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## Documents reveal Ford government opted not to pursue \$1-billion penalty from 407 Express Toll Route

By Paul Webster

Special to the Star  
Fri., Nov. 26, 2021  
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7 min. read

The Ford government opted against pursuing approximately \$1 billion in penalties from the owner of the 407 Express Toll Route when traffic levels fell below a contractual target during the pandemic.

Internal documents obtained by the Star reveal months of negotiations between ministry officials and the private operator ended with the government not seeking compensation. Nor is there evidence that the government requested tolls be lowered to increase traffic volumes.

Last December, the Ministry of Transportation declined to answer questions about whether it was giving COVID-related rebates to the highway's owner, 407 International Inc., which is majority-owned by Canada Pension Plan Investments on behalf of more than 20 million Canadian public pension plan contributors and beneficiaries.

But according to documents obtained through provincial freedom of information requests, the Ford government didn't pursue "potential congestion penalty payments in the order of \$1 billion" for 2020 and could decide not to do so again this year.

The congestion penalties were triggered because there wasn't enough traffic on the 407 to meet traffic threshold requirements in accordance with the highway's Concession and Ground Lease Agreement with the province.

This comes at a time when the Ford government has announced it will move ahead with plans to build a controversial freeway, Highway 413, to run parallel to the underutilized 407 to solve what the government calls a traffic congestion crisis.



Christina Basil, director of communications and government relations for the 407 ETR, explained in a Nov. 16 email to the Star that while it didn't lower

tolls to encourage more traffic, the 407 ETR kept tolls frozen at pre-pandemic levels.

“When the pandemic hit in March 2020, we suspended seasonal toll rates which included a subsequent toll rate increase that had been announced for May 2020,” Basil said. “Our rates remain frozen at February 2020 levels.”

That helped the 407 ETR to post a \$147.1-million profit in 2020, even while it sought billions in potential penalty forgiveness.

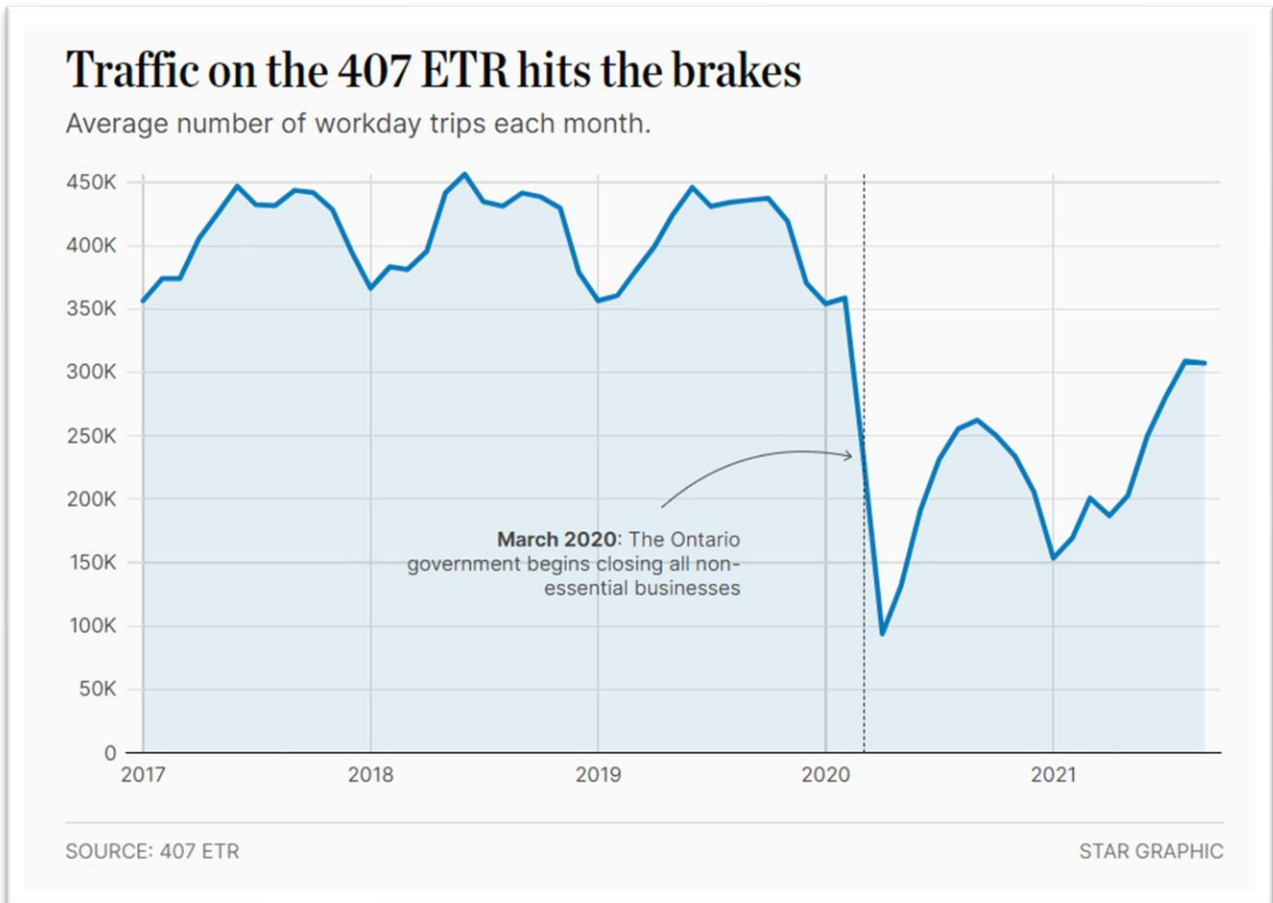
“The amounts of any related congestion payments are hypothetical and have not been waived or forgiven,” Basil wrote, “since they are relieved by the application of the force majeure clause in the concession agreement.”

Ontario Transportation Minister Caroline Mulroney defended the government’s decision not to pursue the billion-dollar payment or ask the 407 to reduce tolls at a Nov. 10 news conference convened by Ford to announce his commitment to build Highway 413.

“The 407 is a private company and they make their decisions,” she said.

After providing more than 20 years of profitability for the Canada Pension Plan and other longtime stakeholders based in Europe and Quebec, the 407 ETR, which runs from Milton on the western fringe of the GTA to Bowmanville in the east, hit a series of pandemic-induced speed bumps beginning last year.

According to publicly released financial disclosures from 407 ETR International Inc., average workday trips declined significantly due to the adverse traffic impacts of the COVID-19 pandemic commencing in March 2020, to 233,155 trips per day from a peak of 408,232 trips per day in 2019.



Toll income dropped dramatically in March, with average traffic volumes roughly 75 per cent lower than they were in 2019.

Traffic volumes on Highway 407 quickly began rebuilding by May 2020, but even so, the 407 posted a net loss of \$46.9 million for the second quarter of 2020, compared to net income of \$147.1 million for the same period in 2019.

It's been profitable ever since, though much less so than it was before the pandemic. The company reported a net income of \$106.6 million for the third quarter of 2021, compared to a net income of \$49.1 million for the same period in 2020.

As the first pandemic-induced GTA lockdown stretched into April and May 2020, neither the 407 ETR nor the government was taking the situation lightly.

Concerned by the drop in traffic in March and April of last year, the 407's corporate executives began writing to the Ministry of Transportation, warning that the initial weeks of the pandemic threatened to create so-called "force majeure" circumstances — an event beyond the control of the affected party — that could nullify aspects of its contract.

"In this rapidly evolving situation," 407 International president Andres Sacristan wrote to the Ministry of Transportation in a letter dated March 20, 2020, "I think it prudent to advise that 407 ETR reserves its right to invoke the force majeure protections."

According to internal documents viewed by the Star, the highway had the option of reducing tolls to encourage more drivers to use the highway, possibly preventing the congestion clause from being triggered, but opted not to do so.

"407 ETR has the right to set tolls and fees on Highway 407 ETR, but 407 ETR must meet specified traffic volumes established yearly," Ministry of Transportation officials briefed their superiors in an internal memo dated April 3, 2020.

"Under normal circumstances (without the pandemic in 2020) this could result in potential congestion penalty payments in the order of \$1 billion," ministry officials estimated.

That was just for 2020, they emphasized. Potentially, the 407 ETR still faces another billion-dollar penalty for its lowered traffic volumes in 2021, according to ministry officials.

"407 ETR is required to use commercially reasonable efforts to minimize the effect and duration of the force majeure," ministry officials noted in their April 3 memo. "This could include, amongst other things, reducing tolls to encourage traffic."

A followup letter to the ministry from Sacristan on April 23, 2020 described "an unanticipated and unprecedented reduction in traffic volumes throughout the province, including on Highway 407 ETR."

That meant that 407 ETR was failing to meet its contractual obligations to encourage traffic flow and reduce GTA traffic congestion within its "tolling,

congestion relief and expansion agreement” with the province, Sacristan explained to the ministry.

“407 ETR has initiated discussions with ministry staff and is seeking comfort that the government will exclude the pandemic period from any congestion penalty payment calculations,” ministry officials explained in internal memos to their superiors in Transportation Minister Mulroney’s office. “Corporate reporting requirements to shareholders, investors, debt holders and public auditing and disclosure requirements are driving the urgency of this matter for 407 ETR.”



What followed, according to Ministry of Transportation documents, was a complex, yearlong pas de deux between lawyers for the Ford government and those working for the 407 ETR.

The Ministry of Transportation does not make its traffic data public, despite the Open Government directives of the Ford government, but the City of Toronto does make traffic data public, and according to its data, by early June traffic volumes had begun to substantially recover.

Even so, on June 9, 2020, the 407's Sacristan wrote to the Ministry of Transportation to state "we believe that the congestion relief mechanisms have been rendered inoperative by the lack of congestion." It would not be able to meet the traffic thresholds requirements due to the COVID-19 pandemic, he predicted.

Mindful that the 407 managers could reduce tolls to encourage higher traffic levels and avoid billion-dollar penalties, however, Eric Doidge, assistant deputy minister, operations division, at the Ontario Ministry of Transportation, took issue with the company's characterization of traffic levels.

"The ministry disagrees with 407 ETR's statements regarding the existence or non-existence of congestion in the Greater Toronto Area," Doidge wrote back to Sacristan on July 13, 2020

At the Ministry of Transportation, there's no evidence in the highly censored records released under the freedom of information requests that any effort was made to prod the 407 ETR to reduce its tolls to meet its contractual traffic threshold.

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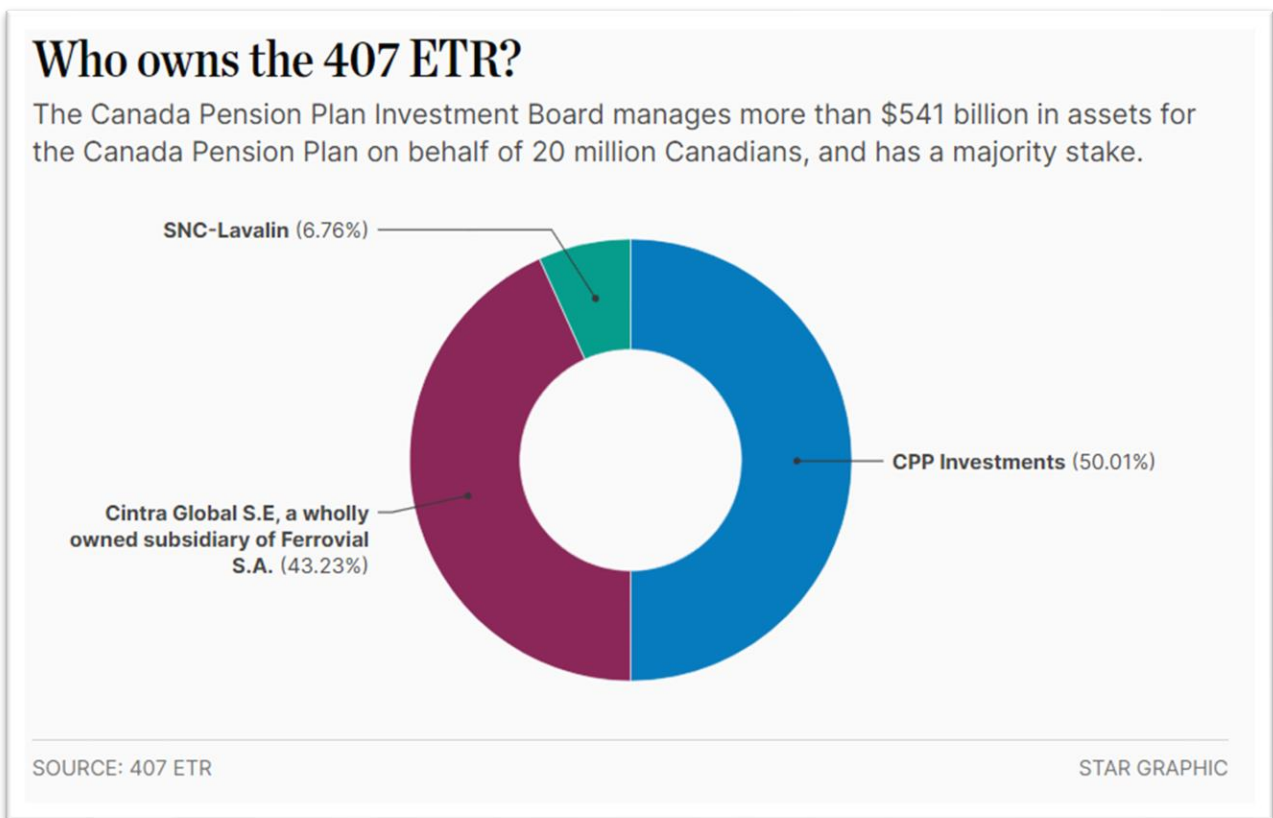
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What we do know is that on April 19 of this year, Transportation Minister Mulroney signed off on a deal to forgive the 407 ETR its billion-dollar

annual penalties associated with congestion threshold tests for 2020, and will face a similar choice this year.

Sanford Borins, a University of Toronto professor emeritus who co-wrote a book that closely investigated the 1999 deal through which Mike Harris, Ford’s Conservative predecessor in office, sold the 407 ETR to the Canada Pension Plan as well as other buyers in Quebec and Europe, says the documents detailing Mulroney’s billion-dollar peace deal with the 407 ETR depict a government “that was very helpful to the 407 ETR operators.”

“The government could have pressed them to drop the tolls,” Borins said after viewing the freedom of information documents, many of which contain passages that are almost entirely censored. “They don’t seem to have put any pressure on the operator. They lost that opportunity.”



Opponents of the Ford government’s 413 plan argue that the province’s handling of the 407 penalty adds weight to their concerns about new highway projects.



Laura Bowman, an environmental lawyer with Ecojustice who wrote a detailed legal analysis of the case against the 413 that succeeded in persuading the federal government in May 2021 to warn the Ford government it may require a federal legal review before proceeding, also looked at the documents released through freedom of information laws.

“They show how little effort is being made to achieve better use of the 407,” Bowman said, before stressing that better use of the 407 would largely eliminate any need for the 413, and that the previous Liberal government shelved the 413 project after expert advisers told them exactly that in 2018.

“It’s obvious the congestion relief solution for the 407 hasn’t been working,” Bowman said, referring to the Ford government’s plan to build the new highway.

“This was an opportunity to renegotiate. But it’s like they’ve given up. It doesn’t make much sense to have already built a large east-west highway but not use it properly.”

Peter Miasek, president of Transport Action Ontario, an activist group that says Ford’s plan to invest in new highways rather than public transit will simply stimulate more car purchases, more congestion and more carbon emissions, also reviewed the freedom of information documents.

“The door was open for the government to press for more truck traffic, especially on the 407,” Miasek concluded.

“The Ontario government missed an opportunity to step away from constructing another environmentally destructive highway,” Miasek said.