Date: 20200708
Docket: CI 17-01-05956
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(Winnipeg Centre)
Indexed as: Ladco Company Limited v. The City of Winnipeg
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
LADCO COMPANY LIMITED,	)	Keith Ferbers
applicant,	)	for the applicant, Ladco
- and -	)	Company Limited
	)	
THE CITY OF WINNIPEG,	)	Mark Newman and
respondent,	)	Dayna Steinfeld
	)	for the applicants, Ridgewood
	)	West Land Corp. and Sage
APPLICATION UNDER: *The City of Winnipeg Charter*, S.M. 2002, c. 39; *The Constitution Act 1867* and *The Court of Queen's Bench Act* S.M. 1988-89 c.4	)	Creek Development Corporation
	)	
	)	Antoine Hacault and
	)	John Stefaniuk
	)	for the applicants, Urban
IN THE MATTER OF: The City of Winnipeg Charter Act, City of Winnipeg By-law 127/2016 and Section 92(2) of the *Constitution Act 1867*	)	Development Institute (Manitoba Division) and Manitoba Home Builders' Association
	)	
AND BETWEEN:	)	Brian Meronek Q.C., Orvel Currie, Jennifer Hanson and Erin Lawlor-Forsyth
RIDGEWOOD WEST LAND CORP., and SAGE CREEK DEVELOPMENT CORPORATION,	)	for the respondent
	)	
applicants,	)	
	)	
- and -	)	
	)	
THE CITY OF WINNIPEG,	)	
respondent,	)	Judgment delivered:
	)	July 8, 2020

IN THE MATTER OF: City of Winnipeg By-law 127/2016, as amended and passed on October 26, 2016, *The City of Winnipeg Charter* S.M. 2002, c. 39 and Subsection 92(2) and (9) of the *Constitution Act 1867*	)
URBAN DEVELOPMENT INSTITUTE (MANITOBA DIVISION) and MANITOBA HOME BUILDERS' ASSOCIATION INC.,	)
applicants,	)
- and -	)
THE CITY OF WINNIPEG,	)
respondent.	)

EDMOND J.

Introduction

[1] These three proceedings are applications for judicial review. On October 26, 2016, the City of Winnipeg ("City") council passed Impact Fee By-Law 127/2016 ("By-Law") and a related Resolution ("Resolution"). The By-Law and Resolution came into effect on May 1, 2017. The Impact Fee imposes a development cost charge of $54.73 per square metre of floor area, payable at the time that a developer or builder takes out a building permit or development permit ("Impact Fee"). The Impact Fee applies to the building of new residential properties in some, but not all, developments within the City.

[2] The Resolution addresses amendments respecting the implementation of the By-Law, including:

a) City council's decision to establish:

(i) Phases for the Impact Fee implementation plan;

(ii) An Impact Fee reserve fund ("Reserve Fund"); and

(iii) A working group to make recommendations to City council for rates applicable to other developments;

b) Revising the maps designating the areas of the City where the Impact Fee is imposed.

[3] Ladco Company Limited ("Ladco") filed its notice of application on January 25, 2017. Two related applications were filed, one by the Urban Development Institute (Manitoba Division) ("UDI") and the Manitoba Home Builders' Association Inc. ("MHBA") and the other by Ridgewood West Land Corp. ("Ridgewood") and Sage Creek Development Corporation ("Sage Creek") (collectively referred to as "Qualico"). The applications were heard together pursuant to a consent order granted by the court.

[4] The applicants seek to quash the By-Law and Resolution on the following grounds:

I. ***The City of Winnipeg Charter***, S.M. 2002, c. 39 (the "***Charter***") does not provide the authority or power to the City to enact the By-Law and Resolution, and as such, the By-Law and Resolution are *ultra vires* the City;

II. If the City does have statutory authority to pass the By-Law and Resolution, the Impact Fee imposed pursuant to the By-Law is a constitutionally invalid indirect tax and is not saved as a valid user fee or regulatory charge;

III. The imposition of the Impact Fee pursuant to the By-Law and Resolution discriminates against developers, builders and homeowners within certain developments who are required to pay the Impact Fee, whereas other

persons in different areas of the City are not required to pay the Impact Fee, such that the Impact Fee is discriminatory, arbitrary and invalid; and

IV. The developers, Ladco and Qualico submit that applying the Impact Fee within their developments is in breach of the development approval process and specific development agreements entered into with the City.

[5] The City submits that the Impact Fee is, in pith and substance, a regulatory charge and is validly imposed by the City pursuant to the ***Charter***.

[6] The By-Law was passed to impose an Impact Fee on new development pursuant to the authority granted by the ***Charter*** to establish, charge and collect fees respecting permits, licences, consents and approvals. (See ss. 209 and 210)

[7] The City submits that in reading the ***Charter*** as a whole, the City has the necessary authority to pass the By-Law and Resolution. Further, the Impact Fee is imposed as part of a Regulatory Scheme of the City which is comprised of a complex and detailed code of regulation relating to development including the ***Charter***, by-laws and policies as detailed in the affidavits filed on behalf of the applicants and the City.

[8] The applicants challenge the City's authority to impose the Impact Fee and submit it is an unconstitutional, illegal indirect tax. The City disagrees that it is an indirect tax and argues that the Impact Fee is ancillary to a valid regulatory scheme.

[9] Further, the applicants submit that the By-Law and Resolution are discriminatory and discrimination is not permitted unless expressly authorized by statute.

[10] The City denies that the imposition of the Impact Fee is discriminatory and submits that the ***Charter*** permits the imposition of fees in the manner contemplated in the By-Law and Resolution pursuant to s. 174(c).

[11] The Final ground of challenge to the By-Law and Resolution advanced by Ladco and Qualico, alleging breach of contract is contested and the City submits it is not an appropriate issue to be determined in an application. That issue is dealt with under the heading "Breach of Contract Issue".

The Evidence

[12] Numerous affidavits have been filed by the applicants and the respondent. The applicants filed 10 affidavits, in the form of initial supporting affidavits to the applications and affidavits responding to affidavit material filed by the City as follows:

i. Ladco's application in file No. CI 17-01-05956:

- Affidavit of Alan Borger, sworn February 27, 2018 ("Borger's first affidavit");
- Affidavit of Michael Carruthers sworn April 11, 2018 ("Carruthers' affidavit);
- Affidavit of Alan Borger sworn April 18, 2019 ("Borger's second affidavit");
- Affidavit of Eric Vogan, affirmed April 22, 2019 ("Vogan's April 2019 affidavit");
- Affidavit of Sara Varnes, sworn May 16, 2019; and

- Affidavit of Eric Vogan, affirmed May 2019 ("Vogan's May 2019 affidavit").

ii. Ridgewood and Sage Creek application CI 17-01-05957:

- Affidavit of Eric Vogan, affirmed December 1, 2017 ("Vogan's December 2017 affidavit");
- Affidavit of Ken Braun, sworn April 12, 2018 ("Braun affidavit"); and
- Affidavit of Tony Balaz, sworn April 12, 2018.

iii. UDI and MHBA application CI 17-01-05958:

- Affidavit of Eric Vogan affirmed November 29, 2017 (Vogan's November 2017 affidavit"); and
- Affidavit of Mike Moore, sworn November 28, 2017 ("Moore affidavit").

[13] The City filed the following affidavits responding to the affidavits filed by the applicants:

a) Affidavit of Valdene Lawson, sworn March 14, 2019 ("Lawson affidavit");

b) Affidavit of John Tyler Markowsky, affirmed March 15, 2019 ("Markowsky affidavit");

c) Affidavit of John Hughes, affirmed March 13, 2019 ("Hughes affidavit");

d) Affidavit of Yolanda Woods, affirmed May 17, 2019; and

e) Affidavit of Mike Stevens, sworn July 3, 2019 ("Stevens' affidavit").

[14] This application was case managed and the cross-examinations on affidavits were conducted in court. The following witnesses were cross-examined:

a) John Markowsky;

b) Valdene Lawson; and

c) John Hughes.

[15] The City gave notice that it wished to conduct cross-examinations, but prior to the scheduled hearings, elected not to proceed with cross-examinations. As a result, none of the applicants' deponents were cross-examined on their affidavits.

[16] On December 18, 2019, the City filed a notice of motion seeking an order striking out or expunging portions of the affidavits filed on behalf of the applicants as listed above.

[17] The City submits that portions of the affidavits filed on behalf of the applicants, including numerous exhibits, should be struck out or expunged from the Record on the grounds that the affidavits contain:

a) Argument, not facts;

b) Irrelevant evidence;

c) Hearsay and "statutorily prohibited hearsay";

d) Inadmissible opinion evidence;

e) Inadmissible third party evidence; and

f) Inadmissible recitals of third party evidence.

[18] The applicants contest the respondent's motion to strike out or expunge the evidence and it was agreed in advance of the hearing dates, that the preliminary issue regarding admissibility of the evidence would be considered on the first day of the hearing. The second and third days were reserved for submissions dealing with the merit of the applications and the grounds noted above.

[19] I propose to summarize the salient background facts and then address the preliminary issue regarding the admissibility of the disputed evidence. The admissible evidence will then be applied and considered in the context of the appropriate standard of review to decide the substantive issues raised in each of the applications.

Statement of Facts

[20] Many of the facts set forth in the numerous affidavits that have been filed are not contentious and deal with the history of the development process in Winnipeg, the governing legislation, by-laws and policies of the City. The facts that are relevant to the applications are summarized below.

The City Regulatory Scheme

[21] The regulatory scheme that governs planning, zoning and development in the City is comprised of the following legislation, by-laws passed and policies adopted by City council:

i. The ***Charter***;

ii. OurWinnipeg by-law (No. 67/2010) ("OurWinnipeg"), which is the City's development plan which was prepared by the City, approved by the Province of Manitoba and adopted in accordance with s. 224 of the ***Charter***. It replaced the City's former development plan which was known as PlanWinnipeg 2020 ("PlanWinnipeg");

iii. The Complete Communities Direction Strategy by-law (No. 68/2010) ("Complete Communities"), which is a secondary plan by-law passed

pursuant to s. 234(1) of the ***Charter***, which supplements and expands on OurWinnipeg;

iv. The Downtown Winnipeg Zoning by-law (No. 100/2004) and the City of Winnipeg Zoning by-law (No. 200/2006);

v. The Subdivision Standards by-law (No. 7500/99);

vi. The Development Agreement Parameters, which were adopted by City council on July 17, 2002 ("Parameters");

vii. Other secondary plan by-laws enacted and adopted by the City to regulate development within certain areas of the City, pursuant to s. 234(1) of the ***Charter***; and

viii. The Development Procedures by-law (No. 160/2011)

("Regulatory Scheme").

[22] The Regulatory Scheme establishes a detailed process whereby:

i. Developers can propose plan developments and work with City's administration respecting those developments;

ii. The City can evaluate, plan, consider and approve developments; and

iii. The City ensures the provision and funding of infrastructure and services in accordance with the Regulatory Scheme.

[23] Extensive evidence is filed by the applicants detailing the steps taken by the developers to comply with the ***Charter***, the Subdivision Standards by-law and the Parameters. In Borger's first affidavit at para. 13, he states that "the City and the developer share responsibility for regional and offsite infrastructure which benefits the

City at large." He reviews the costs that are the responsibility of the City and the costs that are offset and mitigated, particularly with regard to the development known as Waverley West. Mr. Borger outlines the significant contributions for offsite and regional infrastructure made by Ladco pursuant to the Regulatory Scheme and in accordance with the development agreements entered into with the City.

[24] Mr. Borger provides details of the cost/benefit studies that were undertaken in accordance with the Regulatory Scheme and as part of the planning and approval process. None of the cost/benefit studies or reports were attached to affidavits sworn or affirmed by the persons that prepared the reports. Instead, the cost/benefit studies or reports were attached to Mr. Borger's first affidavit and numerous references are made to the cost/benefit studies and reports.

[25] Mr. Eric Vogan in his affidavits, the Moore affidavit and the Carruthers affidavit all address the Regulatory Scheme, the development process in the City and reference cost/benefit studies or reports that were submitted as part of the development process.

[26] In July 2016, Hemson Consulting Ltd. ("Hemson") was retained by the City to provide consulting advice regarding the mechanisms and regulatory fees for financing growth in the City.

[27] On August 31, 2016, Hemson released two reports, a report entitled "*Review of Municipal Growth Financing Mechanisms*" (the "Growth Report") and a report entitled "*Determination of Regulatory Fees to Finance Growth: Technical Report*" ("Technical Report"). The Growth Report states, among other things, that the City has been unable to meet its capital needs, resulting in deterioration in the City's existing infrastructure and

a growing City-wide infrastructure deficit. The Growth Report expresses the opinion that growth in the City is causing the need for new development related infrastructure beyond the boundaries of new developments, and these infrastructure costs are not being paid for by those developments.

[28] The Technical Report undertook a review of the City's growth-related costs versus growth-related revenues, based on information and data provided by the City. After conducting a review of an established list of capital infrastructure projects, Hemson concluded that the cost of growth in the City is exceeding the revenue contributed by new development. In other words, Hemson concluded that "growth does not pay for growth".

[29] The applicants challenge Hemson's conclusions that "growth does not pay for growth" and new communities are "not paying for their fair share." In addition to criticism respecting the Growth Report, the applicants challenge the calculations advanced by Hemson in the Technical Report. The details of the numerous challenges to Hemson's calculations are outlined in the affidavits and are based in part on the cost/benefit studies or reports attached to the applicants' affidavits.

The Record

[30] The Growth Report and the Technical Report were submitted to City council by the City's administration. Mr. Tyler Markowsky, the City economist, prepared a report dated September 1, 2016 ("Administration Report") which was first submitted to the Executive Policy Committee of the City ("EPC") on September 21, 2016 and then to City council on October 26, 2016. The Administration Report is a comprehensive review of the purpose

of imposing the Impact Fee and reasons for recommending City council enact a draft by-law based on the Hemson reports. The Administration Report recommends the City impose an Impact Fee payable when a builder or developer applies for a building permit based on certain categories of development as follows:

i. Residential uses - $109.45 per square metre;

ii. Office - $226.51 per square metre;

iii. Commercial and retail - $152.91 per square metre;

iv. Public and institutional - $94.08 per square metre; and

v. Industrial - $61.16 per square metre.

[31] Certain exemptions and qualifications were proposed including three modifications:

i. City council establish a Reserve Fund that would be used to fund capital projects, whereas the Technical Report recommended that the dedicated reserves should be created for different types of capital projects;

ii. The City's Chief Financial Officer ("CFO") would manage the Reserve Fund and would determine which projects are growth related and which projects would be paid for out of the Reserve Fund; and

iii. The purpose of the Reserve Fund could be changed by a two-thirds vote of City council.

[32] The Administration Report states on page 20 that City council had asked the Province to amend the ***Charter*** to permit the City to charge development cost charges,

but "the Province advised the City that it had sufficient authority to recover the cost of growth."

[33] The Administration Report states on pages 14 and 20 that the City has the authority to pass the Impact Fee By-Law based on the following:

i. Sections 209 and 210 permit the City to charge fees for services and facilities (page 20);

ii. The powers of the City give broad authority to council to govern the City in whatever way council considers appropriate within the jurisdiction given to it under the ***Charter*** or other legislation and to enhance the ability of council to respond to present and future issues in the City (page 14); and

iii. More recent judicial interpretation of the powers of governments to impose fees has demonstrated a greater willingness to recognize the legitimacy of fees to defray the cost of comprehensive regulatory systems (page 20).

[34] The Administration Report also claims that the Impact Fee is consistent with the City's existing policy framework and the City's various by-laws and policies.

[35] The applicants challenge many aspects of the Administration Report which are outlined in the affidavits.

[36] On September 21, 2016, the EPC met and considered the Administration Report, the Growth Report and the Technical Report as well as a draft of the By-Law. The EPC heard a number of public submissions and the EPC laid the matter over to allow councillor Orlikow to proceed with further discussions with stakeholders, including City councillors, the industry and the Winnipeg Public Service.

[37] On October 14, 2016, the City issued an information sheet entitled "Amendments Proposed to Impact Fee Implementation – phased-in approach recommended to Executive Policy Committee" ("Information Sheet").

[38] The Information Sheet:

i. Outlined a three-year phase-in period;

ii. Provided that Impact Fees would be payable commencing May 1, 2017, but only at the rate equivalent to fifty percent of the amounts proposed by Hemson in the Technical Report and only for residential development in new communities and emerging communities as referenced in OurWinnipeg/Complete Communities;

iii. Created a working group to support and advise the City during the three-year phase-in period;

iv. Stated that commercial, office, industrial and institutional development would be exempt for two years; and

v. Stated that residential infill developments in downtown, mature and existing neighbourhoods in the City would be exempt for three years.

[39] The City released a document entitled "Backgrounder-Key Changes and Additions to Proposed Impact Fee Implementation" ("Backgrounder"). The Backgrounder confirmed the changes outlined in the Information Sheet. On October 14, 2016, the City released a phase 1 Impact Fee implementation plan which included a map designating the geographic areas where the Impact Fee would be imposed under the draft By-Law.

[40] On October 14, 2016, the City also released a draft version of the Impact Fee working group terms of reference.

[41] On October 19, 2016, EPC recommended that council concur with the Administration Report subject to a number of amendments and recommendations, including:

i. An Impact Fee working group be established;

ii. The Phase 1 map be adopted;

iii. The Impact Fee would be charged, but only in respect of residential development in new communities and emerging communities as defined in OurWinnipeg and Complete Communities ("New Communities and "Emerging Communities"), commencing May 1, 2017.

[42] At a meeting of City council held October 26, 2016, City council concurred in the recommendations of the EPC, passed the Resolution and enacted the By-Law.

[43] The Resolution enacts the By-Law and also provides:

i. The City create an Impact Fee working group to ensure long-term, ongoing collaboration and consultation with industry and community stakeholders to provide recommendations to the AD HOC Committee on Development Standards;

ii. With recommendations from the working group, City council would consider rates for implementation for the following:

- Non-residential uses in New communities and Emerging communities no later than November 1, 2018;

- All uses in all other areas of the City no earlier than November 1, 2019;

iii. For the creation of the Reserve Fund to hold all collected Impact Fees which would be managed by the City's CFO who is authorized to recommend capital projects that would be approved by council and paid for out of the Reserve Fund.

[44] The record that was before City council when the By-Law was passed ("Record") is comprised of:

i. the Administration Report and each of the attachments including:

- The Hemson Growth Report and Technical Report;
- Draft Impact Fee By-Law;

ii. Minutes of a meeting of EPC held October 19, 2016, including recommendations by way of Resolution from EPC;

iii. The By-Law and Resolution passed by City council (see Markowsky affidavit, Exhibit C, pages 12 - 28);

iv. The Record also includes as set out in the Moore affidavit the following:

- paragraph 32 (Ex. R) – Hemson Presentation to council;
- paragraph 33 (Ex. S) – Agenda and Administration Report;
- paragraph 36 (Ex. T) – UDI/MHBA presentation to council (Sept. 20/16);
- paragraph 44 (Ex. V) – Working Group Terms of Reference;
- paragraph 45 (Ex. W) – Information Sheet;
- paragraph 46 (Ex. X) – Backgrounder;

- paragraph 50 (Ex. Z) – EPC Motion;
- paragraph 51 (Ex. AA) – MHBA Presentation to EPC;
- paragraph 54 (Ex. CC) – MHBA Presentation to council.

v. The Record includes presentations that were made before council on behalf of the applicants or other interested parties and any reports that were filed and reviewed by City council.

The Developments and the Impact Fee

[45] Sage Creek is a residential development located east of Lagimodiere Boulevard in Winnipeg and consists of approximately 884 acres and has been developed in phases. Effective May 1, 2017, the Impact Fee was paid by developers/builders applying for building permits in Sage Creek. By the end of 2017, phases 1, 2, and 7A had largely been subdivided and serviced and according to Vogan's December 2017 affidavit, most of the necessary infrastructure both inside and outside the development had been completed. (See Vogan's December 2017 affidavit, at paras. 111, 113 and 117; and Exhibit 32)

[46] In August 2005, City council passed a secondary plan adopting the development of Sage Creek under an area structure plan. The Sage Creek development was subject to a number of development agreements. (See Vogan's December 2017 affidavit, at para. 112 and Exhibits 33 - 46)

[47] Ridgewood West is a development located in the south Charleswood area of Winnipeg and is comprised of approximately 180 acres and 813 new dwellings. Ridgewood West has been developed in two phases and it is also subject to a

development agreement. (See Vogan's December 2017 affidavit, at paras. 96, 97, 99, 100 and Exhibits 29 and 30)

[48] Ridgewood South is approximately 947 acres of land also located in the Charleswood area. On October 23, 2013, City council passed a secondary plan by-law approving the precinct plan for Ridgewood South. Ridgewood South was required to submit a cost benefit analysis of the precinct as a whole. The cost benefit analysis was performed by Deloitte in September 2012. (See Vogan's December 2017 affidavit, at paras. 89 - 91, 93 - 95 and 107, and Exhibits 25 and 26)

[49] Effective May 1, 2017, developers/builders applying for building permits to construct new homes in Ridgewood West and Ridgewood South were required to pay the Impact Fee.

[50] In 2003, Ladco commenced the development approval process for Waverley West. Waverley West consists of a number of neighbourhoods which are defined in the Borger affidavits. Effective May 1, 2017, Ladco/builders applying for building permits in certain new developments in Waverley West paid the Impact Fee.

[51] The development approval process for Waverley West involved approval of zoning, by-laws approving an area structure plan as well as neighbourhood plans and entering into development agreements. Ladco was required to submit cost/benefit studies which included a detailed listing of onsite and offsite infrastructure as well as commitments that Ladco made as part of the development approval process. (See Borger's first affidavit, at paras. 36 - 53)

[52] Section 259 of the ***Charter*** permits the City to impose conditions on an applicant for a re-zoning or subdivision. Development agreements are typically entered into with developers and the basic requirements for the development agreements are set out in the subdivision standards by-law and the general policy is set out in the Parameters. The development agreements attached as exhibits to the applicants' affidavits establish that a developer typically installs all infrastructure within the development, including roads, sewers, storm drainage, underground services, water mains, sanitary sewers, curbs, sidewalks, street lighting, traffic control devices and signage, required flood protection, landscaping and other amenities in the subdivision. The developers install the infrastructure at their own cost and may also be required to set aside land for public parks or public school sites. (See Vogan's December 2017 affidavit, at paras. 26, 38, 39, 102 and Exhibits 5 and 6)

[53] Development agreements impose requirements for the installation of infrastructure and amenities both within and outside of the development. Examples were provided in the affidavit material. (See Vogan's December 2017 affidavit, at paras. 103, 199 - 121)

[54] The evidence in Vogan's November 2017 affidavit, the Moore affidavit and the Braun affidavit establish that the Impact Fee is being passed on by developers/builders to their customers, the home buyers, who are bearing the cost of the Impact Fee.

[55] Although the Technical Report involved quantifying the cost of new development and deducting "grants/subsidies/other recoveries" no specific account was taken of the

developer contributions to offsite infrastructure or the fact that utility rates cover the cost associated with water and waste infrastructure.

[56] At page 29 of the Technical Report it states:

> VI. Administration of Regulatory Fees
>
> The following policies and practices should be considered when implementing the regulatory fee. The application of fees in other municipalities is described in more detail in the companion report entitled "Review of Municipal Growth Financing Mechanisms.
>
> Service Responsibility
>
> It is recommended that the City review its development agreement parameters to ensure that any capital projects recovered through a regulatory fee are also not required to be emplaced and funded by developers as condition of planning approval.
>
> Notwithstanding the above, the City may wish to enter into credit agreements with developers so that a developer receives a credit from a regulatory fee for regulatory fee infrastructure constructed on the municipality's behalf.

[57] The cross-examination of Mr. Hughes and other evidence establishes that no credit/rebates were given to developers for offsite or regional infrastructure and no adjustment was made to utility rates in calculating the regulatory charge recommended in the Technical Report. Mr. Hughes acknowledged that to the extent development agreement parameters address offsite infrastructure, the City should take that into account to be fair in calculating the regulatory charge.

[58] Mr. Markowsky acknowledged during cross-examination that the City's water and waste utilities are profitable and that there was a dividend in 2016 which financed the City budget. He confirmed that water and waste utility fees to customers also take into account the capital and operating costs.

[59] Since May 1, 2017, the Impact Fee has been charged to developers/builders within the City defined as New Communities and Emerging Communities respecting residential development.

[60] At paras. 96 - 106 of Borger's first affidavit, Mr. Borger explains in detail the notion of New Communities and Emerging Communities from his perspective.

[61] The Growth Report and Technical Report make no reference to New Communities and Emerging Communities in residential development. The Technical Report recommends imposing a City-wide Impact Fee based on categories of development, including: residential, office, commercial and retail, public and institutional and industrial.

[62] The Lawson affidavit addresses the issue of the Impact Fee applying to New Communities and Emerging Communities (at para. 65). She acknowledged during cross-examination that the maps attached to the By-Law and Resolution depict the areas of the City where the Impact Fee is imposed. She accepted that if you compare a builder or homeowner on one side of any boundary depicted on the maps with a builder or homeowner on the other side (not covered on the maps), even though they may both be located in recent communities, new construction on a property in the area shown on the maps would be subject to the Impact Fee and new construction on a property on the other side of the boundary would not. (See transcript of proceedings, cross-examination of Ms. Lawson, dated October 7, 2019 at p. 28)

[63] The City economist, Mr. Markowsky, states that prior to the enactment of the By-Law, the City relied primarily on property tax revenues to recover the costs associated with growth to the City as a whole. (See Markowsky affidavit, at para. 9,)

[64] Mr. Markowsky states that the City decided to implement the Impact Fee in phases. Phase 1 imposes the Impact Fee on new residential development in New Communities and Emerging Communities effective May 1, 2017. In phase 2, City council was to consider implementing the Impact Fee rates respecting the remaining four categories of development in New Communities and Emerging Communities no earlier than November 1, 2018. The third phase of implementation was for City council to consider implementing the Impact Fee in all other areas of the City no earlier than November 1, 2019. As of the date of the hearing, the City did not proceed with implementation of phases 2 and 3.

[65] Mr. Markowsky is familiar with the various options available to the City to generate revenue and states that "[t]he Impact Fee places more of the burden of costs associated with growth on those who cause the need for, or benefit from, the Regulatory Scheme." (See Markowsky affidavit, at para. 20) He also states that "[t]he projected revenues associated with the Regulatory Scheme do not exceed the projected costs associated with growth to the City as a whole." (See Markowsky affidavit, at para. 23)

[66] Mr. Markowsky reviewed the cost/benefit reports and studies referred to in the applicants' affidavits and challenges the conclusions on numerous grounds.

[67] Mr. Hughes in his affidavit, explains the process that Hemson used in terms of the framework, process and analysis undertaken. He describes the two meanings of the phrase "growth pays for growth" as follows:

> 18. The first meaning **(the "First Meaning")** describes a broad municipal finance framework and practice under which; as growth occurs, sufficient revenues are raised through utility rates and municipal taxation to pay for the first round capital infrastructure costs, the annual operating costs and the costs of periodic infrastructure replacement without any impact on tax and utility rates. The second and narrower meaning **(the "Second Meaning")** of the term "growth pays for

growth" referred to in Section II Part C.1 of the First Report is the concept of new development paying for first round capital infrastructure attributable to growth.

[68] In the Hughes affidavit, he states that the process of calculating the cost of an infrastructure project attributable to growth is complicated because attributions of infrastructure costs to growth need to take into account timeframes during which growth will occur, the types of development expected and expected rates of usage of different types of development. Mr. Hughes acknowledges that the allocation of benefit may be difficult to quantify, especially if projects are being proposed for construction in 20 to 30 years.

[69] The Technical Report recommends that forecasts should be re-examined and revised as necessary, every three to five years. Further, Mr. Hughes agrees that the Technical Report calculated and intended the regulatory fees be applied on a City-wide basis and not in respect of particular projects or services benefiting specific developments.

Preliminary Issue/Motion to Strike Affidavit Evidence

[70] The City seeks to strike out or expunge the following number of paragraphs, or portions thereof, and exhibits:

	Paragraphs sought to be expunged	**Exhibits sought to be expunged**
CI 17-01-05956		
Borger's first affidavit	7 - 25, 27 - 53, 58 - 81, 83 - 85, 88, 105 - 131	E-N, Q, T and Z
Carruthers' affidavit	5, 6 and 8	None

Borger's second affidavit	3, 5(b), 7, 9 - 14, 17, 18, 20, 22 - 28	A-E, G-N
Vogan's April 2019 affidavit	5 - 8	None
CI 17-01-05957		
Vogan's December 2017 affidavit	32, 44 - 46, 71 - 74, 78 - 86, 89 – 95, 98, 103 - 106, 114, 118, 121 - 123, 125, 127, 129, 130 and portions of paras. 54, 69, 73, 84	8A, 24, 24B, 26 - 28, 33 and 34
Tony Balaz's affidavit of April 12, 2018	8, 12	1
Braun's affidavit of April 12, 2018	8, 12	1
CI 17-01-05958		
Moore's affidavit of November 28, 2017	10, 12, 16 - 22, 30, 36, 39, 43, 47, 55, 62 - 67 and a portion of para. 14	C-I, O, T, U, GG - OO
Vogan's affidavit of November 2017	38, 53 - 59, 75 - 77, 81, 87, 88, 92, 93, 96 - 110, and a portion of para. 86	L - Q, T, W, DD, EE – LL, NN, OO

[71] Due to the volume of the challenged portions of the affidavits, I do not propose to review each paragraph in my reasons for decision. Instead, I attach as Schedule "A" my rulings regarding the impugned paragraphs and exhibits. I start my review with the governing law and legal principles applicable to motions to strike or expunge affidavit evidence.

The Queen's Bench Rules and General Principles

[72] Queen's Bench Rule 14.05 permits a party to commence an application by way of notice of application and portions of the applicable rules provide:

> **Proceedings which may be commenced by application**
> 14.05(2) A proceeding may be commenced by application,
> (a) where authorized by these rules;

(b) where a statute authorizes an application, appeal or motion to the court and does not require the commencement of an action;

(c) . . . .

(iv) the determination of rights which depend upon the interpretation of a deed, will, agreement, contract or other instrument, or upon the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution,

. . . .

(d) in respect of any matter where it is unlikely there will be any material facts in dispute.

Injunction, declaration, receiver

14.05(3) Where the relief claimed in a proceeding includes an injunction, declaration or the appointment of a receiver, the proceedings shall be commenced by action; but the court may also grant such relief where it is ancillary to relief claimed in a proceeding properly commenced by application.

[73] Queen's Bench Rules 38.01 and 38.09 deal with a judge's discretion on hearing an application under Rule 14.05 as follows:

38.01 This Rule applies to all proceedings under rule 14.05 which are commenced by a notice of application.

38.09 On hearing an application, a judge may,

(a) allow or dismiss the application or adjourn the hearing, with or without terms; or

(b) where satisfied that there is a substantial dispute of fact, direct that the application proceed to trial or direct the trial of a particular issue or issues and, in either case, give such directions and impose such terms as may be just, subject to which the proceeding shall thereafter be treated as an action.

[74] The Queen's Bench Rules also address the content of affidavits on applications as follows:

Contents

4.07(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

. . . . .

Contents – applications

39.01(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[75] Queen's Bench Rule 25.11(1) governs a motion to strike or have affidavit evidence expunged. This Rule provides:

25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious;

(c) is an abuse of the process of the court; or

(d) does not disclose a reasonable cause of action or defence.

[76] The proper interpretation of Queen's Bench Rule 39.01(5) is to admit evidence that is otherwise inadmissible under Queen's Bench Rule 4.07(2). Rule 39.01(5) is not a freestanding exclusionary Rule to challenge otherwise admissible evidence. (See ***Tran Estate v. Mosleneko***, 2017 MBCA 47, 413 D.L.R. (4th) 36 (QL)) The first step is to determine whether the deponent could give the evidence set forth in the affidavit as a witness in court. While hearsay evidence is presumptively inadmissible, there are exceptions to the hearsay rule and the principled approach, when applied, may permit hearsay evidence to be admissible.

[77] Further, Rule 39.01(5) permits hearsay evidence in an affidavit filed in support of an application when the facts are not contentious and if the source of the information

and the fact of the belief are specified in the affidavit. (See ***Manitoba Hydro Electric Board v. John Inglis Co.***, [1996] 112 Man.R. (2d) 174, [1996] M.J. No. 409)

[78] In ***Tran Estate***, the Court of Appeal dealt with what is a contentious fact for the purpose of interpreting Rule 39.01(5). In essence, the court found that a contentious fact is one that is likely to cause an argument, be disputed or raise a controversy and counsel's mere objection to a fact is not sufficient to make it contentious. Unless a fact is obviously contentious, opposing counsel must establish the fact is contentious through either cross-examination on the affidavit or filing responding affidavit material. (See ***Tran Estate***, at para. 76)

[79] The general principles applicable to affidavit evidence establish that an affidavit should not contain:

a) Opinions of the deponent, unless the person is qualified as an expert and is expressing an opinion within his or her area of expertise;

b) Conclusions of fact or law;

c) Legal argument; and

d) Statements that are not relevant to the facts and matters at issue in the application.

(See ***Tymkin v. Winnipeg (City) Police Service***, 2001 MBQB 246, 158 Man.R. (2d) 204 (QL), at para. 11 and ***Tymkin v. Ewatski***, 2002 MBCA 91, 166 Man.R. (2d) 159)

Expert Evidence

Gatekeeper Function

[80] Expert opinion evidence is admissible providing it is filed in accordance with the Queen's Bench Rules and specifically Rule 53.03. To determine admissibility, the onus is on the party who wishes to adduce expert opinion evidence to satisfy admissibility criteria established in the leading authorities. (See ***R. v. Mohan***, [1994] 2 S.C.R. 9 (S.C.C.) and ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, [2015] 2 S.C.R. 182 (QL)). In order for the expert opinion evidence to be admissible, each of the following factors must be met:

a) the evidence must be relevant to some issue in the application;

b) the evidence must be necessary to assist the trier of fact;

c) the evidence does not contravene an exclusionary rule; and

d) the witness is a properly qualified expert.

(See ***Mohan*** and *The Law of Evidence in Canada* 4th ed (Canada: LexisNexis, 2014) at para. 12.39)

[81] Expert witnesses have a duty to give fair, objective and non-partisan opinion evidence. An expert witness who is unable or unwilling to fulfill this duty is not properly qualified to perform the role of an expert. Exclusion at the threshold stage of analysis should only occur in very clear cases (See ***White Burgess Langille Inman***, at para. 49).

[82] The City filed affidavits by experts, Mr. John Hughes and Mr. Mike Stevens attaching expert reports and their respective curriculum vitae. In performing the

gatekeeper function, I accept that they both met the ***Mohan*** framework and as a result they were qualified as experts to give opinion evidence within their respective areas of expertise.

[83] In performing the gatekeeper analysis, I must also consider the ability and willingness of the experts to give their evidence in a fair, objective and non-partisan manner in accordance with the additional threshold requirement outlined in ***White Burgess Langille Inman***. I am satisfied that both experts met the required criteria such that their reports should not be excluded. The analysis concerning Mr. Hughes is somewhat unique in that he was retained by the City for the specific purpose of providing consulting services regarding mechanisms and regulatory fees for financing growth. In my view, his evidence and opinions should not be excluded at the threshold stage because the evidence does not satisfy me that this is a very clear case in which the expert is unable or unwilling to meet his primary duty to the court.

[84] As established in ***White Burgess Langille Inman***, I am still required to take into account any evidence that the expert may not be objective and impartial, in the overall weighing of the costs and benefits of receiving the evidence. It is also important to recognize that the By-Law and Resolution were enacted, at least in part, based upon the Hemson reports and accordingly, the Growth Report and the Technical Report are part of the Record that I must review in order to determine the issues before the court. The bottom line is that I accept Mr. Hughes was able and willing to carry out his primary duty to the court and his retainer and relationship with the City does not lead to the conclusion

that his evidence should be excluded. Nevertheless, it is a factor I considered in the overall weighing of the costs and benefits of receiving his opinion evidence.

Expert Report Attached to Affidavits of Non-expert

[85] There are numerous authorities in Manitoba and Ontario that stand for the proposition that it is improper to introduce expert evidence by attaching an expert report to the affidavit of a non-expert. (See ***Bartmanovich v. Manitoba***, 2001 MBQB 190, 161 Man.R. (2d) 1; ***Deslauriers v. Bowen***, [1994] O.J. No. 2198, ***Lexogest Inc. v. Manitoba (Attorney General)***, [1990] M.J. No. 353; ***Dutton v. Hospitality Equity Corp.***, [1994] O.J. No. 1071; ***Manitoba Hydro Electric Board***; ***Towers Ltd. v. Quinton's Cleaners Ltd.***, 2009 MBQB 34, 237 Man.R. (2d) 100; ***Weber v. Yee et al.***, 2001 MBQB 169, 158 Man. R. (2d) 1 at paras. 15-17; ***Dutton v. Hospitality Equity Corp.*** (1994), 26 C.P.C. (3d) 209 at 212 (Ont. Ct. J. (Gen. Div.)); ***Riverside Developments Bobcaygeon Ltd. v. Bobcaygeon (Village)***, [2001] O.J. No. 2968 (Sup. Ct. J.) (QL); ***Ewaskiw v. Zellers Inc.*** (1998), 40 O.R. (3d) 795 (Gen. Div.); ***Beland v. Kieffer***, [2002] O.J. No. 709 (Sup. Ct. J.) (QL); ***D.W. v. D.W.***, [1998] O.J. No. 2927 (Gen. Div.) (QL); ***Mugford v. Canada Life Assurance Co.***, [1998] O.J. No. 1761 (Gen. Div.) (QL) and ***Berscheid v. Federated Co-operatives Ltd.***, 2017 MBQB 25, [2017] M.J. No. 31)

[86] In essence, the authorities establish that expert reports attached as exhibits to an affidavit of a non-expert are inadmissible as they constitute hearsay evidence and the opinion expressed by the expert cannot be tested by cross-examination. Therefore, it is unfair and prejudicial to find that such evidence is admissible.

Litigant Experts

[87] While the general rule is that a witness may not express an opinion unless qualified to do so, the court may receive a lay witness's opinion in limited circumstances. (***R. v. Graat***, [1982] 2 S.C.R. 819 (S.C.C.)) A lay witness's opinion may be admissible if:

a) the witness has personal knowledge of the observed facts;

b) the witness is in a better position than the trier of fact to draw the inference;

c) the witness has the necessary experiential capacity to draw the inference or form the opinion;

d) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts that she or he is testifying about. (See ***Graat***; Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* 4th ed (Canada: LexisNexis, 2014) at para. 12.14)

[88] A number of the deponents of affidavits filed on behalf of the applicants have been affirmed by witnesses that have extensive experience in land development in the City. For example, Mr. Borger, the President of Ladco, oversees the operations of Ladco and has extensive experience in all aspects of land development, including land assembly and the planning and development of master-planned communities. He has been involved in the land development of numerous residential subdivisions in the City including the ones at issue in this case. He is a practicing lawyer who has extensive experience in land and property development over the last 25 years.

[89] Mr. Vogan is the Vice President Community Development of Qualico, which is an integrated real estate business primarily operating in Western Canada with regional offices in Winnipeg, Regina, Saskatoon, Edmonton, Vancouver, and Austin, Texas. Mr. Vogan has worked with Qualico since 1979 and has managed Qualico's land development operations in the Winnipeg region since 1986. Since 1986, Qualico has developed land for approximately 12,000 homes in the Winnipeg region. He is the President of UDI. UDI is an industry body formed in 1962 to represent the professional development industry and for the purpose of sharing of knowledge and information. He too has extensive experience in land development as well as the legislative scheme governing municipal planning and land development in the City.

[90] Mr. Michael ("Mike") Moore, is the former president of the MHBA. Numerous developers are members of the MHBA and the MHBA has over 200 associate members that are suppliers of goods and services to the residential construction industry. The Moore affidavit describes his experience advocating with the City on behalf of home builders.

[91] Mr. Michael Carruthers has worked at Ladco in its land development division for 12 years and is currently manager of land development. He is a member of the MHBA and was President of UDI from 2010 to 2015. He has a Master's Degree in Community and Regional Planning and has experience working in City planning in the City's planning property and development department. As well, he was a planning consultant at the planning and engineering firm ND LEA. His affidavit confirms that he has been extensively

involved in the planning and development of Waverley West, including Ladco's development of South Pointe and Prairie Pointe.

[92] I have no hesitation in finding that each of these witnesses who are officers and employees of the corporate litigants and representatives of the organizations, have special expertise and qualifications to deal with the matters that are at issue in these proceedings. While these witnesses are not independent experts within the meaning of ***Mohan***, they are, nevertheless, experts who would fall into the category of witnesses that have the necessary qualifications in order to provide the court with an opinion. (See ***Kon Construction Ltd. v. Terranova Developments Ltd.***, 2015 ABCA 249, 20 Alta. L.R. (6th) 85 and ***SemCAMS ULC v. Blaze Energy Ltd.***, 2016 ABCA 113, [2016] A.J. No. 374)

[93] Unlike an independent expert retained by a party to assist the court in matters beyond the knowledge and expertise of the court, litigant experts need not be "qualified" to give opinion evidence. In ***Kon***, the Alberta Court of Appeal dealt with the distinction as follows at paras. 38, 40 and 41:

> **38** The final category of litigant-witnesses with expertise does not fall neatly into the ***White Burgess*** and ***Mohan*** analysis. First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in ***White Burgess***. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.
>
> . . .
>
> **40** Secondly, it is generally not necessary to qualify the last class of witnesses with expertise as "experts" under the ***Mohan*** procedure. As parties to the litigation they are entitled to testify, and generally they will have the most direct and relevant evidence about the issues. The truth finding function of a trial requires that their evidence be received. Since they were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise. Their opinions explain why they acted as they did. Since these witnesses are available

> for pre-trial questioning, formal advance notice of their opinions or their evidence is not needed.
>
> **41** The issues are neatly illustrated by ***Diotte v Canada***, 2008 TCC 244, 2008 DTC 4558, where the valuation of certain shares was in issue. Diotte was both the taxpayer involved in the litigation, one of the persons who had initially set the valuation of the shares, and a long-time employee of the securities industry. The attempt to have him qualified as an expert witness was summarily dismissed at para. 28, because ". . . it is unreasonable to believe that the Appellant Mr. Diotte could have offered an entirely objective opinion uninfluenced by his personal interest". Nevertheless, he was allowed to give evidence on how he set the value of the shares, and why that valuation was appropriate. His interest in the outcome of the case was not a barrier to his testimony. This evidence was, presumably, given by him as a lay witness, even though it clearly engaged his opinions about the value of the shares. Diotte was a witness with expertise, who was involved in the underlying events, and so was permitted to give evidence arising from his expertise even though he was not qualified as an "expert" under the ***Mohan*** test.

[94] It is clear that the applicants are not impartial and unbiased as a traditional expert must be as set forth in the ***White Burgess Langille Inman*** decision. Following this reasoning, there is no need to engage in a ***Mohan*** type of analysis to "qualify" these witnesses as experts to receive their evidence. Generally, such witnesses are allowed to give their opinion to explain their actions in relation to the underlying events to permit the court to decide the matters at issue. These witnesses each have extensive experience that permits them to explain the development and regulatory process and their opinions are admissible to the extent that the opinions are relevant to one or more of the issues that must be determined. (See ***Kon***; ***Kaul v. Canada***, 2017 TCC 55, 2017 D.T.C. 1059 (QL), and ***Hassouna v. Canada (Minister of Citizenship and Immigration***, 2016 FC 1189, [2016] F.C.J. No. 1519 (QL))

[95] The same reasoning applies to the respondent's witnesses. Mr. Markowsky is the City economist and has experience with the City planning process, City budget and the

cost of operating and maintaining City facilities. He expresses opinions in his affidavit which are admissible to the extent that they are made within his area of expertise.

[96] Ms. Lawson is a Senior Planner in the Planning, Property and Development Department of the City and prior to that she held the positions of Manager of Regulatory Reform for six years and Manager of Planning and Land Use with the City. She is a registered Professional Planner with the Manitoba Professional Planners Institute. She has held the positon of director on the board of the Canadian Institute of Planners and was the president of the Manitoba Professional Planners Institute. In my view, she is qualified to explain and express opinions regarding the Regulatory Scheme and development process in the City.

The Record and Extrinsic Evidence

[97] Applications for judicial review are, in most cases, determined on the basis of the "record" that was before the administrative decision-maker when it made the impugned decision. Extrinsic evidence is permitted, but only in exceptional cases. Principled exceptions to the general inadmissibility of extrinsic evidence include evidence to establish:

i. that the Record is incomplete or contains gaps;

ii. procedural unfairness, jurisdictional error or bad faith; and

iii. the existence, the scope and the content of Crown's duty to consult. (See ***Manitoba Metis Federation Inc. v. Manitoba (Premier)***, 2019 MBQB 118, [2019] M.J. No. 216; ***Pimicikamak et al. v. Her Majesty the Queen in Right of Manitoba et al.***, 2014 MBQB 143, 308 Man.R. (2d)

49, at paras. 52-54 (***Pimicikamak QB***); ***Pimicikamak et al. v. Manitoba***, 2018 MBCA 49, [2018] M.J. No. 113, at para. 71 (leave to appeal to SCC refused) (***Pimicikamak CA***) and ***Sowemimo v. College of Physicians & Surgeons of Manitoba***, 2013 MBQB 42, 287 Man.R. (2d) 270, at para. 54)

[98] The reason for the rule that extrinsic evidence on judicial review is only permitted in exceptional circumstances is to ensure that the review is conducted on the evidence that was before the decision-maker, in this case, City council. (See ***AOV Adults Only Video Ltd v. Manitoba (Labour Board)***, 2003 MBCA 81, 177 Man.R. (2d) 56 (QL), at para. 34; ***Town of Grand Bay-Westfield v. The Canadian Union of Public Employees, Local 2404***, 2006 NBCA 115, 308 N.B.R. (2d) 205, at para. 4; ***Sowemimo***, at paras. 53-55 and ***Albu v. The University of British Columbia***, 2015 BCCA 41, 69 B.C.L.R. (5th) 222, at para. 36)

Legislative Facts

[99] The affidavits relied upon by the applicants include numerous references to the ***Charter***, by-laws and policies relevant to development in the City. The documents identified in paragraph 21 above, address the development process in the City. Ms. Lawson's affidavit addresses numerous by-laws and policies that impact development in the City.

[100] In litigation dealing with constitutional questions, the courts have drawn a distinction between "adjudicative facts" and "legislative facts" (See ***Danson v. Ontario (Attorney General)***, [1990] 2 S.C.R. 1086 (S.C.C.), at paras. 27 and 28).

[101] Legislative facts can be introduced by affidavit, although in most cases, legislative facts can be introduced by way of judicial notice.

[102] Binnie J. noted in ***Public School Boards Assn. of Alberta v. Alberta (Attorney General)***, 2000 SCC 2, [2000] 1 S.C.R. 44 (QL), at para. 5:

> **5** The usual vehicle for reception of legislative fact is judicial notice, which requires that the "facts" be so notorious or uncontroversial that evidence of their existence is unnecessary. Legislative fact may also be adduced through witnesses. The concept of "legislative fact" does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested. In this application, PSBAA is endeavouring to adduce apparently controversial material without the intermediary of a knowledgeable witness. There is a supporting "information and belief" affidavit from a member of the Board of Trustees of the Edmonton School District No. 7, who essentially identifies the various categories of fresh evidence based on information provided by one of his counsel on this appeal. The deponent does not claim in his affidavit either relevant expertise or relevant personal knowledge.

Analysis and Decision on Preliminary Issue

[103] Extensive briefs have been filed by the parties addressing what the respondent submits is the impugned evidence that should be struck out or expunged from the Record. Applying the legal principles outlined above and the legal principles applicable to the admissibility of extrinsic evidence on an application for judicial review, I propose to review my general findings that apply to the impugned evidence. Specific rulings are detailed in Schedule "A". My findings are summarized as follows:

a) I am not satisfied that the Record is incomplete or contains gaps which may permit extrinsic evidence to be received by the court. The first issue to be determined is whether the By-Law and Resolution are *ultra vires* the City. Determining whether the City has the legislative authority to enact the By-

Law and Resolution can be decided on the basis of the Record and an interpretation of the ***Charter***. In my view, extrinsic evidence is not required.

b) However, extrinsic evidence is permitted to decide the other issues before the court, namely: whether the By-Law and Resolution create an indirect tax which is beyond the constitutional authority of the City or whether the By-Law and Resolution impose a fee that constitutes a valid regulatory charge; whether enacting the By-Law and Resolution breach the development agreements entered into between the applicants and the City; and/or whether enacting the By-Law and Resolution and imposing the Impact Fee is discriminatory and invalid. In my view, an evidentiary foundation is necessary and evidence is required to decide these issues.

c) The applicants' deponents reference numerous extracts of and attach as exhibits to their affidavits, copies of the relevant City by-laws and legislation including quotes from the ***Charter***, relevant by-laws and City policies including the Parameters. Copies of the legislation including references to the by-laws may not be required as the court may take judicial notice of the legislative enactments and relevant by-laws. The legislative enactments including the relevant by-laws could simply have been attached to the books of authorities filed by the parties. Legislative facts may include reference to Hansard or facts that may be relevant to decide the constitutional issue. The references in the affidavits to legislative enactments, relevant by-laws

and the history of the Regulatory Scheme provide context and background regarding the Regulatory Scheme and this evidence provides assistance to the court to decide some of the matters at issue. I agree that the interpretations given to the various by-laws and the Regulatory Scheme is argument which more appropriately ought to be advanced in the briefs. However, I considered much of this information and the background provided by the deponents including the history of the development approval process to be relevant. I recognize that the interpretations of the legislation, by-laws and policies were given from the perspective of developers, in the case of Ladco and Qualico, and from the perspective of UDI and MHBA. In the affidavits filed by the City, Mr. Markowsky and Ms. Lawson replied to most of the positions advanced by the applicants' deponents. In any event, it is the court that must interpret the applicable legislation in accordance with principles of statutory interpretation described below. In my view, it is unnecessary to strike out or expunge the numerous paragraphs dealing with the relevant by-laws, legislation, policies dealing with the development process and the Regulatory Scheme. This evidence is admissible subject to findings as to the appropriate weight.

d) The cost/benefit reports and third party expert reports that were attached to the affidavits relied upon by the applicants' deponents, contain inadmissible opinion evidence and the third party reports are only

admissible for a limited purpose as outlined below. The third party reports include:

Attached to the Moore affidavit sworn November 28, 2017:

i. Presentation prepared by MNP LLP to Winnipeg City council members based on the UDI/MHBA presentation, attached as Exhibit "U";

ii. City of Brandon Development Charge Background Study, attached as Exhibit "HH";

iii. Brandon presentation on the Financial Implications of Development Charges, attached as Exhibit "JJ";

iv. City of Brandon Data collected from other municipalities, attached as Exhibit "KK";

v. City of Brandon presentation dated November 24, 2016, attached as Exhibit "LL";

vi. Brandon Local Service Policy presentation dated November 24, 2016, attached as Exhibit "MM";

vii. Public Consultation Summary – City of Brandon Development Charges Project, attached as Exhibit "NN";

viii. Report on second reading of Development Charge by-law No. 7175 on October 16, 2017, attached as Exhibit "OO";

Attached to Vogan's November 2017 affidavit:

ix. Information presented at a City of Toronto Corporate Finance Division industry stakeholder consultation meeting held June 5, 2017, attached as Exhibit "P";

x. Information presented to a City of Toronto Corporate Finance Division Industry Stakeholder Consultation Meeting held July 10, 2017, attached as Exhibit "Q";

xi. Cost Benefit Analysis Report Waverley West Plan Winnipeg Amendment City of Winnipeg Financial Cost – Benefit Analysis, dated July 2004 (Revisions December 2004) prepared by ND LEA, attached as Exhibit "HH";

Attached to Vogan's December 2017 affidavit:

xii. PowerPoint Presentation by MNP LLP (MNP Presentation) on October 11, 2016, attached as Exhibit "24A";

xiii. Cost/Benefit Analysis of the precinct as a whole performed by Deloitte dated September 18, 2012, "Qualico Communities Cost/Benefit Analysis: Ridgewood Community" (Deloitte Analysis), attached as Exhibit "26";

xiv. Traffic Impact Assessment performed by Stantec (Traffic Assessment), attached as Exhibit "27";

xv. Background study of the Servicing Infrastructure performed by Stantec (Servicing Infrastructure), attached as Exhibit "28";

xvi. Background Report on Waste, Wastewater, Stormwater and Transportation Services prepared by SEG Engineering (Sage Creek Servicing Report), attached as Exhibit "33";

Attached to Borger's first affidavit:

xvii. ND LEA Report dated December 2003, attached as Exhibit "J";

xviii. Waverley West Plan Winnipeg Amendment City of Winnipeg Financial Cost-Benefit Analysis (Cost Benefit Report), prepared by ND LEA, attached as Exhibit "K";

xix. Waverley West Proposed Plan Winnipeg Amendment City of Winnipeg Financial Impact Analysis (City's Cost Benefit Report), dated December 10, 2004, attached as Exhibit "L";

xx. Report prepared by MMM Group Limited (successor to ND LEA) "2013 Waverley West Cost Benefit Analysis Updated" dated December 2013 (Cost Benefit Update), attached as Exhibit "M";

xxi. Letter report dated February 5, 2016 (the Deloitte Update), attached as Exhibit "N".

These reports are not admissible to prove the opinions expressed or the truth of the calculations in the expert studies or reports. Further, these

reports cannot be received in evidence to determine or prove whether "growth pays for growth". In order to be admissible for that purpose the expert reports ought to have been attached to affidavits sworn/affirmed by each of the experts and the court would be required to apply the ***Mohan*** test to assess whether the reports are admissible. If the experts were qualified and the evidence was determined to be admissible, the various experts would then have been available for cross-examination by the respondent. That did not occur in this case. The expert reports are admissible for a limited purpose only.

e) Mr. Borger gives evidence regarding the cost/benefit studies in paras. 36 - 53 of his affidavit. In my view, this evidence is admissible to the extent that the studies were required in order to comply with the City's by-laws (PlanWinnipeg/OurWinnipeg and Complete Communities). The evidence is relevant to understand the development approval process which was required by the City. The cost/benefit studies were received by the City and were relied upon for the purpose of entering into the development agreements. This evidence has relevance to the discrimination and the constitutional issue. However, the actual opinions including the mathematical calculations and conclusions made in the expert reports are not admissible. I note the applicants took the position in their briefs and during submissions in court that the expert reports were not being tendered to prove the truth of the opinions. Instead, the applicants submit, and I

agree, that the expert reports are admissible for a limited purpose because there is no dispute the reports were submitted to the City as required pursuant to the City by-laws and policies. The applicants' evidence is admissible to explain how the cost/benefit studies/expert reports were used in the development approval process.

f) Since the cost/benefit studies were required, and were in the possession of the City, Hemson could have been asked to evaluate the cost/benefit studies and take the studies into account when Hemson prepared the Growth Report and the Technical Report. It was established during cross-examination that the cost/benefit studies or reports were not evaluated by Hemson. Mr. Hughes expressed the opinion that the studies were not relevant to his opinion.

g) The City submits that all opinions expressed by the applicants' deponents should be struck out or expunged. In my view, some of the opinions expressed by the applicants' deponents are admissible providing the opinions are relevant and expressed within their area of expertise as a "litigant expert" to explain their understanding of the development process, the Regulatory Scheme and why they did certain things or had a certain understanding respecting the process from an applicants' perspective. So too are the opinions expressed in the affidavits filed by the City by Mr. Markowsky and Ms. Lawson. In my view, the opinions that are admissible

have some relevance to decide one, or more, or all of the issues raised in the applications.

h) The applicants' deponents comment on and provide opinions respecting the Growth Report and the Technical Report. Both reports were submitted to City council together with the Administration Report. To the extent that Mr. Borger and other deponents of the applicants' affidavits have expertise regarding the development process, they may express their opinion on the reasons why the Growth Report and Technical Report contain errors or omissions. For example, Mr. Borger is familiar with all aspects of land development and has personal knowledge and experience in working within the Regulatory Scheme and the matters and issues discussed in the Growth Report and the Technical Report. While I am satisfied that as a litigation expert he can provide an opinion such that it is admissible, the weight that may be given to his testimony is subject to argument as there are clear differences of opinion between Mr. Borger and Mr. Hughes. The same applies to the opinions expressed by the other applicants' deponents to the extent that I have found that they are litigant experts.

i) I am not satisfied that the applicants' deponents can provide opinion evidence relying on or based upon the third party information contained in the cost/benefit studies or expert reports. To do so, the third party information and the expert reports ought to have been filed in evidence in accordance with the Queen's Bench Rules. As a result, portions of the

applicants' affidavits relying upon third party information, the specific calculations contained in the cost/benefit studies and expert reports must be struck out or disregarded.

j) That said, the conceptual issues raised in the applicants' affidavits have relevance to the determination of the constitutional and discrimination issues. For example, as to the constitutional argument, Mr. Borger's opinion is relevant to decide whether there is a sufficient nexus between the Impact Fee and the Regulatory Scheme and whether the Impact Fee is an indirect tax or not.

k) Evidence regarding the Reserve Fund and evidence as to the manner in which the Impact Fee is imposed is relevant and admissible evidence to determine whether the Impact Fee is a regulatory charge or an indirect tax and to determine whether the Impact Fee is imposed in a manner that is arbitrary and discriminatory. Conclusions of law expressed in the affidavits are not admissible. However, I accept that views expressed as to the impact on the applicants and third parties are relevant and admissible.

l) The applicants filed and rely upon a number of development agreements entered into between Ladco and the City and Qualico and the City respecting developments in various New Communities and Emerging Communities in the City. The following development agreements were referenced or attached as exhibits to affidavits filed by the applicants:

    i. Development Agreement for South Pointe (November 21, 2007);

ii. Development Agreement for Prairie Pointe (June 26, 2013), attached as Exhibit I to Borger's first affidavit, sworn February 27, 2018;

iii. Ridgewood Development Agreement (February 26, 2014), Exhibit 30 to Vogan's December 2017 affidavit;

iv. Sage Creek Development Agreement, Phase 1 (February 22, 2006), Exhibit 35 to Vogan's December 2017 affidavit;

v. Sage Creek Development Agreement Addendum to Phase 1 (April 28, 2010), Exhibit 36 to Vogan's December 2017 affidavit;

vi. Sage Creek Development Agreement Phase 2 (September 26, 2007). Exhibit 37 to Vogan's December 2017 affidavit;

vii. Sage Creek Development Agreement Phase 3 (November 21, 2007), Exhibit 38 to Vogan's December 2017 affidavit;

viii. Sage Creek Development Agreement Phase 3 Addendum (July 16, 2008), Exhibit 39 to Vogan's December 2017 affidavit;

ix. Sage Creek Development Agreement Phase 3 Second Addendum (June 24, 2009), Exhibit 40 to Vogan's December 2017 affidavit;

x. Sage Creek Development Agreement Phase 4 (February 24, 2010), Exhibit 41 to Vogan's December 2017 affidavit;

xi. Sage Creek Development Agreement Phase 5 (September 22, 2010), Exhibit 43 to Vogan's December 2017 affidavit;

xii. Sage Creek Development Agreement Phase 5 Addendum (January 30, 2013), Exhibit 44 to Vogan's December 2017 affidavit;

xiii. Sage Creek Development Agreement Phase 6 (June 22, 2011), Exhibit 45 to Vogan's December 2017 affidavit; and

xiv. Sage Creek Development Agreement Phase 7 (January 30, 2013), Exhibit 46 to Vogan's December 2017 affidavit.

These development agreements and statements made about the development agreements are admissible as the evidence has some relevance to determining the regulatory charge versus indirect tax issue.

Breach of Contract Issue

[104] The applicants submit that there is an express, or alternatively, an implied obligation on the City to pay for any offsite or regional infrastructure that was not specifically agreed to be funded or provided by Ladco or Qualico pursuant to the development approval process and the development agreements. The applicants submit that imposing the Impact Fact on developers, builders and homeowners within their developments is in breach of that promise.

[105] The City denies the alleged breach of contract and submits that the breach of contract issue is not an issue that can be determined as part of the applications. Further, the City submits that claims for breach of contract require pleadings, discovery and a particularization of the damages, none of which has been provided by the applicants. Finally, the City submits that the development agreements filed by the applicants contain

an arbitration clause, which contractually bars the applicants from advancing court proceedings as they contain a mandatory arbitration provision which requires arbitration of disputes. The applicants submit that they are not claiming damages, only seeking declaratory relief which is ancillary to the other relief sought in the application.

[106] The general rule is that applications where material facts are in dispute can be determined by affidavit evidence only in limited circumstances. (See ***Garwood v. Garwood Estate***, 2007 MBCA 160, 225 Man.R. (2d) 30, at paras. 52 and 58 (QL) and ***Winnipeg Condominium Corp. 479 v. 520 Portage Avenue***, 2020 MBCA 66, at para. 43) In ***Garwood***, the court examined whether an application to revoke or grant probate should have been referred to trial rather than decided on affidavit evidence. The application judge made findings of credibility and decided the issue on the application based on affidavit evidence and cross-examination. The Court of Appeal examined the law and allowed the appeal of the judgment dismissing the application to revoke the grant of probate and referred the matter back to the Court of Queen's Bench for the necessary directions for trial. The Court of Appeal found that:

- the evidence did not present "the clearest of cases" that would have entitled the judge to proceed on affidavit evidence;
- there was a substantial dispute concerning the evidence and the only realistic option for the judge was to direct a trial. (See ***Garwood***, at para. 58)

[107] In ***Winnipeg Condominium Corp. 479***, the Court of Appeal referred to ***Garwood*** for the general principle that an application generally cannot proceed where

there is a substantial dispute concerning the evidence. However, in this case, the Court of Appeal determined that the dispute turned largely on the interpretation of documents and as a result found that the application judge did not misdirect himself or the application judge's discretionary decision was so wrong as to amount to an injustice. (See ***Winnipeg Condominium Corp. 479***, at paras. 43 and 44)

[108] Applying these principles and the applicable Queen's Bench Rules (38.01 and 38.09), I am satisfied the applicants are not permitted to advance claims for relief based on alleged breach of contract pursuant to Queen's Bench Rule 14.05 or generally in these applications. There are substantial factual issues in dispute in order to determine whether there is an obligation on the City to pay for any offsite or regional infrastructure that was not specifically agreed to be funded or provided by Ladco or Qualico.

[109] Queen's Bench Rule 14.05(3) permits declaratory relief to be sought if it is ancillary to the other relief sought in the application. In my view, the breach of contract issue is a stand-alone claim, is not ancillary to the other relief and the other issues addressed in this application and accordingly, all references to the breach of contract issue in the affidavits must be disregarded. The only exception to this finding is where evidence relating to the development approval process and the development agreements is relevant to decide the issues that are properly before the court.

[110] I am not satisfied that there is express language in the development agreements that would lead me to conclude that the promise alleged by the applicants was made expressly. In my view, determining whether there is an implied term or obligation on the City is not an issue that should be decided in these applications. I agree with the City's

submission that a breach of contract claim is best dealt with by way of an action which would include discovery rights and testimony at a trial. The authorities noted above stand for the proposition that applications are generally not intended to address alleged breaches of contract where there is contested evidence involving a substantial dispute of facts. I am satisfied that there is a substantial dispute of facts and the appropriate manner to decide the breach of contract issue is to direct a trial of an issue or have the dispute arbitrated.

[111] The City submits that the development agreements contain an arbitration clause which requires the parties to proceed to arbitration to resolve "disputes". Since I have determined that the breach of contract issue should not be decided in these applications, it is unnecessary and premature for me to decide whether the arbitration clause applies in this case. It is unclear whether the present dispute respecting the imposition of the Impact Fee is a "dispute" as defined in the various development agreements. I leave that issue for another day, to be determined if the applicants wish to proceed with the breach of contract issue as a trial of an issue, commence a separate action or give notice to proceed with an arbitration pursuant to the various development agreements.

[112] To conclude on the preliminary issue, applying the law and the various findings set out above, I have attached as Schedule "A" to the reasons for decision my rulings on the paragraphs and exhibits attached to the applicants' impugned evidence.

Issues

[113] The issues to be determined in these applications are:

Issue I. - Do the provisions of the ***Charter*** provide the authority or power to the City to enact the By-Law and Resolution and impose the Impact Fee?

Issue II. - If the City does have statutory authority to pass the By-Law and Resolution, is the Impact Fee imposed pursuant to the By-Law and Resolution a constitutionally invalid indirect tax which is not saved as a valid user fee or regulatory charge?

Issue III. - Does the imposition of the Impact Fee pursuant to the By-Law and Resolution discriminate against developers, builders and homeowners within certain developments who are required to pay the Impact Fee, such that the Impact Fee is discriminatory, arbitrary and invalid? and

Issue IV. - If the answer to one or more of Issues I. – III. is yes, what is the appropriate remedy?

Standard of Review

[114] The parties acknowledge in accordance with the principles established by the Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, 44 D.L.R. (4th) 1, the starting point for analysis on an application for judicial review "is a presumption that the legislature intended the standard of review to be reasonableness." (See ***Vavilov***, at para. 23)

[115] The parties agree that the question of whether the ***Charter*** grants the City the authority to impose the Impact Fee is to be reviewed on a reasonableness standard.

[116] In my view, there is nothing in the facts and circumstances of this case that would rebut the presumption of a reasonableness review.

[117] ***Vavilov*** provides guidance on the manner in which to conduct a reasonableness review. The application of the reasonableness standard is a contextual inquiry. Authorities establish that the context of municipal decision to pass by-laws demonstrates a deferential approach on judicial review. A review of municipal by-laws must reflect the broad discretion provincial legislatures have traditionally accorded to municipalities engaged in delegated legislation. In this context, reasonableness includes the fact that courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable. (See ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 18 - 21)

[118] In conducting the reasonableness assessment, the court reviews the decision-maker's reasons in light of the history and context of the proceedings. Formal written reasons supporting or explaining a decision to pass a by-law is not necessarily required. As pointed out in ***Vavilov***, at para. 94:

> **94** The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves ...

[119] In applying the reasonableness standard on a question of statutory interpretation, ***Vavilov*** is also instructive. I am to employ the modern principles of statutory interpretation in the review of City council's decision as follows:

> **117** A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

118 This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law -- whether courts or administrative decision makers -- will do so in a manner consistent with this principle of interpretation.

119 Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[120] ***The Interpretation Act*** C.C.S.M. c. I80, also governs the rules of statutory interpretation as follows:

> Rule of liberal interpretation
>
> 6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[121] I am also bound by the principles of statutory interpretation dealing specifically with municipal provisions as set forth in ***United Taxi Drivers' Fellowship of Southern Albert v. Calgary (City)***, 2004 SCC 19, [2004] 1 S.C.R. 485 and ***114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)***, 2001 SCC 40, [2001] 2 S.C.R. 241.

[122] Applying these principles, the standard of review applicable to decide Issue I. is reasonableness. I must be mindful of the fact that City councilors are elected by the public and courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[123] ***Vavilov*** provides guidance regarding the circumstances in which the presumption of reasonableness review can be rebutted. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. The second situation is where the rule of law requires that the standard of correctness be applied. The court referenced certain categories of questions including constitutional questions and general questions of law of central importance to the legal system as a whole where the standard of correctness applies. (See ***Vavilov***, at para. 17)

[124] Issue II. involves a determination as to whether the By-Law imposes a constitutionally invalid indirect tax. ***Vavilov*** referred to constitutional questions as follows at paras. 55 and 56:

> **55** Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.
>
> **56** The Constitution -- both written and unwritten -- dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

[125] In my view, deciding Issue II. involves a determination of the constitutional authority of the legislature to delegate to an administrative body, in this case, City council. Since the constitutional authority to act must have determinate, defined and consistent limits, I am satisfied that determining Issue II. necessitates the application of a correctness standard.

[126] The standard of review applicable to Issue III., whether the By-Law and Resolution discriminate in their application is reasonableness. As noted above, the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness. I see nothing to distinguish this issue from Issue I. that would rebut the presumption of a reasonableness review.

Position of the Parties on Issue I. - Do the provisions of the *Charter* provide the authority or power to the City to enact the By-Law and Resolution and impose the Impact Fee?

[127] The applicants submit that the ***Charter*** does not grant authority to the City to enact the By-Law or Resolution and accordingly, the By-Law and Resolution are *ultra vires* the City.

[128] The City relies upon the following sections of the ***Charter*** which it submits grant the necessary authority to the City to pass the By-Law and Resolution:

> Purposes of city
>
> 5(1) The purposes of the city are
>
> (a) to provide good government for the city;
> (b) to provide services, facilities or other things that council considers to be necessary or desirable for all or part of the city;
> (c) to develop and maintain safe, orderly, viable and sustainable communities; and
> (d) to promote and maintain the health, safety, and welfare of the inhabitants.
>
> City is responsible and accountable
>
> 5(2) The city is created to be a responsible and accountable government with respect to matters within its jurisdiction.
>
> Broad authority
>
> 6(1) The powers given to council under this Act are stated in general Terms
>
> (a) to give broad authority to council to govern the city in whatever way council considers appropriate within the jurisdiction given to it under this or any other Act; and
> (b) to enhance the ability of council to respond to present and future issues in the city.
>
> General powers not limited by specific
>
> 6(2) If this Act confers a specific power on the city in relation to a matter that can be read as coming within a general power also conferred by this Act, the general power is not to be interpreted as being limited by the specific power.
>
> Spheres of authority not mutually exclusive
>
> 128 If authority is granted to council under a provision of this

Act to pass by-laws in respect of any matter, that authority shall not be construed to reduce or limit authority granted under any other provision of this Act

(a) to pass by-laws in respect of the same or a related matter; or
(b) to deal with the same or a related matter in a manner other than by by-law.

EXERCISING BY-LAW MAKING AUTHORITY

General powers in exercise of authority

174 Without limiting the generality of any other provision of this Act, council may, in a by-law passed under this Act,

(a) regulate or prohibit;
(b) adopt by reference, in whole or in part, with or without changes or additions, any code or standard made or recommended by the Government of Canada or a province or by a recognized technical or professional organization, and require compliance with the code or standard;
(c) deal with any activity, development, construction, industry, business, property, animal or thing in different ways, or divide any of them into classes and deal with each class differently;
(d) for a system of licences, permits or approvals, and procedures for making and dealing with applications for licences, permits and approvals, including any or all of the following:

(i) the form and provide content of applications for licences, permits or approvals,
(ii) prohibiting an activity, business, development, construction, industry or thing until a licence, permit or approval is granted in respect of it,
(iii) providing for the duration of licences, permits and approvals,
(iv) providing that terms and conditions may be imposed on any licence, permit or approval and providing for the nature of the terms and conditions and when, how and by whom they may be imposed,
(v) providing for the refusal to grant licences, permits or approvals,
(vi) providing for the suspension, cancellation or revocation of licences, permits or approvals and other remedial actions in respect of them,
(vii) the charging, including the method of calculating the charges, and collection of the costs of inspections made and remedial actions taken in respect of licences, permits and approvals or in respect of codes or standards adopted under clause (b),
(viii) requiring persons to whom licences, permits or approvals are granted to obtain and keep in effect policies of insurance for public liability for the protection of persons who might suffer loss or damage directly or indirectly from the business or activity, or the use of the property, to which a licence, permit or approval relates,
(ix) providing for the posting of a bond or the deposit of other securities

(A) to ensure compliance with the terms and conditions of a licence, permit or approval, or
(B) to protect and indemnify the city or any other person against any loss or damage that the city or the other person may suffer arising directly or indirectly from the business or activity, or the use of the property, to which a licence, permit or approval relates;

(e) require the person responsible to produce prescribed information and documents for the purpose of
(i) administering or enforcing any provision of this Act or any by-law respecting businesses, construction, development or property or any activity,
(ii) an application in respect of a licence, permit or approval, or
(iii) determining the cost of construction; and

(f) except where a right of appeal is provided by this or any other Act, provide for appeals.

PUBLIC SERVICES AND FACILITIES

General authority

209(1) Without limiting the generality of any other provision of this Act, the city may for its purposes

(a) acquire, establish, extend, construct, improve, maintain, operate, provide and equip works, services, facilities and utilities within or outside the city;
(b) deal in any by-products resulting from, or incidental to, the operation of any undertaking mentioned in clause (a);
(c) acquire, deal in and use intellectual property, licences, privileges, water power, water power rights and licences and rights and licences to use and extract water;
(d) do all things necessary or required to join any of the city's works to privately owned property and to seal or weatherproof the works;
(e) authorize persons to operate or carry on a commercial or other activity on land owned or controlled by the city; and
(f) use city equipment, materials and labour to provide services or to do work on private property.

Powers under subsection (1)

209(2) For the purpose of exercising the city's powers under subsection (1), the city may

(a) set terms and conditions under which commodities or services are supplied to consumers or property;
(b) prescribe the method of determining the amount of use or consumption of any of the commodities or services mentioned in clause (a), including the estimating of the use or consumption;

(c) without limiting the generality of section 210, establish, charge and collect prices, rates, fees, deposits and other charges
(i) for the use, consumption by consumers, or provision by the city, of commodities, equipment, works, services or things provided by the city, or
(ii) for the use of, or connection to, works or property owned by, or under the direction, control and management of, the city;
(d) regulate or prohibit the reselling or giving away of any of the commodities or services mentioned in clause (a) or disposing of them in any manner other than consuming them on the property to which they are supplied;
(e) regulate or prohibit the use or the waste of any of the commodities or services mentioned in clause (a), or the taking or using of them fraudulently or in a quantity or at a rate that is greater than is specified in a by-law;
(f) subject to section 183 (warrant for entry), provide for a right of entry by designated employees onto private property for the purpose of connecting, disconnecting or maintaining a service or the means of delivering any of the commodities or services mentioned in clause (a) or for the purpose of reading meters in respect thereof;
(g) provide for the connections that may be made to pipes, wires or equipment belonging to the city for the purpose of obtaining any of the commodities or services mentioned in clause (a) including, without limiting the generality of the foregoing, the number of such connections, the individuals authorized to make the connections, the standards to be met in making the connections and the type of equipment or apparatus to be used in making the connections; and
(h) provide for the discontinuance or the disconnecting of a service or the means of delivering any of the commodities or services mentioned in clause (a) and refusing to provide a service or to deliver those commodities to users or consumers who fail to comply with terms and conditions.

The meaning of "works" is defined in the Charter as:

"works" includes buildings, walls, bridges, trestlework, dams, waterworks, water control works, canals, locks, tunnels, subways, railways, tramways, wharfs, piers, ferries, viaducts, aqueducts, conduits, watercourses, embankments of watercourses, vaults, mines, wells, streets, pavements, pedestrian decks or tunnels, street railways, harbours, docks, booms, excavations, fabrics and the towers, poles, lines, and equipment of transportation or transit systems or the construction of any of them;

Fees and charges

210(1) The city may, if authorized by council, establish
(a) the method of calculating the prices, rates, fees, deposits or other charges, which may vary depending on the type of use or consumption, the quantity used or consumed, or the type of property in which use or consumption takes place; and
(b) fees, and the method of calculating and the terms of payment of fees, for
(i) applications,
(ii) filing appeals under this Act or a by-law,

(iii) permits, licences, consents and approvals,
(iv) inspections,
(v) copies of by-laws and other city records including records of hearings, and
(vi) other matters in respect of the administration of this Act or the administration of the affairs of the city.

Rates for services and commodities

210(5) Despite *The Public Utilities Board Act*, the city may, as provided in this Act, establish prices, rates, fees, deposits or other charges for any commodity or service that the city supplies and, for that purpose, the city need not obtain any approval from The Public Utilities Board, the intention being that the city may establish such amounts and use the revenues therefrom for the general purposes of the city and not solely for the purposes of offsetting any costs related to supplying the commodity or service.

[129] The City submits that ss. 5(2), 6(1) and (2) of the ***Charter*** provide:

i. That the City is a reasonable and accountable Government;

ii. That the City has broad authority; and

iii. That the general powers are not limited by specific provisions and were not in the former City of Winnipeg Act. Further, s. 128 contains broad authority and s. 174 provides comprehensive general powers and by-law making authority, also not found in the former City of Winnipeg Act.

[130] The City submits specific authority is found is ss. 209 and 210 of the ***Charter*** to permit the City to impose fees and charges and specifically, s. 210(1)(b)(iii) authorizes City council to establish fees and the method of calculating and the terms of payment of fees for permits, licences, consents and approvals.

[131] The applicants submit that the City's interpretation of s. 210(1)(b) does not support the conclusion that the City is granted the power to impose the Impact Fee. The applicants submit that the general words in subparagraph 210(1)(b)(vi) "other matters in respect of the administration of this Act or the administration of the affairs of the city"

must be read in the context of the preceding list, *ejusdem gereris*. The applicants submit that the powers are limited to defraying the cost associated with City administrative processes, such as permitting, inspection and filing appeals. (See ***Schnarr v. Blue Mountain Resorts Ltd.***, 2018 ONCA 313, 140 O.R. (3d) 241, at paras. 52 - 56)

[132] Further, the applicants dispute that ss. 5(1) and 5(2) of the ***Charter*** support a reasonable interpretation that authorizes the City's imposition of the Impact Fee. The applicants say that s. 5 sets out broad purposes of the City and does not add to the jurisdiction of the City. Further, the applicant says that s. 6 permits broad authority "to govern" but again, that is limited to matters "within the jurisdiction given to it under this or any other Act".

[133] The applicants submit that part 6 of the ***Charter*** is a complete code respecting the development of land within the City and authorizes the City to impose conditions on developers respecting the rezoning or subdivision of land. The City agrees that part 6 gives the City the power to regulate development, but denies that it is a complete code and says it should not be interpreted to preclude the City from imposing an otherwise valid Impact Fee.

[134] The applicants further submit that the authority granted to the City under part 6 of the ***Charter*** is similar to the legislature's grant of authority to other municipalities to regulate land development under ***The Planning Act***, C.C.S.M. c. P80.

[135] The applicants submit that ***The Planning Act*** contains a specific power to set levies to be paid to compensate the municipality for capital costs specified in a by-law that may be incurred by reason of the subdivision of land. (See s. 143(1) of ***The***

Planning Act) Section 143(2) provides that a municipal council must establish a reserve fund into which the levies are to be paid. No such comparable provision is contained in the ***Charter***.

[136] The applicants submit the general powers of the City to raise revenue are found in ***The Municipal Assessment Act***, C.C.S.M. c. M226 and ***The Municipal Taxation and Funding Act***, C.C.S.M. c. M265, and the power to impose the Impact Fee is not found in the general and purposive provisions of ss. 5 and 6 of the ***Charter***.

[137] Finally, the applicants point to examples from other provinces of legislation that expressly provide for the imposition of development cost charges in the nature of the Impact Fee. No such similar provision is contained in the ***Charter*** and as such, the applicants submit the By-Law and Resolution are *ultra vires*.

[138] In essence, the applicants submit:

a) The By-Law and Resolution are not authorized by the ***Charter***;

b) There is no specific power granted by the legislature to the City under the ***Charter*** to impose the Impact Fee and there is no basis to imply a power to impose the Impact Fee pursuant to the general powers enumerated in the ***Charter***; and

c) There is no other power to impose the Impact Fee granted by the legislation to the City under other legislation.

Analysis and Decision – Issue I.

[139] ***Vavilov*** establishes that in applying the reasonableness standard, I must concern myself with the " ... justification, transparency, and intelligibility within the decision-

making process" and determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." It is not enough for the outcome to be justifiable, the reasonableness review must include a review of the outcome and the reasoning process that led to the outcome. (See ***Vavilov*** at para. 86, quoting ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 and para. 87)

[140] Further, my role as set forth in ***Vavilov*** (at paras. 83 - 85) is to conduct a robust review, but refrain from deciding the issue that was before City council. I am not to consider what decision I would have made in place of City council, or attempt to ascertain the "range" of possible conclusions that would have been open to the decision-maker. I am not to conduct a *de novo* analysis or seek to determine the correct solution to the problem. Instead, I must consider only whether the decision made by City council, including both the rationale for the decision and the outcome was unreasonable. The reasonableness standard requires that I defer to the decision of City council.

[141] My review of the decision to pass the By-Law and Resolution by City council involves a review of the Record in order to understand and assess the reasonableness of the rationale for the decision and the outcome. Deciding this issue involves two questions. The first question is whether the ***Charter*** grants the power to pass the By-Law and Resolution. This is determined by applying the principles of statutory interpretation in the context of the Record. The second question involves a review of the Record to determine whether the decision made by City council was reasonable. To assess whether the decision made by City council was reasonable, I must review the

Record including the rationale and recommendations contained in the Administration Report, as amended by EPC, and City council's reliance, at least in part, on the findings and conclusions contained in the Hemson reports.

[142] Applying the principles and the standard of review and giving a fair, broad and liberal interpretation to the relevant provisions of the ***Charter***, I am satisfied that the decision made by City council was reasonable and within the power of City council provided in the ***Charter***. In my view, the ***Charter*** grants the City very broad authority "to govern the city in whatever way council considers appropriate" within its jurisdiction. Section 6(2) of the ***Charter*** makes it clear that the "general power is not to be interpreted as being limited by the specific power" granted under the ***Charter***. Section 174 grants broad powers to pass by-laws to "regulate or prohibit" and to "deal with any activity, development, construction, industry, business, property, animal or thing in different ways or divide any of them into classes and deal with each class differently". The City, if authorized by council, may establish fees and the method of calculating and the terms of payment of fees for permits, licences, consents and approvals pursuant to paragraph 210(1)(b)(iii). The Impact Fee was authorized by City council by passing the By-Law and Resolution and the rationale set out in the Administration Report based on the Hemson reports accepted by council was reasonable and justifiable.

[143] I disagree with the City's submission that a fair, broad and liberal interpretation of s. 209 grants the City the authority to pass the By-Law and Resolution. Section 209 is generally concerned with "public services and facilities" and the power to pass the By-Law and Resolution do not appear to fit in the list or descriptions of the general authority

found in s. 209. I certainly agree that the meaning of "works" under the ***Charter*** is very broad. However, I am satisfied that a fair, broad and liberal interpretation of this section does not support the City's submission that it grants the City power to impose the Impact Fee.

[144] The applicants submit that s. 210(1)(b) does not support a conclusion that the City has the power to impose the Impact Fee. The facts establish that the Impact Fee is imposed at the time a building permit or development permit is issued and therefore the question is whether the Impact Fee is a fee which can be defined as being for "permits, licences, consents and approvals" under subparagraph 210(1)(b)(iii). Further, the applicants submit that subparagraph 210(1)(b)(vi) must be read in the context of the list provided in s. 210(1)(b) and the City's power is limited to defraying the cost of administrative processes. I disagree the authority should be interpreted in such a restrictive fashion. The general power to impose fees under the ***Charter*** is broad and I am satisfied the decision made by City council that it had the power to impose the Impact Fee pursuant to subparagraph 210(1)(b)(iii) is reasonable when viewed in the context of the provisions of the ***Charter*** as a whole. The interpretation given to s. 210(1)(b) must be considered in the context of the purposes of the City and the broad authority provided under ss. 5 and 6 of the ***Charter***. This broad authority satisfy me that the City had the power to pass the By-Law and Resolution. The City's authority to pass the By-Law and Resolution and impose the Impact Fee is justified in the context of the Record when a fair, broad and liberal interpretation of the ***Charter*** as a whole is applied.

[145] The applicants' reliance upon legislation in other provinces which deal specifically with the imposition of regulatory fees in the context of other legislation is not determinative. The applicants submit that if the legislature had intended to grant authority to the City to impose regulatory fees on development to pay for growth, a provision similar to those enacted in other provinces is required in the ***Charter***. Without that specific authority the applicants say no such power exists. However, in my view, the applicants are applying a strict interpretation to the ***Charter*** and referring to legislation in force in other provinces is of limited relevance when assessing the power or authority of City council pursuant to the ***Charter***. The provisions of the ***Charter*** must be interpreted in accordance with the principles noted above. The fact that other provinces have different provisions expressly permitting the imposition of regulatory charges does not mean that City council does not have the authority to pass the By-Law and Resolution and impose the Impact Fee.

[146] Similarly, the applicants' reference to ***The Planning Act*** does not assist in assessing the power or authority of City council and the reasonableness of the decision, as ***The Planning Act*** applies to municipalities outside the City of Winnipeg. While ***The Planning Act*** specifically states a municipal council may set levies to compensate the municipality for the capital costs incurred by the subdivision of land (s. 143(1)), ***The Planning Act*** does not have the general enabling and enhancing provisions and powers that are contained in the ***Charter***. The reference made by the applicants to ***The Municipal Assessment Act*** and ***The Municipal Taxation Funding Act*** have some relevance, but the City takes the position that the By-Law is levying a fee which is not

akin to real property taxes. In my view, this position has more relevance to a determination of Issue II., not the determination of Issue I.

[147] Assessing the second question of Issue I. involves a determination of whether the decision of City council is based on an internally coherent and rational chain of analysis and is justified in relation to the context of the Record. The City passed the By-Law and Resolution relying upon the Administration Report, the Hemson reports, the recommendations from EPC, reviewing the presentations of interested parties and the power of the City to impose an Impact Fee to recover what it considered to be part of the cost attributed to growth in the City. Assessing the reasonableness of the decision involves an assessment of whether the decision is supported by intelligible and rational reasoning. In this case, the decision is based to a certain extent upon the analysis contained in the Growth Report and Technical Report.

[148] I agree with some of the submissions made by the applicants pointing to flaws and challenging the opinions and calculations contained in the Growth Report and the Technical Report. I am satisfied that there is a basis to question some of the Hemson opinions and particularly the calculations contained in the Technical Report based on the following:

a) Mr. Hughes is a founding partner of Hemson and while his qualifications as a municipal finance expert are not in question, he was retained by the City for the specific purpose of providing consulting services regarding mechanisms and regulatory fees for financing growth. His assignment, as described in his affidavit, was to provide consulting services and make

recommendations regarding potential fees to be utilized for financing growth. He was retained before any litigation was commenced to provide advice and recommendations to the City and to specifically consider the extent to which new development or growth funds the associated municipal infrastructure servicing requirements in the City;

b) As a result of the nature of his retainer and assignment, I am satisfied Mr. Hughes is an advocate for the recommendations and opinions he provided to the City to impose the Impact Fee and it is necessary to take that into account in assessing the costs and benefits of accepting all of his evidence. The City, given the financial circumstances it is facing, accepted many of Hemson's recommendations and Mr. Hughes' opinion supported the position advanced by the City. That does not mean that Mr. Hughes did not give his evidence in a fair, objective and non-partisan fashion or that the opinions in the Hemson reports are necessarily wrong or invalid. It simply means I must be more vigilant as the gatekeeper to take into account Hemson's relationship with the City and the purpose of the retainer in assessing the overall weight I give to the Hemson reports. I must be satisfied, as stated in ***White Burgess Langille Inman*** "that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence" (at para. 54), in assessing the Hemson reports and opinions. This argument and

assessment process applies equally to the applicants' litigant experts who are advocating for their respective positions;

c) In assessing the costs attributable to development or growth in the City, Hemson was not asked to review and evaluate the cost/benefit studies, or expert reports submitted as part of the development approval process. The scope of the assignment did include a review of the cost/benefit studies but did not include the evaluation of the studies. He stated this was not required because the purpose of his assignment was to examine costs associated with growth on a City-wide basis and not look at any specific development in isolation. Further, he stated not evaluating the cost/benefit studies does not change the opinion in the Hemson reports. The evidence establishes that the analysis conducted by Hemson fails to specifically take into account actual off-site infrastructure contributions made by Ladco and Qualico pursuant to the Regulatory Scheme;

d) Hemson relied on City staff for population and employment forecasts, development related capital project information data concerning the City's infrastructure deficit and similar information. No independent verification of the information provided was conducted. For example, there was no review of the development related capital project information to determine whether that information was related to development or related to other decisions made by the City;

e) The applicants filed evidence and cross-examined Mr. Hughes regarding a previous report prepared by Hemson for the City in 2005, and argue that the 2005 report supports the applicants' submission that individual new developments are a net benefit to the City such that growth does in fact pay for growth. Mr. Hughes in his affidavit, responded to the premise that the inclusion of property taxes from new developments more than pays for the infrastructure costs necessary to accommodate those developments. In my view, his explanations do not provide a complete answer to the submissions made by the applicants regarding the 2005 Hemson report. His explanation that almost all other Cities in Canada have imposed regulatory fees on new development is not an answer explaining the different opinion in the 2005 report. According to Mr. Hughes, it is not possible to consider each neighbourhood or subdivision as if it were a separate municipal entity, unconnected to the rest of the City. I note that the Markowsky affidavit states the 2005 Hemson report was prepared 14 years ago using assumptions that are no longer valid, including assumptions related to population growth. Nevertheless, the earlier opinion raises some question regarding the reasonableness and validity of the findings and opinions provided in the Hemson reports;

f) Mr. Hughes acknowledged during cross-examination, that he did not conduct a review of the development agreements to determine whether the cost of capital projects was funded by developers as a condition of planning

approval. He recommended that the City may wish to enter into credit agreements with the developers so the developers receive a credit from a regulatory fee for regulatory infrastructure constructed on the municipality's behalf. No such analysis was completed by Hemson and there is no evidence that the City considered entering into credit agreements with Ladco or Qualico respecting the developments referred to in the evidence;

g) Mr. Hughes acknowledged that water and waste costs were included in Hemson's analysis of capital costs and during cross-examination it was suggested to him, based on the City records that water and waste utility charges are billed and recovered by the City, in some years generating a surplus or a dividend to the City. While he did not know if that was true, he acknowledged that if that was the case, it would have to be taken into account to avoid double charging for water and waste charges when imposing the Impact Fee. Mr. Markowsky testified during cross-examination that the City's water and waste utility did generate a surplus or profit in 2016. (See transcript of proceedings, cross-examination of Mr. Markowsky, dated October 7, 2019, at p. T79) There is insufficient evidence to establish this was taken into account by Mr. Hughes in the Hemson reports or by City council when the By-Law and Resolution were passed.

[149] These questions cast some doubt on the accuracy of the calculations made in the Technical Report which was relied upon for the decision made by City council to enact

the By-Law, pass the Resolution and impose the Impact Fee. That said, the general rationale for imposing a regulatory fee was provided in the Growth Report and the Administration Report and in the context of the entire Record, I accept that it was reasonable for City council to rely upon the opinions expressed and recommendations made in the Growth Report and the recommendation made in the Administration Report to conclude that growth in the City is not paying for the cost of growth or development on a City-wide basis.

[150] Although the decision to reduce the calculation of the Impact Fee is not explained, City council decided to reduce by 50 percent the recommended Impact Fee applicable to residential uses calculated by Hemson in the Technical Report. Notwithstanding the questions raised above, I accept that the decision made by City council to pass the By-Law and Resolution based, in part, on the findings contained in the Hemson reports is based on intelligible and rational reasoning that growth increases overall costs to the City, particularly the costs of off-site infrastructure necessary to support growth that is not being recovered by the City pursuant to the Regulatory Scheme.

[151] On the basis of my review of the ***Charter***, including ss. 5, 6, 128, 174, 209 and 210, in the context of the Record, I conclude that it was reasonable for the City to decide that it had the authority to pass the By-Law and Resolution. It was reasonable for the City to determine the ***Charter*** establishes broad general powers for the City to govern in the way council considers appropriate pursuant to ss. 5(1) and 6(1) of the ***Charter***. It is important to note that s. 6(2) makes it clear that the general power is not to be interpreted as being limited by a specific power set forth in the ***Charter***. The City has

broad by-law making authority pursuant to s. 174, as well as specific powers delineated in s. 210(1) to establish fees.

[152] The express purpose of the By-Law is to impose an Impact Fee to pay for the cost of growth and the decision made by City council was reasonable applying the principles of statutory interpretation noted above in the context of the Record. In the result, the answer to Issue I. is that the City's decision was reasonable. The City had the power or authority to enact the By-Law and Resolution and the application to quash the By-Law and Resolution based on Issue I. is denied.

Positions of the Parties on Issue II. - If the City does have statutory authority to pass the By-Law and Resolution, is the Impact Fee imposed pursuant to the By-Law and Resolution a constitutionally invalid indirect tax which is not saved as a valid user fee or regulatory charge?

[153] The applicants submit:

a) the Impact Fee, in pith and substance, is an invalid indirect tax and is not a valid regulatory charge;

b) the Province of Manitoba has authority over "municipal institutions" under subsection 92(a) of the ***Constitution Act***, 1867 (UK), 30 & 31 Victoria, c 3, and provincial legislation can only delegate to municipalities powers that are within provincial constitutional authority. (See ***Constitution Act***, s. 92; ***Catalyst Paper Corp.*** and David G. Boghosian & J. Murray Davidson, *The Law of Municipal Liability in Canada* (Toronto: LexisNexis Canada, 1999) (loose-leaf), ch 1 at 1-3 and 1-4);

c) an indirect tax is beyond the jurisdiction of the province to impose and therefore beyond the jurisdiction of a municipality to impose. The exception is where the dominant purpose of a fee is to finance or constitute a Regulatory Scheme under a provincial head of power (see ***Constitution Act***, ss. 91, 92; ***620 Connaught Ltd. v. Canada (Attorney General)***, 2008 SCC 7, [2008] 1 S.C.R. 131 (QL) and ***Ontario Home Builders' Assn. v. York Region Board of Education***, [1996] 2 S.C.R. 929, (S.C.C.));

d) the evidence establishes that the Impact Fee imposed on developers and builders is passed on to homeowners and is therefore an indirect tax;

e) the stated purpose of the By-Law, to defray the cost of growth to the City as a whole, is challenged because the City developed a list of capital projects to be included without independent analysis or verification by Hemson. Further, the calculations completed by Hemson failed to take into account the cost benefit reports and a proper analysis of the water and wastewater utility costs and credits;

f) the opinion expressed in the Hemson reports that "growth does not pay for growth" is challenged on several grounds;

g) the Impact Fee is not connected to a Regulatory Scheme. The costs and revenues that have been raised through the Regulatory Scheme have not been properly estimated and there is an insufficient nexus between the estimated costs and the revenue raised through the Regulatory Scheme;

h) there is no relationship between the individuals subject to the regulatory charge and the regulation. The revenues generated from the Impact Fee are collected and placed in a general Reserve Fund which can be used for any purpose designated by the CFO;

i) the Impact Fee fails the second step of the ***Westbank First Nation v. British Columbia Hydro and Power Authority***, [1999] 3 S.C.R. 134 (S.C.C.) test, which requires that there be a relevant relationship between the fees paid by the persons being regulated and the Regulatory Scheme.

[154] The City submits:

a) that s. 92(2) of the ***Constitution Act***, grants provinces the authority to impose direct taxation to raise revenue for provincial purposes. Delegated authority through municipal legislation (Planning and Municipal Statutes) are the main forms of revenue–raising powers for municipalities;

b) Section 92(8) of the ***Constitution Act***, grants provincial governments jurisdiction over municipalities and revenue raising powers that municipalities possess are limited to those that are delegated by the province;

c) the ***Ontario Home Builders' Assn.*** case is strikingly similar to this case in that:

i) the education development charge ("EDC") reviewed in that case imposed a fee upon a building permit for new housing which caused the need for new schools. The City is imposing an Impact Fee on new

construction which it submits causes a need for more infrastructure in the City;

ii) the EDC was found to be part of a comprehensive and integrated Regulatory Scheme respecting planning, zoning, subdivision and development of land in the province. The By-Law imposes an Impact Fee which is part of a comprehensive and integrated Regulatory Scheme for planning, zoning, subdivision and development of land within the City;

iii) the EDC was found to be a charge on development and involved features of both direct and indirect taxation;

iv) the purpose of the EDC was not taxation of land, but rather defraying the cost of infrastructure necessitated by new residential development. Similarly, the City submits the By-Law was passed for the purpose of growth paying for growth or to defray the cost of infrastructure necessitated by new development.

d) applying the two-step test in ***Westbank First Nation*** and ***620 Connaught Ltd.***, the City submits that there is a relevant Regulatory Scheme and there is a relationship between the regulatory charge and the Regulatory Scheme. The City submits that there is a complete, complex and detailed code of regulation set forth in the ***Charter*** which regulates the development of land. The Hemson reports and the Stevens report identify the actual and properly estimated the costs of the regulation.

Finally, the City submits that there is a relationship between the Impact Fee and the Regulatory Scheme. Relying upon the evidence of Markowsky, Hughes and Stevens, the City submits that the Impact Fee is a charge which compensates the City for the increased costs of off-site infrastructure necessitated by new development. This connection establishes that the fees are regulatory charges and are *intra vires* the City's authority under the ***Charter***.

Analysis and Decision on Issue II.

[155] The task of the court is to determine whether the Impact Fee is, in pith and substance, a regulatory charge or an invalid indirect tax. The parties agree on the leading authorities and the test to be applied by the court to determine whether a fee imposed is a regulatory charge or an indirect tax. In ***620 Connaught Ltd.***, the Supreme Court of Canada set out the test to be applied. The issue determined in that appeal was whether an annual business licence fee for the right to sell alcoholic beverages imposed on hotels, restaurants and bars in Jasper National Park was a regulatory charge or a tax. The appellants owned all or nearly all of the hotels, restaurants and bars in Jasper National Park serving alcoholic beverages. The owners were required to have a business licence to sell alcohol for which they paid a fee in accordance with the Parks Canada master list of fees. The fee for the business licence was made up of a base fee of $75. plus three percent of the gross value purchased annually for the sale of spirits and wines and two percent of the gross value purchased annually for the sale of beer.

[156] Evidence was led about the forecasted cost of operation of Jasper National Park and the total amount of business licence fees collected.

[157] Rothstein J. speaking for the court, described the test to be applied as follows:

> **17** In the context of whether a government levy is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory [page141] fee. In *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, Gonthier J. described the pith and substance of a government levy in terms of its primary purpose. At para. 30, he stated:
>
> > In all cases, a court should identify the primary aspect of the impugned levy... . Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis deleted.]
>
> There is no suggestion in this case that the levy is a user fee for the provision of government services or facilities. The sole question is whether in pith and substance the levy is a tax or a regulatory charge.
>
> **18** The issue of whether a levy is a tax or a regulatory charge has been considered on prior occasions by this Court. The issue was relevant when determining the constitutionality of a provincial levy that had indirect tendencies (*Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, and *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929). If it was a tax, it would be *ultra vires* the province whose taxing authority under s. 92(2) of the *Constitution Act, 1867* is restricted to direct taxes within the province. However, if it was a regulatory charge, the province was constitutionality competent to impose such charge. It was also relevant when deciding if a by-law of an Indian band enacted a system of taxation under the purported authority of the *Indian Act*, for if it was, it could not be applied to an agent of the provincial Crown by reason of s. 125 of the *Constitution Act, 1867* [page142] (*Westbank*). However, determining whether a government levy is *ultra vires* a Minister's delegated power has not yet been addressed by this Court.

[158] Rothstein J. distinguishes regulatory charges from user fees and states:

> **20** By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee

> may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles" (see *Westbank*, at para. 29, referring to *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL), and *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), [page143] leave to appeal refused, [1997] 3 S.C.R. vii)).

[159] Rothstein J. also reviews the characteristics of a tax and states:

> **22** In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, Duff J. (as he then was) identified the characteristics of a tax (pp. 362-63). In *Eurig*, Major J. summarized the *Lawson* characteristics of a tax at para. 15:
>
> > Whether a levy is a tax or a fee was considered in *Lawson, supra*. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.
>
> **23** These characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics of the levy or whether they are only incidental.

[160] Rothstein J. refers to the distinction between a tax and a regulatory charge and adopts the two-step approach in ***Westbank First Nation*** to determine if the governmental levy is connected to a regulatory scheme as follows:

> **25** In *Westbank*, Gonthier J. established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:
>
> > [A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. [para. 44]

> The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.
>
> **26** Although this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute. As stated by Gonthier J., at para. 24:
>
> > This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.
>
> Nonetheless, there must be criteria establishing a regulatory scheme and its relevance to the person being regulated.

[161] Applying these principles to this case, the Impact Fee is imposed pursuant to the By-Law and Resolution passed by City council and is enforceable by law. It was imposed pursuant to the ***Charter*** which is under the authority of the Manitoba Legislature. It is levied by a public body, in this case, the City, and intended for a public purpose. These characteristics are all attributes of a tax but would apply to most government levies or fees. Therefore, my task is to determine whether these are the dominant characteristics of the Impact Fee or whether they are only incidental. In doing so, I must address whether the Impact Fee is connected to a regulatory scheme and address the two-step test set forth in ***Westbank First Nation***. I will address the following questions:

I. Identify the existence of a relevant regulatory scheme including determining whether:

   a) there is a complete, complex and detailed code of regulation;

   b) there is a regulatory purpose which seeks to affect some behaviour;

   c) there is the presence of actual or properly estimated cost of the regulation; and

d) there is a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

[162] The authorities make it clear that this list of factors is not exhaustive and the issue that must be determined is whether there is criteria establishing a regulatory scheme and the nexus to the person being regulated.

[163] Dealing with the first question of identifying a relevant regulatory scheme, the City submits that the relevant regulatory scheme can be characterized as either a narrow or wider regulatory scheme. The City submits that ***620 Connaught Ltd.*** introduced the concept of a narrow and a wider regulatory scheme. The narrow regulatory scheme being the costs of growth in the City and the expenses the regulatory scheme covers. The wider regulatory scheme considers the capital costs that are attributable to the costs of the entire operations of the entity. (See ***620 Connaught Ltd.*** at paras. 14 and 15)

[164] The wider or broader view is based on the City-wide regulatory scheme or the City providing all services pursuant to the ***Charter***, by-laws and policies as identified in para. 6 of the Lawson affidavit including, but not limited to:

a) the ***Charter***;

b) ***The Police Services Act***, S.M. 2009, c. 32;

c) the OurWinnipeg Plan by-law No. 67/2010;

d) the Complete Communities Direction Strategy by-law No. 68/2010;

e) the Sustainable Transportation Direction Strategy Council Policy;

f) the Sustainable Water and Waste Direction Strategy Council Policy;

g) the Sustainable Winnipeg Direction Strategy Council Policy;

h) the Development Procedures by-law No. 32/2005;

i) the Downtown Winnipeg Zoning by-law No. 100/2004;

j) the Encroachment by-law No. 692/74;

k) the Fire Paramedic Service by-law No. 6311/94;

l) the Fire Prevention by-law No. 35/2017;

m) the Heritage Conservation Districts by-law No. 87/2018;

n) the Historical Resources by-law No. 55/2014;

o) the Lot Grading by-law No. 7294/98;

p) the Private Access by-law No. 49/2008;

q) the Residential Buildings Fire Safety by-law No. 4304/86;

r) the Sewer by-law No. 106/2018;

s) the Solid Waste by-law No. 110/2012;

t) the Streets by-law No. 1481/77;

u) the Subdivision Standards by-law No. 7500/99;

v) the Vacant Buildings by-law No. 79/2010;

w) the Water by-law No. 107/2015;

x) the Winnipeg Building by-law No. 4555/87;

y) the Winnipeg Electrical by-law No. 86/2018;

z) Winnipeg Police Service Regulation by-law No. 7610/2000;

aa) the Winnipeg Zoning by-law No. 200/2006;

bb) various secondary plan by-laws, including but not limited to

i) the Airport Area West Secondary Plan by-law No. 8097/2002;

ii) the Airport Vicinity Protection Area Secondary Plan by-law No. 6378/94;

iii) the Corydon-Osborne Area Plan by-law No. 99/2014;

iv) the Henderson Highway Corridor Secondary Plan by-law No. 3215/82;

v) the North St. Boniface Secondary Plan by-law No. 30/2017;

vi) the Osborne Village Neighbourhood Secondary Plan by-law No. 220/2006;

vii) the Precinct "E" Precinct Plan by-law No. 97/2014;

viii) the Precinct "G" Secondary Plan by-law No. 5/2018;

ix) the Precinct K Precinct Plan by-law No. 48/2014; and

x) the Waverley West Area Structure Plan by-law No. 10/2006;

cc) various non-statutory local area plans adopted as council Policies, including, but not limited to:

i) the Assiniboia Downs Local Area Plan;

ii) the Bishop Grandin Crossing Local Area Plan;

iii) the Dawson Trail Local Area Plan;

iv) the Railside at The Forks Local Area Plan; and

v) the Taylor Redevelopment Local Area Plan;

dd) various Council Policies, including but not limited to:

i) the Active Transportation Policy;

ii) the Development Agreement Parameters Policy (the "DAPs");

iii) the Housing Policy;

iv) the Recreation, Leisure and Library Facilities Policy;

v) the Transit-Oriented Development Handbook Policy;

vi) the Transportation Master Plan Policy; and

vii) the Universal Design Policy.

[165] I do not agree that the relevant regulatory scheme should be defined as the ***Charter*** and all the by-laws and plans referenced in the Lawson affidavit. That is too broad. If the wider definition is the relevant regulatory scheme it lacks a necessary connection to the Impact Fee. In my view, using the entire City capital budget also does not assist the City's submission. Doing so supports the conclusion that the primary purpose of the Impact Fee is to tax specific developments in the City to raise revenue for the City's general purposes and not for the purpose of regulation.

[166] Earlier in these reasons at para. 21, I defined the term Regulatory Scheme which includes the ***Charter*** and all by-laws and policies regulating development in the City. The evidence satisfies me that the relevant regulatory scheme that must be assessed is the Regulatory Scheme dealing with development. I agree that the ***Charter***, by-laws

and policies defined as the Regulatory Scheme establish the manner in which planning, zoning, subdivision and development occurs, how rights and privileges are obtained as well as what is permitted and prohibited within the City, among other things. The Regulatory Scheme does form a complete, complex and detailed code of regulation for planning and development in the City.

[167] The applicants submit that there is no "complex and detailed code" of regulation equivalent to the complete and detailed codes of regulation found in the ***Allard Contractors Ltd. v. Coquitlam (District)***, [1993] 4 S.C.R. 371 (S.C.C.) and ***Grapes Leon's Centre Limited Partnership v. Manitoba***, 2014 MBQB 167, 308 Man.R. (2d) 59, decisions. I disagree. The Regulatory Scheme identified in the evidence refers to the ***Charter***, by-laws and policies specifically governing planning and development in the City.

[168] In my view, there are similarities between the facts of this case and the facts reviewed in the ***Ontario Home Builders' Assn.*** decision, in which it was found that there was a complete, complex regulatory framework governing land development. That said, I agree that ***Ontario Home Builders' Assn.*** considered the validity of imposing a fee, paid at the time of applying for a building permit for new housing which was intended to defray the cost of new schools directly necessitated by new development. The Supreme Court of Canada found that the EDC was part of a comprehensive and integrated regulatory scheme dealing with planning, zoning, subdivision and development of land in the province. The City submits that the imposition of the Impact Fee at the time of

applying for a building permit on new construction is no different, as the evidence establishes that new development or growth causes a need for more infrastructure.

[169] In my view, the first criterion of establishing a relevant regulatory scheme is satisfied.

[170] The second criterion identified in ***620 Connaught Ltd.*** is whether the regulatory scheme identified is aimed at affecting some behaviour. Generally, the court examines whether the fee regulates in "some specific way and for some specific purpose" and usually "delineates certain required or prohibited conduct" (see ***Westbank First Nation***, at paras. 26, 29 and 44).

[171] In my view, the imposition of the Impact Fee is not regulating development or growth or trying to alter the behaviour of individuals or the manner in which homes or buildings are constructed. Instead, the Impact Fee is aimed at raising revenues to support the operations and infrastructure of the City as a whole and also without any definite or clear requirement that the monies collected be tied back to growth caused by the developments from which the monies are collected.

[172] I agree with the submission of the applicants that the Impact Fee does not regulate behaviour, for example, as pointed out in ***620 Connaught Ltd.*** a per tonne charge on landfill waste may be levied to discourage the production of waste or a deposit refund charge on bottles may encourage recycling of glass or plastic bottles (see ***620 Connaught Ltd.***, at para. 20).

[173] The whereas paragraphs contained in the By-Law state:

> **WHEREAS** subsection 5(1) of *The City of Winnipeg Charter* defines the purposes of The City of Winnipeg as follows:

(a) To provide good government for the city;
(b) To provide services, facilities or other things that council considers to be necessary or desirable for all or part of the city;
(c) To develop and maintain safe, orderly, viable and sustainable communities; and
(d) To promote and maintain the health, safety and welfare of the inhabitants;

AND WHEREAS accommodating and managing growth and development so that it is safe, orderly, viable and sustainable and so that it promotes and maintains the health, safety and welfare of the inhabitants requires urban planning, zoning and land use restrictions, enforcement of building codes and the creation of a variety of infrastructure and services, including (but not restricted to) transportation, sewer, water, land drainage, recreation and police, fire, paramedic and emergency services;

AND WHEREAS to date, the costs to The City of Winnipeg of accommodating and managing growth and development have been only partially paid through development agreements, zoning agreements and fees for the permits and approvals required to develop and construct buildings;

AND WHEREAS the council of The City of Winnipeg has determined that the costs of accommodating and managing growth should be more fully paid for by the individuals and businesses directly benefitting from growth and development;

AND WHEREAS clause 210(1)(b) of *The City of Winnipeg Charter* provides as follows:

210(1) *The city may, if authorized by council, establish*
...
(b) fees, and the method of calculating and the terms of payment of fees, for
(i) applications,
(ii) filing appeals under this Act or a by-law,
(iii) permits, licences, consents and approvals,
(iv) inspections,
(v) copies of by-laws and other city records including records of hearings, and
(vi) other matters in respect of the administration of this Act or the administration of the affairs of the city.

AND WHEREAS subsection 6(1) of *The City of Winnipeg Charter* provides as follows:
6(1*) The powers given to council under this Act are stated in general terms*
(a) to give broad authority to council to govern the city in whatever way council considers appropriate within the jurisdiction given to it under this or any other Act; and
(b) to enhance the ability of council to respond to present and future issues in the city.

> **AND WHEREAS** the imposition of fees under subsection 210(1) of *The City of Winnipeg Charter* promotes the purposes of the City of Winnipeg and enhances the ability of council to respond to present and future issues in the City, as set out in subsection 5(1) and clause 6(1)(b) of *The City of Winnipeg Charter.*

[174] I agree that the purpose of the By-Law as stated, is that the costs of accommodating and managing growth should be more fully paid for by the individuals and businesses directly benefitting from growth and development. However, the list of capital projects used to calculate the cost of growth in the Technical Report is very broad and includes most capital projects undertaken by the City. I agree with the applicants that this is different than the regulatory purposes in ***Allard Contractors Ltd.*** and ***Ontario Home Builders' Assn.*** In ***Allard Contractors Ltd.***, the purpose was to defray the additional costs of road building and repair that were caused by authorized operators of gravel pits. In ***Ontario Home Builders' Assn.***, the purpose was to charge developers for the cost of construction of new education infrastructure necessitated by the new development. The capital costs included in the Technical Report include projects, some of which have already been completed such as the new police headquarters. There is no evidence that the capital costs of the new police headquarters was required due to new development. The evidence is that the former Public Safety Building was in a state of disrepair and a decision was made by the City to construct a new police headquarters.

[175] The City's expert, Mr. Hughes, confirmed during cross-examination that he was asked to consider costs of the City from a "holistic, City-wide view" (See transcript of proceedings, cross-examination of Mr. Hughes, dated December 13, 2019, at p. T37).

[176] Similar to what the court found in ***Westbank First Nation***, I agree that the primary purpose of the Impact Fee is to raise revenue by the City, to be deposited into the Reserve Fund and used for discretionary spending as the CFO recommends and City council approves.

[177] In my view, the Impact Fee does not discourage or encourage any behaviour of the individuals assessed and does not regulate in a manner described in ***620 Connaught Ltd.*** As a result, the second criterion favours a finding that the Impact Fee is an indirect tax and not a regulatory charge.

[178] The third criterion considered by the court is the presence of proper estimation of the costs. The approach used by Hemson was to review the list of capital projects submitted by the City and consider costs incurred on a City-wide basis. The Technical Report did not consider the cost associated with specific development and certainly not development within the areas of the City subject to the Impact Fee. The Technical Report considered the cost of growth and whether growth pays for the cost of growth.

[179] It is difficult to determine whether the costs and the revenues raised through the Regulatory Scheme have been properly estimated. Hemson relied on information provided by the City. Mr. Hughes acknowledged that he did not perform any independent verification of the costs. Mr. Hughes did not evaluate the numerous cost/benefit studies and reports, which were prepared as part of the development process in relation to each of the developments referred to in the evidence.

[180] Mr. Hughes acknowledged during cross-examination that the City would have to ensure that it provided credits to developers for contributions made pursuant to

development agreements or for capital expenditures related to water and wastewater infrastructure. There is no evidence that the City has done so in connection with the developments that are subject to the Impact Fee. (See transcript of proceedings, cross-examination Mr. Hughes, dated December 13, 2019, at pp. T37, T43, T48 - T51)

[181] Further, the evidence of Mr. Stevens establishes that the City is operating with a substantial capital project deficit on the basis of his review of the financial information referenced in his report, including the general City budget. His opinion and assessment demonstrate that the City operates at a deficit, but does not assist the court in assessing the actual cost of growth and whether new development is paying for growth in the City. Nor does Mr. Stevens' report assist in determining whether the developments where the Impact Fees are being levied are paying for the cost of growth or not.

[182] This is in contrast to cases in which the courts have found valid regulatory schemes exist. As stated in ***Westbank First Nation***, at para. 27:

> **27** Regulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated. In Ontario Home Builders', supra, at para. 55, the charge levied was "meticulous in its detail" and "clearly operate[d] so as to limit recoupment to the actual costs". In Allard, supra, evidence was led by city officials demonstrating the actual costs of annual road repair, based on estimates from similar repairs in the municipality. In both cases, there was a fairly [page151] close "nexus" between the estimated costs and the revenues raised through the regulatory scheme.

[183] I am not satisfied that the evidence establishes that there is a sufficient nexus between the estimated costs of the Regulatory Scheme and the revenues raised through the imposition of the Impact Fee. While Hemson has undertaken an assessment of the overall cost associated with growth in the City, the revenues derived from the Impact Fee

collected in certain developments are not directly connected to the costs generated by those developments. Accordingly, this factor also favours a finding that the Impact Fee is akin to an indirect tax and not a valid regulatory fee.

[184] The fourth criterion to be considered is the existence of the relationship between the regulation and the person being regulated. In ***620 Connaught Ltd.***, the court stated:

> **34** ... In *Allard*, this Court recognized that companies that removed gravel benefited from the roads that were funded from the fees collected for the removal of gravel. In *Ontario Home Builders'*, the majority found that the benefit conferred on construction contractors was the creation of residential developments with adequate amenities. The same approach is applicable here. The appellants benefit from the existence of a well-maintained national park. The appellants' revenues are linked to the number of visitors coming each year to Jasper National Park. The more the park attracts visitors, the greater the potential volume of the appellants' business. Also, regulations limiting development and thus the number of businesses within the park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. These factors demonstrate that the appellants benefit from the regulation of Jasper National Park.
>
> **35** However, where a regulatory scheme is very broad, the scheme may not be sufficiently related to the persons being regulated either because the regulation does not benefit those persons, or because those persons do not cause the need for the regulation, except in a very indirect manner. In such a case, the fees may be found to be a tax. Evans J.A. [page148] recognized the need for a sufficient relationship in his reasons, at paras. 44-45:
>
> > The fees in the present case were not attributed to the operations of the Department of Canadian Heritage at large nor even, more specifically, to the administration of the entire system of national parks. The licence fees paid by the appellants were attributed to the operating budget of the very park, Jasper, in which the appellants conducted their businesses. Any aspect of the operation of Jasper National Park which makes it more attractive to visitors, including on-site heritage presentations, visitor services and through highways, increases the appellants' potential customer base.
> >
> > In contrast, the appellants obtain only a very indirect benefit at best from the operation of other national parks and from the central administration of the responsible Department and the Parks Canada Agency. In my opinion, the analogies relied on by the appellants would be more persuasive if the Crown were arguing that the relevant regulatory scheme was the operation and administration of the national parks system as a whole.

[185] Applying these principles, there is a reasonable basis to accept the premise that development increases the overall costs to the City to provide infrastructure and services. I agree that there may be some connection between the costs related to growth caused by the developers and the By-Law. However, the applicants and homeowners living in the areas affected by the By-Law and Resolution are receiving only an indirect benefit from the operation of the City as a whole. The analysis completed by Hemson and relied upon by the City, was to examine the overall costs of capital projects to the City.

[186] In contrast, ***620 Connaught Ltd.***, considered the appellants who sold alcoholic beverages at establishments inside the Jasper National Park who benefited from the regulation of the National Park as they operated within a restricted market which attracted visitors to a well-maintained National Park.

[187] In ***Allard Contractors Ltd.***, the companies that removed the gravel benefited from the roads that were funded from the fees collected respecting the removal of the gravel. Similarly, in ***Ontario Home Builders' Assn.***, the parties benefited from the creation of residential developments with adequate educational facilities. In that case, the fund was used to fund only new school buildings in the area subject to the charge. (See ***620 Connaught Ltd.***, at para. 34 and ***Ontario Home Builders' Assn.***, at paras. 4, 7, 43, and 55)

[188] The Impact Fee is presently being held by the City in a general Reserve Fund which may be used for any purpose and not necessarily in respect of the costs generated as a result of growth generally or as a result of the specific developments subject to the Impact Fee. There is no requirement that the Impact Fee collected be used only to fund capital

projects associated with or caused by development where the Impact Fee is collected. There is also no requirement that the City provide any credit for developer contributions made to named capital projects paid pursuant to development agreements or as a condition of a specific planning approval.

[189] While there is a basis for saying that development or growth in a certain area of the City results in the requirement for additional infrastructure outside of that development, I am satisfied that the benefit in this case is more indirect than direct.

[190] The Hemson reports recommend that dedicated reserves be created for different types of capital projects and that the use of the Reserve Fund would be based on determinations as to which projects are growth related. The evidence filed does not support that the costs caused by specific development was examined or that the Reserve Fund would be used solely for projects that are growth related. The capital costs were assessed looking at the City as a whole (see ***Westbank First Nation***, at para. 44; Vogan's December 2017 affidavit, at para. 120; Vogan's November 2017 affidavit, at para. 71; Moore affidavit, at para. 61; Borger affidavit, at paras. 82 and 97; Borger's second affidavit, at para. 5; Markowsky affidavit, at para. 29 and Hughes affidavit, at para. 42).

[191] On the basis of my review of all of the evidence, I am not satisfied that there is a sufficient relationship between the persons being regulated and the regulation. As a result, this factor favours a determination that the Impact Fee is an indirect tax and not a valid regulatory charge.

Step 2 – The Relationship between the Impact Fee and the Regulatory Scheme

[192] In ***Westbank First Nation*** and ***620 Connaught Ltd.***, the court stated that the relationship will exist when the revenues are tied to the costs of the regulatory scheme such that they are "connected". (See ***Westbank First Nation***, at para. 44 and ***620 Connaught Ltd.***, at para. 38)

[193] In ***620 Connaught Ltd.***, the court found that the fees generated under the regulatory scheme were used to defray the costs of the scheme and the fee revenue generated did not exceed the costs of the scheme. The court referred to the regulatory scheme in ***Ontario Home Builders' Assn.***, at para. 85:

> The carefully designed mechanics of the scheme ensure that the power of indirect taxation will not extend beyond the regulatory costs; this is crucial in order to avoid rendering s. 92(2) of the *Constitution Act, 1867* meaningless.

[194] Further, in ***620 Connaught Ltd.***, the court stated at para. 42:

> ... An "apples to apples" comparison requires that all fees collected in respect of the operation of Jasper National Park by the Agency must be taken into account to ensure that the total of such fee revenues did not exceed the cost of the operation of the park.

[195] The court in ***620 Connaught Ltd.*** found that the fees were connected to the regulatory scheme. The court noted that "if the fee revenues generated in Jasper National Park are not expended entirely within, or for the benefit of that park, the fees may well be "unconnected" and not in pith and substance a regulatory charge, but rather, a tax." (***620 Connaught Ltd.***, at para. 45)

[196] Unlike the facts in ***620 Connaught Ltd.***, the Impact Fee fails to meet the requirement that there be a relationship between the charge and the Regulatory Scheme.

The connection referred to by the Supreme Court of Canada is at best, indirect and there is, in my view, insufficient evidence to establish that there is a matching between the Impact Fee revenues and the costs of growth within the Regulatory Scheme.

[197] The City submits that the Impact Fee is imposed to cover the cost of growth and yet the capital and operating costs included do not necessarily have a link to the developments that are subject to the Impact Fee. As stated in Mr. Hughes' affidavit, and during his testimony in court, the Impact Fee will be applied on a City-wide basis and not in respect of particular projects or services benefiting specific developments. (See Hughes affidavit, at para. 42) During cross-examination, he confirmed the intent of the Impact Fee is to assist the City in dealing with its broad infrastructure requirements. (See transcript of proceedings, cross-examination Mr. Hughes, dated December 13, 2019, at p. T35)

[198] In my view, an insufficient "apples to apples comparison" of the Impact Fees collected and the cost of growth caused by development has been established or proven. I am unable to determine whether the fees collected will exceed the cost of managing growth in the City, particularly as it relates to the developments referred to in the evidence.

[199] Further, the revenues collected from the Impact Fee are being held in a Reserve Fund, which funds can then be used to fund capital projects across the entire City. There is no requirement that the capital projects funded by the Reserve Fund be related or connected to the developments from which the Impact Fees were collected. Although the Administration Report recommended that expenditures from the Reserve Fund be

restricted to capital projects related to growth, that recommendation was not adopted by City council when it passed the By-Law and Resolution. In my view, there is insufficient evidence to establish that the Impact Fee and the use of the funds is connected to the Regulatory Scheme.

[200] The evidence filed simply does not satisfy me that there is sufficient nexus between the revenues generated by the Impact Fees and the expenses generated by growth being regulated under the Regulatory Scheme. While there is an indirect connection, I am satisfied that the Impact Fees which are being held in the Reserve Fund are, in pith and substance, an indirect tax and not a regulatory charge. The By-Law and Resolution allow for the Impact Fees to be collected and used as general revenues to defray the overall cost of all infrastructure and operations of the City which is more akin to the use of general revenues raised from real property taxes.

[201] As pointed out in ***620 Connaught Ltd.***:

> **46** Raising revenues is one of the most powerful tools of government. It involves the taking of property by the government. That is why taxes may be levied only by elected legislators in Parliament or the legislature of a province under the *Constitution Act, 1867*. Where the connection between the use of the revenues generated from a government levy and the persons being regulated is doubtful, the courts will scrutinize the facts to ensure that the Constitution is not circumvented by executive or bureaucratic edict.

[202] In my view, the connection between the use of revenues generated from the Impact Fee and the persons being regulated is doubtful and as a result, I find that the Impact Fee imposed pursuant to the By-Law and Resolution is an invalid indirect tax, and therefore an unenforceable tax beyond the legislative authority granted to the City to collect.

Position of the Parties on Issue III. - Does the imposition of the Impact Fee pursuant to the By-Law and Resolution discriminate against developers, builders and homeowners within certain developments who are required to pay the Impact Fee, such that the Impact Fee is discriminatory, arbitrary and invalid?

[203] The applicants submit that the By-Law and Resolution discriminate in their application. The ***Charter*** does not authorize discriminatory treatment. In ***Shell Canada Products Ltd. v. Vancouver (City)***, [1994] 1 S.C.R. 231 (S.C.C.), the Supreme Court of Canada confirmed the principle that by-laws may only discriminate where authorized by statute.

[204] Further, the applicants submit that there must be proper planning grounds to warrant a discriminatory distinction between property owners in the same position and absent such evidence, the By-law is beyond the authority of the City.

[205] The applicants say the By-Law discriminates between people residing in different areas of the City. For example, a builder applying for a building permit in one of Ladco's developments in Waverley West is subject to the By-Law and would pay an Impact Fee, whereas a builder constructing the same residence on a lot in an area which is not subject to the By-Law, pays no Impact Fee.

[206] The applicants say that the implementation of the Impact Fee effective May 1, 2017, in certain residential developments in the City is contrary to the recommendations made by Hemson of imposing the Impact Fee on a City-wide basis. Further, they say no justification has been put forward based upon proper planning principles and the notion of "growth paying for growth".

[207] The evidence filed by the respondent including the cross-examination of Ms. Lawson, according to the applicants, did not provide a principled basis for the approach taken by the City to impose the Impact Fee in New Communities and Emerging Communities versus other communities. The only explanation provided was that one community had a local area plan and the other did not. The applicants submit that there is no nexus or relationship between local area plans in New Communities and Emerging Communities and the concepts of managing and accommodating growth, growth paying for growth or consideration of offsite/regional infrastructure. Accordingly, the applicant says that the By-Law is discriminatory and should be quashed.

[208] The respondent submits the manner of imposing fees is within the discretion of the City and by-laws may assist some and adversely affect others. A differential treatment is not discrimination unless it is carried out with an improper motive of favouring or hurting one individual without regard to the public interest. (See ***Beaulieu v. Alexander (Rural Municipality)***, 2011 MBQB 213, 269 Man.R. (2d) 64)

[209] The City submits that s. 174(c) of the ***Charter*** provides statutory authority for the City to "deal with any activity, development, construction, industry, business, property, animal or thing in different ways or divide any of them into different classes and deal with each class differently".

[210] Further, the City relies on the Supreme Court of Canada decision of ***Vancouver (City) v. Simpson***, [1977] 1 S.C.R. 71, 1976 CarswellBC 147, as authority for the principle that the court should not interfere with a municipal decision unless there is evidence of bad faith. (See ***Beaulieu***, at para. 74)

[211] Further, the City submits that its authority to distinguish among users when setting fees is broad and discretionary pursuant to ss. 174 and 210(1) of the ***Charter***. Specifically, the City argues that it has the authority to pass the By-Law specifically targeted at growth or development in the City and the ***Charter*** allows the City to exercise discretion to implement the By-Law in phases.

Analysis and Decision on Issue III.

[212] The standard of review applicable to the discrimination issue is one of reasonableness. On the face of it, the By-Law is discriminatory in its application. It applies in certain developments, specifically New Communities and Emerging Communities in the City and not other developments and not communities that did not have a local area plan. This implementation plan is inconsistent with the recommendation made in the Hemson reports that the City should impose an Impact Fee to assist in paying for the growth and development on a City-wide basis.

[213] The starting point for the reasonableness review is an analysis of the ***Charter***. Section 174(c) of the ***Charter*** states:

> **General powers in exercise of authority**
> **174** Without limiting the generality of any other provision of this Act, council may, in a by-law passed under this Act,
>
> . . . .
>
> (c) deal with any activity, development, construction, industry, business, property, animal or thing in different ways, or divide any of them into classes and deal with each class differently;

[214] In my view, the City chose to implement the Impact Fee on a phased-in basis. It chose to implement the Impact Fee first in New Communities and Emerging Communities

and impose the Impact Fee in other areas of the City and on other types of developments in the future. The decision of the City was reasonable based on the authority to do that pursuant to s. 174(c) of the ***Charter***. In essence, the City chose to deal with development, construction, industry and property "in different ways, or divide any of them into classes and deal with each class differently" as authorized under the ***Charter***.

[215] The onus of proving that a by-law is unreasonable or was not passed in good faith or in the public interest is upon the applicant (see ***Vavilov***, at para. 100; ***Kuchma v. Tache (Rural Municipality)***, [1945] S.C.R. 234 at p. 235 (S.C.C.) (QL)).

[216] The majority in the Supreme Court of Canada decision of ***Vancouver (City) v. Simpson***, at para. 14, made this statement which is instructive in this case:

> ... [where] there is direct statutory foundation for the ground given for the decision to approve or disapprove, and where it is not shown that that decision, despite its impact on an individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should, in my opinion, be no interference by the court with municipal officials honestly endeavouring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas.

[217] In ***R. v. Sharma***, [1993] 1 S.C.R. 650 (S.C.C.) (QL), the Supreme Court of Canada considered whether licencing by-laws were discriminatory. At paras. 25 and 26 it states:

> **25** ... this case is governed by the decision of this Court in Montréal (City of) v. Arcade Amusements Inc., supra, with respect to the discrimination in the by-law scheme. In that case, the Court held that the power to pass municipal by-laws does not entail that of enacting discriminatory provisions (i.e., of drawing a distinction) unless in effect the enabling legislation authorizes such discriminatory treatment. See also Rogers, The Law of Canadian Municipal Corporations (2nd ed. 1971), at pp. 406.3-406.4:
>
> > It is a fundamental principle of municipal law that by-laws must affect equally all those who come within the ambit of the enabling enactment. Municipal legislation [page668] must be impartial in its operation and must not discriminate so as to show favouritism to one or more classes of citizens. Any by-law violating this principle so that all the inhabitants are not placed in the same position regarding matters affected by it is illegal.

> The general principle does not apply where the enabling statute clearly specifies that certain persons or things may be excepted from its operation or expressly authorizes some form of discrimination.
>
> . . .
>
> **26** ... Further, the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province ...

[218] Applying these principles to the present case, I agree that the By-Law must not discriminate so as to show favouritism to one or more classes of citizens unless the enabling statute clearly specifies that certain persons or things may be accepted or in other words, it authorizes some form of different treatment.

[219] As pointed out in ***Catalyst Paper Corp.***, at para. 9, the power of the court to set aside municipal by-laws is a narrow one and cannot be exercised simply on the basis that the by-law imposes a greater share of the tax burden on some taxpayers than on others.

[220] While I agree that the imposition of the Impact Fee in phase 1 appears to be applied in a discriminatory fashion, I am satisfied that implementing the Impact Fee on a phased-in basis is a reasonable decision and is authorized by the ***Charter***.

[221] Further, I am not satisfied that City council acted with an improper motive in passing the By-law and Resolution. The City made the decision to pass the By-Law and Resolution to implement the Impact Fee in phases. The first phase affects residential development in New Communities and Emerging Communities. The City's intention was and remains to apply the Impact Fee to other types of developments within New Communities and Emerging Communities and then to other areas in the City. At the

hearing of this matter, counsel for the City advised the City has held off proceeding with further phases until a decision is made in this case.

[222] In my view, the decision by the City to draw certain boundaries and to differentiate treatment within the City is reasonable as it is generally authorized pursuant to s. 174(c) of the ***Charter***.

[223] The court's role is to review the decision of the City and to refrain from deciding the issue when applying the reasonableness standard. As clarified in ***Vavilov***, I am not to ask what decision I would have made in place of the administrative decision-maker. I am not to attempt to ascertain the "range" of possible conclusions that would have been open to the decision-maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. I must only consider whether the decision made by the City, including both the rationale for the decision and the outcome to which it led – was reasonable. (See ***Vavilov***, at para. 83)

[224] In my view, the City chose to exercise its discretion and implement the By-Law and impose the Impact Fee in phases and that was within its discretion pursuant to the ***Charter***. In exercising its discretion, the decision of the City was not unreasonable as long as persons within the same areas designated in the By-Law and Resolution are treated the same.

[225] As pointed out in ***Sharma***, at para. 26: "... discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province ...". I am satisfied that even though the By-Law applies to certain residential communities, it was not unreasonable

for the City to make a decision to phase-in the Impact Fee on the basis that such a decision is authorized pursuant to the ***Charter***. Therefore, I conclude that the City's decision to phase-in the Impact Fee and treat areas of the City differently was not unreasonable and the request to quash the By-Law and Resolution on this basis is denied.

Analysis and Decision on Issue IV. – If the answer to one or more of Issues I. – III. is yes, what is the appropriate remedy?

[226] Since I have ruled that the answer to Issue II. is yes, are the applicants entitled to an order of mandamus directing the City to refund the Impact Fees collected pursuant to the By-Law and Resolution together with interest?

[227] Relying upon the Supreme Court of Canada decision of ***Kingstreet Investments Ltd. v. New Brunswick (Finance)***, 2007 SCC 1, [2007] 1 S.C.R. 3, the applicants submit that the appropriate remedy when a law has been held to be unconstitutional, is to refund to the taxpayer the tax collected pursuant to the unconstitutional law.

[228] I agree that since I have found that the Impact Fee imposed pursuant to the By-Law and Resolution is unconstitutional, applying the principle established in ***Kingstreet Investments Ltd.***, the Impact Fees should be refunded to the taxpayers together with any interest that has accrued while the Impact Fees have been deposited in the Reserve Fund and invested by the City pursuant to the ***Charter*** (See ***Kingstreet Investments Ltd.***, at paras. 20, 21 and 53 - 57).

[229] The order directing the City to refund the Impact Fees requires the City to return the Impact Fees paid by the person that paid the fee. In this case the Impact Fee must be refunded to the applicants, developers and builders that paid the Impact Fee. Since

the evidence establishes that the Impact Fee was passed on to the homeowners by the developers or builders, a just and equitable remedy applicable in the circumstances is to order or direct the applicants to refund the Impact Fee to the homeowners that paid the Impact Fee. The homeowners are not named as parties in these applications, however the parties must have records identifying the homeowners at the time the Impact Fee was collected.

[230] In the briefs filed by the City, no submission was made regarding the appropriate remedy. If there are issues requiring clarification in order to comply with this order, the parties may contact the trial coordinator to schedule a further case management conference to address this issue.

Conclusion

[231] I find as follows:

a) Enacting the By-Law and Resolution and imposing the Impact Fee was reasonable based on the authority or power of City council in the ***Charter***.

b) The By-Law and Resolution imposes a constitutionally invalid indirect tax and is not saved as a valid user fee or regulatory charge.

c) The imposition of the Impact Fee pursuant to the By-Law and Resolution treats developers, builders and homeowners within certain developments differently. However, the decision by City council to phase-in the imposition of the Impact Fee is authorized pursuant to the ***Charter*** and therefore was reasonable. As such, the Impact Fee is not invalid by reason of being discriminatory.

d) It is inappropriate and not in accordance with the Queen's Bench Rules and the authorities to decide the alleged breach of contract issue in the context of the applications.

e) The request for mandamus or an order of restitution requiring the City to refund the Impact Fees to persons that made the payments is granted. The City is required to refund the Impact Fees to the developers and builders that paid the fees together with any interest earned on the funds while they were deposited in the Reserve Fund. Interest should be calculated from the date the Impact Fees were collected to the date the Impact Fees are refunded. The applicants are ordered or directed to refund the homeowners that paid the Impact Fees plus accrued interest received from the City.

f) If the parties cannot agree on costs or the interest calculation applicable to the refunds, they may contact the trial coordinator and schedule a hearing to determine these issues.

J.

SCHEDULE A

NOTE: The capitalized terms referenced in Schedule A are the same defined terms as contained in the reasons for decision.

Affidavit of Eric Vogan, affirmed December 1, 2017

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
10-31	Argument	These paragraphs are admissible. They address the development process from the applicants' perspective. To the extent that an opinion is expressed, Mr. Vogan is qualified to give an opinion based on his experience and expertise.
32	Argument, relevance, and Inadmissible Opinion Evidence	This paragraph is admissible. It is relevant and probative to determine whether the Impact Fee is a regulatory charge or an indirect tax. To the extent that it is opinion evidence, it is permissible on the basis that Mr. Vogan's is a litigant expert.
44	Relevance	This evidence is admissible as it is relevant to the regulatory charge versus indirect tax issue. The probative value of this evidence is low. Information based on Mr. Vogan's experience is admissible
45	Relevance and inadmissible opinion evidence	This evidence is admissible as it is relevant to the regulatory charge versus indirect tax issue. The probative value is low. The opinion evidence is admissible as Mr. Vogan is a litigant expert.
46 and Ex. 8A-2005 Hemson	Argument and relevance	This evidence is admissible. The 2005 Hemson Consulting Ltd. report was introduced to challenge the opinions contained in the 2016 Hemson Reports. The 2005 report could have been introduced when Mr. Hughes was cross-examined. This evidence is relevant to assess the credibility of the opinions contained in the Hemson Reports and therefore to determine one or more of the issues.
54-2nd and 3rd and 4th sentences	Argument and inadmissible opinion evidence	This evidence is admissible. It contains a combination of argument and facts based on the personal knowledge of the deponent. To the extent that an opinion is expressed, Mr. Vogan is qualified to give the opinion as a litigant expert to explain UDI's position.
69-3rd, 4th, 5th and 6th sentences	Argument and inadmissible opinion evidence	This evidence contains a combination of facts and argument and is admissible. To the extent the sentences contain opinion, it is admissible as Mr. Vogan is a litigant expert. A portion of para. 69 is argument and while it is more appropriate for arguments to be included in the applicants' brief, it is allowed to assist the court in explaining UDI's position based on the evidence.
71	Argument and inadmissible opinion evidence	This paragraph contains a combination of facts and argument. It provides an explanation of Mr. Vogan's understanding and therefore is admissible.
72		This evidence is admissible.
73-2nd sentence	Relevance and hearsay	This evidence is Mr. Vogan's opinion and it has limited probative value. It is admissible as Mr. Vogan is a litigant expert and is relevant to the indirect tax versus regulatory charge issue.
74	Relevance and hearsay	This evidence is within the personal knowledge of Mr. Vogan and while the probative value is low, it is admissible.
78 and Ex. 24-MNP Report	Relevance and inadmissible opinion evidence	This evidence is admissible as it explains the steps taken by UDI/MHBA. Ex. 24 is part of the submission made to City Council and is therefore admissible

		as part of the Record. The MNP Report is admissible for a limited purpose as outlined in the reasons for decision.
79 and Ex. 24A-MNP Presentation	Relevance and inadmissible third-party evidence	This evidence is admissible as it explains the steps taken by UDI/MHBA. Ex. 24A is part of the submission made to City Council and is therefore admissible as part of the Record. The MNP Report is admissible for a limited purpose as outlined in the reasons for decision.
80	Relevance, inadmissible opinion evidence and inadmissible third-party evidence	This para. contains a quote from the MNP Report which is admissible for a limited purpose only. Ex. 24 and 24A contain expert opinion evidence which is not admissible for the truth of their contents.
81	Relevance, inadmissible opinion evidence and inadmissible third-party evidence	This is a quote from the MNP Report which is admissible for a limited purpose only. Ex. 24 and 24A contain expert opinion evidence which is not admissible for the truth of their contents.
82-83	Relevance, inadmissible opinion evidence, inadmissible third-party evidence and inadmissible recitals of third-party evidence	This is a quote from the MNP Report which is admissible for a limited purpose only. Ex. 24 and 24A contain expert opinion evidence which is not admissible for the truth of their contents.
84	Argument, relevance, hearsay and inadmissible opinion evidence	The first sentence contains a statement based on Mr. Vogan's personal knowledge and it is admissible. The second sentence is an opinion or argument which is inadmissible as it lacks evidentiary foundation.
85 and Ex. 24B-Tax Contributions Map	Argument, relevance, hearsay (double hearsay), inadmissible opinion evidence and inadmissible third-party evidence	This evidence is admissible as it was prepared by Qualico and Mr. Vogan has personal knowledge of the information. To the extent that this is opinion evidence, it is admissible as Mr. Vogan is a litigant expert.
86	Argument and inadmissible opinion evidence	This is Mr. Vogan's opinion and is inadmissible as the opinion lacks evidentiary foundation.
89 and Ex. 26-Deloitte Analysis	Argument, relevance, hearsay, statutory prohibited hearsay, inadmissible opinion evidence and inadmissible third-party evidence	This evidence is admissible to explain the information that was required by the City. Ex. 26, the Deloitte Analysis is admissible for a limited purpose as outlined in the reasons for decision. It is not admissible to prove the truth of the opinions contained in the report.
90-93	Argument, relevance, hearsay (double hearsay), inadmissible opinion evidence, and inadmissible third-party evidence	The description of the development process is relevant and admissible. The references to the third party expert reports are admissible for a limited purpose. They are not admissible to prove the truth of the opinions contained in the third party expert reports.
94 and Ex. 27-Traffic Assessment	Argument, relevance, hearsay (double hearsay), inadmissible opinion evidence, and	The description of the development process is relevant and admissible. The references to the third party expert reports are admissible for a limited purpose. They are not admissible to prove the truth of the opinions contained in the third party expert reports

	inadmissible third-party evidence	
95 and Ex. 28-Servicing Infrastructure	Argument, relevance, hearsay (double hearsay), inadmissible opinion evidence and inadmissible third-party evidence	The description of the development process is relevant and admissible. The references to the third party expert reports are admissible for a limited purpose. They are not admissible to prove the truth of the opinions contained in the third party expert reports
98	Argument and inadmissible opinion evidence	This evidence is a combination of facts based on Mr. Vogan's personal knowledge and argument. The evidence is relevant to the regulatory charge versus indirect tax issue and discrimination issue. The facts are admissible. To the extent this evidence is argument or alleges a breach of contract, it is inadmissible and is disregarded by the court.
103	Argument, relevance, hearsay and inadmissible opinion evidence	This evidence is admissible as it is relevant to the indirect tax versus regulatory charge issue. The probative value is low. To the extent that this is opinion evidence, Mr. Vogan is qualified to give the evidence as a litigant expert.
104		This evidence is admissible. The probative value is low as it may be relevant to the indirect tax vs. regulatory charge issue. To the extent that this is opinion evidence, Mr. Vogan is qualified to give the evidence as a litigant expert.
105	Argument, relevance, hearsay and inadmissible opinion evidence	This is a conclusion which is inadmissible. This evidence may be relevant to the breach of contract issue which is not being decided by the court. This evidence is disregarded by the court.
106	Argument and inadmissible opinion evidence	This evidence is admissible. It recites a statement of City Council and expresses a statement of fact and opinion regarding homeowners. To the extent that this is opinion evidence, Mr. Vogan is qualified to give the evidence as a litigant expert.
114 and Ex. 33, 34-Sage Creek Report and Plan	Argument, relevance, inadmissible opinion evidence and inadmissible third-party evidence	This evidence is relevant to the background of the Sage Creek development. The probative value is low. Ex. 33 and 44 are admissible for a limited purpose only. They are not admissible to prove the truth of the opinions contained in the reports.
118	Argument, relevance, hearsay and inadmissible opinion evidence	This evidence provides Mr. Vogan's interpretation of the Sage Creek Development Agreements. To the extent that this paragraph is relevant to the breach of contract issue, it is being disregarded by the court. To the extent that this paragraph is relevant to the issue as to whether the Impact Fee is a regulatory charge or an indirect tax, it is admissible.
121	Argument, relevance, and inadmissible opinion evidence	This evidence is admissible and may have some probative value to the regulatory charge versus indirect tax issue.
122-128	Argument, relevance hearsay and inadmissible opinion evidence	This evidence is relevant to the regulatory charge versus indirect tax issue and is admissible. To the extent that this evidence is opinion evidence, Mr. Vogan is qualified to give such evidence as a litigant expert.
129	Argument, relevance, hearsay and inadmissible opinion evidence	This evidence contains a combination of facts based on Mr. Vogan's personal knowledge and opinion. This evidence is relevant to the issue of discrimination. To the extent that this evidence contains opinion evidence, Mr. Vogan is qualified to give such evidence as a litigant expert.
130	Relevance	This evidence is relevant to the discrimination issue and is admissible.

Affidavit of Ken Braun, Sworn April 12, 2018

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
8	Hearsay	This evidence is admissible although the probative value is low.
9 and Ex. 1		This evidence is relevant to the regulatory charge versus indirect tax issue and is admissible
12	Relevance, hearsay and statutory prohibited hearsay	This evidence is inadmissible hearsay and does not comply with Queen's Bench Rule 39.01(5).

Affidavit of Tony Balaz, sworn April 12, 2018

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
8	Relevance and hearsay	This evidence is admissible although the probative value is low.
9 and Ex. 1		This evidence is relevant to the regulatory charge versus indirect tax issue and is admissible
12	Relevance, hearsay and statutory prohibited hearsay	This evidence is inadmissible hearsay and does not comply with Queen's Bench Rule 39.01(5).

Affidavit of Eric Vogan, affirmed November 29, 2017

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
1-132	Relevance	No motion was made to challenge the standing of UDI to advance the application. The court ruled at the hearing that UDI has standing to advance this application. Mr. Vogan, as the President of UDI, has personal knowledge of the history of the Impact Fee and had direct communications with and made representations to the City. His evidence is admissible subject to specific rulings made in the reasons for decision and in Schedule A. (See ***Urban Development Institute v. Rocky View (Municipal District No. 44)***, 2002 ABQB 651 and ***Urban Development Institute, Alberta Division v. Leduc (City)***, 2006 QBQB 62)
38	Facts, not argument not opinion evidence	This evidence summarizes provisions in *The Planning Act* and describes the differences between *The Charter* and *The Planning Act* from Mr. Vogan's perspective. This evidence is admissible but has limited probative value. It is admitted to provide background to the court and to understand the applicants' position. It more properly should have been advanced in the applicants' brief, and is allowed to assist in explaining the applicants' position.
43		This evidence is inadmissible hearsay and is not relevant to the issues to be determined.
47-52		This evidence provides background regarding UDI's involvement respecting the Development Agreement parameters process in other Cities in Canada. This evidence has limited relevance to the issues to be decided by the court and is admissible although the assessed weight is low.

53-55	Relevance and inadmissible opinion evidence	Evidence regarding Mr. Vogan's experience in other jurisdictions has limited probative value. It is relevant to the identification of development related costs and development charges. It is admissible although the assessed weight is low.
56 and Ex. L, M, N and O	Relevance	Statutes need not be attached to affidavits. They are not evidence. The court may take judicial notice of statutes and laws from other jurisdictions and law should be attached to briefs, not affidavits. A Government publication is a public record which may provide assistance to the court in assessing an issue and is admissible.
57 and 58 and Ex. P and Q	Relevance, hearsay, statutory prohibitive hearsay and inadmissible third-party reports	Evidence regarding land development in other jurisdictions has limited probative value. The statements of fact may be relevant to challenging the Hemson Reports and are admissible. Ex. P and Ex. Q are inadmissible hearsay prepared by third parties.
59	Relevance and inadmissible opinion evidence	This evidence is within the personal knowledge of Mr. Vogan and is admissible although it has limited probative value.
60-73	Relevance and inadmissible opinion evidence	This evidence is relevant to the development approval process in the City and is based on Mr. Vogan's personal knowledge and experience in the development industry. This evidence is admissible.
75	Argument, relevance and inadmissible Opinion Evidence	This evidence is admissible based on Mr. Vogan's experience in the development industry and to the extent that it provides an opinion, it is admissible as evidence explaining the position from the perspective of developers and UDI.
76	Relevance, hearsay, statutory prohibited hearsay and inadmissible opinion evidence	This evidence explains off-site impacts through development agreements and development permits in other municipalities. This evidence is irrelevant to the issues that must be decided and is therefore inadmissible.
77 and Ex. T	Argument and relevance	This evidence is admissible. The 2005 Hemson Consulting Ltd. report was introduced to challenge the opinions contained in the 2016 Hemson Reports. The 2005 report could have been introduced when Mr. Hughes was cross-examined. This evidence is relevant to assess the credibility of the opinions contained in the Hemson Reports and therefore to determine one or more of the issues.
81 and Ex. W	Relevance, hearsay and inadmissible opinion evidence	This evidence is admissible. The evidence of another report prepared by Hemson Consulting Ltd. is not admissible to prove the truth of contents of the other report. It is admissible to challenge the opinions contained in the 2016 Hemson Reports. Exhibit W could have been introduced when Mr. Hughes was cross-examined. This evidence is relevant to assess the Hemson reports and to determine one or more of the issues.
86	Argument and inadmissible opinion evidence	This evidence provides Mr. Vogan's views regarding capital projects based on his personal knowledge and experience and is admissible.
87	Relevance, hearsay and inadmissible opinion evidence	This evidence is based on Mr. Vogan's personal knowledge and is relevant to determining how capital projects are related to growth. How other jurisdictions pay for growth is not relevant to the issues to be determined in this matter. However, the evidence has some probative value to identifying projects that are growth related. The evidence is therefore admissible.
88	Relevance, hearsay and inadmissible opinion evidenced	This evidence is based on Mr. Vogan's personal knowledge and whether the Impact Fee takes into account contributions made by developers. This evidence is relevant and admissible.
92 and Ex. DD	Relevance, inadmissible opinion evidence and	This evidence is admissible as it explains the steps taken by UDI/MHBA. Ex. DD is part of the submission made to City Council and is therefore admissible

	inadmissible third-party evidence	as part of the Record. The MNP Report is admissible for a limited purpose as outlined in the reasons for decision.
93 and Ex. EE	Relevance and inadmissible third-party evidence	This evidence is admissible as it explains the steps taken by UDI/MHBA. Ex. EE is part of the submission made to City Council and is therefore admissible as part of the Record. The MNP Report is admissible for a limited purpose as outlined in the reasons for decision.
96-101 and Ex. FF and GG	Relevance, hearsay, statutory prohibited hearsay and inadmissible opinion evidence	This evidence is within the personal knowledge of Mr. Vogan dealing with the development approval process in Winnipeg. The evidence is relevant, but the probative value is low. To the extent that this evidence contains opinion evidence, Mr. Vogan is qualified to give such evidence as a litigant expert. The evidence is admissible.
102 and Ex. HH	Argument, relevance, hearsay, statutory prohibited hearsay and inadmissible opinion evidence and inadmissible third-party evidence	The description of the development process is relevant and admissible. The references to the third party expert reports are admissible for a limited purpose. They are not admissible to prove the truth of the opinions contained in the third party expert reports.
103 and Ex. II	Argument, relevance and inadmissible opinion evidence	The description of the development process is relevant and admissible. The references to the third party expert reports are admissible for a limited purpose. They are not admissible to prove the truth of the opinions contained in the third party expert reports.
104-107 and Ex. JJ, KK and LL	Relevance	This evidence is within the personal knowledge of Mr. Vogan and the various plans and minutes of council are public records, all of which may have some relevance to the credits applicable to developers by reason of the imposition of the Impact Fee.
108-113	Argument, relevance, hearsay, statutory prohibited hearsay, inadmissible opinion evidence and inadmissible third-party evidence	This evidence has limited probative value and is based on third party information and reports that are not attached to the affidavit. If the reports were attached, they would not be admissible for the truth of the opinions or contents of the report. This evidence is inadmissible.
118 and 119	Argument and inadmissible opinion evidence	This evidence contains a combination of facts and argument and is admissible. To the extent the sentences contain opinion, it is admissible as Mr. Vogan is a litigant expert. This argument more appropriately ought to have been included in the applicant's brief on the basis of the record before the court. It is allowed to assist the court to explain UDI's position based on the evidence.
121	Argument and inadmissible opinion evidence	This paragraph contains a summary of facts and argument. It explains Mr. Vogan's understanding and therefore is admissible.
122 and Ex. NN		This evidence is within the personal knowledge of Mr. Vogan and is admissible. The Template Agreement of purchase and sale is relevant to the regulatory charge versus indirect tax issue and is admissible.
124-126	Argument and inadmissible opinion evidence	This evidence is based on Mr. Vogan's personal knowledge and his expertise in the development industry. His views as to why the 2016 Hemson Reports are flawed are admissible as he is qualified to give an opinion as a litigant expert to explain the applicants' position.
127 and Ex. OO	Argument, relevance, hearsay and inadmissible opinion evidence	This evidence is based on Mr. Vogan's personal knowledge and his expertise in the development industry. Ex OO was prepared by Mr. Vogan based on public information. This evidence is admissible.

128	Argument, inadmissible opinion evidence and third-party report	This evidence is admissible as it explains the steps taken by UDI/MHBA. Ex. DD is part of the submission made to City Council and is therefore admissible as part of the Record. The MNP Report is admissible for a limited purpose as outlined in the reasons for decision.
129	Argument, inadmissible opinion evidence and third-party report	The UDI/MHBA Presentation was provided to City Council and is part of the record. The references to the amount of revenue generated by the Waverley West Development is based on cost benefit studies that have not been introduced to prove the truth of the calculations. The fact that cost benefit studies were done and are in the possession of the City is admissible. The actual analysis and the amounts of revenue generated have not been proven and are therefore inadmissible.
130	Argument and inadmissible opinion evidence	The UDI/MHBA Presentation is admissible but the actual costs have not been proven and are inadmissible.
131	Argument, hearsay and inadmissible opinion	Ex. OO is admissible. The conclusions by Mr. Vogan are opinions that are admissible as he has expertise in the development industry and this evidence is admissible as he is a litigant expert.

Affidavit of Mike Moore, sworn November 28, 2017

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
10, 12, 14, 16, 17 and Ex. C and D	Relevance and hearsay	This evidence is irrelevant to the matters to be determined on these applications and is inadmissible.
18 and 19 and Ex. E, F and G	Argument, relevance, hearsay and inadmissible opinion evidence	This evidence is inadmissible as it is irrelevant to the determination of the matters at issue.
20-22 and Ex. H and I	Relevance	This evidence is inadmissible as it is irrelevant to the determination of the matters at issue.
30 and Ex. O	Relevance	This evidence and Ex. O are within the personal knowledge of Mr. Moore and relevant to the stakeholder consultation process which led to the enactment of the By-Law and Impact Fee. This evidence is admissible.
36 and Ex. T	Relevance, inadmissible opinion evidence and inadmissible third-party evidence	This evidence is admissible as it explains the steps taken by UDI/MHBA. Ex. T is part of the submission made to City Council and is therefore admissible as part of the record. The MNP Report is admissible for a limited purpose as outlined in the reasons for decision.
39		This evidence has some relevance although the probative value is low. To the extent that Mr. Moore expresses an opinion, the evidence is admissible as he is qualified to express an opinion as a litigant expert.

43 and Ex. U		This evidence is admissible. Exhibit U is admissible for a limited purpose as outlined in the reasons for decision.
47 and 48		This is opinion evidence and criticism of the Backgrounder. The opinion evidence is admissible as Mr. Moore is a litigant expert.
55		This evidence is relevant to provide background information regarding the enactment of the By-Law. The probative value is low. To the extent that Mr. Moore expresses an opinion, it is admissible as he is a litigant expert.
62-67 and Ex. GG, HH, II, JJ, KK, LL, MM, NN and OO		These paragraphs deal with the approach taken by the City of Brandon respecting development charges permitted under *The Planning Act*. The referenced exhibits are within Mr. Moore's personal knowledge and are generally not controversial public records of the City of Brandon. The probative value of this evidence is low.

Affidavit of Alan Borger sworn February 27, 2018

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
7	Argument, hearsay, and inadmissible opinion evidence	This evidence is admissible. It addresses the regulatory scheme from Mr. Borger's perspective. To the extent that he expresses an opinion, Mr. Borger is qualified to give an opinion based on his experience and expertise as a litigant expert.
8	Argument, hearsay, statutory prohibited hearsay, and inadmissible opinion evidence	This evidence is admissible. It addresses the regulatory scheme from Mr. Borger's perspective. To the extent that an opinion is expressed, Mr. Borger is qualified to give an opinion based on his experience and expertise as a litigant expert.
9 and 10	Argument and inadmissible opinion evidence	These paragraphs summarize the legislative framework for the regulatory scheme from Mr. Borger's perspective. The paragraphs recite sections from the Charter. While the quotes of different sections of the Charter are unnecessary, the compilation in the affidavit of the various relevant sections provides background and assistance to the court in understanding the development process. This evidence is therefore admissible.
11	Argument, hearsay, statutory prohibited hearsay and inadmissible opinion evidence	This evidence is admissible. It is relevant background information based on his knowledge and experience of the development approval process.
12	Argument and inadmissible opinion evidence	This evidence is admissible although the probative value is low. Mr. Borger provides his understanding of the various mechanisms the City can use to raise revenue. It is relevant to understanding the development approval process.
13-17 and	Argument and relevance	The evidence is admissible. These paragraphs provide Mr. Borger's explanation as to how PlanWinnipeg/OurWinnipeg and Complete Communities have been used historically in the development approval

Ex. X & Y		process. This provides background information and assistance to the court.
18 and Ex. C	Argument.	This evidence is admissible. This paragraph provides a summary of the applicable portions of the subdivision standards By-Law from the perspective of Mr. Borger, who has experience and expertise in the development approval process.
19 and Ex. D	Argument, hearsay, statutory prohibited hearsay and inadmissible opinion evidence.	This evidence is admissible. This paragraph provides a summary of the applicable portions of the Parameters for development from the perspective of Mr. Borger, who has experience and expertise in the development approval process.
20	Argument and inadmissible opinion evidence.	This is admissible evidence. To the extent this is an opinion, Mr. Borger is qualified to provide an opinion based on his experience and expertise.
21 and 22	Argument.	This evidence is admissible as setting forth the developers' obligations pursuant to the Parameters from Mr. Borger's perspective.
23	Argument, relevance and inadmissible opinion evidence.	This evidence is admissible as Mr. Borger is expressing his opinion as a litigant expert.
24	Argument, hearsay, statutory prohibited hearsay and inadmissible opinion evidence.	This evidence is admissible. It contains a combination of facts, argument and opinion. To the extent that Mr. Borger expresses an opinion, it is admissible as he is a litigant expert.
25	Argument, hearsay, statutory prohibited hearsay and inadmissible opinion evidence.	This evidence is admissible as it is based on his personal knowledge and experience. To the extent that Mr. Borger expresses an opinion, it is admissible as he is a litigant expert.
26-35 and Ex. E, F, G, H & I	Argument, relevance, hearsay, statutory prohibited hearsay, inadmissible opinion evidence, inadmissible third-party evidence	This evidence deals with the development approval process for the Waverley West development including the Waverley West Area Structure Plan (Ex. F), the cost-framework model (Ex. G), the By-Law approving the neighborhood plan for Prairie Pointe (Ex. H), and the Prairie Pointe development agreement (Ex. I). Mr. Borger explains the development approval process from his perspective. This evidence is admissible, background evidence. To the extent that Mr. Borger expresses an opinion, the evidence is admissible as he is a litigant expert. The exhibits referenced were received by the City and are not generally contentious. To the extent that the exhibits provide opinion or a third-party evidence, the references are admissible for a limited purpose as outlined in the reasons for decision. Statements of opinion made in reports by third-parties are inadmissible to prove the truth of those opinions.
36-53 and Ex. J, K, L, M & N	Argument, relevance, hearsay, inadmissible opinion evidence, inadmissible third-party evidence, statutory prohibited hearsay	This evidence addresses cost/benefit studies and reports prepared by third-parties and Mr. Borger's explanation of the development approval process. The cost/benefit studies/expert reports are admissible for a limited purpose as outlined in the reasons for decision. The cost/benefit studies and third-party expert reports are not being introduced to prove the truth of the findings respecting the mathematical conclusions in the reports. The evidence is admissible to explain that the development approval process required the cost/benefit reports and to explain the manner in which they were used in the process.
58-63	Argument, hearsay, statutory third-party evidence, and inadmissible opinion evidence.	These paragraphs address Mr. Borger's responses and comments on the Hemson Reports. Mr. Borger provides comments on his understanding respecting the Growth Report and Technical Report. This evidence includes opinions provided by Mr. Borger which is admissible evidence as Mr. Borger is qualified to provide his opinion as a litigant expert.
64-81	Argument, hearsay, statutory third-party evidence, inadmissible opinion	These paragraphs address Mr. Borger's responses and comments on the Hemson Reports. Mr. Borger provides comments on his understanding

and Ex. Q	evidence and inadmissible third-party evidence	respecting the Growth Report and Technical Report. This evidence includes opinions provided by Mr. Borger which are admissible evidence as Mr. Borger is qualified to provide his opinion as a litigant expert. Exhibit Q is a chart summarizing Mr. Borger's concerns with the data chosen by Hemson in the Technical Report. He has personal knowledge of this information and it is admissible opinion evidence as Mr. Borger is qualified as a litigant expert to provide the opinion.
83-84 and Ex. B	Argument and inadmissible opinion evidence.	These paragraphs quote from the Administration Report which is part of the Record and is admissible. While this evidence is technically unnecessary, it simply provides context for Mr. Borger's comments and concerns respecting the Administration Report.
85 and Ex. B	Argument and inadmissible opinion evidence	This is Mr. Borger's opinion regarding the Administration Report and his view concerning what the Administration Report and Hemson reports did not address. Mr. Borger is qualified to provide his opinion as a litigant expert and this evidence is admissible. I agree with the City that to the extent that this paragraph contains argument, it more appropriately ought to have been included in the applicants' brief. A number of Mr. Borger's comments were confirmed during the cross-examination of Mr. Hughes. This evidence is admissible.
88 and Ex. T	Argument and inadmissible opinion evidence.	This evidence references Ex. T which is the Information Sheet which is admissible as part of the Record. Mr. Borger comments that no specific reasons were given for any of the changes other than a quote from Mayor Bowman. This evidence is admissible as it is within the personal knowledge of Mr. Borger. To the extent that it contains an opinion, it is admissible as he is a litigant expert.
105-117 and Ex. Z	Argument, relevance, hearsay, inadmissible opinion evidence and statutory prohibited hearsay.	Mr. Borger provides comments regarding Complete Communities, Recent Communities and Emerging Communities and a map that is part of the By-Law and Resolution. These paragraphs contain Mr. Borger's comments on which communities are subject to the Impact Fee and this evidence is relevant to the indirect tax versus regulatory charge issue and discrimination issue. Ms. Lawson was cross-examined regarding some of this evidence. This evidence is admissible. To the extent that Mr. Borger expresses an opinion regarding the imposition of the Impact Fee, he is qualified to give the opinion as a litigant expert.
118	Argument, relevance and inadmissible opinion evidence.	This is opinion evidence. The probative value is low. The evidence is admissible as Mr. Borger is a litigant expert.
119-121	Argument, relevance and inadmissible opinion evidence.	Mr. Borger provides evidence respecting two communities, South Pointe and Prairie Pointe with which he has personal knowledge. To the extent he expresses an opinion, it is admissible as he is a litigant expert.
122-131	Argument, relevance, hearsay, statutory prohibited hearsay, inadmissible opinion evidence,	Mr. Borger provides comments regarding Complete Communities, Recent Communities and Emerging Communities and a map that is part of the By-Law and Resolution. These paragraphs contain Mr. Borger's comments on which communities are subject to the Impact Fee and this evidence is relevant to the indirect tax versus regulatory charge issue and discrimination issue. Ms. Lawson was cross-examined regarding this evidence. This evidence is admissible. To the extent that Mr. Borger expresses an opinion regarding the imposition of the Impact Fee, he is qualified to give the opinion as a litigant expert.

Affidavit of Alan Borger sworn April 18, 2019

Mr. Borger's April 2019 affidavit responds to the affidavits filed on behalf of the City.

Para No.	Reasons for Inadmissibility	Court Ruling on Admissibility
3 and Ex. A, B, C, D & E	Argument, hearsay, inadmissible opinion evidence and inadmissible third-party evidence.	This evidence contains Mr. Borger's opinion responding to the opinions expressed by Mr. Markowsky. This evidence is admissible as Mr. Borger is a litigant expert and is responding to opinions expressed by the City economist, who I accept is also a litigant expert.
5 and Ex. F & G	Argument and inadmissible opinion evidence	This evidence addresses the evidence in Mr. Markowsky's affidavit relating to the Chief Peguis Trail in Winnipeg. This is opinion evidence which is admissible as Mr. Borger is a litigant expert qualified to give an opinion.
7 and Ex. E, H	Argument, hearsay, inadmissible opinion evidence and inadmissible third-party evidence.	This evidence addresses the cost/benefit studies which Mr. Markowsky addressed in his affidavits. The cost/benefit studies/expert reports are admissible for a limited purpose as outlined in the reasons for decision. The probative value of this evidence is low as the reports have not been introduced to prove the truth of the findings respecting the mathematical conclusions in the reports. Ex. H was prepared by Ladco's Chief Financial Officer and is not admissible to prove the truth of the mathematical calculations and the conclusion stated in the report.
9-10	Argument, hearsay and inadmissible opinion evidence.	This evidence is argument and simply repeats evidence provided in Borger's February 2018 affidavit. It is inadmissible.
11	Argument, relevance, hearsay and inadmissible opinion evidence	This evidence is within the personal knowledge of Mr. Borger. To the extent that it contains an opinion, it is admissible as Mr. Borger is a litigant expert.
12	Argument and inadmissible opinion evidence	This paragraph responds to paragraphs 48 and 57 of Ms. Lawson's affidavit and critiques her evidence. Mr. Borger expresses opinions and that evidence is admissible as he is a litigant expert.
13-20 and Ex. I, J, K & L	Argument, inadmissible opinion evidence	These paragraphs respond to various paragraphs of Ms. Lawson's affidavit. The evidence is within the personal knowledge of Mr. Borger. To the extent that an opinion is expressed, he is qualified to give the opinion as a litigant expert.
22-28 and Ex. Q, M & N	Argument and inadmissible opinion evidence	Mr. Borger responds to the comments and opinion made by Mr. Hughes in his affidavit. Some of this evidence is based on Mr. Borger's personal knowledge. To the extent that he expresses an opinion, his comments, analysis and criticisms of Mr. Hughes' opinion are admissible as he is qualified as a litigant expert.