Court File No. 112/18

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

THE TORONTO DISTRICT SCHOOL BOARD

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

APPLICATION UNDER section 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

FACTUM OF THE APPLICANT

June 13, 2019

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PART I - INTRODUCTION

1. The Applicant, the Toronto District School Board ("**TDSB**") delivers this factum in support of its Application for Judicial Review seeking an order quashing clauses 10(2)(i) and (ii) (the "**Impugned Provisions**") of Ontario Regulation 20/98 (the "**Regulation**") under the *Education Act* (the "***Act***") on the basis that they are *ultra vires* the authority granted to the Lieutenant Governor in Council by the *Education Act*.

2. This Application concerns the scheme for collecting Educational Development Charges ("**EDC**s") to support educational infrastructure, the need for which has been occasioned by development and growth. School boards in Ontario are required under section 170 of the *Act* to provide adequate accommodation to all pupils who have a right to attend school within the jurisdiction of the Board. This mandatory statutory obligation exists even though boards have no control over the funds available to ensure that this statutory purpose can be achieved.

3. This Application arises because the TDSB, the largest school board in the Province, has been precluded from collecting EDCs since the Impugned Provisions entered into force, as is the case for the large majority of school boards in Ontario. Given the TDSB's large size, it continuously faces growth-related needs, but has no access to the funding that the Act contemplated would be available to meet those needs.

4. School Boards such as the TDSB are powerless to prevent or otherwise influence residential development that would obligate them to ensure available educational infrastructure. The purpose of the EDC regime—and the source of its constitutional validity—is that growth should pay for itself. This objective is not simply one purpose that inspired the EDC regime. It is fundamental to the operation and validity of that regime. EDCs are saved from being invalid as unconstitutional indirect taxes because they are part of a carefully calibrated scheme to ensure that growth pays for growth.

5. The Impugned Provisions sever the vital link between the ability to levy EDCs and the existence of growth-related educational infrastructure requirements. Residential development in an area within the TDSB's jurisdiction will create infrastructure requirements that will not be paid for by that development. *Need* for educational infrastructure must, and in practice, is assessed on a sub-area basis, not a board-wide basis. The TDSB is currently experiencing that need, but the Impugned Provisions prevent its satisfaction.

6. By limiting the ability to levy EDCs notwithstanding growth-related development needs, the Impugned Provisions undermine the EDC regime's calibration of growth-related development needs to revenues from residential development creating that need. They are contrary to the purpose of the enabling legislation and are invalid for that reason.

7. Indeed, the Impugned Provisions in many ways turn the justification for the EDC regime on its head, at least as it relates to Boards like the TDSB. The Impugned Provisions require boards like the TDSB to accommodate new development by bussing students to distant schools, or by engaging in divisive and unpopular school closures to obtain access to the ability to charge EDCs. Rather than allowing growth to pay for itself, the Impugned Provisions require educational priorities and student needs to be re-adjusted to accommodate development.

8. This is the opposite of what the scheme intended, and is contrary to the fundamental principles that make the scheme valid. For this reason, the Impugned Provisions are *ultra vires*.

PART II - SUMMARY OF FACTS

The EDC Framework

9. In 1989, the province enacted the *Development Charges Act, 1989*, which authorized school boards and municipalities to adopt by-laws to collect development charges to fund growth-related infrastructure costs, i.e. infrastructure costs necessitated by increased residential development. The legislation permitted boards to fund growth-related land acquisition needs (including site servicing costs), along with the capital costs of school construction not otherwise provided for through provincial grants.[1]

10. Development charge regimes in general reflect the premise that "growth should pay for growth." They ensure that buyers of new homes and new non-residential development (where applicable) shoulder some of the burden associated with infrastructure emplacement costs related to such things as water, sewer, storm water management, roads, bridges, libraries, parks, and

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[1] Affidavit of Cynthia Clarke, Sworn February 14, 2018 (the "**Clarke Affidavit**"); Application Record, Tab 2, para. 14.

vehicles. EDCs serve this purpose as it relates to the schools needed to serve new residential communities, while general taxation covers any associated operating and capital renewal costs.[2]

11. The legislative regime applicable to EDCs changed in 1998. The authority to levy EDCs was moved from the *Development Charges Act, 1989*, which was repealed, to Part IX, Division E of the *Act*. While the *Development Charges Act, 1989*, had provided for EDCs to fund growth-related capital costs for the construction of new schools, the EDC provisions in Part IX, Division E of the Education Act removed that ability, replacing it with a system of automatic funding through grants for new pupil places.[3] EDCs, however, remain available to cover "education land costs" within the meaning of section 257.53 of the *Act*.

12. "Education land costs" comprise more than simply the costs of land, but also include a variety of expenditures to address growth-related student accommodation including site development costs, service installation, acquiring interests in land, temporary relocation of students, and interest on related borrowings.[4]

13. Subsequently, in 2006, Ontario revised the education capital funding model to rescind the automatic grant entitlement to school boards experiencing student enrolment in excess of capacity and needing to construct additional student accommodation. Now, school boards are required to submit capital priority business cases each year, in the hope that Ontario will fund one or more proposed capital projects.[5]

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[2] Clarke Affidavit, Application Record, Tab 2, paras. 15-16
[3] Clarke Affidavit, Application Record, Tab 2, paras. 17-18
[4] Clarke Affidavit, Application Record, Tab 2, para. 20
[5] Clarke Affidavit, Application Record, Tab 2, para. 18

14. Significantly, in response to such requests, the Ministry of Education assesses and approves student accommodation needs not on a district-wide basis but on a sub-area basis where the area is made up of the attendance boundary of the school in question, with consideration of comparable schools within close proximity. In assessing and approving any capital project requests, the Ministry of Education recognizes that a school board has growth-related needs in certain areas of the jurisdiction of the board, regardless of whether there is excess pupil capacity elsewhere within the jurisdiction.[6]

15. The Regulation came into force in 1998 and, among other things, sets out the calculation methodology applicable to a board's ability to levy EDCs.

Growth-Related Land Acquisition Needs of the TDSB

16. As set out more fully below, section 257.54 of the Education Act sets out the sole statutory criteria for adopting an EDC by-law, stipulating that

> If there is residential development in the area of jurisdiction of a board that would increase education land costs, the board may pass by-laws for the imposition of education development charges against land in its area of jurisdiction undergoing residential or non-residential development.[7]

17. The TDSB has growth-related land acquisition needs as contemplated by section 257.54. The accepted steps in the analysis to determine growth-related land acquisition needs are as follows:

(a) Determine anticipated development;

(b) Establish review areas (i.e. a group of elementary school catchment areas making up one or more secondary school catchment areas);

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[6] Clarke Affidavit, Application Record, Tab 2, para. 18
[7] *Education Act,* RSO 1990, c E.2, as amended, section 257.54

(c) Determine permanent student capacity for each school;

(d) Determine how many new students will be generated by residential development; and

(e) Based on the above steps, determine if there is a need for additional capacity to accommodate new students generated by new residential development.[8]

18. In applying each of these steps, the TDSB has growth-related land acquisition needs:

(a) Based on the methodology contemplated by subsection 7(1) of the Regulation, a 15-year forecast of new occupied dwellings yields an average of 14,296 per annum, 95% of which are anticipated to be high density apartment units with the remaining expected to be ground-related housing development;[9]

(b) For school boards, long-term student accommodation needs are conventionally assessed on a sub-area basis, not a jurisdiction-wide basis. EDC Background Studies determine growth-based needs on a review area basis, which describes a group of elementary school catchment areas making up one or more secondary catchment areas.[10] The purpose of the Review Area approach is to assess the number of pupil places that would be available and accessible to new housing development within the area in which the development is occurring. The Review Area concept is based on the premise that pupils should, in the longer term, be accommodated in permanent facilities within their resident area, particularly

[8] Clarke Affidavit, Application Record, Tab 2, para. 22
[9] Clarke Affidavit, Application Record, Tab 2, paras. 32-33
[10] Clarke Affidavit, Application Record, Tab 2, para. 34

elementary school children. As such, this step allows for the repatriation of any students that are temporarily being held outside of their resident area. In the case of the TDSB analysis, TDSB Wards are used as a sub-area disaggregation of the TDSB's City-wide facilities inventory. For the purposes of assessing growth-related land acquisition needs, the appropriate review area is on a sub-area basis.[11]

(c) Based on "Requirements of New Development" ("**ROND**") projections, there is a need for the TDSB to provide additional student accommodation within the City of Toronto based on the following:

(i) Of the 473 elementary schools currently operated by the TDSB and providing student instruction, 246 are situated in locations that are affected by proposed new housing development.[12]

(ii) While 154 of these schools have permanent capacity in excess of projected enrolment and as such are not expected to generate growth-related student accommodation needs, 47 are expected to experience enrolment in excess of permanent capacity, and are limited in terms of expansion of in-place permanent capacity because the schools' existing size exceeds applicable regulatory maximums[13] of approximately 1 acre per 100 pupils;[14]

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[11] Clarke Affidavit, Application Record, Tab 2 para. 37
[12] Clarke Affidavit, Application Record, Tab 2, para. 58
[13] See O. Reg 20/98, subs 2(5)
[14] Clarke Affidavit, Application Record, Tab 2, paras. 58-59

(iii) Given these circumstances, the growth-related education land needs for elementary schools is reasonably projected to require the acquisition of approximately 60 acres of land to accommodate enrolment growth.[15]

(d) This analysis concerns only elementary school needs: it is also noteworthy that 35 of the 114 secondary schools within the jurisdiction of the TDSB approached or exceeded 100% facility utilization based on 2016 Board-reported enrolments for each school.[16]

19. The needs for growth-related land acquisition to accommodate student enrolment are disbursed widely across the TDSB's extensive territory, as the following map[17] illustrates:

[15] Clarke Affidavit, Application Record, Tab 2, para. 62
[16] Clarke Affidavit, Application Record, Tab 2, para. 46
[17] See Clarke Affidavit, Application Record, Tab 2, para. 64

Growth Related Pupil Places
Legend
Acres Required
< 1
1
2
3
4
5
Junior Boundary
Not Operating School
Operating School
Development Location
Road

20. This figure illustrates starkly how assessing growth-related land acquisition needs on a jurisdiction-wide basis for the TDSB practically means that growth will not pay for itself in the TDSB. Developers are consequently free to construct additional dwellings within the TSDB jurisdiction, placing significant pressure on the educational infrastructure, but are not required to pay for the additional services cost occasioned by that development, even though it is clear that growth-related capacity requirement remain unmet throughout the system.

Impact of the Impugned Provisions

21. Notwithstanding the demonstrated need for additional land acquisition to serve student growth occasioned by development, the Impugned Provisions prohibit the TDSB from allowing this growth to pay its way because these provisions unrealistically require capacity to be assessed on a board-wide as opposed to the conventional sub-area basis. These provisions require need to be assessed against "the total capacity of the board to accommodate … school pupils ***throughout its jurisdiction…***".[18]

22. According to TDSB reported 2016 enrolment, there are 34,582 surplus elementary and 21,302 surplus secondary pupil places. The board's current enrolment trends dictate that, even projecting growth out for a five-year period, the TDSB cannot satisfy the provisions of section 10(2)(i) or (ii).[19]

23. The Regulation's focus on jurisdiction-wide capacity as opposed to real capacity calculated on a sub-area basis, means that boards with sub-area accommodation pressures cannot

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[18] See O. Reg 20/98, clauses 10(2)(i) and (ii)
[19] Clarke Affidavit, Application Record, Tab 2, para. 66

levy EDCs,[20] even though calculation of need on a jurisdiction-wide basis is anomalous given that the overall provincial funding model recognizes the need to address local accommodation pressures.[21] Practically speaking, this means that under the current EDC scheme, growth does not pay for growth.[22]

24. Section 257.54(4) of the *Act* authorizes Boards to pass EDC by-laws which can apply to the entire area of Board or can be limited to only delineated parts of the Board's jurisdiction. As is clear from this section, the *Act* expressly contemplates that EDC's may only be necessary in those portions of the Board's area where growth is actually occurring but then deviates from that scheme by requiring jurisdiction-wide capacity tests to be applied.

25. The operational impact of the Impugned Provisions undermines the overriding objective of ensuring that growth pays for growth. In Toronto, the existing tax base must shoulder the burden of additional growth, and the TDSB is unable to plan for and address accommodation pressures occasioned by new growth.[23]

26. It is no answer to this issue to suggest as, Ontario's affiant Mr. Bloye does, in his affidavit, that Boards facing ineligibility for EDCs because of the Impugned Provisions, should resort to other measures to address "underutilization," including, "school closure and consolidation, boundary changes, grade configurations, offering targeted programming or exploring whether available space can be leased out to community partners." [24]

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[20] Clarke Affidavit, Application Record, Tab 2, para. 68
[21] Clarke Affidavit, Application Record, Tab 2, para. 70
[22] Clarke Affidavit, Application Record, Tab 2, para. 72
[23] Clarke Affidavit, Application Record, Tab 2, para. 73
[24] Affidavit of Christopher Paul Bloye, affirmed July 27, 2018, Responding Application Record, Tab A, paras. 27-31

27. There are significant pragmatic and policy issues associated with Ontario's proposed solution.

28. Pragmatically, there are the following problems with Ontario's position concerning "underutilization" and measures suggested to address "underutilization":

(a) Given the moratorium on school closures imposed by the province in June, 2017 accommodation needs caused by new development cannot be met by using school closure as a means of bringing a school board into compliance with Section 10 of 0. Reg. 20/98. Since 2003, there has been a history of on-again, off-again school closure moratoriums. The question whether an underutilized school should be closed is a completely different policy question from the question of how to fund development-related needs in a different sub-area;[25]

(b) Even absent a moratorium, closing a school is a cumbersome and lengthy process with extensive public consultation. Moreover, closing a school in the east end of Toronto does nothing to address accommodation pressure at a school in the west end of the City;[26]

(c) Absent school closure, growth-related demand on the system can only be met by bussing students from an area with excess demand to an area having excess capacity, which would undermine educational system goals, including encouraging active transportation, such as students being able to walk to their schools. [27]

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[25] Clarke Affidavit, Application Record, Tab 2, para. 74
[26] Clarke Affidavit, Application Record, Tab 2, para. 74
[27] Clarke Affidavit, Application Record, Tab 2, para. 74

29. These pragmatic issues underline a far bigger policy problem with the Impugned Provisions. The EDC regime is designed to allow growth to pay for itself. As the above examples illustrate, the Impugned Provisions reverse the logic of the EDC system, forcing students and communities to contort themselves to accommodate the demands of growth. The regime contemplated by the Impugned Provisions, compels the educational system to make policy decisions having far reaching implications in order to avoid placing upon developers the burden of sharing in the costs occasioned by development. Under this logic, unmoored from the fundamental principle that growth should pay for itself, EDCs look like any other tax.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Jurisdiction

30. The Applicant seeks an order under subsection 2(1) of the *Judicial Review Procedure Act* in the nature of *certiorari* quashing the Impugned Provisions as being *ultra vires* the authority of the Lieutenant Governor in Council to enact regulations under the *Act*.

31. As is set out more fully below, the Impugned Provisions undermine the fundamental purpose to the EDC regime established under the *Act* and affirmed by the Supreme Court of Canada. They sever the link vital link between the need for development related land acquisition and the requirement that new development contribute to satisfying that need.

The Regulatory Scheme

32. As noted above, the fundamental purpose of the EDC regime is set out at subsection 257.54(1) of the *Act* as follows:

> If there is residential development in the area of jurisdiction of a board that would increase education land costs, the board may pass by-laws for the

> imposition of education development charges against land in its area of jurisdiction undergoing residential or non-residential development.[28]

33. EDCs can be charged for development that requires:

(a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the *Planning Act*;

(b) the approval of a minor variance under section 45 of the *Planning Act*;

(c) a conveyance of land to which a by-law passed under subsection 50 (7) of the *Planning Act* applies;

(d) the approval of a plan of subdivision under section 51 of the *Planning Act*;

(e) a consent under section 53 of the *Planning Act*;

(f) the approval of a description under section 9 of the *Condominium Act, 1998*; or

(g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure.[29]

34. The passage of an EDC by-law requires a detailed and public process, including a prior review by the board of its development charge policies and public notice of a meeting in relation to certain reviews.[30] The Act also requires an EDC background study that includes

(a) estimates of the anticipated amount, type and location of residential and non-residential development;

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[28] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.54(1)
[29] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.54(2)
[30] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.60

(b) the number of projected new pupil places and the number of new schools required to provide those new pupil places;

(c) estimates of the education land cost, the net education land cost and the growth-related net education land cost of the new schools required to provide the projected new pupil places; and

(d) such other information as may be prescribed.[31]

35. The Act also requires a public meeting before an EDC by-law can be passed,[32] requires public notice of such a by-law,[33] and grants a right of appeal from the passage of an EDC by-law to the Local Planning Appeal Tribunal ("**LPAT**").[34]

36. The Act further provides that the imposition of an EDC by-law is subject to prescribed conditions.[35] The Regulation generally sets out a detailed methodology for the calculation of requirements in relation to an EDC by-law, [36] and then specifically prescribes conditions pursuant to subsection 257.54(6) at section 10 of the Regulation. The prescribed conditions, prior to recent amendments made the Regulation,[37] are of both a procedural and a substantive nature. The procedural conditions are as follows:

(a) The Minister has approved,

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[31] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.61
[32] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.63
[33] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.64
[34] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.65
[35] *Education Act*, RSO 1990, c E.2, as amended, subs. 257.54(6)
[36] Reg 20/98, sections 7 to 9
[37] These amendments, in effect as of October 12, 2018, effectively freeze the areas over which new EDC by-laws can operate to those areas in which EDC by-laws were in force on August 31, 2018.

(i) the board's estimates under paragraph 3 of section 7, for each of the years required under that paragraph, of the total number of new school pupils, without the adjustments set out in that paragraph being made, and

(ii) the board's estimates of the number of school sites used by the board to determine the net education land cost under paragraph 4 of section 7; and

(b) The board has given a copy of the education development charge background study relating to the by-law to the Minister and to each board having jurisdiction within the area to which the by-law would apply.[38]

37. The substantive conditions are set out at paragraph 2 of section 10 of the Regulation as follows:

> i. The estimated average number of elementary school pupils of the board over the five years immediately following the day the board intends to have the by-law come into force exceeds the total capacity of the board to accommodate elementary school pupils throughout its jurisdiction on the day the by-law is passed.
>
> ii. The estimated average number of secondary school pupils of the board over the five years immediately following the day the board intends to have the by-law come into force exceeds the total capacity of the board to accommodate secondary school pupils throughout its jurisdiction on the day the by-law is passed.
>
> iii. At the time of expiry of the board's last education development charge by-law that applies to all or part of the area in which the charges would be imposed, the balance in the education development charge account is less than the amount required to pay outstanding commitments to meet growth-related net education land costs, as calculated for the purposes of determining the education development charges imposed under that by-law.

[38] Reg 20/98, sections 10 1 and 3

38. Clauses (i) and (ii) of section 10 are the Impugned Provisions. They limit the ability of a board to pass an EDC by-law where there is excess capacity anywhere within the territory over which the board exercises jurisdiction.

The Limits on Regulation-Making Powers

39. Subordinate legislation such as the Regulation and the Impugned Provisions can be challenged if it can be demonstrated that it is inconsistent with the enabling legislation or outside of the scope of the statutory mandate.[39]

40. In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purposes or objects of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.[40]

The Supreme Court of Canada Decision in *Ontario Home Builders' Association*

41. While ordinarily, regulations benefit from a presumption of validity, the provisions of the *Education Act* concerning EDCs exist in a unique legal context. The constitutional authority of provincial legislatures to authorize school boards to levy EDCs was addressed by the Supreme

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[39] *Shoppers Drug Mart Inc v Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64 at para 24, [2013] 3 SCR 810, Book of Authorities of the Applicant ("BOA"), Tab 3
[40] *Waddell v Canada (Governor in Council)* (1983), 49 BCLR 305 at para 29, BOA Tab 4; *Ibid*, BOA Tab 3

Court of Canada in *Ontario Home Builders' Assn. v. York Region Board of Education*.[41] That case concerned a constitutional challenge to the former development charges regime established under the *Development Charges Act*.

42. The applicants in *Ontario Home Builders Association* challenged the EDC regime then in place on the basis that it was an unconstitutional indirect tax. A majority of the Supreme Court of Canada found that the EDC regime then in place was a form of indirect taxation because, unlike traditional land taxes (which are presumptively direct taxes) EDCs are directed at development, and as such impose a burden that is intended to transferred on by the initial chargee of the tax:

> 47 In the case at bar, an EDC may at first blush seem to bear the characteristics of a land tax in that it is, in the words of the enabling legislation, imposed "on land undergoing residential and commercial development". Further, the failure to pay the EDC results in the charge being placed on the tax roll in respect of a specific parcel of land. In many respects, the EDC scheme is a novel scheme of taxation which involves features of both direct and indirect taxation.
>
> 48 However, in my view, EDCs are not true land taxes in the traditional sense. The purpose of the EDC scheme is not taxation of land, but rather, taxation imposed in order to defray the costs of infrastructure necessitated by new residential development. As McKeown J. of the Divisional Court noted at p. 510, "[t]he land can sit forever without attracting tax if no development is undertaken". While the EDC collection mechanism is linked to land, it is not the ownership of land *qua* land that is the object and purpose of the tax, but rather, the costs of infrastructure associated with new development upon land. The assessment of the tax is not based upon the value of the land, but rather, is based on the impact development will have in terms of creating a need for educational services. Although the "categories approach" articulated in *Fairbanks* may be of some relevance on other facts, it is my view that in the instant appeal, it is of no application. Rather, the incidence of the EDCs must be determined according to Mill's formulation, as discussed above.
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> 49 As I see it, the general tendency of the EDCs is to be passed on to the ultimate purchaser of the new building. The vast majority of new development is undertaken by developers, who benefit from economies of scale when undertaking multi-unit building projects, and who have every intention of selling the new buildings and homes. As Carthy J.A. stated at

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[41] *Ontario Home Builders' Assn v York Region Board of Education*, [1996] 2 SCR 929, BOA Tab 2

> p. 110 for the Court of Appeal below, "common sense therefore says that the tendency will be to pass the cost along". It is true that in certain instances, the ultimate owner of a new home will also have been the builder, and thus will have paid the EDC directly. However, this is not sufficient to dislodge the *general* tendency of the tax. Indeed, the legislation itself is indifferent as to who actually bears the cost of an EDC: it is the person applying for a building permit from whom the tax is collected, whether this be the developer or the ultimate homeowner. This is a further indication of indirectness:
>
> > There are situations where actual payment of a tax is required of one person for administrative convenience but where it is obvious that the tax is really directed at another ascertained person. These situations differ from traditional indirect taxes such as customs and excise where the ultimate incidence of the taxes is a matter of indifference to the legislature. [Professor La Forest, *supra*, at p. 86]
>
> In a sense, EDCs are imposed in the course of manufacture on the commodity to be sold, that is, the new house or building. Most of the charge payers, the majority of whom are developers, intend to trade in the commodity, that is to sell the newly constructed buildings. It follows, in my view, that EDCs cling as a burden to new buildings when they are brought to market. Accordingly, EDCs constitute indirect taxation and are *ultra vires* provincial competence under s. 92(2). [42]

43. Critically, the EDC regime at issue in *Ontario Home Builders' Association* was nevertheless found to be within the constitutional competence of the Legislature of Ontario because it was ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning.[43]

44. Central to the purpose identified by the Court in *Ontario Home Builders' Association* was the chief objective of the EDC regime, which was to ensure that growth paid for itself:

> 65 As noted above, the Act is one component of a comprehensive regulatory framework governing land development in Ontario, comprised of at least nine different statutes: the *Building Code Act*, R.S.O. 1990, c. B.13, the *Environmental Assessment Act*, R.S.O. 1990, c. E.18, the *Environmental Protection Act*, R.S.O. 1990, c. E.19, the *Fire Marshals Act*, R.S.O. 1990, c. F.17, the *Municipal Act*, R.S.O. 1990, c. M.45, the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, the *Ontario Water*

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[42] *Ibid* at paras 47-49, BOA Tab 2
[43] *Ibid* at para 50, BOA Tab 2

> *Resources Act*, R.S.O. 1990, c. O.40, the *Planning Act*, R.S.O. 1990, c. P.13 and the *Conservation Authorities Act*, R.S.O. 1990, c. C.27. While the regulatory scheme of which EDCs are only a small part is clearly very complex, the complexity is necessitated by the very scope of the matter regulated — urban planning. It is only to be expected that a variety of provincial actors would be involved in the various phases of the scheme's operation. However, this fact does not serve to invalidate the regulatory nature of the scheme. In my view, the appellants impose an artificial and rigid distinction between the school board and the municipality. This distinction fails to reflect the true nature of the regulatory framework.
>
> 66 The construction of schools is a legitimate and crucial component of modern land use planning, schools being an essential element in the creation of successful, dynamic and democratic communities. The legislature of Ontario clearly takes the view that the cost of educational facilities made necessary by new land development should be taken into account in the land development approval process. For example, the *Planning Act* expressly provides that the "adequate provision
>
> . . . . .
>
> of educational facilities" and the "adequacy of school sites" are factors to be taken into account in land use planning (see ss. 2(i), 51(24)(a) and (j)). The Act itself authorizes municipalities to impose development charges not only for education but also for water mains, sewers, roads, libraries, parks and recreational facilities. ***The common theme is that new development should bear the costs of infrastructure necessitated by the new development. Further, just as the gravel excavators in Allard benefitted from the regulatory scheme in terms of road improvements, so too do the developers receive a considerable benefit from the EDC scheme: a development with adequate amenities. The presence of adequate school facilities clearly contributes to the marketability of a new home.***
>
> 67 For the foregoing reasons, it is my opinion that EDCs are properly adhesive to the province's planning and development regime, and accordingly, are *intra vires* the province of Ontario pursuant to ss. 92(9), (13) and (16) of the *Constitution Act, 1867*.[44]

45. The Court's reasons in *Ontario Home Builders' Association* place central emphasis on the objective of requiring new growth to participate in paying for the amenities—including available and accessible public education—that give value to such development. In this sense, the objective of requiring growth to pay for itself is not just one element of the inspiration for legislation—it is the key to the constitutional validity of that legislation.

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[44] *Ibid* at paras 65-67, BOA Tab 2

The Regulation-Making Power Under the *Education Act*

46. The power under which the Impugned Provisions were promulgated is contained in subsection 257.54(6) of the Act. That subsection merely permits the Lieutenant Governor in Council to prescribe "conditions" on the imposition of a development charge by a board. It does not authorize regulations that prohibit the enactment of such by-laws entirely in the face of a need for growth-related land acquisition that would otherwise justify an EDC.

47. As noted above, the purpose of the power to authorize EDCs is stated clearly in section 257.54 of the *Education Act* and affirmed in the decision of the Supreme Court of Canada in *Ontario Home Builders' Association*. Section 257.54 clearly permits a board to levy EDCs where residential development in the area of jurisdiction of a board would increase education land costs. The legislation is intended to provide a means by which growth should pay for itself.

48. The power to enact regulations is a species of delegated legislation. It has long been accepted that if the purposes of the subordinate legislation are contrary to, or extraneous to the purposes of the governing legislation, the subordinate legislation will be invalid as not having been authorized by the governing legislation. Unlike a private party, a body to whom the power to enact delegated legislation is given must exercise that power not simply within the letter of the applicable provision, but must also honour its spirit.[45]

49. Accordingly, it is insufficient that the Act authorizes the Lieutenant Governor in Council to impose "conditions" on the authority to levy EDCs. Examples of the kinds of conditions contemplated by the authorizing legislation are apparent in paragraphs 1 and 3 of section 10 of the

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[45] *Barrick Gold Corp v Ontario (Minister of Municipal Affairs & Housing)* (2000), 51 OR (3d) 194 at para 64, BOA Tab 1

Regulation. These are bona fide procedural or "gating" provisions that serve the purpose of the governing legislation by ensuring consistency in how EDCs are enacted.

50. The Impugned Provisions, however, have nothing to do with achieving the purpose of the EDC regime. As is apparent in the evidence filed by Ontario on this application, they serve behaviour modification objectives that are alien to the overriding purpose of requiring growth to pay for itself. Forcing boards to consolidate or close schools in sub-areas that may experience a temporary surplus does nothing to further the board's land acquisition needs in sub areas where there is a need for additional land because of development-related growth. This is particularly the case since, depending upon the political climate surrounding school closure, it may not even be possible to comply with the apparent incentives behind the Impugned Provisions.

Impact of the Impugned Provisions on the EDC Scheme's Validity

51. The result is acute in a jurisdiction sufficiently large (like the TDSB) to have growth-occasioned land acquisition needs within a broader area that, overall, has a surplus of available spaces. Developers choosing to erect new residential developments in such areas get the benefit of "free" infrastructure, at least to the extent of being excused from what would otherwise have been a requirement to bear the cost of education land acquisition occasioned by additional growth.

52. Under the Impugned Provisions, Boards are compelled to accommodate growth occasioned by development, and not the other way around. This reality turns the EDC regime upside-down and detaches it from the principal justification—growth paying for itself—that preserved the predecessor EDC regime from being set aside as an unconstitutional indirect tax.

53. Whatever may be the limits on judicial review of subordinate legislation, they do not embrace a circumstance such as the present, where specific terms of subordinate legislation so undermine the court-sanctioned purpose of a legislative scheme that they impair the constitutionality of that scheme.

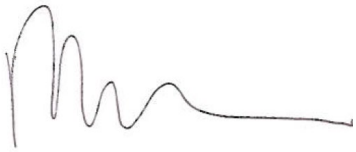
54. The Impugned Provisions are therefore ultra vires as fundamentally undermining a basic purpose of the governing legislation.

PART IV - ORDER REQUESTED

55. The Applicant asks that the Application be granted and that an order issue quashing the Impugned Provisions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2019.

Scott Rollwagen



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Barrick Gold Corp v. Ontario (Minister of Municipal Affairs & Housing)*, 51 O.R (3d) 194

2. *Ontario Home Builders' Assn v. York Region Board of Education*, [1996] 2 S.C.R. 929

3. *Shoppers Drug Mart Inc v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64

4. *Waddell v Canada (Governor in Council)*, 49 B.C.L.R. 305

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***Judicial Review Procedure Act*, R.S.O. 1990, c J.1**

Applications for judicial review

2(1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

2. ***Education Act*, R.S.O. 1990, c. E.2**

Interpretation

257.53 (1) In this Division,

"board" means a board other than a board established under section 68; ("conseil")

"building permit" means a permit under the Building Code Act, 1992 in relation to a building or structure; ("permis de construire")

"development" includes redevelopment; ("aménagement")

"education development charge" means a development charge imposed under a by-law passed under subsection 257.54 (1) respecting growth-related net education land costs incurred or proposed to be incurred by a board; ("redevance d'aménagement scolaire")

"education development charge account" means an account established under subsection 257.82 (1); ("compte de redevances d'aménagement scolaires")

"education development charge by-law" means a by-law passed under subsection 257.54 (1); ("règlement de redevances d'aménagement scolaires")

"education land cost" means education land cost within the meaning of subsections (2), (3) and (4); ("dépense immobilière à fin scolaire")

"growth-related net education land cost" means the portion of the net education land cost reasonably attributable to the need for such net education land cost that is attributed to or will

result from development in all or part of the area of jurisdiction of a board; ("dépense immobilière nette à fin scolaire liée à la croissance")

"municipality" includes an upper-tier municipality; ("municipalité")

"net education land cost" means the education land cost reduced by any capital grants and subsidies paid or that may be paid to the board in respect of such education land cost; ("dépense immobilière nette à fin scolaire")

"non-residential development" means development other than residential development; ("aménagement non résidentiel")

"owner" means the owner of the land or a person who has made application for an approval for the development of the land on which an education development charge is imposed; ("propriétaire")

"pupil accommodation" means a building to accommodate pupils or an addition or alteration to a building that enables the building to accommodate an increased number of pupils. ("installations d'accueil pour les élèves") 1997, c. 31, s. 113 (5); 2002, c. 17, Sched. F, Table; 2009, c. 34, Sched. I, s. 17.

Education land costs

(2) Subject to subsections (3) and (4), the following are education land costs for the purposes of this Division if they are incurred or proposed to be incurred by a board:

1. Costs to acquire land or an interest in land, including a leasehold interest, to be used by the board to provide pupil accommodation.

2. Costs to provide services to the land or otherwise prepare the site so that a building or buildings may be built on the land to provide pupil accommodation.

3. Costs to prepare and distribute education development charge background studies as required under this Division.

4. Interest on money borrowed to pay for costs described in paragraphs 1 and 2.

5. Costs to undertake studies in connection with an acquisition referred to in paragraph 1. 1997, c. 31, s. 113 (5).

Exclusions from education land costs

(3) The following are not education land costs:

1. Costs of any building to be used to provide pupil accommodation.

2. Costs that are prescribed in the regulations as costs that are not education land costs. 1997, c. 31, s. 113 (5).

Education land costs, leases, etc.

(4) Only the capital component of costs to lease land or to acquire a leasehold interest is an education land cost. 1997, c. 31, s. 113 (5)

Education development charge by-law

257.54 (1) If there is residential development in the area of jurisdiction of a board that would increase education land costs, the board may pass by-laws for the imposition of education development charges against land in its area of jurisdiction undergoing residential or non-residential development. 1997, c. 31, s. 113 (5).

What development can be charged for

(2) An education development charge may be imposed only for development that requires,

(a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the Planning Act;

(b) the approval of a minor variance under section 45 of the Planning Act;

(c) a conveyance of land to which a by-law passed under subsection 50 (7) of the Planning Act applies;

(d) the approval of a plan of subdivision under section 51 of the Planning Act;

(e) a consent under section 53 of the Planning Act;

(f) the approval of a description under section 9 of the Condominium Act, 1998; or

(g) the issuing of a permit under the Building Code Act, 1992 in relation to a building or structure. 1997, c. 31, s. 113 (5); 2015, c. 28, Sched. 1, s. 149.

Same

(3) An action mentioned in clauses (2) (a) to (g) does not satisfy the requirements of subsection (2) if the only effect of the action is to,

(a) permit the enlargement of an existing dwelling unit; or

(b) permit the creation of one or two additional dwelling units as prescribed, subject to the prescribed restrictions, in prescribed classes of existing residential buildings. 1997, c. 31, s. 113 (5).

Application of by-law

(4) An education development charge by-law may apply to the entire area of jurisdiction of a board or only part of it. 1997, c. 31, s. 113 (5).

Limited exemption

(5) No land, except land owned by and used for the purposes of a board or a municipality, is exempt from an education development charge under a by-law passed under subsection (1) by reason only that it is exempt from taxation under section 3 of the Assessment Act. 1997, c. 31, s. 113 (5).

Conditions

(6) The imposition of an education development charge by a board is subject to the prescribed conditions. 1997, c. 31, s. 113 (5).

Review of policies

257.60 (1) Before passing an education development charge by-law, the board shall conduct a review of the education development charge policies of the board. 1997, c. 31, s. 113 (5).

Public meeting

(2) In conducting a review under subsection (1), the board shall ensure that adequate information is made available to the public, and for this purpose shall hold at least one public meeting, notice of which shall be given,

(a) in at least one newspaper having general circulation in the area of jurisdiction of the board; and

(b) on the board's website or, if the board does not have a website, in another manner that the board considers appropriate. 2016, c. 5, Sched. 8, s. 5.

Non-application, first by-law under new scheme

(3) A board is not required to conduct a review under this section before passing the first education development charge by-law it passes after December 31, 1997. 1997, c. 31, s. 113 (5).

Education development charge background study

257.61 (1) Before passing an education development charge by-law, the board shall complete an education development charge background study. 1997, c. 31, s. 113 (5).

Same

(2) The education development charge background study shall include,

(a) estimates of the anticipated amount, type and location of residential and non-residential development;

(b) the number of projected new pupil places and the number of new schools required to provide those new pupil places;

(c) estimates of the education land cost, the net education land cost and the growth-related net education land cost of the new schools required to provide the projected new pupil places; and

(d) such other information as may be prescribed. 1997, c. 31, s. 113 (5). Public meeting before by-law passed

257.63 (1) Before passing an education development charge by-law, the board shall,

(a) hold at least one public meeting;

(b) give at least 20-days notice of the meeting or meetings in accordance with the regulations; and

(c) ensure that the proposed by-law and the education development charge background study are made available to the public at least two weeks prior to the meeting or, if there is more than one meeting, prior to the first meeting. 1997, c. 31, s. 113 (5).

Making representations

(2) Any person who attends a meeting under this section may make representations relating to the proposed by-law. 1997, c. 31, s. 113 (5).

Board determination is final

(3) If a proposed by-law is changed following a meeting under this section, the board shall determine whether a further meeting under this section is necessary and such a determination is final and not subject to review by a court or the Ontario Municipal Board. 1997, c. 31, s. 113 (5).

Notice of by-law and time for appeal

257.64 (1) The secretary of a board that has passed an education development charge by-law shall give written notice of the passing of the by-law, and of the last day for appealing the by-law, which shall be the day that is 40 days after the day the by-law is passed. 1997, c. 31, s. 113 (5).

Requirements of notice

(2) Notices required under this section must meet the requirements prescribed in the regulations and shall be given in accordance with the regulations. 1997, c. 31, s. 113 (5).

Same

(3) Every notice required under this section must be given not later than 20 days after the day the by-law is passed. 1997, c. 31, s. 113 (5).

When notice given

(4) A notice required under this section shall be deemed to have been given,

(a) if the notice is by publication, on the day that the publication occurs;

(b) if the notice is given by mail, on the day that the notice is mailed. 1997, c. 31, s. 113 (5); 2016, c. 5, Sched. 8, s. 6.

Appeal of by-law after passed

257.65 Any person or organization may appeal an education development charge by-law to the Ontario Municipal Board by filing with the secretary of the board that passed the by-law, on or before the last day for appealing the by-law, a notice of appeal setting out the objection to the by-law and the reasons supporting the objection. 1997, c. 31, s. 113 (5).

3. **Education Development Charges - General, O Reg 20/98**

2(5) In this section,

"excess land" means the part of a school site that exceeds the maximum area determined, under Table 1 or Table 2 to this section, based on the number of pupils that can be accommodated in the school to be built on the site.

7. Before an education development charge by-law is passed, the board shall do the following for the purposes of determining the education development charges:

1. The board shall estimate the number of new dwelling units in the area in which the charges are to be imposed for each of the years, for a period chosen by the board of up to 15 years, immediately following the day the board intends to have the by-law come into force. The board's estimate shall include only new dwelling units in respect of which education development charges may be imposed.

2. The board shall identify different types of new dwelling units and estimate, for each type, the average number of new school pupils generated by each new dwelling unit who will attend schools of the board.

3. For each of the years referred to in paragraph 1, the board shall estimate the total number of new school pupils using the estimated number of new dwelling units and the estimated average number of new school pupils generated by each new dwelling unit and, subtracting from that number, the number of existing school pupil places that, in the opinion of the board, could reasonably be used to accommodate those new school pupils.

4. The board shall estimate the net education land cost for the school sites required to provide pupil places for the number of new school pupils estimated under paragraph 3.

5. The board shall estimate the balance of the education development charge account, if any, relating to the area in which the charges are to be imposed. The estimate shall be an estimate of the balance immediately before the day the board intends to have the by-law come into force.

6. The board shall adjust the net education land cost with respect to any balance estimated under paragraph 5. If the balance is positive, the balance shall be subtracted from the cost.

If the balance is negative, the balance shall be converted to a positive number and added to the cost.

7. The net education land cost as adjusted, if necessary, under paragraph 6, is the growth-related net education land cost.

8. The board shall choose the percentage of the growth-related net education land cost that is to be funded by charges on residential development and the percentage, if any, that is to be funded by charges on non-residential development. The percentage that is to be funded by charges on non-residential development shall not exceed 40 per cent.

9. The board shall determine the charges on residential development subject to the following:

i. The charges shall be expressed as a rate per new dwelling unit.

ii. The rate shall be the same throughout the area in which charges are to be imposed under the by-law.

iii. The rate shall be an amount that does not exceed the maximum rate, which is determined for each year of the proposed by-law by taking the lesser of,

A. the rate that, if applied over the period referred to in paragraph 1 to the estimated residential development in the area to which the by-law would apply and for which charges may be imposed, would not exceed the percentage of the forecasted growth-related net education land cost that is to be funded by charges on residential development, and

B. the rate determined under paragraph 9.1.

9.1 The rate referred to in sub-subparagraph 9 iii B shall be determined as follows:\

i. In respect of the first year of the by-law, take the greater of,

A. the product of 1.05 and,

1. if a by-law is currently in force, the residential rate set out in that by-law that would apply, on the day immediately before the day the proposed by-law would come into force, to the area to which the proposed by-law would apply, or

2. if a by-law is not currently in force, the residential rate set out in the most recent by-law that would have applied, on the day that by-law expired, to the area to which the proposed by-law would apply, and

B. the sum of $300 and,

1. if a by-law is currently in force, the residential rate set out in that by-law that would apply, on the day immediately before the day the proposed by-law would come into force, to the area to which the proposed by-law would apply, or

2. if a by-law is not currently in force, the residential rate set out in the most recent by-law that would have applied, on the day that by-law expired, to the area to which the proposed by-law would apply.

ii. In respect of the second year of the by-law and each subsequent year, if applicable, take the greater of,

A. the product of 1.05 and the residential rate determined under subparagraph 9 iii in respect of the previous year of the by-law, and

B. the sum of $300 and the residential rate determined under subparagraph 9 iii in respect of the previous year of the by-law.

10. Despite paragraph 9, if the board intends to impose different charges on different types of residential development, the board shall determine,

i. the percentage of the growth-related net education land cost to be funded by charges on residential development that is to be funded by each type of residential development, and

ii. the charges on each type of residential development, subject to the rules in subparagraphs 9 i, ii and iii.

THE TORONTO DISTRICT SCHOOL BOARD

Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

Court File No. 112/18

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT TORONTO

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