IN THE MATTER OF AN ARBITRATION AGREEMENT
DATED MAY 14, 2004;

AND IN THE MATTER OF THE CONCESSION AND GROUND LEASE
AGREEMENT DATED APRIL 6, 1999;

AND IN THE MATTER OF THE TOLLING, CONGESTION RELIEF AND
EXPANSION AGREEMENT DATED APRIL 6, 1999;

AND IN THE MATTER OF THE ARBITRATION ACT 1991;
S.O. 1991, c. 17

BETWEEN:

407 ETR CONCESSION COMPANY LIMITED

Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION AND THE MINISTER OF TRANSPORTATION FOR ONTARIO

Respondents

Heard: June 21 and 22, 2004

J. Thomas Curry, Nina Bombier, Rebecca Jones counsel for the Applicant

John Keefe, Jessica Kimmel, Rebecca Burrows counsel for the Respondents

REASONS FOR DECISION

The Honourable J. Drew Hudson, Q.C., Arbitrator

There has been a tremendous amount of work done since 1950 in trying to understand what the transportation requirements of the GTA will be as it grows and develops.

In 1993 the Ontario Government attempted to interest the private sector in constructing Highway 407. This was unsuccessful because the risk/reward relationship was not attractive to the private sector.

The Ontario Transportation Capital Corporation ("OTCC") was therefore established by the Province as a Crown Agency to oversee the design, construction, operation, maintenance and management of Highway 407. OTCC's operation of Highway 407 was

pursuant to the legislative authority granted to it under the Capital Investment Plan Act, 1993 (CIPA") and its regulations.

Actual construction of Highway 407 commenced in 1994. Highway 407 opened initially under the management of the OTCC on June 7, 1997. The OTCC only began to charge tolls on October 14, 1997. At the time of opening, Highway 407 was 36 kilometres long and had 79 entry and exit points.

OTCC was continued as a corporation with share capital as 407 ETR Concession Company Limited ("407 ETR") by Articles of Continuance dated April 6, 1999.

Also on April 6, 1999, 407 ETR entered into the Concession and Ground Lease Agreement ("CGLA"), a 99 year concession agreement, with the Province. Also on April 6, 1999, 407 ETR entered into the Tolling, Congestion Relief and Expansion Agreement ("TCREA") with the Province and this was schedule 22 to the CGLA.

Both the CGLA and the TCREA were agreements between 407 ETR and the Province. Both were executed by "THE CROWN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER WITHOUT PORTFOLIO WITH RESPONSIBILITY FOR PRIVATIZATION" and "407 ETR CONCESSION COMPANY LIMITED. It should be observed that the CGLA and the TCREA were Agreements entered into between the Province and a Crown Agency of the Province.

It should also be observed that there are 24 schedules attached to the CGLA and of these only the TCREA and schedules 13, 15, 18 and 19 are called Agreements. In my opinion this is not relevant to the resolution of the present dispute.

The shares of 407 ETR were acquired by 407 International Inc, a consortium of non-public corporations, from the Province under a Share Purchase Agreement dated April 12, 1999 with a closing date of May 5, 1999.

The Province operated Highway 407 first through OTCC and then 407 ETR as a toll highway from October 14, 1997 to May 5, 1999. On May 5, 1999 the highway was 68 kilometres long and had 28 interchanges and a total of 146 entry and exit points.

Over the next 28 months Highway 407 was extended to 108 kilometres and now has 40 interchanges and a total of 193 entry and exit points.

I understand that the cost to the Province of building the 68 kilometre length was about $2 billion dollars. The Province sold the shares of 407 ETR for $3.107 billion dollars. The Province and its taxpayers made a profit of at least $1 billion dollars (50%) over a period of about 3 years from the start of construction to the closing of the sale. The cost of extending the highway from 68 kilometres to its present 108 kilometres was about $1 billion dollars which cost was borne entirely by the consortium and at absolutely no cost to the Province.

There is now a dispute between the parties as to the interpretation of the TCREA and certain provisions of the CGLA itself. At issue is whether the Applicant is required to obtain any form of approval or consent from the Province before revising toll rates or administration fees on Highway 407.

The Parties have agreed that the issues to be determined in this arbitration are:

(a) Is the only requirement to be met by 407 ETR prior to the change of any toll or administration fee the provision of Notice under Article 2.3 of the TCREA and are the tolls and administration fees set by 407 ETR after compliance with Article 2.3 of the TCREA valid and enforceable?

(b) Is 407 ETR required to seek or obtain any form of consent or approval, apart from the provisions of Notice under Article 2.3 of the TCREA, prior to the implementation of any change in tolls or administration fees charged in connection with the use of Highway 407?

(c) Did 407 ETR's toll rate increase of February 1, 2004 comply with the terms of the CGLA and the TCREA and was it therefore a valid exercise of the rights of 407 ETR to implement a toll rate change?

(d) Was 407 ETR in default of the CGLA, the TCREA, or the ACT as a result of the February 1, 2004 toll rate increase?

In order to answer these questions we must determine the intention of the parties on April 6, 1999 from the words used in the CGLA and the TCREA and any extrinsic evidence which can be properly considered.

I have watched the videotape of the May 8, 2003 Press Conference with Dalton McGuinty. I agree with counsel for the Province that the broadcast is not relevant to the intention of the parties at the time they entered into the agreements. It does not help me determine the intention of the parties on April 6, 1999.

In February 1998, the Province, by the Minister without Portfolio with Responsibility for Privatization, announced its decision to privatize Highway 407. Highway 407 Act, 1998, S.O. 1998, c. 28 ("Highway 407 Act") was given Royal Assent on December 18, 1998 which was more than 3 months before the CGLA and the TCREA were executed on April 6, 1999. The continued operation of Highway 407 as a private toll highway is governed by this Act.

In the Act """owner" means the person from time to time who is a tenant under a ground lease of the Highway 407 lands and who is an owner of assets comprising or relating to Highway 407".

Section 14 of the Act sets out the powers of the owner of Highway 407 as follows:

14.(1) Subject to subsection (2) the owner may,

(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 the owner considers appropriate, and fees to commence or appeal any dispute proceedings;

(c) establish interest rates to be charged on unpaid tolls and fees, and collect interest charged at those rates;

(d) exempt any vehicle or class of vehicles from the application of section 13;

(e) establish terms and conditions for the registration and distribution of toll devices;

(f) require security for the provision of any toll devices; and

(g) determine the methods of payment of tolls, fees and interest.
1998,c.28,s.14(1)

(2) The owner's powers set out in subsection (1) shall only be exercised in accordance with the terms and conditions set forth in an agreement to be entered into between the Minister for Privatization and the owner.

As previously noted the CGLA and TCREA were executed on April 6, 1999 which was more than three (3) months after the Act was enacted. The same language that was in s. 14(1) of the Act was repeated in s. 2.2 of the TCREA as follows:

2.2 Right to Establish Tolls and Administration Fees

(a) as of and with effect from the Effective Date, the Concessionaire shall have the right to

(i) establish, collect and enforce payment of tolls with respect to the operation of any vehicle or class of vehicles on Highway 407,

(ii) establish, collect and enforce administration fees based on such criteria as the owner considers appropriate, and fees to commence or appeal any dispute proceedings,

(iii) establish interest rates to be charged on unpaid tolls and fees, and collect interest charged at those rates,

(iv) exempt any vehicle or class of vehicles from the application of section 13 of the Highway 407 Act,

(v) establish terms and conditions for the registration and distribution of toll devices,

(vi) require security for the provision of any toll devices, and

(vii) determine the methods of payment of tolls, fees and interest

at any time while this Agreement is in force in accordance with the provisions of **this** Agreement. (emphasis added)

The Applicant submits that the agreement referred to in s. 14(2) of the Act must be the TCREA because the same words are used to describe the power or right in both the Act and the TCREA.

Furthermore in the definition section of the TCREA ""Agreement" means **this** tolling, congestion relief and expansion agreement, including, for the avoidance of doubt, all schedules referred to herein." (emphasis added)

The TCREA contains an "Entire Agreement" clause at Article 1.14 which provides:

> 1.14 Entire Agreement
>
> **This** Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements, negotiations, discussions and understandings, written or oral, between the parties hereto. There are no representations, warranties, conditions or other agreements, whether direct or collateral, or express or implied that form part of or affect **this** Agreement, or which induced any party hereto to enter into **this** Agreement or on which reliance is placed by any party hereto, except as specifically set forth in **this** Agreement. (emphasis added)

The purpose of the TCREA is described in Article 1.22 as follows:

> 1.22 Purpose of Agreement
>
> The purpose of **this** Agreement is to establish a regime which offers the Concessionaire flexibility to manage the basis on which tolls will be established, the assurance of a minimum level of tolls, administration fees and charges which will be acceptable, regardless of traffic levels and the freedom to establish higher tolls if prescribed traffic levels are achieved, while offering to the Grantor the assurance that the Concessionaire will be financially motivated to provide congestion relief to other roads and highways by achieving prescribed traffic levels, providing open access to all Highways, providing access on reasonable terms to trucks and expanding Highway 407as required. (emphasis added)

The CGLA does not contain a purpose provision and none of the other 23 schedules contains a purpose provision. This purpose provision does not support an argument for pre-approval of toll rate increases.

s. 2.3 of the TCREA is as follows:

2.3 Notice of Toll Changes

(a) If the concessionaire desires to change any toll or administration fee, it shall give notice of such change (the "Pending Toll Change") to the grantor at least four (4) weeks prior to the implementation of such change.

If the Applicant is correct that the agreement referred to in s. 14(2) of the Act must be the TCREA and that the definition of "Agreement" in the TCREA is clear and unambiguous then the concessionaire must only give four (4) weeks prior notice of the Pending Toll Change to the Province.

There is no express or implied requirement in s. 2.3 of the TCREA to obtain the consent of the Province. If such consent was required then it would have been expressly provided in the TCREA. It defies commercial reality and common sense that the Province, in drafting these agreements, would fail to provide for pre-approval of toll rate or fee increases if that was intended. The Concessionaire is only required to give four (4) weeks prior notice to the Province and make "commercially reasonable efforts to inform the Public" of the Pending Toll Change.

ARTICLE 3 of the TCREA deals with CONGESTION RELIEF. It is at once apparent that Congestion in any calendar year can only be determined **after** the end of that calendar year. Section 3.2 provides that in the event of Congestion, the Concessionaire shall pay the Province an amount equal to two (2 times the excess amount of tolls that have been collected.

In my opinion this would be grossly unfair if the Concessionaire had first obtained the consent of the Province to the increase. In my opinion no reasonable business executives would agree to such an arrangement.

The Respondents submit that the agreement referred to in s. 14(2) of the Act must be the CGLA because in the CGLA ""Agreement" means this Highway 407 concession and ground lease agreement, including for the avoidance of doubt, all schedules referred to therein" and the TCREA is schedule 22 to the CGLA.

The Respondents then refer to the definitions in the CGLA of "Work", "DDB Work", "OMM Work", "Toll System", "Highway 407", "Project" and "Change Request" and submit that the word "tolling" in the definition of OMM Work is a verb and refers to the setting of toll rates and further that a change in the toll rates is a change in the OMM Work and requires a Change Request and the consent of the Province before it can be

implemented. This is a complicated argument that is a tribute to the skill of counsel for the Respondents.

Because it is such a complicated argument it is impossible to find that the plain meaning of the contract is that the consent of the Province is required before the toll rate or fees can be increased.

Counsel for the Applicant submits that the plain meaning of the contract is that the Concessionaire must give notice of the Pending Toll Change to the Province but that there is no requirement that the Province consent to the change. Counsel for the Respondents submits that the plain meaning of the contract is that the Concessionaire must make a Change Request before changing the toll rates and the Province must consent to the change in toll rates before it is implemented.

In my opinion there is a clear conflict between the definition of "Agreement" in the CGLA and the definition of "Agreement" in the TCREA which is resolved by consideration of section 1.21 of the CGLA.

1.21 Conflict

(a) In the event of any conflict between the provisions of the documents mentioned below, the following order of precedence shall apply for interpretation purposes

(ii) the provisions of this Agreement (excluding the Schedules) shall take precedence over the schedules to this Agreement **unless otherwise expressly stated in any such Schedule.** (emphasis added)

In my opinion it is **otherwise expressly stated** in the definition of Agreement in the TCREA which I will repeat. ""Agreement" means **this** tolling, congestion relief and expansion agreement, including, for the avoidance of doubt, all schedules referred to herein." (emphasis added)

Article 5 of the TCREA and Article 25 of the CGLA are both entitled "**Dispute Resolution**". All of the provisions of Article 5 of the TCREA are included in Article 25 of the CGLA. This indicates to me that on April 6, 1999 the TCREA was considered to be a stand alone agreement because otherwise there would have been no need to repeat the procedure for resolving disputes. This is confirmed by the first sentence of Article 5 of the TCREA which commences "Unless otherwise provided herein, in the event of any dispute arising between the Grantor (i.e. the Province) and the Concessionaire under or relating in any way to **this** Agreement,....." (emphasis added)

The contract should, if possible, be interpreted according to its plain meaning. In my opinion, the plain meaning is that the Concessionaire is not required to obtain any form of approval or consent from the Province before revising toll rates or administration fees on Highway 407.

If I am wrong and there is no plain meaning then I can refer to extrinsic evidence.

Relevance of the factual matrix

Evidence of the circumstances surrounding the formation of the contract is always admissible. In Hi-Tech, the Court of Appeal of Ontario stated that:

> Indeed, because words always take their meaning from their context, evidence of the circumstances surrounding the making of the contract has been regarded as admissible in every case....

Reference: Hi-Tech Group Inc. v. Sears of Canada Inc. , 52 O.R. (3d) 97 (C.A.) at paragraphs 23-25

See also Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998) (Ont C.A.) at paragraphs 25 and 44

Reardon Smith Line Ltd. v. Hansen-Tangen, [1976] 3 All ER 574 (H.L.) at 574

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of), 1998 40 B.L.R. 1(Ont. Gen. Div.) at paragraph 410

Prenn v. Simmonds, [1971] 3 All E.R. 237 (H.L.)

Congestion in 1998 on GTA highways such as Highway 401 and 403 had been determined by the Province to be costing the economy close to $2 billion dollars a year. It was estimated that it would take about 25 years to complete construction of Highway 407 if it was to be done by the Province and not by private enterprise. Privatization addressed the problem of congestion as well as the problem of public debt and infrastructure financing because 407 ETR was responsible for the cost of expanding the highway. In addition the ability to immediately expand the highway created many jobs in Ontario.

In September 1998, the Province announced that the privatization process would be guided by several outside advisors including Merrill Lynch, RBC Dominion Securities, KMPG and Price Waterhouse.

Use of Parol Evidence

In Hi-Tech the Ontario Court of Appeal noted that a provision in an agreement is ambiguous when it is "reasonably susceptible of more than one meaning". A finding of ambiguity allows for a consideration of parol evidence (that is, evidence of subjective intent outside the four corners of the contract) and evidence of past performance in interpreting the meaning of the contract.

Reference: Hi-Tech Group, supra at paragraph 18

See also Adolph Lumber Co. v. Meadow Creek Lumber Co., (1919) 58 S.C.R. 306 at 2

Corporate Properties Ltd. v. Manufacturers Life Insurance Co., 63 D.L.R. (4th) 703 (Ont C.A.)

TransCanada Pipelines v. Northern & Central Gas Corp. (1983) 146 D.L.R. (3d) 293 (Ont. C.A.)

New Beginnings Management Corp. v. Acmetrack Ltd. (1991) 115 A.R., 25 (Q.B.)

Canadian Atlas Diesel Engines Co. Ltd. v. McLeod Engines Ltd., [1952]2 S.C.R. 122 (S.C.C.)

The Province knew from its advisors that a private sector investor would require clear toll rate setting authority and the bond rating agencies would need to be convinced that the Concessionaire could service the debt. The relationship between high toll rates and lower traffic volume was considered. The solution that emerged was the congestion payments that act as a disincentive to toll increases that reduce traffic volume.

On October 26, 1998 the Province provided a number of companies with a Request for Expressions of Interest (RFEI) regarding the sale of the Highway 407 Express Toll Route. The RFEI advised that "**It is the Province's strong preference to receive fair value for Highway 407 and complete the sale.**" "8. substantially all of the risks of highway ownership and construction are transferred to the private sector owner including, but not limited to, approvals, costs and revenues."

RFEI "s. 2.13 **Congestion Relief, Toll Rates, and Expansion Mechanisms**

It is recognized that Highway 407 provides congestion relief in the east-west corridor of the GTA and will provide further congestion relief when Highway 407 West, Highway 407 East Partial, and Highway 407 East Completion are built. **The owner will have the ability to establish tolls, administration fees, and interest charges subject to the achievement of congestion relief and/or related targets to be established in the concession agreement described in Appendix G, *contracts in place* (the "Concession Agreement"). The process is intended to be non-intrusive."** emphasis added

On December 23, 1998 the Province provided a Confidential Information Memorandum regarding the sale of the Highway 407 Express Toll Route. Appendix 4.3 to the Confidential Information Memorandum states:

"Provided that concession Co can achieve peak traffic levels above the traffic

threshold it will be permitted to set peak toll rates at any level without constraint. Essentially, market forces will determine toll rate levels. In any year when Concession Co cannot achieve peak traffic levels at or above the traffic threshold, it will be strongly incented not to charge tolls higher than the toll rate threshold by being liable to pay "Congestion Payments".

With this approach, there are no advance regulatory approvals required." (emphasis added)

The RFEI and the Confidential Information Memorandum were documents authorized by the Province and can be relied upon unless we assume the Province was intentionally attempting to mislead. There is no cogent evidence to support such an assumption and, absent such cogent evidence, this would be a preposterous assumption.

407 International was told that the Province had created, in the TCREA, a regime that gave the owner an unfettered right to set toll rates and other charges, subject to the obligation to make congestion payments, after the fact, if traffic volumes were not sufficient. No approval would be required from the Province for the concessionaire to set tolls. Various documents articulated this approach.

Jodie Parmar was employed from March 1998 to November 1999 by the Province as Vice-President of Corporate Development in the Privatization Secretariat. His responsibilities included the management of the sale by the Province of the shares of 407 ETR. He and three (3) senior executives at Merrill Lynch authored an article "The Sale of Highway 407 Express Toll Route: A Case Study" that was published in the Fall 1999 issue of The Journal of Project Finance. At the conclusion of the article the authors thanked a number of persons including John Taylor of the Privatization Secretariat of the Government of Ontario. The following statements are contained in the article:

> "Imposing strict toll rate or profit regulation on the new owners did not seem to be the answer, since this would likely result in lower bid prices by restricting the ability of the private sector to effectively manage the road."
>
> "Unlike most toll road concessions, there is no rate of return restriction, **nor is there a need for government approval of rate increases**. Two "thresholds" form the basis of the regulation." (emphasis added)
>
> "Investors were comfortable with the facility's demand profile and with the well-structured concession that gave the company significant flexibility in setting tolls and in refinancing its debt."

This article is an inherently reliable statement of the intention of the Province on April 6, 1999 because it was co-authored by a very senior employee of the Province who led and managed the process for privatization, the governing agreements and the legislation. It is clear that Jodie Parmar would know about it if there had been an intention to use a method to restrict toll rates other than the after the fact congestion payments.

Jodie Parmar was cross-examined on his affidavit. He testified in his re-examination that the idea of government approval of toll rate setting was specifically rejected as an approach in favour of the current regime (i.e. congestion payments).

Ross Flowers, the only affiant on behalf of the Province, did not challenge any of this evidence. He did not say that it was not the intention of the Province to give the Concessionaire the unfettered right to set toll rates, subject only to the congestion payment regime. He agreed that the only part of the CGLA that deals specifically with toll rate setting is the TCREA. He also acknowledged that the CGLA contains no express language dealing with toll rate setting.

In my opinion it would be inconsistent with the congestion payment regime if the Concessionaire needed the consent of the Province to increase toll rates.

Highway 407 Act was debated in the Legislature and was given Royal Assent on December 18, 1998. Hansard for Thursday, November 19, 1998 records the following statements by Mr. Cordiano, a member of the official Liberal opposition "The other major concerns I have are with regard to tolling. Obviously, you've created a monopoly situation for the eventual owners. **They get to set the toll rates at whatever level they want.** The public has no say, the consumer has no say. There isn't an independent body that would examine the increase in tolling as it pertains to the economy……." "what will tolls be like after the private sector operator is able to determine what those tolls ought to be, with no oversight from the public whatsoever **or the minister.**" "What I'm suggesting to you is that Bill 70 (Highway 407 Act) does not contemplate any kind of restrictions on tolls." (emphasis added)

The Legislative debates that ensued following presentation of Bill 70 in the House served the purpose of exposing the proposed legislation to careful scrutiny. The Bill was passed without any restriction on the ability of the concessionaire to raise tolls except for the disincentive of congestion payments if toll rates exceeded the Toll Threshold and traffic volumes fell below Traffic Thresholds.

407 International's team members included as its lead financial advisor, BMO Nesbitt Burns ("Nesbitt"). Nesbitt participated in all Bidders' Briefing Sessions and had access to all relevant documents in the Sale Bid data rooms. Nesbitt provided its underwriting commitments to 407 International for up to $2.1 billion in senior secured bonds. Every version of every prospectus filed in connection with each bond offering by 407 International summarizes the CGLA and the TCREA and consistently states that the establishment of tolls is fully within the right of the company subject to giving proper notice to the MTO and the payment of Congestion Payments to the MTO should tolls exceed the Toll Threshold and traffic fall short of the Traffic Threshold. In my opinion it is absolutely inconceivable that the Province &/or the Securities Exchange Commission would have allowed these statements to be made unless they accurately expressed the intention of the Province. In my opinion it is absolutely inconceivable that Nesbitt would

have made these statements without first obtaining the opinion of legal counsel that they were accurate.

Subsequent dealings between the parties may assist in the interpretation of the parties' intentions in the contract.

CGLA s. 1.15 provides in part "No failure on the part of any party hereto to exercise, and no delay in exercising any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right."

However the Ontario Court of Appeal has stated that "Subsequent conduct may be used to interpret a written agreement because "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date": S.M. Waddams, The Law of Contracts, 3rd ed. (1993), at para, 323. Often, as Thomson J. wrote in Bank of Montreal v. University of Saskatchewan (1953), 9 W.W.R. (N.S.) 193 at p. 199 (Sask. Q.B.): "there is no better way of determining what the parties intended than to look to what they did under it"".

Reference Montreal Trust Co. of Canada v. Birmingham Lodge Ltd. 24 O.R. (3d) 97, [1995] O.J. No. 1609 (C.A.) at p. 9

See also Canadian National Railways v. Canadian Pacific Ltd., [1979] 1 W.W.R. 358 at p. 372, 95 D.L.R. (3d) 242 (B.C.C.A.) affirmed (1979) 105 D.L.R. (3d) 170...(S.C.C.)

Arthur Andersen Inc. v. Toronto-Dominion Bank (1994), 17 O.R. (3d) 363 at p. 7

Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp., [1985] N.J. No. 80 (C.A.) (QL), aff'd [1998] 1 S.C.R. 1085

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] A.C. 583 (H.L.)

407 ETR has established and implemented 5 toll rate increases as well as other fee adjustments subsequent to the sale of the shares on May 5, 1999 and prior to December 23, 2003. 407 ETR did not seek the prior approval of the Province (MTO) and the Province never suggested prior approval was required until December 23, 2003 after there had been a change from a Progressive Conservative to a Liberal Government.

The conduct of the Province prior to the change in Government is consistent with its statements to bidders and the evidence of Jodie Parmar that 407 ETR did not require the approval of the Province to make toll rate and fee changes. Ross Flowers agreed that the

process of Change Request and approval of the Province to any toll rate and fee changes was inconsistent with the Congestion Payment regime.

In my opinion the conduct of the parties prior to the change in Government is further confirmation that it was never the intention of the parties on April 6, 1999 that 407 ETR required the approval of the Province before making toll rate and fee changes.

The principle of contra proferentem

The Respondents have referred to Earl of Lonsdale v. Attorney-General and Another for the proposition that in cases of grants or contracts with the Crown, The contra proferentem rule is generally reversed, in that grants by the Crown are usually construed most favourably for the Crown.

The Applicant has referred to Lieding v. Ontario (1991), 2 O.R. (3d) 206 (C.A.). For the Court, Finlayson J.A. quoted with approval Halsbury's (Halsbury's Laws of England, 4th ed., vol. 8 (London: Butterworths, 1975), para. 1050, p.657). The full sub-paragraph of para. 1050 of Halsbury's reads as follows:

> If the grant is for valuable consideration it must be construed strictly in favour of the grantee, for the honour of the Sovereign; and where two constructions are possible, one valid and the other void, that which is valid ought to be preferred, for the honour of the Sovereign ought to be more regarded than the Sovereign's profit. Where, however, two interpretations may be given to the grant, both of which are good, that which is more favourable to the Crown is in many cases preferred.

His Lordship then expressed his view of the law as follows:

(a) In the event of an ambiguity, grants from subject to subject are construed in favour of the grantee but grants from Crown to subject are construed in favour of the Crown.
(b) There are certain exceptions to this rule, including the exception cited by the appellant which permits construction in favour of the subject where valuable consideration has been given for the grant.

Paul Lordon, Q.C. in the text *Crown Law*, Butterworths 1991 at p. 279 expressed the exception as follows:

"in the case where a grant was made for valuable consideration, it is to be considered in a way favourable to the grantee."

$3.107 billion dollars is certainly valuable consideration and if there is an ambiguity in the CGLA and the TCREA then in my opinion it is to be resolved in favour of 407 ETR.

The commercially reasonable interpretation should be preferred in considering commercial contracts

Professor Fridman states "It is the duty of the court to avoid any interpretation that would result in a commercial absurdity ...."

> "The point here is that, since the parties obviously did not intend to contract in such a manner as to produce an absurd agreement, that interpretation must be placed upon their language as will give it most effect. If there are two possible interpretations, one of which is absurd or unjust, the other of which is rational, that latter must be taken as the correct one, on his basis of giving effect to the general contractual intentions of the parties."

Reference: G.H.L. Fridman, Law of Contract in Canada, 4th ed., at 493

See also Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888

Eli Lilly & Co. v. Novopharm Ltd.; Eli Lilly & Co. v. Apotex Inc., [1998] 2 S.C.R. 129

Scanlon v. Castlepoint Development Corporation, 11 O.R. (3d) 744 (C.A.)

Kentucky Fried Chicken, supra at paragraph 27

Indian Molybdenum Ltd. v. The King, [1951] 3 D.L.R. 497 (S.C.C.)

Canada Square Corp. v. VS Services Ltd. (1982), 34 O.R. (2d) 250 (Ont C.A.)

It must be repeated that S. 3.2 of the TCREA provides that in the event of Congestion, the Concessionaire shall pay the Province an amount equal to two (2 times the excess amount of tolls that have been collected. In my opinion this would be grossly unfair if the Concessionaire had first obtained the consent of the Province to the increase. In my opinion no reasonable business executives would agree to such an arrangement.

It would be a commercial absurdity to interpret the CGLA and the TCREA so as to require the Concessionaire to first obtain the consent of the Province to any toll rate or fee increases. A provision that the Province could not unreasonably withhold its consent to a toll increase would be inadequate protection to the Concessionaire and would expose the Concessionaire to the risk of lengthy delays and would require access to the dispute resolution process, arbitration and the court.

My answers to the issues to be determined in this arbitration are:

(a) Is the only requirement to be met by 407 ETR prior to the change of any toll or administration fee the provision of Notice under Article 2.3 of the TCREA and are the tolls and administration fees set by 407 ETR after compliance with Article 2.3 of the TCREA valid and enforceable? **YES**

(b) Is 407 ETR required to seek or obtain any form of consent or approval, apart from the provisions of Notice under Article 2.3 of the TCREA, prior to the implementation of any change in tolls or administration fees charged in connection with the use of Highway 407? **NO**

(c) Did 407 ETR's toll rate increase of February 1, 2004 comply with the terms of the CGLA and the TCREA and was it therefore a valid exercise of the rights of 407 ETR to implement a toll rate change? **YES**

(d) Was 407 ETR in default of the CGLA, the TCREA, or the ACT as a result of the February 1, 2004 toll rate increase? **NO**

There is a dispute between the parties as to whether or not the year 2002 is the Base Year. This can only be resolved after the relevant evidence has been provided and counsel have made submissions with respect to that evidence and the law.

There are other disputes.

I have not considered any of those disputes because the relevant evidence has not been provided; counsel have not made submissions with respect to that evidence and the law; and the resolution of those disputes is not relevant to my decision in this arbitration.

Dated at Toronto, Ontario, this 10th day of July, 2004

THE HONOURABLE J. DREW HUDSON, Q.C.