

CONCESSION COMPANY LIMITED. et al v. REGISTRAR OF MOTOR VEHICLES

Court File No. 412/04

DIVISIONAL COURT

BEFORE THE HONOURABLE MR JUSTICE CARNDATH, MR JUSTICE LAX, & MR JUSTICE
MONDAY 17th OCTOBER 2006
DISPOSITION - THIS APPEAL

APPLICATION IS RESERVED ON TUESDAY OCTOBER 16/2006

C. J. Lax
Judgment issued this 7th day of November 2006
C. J. Lax

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

PROCEEDING COMMENCED AT TORONTO

JOINT APPLICATION BRIEF
VOLUME I

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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, LAX AND SWINTON JJ.

BETWEEN:)	
)	
407 ETR CONCESSION COMPANY)	<i>J. Thomas Curry, Nina Bombier and</i>
LIMITED)	<i>Rebecca Jones, for the Applicant</i>
)	
)	
Applicant)	
)	
- and -)	
)	
)	<i>M. Michele Smith, Troy Harrison and Taia</i>
REGISTRAR OF MOTOR VEHICLES)	<i>Wong, for the Respondent</i>
)	
)	
Respondent)	
)	
)	
)	HEARD at Toronto: October 17 and 18,
)	2005

REASONS FOR JUDGMENT

THE COURT:

[1] The Applicant, 407 ETR Concession Company Limited ("407 ETR"), applies for judicial review seeking an order in the nature of *mandamus* compelling the Registrar of Motor Vehicles ("the Registrar") to refuse to validate or issue vehicle permits for those persons who have failed to pay tolls and administrative fees owed to 407 ETR (as listed in Revised Schedule "A" to the Notice of Application). The application requires an understanding of the *Highway 407 Act*, S.O. 1998, c. 28 ("the *Act*") and Regulation 138/00 passed under the *Act* ("the *Regulation*").

[2] For *mandamus* to issue, 407 ETR must overcome the following submissions of the Registrar:

- (a) There are pre-conditions in the *Act* of which the Registrar must be satisfied before denying permit validation or issue.
- (b) There are pre-conditions in the Regulation of which the Registrar must be satisfied before denying permit validation or issue.
- (c) The Ministry of Transportation's withdrawal of its approval of the independent auditor appointed under the Regulation relieves the Registrar from his statutory duty.
- (d) The refusal of the Registrar to act requires the court to apply a "standard of review" analysis to his decision.
- (e) The court should exercise its residual discretion and refuse *mandamus*.

Background Facts

[3] 407 ETR is the private operator of the Highway 407 toll road concession, pursuant to the authority of the *Act* and a 99 year Concession and Ground Lease Agreement with the province of Ontario. Highway 407 is the world's first all-electronic, open-access toll road. Persons who use the highway are identified either by the use of cameras that identify licence plates or through the use of scanners to identify the use of a toll device called a "transponder".

[4] When the highway was first opened in 1997, it was operated by a Crown corporation. In May 1999, the province privatized Highway 407, and 407 ETR became the operator of the highway. The *Act* defines 407 ETR as the "owner" with the statutory power to establish, collect and enforce the payment of tolls, fees and interest in respect of Highway 407 (s. 14).

[5] When a vehicle is driven on Highway 407, an obligation to pay a toll and any related fee and interest payable under the *Act* is imposed upon the person in whose name the plate portion of the vehicle is issued or, if there is a transponder, upon the person to whom the transponder is registered (s. 13(1)). Photographic or electronic evidence of the use of Highway 407 is proof, in the absence of evidence to the contrary, of the obligation to pay a toll (s. 13(2)). Section 13(3) of the *Act* deals with enforcement, stating:

Sections 16 to 25 apply to the enforcement and collection of tolls and related fees and interest payable under this Act by a person described in subsection (1) but do not apply to the enforcement and collection of such tolls, fees and interest if,

- (a) the person is responsible for the payment of such tolls, fees and interest under clause (1)(b); and

- (b) the toll device that was affixed to the vehicle in question was obtained without providing information identifying the plate portion of a vehicle permit.

[6] A toll or fee is due and payable on the day that an invoice for these amounts is mailed, delivered or otherwise sent to the person responsible for payment, and interest begins to accrue and is payable 35 days after the invoice is mailed (s.15). Pursuant to s. 16, the owner may send a notice of failure to pay a toll to the invoiced user if payment is not made within 35 days after the day it is payable. Subsection 16(2) sets out the content of the notice, which must include information that the person may dispute the matter on the grounds set out in s. 17(1) of the Act, and that if the amount owing is not paid within 90 days of the receipt of the notice, the Registrar may refuse to validate the person's vehicle permit or refuse to issue a vehicle permit to the person.

[7] A dispute is determined in the first instance by 407 ETR. If the dispute is unsuccessful, the owner must give notice to the person of the right to appeal to a dispute arbitrator on the grounds set out in s. 17(1) (see s. 17(6)). Sections 18 through 19 deal with appeals.

[8] If a toll, related fees and interest are not paid within 90 days of the day a person receives a Notice of Failure to Pay under s. 16, 407 ETR may give notice to the Registrar of that fact and must also inform the person who received the Notice of Failure to Pay of the fact that notice has been provided to the Registrar under s. 22 of the Act (ss. 22(1) and (3)). Subsections 22(4) through (7) deal with the Registrar and read:

22(4) If the Registrar of Motor Vehicles receives notice under subsection (1), he or she shall, at the next opportunity, refuse to validate the vehicle permit issued to the person who received the notice of failure to pay under section 16 and refuse to issue a vehicle permit to that person.

(5) The Registrar of Motor Vehicles may act under subsection (4) even though the person who received the notice of failure to pay under section 16 has disputed his or her obligation to pay under section 17 or has appealed a decision of the owner under section 19.

(6) If notice has been given to the Registrar of Motor Vehicles under subsection (1) and the toll and related fees and interest are subsequently paid, the owner shall immediately notify the Registrar of the payment.

(7) If the Registrar of Motor Vehicles is notified by the owner that the toll, fees and interest have been paid or is notified by the dispute arbitrator that the person is not responsible for paying the toll, fees and interest, the Registrar shall,

- (a) validate any vehicle permit that he or she refused to validate under subsection (4);
- (b) issue a vehicle permit to a person if it was refused under subsection (4).

[9] After privatization in May, 1999, the Registrar acted on s. 22 notices and refused to issue or validate vehicle permits to those who owed a debt to 407 ETR until the debt was paid. However, with the increasing popularity of the highway, 407 ETR was unable to deal effectively with customer service inquiries; as well, the computer system, sold as part of the privatization, lacked the capacity to generate information required to support customer service issues. Moreover, the billing and enforcement systems were generating erroneous plate denial requests. Some initiatives were implemented to resolve these issues, but as licence plate denial was in effect, this attracted further customer complaints, which could not be resolved due to inadequate staffing and customer service infrastructure.

[10] On February 24, 2000, 407 ETR and the Ministry of Transportation ("the Ministry") entered into a Temporary Suspension Agreement, in which they agreed to suspend temporarily the operation of licence plate denial while the customer service issues were being addressed, without prejudice to the rights of either side under the *Act*. Pursuant to the agreement, 407 ETR undertook not to submit any new requests for plate denial to the Registrar until certain customer service and dispute resolution initiatives were implemented. In addition, 407 ETR withdrew all s. 22 notices already forwarded to the Registrar.

[11] On the same day, the Ministry filed Regulation 138/00 ("the Regulation") to implement certain changes to the licence plate denial process. Part of the regulation dealt with the sending of notices (ss. 1-5). Under the heading "Additional Procedures for the Owner in Enforcing Payment of Tolls", new obligations were imposed on 407 ETR with respect to confirming customer addresses (s. 6) and appeal procedures (s. 7). In addition, s. 8 imposed an obligation on 407 ETR to send a certificate signed by a senior company official, at the time of sending a s. 22 notice of failure to pay to the Registrar, which includes the following assurances:

- (a) the tolls and related fees and interest that are the subject of the notice have not been paid or been deemed, by subsection 17(7) of the *Act*, to have been paid;
- (b) the notice of failure to pay required by section 16 of the *Act* in respect of such tolls, fees and interest was sent in accordance with the *Act*, this Regulation and the terms and conditions of any agreement between the owner and the Crown in right of Ontario; and
- (c) the notice being sent under subsection 22(1) of the *Act* with the certificate is being sent in accordance with this *Act*, this Regulation and the terms and conditions of any agreement between the owner and the Crown in right of Ontario.

[12] In addition, the owner is to advise the Registrar if a person could not be considered to have received a failure to pay notice under s. 16 of the *Act* (s. 9). The owner is also required to withdraw any s. 22 notices sent to the Registrar if there was an error in the Notice of Failure to Pay or if the tolls, fees and interest have been paid or deemed to have been paid.

[13] Finally, s. 10 of the Regulation provides for periodic audits by an independent auditor. It reads as follows:

10(1) The owner shall appoint a chartered accountant or certified general accountant who is approved by the Ministry of Transportation as an independent auditor to conduct audits of the owner and to submit the reports of the audits to the owner and to the Registrar of Motor Vehicles.

(2) The independent auditor shall review the owner's compliance, with respect to the enforcement of tolls, fees and interest, with the *Act*, this Regulation, the terms and conditions of any agreement between the owner and the Crown in right of Ontario and the terms and conditions of any agreement between the owner, the dispute arbitrator and the Crown in right of Ontario.

(3) The independent auditor shall conduct random audits of the owner, at least once every three months, and shall also conduct an audit of the owner at any time if the Registrar of Motor Vehicles, believing on reasonable grounds that there may have been a lack of compliance as described in subsection (2), requests an additional audit.

(4) Upon request, the owner shall provide the independent auditor with a certificate, and the supporting documentation, prepared under section 8.

(5) The fees and expenses of the independent auditor shall be paid by the owner.

[14] In accordance with the Temporary Suspension Agreement, 407 ETR implemented customer service and dispute resolution initiatives. In the period after the agreement was made, 407 ETR and the Ministry held meetings and corresponded on many occasions with respect to the reinstatement of licence plate denial.

[15] In 2001, the Ministry approved the appointment of Arthur Andersen LLP as the independent auditor on two conditions: first, the accountants performing the audits would not reside on the premises of 407 ETR, and second, the particular accountants performing the audit would not be engaged in any other audit capacity with 407 ETR. These conditions were imposed because Arthur Andersen was the co-auditor of the financial statements of 407 ETR. The

Ministry's approval was continued on the same conditions with respect to Deloitte & Touche LLP after it acquired Arthur Andersen LLP in June, 2002. There is no evidence that these conditions have not been fulfilled.

[16] On November 1, 2002, 407 ETR began issuing s. 16 notices of a failure to pay to customers who had not paid for the use of Highway 407. Then on August 7, 2003, 407 ETR sent ten s. 22 Notices and the certificate required by the Regulation to the Registrar and asked that the Registrar act in accordance with s. 22(4) and deny the plates. Each of the ten was among the most flagrant abusers of the open access system. Although not required to do so, 407 ETR requested that the independent auditor examine each of the ten accounts in order to ensure the required compliance with the *Act*, the Regulation and the applicable agreements. The Registrar was informed that the auditor had done this and had concluded that 407 ETR was in compliance with its obligations. 407 ETR also undertook other quality control procedures when it first began to submit plate denial notices, such as calling each customer to ensure that he or she had actually been on Highway 407.

[17] While correspondence was received from the Deputy Minister stating that the province had not agreed to re-instate plate denial, no reply was received from the Registrar. 407 ETR continued to send s. 22 notices to the Registrar, along with audit reports. Those reports were based on an examination of each of the s. 22 notices by the auditor. In a letter to the Registrar dated November 12, 2003, Ken Walker of 407 ETR indicated that the s. 22 notices targeted the most flagrant abusers of Highway 407.

[18] On December 15, 2003, the Registrar, Frank D'Onofrio, wrote to 407 ETR, stating that it was a pre-condition to a notice being sent under s. 22(1) of the *Act* that the amounts in it are outstanding as of the date the notice is sent and that 407 ETR has procedurally complied with the *Act* and the Regulation. He went on to say:

In order to independently determine whether 407 ETR is able to meet all of the requirements of the legislation and the regulations pertaining to the plate denial process, I will shortly be initiating a review of the 407 ETR's systems and processes including the information related to the notices sent to the Registrar.

Until I am satisfied that 407 ETR has complied with all of the requirements of the *Highway 407 Act, 1998* and Ontario Regulation 138/00, I will not be in a position to satisfy myself that I have jurisdiction to carry out the requested refusal to validate the vehicle permits of those persons pursuant [sic] to a notice sent to me under ss. 22(1) of the *Highway 407 Act, 1998*.

[19] 407 ETR made a direct demand that the Registrar act on January 12, 2004. The Registrar refused to act in a letter dated January 19, 2004, where he stated that

... prior to acting under s. 22(4) of the *Highway 407 Act* I believe under the circumstances that I am obliged to make reasonable inquiries to satisfy myself that the notice and requirements precedent to my suspending drivers' licences, have been complied with.

Accordingly, I am not yet in a position to refuse to validate vehicle permits pursuant to the *Highway 407 Act*.

[20] On the same date, the Ministry, acting through Bruce McCuaig, Assistant Deputy Minister, withdrew its approval of Deloitte & Touche as the independent auditor, stating,

We understand that Deloitte & Touche are 407 ETR's external auditors. Clearly, Deloitte & Touche is not independent as required under the Regulation.

[21] 407 ETR objected and the dispute over the Ministry's decision to withdraw its approval is to be the subject of arbitration between the parties under the Ground Lease Agreement. 407 ETR has continued to use Deloitte & Touche to perform audits, based on a sampling of accounts since January, 2004. The audit of 407 ETR's enforcement systems and processes is presently a process audit that involves sampling a number of items so as to provide a confidence level for the auditor that the error rate in the population does not exceed a certain error rate. In his sampling, the auditor compares the Notice of Failure to Pay and the Section 22 notice to see that it reflects the same account as that on the regular invoice. While the auditor has been using a 90% confidence level and a 3% error rate, the Registrar and the Ministry, in discussions with 407 ETR, have sought a higher confidence level and a lower error rate.

[22] In a chart of audits prepared by the auditor between August 2003 and July 2004, each of the audits reflected in the chart actually achieved confidence levels at or higher than 95% and error rates at or lower than 1.5%. In each audit, the auditor has stated,

In our opinion 407 ETR Concession Company Limited is in compliance, in all material respects, with the criteria established by the above Acts, Regulation, agreements and interpretation with regard to the issuance of Section 22 Notices as at [the relevant date of the audit].

[23] Although the Registrar has the authority pursuant to s. 10(3) of the Regulation to request an additional independent audit on reasonable grounds, he has never exercised this power.

The Law of *Mandamus*

[24] 407 ETR seeks *mandamus*. There are four jurisdictional requirements for *mandamus*, as described by Laidlaw J.A. in *Karavos v. Toronto (City)*, [1948] 3 D.L.R. 294 (Ont. C.A.) at p. 3 (Quicklaw):

(1) The applicant must demonstrate “a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced”.

(2) The duty must be due and incumbent on the official at the time the relief is sought.

(3) The duty must be purely ministerial in nature – in other words, “plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers.”

(4) There must be a demand and a refusal to perform the act which the applicant seeks to have ordered.

[25] In this case, the court must determine whether 407 ETR has met the requirements for *mandamus* and whether the court should exercise its discretion to grant the remedy sought.

(a) The alleged pre-conditions in the *Act*

[26] The Registrar submits that the *Act*, and in particular, s. 13, imposes an obligation on 407 ETR to ensure a match between an invoice sent to a user and the licence plate that actually travelled on the highway, so that users are not incorrectly denied a licence plate renewal.

[27] As noted above, the purpose of the *Act* was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner an effective method of toll collection. The Legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances, and the cost of other means of debt collection. Contrary to the submissions of the Registrar, the *Act* places the onus on the user to dispute the obligation to pay, rather than on the owner to prove an entitlement to pay before delivering an invoice or a s. 16 notice.

[28] Section 13 of the *Act* imposes a mandatory obligation to pay on the highway user, who is identified either by licence plate or by transponder. Under s. 15, a toll or fee is payable on the day an invoice is mailed, delivered or sent to the person described in s. 13. The *Act* does not require the owner to satisfy the Registrar the user is accurately identified. Neither does the *Act* give the Registrar any function to perform in the operation of these sections.

[29] Sections 16 to 25 of the *Act* describe the process by which tolls and other charges are collected and enforced. They place the onus for disputing payment and proving that the debt is not owed on the recipient of the s. 16 Notice of Failure to Pay. The *Act* is explicit that a recipient of the notice is expected to pay the charge (or have his or her licence plate renewal denied) even if a dispute is pending. If the dispute is successful, the *Act* requires 407 ETR to reimburse the recipient of the notice with interest. There is a right to appeal the determination of a dispute to an independent dispute arbitrator appointed by the Lieutenant-Governor-in-Council (s. 18).

These sections of the *Act* provide a comprehensive code of dispute resolution and do not involve the Registrar.

[30] The *Act* provides that a person may dispute the obligation to pay if the person who has received notice under s. 16 is not the person responsible for the payment of the toll under s. 13. By including this as a statutory ground of dispute, the Legislature recognized there would be instances where plates are misread and notices under s. 16 are improperly delivered. The Legislature has left this to be determined in the dispute resolution process described in ss. 17 to 21. The Registrar has no role in this process.

[31] Further, the dispute resolution process provides safeguards and remedies that satisfy the Registrar's concerns. These include the payment without prejudice provision in s. 17(3); the lengthy notice period of ninety days before a s. 22 notice may be sent to the Registrar (ss. 22(1) and (3)); the requirement that the owner respond within thirty days to a notice of dispute or forfeit its entitlement to be paid (s. 17(7)); and the owner's obligation under s. 22(6) to immediately notify the Registrar of payment, if a s. 22 notice has been previously sent.

[32] Under s. 22(5), the Registrar has the power to refuse to issue or renew a vehicle permit notwithstanding a dispute or appeal. The Legislature could have limited or suspended the Registrar's power until the determination of a dispute or appeal. By removing the Registrar from this process and allowing him to act despite a dispute or appeal, the Legislature recognized, as with erroneous invoices and s. 16 notices, that there could also be erroneous plate denials. In this event, the Registrar's only role upon being notified of an error or of payment is to rectify this by validating or issuing a vehicle permit that he had refused.

[33] The *Act* imposes statutory requirements on 407 ETR and on the Registrar as part of the licence plate denial scheme, but the Registrar has no authority to act as a monitor of the enforcement process. The *Act* prescribes a limited and strictly administrative role for the Registrar. Only s. 22, and specifically ss. 22(4) and (5), prescribe the statutory duty and power of the Registrar.

[34] Subsection 22(4) of the *Act* uses mandatory language that does not afford the Registrar any discretion. Once the Registrar receives a notice under subsection (1), he or she "shall, at the next opportunity" refuse to validate a vehicle permit or to issue a vehicle permit to the person named in the notice.

[35] The golden rule of literal construction provides that a statute be interpreted in a manner consistent with the plain meaning of its terms (*R. v. McIntosh*, [1995] 1 S.C.R. 686 at para. 18). Moreover, s. 29(2) of the *Interpretation Act*, R.S.O. 1990, c. I. 11 provides:

In the English version of an Act, the word "shall" shall be construed as imperative and the word "may" as permissive.

[36] We find s. 22(4) of the *Act* obliges the Registrar to act when he receives a notice under s. 22(1). However, s. 65(b) of the *Act* permits the Lieutenant-Governor-in-Council to pass regulations "respecting additional procedures to be used by the owner for enforcing payment of

tolls on Highway 407". Regulation 138/00 has added further procedures with respect to enforcement, to which we now turn.

(b) The alleged pre-conditions in the Regulation

[37] The Regulation requires 407 ETR:

- (1) To provide the Registrar with a certificate of compliance with the *Act* prepared by a senior corporate officer (s. 8);
- (2) To notify the Registrar at any time of an error in the s. 16 notice or of payment (s. 9); and,
- (3) To appoint an independent auditor satisfactory to the Ministry of Transportation (s. 10).

[38] The Registrar submits the Regulation was intended to reduce erroneous plate denials by giving him the right to examine the owner's compliance with the *Act* and Regulation. He submits that as an "end user" of the compliance certificate required by s. 8 and the audit reports required by s. 10(3), the Lieutenant-Governor-in-Council intended the Registrar to have an oversight role, in order to safeguard the public from erroneous plate denial. The Registrar submits he has a discretion to "go behind" the compliance certificate and require a "proper" audit report that virtually guarantees the recipient of the s. 16 notice is the actual user of the highway.

[39] We accept that the Regulation intends to provide greater scrutiny of the collection and enforcement process under the *Act*, with a view to minimizing erroneous plate denial. We reject the submission that the Regulation gives the Registrar the discretions he purports to exercise.

[40] Section 9 of the Regulation requires 407 ETR to advise the Registrar at any time if a person ought not to have received a notice under s. 16 of the *Act* due to error, payment, or 407 ETR's failure to comply with the *Act* and Regulation. At the same time, the owner must withdraw the s. 22 notice and request that the Registrar "not take the actions he or she would otherwise be required to take under subsection 22(4)". By this section, the Lieutenant-Governor-in-Council has placed the onus on 407 ETR to withdraw an improper s. 22 notice. This is consistent with the general scheme of plate denial and consistent with the intention of the *Act* that the mere delivery of the s. 22 notice triggers the Registrar's duty to act. The Registrar must act unless the s. 22 notice is withdrawn. This is consistent with the mandatory language of "shall" in s. 22(4).

[41] Section 8 of the Regulation requires 407 ETR to deliver to the Registrar with the s. 22 notice, a certificate from a senior corporate officer stating that the owner has complied with its duties under the *Act*. Thus, the Regulation augments the statutory pre-condition of notice under s. 22(1). Section 8 prescribes the context of the certificate of compliance, which is to be "in a form satisfactory to the Registrar". The discretion is limited to the "form" of the certificate; the use of such language in this context reinforces the lack of any broader discretion given to the

Registrar by this section. The Registrar takes no issue with the form of certificates that 407 ETR has delivered since August 7, 2003, but submits that, as the recipient of the certificate, he is entitled to have some degree of confidence that the certificate is accurate. The Regulation does not give him this authority. Instead, it contemplates in s. 10 that an independent auditor will monitor accuracy through regular and random audits, performed at least quarterly.

[42] The auditor's function under s. 10(2) is to review 407 ETR's compliance with "the enforcement of tolls, fees and interests". It follows that no audit can be conducted until the company has actually sent invoices, s. 16 notices and s. 22 notices. Clearly, the audits are to be conducted within an operational licence plate denial scheme. The content of the audit report and methodology of the auditor cannot therefore be a pre-condition to the Registrar's duty under s. 22(4) as he contends. The Regulation explicitly requires the independent auditor, not the Registrar, to perform this role.

[43] The Regulation does not give the Registrar authority to impose his standards on an independent auditor. This would defeat the intent of an independent audit. If it were intended that audit standards were to be left to the subjective discretion of individual Registrars, different language would have been used. Further, unlike subsection 8(1) where the Registrar is given limited discretion to be satisfied of the form of the certificate of compliance, s. 10 has no similar language.

[44] The Registrar's duty to act is distinct from the obligation imposed by s. 10(3) of the Regulation with respect to quarterly reports from an independent auditor. The Registrar is given the authority to request at any time an additional audit if, on reasonable grounds, he believes 407 ETR is not in compliance with s. 10(2). He has never exercised this power.

(c) The Ministry of Transportation's withdrawal of its approval of the independent auditor

[45] The Registrar has a duty to refuse to issue and renew vehicle permits upon receipt of s. 22(1) notices and s. 8 certificates of compliance from 407 ETR. Did this change after January 19, 2004, when the Ministry of Transportation withdrew approval of the independent auditor?

[46] The withdrawal of approval is the subject of a dispute that will be determined by arbitration. The Registrar argues, however, that the appointment of an independent auditor is a condition precedent to the exercise of his statutory duty. Since there no longer is one, the argument runs, he is not obliged to deny plate renewal or issue. This is not an answer to the notices delivered before January 19, 2004. Notices delivered after January 19, 2004, remain valid because there is no statutory language connecting the receipt of a quarterly audit report with the Registrar's statutory duty described in s. 22(4). If 407 ETR fails to comply with the independent audit requirements, it is the Province, as opposed to the Registrar, that may initiate a dispute under the Concession and Ground Lease Agreement. This is precisely what happened.

[47] Article 25 of the Concession and Ground Lease Agreement deals with dispute resolution. Article 25.12(a) provides:

25.12 Continuing Performance

(a) At all times, notwithstanding the existence of any dispute, the Grantor and the Concessionaire shall continue to perform their respective obligations in accordance with the provisions of this Agreement without prejudice to the rights to contest, dispute and challenge the relevant matter in accordance with the provisions of this Agreement. For example, in the event of a dispute with respect to the reasonableness of any Approval by the Grantor, the Concessionaire shall comply with such decision but shall have the right to submit the question of reasonableness to the Arbitrator pursuant to this Article 25.

[48] Article 25.12 imposes a requirement of continuing performance on the parties to the Agreement. Consistent with this provision, the independent auditor has continued to deliver quarterly reports. In our view, this is contemplated by the Regulation and by the Agreement. Otherwise, there would be no audit reports pending the determination of the dispute, although the Regulation requires them.

[49] Finally, as a matter of statutory interpretation, regulations are a form of subordinate legislation. The provisions of the Regulation dealing with the independent audit do not derogate from the mandatory intention expressed by the Legislature in s. 22(4) of the *Act*. To the extent of any conflict, the statutory provision prevails. The Registrar's interpretation of the statutory scheme and of his powers relies primarily on the alleged intention of the Legislature and the Regulation. Since this intention cannot be reconciled with the explicit mandatory language of s. 22(4), his interpretation cannot prevail. (See, Sullivan, R. *Driedger on the Construction of Statutes* (3d ed.) (Butterworths: Toronto, 1994) at pp. 185-6, 246.)

[50] In summary, we reject the Registrar's argument that the Regulation grants him a "significant role" by making him the recipient of a compliance certificate and the audit report. There is no language granting additional powers to the Registrar other than the right to be satisfied with the form of the compliance certificate and to request an additional audit if he reasonably believes there has been a lack of compliance.

[51] The Regulation imposes additional requirements on 407 ETR that are designed to provide additional safeguards to the public, but they do not alter the statutory scheme, nor cloak the Registrar with the powers he claims to have under the Regulation. The *Act* and Regulation are explicit in defining only two requirements for triggering the Registrar's duty to act: delivery of a notice under s. 22(1) of the *Act* and delivery of a certificate from a senior corporate officer under s. 8 of the Regulation.

[52] For the foregoing reasons, we find the jurisdictional requirements for *mandamus* as set out in paragraph 24 above, have been met.

(d) Does the refusal of the Registrar to act require a “standard of review” analysis?

[53] The Registrar submits that his determination of whether alleged conditions precedent to the exercise of his statutory duty have been met, is a finding of fact to which deference must be granted. We reject this submission. As far back as 1968, the Inquiry into Civil Rights conducted by former Chief Justice McRuer stated the law as follows:

Where a statute provides that a tribunal has power to make a decision, if facts A, B and C exist, a court, on judicial review of a purported exercise of power by the tribunal, may determine whether the facts existed or not. If the court finds that the facts existed, the decision of the tribunal will be upheld as authorized. If the court finds that the facts did not exist, the decision will be quashed. The power of the tribunal to decide never arose and its purported exercise was unauthorized.

Royal Commission: Inquiry into Civil Rights (Commissioner: Honourable James Chalmers McRuer, L.L.D.) Vol. 1 (1968) at p. 250

[54] The question of whether pre-conditions exist before a public official must carry out an action directed by a statute is not governed by “findings of fact” made by that official. A public body’s discretion does not extend to defining the limits of its own power. It is the court’s function to ensure the public body does not make decisions based on a misapprehension of jurisdiction.

[55] Thus, where the Ontario Energy Board issued a gas distribution ruling, two major gas distributors appealed, alleging lack of jurisdiction in the Board. The Ontario Court of Appeal agreed with the Divisional Court that the standard of review was correctness. The Board’s view of its jurisdiction to issue the disputed ruling was accorded no deference and the standard of correctness was applied.

Enbridge Gas Distribution Inc. v. Ontario Energy Board, [2005] O.J. No. 33 (C.A.)

[56] The law does not permit the Registrar to ascribe to himself certain discretionary powers and then to conduct an analysis of the pragmatic and functional approach to shield his action from judicial scrutiny. To describe his actions as “findings of fact” adds nothing. The pragmatic and functional analysis is never engaged.

Should the court exercise its residual discretion and refuse *mandamus*?

[57] The Registrar is correct in submitting the court has a residual discretion to refuse *mandamus*.

Judicial Review Procedure Act, R.S.O. 1990, c. J. 1, s. 2(1)

[58] In exercising that discretion, the court can decide whether, and what sort of, a remedy should be granted. But the court does not, any more than the government, have the power to suspend the operation of a public statute that is fully enforced by operation of law.

Algonquin Wildlands League v. Ontario (M.N.R.), [1998] O.J. No. 419 (Div. Ct.), varied on other points in [1998] O.J. No. 4331 (C.A.)

[59] The Registrar further submits the Court may consider:

- (a) the existence of alternative remedies;
- (b) the public interest in good government;
- (c) the balance of convenience; and,
- (d) the potential consequences of the order.

The Registrar derives these principles from a reading of *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), *aff'd*, [1994] 3 S.C.R. 1100. While the above categories may not be set out in *Apotex* exactly as submitted by the Registrar, we are content to use them for purposes of our analysis.

(a) The existence of alternative remedies

[60] The Registrar submits the owner can achieve collection of tolls by other means, *i.e.*, collection agencies or court proceedings. We reject this submission. The use of collection agencies would result in a significant percentage loss of tolls collected; we take judicial notice of the fact that collection agencies seldom, if ever, act without fee. Court proceedings would choke the court system, particularly Small Claims Court. Between November 1, 2002 and June 30, 2004, 531,350 s. 16 notices were issued. It does not take a febrile imagination to conclude court action is not a useful alternative.

(b) Public interest in good government

[61] The Registrar submits the public interest is not advanced by allowing 407 ETR to “wrongly place individuals into plate denial”. We reject the suggestion that the owner is “allowed” to wrongly place individuals into plate denial. The *Act* and Regulation recognize there will inevitably be errors underlying the issue of a certain number of toll notices. In its wisdom, the government has placed the onus of disputing the toll notices on the recipient of the notice, with the penalty of plate denial applied until the dispute process is complete. We find this process is in the public interest for two reasons: it provides an effective method of dealing with scofflaws who refuse to pay their share and also provides a dispute mechanism for those tolls imposed in error.

[62] The residual discretion to refuse *mandamus* is an answer to the Registrar’s *in terrorem* submission that, were we to accept the owner’s arguments, the Registrar would be forced into

plate denial, even where the owner had flagrantly ignored the requirements of the *Act* and regulation. Were such to happen, the residual discretion is available to the court to respond by refusing *mandamus* in the name of the public interest and good government.

(c) The balance of convenience

[63] The Registrar made no submissions on this head. Since we take the view the Registrar had no discretion to refuse plate denial, the balance of convenience does not involve the owner and the plate holders, as alleged by the Registrar. If the balance of convenience has any application, which we doubt, it would be between the Registrar and the owner. The balance of convenience clearly favours the owner.

(d) The potential consequences of the order

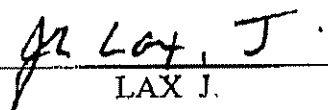
[64] The Registrar made no submissions on this head. We find the potential consequences of the order are those envisaged by the Legislature when it passed the *Act* and Regulation – that is, an effective method by which to collect the tolls from users unwilling to pay and a dispute mechanism to relieve from payment those tolls issued in error.

[65] For the foregoing reasons, we order as follows:

We order the Registrar to comply with his statutory obligation to refuse to validate or issue vehicle permits for those persons, as listed in the Revised Schedule "A" to the Notice of Application, who have failed to pay tolls and administrative fees owed to 407 ETR and with respect to whom a Section 22 Notice and Certificate under the *Act* have been delivered to the Registrar.

[66] The parties have thirty days to make brief written submissions as to costs.


CARNWATH J.


LAX J.


SWINTON J.

COURT FILE NO.: 412/04
DATE: 20051107

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, LAX & SWINTON JJ.

B E T W E E N:

407 ETR CONCESSION COMPANY LIMITED

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

JUDGMENT

BY THE COURT

Released: 20051107