

Court File No. 112/18

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

BETWEEN:

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

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at 130 Queen St West Toronto, Ontario, M5H 2K5

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve

it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date February 23, 2018 Issued by AS Registrar  
Address of  
court office: 130 Queen Street West  
Toronto, Ontario  
M5H 2N6

TO: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO  
Attorney General of Ontario  
Constitutional Law Branch  
720 Bay Street, 4<sup>th</sup> Floor  
Toronto ON M7A 2S9

Lawyers for the Respondent

## APPLICATION

The Applicant, the Toronto District School Board, requests:

1. An order in the nature of *certiorari* quashing Sections 10(2)(i) and (ii) of Ontario Regulation 20/98 under the *Education Act*, R.S.O. 1990, c. E. 2, as amended (the "*Education Act*") on the basis that they are *ultra vires* the authority granted to the Lieutenant Governor in Council by the *Education Act*, and are without any legal force or effect;
2. An order declaring that Sections 10(2)(i) and (ii) of Ontario Regulation 20/98 under the *Education Act* are constitutionally inoperative because they remove the necessary connection between Educational Development Charges and educational facility requirements as a component of land use planning, that is a necessary condition of the constitutional validity of Ontario's Educational Development Charges regime under the decision of the Supreme Court of Canada in *Ontario Home Builders' Assn. v. York Region Board of Education*. [1996] 2 S.C.R. 929;
3. An order in the nature of *certiorari* quashing Sections 10(2)(i) and (ii) of Ontario Regulation 20/98 under the *Education Act*, on the basis that they operate in an unfair and discriminatory manner as between English-language public boards and English-language Roman Catholic boards, in particular, as between the Toronto Catholic District School Board (which is receiving Education Development Charges) and the Toronto District School Board (which is not receiving Education Development Charges) contrary to Section 234(2) of the *Education Act*;

4. an Order expediting the hearing of this Application;
5. the costs of this proceeding, plus all applicable taxes; and
6. such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

***Overview***

7. In Ontario, municipalities and school boards have the statutory authority to impose development charges on new development. For school boards, the authority to do so is found in Division E of Part IX of the *Education Act*.
8. The policy underlying the imposition of education and municipal development charges is that *growth should pay for growth* - rather than imposing additional burdens on existing homeowners. As such, the primary purpose of Education Development Charges (“EDCs”) is to provide a source of funding for growth-related education land costs generated by new residential development.
9. Pursuant to Section 170 of the *Education Act*, a school board is statutorily obligated to provide adequate accommodation to all pupils who have a right to attend school within the jurisdiction of the board.
10. The Supreme Court of Canada has held that EDCs are an integral part of land use planning and that, as school boards have no statutory bases to oppose development because of inadequate pupil accommodation, the remedy for a school board to

address pupil accommodation pressure caused by new development is to collect EDCs.

11. In Ontario, more than \$1.6 billion in site acquisition and site preparation costs have been funded through EDCs since 1998, with approximately \$2.7 billion in additional funding expected over the next decade.
12. The Toronto Catholic District School Board has collected more than \$221 million in EDCs since 2000 and is expected to collect an additional \$600 million, or more, over the next 15 years.
13. The Applicant, on the other hand, the largest school board in Ontario, has been precluded from collecting EDCs by operation of Sections 10(2)(i) and (ii) of Ontario Regulation 20/98 under the *Education Act* (“O. Reg. 20/98”).

#### ***EDC History and Framework***

14. In 1989, the province enacted the *Development Charges Act, 1989*, providing the legislative authority for school boards and municipalities to adopt by-laws to collect development charges to fund growth-related infrastructure costs. The legislation afforded school boards the opportunity to fund growth-related land acquisition needs (including site servicing costs), along with the capital costs of school construction net of Provincial grant allocations.
15. Development charges, as a funding scheme, are based on the premise that “growth should pay for growth”.

16. In 1998, the legislative authority to impose EDCs was ascribed to Part IX, Division E of the *Education Act* (and the *Development Charges Act, 1989*, was repealed). At the same time, the province introduced a new education funding model that removed the ability of school boards to generate their own capital funds through taxation.
17. While the *Development Charges Act, 1989*, 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. However, growth-related capital costs for the construction of new schools to serve enrolment growth were originally automatically funded through grants for new pupil places. Then, in 2006, the province 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 hopes that one or more proposed capital projects will be funded by the province. In this regard, 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.
18. 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. For example, the Ministry recently approved capital funding to construct a new TDSB JK-8 facility on the existing Davisville school site, to address overcrowding within the local Yonge-Davisville community. This is consistent with the capital priority funding approved for the TCDSB to address sub-area enrolment growth through new schools (e.g. St. Edward on the Yonge St. corridor) and school additions.

19. With respect to EDC funds, more than \$1.6 billion in growth-related education land costs have been funded since the current legislation was enacted in 1998, with collections expected to exceed \$2.7 billion over the next decade. The Toronto Catholic District School Board has already collected more than \$221 million since the year 2000, and could recover an additional \$600 million, or more, over the next 15 years.
20. While currently EDC funds may only be used to cover “education land costs”, this can include a variety of expenditures to address growth-related student accommodation.
21. O. Reg. 20/98 also came into force in 1998 and, amongst other things, sets out the calculation methodology in a predictive manner (i.e. the calculation process is based on estimates) and prescriptive manner (i.e. the calculation steps are prescribed and must be followed in the order set out in the Regulation in order to determine the EDC rates).

22. O. Reg. 20/98 has not been reviewed by the province since it came into force, save and except for a review in 2001/02 resulting in some minor modifications to the Regulation and the creation of the *Education Development Charges Guidelines, Facilities Information & Analysis Unit, Business Services Branch, Ontario Ministry of Education, 2002* (the “EDC Guidelines”) providing further rules respecting EDC requirements, calculations and the consultation processes.
23. The salient provisions of the *Education Act* are as follows:

**257.53 (1) Definitions – In this Division,**

...

“education land cost” means education land cost within the meaning of subsection (2), (3) and (4);

...

“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 areas of jurisdiction of a board;

...

“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;

...

“pupil accommodation” means a building to accommodate pupils or an addition or alternation to a building that enable the building to accommodate an increased number if pupils.

**(2) Education land costs** – 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.

...

**(3) Exclusions from education land costs** – 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.

...

**257.54(1) Education development charge by-law** – 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.

...

**(4) Application of by-law** – An education development charge by-law may apply to the entire area of jurisdiction of a board or only part of it.

...

**(6) Conditions** – The imposition of an education development charge by a board is subject to the prescribed conditions.

...

**257.61(1) Education development charge background study** – Before passing an education development charge by-law, the board shall complete an education development charge background study.

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

(a) estimates of the anticipated amount, type and location or residential and of 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 new education land costs of the new schools required to provide the projected new pupil places; and,
- (d) such further information as may be prescribed.

**257.62 By-law within one year after study** – An education development charge by-law may be passed only within a period of 365 days following the completion of the education development charge background study.

**257.101 (1) Regulations** – The Lieutenant Governor in Council may make regulations that may have general or particular application in respect of a board,

- (a) prescribing any matter that is referred to as prescribed in this Division.

***The TDSB Has Growth-related Land Acquisition Needs***

- 24. : Section 257.54 of the *Education Act* set out the sole statutory criteria for adopting an EDC by-law, in stating: “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 the land in the area of jurisdiction undergoing residential or non-residential development”.
- 25. The TDSB has growth-related land acquisition needs as contemplated by Part IX, Division E of the *Education Act*.
- 26. Of the 473 elementary schools currently operated by the TDSB and providing student instruction, 246 are situated in locations that are affected by the proposed

new housing development. That is, the address of the proposed new housing development is situated within the catchment area of the elementary school. Of the 246 affected schools, 154 of them have permanent capacity in excess of projected enrolment and are therefore not expected to generate growth-related student accommodation needs.

27. Of the remaining 92 elementary schools, 47 are expected to experience enrolment in excess of permanent capacity; however, the existing site size exceeds the regulatory maximum of approximately 1 acre per 100 pupils (per: O. Reg. 20/98 Section 2 (5)).
28. The final group of 45 elementary schools are projected to have enrolment in excess of capacity and have a current site size below the EDC benchmark stipulated in the Regulation.
29. These schools account for 38% of the 15-year residential housing forecast, or 81,902 new occupied units.
30. The growth-related education land needs derived by this group of elementary schools is the potential to acquire in the order of 60 acres of additional land to serve enrolment growth within the City of Toronto.
31. The details of the methodology and analysis are set out in detail in the Application Record but may be summarized in the following chart:

**TORONTO DISTRICT SCHOOL BOARD**  
Summary List of Potential EDC-eligible Net Growth-related Pupil Places

	Grade Structure	Name of School	Mid-2018 to mid-2033 Housing Forecast	OTG Capacity	2016 FTE Enrolment	2016 Facility Utilization	2016 Pupil Place Shortfall	Existing Site Size (acres)	Ward	'Draft' Year 15 ROND	'Draft' 15-yr NGRPP	Yr 15 Projected Enrolment	Projected Net Education Land Needs (acres)
1	JK 05	Etienne Brule JS	3,670	205	179	87%	-26	1.61	3	181	155	334	2.0
2	JK 05	Norseman JMS	1,783	654	747	114%	93	6.13	3	170	263	1010	3.0
3	JK 08	Gulfstream PS	30	541	575	106%	34	5.31	4	11	45	620	0.5
4	JK 05	Ancaster PS	236	148	123	83%	-25	2.99	5	61	36	159	1.0
5	JK 05	Faywood Arts-Based Curriculum School	2,221	440	465	106%	25	6	5	152	177	642	2.0
6	JK 06	Rockford PS	1,091	709	672	95%	-37	6.08	5	60	23	695	1.0
7	JK 05	H J Alexander CS	396	579	589	102%	10	3.14	6	46	56	645	1.0
8	JK 06	Keele Street PS	3,773	533	491	92%	-42	3.19	7	325	283	774	3.0
9	JK 06	Runnymede Jr & Sr PS	191	1011	1003	99%	-8	4.45	7	16	8	1011	0.1
10	JK 06	John Wanless Jr PS	478	755	721	95%	-34	2.84	8	64	30	751	1.0
11	JK 05	Ledbury Park E & MS	749	554	509	92%	-45	4.99	8	58	13	522	1.0
12	JK 06	Ogden Jr PS	9,342	242	201	83%	-41	1.78	10	101	60	261	1.0
13	JK 06	Brown Jr PS	1,559	601	615	102%	14	2.67	11	55	69	684	1.0
14	JK 06	Cedarvale CS	498	383	402	105%	19	4.03	11	17	36	438	0.4
15	JK 05	Davisville Jr PS	1,441	469	561	120%	92	3.81	11	49	141	702	1.0
16	JK 05	Eglinton Jr PS	14,068	507	567	112%	60	1.61	11	485	545	1112	5.0
17	JK 05	Oriole Park Jr PS	632	242	307	127%	65	3.14	11	22	87	394	1.0
18	JK 05	Cameron PS	2,586	326	325	100%	-1	4.1	12	151	150	475	2.0
19	SK 08	Lester B Pearson ES	42	429	519	121%	90	4.6	12	9	99	618	1.0
20	JK 05	McKee PS	1,135	711	767	108%	56	3.78	12	68	124	891	1.0
21	JK 06	Pleasant PS	152	418	425	102%	7	3.98	12	56	63	488	1.0
22	JK 06	Bessborough Drive E & MS	27	436	505	116%	69	3.6	13	17	86	591	1.0
23	JK 06	Blythwood Jr PS	203	369	398	108%	29	5.31	13	17	46	444	0.5
24	JK 06	Dunlace PS	192	387	446	115%	59	5.34	13	11	70	516	1.0
25	JK 06	Grenoble PS	656	706	904	128%	198	4.5	13	51	249	1153	2.0
26	JK 06	Owen PS	102	559	631	113%	72	4.99	13	36	108	739	1.0
27	JK 06	Rolph Road ES	2,829	317	390	123%	73	4.6	13	241	314	704	3.0
28	JK 06	Church Street Jr PS	16,278	421	437	104%	16	1.95	14	177	193	630	2.0
29	JK 06	Balmly Beach CS	144	398	409	103%	11	2.27	16	25	36	445	0.4
30	JK 06	Kew Beach Jr PS	89	412	523	127%	111	3.21	16	10	121	644	1.0
31	JK 06	Kimberley Jr PS	144	245	271	111%	26	2.94	16	15	41	312	0.4
32	JK 05	Secord ES	1,195	591	635	107%	44	4.66	16	98	142	777	1.0
33	JK 05	Schwyn ES	20	254	245	96%	-9	1.5	16	12	3	248	0.0
34	JK 05	Victoria Park ES	142	143	157	110%	14	2.21	16	12	26	183	0.3
35	JK 06	Williamson Road Jr PS	139	553	568	103%	15	3	16	22	37	605	0.4
36	JK 05	Forest Manor PS	1,970	717	736	103%	19	8.01	17	108	127	863	1.0
37	JK 06	Blantyre PS	2,251	323	291	90%	-32	3.9	18	128	96	387	1.0
38	JK 06	Clairlea PS	3,269	573	592	103%	19	5.29	18	278	297	889	3.0
39	JK 04	Oakridge Jr PS	228	703	664	94%	-39	3.58	18	74	35	699	1.0
40	JK 07	Regent Heights PS	12	484	544	112%	60	4.55	18	8	68	612	1.0
41	JK 06	Bendale Jr PS	3,153	376	403	107%	27	6	19	378	405	808	4.0
42	JK 06	Tredway Woodsworth PS	1,515	883	744	84%	-139	7.98	19	181	42	786	2.0
43	JK 08	Terraview-Willowfield PS	1,191	309	298	96%	-11	4.45	20	143	132	430	1.0
44	JK 06	Agincourt Jr PS	35	150	222	148%	72	2.79	21	5	77	299	1.0
45	JK 06	Brookside PS	45	743	773	104%	30	6.03	21	22	52	825	1.0
		<b>TOTALS</b>	<b>81,902</b>	<b>21,509</b>	<b>22,549</b>	<b>105%</b>	<b>1,040</b>	<b>183</b>		<b>4,223</b>	<b>5,263</b>	<b>27,812</b>	<b>59.8</b>

Notes: NGRPP is Net Growth-related Pupil Places

*Section 10(2)(i) and (ii) of O. Reg. 20/98*

32. Notwithstanding the foregoing, the TDSB is ineligible to collect EDCs by operation of Sections 10(2)(i) and (ii) of O. Reg. 20/98. Section 10 of O. Reg. 20/98 provides as follows:

CONDITIONS OF PASSAGE OF BY-LAW

10. The following conditions are prescribed, for the purposes of subsection 257.54 (6) of the Act, as conditions that must be satisfied in order for a board to pass an education development charge by-law:

1. The Minister has approved,

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 elementary school pupils and the total number of new secondary school pupils, without the adjustments set out in that paragraph being made, and

ii. The board's estimates of the number of elementary school sites and the number of secondary school sites used by the board to determine the net education land cost under paragraph 4 of section 7.

2. At least one of the following conditions:

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.

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

33. There are 34,582 surplus elementary and 21,302 surplus secondary pupil places at the TDSB - when assessed on a jurisdiction wide basis. The board's current enrolment trends dictate that, even projecting growth out for a five period, the TDSB does not satisfy the provisions of section 10(2)(i) or (ii).
34. There are today, twenty-seven school boards in Ontario that are eligible to impose EDCs. It is increasingly the case that these boards can only requalify under Section 10(2)(iii) of O. Reg. 20/98 on the basis of having a deficit in their EDC accounts. That is, they would not qualify under Section 10(2)(i) and (ii). To continue to qualify to collect EDCs to fund growth-related development needs, therefore, these school boards must manage the timing of collections and expenditures in such a manner as to create a deficit in their EDC accounts on the date that the current by-law expires. Typically, this means acquiring land several years ahead of the need to actually construct a school. This is at odds with the normalized school planning process, whereby school sites are purchased within 1 to 2 years of the opening of the new school.

35. In the result, school boards that have excess capacity on a jurisdiction-wide basis can still collect EDCs by creating a deficit in their EDC account while other boards, like the TDSB, that also have sub-area accommodation pressures, are shut out.
36. In Toronto, residential development continues to generate the need for local additional student accommodation. Moreover, existing surplus school capacity is most often not in the right location to serve increased student enrolment. This situation is equally true for the TDSB as it has been, and will continue to be, for the Toronto Catholic DSB. Yet, the Catholic board is collecting EDCs.
37. Sections 10(2)(i) and (ii) of O. Reg. 20/98 are anomalies. Throughout the EDC framework, and the overall provincial funding model, the need to address local accommodation pressures is unequivocally recognized.
38. Within the EDC framework, for example, a school board is entitled to remove any capacity that, in the opinion of the board, is not available to be used to accommodate growth-related pupils. Within the provincial funding model, for example, capital priority funding is assessed and delivered based on school and sub-area need.
39. The operational impacts of Section 10(2)(i) and (ii) of O. Reg. 20/98 for the TDSB, and other boards that are impacted by it, is that, contrary to the policy basis for EDCs, growth does not pay for growth. Sections 10(2)(i) and (ii) bear no rational connection with the objective of ensuring that growth pays for growth.

40. Indeed, the operational impact of these sections directly undermines that purpose and negatively impacts the ability of the TDSB to meet its statutory obligations under the *Education Act*, including to provide adequate accommodation to all pupils who have a right to attend a TDSB school (per: Section 170 of the *Education Act*).
41. In Toronto, not only must the existing tax base shoulder the additional burden of growth - but the TDSB is not able to adequately plan for and address the accommodation pressures occasioned by that growth.
42. The ostensible purpose of Sections 10(2)(i) and (ii) appears to be to force school boards to close existing schools to shed excess capacity in the system before benefiting from EDCs. However, given the moratorium on school closures imposed by the province in June, 2017 (per: *Ministry of Education B Memorandum 2017: B09, Plan to Strengthen Rural and Northern Education, June 28, 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 Sections 10(2)(i) and (ii) of O. Reg. 20/98. Since 2003, there has been a history of on-again, off-again school closure moratoriums.
43. Even absent a moratorium, closing a school is a cumbersome and lengthy process with extensive public consultation and, in any event, 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.



44. Further, on September 5, 2017, the Ministry of Education announced investment into new and expanded well-being programs for students across the province (per: *Ministry of Education SB Memorandum 2017: SB31, Centralized Framework Pilot for Active School Travel, October 12, 2017*). One of the initiatives includes active transportation to create more physical activity opportunities for students and encourage more walking and wheeling to and from school to alleviate vehicle congestion and improve student safety. This initiative supports the municipal planning policies around active transportation and “walkability to schools”. Continually busing students out of their resident area, over the lifespan of a school, is not a cost-effective approach to accommodating students. Again, this is recognized in the EDC calculation in assessing growth-related student needs on a sub-area basis.
45. In the absence of Sections 10(2)(i) and (ii), once EDC eligibility is established and the by-law adopted, the TDSB would then be able to co-mingle long term land acquisition needs with long term student accommodation strategies in furtherance of the Board’s statutory mandate under Section 170 of the *Education Act* to provide instruction and adequate accommodation to all pupils who have a right to attend a TDSB school.
46. This exercise of merging land acquisition opportunities with accommodation strategies would be conducted by the TDSB as part of preparing an EDC Background study required as part of an EDC by-law adoption process.

47. The determination of long term need assumes that the school board will retain its share of the school-age population over time (i.e. apportionment will remain consistent with historical levels), unless there are factors to suggest otherwise. Further, it assumes the Existing Community enrolments of schools impacted by new housing development will not suddenly experience sharp declines in enrolment due to changes in attendance boundaries, program delivery or parent/student choice. The EDC framework requires that all calculation assumptions be revisited at least once every five years to ensure that any changes in enrolment or demographic trends are taken into consideration in establishing the EDC rates.
48. Long term land acquisition strategies are inextricably linked to long term student accommodation strategies. As such, a key component of the consultation process involving development community stakeholders is to demonstrate how the two strategies work together.
49. In the result, there are checks and balances within the EDC framework that help ensure an appropriate EDC funding scheme - which is a critical piece of the puzzle around long term land acquisition and long term student accommodation strategies, all in furtherance of providing instruction and adequate accommodation to students in the City of Toronto.

*Ultra Vires*

50. The express purpose of the *Education Act*, as found in Section 0.1 of the *Education Act* includes a strong public education system and, by virtue of Section 170 of the *Education Act*, the Applicant is statutorily obligated to provide adequate accommodation for the education of pupils within its jurisdiction.
51. Sections 10(2)(i) and (ii) of O. Reg. 20/98 are inconsistent with the purpose and objects of *Education Act* and, in particular, of Part IX, Division E. Sections 10(2)(i) and (ii) of O. Reg 20/98 bear no rational connection with the objective of EDCs - ensuring that growth pays for growth.
52. Indeed, the operational impact of these sections directly undermines that purpose and undermines the ability of the TDSB to meet its statutory obligations under the *Education Act*, including to provide adequate accommodation to all pupils who have a right to attend a TDSB school.
53. By virtue of Sections 10(2)(i) and (ii) of O. Reg 20/98, not only must the existing tax base shoulder the additional burden of growth - but the TDSB is not able to adequately plan for and address the accommodation pressures occasioned by that growth.
54. Sections 10(2)(i) and (ii) of O. Reg. 20/98 are directly at odds with, and render meaningless, the express statutory provisions of Sections 257.54(1) and (4) of the *Education Act*.

55. Further, the Supreme Court of Canada has considered the purpose of Division E of the *Education Act* (as it existed in its previous incarnation in the *Education Development Charges Act*) and found it to be a “scheme for the provision of educational facilities as a component of land use planning”. The Supreme Court determined that EDCs are an indirect taxation and are, therefore, *ultra vires* provincial competence under section 92(2) of the *Constitution Act, 1867*. However, the Supreme Court held that the EDC scheme was ultimately *intra vires* provincial competence because it was ancillary to a valid regulatory scheme for the provision of educational facilities as a component of land use planning, pursuant to ss. 92(9), (13) and (16) (per: *Ontario Home Builders’ Assn. v. York Region Board of Ed.* [1996 2 S.C.R 930]).
56. That decision was given prior to the promulgation of O. Reg. 20/98. Sections 10(2)(i) and (ii) of O. Reg. 20/98 remove the necessary connection between EDCs and educational facility requirements as a component of land use planning.
57. Sections 10(2)(i) and (ii) of O. Reg. 20/98 also operate in an unfair and discriminatory manner as between English-language public boards and English-language Roman Catholic boards, in particular, as between the Toronto Catholic District School Board (which is receiving EDC funds) and the Toronto District School Board (which is not receiving EDC funds) contrary to section 234(2) of the *Education Act*.

*Statutory Provisions*

58. Sections 0.1, 170, 234, 257.53, 257.54, 257.6, 257.62, and 257.101 of the *Education Act* RSO 1990, c E.2, as amended.
59. Sections to ss. 92(2), (9), (13) and (16) of the *Constitution Act, 1867*.
60. Sections 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.
61. Rules 14, 38, and 68 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
62. Such further and other grounds as counsel may advise.

The following documentary evidence will be used at the hearing of the application:

- (a) the Affidavit of Cynthia Clarke, sworn February 14, 2018; and
- (b) such further and other evidence as counsel may advise and this Honourable

Court may permit.

February 23, 2018  
~~February 19, 2018~~

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