

COURT OF QUEEN'S BENCH OF MANITOBA
WINNIPEG CENTRE

BETWEEN

LADCO COMPANY LIMITED

Applicant

and

THE CITY OF WINNIPEG

Respondent

File No. CI 17-01-05957

AND BETWEEN

RIDGEWOOD WEST LAND CORP., AND SAGE CREEK DEVELOPMENT
CORPORATION,

Applicants

and

THE CITY OF WINNIPEG

Respondent

File No. CI 17-01-05958

AND BETWEEN

URBAN DEVELOPMENT INSTITUTE (MANITOBA DIVISION)
AND MANITOBA HOME BUILDERS' ASSOCIATION INC.,

Applicants

and

THE CITY OF WINNIPEG

Respondent

REASONS FOR JUDGMENT

(Excerpt)

(Pages T1 - T16)

March 12, 2021
Winnipeg, Manitoba

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1 Proceedings taken in the Court of Queen’s Bench, Winnipeg, Manitoba

2

3

4 March 12, 2021

Afternoon Session

5

6 The Honourable Mr. Justice
7 J. Edmond (by teleconference)

The Court of Queen's Bench
for Manitoba

8

9 K. Ferbers (by teleconference)

For the Applicant Ladco Company
Limited

10

11 M. Newman (by teleconference)

For the Applicant Ridgewood West Land
Corp. and Sage Creek Development

12

13 D. Steinfeld (by teleconference)

For the Applicant Ridgewood West Land
Corp. and Sage Creek Development

14

15 J. Stefaniuk (by teleconference)

For the Applicant Urban Development
Institute (Manitoba Division) and
Manitoba Home Builders' Association
Inc.

16

17

18

19 L. Warelis (by teleconference)

For the Applicant Urban Development
Institute (Manitoba Division) and
Manitoba Home Builders' Association
Inc.

20

21

22

23 O. Currie (by teleconference)

For the Respondent, City of Winnipeg
Court Clerk

24

25

26

27 **Reasons for Judgment**

28

29 THE COURT: I am prepared to deliver my reasons for decision orally today. If
30 a transcript of the reasons for decision is ordered, I reserve the right to edit the oral
31 reasons for decision for clarification and grammatical purposes, but not in relation
32 to the substance of my decision.

33

34 On July 8, 2020, I released reasons for decision in three applications for judicial
35 review. On October 26, 2016, the City of Winnipeg (the “City”), counsel passed
36 impact fee By-law 127/2016 (the “By-Law”), and a related resolution (the
37 “Resolution”).

38

39 The applicant, Ladco Company Limited (“Ladco”), filed its notice of application
40 on January 26, 2017. Two related applications were filed, one by Urban
41 Development Institute (Manitoba Division) (“UDI”), and the Manitoba Home

1 Builders' Association Inc. (“MHBA”), and the other by Ridgewood West Land
2 Corp. and Sage Creek Development Corporation (collectively referred to as
3 “Qualico”).
4

5 The applicants sought to quash the By-Law and Resolution on four separate
6 grounds. The grounds were reviewed in the reasons for decision. Three of the
7 grounds advanced by the applicants were dismissed. However, the court found that
8 the impact fee imposed pursuant to the By-Law was a constitutionally invalid
9 indirect tax and was not saved as a valid user fee or regulatory charge.
10 Accordingly, the applicant's applications were allowed. The parties were directed
11 that they could not agree on costs they could schedule a hearing to determine the
12 costs. The parties disagree on the manner in which costs should be awarded to the
13 successful parties.
14

15 **Background Facts**

16

17 The three notices of application were heard together pursuant to a consent order
18 granted by the court. The consent order states that each of the applications shall
19 retain their separate court file numbers and separate identity. Further, the consent
20 order states at paragraph 5, that there shall be separate reasons for decision orders
21 and bills of costs for each of the applications.
22

23 The facts relevant to the applications are addressed in the reasons for decision
24 (2020 MBQB 101), and in numerous affidavits that were filed by the parties. It is
25 unnecessary to review the facts for the purpose of deciding the dispute on the
26 award of costs. The findings of the court were summarized at paragraph 231 of the
27 reasons for decision as follows:
28

29 a) Enacting the By-Law and Resolution and imposing the Impact Fee was
30 reasonable based on the authority or power of City council in the Charter;
31

32 b) The By-Law and Resolution imposes a constitutionally invalid indirect tax
33 and is not saved as a valid user fee or regulatory charge.
34

35 c) The imposition of the Impact Fee pursuant to the By-Law and Resolution
36 treats developers, builders, and homeowners within certain developments
37 differently. However, the decision by City council to phase-in the imposition of
38 the Impact Fee is authorized pursuant to the Charter and therefore was reasonable.
39 As such, the Impact Fee is not invalid by reason of being discriminatory.
40

41 d) It is inappropriate and not in accordance with the Queen's Bench Rules and

1 the authorities to decide the alleged breach of contract issue in the context of the
2 applications.

3
4 e) The request for mandamus and an order of restitution requiring the City to
5 refund the Impact Fees to persons that made the payments is granted. The City is
6 required to refund the Impact Fees to the developers and builders that paid the fees
7 together with any interest earned on the funds while they were deposited in the
8 Reserve Fund. Interest should be calculated from the date the Impact Fees were
9 collected to the date the Impact Fees are refunded. The applicants are ordered or
10 directed to refund the homeowners that paid the Impact Fees plus accrued interest
11 received from the City.

12
13 f) If the parties cannot agree on costs or the interest calculation applicable to
14 the refunds, they may contact the trial coordinator and schedule a hearing to
15 determine these issues.

16
17 In addition to hearing the applications, four notices of motion were heard by the
18 court:

19
20 a) A motion filed by the City, which sought leave to file a further expert
21 report from Mr. Michael Stevens of the Exchange Group. The motion was granted,
22 and the court ordered that the applicants were entitled to “throw away costs”
23 arising out of the late request to file the further expert report.

24
25 b) A motion to compel production of documents in the possession of the City.
26 The court ordered the production of the documents and costs in the cause.

27
28 c) A motion by the applicants to produce documents provided to the City's
29 expert regarding the expert opinion, 84 documents were disclosed and of those, the
30 City claimed privilege over 55 documents. The court reviewed the documents and
31 ordered production of one document from the 55, over which privilege was
32 claimed. The court found that the balance of the documents to be subject to
33 litigation privilege and the City was not required to produce them. Costs were
34 ordered in the cause.

35
36 d) A motion brought by the City seeking an order striking out or expunging
37 portions of the affidavits filed on behalf of the applicants on numerous grounds
38 including that the affidavits contained improper argument, irrelevant evidence,
39 inadmissible hearsay and statutorily prohibited hearsay, inadmissible opinion
40 evidence, third party evidence and recitals of third party evidence. The court found
41 that a few portions of the applicants' affidavits contained inadmissible evidence,

1 but primarily dismissed the motion to strike out or expunge portions of the
2 applicants' affidavits.

3
4 The City's motion to strike portions of the affidavits filed by the applicants and the
5 applications were heard over the course of four days on February 24 to 27, 2020.

6
7 On July 8, 2020, that the court released its decision on the applications and the
8 City's preliminary motion to strike affidavit evidence. Schedule 'A' of the decision
9 contains a detailed review of the specific findings relating to the evidence the City
10 submitted should be struck out or expunged from the record. A summary of my
11 findings on the preliminary issue are set fourth at paragraph 103 of the reasons for
12 decision.

13
14 **Positions of the Parties and Governing Principles on Costs**

15
16 The court has broad discretion to fix costs pursuant to s. 96.1 of the *Court of*
17 *Queen's Bench Act*, C.C.S.M. c. C280. Queen's Bench Rule 57.01 lists numerous
18 factors and principles the court may consider in exercising its discretion to award
19 costs:

20
21 **Factors in discretion**

22 57.01(1) In exercising its discretion under section 96 the *Court of*
23 *Queen's Bench Act* to award costs, the court may consider, in addition to
24 the result in the proceeding and any offer to settle made in writing,

- 25
26 (a) the amount claimed and the amount recovered in the proceeding;
27 (b) the complexity of the proceeding;
28 (c) the importance of the issues;
29 (d) the conduct of any party which tended to shorten or lengthen
30 unnecessarily the duration of the proceeding;
31 (d.1) the conduct of any party which unnecessarily complicated the
32 proceeding;
33 (d.2) the failure of a party to meet a filing deadline;
34 (e) whether any step in the proceeding was improper, vexatious, or
35 unnecessary;
36 (f) a party's denial or refusal to admit anything which should have
37 been admitted;
38 (f.1) the relevant success of a party on one or more issues in a
39 proceeding in relation to all matters put in issue by that party;
40 (g) whether it is appropriate to award any costs or more than one set of
41 costs where there are several parties with identical interests who are
42 unnecessarily represented by more than one counsel and
43

1 (h) any other matter relevant to the question of costs.
2

3 ...
4

5 **Court may fix costs**

6 57.01(3) In awarding costs, the court may fix all or part of the costs, with
7 or without reference to Tariff A or B, instead of referring them for
8 assessment, but in exercising its discretion to fix costs the court will not
9 consider any tariff as establishing a minimum level for costs.
10

11 **Disbursements**

12 57.01(4) The court may disallow a disbursement in whole or in part where,
13 based on all the circumstances of the case, it is satisfied that a
14 disbursement claimed by a party was not reasonably necessary for the
15 conduct of the proceeding or was for an unreasonable amount.
16

17 ...
18

19 **Authority of court**

20 57.01(6) Nothing in this Rule affects the authority of the court,
21 (a) to award or refuse costs in respect of a particular issue or a part of a
22 proceeding;
23 (b) to award a percentage of assessed costs or award assessed costs up to
24 or from a particular stage of a proceeding; or
25 (c) to award all or part of the costs on a lawyer and client basis.
26

27 The applicants submit that in view of the amount, complexity, importance of the
28 proceedings and the conduct of the City unnecessarily delaying or adding
29 complexity to the proceeding, an order of elevated costs ought to be granted. Each
30 of the applicants have disclosed their lawyer and client fees and disbursements and
31 submit that the tariff costs pale in comparison to the actual legal fees incurred to
32 litigate the applications.
33

34 The applicants rely upon several Manitoba authorities in which the court has
35 awarded enhanced costs. (See *Albionex (Overseas) Limited et al. v. ConAgra*
36 *Limited et al.*, 2013 MBQB 310, 301 Man.R. (2d) 51, *Brooks Equipment Limited*
37 *et al. v. La Salle Credit Union Ltd. et al.*, 2017 MBQB 205, *Apotex Fermentation*
38 *Inc. v. Novopharm Ltd.*, [1997] 6 W.W.R. 88 (Man. Q.B.), *Manufacturers Life*
39 *Insurance Co. v. Pitblado & Hoskin*, 2008 MBQB 11, 224 Man.R. (2d) 129, and
40 *Dinney v. Great-West Life Assurance Company*, 2007 MBQB 76, 47 C.C.L.I. (4th)
41 52).
42

1 Based on the principles established in these authorities and the appropriate
 2 application of the factors in Court of Queen's Bench Rules, the applicants seek
 3 enhanced costs calculated as follows:

4
 5 Ladco (all of which are inclusive of taxes):

6		Tariff	Requested
7		<u>Costs Class 3</u>	<u>Costs</u>
8			
9	Throw away costs relating to the City's motion		
10	for leave to submit the expert report of Mr. Stevens	\$15,000	\$15,000
11			
12	Motion for production of documents by the City	\$3,808	\$6,000
13			
14	Motion relating to production of communications		
15	with expert	\$3,472	\$6,000
16			
17	Motion relating to the City's request to expunge	\$6,272	\$20,000
18			
19	Hearing of the application itself including		
20	case conferences, cross-examinations, preparation		
21	of briefs attendance at the hearing and other		
22	related matters	\$12,880	\$90,000
23			
24			
25	Disbursements	<u>\$8,833</u>	<u>\$8,833</u>
26			
27	Total	\$50,265	\$145,833

28
 29 Qualico (all of which are inclusive of taxes):

31		Tariff	Requested
32		<u>Costs</u>	<u>Costs</u>
33			
34	Throwaway costs relating to the City's motion		
35	for leave to submit the expert report of Mike Stevens	\$3,350	\$4,500
36			
37	Motion for production of documents by the City	\$1,850	\$3,000
38			
39	Motion relating to production of communications		
40	with expert	\$1,500	\$2,500
41			
42	Motion relating to the City's request to expunge	\$5,550	\$15,000

1			
2	Hearing of the application itself including		
3	case conferences, cross-examination, preparation		
4	of briefs, attendance at the hearing		
5	and other related matters	\$14,883	\$111,500
6			
7	Disbursements	\$_____	\$_____
8	Total		\$140,000
9			

10
11 UDI and MHBA (all of which are inclusive of taxes):

12			
13		<u>Tariff</u>	<u>Requested</u>
14		<u>Costs</u>	<u>Costs</u>
15			<u>Include</u>
16			<u>Disb.</u>
17	Throwaway costs relating to the City's motion		
18	for leave to submit the expert report of Mike Stevens	\$	\$2,500
19			
20	Motion for production of documents by the City	\$4,636	\$4,636
21			
22	Motion relating to production of communications		
23	with expert	\$2520	\$2,520
24			
25	Motion relating to the City's request to expunge	\$6,216	\$15,000
26			
27	Hearing of the application itself including		
28	case conferences, cross-examinations, preparation		
29	of briefs, attendance at the hearing and		
30	other related matters	<u>\$4,792.62</u>	<u>\$114,792.62</u>
31			
32	Total (inclusive of GST, PST, and disbursements)		\$139,448.62
33			

34
35 The City submits:

- 36
- 37 a) Costs are generally awarded to the successful party and orders of solicitor
38 and client costs or enhanced costs over and above the tariff are exceptional;
39
- 40 b) The City acknowledges that the applicants were successful on one of the
41 grounds challenging the impact fee but submit that the applicants were
42 unsuccessful on the other grounds;

1
2 c) Tariff 'A' of the Court of Queen's Bench Tariff establishes that applications
3 are determined to be a Class 3 proceeding and while the court has discretion to
4 award enhanced costs, the City submits that a fair and reasonable test should be
5 applied in the circumstances;

6
7 d) The fair and reasonable analysis should involve the consideration of the
8 following factors:

9
10 i) three applications were filed but one should have sufficed. There was
11 only one common issue which succeeded, and that common issue did
12 not require three applications;

13 ii) there were four discreet issues before the court and the City was
14 successful on three of the four issues;

15 iii) the unsuccessful issues raised by the applicants required additional
16 affidavit material and contributed to the length and complexity of the
17 hearing of the applications;

18 iv) the applications were heard during two days of hearing. The motion to
19 expunge or strike out the affidavit material was heard in a day and a
20 half;

21 v) the issue as to whether the impact fee had amounted to a valid
22 regulatory charge was not a complex or complicated issue and was
23 based on established law. The other issues raised by the applicants were
24 more complex;

25 vi) the authorities relied upon by the applicants in which the court awarded
26 enhanced costs involved:

- 27 • lengthy complicated trials;
- 28 • complicated, scientific and/or financial information with multiple
- 29 experts; or
- 30 • the parties' behaviour was considered dishonest requiring
- 31 significant evidentiary and trial preparation to refute and correct.

32 vii) the applicants should receive one set of tariff costs with a second set of
33 substantially reduced tariff costs for each of the other two applications;

34 viii) the City proposes tariff costs in the amount of \$25,872.50 for a Class 3
35 proceeding and requests the court deny the disbursements for WestLaw
36 legal research and reproduction costs;

37 ix) the two additional sets of costs should be substantially reduced by 68
38 percent to recognize the divided success on discreet issues before the
39 court;

40 x) alternatively, if the court determines that it is fair and reasonable to
41 provide for enhanced costs, not all three applications should be given or

- 1 should be awarded enhanced costs;
- 2 xi) it is not fair and reasonable to award three sets of enhanced costs;
- 3 xii) any award of enhanced costs provided by the court should be reduced
- 4 by 68 percent to acknowledge that the applicants were unsuccessful on
- 5 three of the four grounds argued in support of the applications.

6

7 The parties rely on numerous authorities to advance their positions regarding the

8 appropriate exercise of my discretion in awarding costs.

9

10 The parties appear to be in agreement that courts generally only grant what are

11 called “distributive costs” where success is divided in a proceeding and only in

12 rare circumstances (See *Peter Lombardi Construction Inc. v. Colonnade*

13 *Investments Inc.*, [2000] 51 O.R. (3d) 551, [2000] O.J. No. 4803 (Ont. Sup. Ct. J.)

14 and *Orkin, The Law of Costs* (2d) ed. Canada Law Book).

15

16 The City relies on *Eastern Power Limited v. Ontario Electricity Financial Corp.*,

17 2012 ONCA 366, [2012] O.J. No. 2414), as authority for the proposition that the

18 court may take into account the parties limited success on the legal issues to

19 reduce the cost award on certain issues or under the listed cost factors in the Rules.

20

21 The City also relies upon the decision of the British Columbia Supreme Court in

22 *Dinyer-Fraser v. Laurentian Bank of Canada*, 2005 BCSC 1432, [2005] B.C.J.

23 No. 2189. The principle which has been recited in many authorities is that

24 apportionment of costs is limited to exceptional cases. That said, I agree Queen's

25 Bench Rule 57.01 does provide the judge with a discretion to determine a just

26 apportionment of costs between the parties in cases which have been prolonged by

27 issues raised unsuccessfully by a party.

28

29 There are Manitoba authorities in which the court awarded costs as a percentage of

30 the amount of damages sought compared to the amount granted at trial. See for

31 example *Selta International Trade Inc. v. Duboff, Edwards, Haight & Schachter*,

32 2004 MBQB 116, 185 Man.R. (2d) 22). See also *Moyen v. DiSanto* [1996] 109

33 Man.R. (2d) 91 (Man. Q.B.). In the *Moyen* case, the court adjusted the costs

34 awarded to reflect the fact that the majority of the trial was spent by the plaintiff

35 advancing an unsuccessful attempt to establish an interest in the defendant's

36 business.

37

38 **Analysis and decision**

39

40 Applying the principles outlined in the authorities and the factors set forth in the

41 Queen's Bench Rules, the court has the discretion to determine the appropriate

1 award of costs in the circumstances. In most cases, costs are awarded in
2 accordance with the Court of Queen's Bench tariff. The purpose of the tariff is not
3 to compensate a party on a full indemnity basis. The purpose of the tariff is to
4 establish a set of costs that will apply in most cases. This provides some assurance
5 to the parties that costs will be awarded to the successful party in a reliable and
6 predictable manner.

7
8 Clearly, the court has the discretion to award all or part of the costs on a lawyer
9 and client basis. None of the parties are seeking such an award. However, no one
10 disputes that such an award is exceptional and is generally limited to cases where
11 the conduct of a party is "reprehensible, scandalous or outrageous". (See *Young v.*
12 *Young*, [1993] 4 S.C.R. 3 (S.C.C.), *Provincial Judges' Assn. v. Manitoba*, 2013
13 MBCA) 74, 294 Man.R. (2d) 273)

14
15 The parties do not dispute that the award of costs usually follows the result in the
16 proceeding. In this case, the applicants were successful in their applications for
17 judicial review and were granted an order of mandamus and restitution respecting
18 the impact fees that were held by the City.

19
20 An enhanced award of costs may be awarded when the factors set forth in Queen's
21 Bench Rule 57.01 justify such an order.

22
23 I am not satisfied that a distributive cost award should be made as I am not
24 satisfied the rationale applies in this case and in any event, such an award should
25 be limited to rare cases.

26
27 Unlike the Manitoba cases relied upon by the City, this is not a case in which the
28 applicants only received a portion of the damages sought and were unsuccessful on
29 some or a large portion of the claim being advanced. While four grounds were
30 argued, only one was required for the applicants to be successful and have the
31 court grant the release sought. More importantly, I am not satisfied that any of the
32 issues raised lacked merit or were unnecessary. In my view, the applicants were
33 successful overall in seeking the relief and remedy sought. This case is
34 distinguishable from the decisions relied upon by the City where there was a
35 divided success.

36
37 I agree with the assessment made in the Ontario Court of Appeal in *Mihaylov v.*
38 *1165996 Ontario Inc.*, 2017 ONCA 218, [2017] O.J. No. 1351, in assessing the
39 appropriate indemnity scale under the Ontario Court rules, the court considered
40 which party was successful, " ... on the issues that drove the Proceedings Below
41 ..." (at paragraph 8)

1
2 The City cited the decision of the British Columbia Court in *Dinyer-Fraser*. In that
3 case, the court addressed the concept of distributive cost orders stating that they
4 should be reserved for cases where truly discreet and separate issues can be
5 identified. The court stated at para 10 as follows:

6
7 A key principle which has emerged from the authorities,
8 including *Worthington*, is that the apportionment of costs
9 is limited to exceptional cases. It is not a routine feature of
10 litigation; rather, it is reserved for relatively rare
11 circumstances (see also *Webber v. Canadian Aviation*
12 *Insurance Managers Ltd.* 5 C.C.L.I. (4th) 205, 2003
13 BCSC 274 (B.C. S.C.) [*Webber*] and *Sutherland v.*
14 *Canada (Attorney General)*, 2005 BCSC 479 (B.C. S.C.)
15 [*Sutherland*]. Another established principle is that Rule
16 57(15) is to be invoked only in respect of discreet issues
17 which can be clearly delineated. In *Gotaverken Energy*
18 *Systems Ltd. v. Cariboo Pulp & Paper Co.* (1995), 9
19 B.C.L.R. (3d) 340, 45 C.P.C. (3d) 78 (B.C. S.C.) [in
20 Chambers] at para 9, Vickers J. addressed this vital point:

21
22 Rule 57(15) was not designed to allow for a minute
23 dissection of the success or failure of litigants on
24 the completion of a trial. It envisioned there would
25 be discreet issues, occupying distinct portions of
26 time in the life of the trial, upon which an objective
27 observer could say one or other of the parties was
28 successful in the result. It may not be possible to
29 perform a perfect analysis of how time at trial was
30 utilized. A particular witness may have been called
31 to testify on one matter or several matters in issue.
32 That was the situation in this case.

33
34 I agree with the submission of the applicants that the complex factual context and
35 the matrix of the development process and the legislative and regulatory
36 framework of the development process was required to address all grounds argued
37 in support of the applications. I certainly agree with the City that some facts are
38 discreet to the grounds argued, for example, the evidence regarding the
39 developments in the City where the impact fee was implemented. However, that
40 evidence was relevant to one or more of the other grounds advanced by the
41 applicants.

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In my view, what drove the proceedings in this case was a challenge to the validity of the By-Law and Resolution. The applicants were successful in the challenge and the court granted the relief requested.

None of the parties disputed the general principle that costs should be awarded to the successful parties. The primary question that must be considered is whether the applicants are entitled to an enhanced order of costs. Referencing the cases is helpful for general principles. However, awards of costs are discretionary orders based on the particular facts and circumstances of each case. In my view, the preferred approach is to review the factors set forth in Queen's Bench Rule 57.01(1) being mindful that the successful party is generally entitled to tariff costs. Applying the factors set forth in Rule 57.01, I note the following:

a) The applicants challenged the validity of the impact fee and sought an order of mandamus and restitution which involved monies held by the City in the range of \$37 million. The applications raised very significant legal challenge to the impact fee which affected many developers, contractors, home builders, and owners of property in the City.

b) I have no hesitation in accepting that the hearing of the applications and the issues raised were complex. Numerous affidavits were filed and there was an extensive production of documents, expert evidence was called, and cross-examinations were conducted in court. Four contested motions were heard and decided by the court including the expungement motion, which was the most time consuming and complex as the City sought to expunge portions of various affidavits filed by the applicants. The factual context of the dispute involved the City's development process, a review of the City of Winnipeg Charter Act and a number of City By-Laws. Voluminous affidavits were filed by the applicants and the City describing the process. The affidavits contained a large number of exhibits. The cross-examinations on affidavits of witnesses of the City occurred in court. The parties filed voluminous briefs which in my view were required to assist the court in order to decide the complex issues. The fact that the applications and expungement motions were completed in four days is a credit to the parties' cooperation and not duplicating submissions. Had this matter proceeded as a trial, it would have probably lasted several weeks.

c) I accept and no one disputes that the issues raised are important to not only the applicants, but to contractors, developers, and the citizens of the City.

d) The parties argued that certain steps were taken by the City which

1 lengthened unnecessarily the duration of the proceeding including the late request
2 to file a further expert report of Mr. Michael Stevens and the decision of the City
3 to seek to strike out or expunge substantial portions of the affidavit which took
4 approximately a day and a half of hearing time. The City also submitted that steps
5 were taken by the applicants which unnecessarily lengthened the duration of the
6 proceedings. In my view, the late filing of the expert report has already been
7 addressed by ordering that the applicants were entitled to their “throw away
8 costs”. The extent of the expungement motion did consume a significant amount
9 of time and effort by the parties and the court and in my view, the correct
10 approach is to assess the costs of that motion separate from the costs sought in the
11 applications. On balance, I am not satisfied that the conduct of any party is a
12 significant factor in assessing costs of the application.
13

14 e) Similarly, I am not satisfied that any step in the proceeding was improper,
15 vexatious, or unnecessary. The extent of the expungement motion was
16 complicated and took a considerable amount of time and effort by counsel and the
17 court. The appropriate award of costs should be dealt with as a separate
18 consideration.
19

20 f) One of the most contentious issues is whether the court should award more
21 than one set of costs where there are several parties with similar interests. The
22 position of the City was reviewed in my introduction. I am satisfied that while the
23 applications were heard concurrently, each of the applicants represented different
24 interests and were entitled to bring forward an application separately. The consent
25 order was entered during the case management process to ensure that the
26 applications proceeded in the most efficient and cost-effective manner possible.
27 The consent order states that the applications be heard together and that the
28 applications shall retain their separate court file numbers and separate identities.
29 The consent order also states that there shall be separate reasons for decision,
30 orders and bills of costs for each of the applications. In my view, each of the
31 parties contributed with evidence that affected their respective clients and the
32 applicants worked on a cooperative basis in a manner that minimized duplication.
33 In my view, ordering one set of costs or reducing costs of one or more of the
34 applicants would be inappropriate. Each of the applicants is entitled to costs in the
35 circumstances of this case.
36

37 As to the procedural motions, I find as follows:
38

39 a) Expungement motion

40 i) As mentioned above, the expungement motion utilized a significant
41 amount of counsels’ time and effort as well as the court. Extensive

1 submissions were made and only a few paragraphs were struck out of
2 the affidavits. The applicants were substantially successful on the
3 expungement motion. The tariff costs in relation to the expungement
4 motion would be a fraction of the costs incurred and inappropriate
5 considering the complexity and time required to address the issues
6 raised by the City. Although different positions were advanced on
7 behalf of the applicants, an appropriate award costs taking into account
8 the factors is an award of double tariff costs calculated on a Class 4
9 basis respecting this motion.

10
11 b) City expert motion

12 i) I gave oral reasons for decision on the City expert motion and stated:
13

14 In my view, the filing of the proposed expert report while
15 arguably raises matters that many have been dealt with in
16 the Hughes' report, may very well assist the court in
17 making a fair and just determination of the issues and
18 specifically whether the test set out in *620 Connaught and*
19 *Westbank* has been met or not. I have no doubt that the
20 late filing of this report and affidavit will cause prejudice
21 to the applicants. In the interest of justice, I am prepared
22 to grant the request for leave to file a further affidavit
23 together with a report subject to an award of costs. I will
24 hear brief submissions on the throw away costs incurred
25 by the applicants as a result of granting this motion.
26

27 ii) The applicants seek different amounts for their throw away costs. Ladco
28 advances a claim for \$15,000 whereas Qualico seeks \$4,500 and UDI
29 and MHBA seek \$2,500. Ladco acknowledges that it is difficult to
30 determine the amount of time and legal fees incurred relating to the
31 City's motion seeking leave to file the expert report. Ladco
32 acknowledges that a very rough approximation of the throw away legal
33 fees is \$15,000 inclusive of taxes. I am not prepared to accept that
34 amount as the amount of professional time incurred in connection with
35 this issue. A more reasonable estimate of the throw away costs incurred
36 is the one provided by Qualico. I grant the request for costs in relation to
37 the throw away costs as follows:

- 38 - Ladco \$4,500;
- 39 - Qualico \$4,500;
- 40 - UDI and MHBA \$2,500 (as requested)

41

1 c) Other motions

- 2 i) I see no reason to depart from tariff costs in connection with the other
3 motions made. Costs are granted to the successful parties in accordance
4 with the Queen's Bench tariff calculated on a Class 4 basis.
5

6 **Conclusion**
7

8 Considering all of the factors and taking into account the amount at issue, the
9 complexity and importance of the proceedings, an order of elevated costs is
10 appropriate in this case. The applications determined a very important issue
11 affecting many people living in the City. Tariff costs are a small fraction of the
12 actual legal fees and disbursements incurred to litigate the applications. That said,
13 it is important to distinguish costs awards granted in Ontario from Manitoba.
14 Unlike the Ontario courts where costs are awarded on a partial indemnity or a
15 substantial indemnity basis, costs in Manitoba are generally granted in accordance
16 with the tariff. In exceptional circumstances the court will grant enhanced costs.
17

18 In my view, for the reasons I have already mentioned, this is one of those cases.
19 However, granting enhanced costs is the exception and not the general rule. The
20 amount of legal fees and disbursements incurred by the parties is a factor, but not
21 the determining factor. If actual legal costs were the only factor, all litigants would
22 be seeking enhanced cost awards. In my view, the appropriate disposition of costs
23 on the applications having regard to the factors in Queen's Bench Rule 57.01 is to
24 grant enhanced costs to each of the applicants using the tariff as a guide as
25 opposed to granting costs as a percentage of the actual legal fees incurred by the
26 applicants. I have determined that the appropriate, fair, and reasonable award is to
27 grant costs at double the tariff costs calculated on a Class 4 basis.
28

29 Accordingly, costs of the applications and motions are granted as follows:
30

- 31 a) The applicants are each awarded double tariff costs calculated on a Class 4
32 basis respecting the applications.
33
- 34 b) The applicants are each awarded double tariff costs calculated on a Class 4
35 basis on the expungement motion.
36
- 37 c) The applicants are each awarded costs in accordance with the tariff on the
38 document motions calculated on a Class 4 basis.
39

1 d) The applicants are entitled to costs regarding the motion by the City to seek
2 leave to file the expert report prepared by Mr. Stevens. As mentioned
3 above, throw away costs are granted to the applicants as follows:

- 4 - Ladco and Qualico \$4,500 each;
- 5 - UDI/MHBA \$2,500.

6
7 e) The applicants are awarded costs of this cost motion heard today on a Class
8 4 basis pursuant to the Queen's Bench tariff.

9
10 f) The disbursements claimed by the applicants are not out of the ordinary and
11 disbursements over \$100, subject to production of invoices, are ordinarily
12 reimbursed pursuant to the Court of Queen's Bench tariff providing they are
13 reasonable. In my view, the disbursements submitted are reasonable and should
14 be reimbursed.

15
16 g) All costs and disbursements granted are subject to applicable taxes.

17
18 Counsel are directed to prepare bills of costs in accordance with this decision and
19 submit them to counsel for the City to endorse as approval as to form. The bills of
20 costs can then be filed electronically for approval and signing by me.

21
22 That concludes my reasons for decision. Unless there is questions, we can adjourn
23 the hearing.

24
25 MR. NEWMAN: Thank you, My Lord.

26
27 MR. STEFANIUK: Thank you, My Lord. I have no
28 questions.

29
30 MR. FERBERS: Good. Thank you, My Lord. I am fine
31 too.

32
33 THE COURT: All right. Good afternoon then everyone,
34 have a good weekend.

35
36 THE COURT CLERK: This court is now closed.

37
38
39
40 EXCERPT CONCLUDED

T17

IN THE MATTER OF LADCO COMPANY LIMITED V. THE CITY OF
WINNIPEG

AND BETWEEN BRIDGEWOOD WEST LAND CORP., AND SAGE CREEK
DEVELOPMENT CORPORATION V. THE CITY OF WINNIPEG

AND BETWEEN URBAN DEVELOPMENT INSTITUTE (MANITOBA
DIVISION) AND MANITOBA HOME BUILDERS' ASSOCIATION INC.,
V. THE CITY OF WINNIPEG

I, KRYSTLE PALYNCHUK, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Fifteen (T15), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

COURT TRANSCRIBER