

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO.:

SANDRA MURPHY, DOUGLAS J. BARTH)	
ROBERT ACKLEY, JOEL A. FEINGOLD)	
as beneficiaries of the)	
MASSACHUSETTS TURNPIKE TOLL)	
EQUITY TRUST and on behalf of)	
a class of similarly situated)	APPEAL FROM
persons and JACK ALTSHULER,)	MIDDLESEX
as Trustee of the)	SUPERIOR COURT
MASSACHUSETTS TURNPIKE)	CIVIL ACTION
TOLL EQUITY TRUST,)	NO.:09-01794
)	
Plaintiffs,)	
)	
v.)	
)	
MASSACHUSETTS TURNPIKE AUTHORITY,)	
)	
Defendant.)	
)	

MEMORANDUM OF LAW IN SUPPORT OF THE PETITION OF THE
PLAINTIFFS FOR INTERLOCUTORY RELIEF PURSUANT TO G.L.
C. 231, § 118 (FIRST PARAGRAPH)

I. SUMMARY

Central to this Petition, is the undisputed fact that the Massachusetts Turnpike Authority ("MTA") imposes a toll on the minority of users of the Metropolitan Highway System ("MHS") in order to cover the costs of the majority who are not charged. This flat inequity between those who pay for the services and those who directly benefit from them free of charge is determinative of the unconstitutional nature of the MTA's tolling practices. This inherent unfairness is conclusive regarding the tolls' failure to conform to any constitutionally permissible form of monetary exaction and compels the need for relief.

II. DISPOSITIVE FACT NOT IN DISPUTE

The lower court acknowledged the MTA's longstanding tolling practices that require toll payers to subsidize the use of the MHS by others, in particular the use of the Central Artery (I-93) built by the "Big Dig."¹ Plaintiffs presented undisputed

¹ The lower court described the subsidy as follows:

Since the [1997] legislation's passage, the MTA has been using tolls collected on the Interstate 90 and tunnel portions of the MHS to subsidize costs associated with the Big Dig, which incorporates roadways on which drivers are not required to pay a toll.

evidence that of the 632,000 average daily weekday MHS users, 288,000 (46%) pass through MHS tolled facilities and 344,000 (54%) don't.²

III. PLAINTIFFS' PRELIMINARY INJUNCTION

The Plaintiffs requested the court preliminarily enjoin the MTA from "receiving during fiscal year 2010 aggregate revenues from all tolled facilities of the MHS that are substantially greater than the aggregate costs" of the debt service and operation and maintenance of such tolled roads.³ The relief requested would have caused the MTA to comply with Chapter 32 of the Acts of 2009 (eff. 7-1-09) that, in authorizing the payment to the MTA and its successor of an annual \$100 Million dollar tax payment, required in FY 2010, that the Toll Equity provision (eff. 11-1-09)⁴ of the recently enacted Transportation Reform law

Decision at 2.

²August 4, 2009 Affidavit of K. Hazarvartian, Phd PE PTOE at ¶ 5 attached to the **Addendum at Tab 5**.

³ The Plaintiffs' Proposed Order presented to the lower court is attached to the **Addendum at Tab 4**.

⁴ Chapter 6C §13(c) (Chapter 25 of the Acts of 2009)(eff. 11-1-09) at Exhibit A to 8-6-09 Plaintiffs' Proposed Order:

be complied with, and that compliance would be satisfied by "demonstrating that the aggregate revenues received from all tolled facilities are equal to or less than the aggregate costs of all tolled facilities as described in" Section 13(c).⁵

IV. REASONS WHY RELIEF SHOULD BE GRANTED

Relief is compelled because the lower court committed fundamental constitutional error when it ruled "not relevant" the gross disparity between the minority of MHS users being charged (toll payers) and those receiving the MHS services for free (the majority of MHS users). This fatally infected the consideration causing the court to misapply the Emerson⁶ test and completely ignore, without

All revenue received from tolls, rates, fees, rentals and other charges for transit over or through all tolled roads, bridges or tunnels shall be applied exclusively to: (i) the payment of existing debt service on such tolled roads; and (ii) the cost of owning, maintaining, repairing, reconstructing, improving, rehabilitating, policing, using, administering, controlling and operating such tolled roads.

See Addendum at Tab 4.

⁵See Exhibits A-D of 8-6-09 Plaintiffs' Proposed Order, **Addendum at Tab 4.**

⁶Emerson College v. City of Boston, 391 Mass. 415 (1984).

discussion, the constitutional claims that the inequitable tolls violated both the Massachusetts and US Constitutions.⁷ Further, the court committed clear error by ruling that the right to be free from unconstitutional governmental exactions is not a fundamental constitutional right remediable in equity.

IVA. The Toll Payer Subsidy Is Unconstitutional

The lower court correctly noted that the burden is on Plaintiffs to demonstrate that "the tolls are not lawful fees".⁸ However, the court doomed the demonstration from the outset by ruling that it need not recognize ("*not relevant*") the salient truth that toll payers, who are the minority of MHS users, nevertheless are charged a toll in order to cover the

⁷See **Section IVA(2)**, infra.

⁸ The lower court wrongly cast Plaintiffs' challenge to the tolls as to the facial validity of the 1997 legislation creating the MHS. Decision at 3. Plaintiffs' action is premised not on the facial invalidity of the 1997 legislation but on the fact that, operationally, the tolls are more akin to a tax and therefore an unconstitutional exaction. See Silva v City of Attleboro, 454 Mass. 165, 168 (2009) (quoting Emerson, supra, at 424) ("Although we give some deference to the . . . classification of the . . . charge as a fee, [u]ltimately the nature of a monetary exaction must be *determined by its operation* rather than its specially descriptive phrase.") (emphasis added).

costs of the MHS that the majority use free of charge.⁹

IVA(1). The Subsidy Fails the Emerson Test

The lower court in ruling that the free use of the MHS by the majority was "not relevant" to the analysis, caused the court to fundamentally misapply each of the Emerson prongs.¹⁰

(a). The Services Are Not "Particular" To Toll Payers.

The lower court failed to properly analyze whether the MTA tolls pass muster under the first and most important of the Emerson tests - whether "they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society".¹¹ The Emerson court considered receipt of services that are unique ("particular") to the group being charged to be

⁹ The lower court stated: "the plaintiffs' proposed division of MHS users into toll-paying and non-toll-paying categories is too restrictive, and the relative apportionment of the tolls among MHS users is not relevant to the question of whether they derive a benefit not shared by the general public." Decision at 4 (emphasis added).

¹⁰ Fatally, the lower court treated the MTA as a regulatory agency and misapplied Emerson in this proprietary fee setting. See Silva v. City of Attleboro, 454 Mass. 165 (2009) (noting critical distinctions between regulatory and proprietary fee cases).

¹¹ Emerson, 391 Mass. at 424 (emphasis added).

an "essential characteristic of a fee" and the basis for justifying the distribution of costs of that service to the charged group.¹² Thus, Emerson made crystal clear that the *sine qua non* of a legitimate fee is the necessary symmetry that must exist between the group being charged and the group receiving the services - the groups must be the same in order to justify distributing the costs of the service onto the charged group.

In determining, whether the tolls passed the first Emerson test, the court misread the Emerson requirement regarding symmetry. It wrongly ruled that, to meet this requirement, it was only necessary to compare the charged group to other members of society *who do not use the services*. It ruled that it did not have to compare the charged group to other

¹² Because "the benefits of 'augmented' fire protection [were] not limited to the owners" of the buildings being charged, the fee at issue in Emerson failed to comply with an "essential characteristic of a fee" namely:

Fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized as to justify *distribution of the costs among a limited group ('users', or beneficiaries, of the services)*, rather than the general public.

Emerson, 391 Mass. at 425(emphasis added).

users who do receive the services but don't pay for them.¹³ By doing so, the court engaged in a tautological process that pre-ordained the result. By eliminating from consideration those "members of society" who do use the MHS services but don't pay for them (the majority of MHS drivers who use the non-tolled Big Dig roads), and only comparing the charged group (the minority of MHS drivers who pass through a tolled facility) to those who don't use the MHS, the court, not surprisingly, was able to conclude: "the tolls benefit the plaintiffs, as drivers on the MHS, in a manner not shared by other members of society (namely, those who do not drive on the MHS)".¹⁴

Unfortunately, the court did not consider any of the proprietary fee cases under Emerson that deal directly with the need to consider the "division" of users, in an integrated system of services, between those being charged and those not, and the "relative apportionment" of the charge among the users. None of the cases support distribution of costs on a minority

¹³Decision at 3.

¹⁴Decision at 3. Overlooked by the lower court, is that 344,000 daily users of the MHS who access the MHS free of charge also qualify as "members of society".

group of system users where the charged services are available to other system users who are not being charged - just the opposite. All of the proprietary fee cases that deal with the issue turn for or against legitimacy of the charge on whether the services a group is being charged for are particular to the charged group (legitimate) or available to the system users who are not being charged (illegitimate).¹⁵

Similarly, here, the court was wrong not to take into account the fact that the benefits of MHS use are "not limited" to the group being charged and therefore the costs are not legitimately being distributed "among" the group of "users or beneficiaries of the services rather" than others who are not being

¹⁵See Bertone v. Dept. Of Public Utilities, 411 Mass. 536, 549 (Mass. 1992) (affirming the legitimacy of electrical hook-up charge "assessed only to new customers (including existing customers seeking expanded service)" since "the new customers benefit in a manner not shared by existing customers" and "[t]hese services are 'sufficiently particularized' to justify distributing their costs among the new customers only and not to all customers"; Berry v. Town Of Danvers, 34 Mass. App. Ct. 507 (1993) (new sewer hook up charge was unconstitutional because it was "intended not so much as a means of financing new infrastructure needed to accommodate new users, as in Bertone, as to repair problems inherent in the existing system" thus, the court held that the charge is "not 'sufficiently particularized' ... to justify distributing the costs of the [service] among new customers only and not among all sewer users").

charged. The costs of providing all MHS users access to the system are illegitimately being dumped on the toll payers who comprise the minority of system users.¹⁶ That immutable truth alone, renders the MTA tolls unconstitutional.¹⁷

(b). Illegitimate Fees Are Not "Voluntary."

In applying the "voluntary" test under the second Emerson prong, the lower court wrongly overlooked the fact that the illegitimate distribution of MHS costs onto toll payers cannot in any sense be considered undertaken on a "voluntary" basis. It is true, as the court noted, that toll payers can take "alternate routes" to avoid paying a toll. It is also true, that

¹⁶ Neither Southview or Caldwell, the regulatory fee cases relied on by the lower court support the principle that it is constitutional to charge the minority of system users so that the majority of system users can get the service for free. See Southview Coop. Hous. Corp. v. Rent Control Bd. Of Cambridge, 396 Mass. 395 (1985) ("[B]eneficiaries of the services provided by the board are the landlords seeking individual rent adjustments" and therefore the "services for which the fees are imposed ... justify distribution of the costs among" that limited group; Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (Mass. Appeal 1987) (upholding mooring charge fee because "the services provided by the harbormaster are for the benefit of the parties required to pay the charges" who are the "primary beneficiaries" of those services and that the services provided others who don't pay the charge were "insignificant").

¹⁷Emerson, 391 Mass. at 425 (emphasis added).

once the voluntary decision has been made to use the MHS it cannot be construed as anything more than the free choice to undertake and pay a *legitimate* fee for its use. By agreeing to pay the toll, the toll payer does not in any sense voluntarily undertake to pay *illegitimate* fees that unfairly distribute the costs of the service on the group being charged. In that way, the subsidy attached to the charge is involuntarily exacted and cannot be deemed, by any measure, a free choice.

(c). Illegitimate Fees Are Not "Fair Recompense"

The lower court wrongly determined that the MTA's tolls met the third Emerson prong requiring that a lawful fee must "compensate the governmental entity providing the services for its expenses" - that "proprietary fees" must be "based on fair recompense."¹⁸ Here again, the failure to consider the disparity between the payers and the non-payers led the court to misapprehend the nature of its task. Rather than determining whether the charge for the toll payers' use of the MHS was reasonably proportional to the costs of providing such services

¹⁸Emerson, 391 Mass. at 425 & n. 16 (emphasis added).

to the toll payers, the court mistakenly believed that it could not make the determination because there was a "dispute over the actual costs of administering the MHS."¹⁹ The court missed that the MTA's own acknowledgement that "all revenue collected from MHS tolls is used to pay for MHS expenses", in fact, answered the question. It was not reasonably proportional. If "revenue obtained from a particular charge is not used exclusively to meet expenses incurred in providing the service but is destined instead for a broader range of services ... while not decisive, is of weight in indicating that the charge is a tax."²⁰ Thus, to properly apply the third prong of the Emerson test, the court should have determined that the tolls are not reasonably calculated to cover the cost of the services provided to the fee-payers

¹⁹Decision at 4.

²⁰Emerson, 391 Mass. at 427; Opinion of the Justices, 250 Mass. 591, 597 (1924); see also Bertone, 411 Mass. at 549-550 (revenue received from the hook-up charges imposed on new customers only reasonably calculated to meet expenses incurred in providing electrical services to new customers and revenues were not added to general fund providing service to all); Berry, 34 Mass. App. Ct. at 512 (charges available for many sewer projects rather than the improvements and expansion made to accommodate people charged fee are tax).

but, in fact, were calculated to cover the cost of providing services to *all* users of the entire system.

IVA(2). Excessive Fees Violate the Constitution

The illegitimate tolls constitute excessive fees that violate the Massachusetts Constitution's requirements that fees be "reasonable and proportional"²¹ and the requirement under the dormant Commerce Clause of the United States Constitution that all such charges not be excessive but be based on a "fair approximation" of use.²² The "reasonableness," "proportionality," "excessive" and "fair approximation" requirements - unaddressed by the court - each constitute an independent foundation for Plaintiffs' prospects for success on the merits. As explained in Plaintiffs' Bench Memorandum (**Addendum at Tab 3**), it is unreasonable to saddle only East/West travelers with the costs of the North/South Central Artery; the tolls fall disproportionately (100%) on a minority of MHS users; and the tolling scheme does not divide charges for the privilege of using the MHS in a

²¹Silva v. City of Attleboro, 72 Mass. App. Ct. 450 (2009); Mass Const. pt. II, ch. 1, § 1, art. IV.

²²Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707, 716-720 (1972); see also Massachusetts v. United States, 435 U.S. 444, 464 (1978).

manner that reflects relative use of MHS facilities. Consequently, the constitutional infirmities raised by Plaintiffs (but left unaddressed by the court in its Decision) all provide solid ground for this Court to conclude that the request for preliminary relief was not properly considered.

IVB. "Oppressive" Exactions Cause Irreparable Harm.

The lower court clearly erred when it ruled that it was "less inclined to view the threat of harm as irreparable" "where the alleged constitutional violation implicates rights that are compensable".²³ The court misapprehended that freedom from unconstitutional governmental exaction is a quintessential constitutional right. "The framers of the Constitution and their contemporaries had had abundant experience and knowledge" that "[n]o power is capable of greater abuse or can be made more oppressive and odious in practice".²⁴ The explicit restriction of that power is considered the chief reason why we adopted written Constitutions.²⁵ Under

²³Decision at 6.

²⁴Oliver v. Washington Mills, 11 Allen 268, 278 (1865).

²⁵Opinion of the Justices, 250 Mass. 591, 602 (1925) ("purpose if not a chief motive in adopting written constitutions").

such circumstances, the court was wrong in ruling that the abuse at issue could not be addressed in equity.²⁶

IVC. The Court Improperly Balanced the Harms.

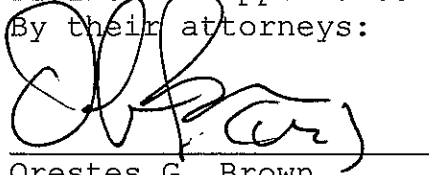
The assumption that Plaintiffs would not "likely prevail on the merits" caused the lower court to "weigh[] in favor of the MTA" the balance of harms and to credit the MTA's assertions that "preventing diversion" of tolls "could ... force[] the MTA to withhold essential services."²⁷ It is untenable for the MTA to suggest that it cannot comply with Constitutionally mandated toll equity during the three month period leading up to statutorily mandated toll equity. The Legislature specifically conditioned its \$100 Million infusion of tax money on there being toll equity in FY 2010.²⁸

²⁶Violations of the Commerce Clause and similar state constitutional violations constitute irreparable harm. See ACLU v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999); Biogonic Safety Brands, Inc., v. Ament, 174 F. Supp. 2d 1168, 1185 (D. Colo. 2001).

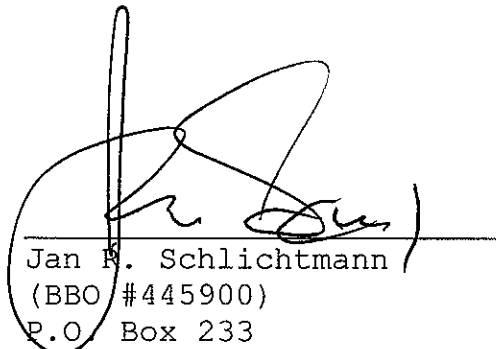
²⁷Decision at 6.

²⁸See **Section III**, supra. The injunctive relief requested does not in any way interfere with use of toll funds for any purpose on a cash flow basis. The proposed order merely ensures compliance with the Constitution and the law regarding ensuring toll equity. The Legislature, C.32 Acts of 2009 (eff. 7-1-

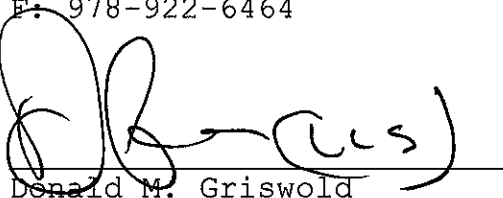
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09), mandated that toll collections in FY 2010 shall be in compliance with the Toll Equity provision (eff. 11-1-09) and that toll collections must equal or be less than the cost of providing such tolled services.