii) a roadside toll collection system;
 - iv) a toll transaction processor; and
 - v) the revenue management system.

33. Some users install transponders. For these users, the electronic sensors located on each overhead gantry log their 407 entry and exit point. For those who do not lease a transponder, their trips are logged by using a licence plate recognition system. The system is located on each overhead gantry and sends up to five video images to a central processing computer when they enter and exit 407 ETR. The cost of each trip depends on four factors:
- i) the time of day 407 ETR is used;
 - ii) vehicle class;
 - iii) distance travelled; and
 - iv) whether or not the user has a transponder.

34. The toll rates effective at present are as follows:

Vehicle Class	Day Rate Weekdays, Saturdays, Sundays and Holidays 6:00 a.m. to 11:00 p.m.	Night Rate Weekdays, Saturdays, Sundays and Holidays 11:00 p.m. to 6:00 a.m.
Light (5,000 kg and under): Passenger cars, vans, limos, pickups, sport utility trucks, light duty trucks	11¢/km \$2.00 extra per trip without a transponder	6¢/km \$2.00 extra per trip without a transponder
Heavy – Single Unit (over 5,000 kg): single unit trucks, tractors, school buses, recreational vehicles	22¢/km Transponders are mandatory \$25 Heavy Vehicle Non-Transponder Toll Charge Per Trip	12¢/km Transponders are mandatory \$25 Heavy Vehicle Non-Transponder Toll Charge Per Trip
Heavy – Multiple Unit Trucks or tractors with one or more trailers	33¢/km Transponders are mandatory \$25 Heavy Vehicle Non-Transponder Toll Charge Per Trip	18¢/km Transponders are mandatory \$25 Heavy Vehicle Non-Transponder Toll Charge Per Trip
Calculation of the total trip charge will be based on the toll rate in effect at the time the vehicle enters 407 ETR.		

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35. Unlike other toll roads where payment is due at the time of passage, tolls for the use of Highway 407 are accumulated for individual accounts and invoices are then prepared and sent on a monthly basis. In effect, the 407 Group advances credit to users.
36. As noted above, the *Highway Traffic Act* applies to Highway 407 and makes it an offence to:
- evade a toll, by any means;
 - obstruct or alter a license plate;
 - sell a device to assist in the evasion of a toll; or
 - operate a vehicle over 5000 kg on Highway 407 without a transponder.

F. The Illegal LPP System and the Experience of the Plaintiff with the LPP

37. If an account for use of Highway 407 is not paid in full within 90 days of the date of invoice, the 407 Group charges a LPP of \$30.
38. LPPs are “interest” within the meaning of s. 347 of *Criminal Code*.
39. Section 347 of the *Criminal Code* makes it an offence to charge interest at a “criminal rate”. “Criminal rate” is defined as “an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement.
40. The effective annual rate of interest charged to the Class by way of LPPs vastly exceeds the “criminal rate” of 60%.

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41. The plaintiff used Highway 407 on October 8 and October 9, 2000. On October 14, 2000, he received an invoice for these trips in the amount of \$12.02, comprised of 2 toll charges at \$3.44 each, 2 "non-transponder" charges at \$1.50 each, a monthly "account fee" of \$2.00 and GST of \$0.14. He did not pay by the 35th day after the date of invoice, so regular interest started to accrue. In December 2000, he received an invoice for \$12.26, that included interest charges. In early January 2001, the plaintiff remitted \$12.26. On February 14, 2001, he received an invoice from the 407 Group charging him a LPP of \$30.00 on an outstanding balance of 12 cents, together with GST of \$2.40 on the LPP. The effective annual rate of interest charged to the plaintiff surpassed 300,000% (three-hundred-thousand per cent). This charge violated s. 347 of the *Criminal Code*.
42. All legislative and administrative action by the Province described above, in so far as such action authorizes the 407 Group to charge LPPs with an effective annual rate of interest that exceeds 60%, violates s. 347 of the *Criminal Code* and is therefore *ultra vires* and void.
43. The arrangements or agreements entered into by the 407 Group to charge LPPs to the Class were foreseen and intended by the 407 Group to result in it receiving interest at rates in excess of 60% per year, and thereby contravened s. 347(1)(a) of the *Criminal Code*.
44. In addition, the 407 Group has received by way of the LPPs payments of interest at rates in excess of 60% per year from members of the Class. The receipt of such payments contravenes s. 347(1)(b) of the *Criminal Code*. All such payments are therefore illegal and void.

45. The total amount of LPPs collected by the 407 Group is not known by the plaintiff, but is known by the 407 Group. The 407 Group has been unjustly enriched by this amount at the expense of the Class. The Class is therefore entitled to an accounting and restitution of all LPPs its members have paid to the 407 Group.
46. The plaintiff proposes that this action be tried in Toronto.

Date: December 18, 2001

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v.

407 INTERNATIONAL INC. ET AL.

Defendants

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Court File No.: ~~2015-01~~

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings Commenced in Toronto

STATEMENT OF CLAIM

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