

CV-09-00379652-00CP

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**STEPHANIE GRAHAM AND ANGELA MICELI**

Plaintiffs

- and -

**IMPERIAL PARKING CANADA CORPORATION  
carrying on business as IMPARK**

Defendant

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c.6, as amended

**STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO

PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date May<sup>28<sup>th</sup></sup>, 2009 Issued by *A. Vainder*  
Local Registrar

Address of court office:  
393 University Avenue  
10<sup>th</sup> Floor  
Toronto, Ontario  
M5G 1E6

TO: Imperial Parking Canada Corporation  
601 West Cordova Street, Suite 300  
Vancouver British Columbia  
V6B 1G1

## CLAIM

1. In this statement of claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Angela**” means the plaintiff, Angela Miceli;
- (b) “**class members**” means all persons who parked a vehicle or whose vehicle was parked at an **Impark parking lot** and were charged and paid **violation fees** to Impark;
- (c) “**collection notice**” is a follow-up notice to a **statement notice** through which a collection agency on behalf of **Impark** demands payment of a **violation fee**;
- (d) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (e) “**Impark**” means Imperial Parking Canada Corporation;
- (f) “**Impark parking lot**” means a parking lot in Ontario owned and/or operated by **Impark**;
- (g) “**OCPA**” means the *Consumer Protection Act, 2002*, S.O. 2002, c.30, Sch. A;
- (h) “**O.Reg 17/05**” means Ontario Regulation 17/05 made pursuant to the *OCPA*;
- (i) “**parking agreement**” means a contract entered into between a person and **Impark** for parking of a vehicle and use of a parking space at an **Impark parking lot**;
- (j) “**payment voucher**” is a document generated by **Impark** to be displayed on a vehicle dashboard when a person enters into a **parking agreement**;

- (k) **“Stephanie”** means the plaintiff, Stephanie Graham;
- (l) **“statement notice”** is a follow-up notice to a **violation notice** through which **Impark** demands payment of a **violation fee**.
- (m) **“violation fee”** means a monetary amount charged by **Impark** through a **violation notice**.
- (n) **“violation notice”** is the initial means by which **Impark** notifies a person that a **violation fee** is owed to **Impark**, in the following three scenarios:
  - (i) a person overstays at an **Impark parking lot** beyond the parking time allotted under a **parking agreement** through purchase of a **parking voucher**; or
  - (ii) a person fails to display an **Impark parking voucher**; or
  - (iii) a person parks a vehicle and fails to pay.

2. The plaintiffs claim:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing them as representative plaintiffs of the class members;
- (b) an order compelling a plan of distribution pursuant to sections 23, 24 and 25 of the *CPA*;
- (c) a declaration that parking agreements, and in particular, the violation fees are unenforceable and not binding on class members;
- (d) a declaration that parking agreements contravene the requirements of section 5 of the *OCPA*;

- (e) a declaration that parking agreements contravene the requirements of section 22 of the *OCPA*;
- (f) a declaration that parking agreements contravene the requirements of sections 24 and 25 of O. Reg. 17/05;
- (g) a declaration that the representations of Impark relating to parking agreements constitute unfair practices and contravene sections 14, 15 and 17 of the *OCPA*;
- (h) a declaration that parking agreements are rescinded pursuant to section 18 of the *OCPA*;
- (i) a declaration that parking agreements are not binding pursuant to section 93 of the *OCPA*;
- (j) a declaration that violation fees constitute illegal charges and payments pursuant to section 98 of the *OCPA*;
- (k) an interim order that upon receipt of this statement of claim, Impark preserve all of its documents, records, communications, files, and materials relating to entering into parking agreements, issuance of violation notices, statement notices and collection notices and collection of violation fees;
- (l) a declaration that violation fees collected by Impark are held in trust for the benefit of class members;
- (m) an accounting of all proceeds received by Impark through its collection of violation fees;
- (n) damages in the amount of \$50,000,000.00;
- (o) punitive and exemplary damages in the amount of \$5,000,000.00;

- (p) a permanent injunction restraining Impark from taking any further action in contravention of the *OCPA*;
- (q) pre-judgment and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, RSO 1990, c.43 as amended;
- (r) costs of providing notice to class members and administration of damages pertaining to a plan of distribution;
- (s) costs of this action on a substantial indemnity basis; and
- (t) such further and other relief as to this Honourable Court may seem just.

### **THE NATURE OF THE ACTION**

3. Impark owns and/or operates parking lots in Ontario. Impark charges persons to park vehicles on Impark lots. The charges are flat fees by the hour.

4. When a person enters onto an Impark parking lot and parks a vehicle, the person enters into a parking agreement with Impark either through purchase of a parking voucher from a mechanical dispenser or through purchase of a parking voucher from a parking lot attendant. The parking voucher is to be displayed on the vehicle dashboard. Other persons enter onto Impark parking lots without purchasing a parking voucher in advance.

5. Parking vouchers contain very little information, identifying only the amount paid, time allotted and that the voucher is to be displayed on the dashboard of the vehicle.

6. At the time a person enters into a parking agreement, he/she does not receive the parking agreement in a form in which it can be retained.

7. If a person overstays beyond the time purchased or fails to purchase and/or display a parking voucher, Impark charges a violation fee of approximately \$68.90.

8. Initial notification of this violation fee is by way of a violation notice left on the vehicle. A statement notice and/or collection notice are later sent to the vehicle owner by mail.

## **THE PARTIES**

9. Stephanie is an individual resident in the Town of Ajax, Ontario.

10. Angela is an individual resident in the City of Toronto, Ontario.

11. Impark is a corporation incorporated pursuant to the laws of the Province of Nova Scotia, with its registered head office in Vancouver, British Columbia and carries on business throughout Canada. Impark is the third largest parking management company in North America. Impark has over 1,800 parking facilities and 425,000 parking spaces in Canada and the United States.

## **BACKGROUND INFORMATION**

12. At Impark parking lots, persons enter into parking agreements either by purchasing a parking voucher from a mechanical dispenser, or by purchasing a voucher from a parking lot attendant. Persons may also enter into parking agreements by parking at Impark parking lots without purchasing a parking voucher.

13. Signage posted at Impark parking lots provides that space for public parking is available on the terms set out on the signs. At each lot, a rate is posted on a sign requiring persons to pay in advance the posted amount, based on an hourly flat rate. Other signage indicates that if persons do not display a valid parking voucher or park over the time limit, a violation fee of either \$68.90 or \$69.55 will be charged.

14. Parking vouchers provided at the time parking agreements are entered into contain very little information, identifying only the amount paid, time allotted and that the parking voucher must be displayed on the dashboard of the vehicle. Parking vouchers do not indicate the amount which may be charged by Impark if a person over-stays at the lot or does not display a voucher.

15. If a person stays at an Impark parking lot for a time which exceeds the time purchased pursuant to a parking voucher, or if a person fails to display a valid parking voucher, Impark charges a violation fee by way of a violation notice left on the vehicle, or by statement notice and/or collection notice subsequently delivered to the owner of the vehicle.

16. Violation notices are similar in appearance and nature to the tickets which are issued by municipal authorities for parking violation on municipal streets.

17. Violation notices typically require payment of \$68.90 if paid after 7 days, or \$38.59 if paid within 7 days of the issuance of the violation notice.

18. The back of the violation notice includes an "Explanation of Amount" which indicates that:

The amount on this notice is set to cover lost revenue as well as the costs of patrol and preliminary collection.

**THE LEGAL AUTHORITY TO CLAIM THE AMOUNT DUE AND/OR HAVE IMPROPERLY PARKED VEHICLE TOWED ARISES UNDER THE LAW OF CONTRACT AND THE LAW OF TRESPASS.**

The above amount is a debt owing to Imperial Parking Canada Corporation and is claimed as an alternative to (or in certain circumstances, in addition to) having your vehicle towed and held for any applicable towing and storage charges.

If this amount remains unpaid for more than thirty (30) days, it will be forwarded to a debt collection agency for collection. We may also tow your vehicle from property managed by us and/or take legal action. Should this charge proceed to a debt collection agency, costs and interest will be added.



19. If the violation fee is not paid, Impark conducts a search for the registered owner of the vehicle license plate, and the owner of the plate is mailed a statement notice demanding payment of the violation fee amount. The statement notice indicates that if the violation is not paid within 14 days from the date of the statement notice, the debt will be referred to a debt collection agency for collection, at which time costs and interest will be added. The statement notice indicates that:

The legal authority to claim the amount due and/or have improperly parked vehicle towed arises under the law of contract and the law of trespass. Our right to claim this amount from owners of vehicles improperly parked on facilities managed by us has been confirmed by a Canadian Federal Court of Appeal decision.

20. If the violation fee is not resolved, Impark assigns the parking debt to a collection agency.

## **STATED FACTS OF THE REPRESENTATIVE PLAINTIFFS**

### **A) Stephanie**

21. On April 6, 2009, Stephanie entered onto an Impark parking lot at 20 York Street, Toronto and paid Impark a fee to park through a mechanical parking voucher dispenser. Stephanie received a parking voucher after making payment. The parking voucher contained very little information identifying only the amount paid, time allotted and that the parking voucher must be displayed on the dashboard of the vehicle. The parking voucher did not set out any violation fee amount if Stephanie overstayed at the lot.

22. Stephanie overstayed at the lot. Upon return to her vehicle, a violation notice on her vehicle notified her that she was being charged a violation fee of \$68.90 by Impark. Stephanie had overstayed approximately one hour at the parking lot.

23. Stephanie will pay the violation fee demanded by Impark, but will do so under protest reserving all her rights.

**B) Angela**

24. On March 11, 2009 Angela's son, Joey Miceli, entered onto an Impark parking lot at 21 Four Seasons Place, Toronto and paid Impark a fee to park through a mechanical parking voucher dispenser. The daily maximum parking fee at the lot was \$5.00. Joey Miceli received a parking voucher after making payment. The parking voucher contained very little information identifying only the amount paid, time allotted and that the parking voucher must be displayed on the dashboard of the vehicle. The parking voucher did not set-out any violation fee amount if Joey Miceli overstayed at the lot.

25. Joey Miceli overstayed at the lot. Upon return to the vehicle, a violation notice on the vehicle notified him that a violation fee of \$68.90 was being charged by Impark. Joey Miceli had overstayed approximately 43 minutes at the parking lot.

26. Angela subsequently received from Impark a statement notice demanding payment of the violation fee. Angela received the statement notice as registered owner of the vehicle licence plate.

27. Angela has refused to make payment of the violation fee. Angela did not enter into a parking agreement with Impark, nor is she responsible for any conduct which caused the violation fee, the violation notice or the statement notice.

**BREACHES OF THE OCPA**

**Consumer Agreement**

28. Parking agreements constitute "consumer agreements" as defined in section 1 of the OCPA. Parking agreements are agreements between Impark and consumers in which Impark agrees to supply services for payment.

29. Sections 5 of the OCPA provides that where a supplier is required to disclose information as prescribed, the disclosure must be clear, comprehensible and

prominent, and delivered to a consumer in a form in which it can be retained by the consumer.

30. Impark fails to disclose required information to class members in respect of parking agreements in a clear, comprehensible and prominent fashion.

31. Impark fails to deliver relevant information in respect of parking agreements to class members in a form which can be retained by them.

### **Unfair Practices of Impark**

32. Section 14(1) and 17 of the *OCPA* state that "It is an unfair practice for a person to make a false, misleading or deceptive representation" and that "No person shall engage in an unfair practice".

33. Section 14 of the *OCPA* provides that a "false, misleading or deceptive representation" is a prohibited unfair practice, and without limiting the generality of the foregoing, provides the following examples of unfair practices, all of which have been contravened by Impark:

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

...

16. A representation that misrepresents the purpose of any charge or proposed charge.

34. Sections 15 and 17 of the *OCPA* provide that "It is an unfair practice to make an unconscionable representation" and that "No person shall engage in an unfair practice".

35. The OCPA provides that a “unconscionable representation” is a prohibited unfair practice, and further provides under section 15 that:

15. (2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person’s employer or principal knows or ought to know,

...

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

...

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment.

36. Impark representations with respect to parking agreements are false, misleading or deceptive and/or constitute unconscionable representations, particulars of which are as follows:

- (a) Impark fails to provide class members with an opportunity to consider whether they wish to risk imposition of a violation fee as a consequence of over-staying at a lot or through failure to display a parking voucher;
- (b) Impark misrepresents its legal authority to charge violation fees, deceives class members with reference to “law of trespass” on violation notices and reference to a Canadian Federal Court of Appeal decision on statement notices, said to authorize the imposition of violation fees;
- (c) Impark represents in violation notices, statement notices and collection notices that Impark will take legal action when the violation fees charged are not enforceable in law;

- (d) Impark issues violation notices in a form intended to communicate to class members that there is an underlying municipal or governmental authority which has legitimized the violation fees.

37. Section 18(1) of the *OCPA* provides that:

**18. (1)** Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

38. As a result of the unfair practices of Impark as described above, the plaintiffs and class members are entitled to rescission of parking agreements and are entitled to damages under section 18 of the *OCPA*.

#### **Future Performance Agreement**

39. Parking agreements constitute "future performance agreements" as defined in section 1 of the *OCPA*. Future performance agreements are agreements between Impark and class members in respect of which performance in full is not made when the parties enter into the parking agreement.

40. At the time parking agreements are entered into, Impark does not perform such agreements in full. Parking agreements are performed in full when class members leave an Impark parking lot.

41. Section 21 of the *OCPA* provides that sections 22-26 of the *OCPA* apply to future performance agreements if the total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds \$50.00, as established by O.Reg 17/05.

42. Section 22 of the *OCPA* provides:

**22.** Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

43. Impark does not deliver parking agreements in writing as required.

44. Section 22 of the *OCPA* provides that parking agreements be made in accordance with certain prescribed requirements as set-out in section 24 of O.Reg. 17/05 and include:

1. The name of the consumer.
2. The name of the supplier and, if different, the name under which the supplier carries on business.
3. The telephone number of the supplier, the address of the premises from which the supplier conducts business, and information respecting other ways, if any, in which the supplier can be contacted by the consumer, such as the fax number and e-mail address of the supplier.
4. A fair and accurate description of the goods and services to be supplied to the consumer, including the technical requirements, if any, related to the use of the goods or services.
5. An itemized list of the prices at which the goods and services are to be supplied to the consumer, including taxes and shipping charges.
6. A description of each additional charge that applies or may apply, such as customs duties or brokerage fees, and the amount of the charge if the supplier can reasonably determine it.
7. The total amount that the supplier knows is payable by the consumer under the agreement, including amounts that are required to be disclosed under paragraph 6, or, if the goods and services are to be supplied during an indefinite period, the amount and frequency of periodic payments.
8. The terms and methods of payment.
9. As applicable, the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur.
- ...
11. For services that are to be performed, the place where they are to be performed, the person for whom they are to be performed, the supplier's method of performing them and, if the supplier holds out

that a specific person other than the supplier will perform any of the services on the supplier's behalf, the name of that person.

12. The rights, if any, that the supplier agrees the consumer will have in addition to the rights under the Act and the obligations, if any, by which the supplier agrees to be bound in addition to the obligations under the Act, in relation to cancellations, returns, exchanges and refunds.

...

15. Any other restrictions, limitations and conditions that are imposed by the supplier.

16. The date on which the agreement is entered into.

45. Impark does not comply with the requirements of section 24 of the O.Reg 17/05, as set out above.

46. Section 25 of O.Reg 17/05 requires that a "supplier shall provide the consumer with an express opportunity to accept or decline the agreement and to correct errors immediately before entering into it." Impark does not provide such express opportunity to accept or decline parking agreements nor an opportunity for correction of errors before parking agreements are entered into.

### **General Remedies under the *OCPA***

47. Section 93(1) of the *OCPA* further provides:

**93. (1)** A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the regulations.

48. As a result of breach by Impark of statutory requirements of the *OCPA*, the plaintiffs and class members are not bound by the terms of parking agreements entered into.

49. Section 93(2) of the *OCPA* provides:

**93. (2)** Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

It would be inequitable for consumers to be bound to Impark customer agreements in the circumstances.

50. The plaintiffs and class members plead and rely upon section 98 of the *OCPA* which provides as follows:

**98. (1)** If a supplier has charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act, the consumer who paid the charge or made the payment may demand a refund...

51. The plaintiffs and class members further rely upon sections 100 and 101 of the *OCPA*.

### **UNCONSCIONABILITY, PENALTIES AND CONTRACTS OF ADHESION**

52. Parking agreements are unconscionable in that persons entering into them have no bargaining power. The terms of parking agreements, and in particular, the violation fees, are substantially unfair.

53. Violation fees are penalties at common law. Amounts charged as violation fees do not constitute a genuine pre-estimate of damage suffered by Impark.

54. Parking agreements are contracts of adhesion. Class members have no bargaining power to negotiate or alter the terms of parking agreements.



55. The plaintiffs and class members furthermore rely upon the *Courts of Justice Act*, R.S.O. 1990, c.C-43 as amended, in particular section 98, which provides for relief from forfeiture on such terms as to compensation or otherwise as are considered just.

### **DAMAGES**

56. As a result of the acts and omissions of Impark, the plaintiffs and class members have suffered loss and damage.

57. The plaintiffs and class members claim entitlement to nominal damages in the amount of \$100.00 each.

58. The plaintiffs and class members request that this Court order damages to be paid to class members on an aggregate basis or otherwise in accordance with sections 23, 24 and 25 of the *CPA*.

59. The plaintiffs and class members state that Impark has been unjustly enriched via funds received through violation fees charged in contravention of the *OCPA*. Class members have suffered a corresponding deprivation through payment of such violation fees, with there being no juristic reason for violation fees to be paid to and retained by Impark.

60. The plaintiffs and class members state that it is inequitable to allow Impark to retain monies received as violation fees and state that all such funds are subject to a constructive trust in favour of the plaintiffs and class members.

61. The plaintiffs and class members claim entitlement to an accounting and disgorgement of monies received by Impark as violation fees.

### **PUNITIVE DAMAGES**

62. The plaintiffs and class members state that Impark has engaged in conduct warranting imposition of punitive damages in the circumstances.

63. The plaintiffs and class members state that Impark was aware or should have been aware of the requirements for disclosure mandated by the *OCPA* but despite such knowledge, Impark failed to disclose prescribed information and failed to provide information to class members in a form which could be retained by them.

64. Impark has engaged in conduct warranting the imposition of aggravated, punitive and exemplary damages, including:

- (a) Impark was aware or ought to have been aware of the requirements for disclosure mandated by the *OCPA*;
- (b) despite such knowledge, Impark failed to disclose the prescribed information required under sections 22 and 45 of the *OCPA* and has deliberately flaunted these requirements; and
- (c) Impark has misrepresented its authority to collect violation fees, deliberately created violation notices to resemble legitimate municipal parking tickets, and has charged consumers violation fees which are penalties.

#### **SERVICE OUTSIDE ONTARIO**

65. It is anticipated that it might be necessary to serve this Statement of Claim on the defendant outside the province of Ontario and in that regard the plaintiffs plead and rely upon the provisions of Rule 17.02 of the Rules of Civil Procedure R.R.O. 1990 Reg. 194 as amended, and in particular:

- (a) Rule 17.02(f) in respect of a contract made in Ontario and/or breached in Ontario;
- (b) Rule 17.02(g) in respect of a tort committed in Ontario;
- (c) Rule 17.02(h) in respect of damages sustained in Ontario;
- (d) Rule 17.02(p) - a person carrying on business in Ontario.

**LEGISLATION**

66. The plaintiffs and class members plead and rely upon the provisions of:
- (a) the *CPA*;
  - (b) the *OCPA*;
  - (c) the *Courts of Justice Act* R.S.O. 1990, c. C.43, as amended;
  - (d) the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, as amended.

**PLACE OF TRIAL**

67. The plaintiffs propose that this action be tried in the City of Toronto in the province of Ontario.

May 28, 2009

**SCARFONE HAWKINS LLP**

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*CV-09-00 3796 Se-0008*

Stéphanie Graham and Angela Miceli  
Plaintiffs

and Imperial Parking Canada Corporation  
Defendant

Court File No:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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