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(Winnipeg Centre)
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v. The City of Winnipeg et al.
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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- and -	)	for the applicants
THE CITY OF WINNIPEG and CITY CENTRE COMMUNITY COMMITTEE,	)	ORVEL L. CURRIE BRIAN MERONEK JENNIFER HANSON ERIN LAWLOR-FORSYTH
respondents.	)	for the respondents
	)	JUDGMENT DELIVERED: March 30, 2020

GRAMMOND J.

INTRODUCTION

[1] On August 6, 2019, I found the respondents in contempt for failing to process the applicants' secondary plan application in file no. SP1/2018 (the "Secondary Plan Application") at a public meeting, pursuant to a non-statutory (policy) approach

(the "Contempt Finding"). The reasons underlying the Contempt Finding are found at ***6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.***, 2019 MBQB 121 (the "Contempt Reasons").

[2] The respondents have asked that the Contempt Finding be reconsidered and set aside or varied. The applicants submitted that the Contempt Finding should be maintained, and that the respondents should be sanctioned.

ISSUES

[3] The issues before me are:

a) Should the Contempt Finding be reconsidered? and

b) If the Contempt Finding is maintained, what sanctions should be imposed upon the respondents?

ISSUE 1: SHOULD THE CONTEMPT FINDING BE RECONSIDERED?

Relevant Legal Principles

[4] Court of Queen's Bench Rule 1.04(1) provides that the rules shall be construed liberally, to secure the just determination of every civil proceeding on its merits.

[5] Rule 59.06(2) provides that a party who seeks to obtain relief other than that originally awarded may make a motion in the proceeding for the relief claimed.

[6] In ***The Assiniboine Credit Union Limited v. Tresoor***, 2002 MBQB 325, the court considered Rule 59.06(2) and stated:

> [2] … In addition, it is well established that the court has discretion to vary or amend its own decision where it is satisfied that the original decision was in error because of overlooked or misconstrued material evidence or misapplied law, or where it is necessary to clarify ambiguous language.

> [3] It is also well established that this discretion should be used sparingly and with the greatest of care so that abuse of the court process does not occur. It should not be used, however, to allow a party to fix a 'broken down case' after the fact (see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983).

[7] In ***Ridout v. Ridout***, 2003 MBCA 61, the court stated:

> 12 … Until the judgment or order has been formalized, the judge who pronounced it can hear further evidence and argument and change his or her mind as expressed in the earlier pronouncement. The limited circumstances permitting change, as envisioned by Rule 59.06, are not applicable to an application for rescission before the judgment or order is signed and filed.
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> [citations omitted]

[8] In ***Chase Industries Ltd. v. Vermette et al.***, 2004 MBQB 152, Justice Scurfield stated:

> [5] The defendants rely on Queen's Bench Rule 59.06 to establish my jurisdiction to set aside an order that I have made. However, at the time of their motion, the order had not yet been executed. Consequently, the jurisdiction to change my reasons flows from the general right of the trial judge to reopen a case and even change a decision before judgment has been entered or an order has been signed: *Munroe v. Heubach* (1909), 1908 CanLII 297 (MB QB), 18 Man.R. 547; *Ridout v. Ridout*, [2004] M.J. No. 228 (C.A.).
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> [6] In *Sykes v. Sykes* (1995), 1995 CanLII 2387 (BC CA), 6 B.C.L.R. (3d) 296 (C.A.), Wood J.A. commented on this jurisdiction, at p. 300:
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> > … It is well established that the discretion which a trial judge has to re-open before formal judgment has been entered is what is called 'an unfettered discretion', although it is one which for obvious reasons must be exercised sparingly. The following quotation from the judgment of Mr. Justice Macdonald in *Clayton v. British American Securities Ltd.*, 1934 CanLII 229 (BC CA), [1934] 3 W.W.R. 257 at 295 (B.C. C.A.), still represents the law in this Province:
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> > > It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of

> further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's process would likely result.
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> In my view, new evidence is not an essential prerequisite to a trial judge's exercise of the discretion to re-open. In some cases, it may be the only circumstance which would justify a re-opening. Indeed it may be that in many cases a re-opening would only be justified on the basis of new evidence which was not available at the time of the original trial. It will in all cases depend on the circumstances.

> [7] Although *Sykes, supra*, is a decision of the British Columbia Court of Appeal, in my view, it summarizes the common law principles referred to by the Manitoba Court of Appeal in *Ridout, supra*. Thus, while a trial judge's discretion is said to be unfettered, a trial judge should still be exercising the discretion to receive new evidence judicially. The integrity of the process cannot be preserved if the trial or motion process can be reopened easily by unsuccessful litigants. …
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> [8] These principles provide general guidance to the court. However, the jurisdiction to admit new evidence and change a decision is clearly broader where an order or judgment has not yet been signed. Practically speaking, while the court should always be extremely reluctant to reopen a matter after evidence has been heard and a decision rendered, the concern is greatest when there has been a trial on the merits, or where it is clear that one party is merely changing tactics in response to an adverse decision.
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> …
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> [11] From … rule [1.04(1)], and from the common law generally, I conclude that while the protection of the process is important, the bias of the court will always favour achieving substantial justice on the merits of a given case. This normally translates into an examination of the prejudice that would flow to either a plaintiff or a defendant from a decision to reopen. The overriding goal remains securing a just determination of issues on the merits. However, the court cannot ignore the potential damage to a party specifically and to the integrity of the judicial process generally that flows from opening a case that has already been decided.

[9] Rule 59.06 does not apply to the respondents' motion, because no order relative to the Contempt Finding has been signed and filed. Accordingly, my power to reconsider and alter the Contempt Finding arises from the common law.

[10] The leading case with respect to civil contempt is ***Carey v. Laiken***, 2015 SCC 17. The background underlying that decision is as follows. In ***Laiken v. Carey; Sabourin v. Laiken,*** 2012 ONSC 7252 (QL), the court was asked to set aside its initial contempt finding, and did so on the basis that, having heard new evidence, it was no longer convinced beyond a reasonable doubt that the requirements for contempt were met.

[11] The Court of Appeal reversed that decision, at ***Sabourin and Sun Group of Companies v. Laiken***, 2013 ONCA 530, stating:

> [32] In my view, neither rule 60.11 nor the case law contemplates the procedure that was followed in this case. A party faced with a contempt motion is not entitled to present a partial defence and then, if the initial gambit fails, have a second 'bite at the cherry'. In contempt matters, as in all other areas of litigation, the interests of justice are best served if the principle of finality is respected. Parties have one chance to present their case and, absent exceptional circumstances, they must live with the consequences of the tactical decisions they have made in deciding what evidence and what arguments to present to the court.
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> [33] The finality principle must, however, be applied in a way that takes into account the fact that contempt motions typically involve two phases. The first phase deals with whether the party is in contempt. When that decision is made, the finding is final. If the party is found to be in contempt, the issue of sanction is usually dealt with at the second phase. It is not until both phases are complete that it is appropriate to proceed with an appeal of the contempt finding. These two phases correspond with the practice in criminal proceedings of dividing the issues of conviction and sentence.
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> …
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> [47] It is well-established that court orders must be respected, even if they were improperly or improvidently granted. See *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council (*2006), 2006 CanLII 41649 (ON CA), 82 O.R. (3d) 721 (C.A.) at para. 90: 'The law is clear that an order of the court, however wrong, must be obeyed until it is reversed or varied' (citation omitted).

[12] The Supreme Court of Canada in ***Carey*** stated:

> [61] The Court of Appeal held that the motions judge erred in setting aside her initial contempt finding. Neither the *Rules* nor the case law contemplates the

procedure the motions judge followed. The interests of justice are best served when the principle of finality is respected. Mr. Carey used the second stage of the proceedings to attack the motions judge's findings and declaration of contempt. This was inappropriate (paras. 30-32).

[62] The court identified two qualifications to the general rule that a contempt finding at the first hearing is final. First, rule 60.11 contemplates that a judge may set aside a finding of contempt if the contemnor purges the contempt, since the contempt proceedings have secured compliance with the court order. Second, contempt proceedings are subject to the standard principles that allow parties to reopen findings in exceptional circumstances to permit consideration of fresh evidence or new facts that were not before the court at the first hearing.

[63] The appellant submits that the Court of Appeal was wrong for two principal reasons: rule 60.11(8) grants the court discretion to set aside a contempt finding and the quasi-criminal nature of civil contempt proceedings demands that judges retain discretion to set aside a finding on the basis of new material evidence. The appellant submits that the motions judge properly exercised her discretion to set aside the contempt finding in this case.

[64] I do not accept these submissions and I agree with the Court of Appeal, for substantially the reasons it gave.

[65] The starting point is that, in civil contempt proceedings, once a finding of contempt has been made at the first stage of a bifurcated proceeding, that finding is usually final. As the Court of Appeal stated, '[a] party faced with a contempt motion is not entitled to present a partial defence [at the liability stage] and then, if the initial gambit fails, have a second 'bite at the cherry''' at the penalty stage (para. 32). This would defeat the purpose of the first hearing. This is what the judge at first instance erroneously permitted Mr. Carey to do.

[66] Without exhaustively outlining the circumstances in which a judge may properly revisit an initial contempt finding, I agree with the Court of Appeal that he or she may do so where the contemnor subsequently complies with the order or otherwise purges his or her contempt or, in exceptional circumstances, where new facts or evidence have come to light after the contempt finding was made.

[emphasis added]

Analysis

[13] The order underlying the Contempt Finding in this case (the "*Mandamus* Order") required the respondent City Centre Community Committee (the "Committee") to conduct a public meeting regarding the Secondary Plan Application on November 13, 2018, pursuant to the non-statutory (policy) approach. The reasons for the *Mandamus*

Order are found at ***6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.***, 2018 MBQB 153 (the "*Mandamus* Reasons").

[14] The *Mandamus* Order was signed on October 12, 2018, was not appealed, and the respondents have not asked that I revisit it. Rather, they seek to reverse the Contempt Finding, and in that context they have asked that I consider certain aspects of the *Mandamus* Reasons. The respondents argued that I can reconsider the Contempt Finding to make the most just determination of the case on its merits, and that I have an unfettered discretion to hear further evidence or argument, and to change my decision.

[15] I accept that the authorities relied upon by the respondents are good law, and I note in particular the comments of Justice Scurfield in ***Chase*** that:

a) the court will always favour achieving substantial justice on the merits of a given case;

b) the overriding goal remains securing a just determination of issues on the merits; and

c) this analysis normally translates into an examination of the prejudice that would flow to either party from a decision to reopen.

[16] Having said that, none of the respondents' cases, including ***Chase***, involved the reconsideration of a contempt finding, and all of them predate ***Carey***. Civil contempt is a unique area of the law for a variety of reasons, including that it is quasi-criminal, and unlike most civil proceedings, the process includes two stages where contempt is found.

The court in ***Carey*** was clear that the sanction stage of the process should not typically be used as an opportunity to revisit a contempt finding.

[17] I recognize that in ***Carey*** an order was signed and filed, but that factual difference does not render ***Carey*** wholly inapplicable to this case, as argued by the respondents. Rather, the general principles articulated by the court relative to the nature and process of civil contempt and the principle of finality still apply.

[18] Similarly, the fact that the motion judge heard new evidence in ***Carey*** does not render it inapplicable to this case. The new evidence was presented at the sanction phase of the motion, in response to an express invitation of the motion judge. While that approach was later overturned, the provision of new evidence *per se* was not the problem. In fact, that is one of the recognized exceptions to the finality principle.

[19] The court in ***Carey*** was clear that the list of exceptions is not exhaustive, and in my view, where no order has been signed and filed, the overriding goal on a reconsideration motion is as set out in ***Chase***: to achieve justice on a determination of the issue on its merits. Having said that, "the protection of the process is important". In other words, a contemnor should not automatically be afforded a "second bite at the cherry" at the second stage of a contempt process, because a contempt finding is usually final. This principle should apply whether the contempt finding is challenged before or after the order is signed and filed. The reconsideration of a judge's decision is a remedy to be used sparingly, and contempt hearings, or any other two stage process, should not typically provide to litigants an opportunity to re-argue the first phase of the case at the hearing of the second phase.

[20] The respondents asked that the Contempt Finding be set aside on the basis that:

a) a public meeting regarding the Secondary Plan Application was held on November 13, 2018 (the "Meeting"), as required by the *Mandamus* Order;

b) in both the *Mandamus* Reasons and the Contempt Reasons:

(i) I misinterpreted ***The City of Winnipeg Charter***, S.M. 2002, c. 39, which requires that a secondary plan proceed pursuant to a by-law. Accordingly, by ordering the respondents to proceed pursuant to the non-statutory (policy) approach, I ordered a breach of the ***Charter***;

(ii) I misinterpreted the law regarding the City's past use of the non-statutory (policy) approach for secondary plans; and

(iii) I appropriated City Council's decision-making power by requiring the Committee to proceed under the non-statutory (policy) approach;

c) the *Mandamus* Order is deficient because I did not consider the standard of review.

[21] The respondents did not purge their contempt subsequent to the Contempt Finding, they filed no new evidence in support of their motion, and they have not alleged exceptional circumstances. The respondents filed the affidavit of James Platt sworn October 23, 2019, on which he was cross-examined, but that evidence relates to the sanction phase of the hearing. The applicants filed new evidence on the reconsideration motion: the affidavit of Andrew Marquess, sworn November 19, 2019 (the "Marquess Affidavit").

[22] I will now comment upon the issue of prejudice to the parties. I have considered the comments of the court in ***Chase***, and the respondents' argument that they have suffered greater prejudice than the applicants because the Contempt Finding is serious, and should be made only in rarest of cases. While those factors were proper considerations on the contempt motion, they do not constitute prejudice to the respondents in the context of whether the Contempt Finding should be reconsidered and set aside. If that were the case, every contemnor in every case could argue prejudice arising from a contempt finding. Moreover, the respondents have filed no evidence that they have suffered prejudice.

The Meeting was held as required

[23] The respondents argued that:

a) the Meeting was held, as ordered, at which the Committee, as distinct from the City's Public Service, reviewed the Secondary Plan Application pursuant to the non-statutory (policy) approach;

b) the Committee concluded that the Secondary Plan Application was flawed, (as a statutory or non-statutory plan), and sent it back to be amended by the applicants; and

c) the Committee did not require that the Secondary Plan Application proceed on a statutory (by-law) basis.

[24] The respondents have asked, in essence, that I now determine that the Meeting complied with the *Mandamus* Order on the basis of the same evidence that was before

me at the contempt hearing. They have sought, however, to characterize some of their arguments differently.

[25] As I have stated, the overriding goal on this motion is to achieve justice on a determination of the issue on its merits, but generally the Contempt Finding is final and the power to set it aside is to be used sparingly. In the absence of any exceptional circumstances or compelling reasons, there is no basis on which to reverse my finding that the Meeting did not comply with the *Mandamus* Order. Nothing of substance has changed since I made the Contempt Finding, and I have concluded that the respondents are simply seeking to take a "second bite at the cherry". To the extent that they seek to argue that I erred in making the Contempt Finding, their remedy is an appeal.

[26] I note that the respondents' review of the Secondary Plan Application from a substantive perspective has never been at issue. As I stated in the Contempt Reasons:

> [66] It was very clear throughout the *mandamus* application process that the applicants did not ask the Court to order a particular substantive outcome of the Applications. In other words, the *mandamus* application was a judicial review of the process by which the Applications would be decided from a procedural standpoint, both in terms of the timing and the steps to be followed. I was not asked to direct the public service to provide particular recommendations with respect to the Applications, and I did not do so.

<u>Interpretation of the Charter</u>

[27] When I made the *Mandamus* Order, I concluded that there was no statutory requirement that a secondary plan be implemented by by-law. I stated in the *Mandamus* Reasons that:

> [13] Pursuant to s. 234(1) [of the ***Charter***], Council may adopt a secondary plan by by-law, or by other means. This interpretation is consistent with the

> evidence of former City employees, now engaged by the applicants as private consultants…
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> …
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> [21] The respondents have not pointed to any authority to support the suggestion that a "secondary plan" must be limited to a statutory context. I have concluded that there is no statutory or other requirement that a secondary plan must be implemented by by-law. Accordingly, the Secondary Plan Application can proceed pursuant to a policy adopted by Council. [emphasis in original]

[28] The respondents submitted that I misinterpreted the ***Charter***, by failing to consider s. 54, which was not raised at the hearing of the *mandamus* application. In addition, the respondents argued that I should have considered the principles of statutory interpretation as found in ***The Interpretation Act***, C.C.S.M. c. I80, (s. 6), ***Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.***, 2016 SCC 47, (paragraph 44), and ***Penner et al. v. Rural Municipality of Montcalm***, 2019 MBQB 122, (paragraphs 16 and 29).

[29] The respondents argued that interpreted properly, the ***Charter*** as whole, including ss. 54 and 234, requires that a secondary plan application proceed pursuant to the statutory (by-law) approach. They argued that there is no discretion to proceed with a secondary plan application pursuant to a non-statutory (policy) approach. In other words, the respondents argued that the Meeting I ordered and that the Committee conducted did not comply with the ***Charter***.

[30] As I have stated already, the respondents filed no new evidence and rely upon no new facts. In addition, there is nothing in the Marquess Affidavit that assists their position. To the contrary, the Marquess Affidavit includes City documents that list secondary plans apparently implemented by Council resolution under the non-statutory

(policy) approach as recently as November 2019. Because Mr. Marquess does not appear to have any direct knowledge of those secondary plans, that evidence carries limited weight, but it does contradict the respondents' position on this issue. Moreover, the respondents neither replied to nor cross-examined on the documents, and they refused to answer questions about them on the cross-examination of their affiant relative to the sanction phase of the contempt motion. Accordingly, the only new evidence before me detracts from the respondents' argument on this point.

[31] In ***Sabourin and Sun Group of Companies***, the court stated that there must be a sound explanation why fresh evidence or new facts were not presented to the court before a contempt finding was made. An example of such a circumstance arose in the ***Re, McGrade Estate***, 2003 CanLII 49390 (ONSC), where the contemnor had been misled throughout the proceedings on a variety of key points. There are no comparable circumstances here.

[32] Certainly, the respondents' reference to s. 54 of the ***Charter*** is new, but that provision existed in its current form when the *mandamus* application was argued. Certainly, it is possible that the *Mandamus* Order or the reasons underlying it would have been somewhat different had s. 54 been raised, or had any of the other arguments been presented differently, but that is <u>not</u> a matter for me to assess on this motion. Those issues can be raised on an appeal. I recognize that the *Mandamus* Order was not appealed, but the Contempt Finding can be appealed in due course.

[33] I appreciate that the respondents are now represented by different counsel, and in that context it is not unusual for new arguments to be raised. The fact remains,

however, that the respondents are not entitled to a reconsideration of the Contempt Finding unless they have purged, exceptional circumstances apply, or there is some other basis on which justice should be done that would convince me to exercise my discretion to do so. Otherwise, in every case where new counsel is retained by an unsuccessful litigant who seeks to repair their case after the fact, the court could be faced with a request to reconsider its decision, on the strength of different authorities, arguments or strategies.

Past practices

[34] The respondents argued that I erred in granting the *Mandamus* Order by relying upon evidence of the past issuance of secondary plans pursuant to the non-statutory (policy) approach. They pointed to ***Bourgouin v. The R.M. of Rosser***, 2013 MBQB 215, aff'd 2014 MBCA 103 where the court stated:

> [79] … Just because the R.M. did not follow a proper or recognized legal process in the past, does not mean that it cannot admit its mistake and start the proper application of the zoning by-laws and the development schemes to parcels of land within its jurisdiction.

[35] That decision is good law, but I do not agree that it applies to this case, because of the evidence before me on the *mandamus* application, and in the Marquess Affidavit, of the respondents' previous and apparent ongoing use of the non-statutory (policy) approach, irrespective of their interpretation of the legislative framework as argued now. In contrast, in ***Bourgouin***, the R.M. applied its new interpretation of the legislation consistently after the previous interpretive error came to its attention.

[36] The more significant problem with this argument is that it raises an issue with the *Mandamus* Order in support of the submission that the Contempt Finding should be

set aside. That approach is flawed, because the *Mandamus* Order is not under review, and this motion is not the appropriate forum in which to allege errors underlying it. As the court held in ***Sabourin***, court orders must be obeyed even if they are wrong. Accordingly, even if I agreed with the respondents on the merits of this issue, which I do not, I am not convinced that setting aside the Contempt Finding would be a just outcome, having regard to the principle of finality and protection of the process.

Required conclusion

[37] The respondents also argued that I usurped the decision making power of City Council by ordering that the Secondary Plan Application proceed under the non-statutory (policy) approach, which the City had determined would no longer be used. They argued that "… a court should not be directing a Council on whether it should proceed by way of non-statutory (policy) review, or by a statutory plan".

[38] I agree that generally, deference is owed to municipal decision-making as referenced in ***Shell Canada Products Ltd. v. Vancouver (City)***, [1994] 1 S.C.R. 231, (page 244), ***Nanaimo (City) v. Rascal Trucking Ltd.***, 2000 SCC 13 (paragraph 35), and ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2 (paragraphs 19 and 30). As I have stated already, however, it was very clear throughout this proceeding that I was not asked to make, and did not make, any decision relative to the substantive outcome of the Secondary Plan Application. The *Mandamus* Order addressed the process by which the Secondary Plan Application would be decided from a procedural standpoint, both in terms of the timing and the steps to

be followed. The *Mandamus* Reasons reflect that a *mandamus* order may be used to control procedural delays, where as here, no decision was made.

[39] In addition, the respondents have raised this issue relative to the *Mandamus* Order as a means of arguing that the Contempt Finding should be set aside. This approach is flawed for the reasons that I have already articulated in paragraph 36 above.

No Standard of Review

[40] The respondents argued that the *Mandamus* Order was a judicial review, and the *Mandamus* Reasons should have included an analysis of the applicable standard of review. Again, they are seeking to set aside the Contempt Finding on the basis of an error in the *Mandamus* Reasons, which is a flawed approach.

[41] In addition, as set out in the *Mandamus* Reasons, the applicants sought relief from the court to control procedural delay. They alleged that the Secondary Plan Application and the applicants' zoning application in DASZ file no. 12/2018, collectively (the "Applications") were not progressing because the respondents refused to hear them. The respondents' position that the Secondary Plan Application should proceed under the statutory (by-law) approach was not characterized as a substantive decision under judicial review, and the standard of review was not argued by the parties.

Conclusion

[42] I am not satisfied that I should exercise my discretion to set aside the Contempt Finding. The respondents have not purged their contempt, there are no exceptional circumstances such as compelling new evidence or argument, and there is no other

basis upon which to overturn the Contempt Finding. The respondents' motion to reconsider and set aside or vary the Contempt Finding is dismissed.

ISSUE 2: WHAT SANCTIONS SHOULD BE IMPOSED UPON THE RESPONDENTS?

Relevant Legal Principles

[43] Court of Queen's Bench Rule 60.10(5) provides that where a finding of contempt is made, the court may order that the person in contempt:

a) be imprisoned;

b) pay a fine;

c) do or refrain from doing an act;

d) pay such costs as are just; and

e) comply with any other order that the judge considers necessary.

[44] In ***Fresno Pacific University Foundation v. Grabski et al.***, 2015 MBCA 70, the court stated that there is a broad discretion in imposing a sanction for contempt.

[45] In ***1984 Enterprises Inc. v. Strider Resources Ltd. et al.***, 2013 MBCA 100, the court stated that:

> [73] … The primary objective in cases of civil contempt is the enforcement of the performance of a court order. Punishment is secondary. See *Apotex Fermentation Inc. et al. v. Novopharm Ltd. et al.* (1998), 1998 CanLII 4886 (MB CA), 129 Man. R. (2d) 161 at para. 283 (C.A.).
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> [74] That said, in the same case, when reviewing the issue of the penalty to be imposed for the contempt, Scott C.J.M., for the court, noted the role of the public interest in the administration of justice when imposing punishment. He stated (at paras. 315-16):
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>> In *United Nurses of Alberta v. Alberta (Attorney General)*, [[1992] 1 S.C.R. 901] … it was Sopinka, J.'s, opinion that when confronted with a civil contempt, the object of the court in imposing a penalty should be to secure compliance or future compliance and not to punish the contemnor. The majority, however, stressed more

> concern than did he that even in cases of civil contempt the court must demonstrate its power to uphold its dignity and support its process. This concern was emphasized in the subsequent Supreme Court decision in Vidéotron Ltée et Premier Choix; TVEC Inc. v. Industries Microlec produits électroniques Inc. et autres, 1992 CanLII 29 (SCC), [1992] 2 S.C.R. 1065; 141 N.R. 281; 50 Q.A.C. 161.

[46] In ***Boily v. Carleton Condominium Corporation 145***, 2014 ONCA 574, the court held:

> [90] The following are the factors relevant to a determination of an appropriate sentence for civil contempt:
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> a) the proportionality of the sentence to the wrongdoing;
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> b) the presence of mitigating factors;
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> c) the presence of aggravating factors;
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> d) deterrence and denunciation;
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> e) the similarity of sentences in like circumstances; and
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> f) the reasonableness of a fine or incarceration.
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> [91] The principle of proportionality requires that the punishment fit the wrongdoing: *York (Regional Municipality) v. Schmidt*, [2008] O.J. No. 4915 (S.C.), at para. 16. As Jeffrey Miller wrote in his leading textbook *The Law of Contempt in Canada* (Toronto: Carswell, 1997), at p. 131: '[t]he fundamental principle in all sentencing, including sentencing for contempt, is that the sentence must be commensurate with or 'fitted to' the gravity of the offence.'
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> …
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> [108] The Individual Appellants correctly point out in their factum that, in general, awards for civil contempt in Canada range between $1,500 and $5,000. … Even in cases where contempt has involved the loss or misuse of substantial amounts of money, the fines imposed on individuals have remained low. See, for example *Chicago Blower Co. v. 141209 Canada Ltd. and Transregent Holdings Ltd. et al.* (1987), 1987 CanLII 7042 (MB CA), 44 Man.R. (2d) 241 (C.A); *Baxter Travenol Laboratories of Canada, Ltd. v. Cutter (Canada) Ltd.*, [1987] 2 F.C. 557 (C.A.).
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> [109] The few instances in which fines have been imposed at $100,000 or higher have been against unions with large membership [citations omitted] or against large corporations in egregious circumstances (*Apotex Fermentation v. Novopharm*). …

> [110] Significant fines have been imposed only in particularly egregious cases and/or where the contemptuous conduct was motivated by personal gain (See, for example: *Imax Corp. v. Trotum Systems Inc.*, 2013 ONSC 743 at paras. 12-14 (fine of $50,000).)
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> [111] However, I also note the observation of Brown J. in *Mercedes-Benz Financial v. Kovacevic,* 2009 CanLII 9423 (ON SC), [2009] O.J. No. 888, that some recent decisions in this province have shown a willingness to impose more substantial penalties for contempt, particularly in cases in which there has been a lengthy course of disobedience and where the contemnors have not purged their contempt.
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> [112] In the end, the sentence imposed must be reasonable.

[47] In ***2363523 Ontario Inc. v. Nowack,*** 2016 ONSC 2518, the court stated:

> [71] A second objective of sentencing is punishment. Punishment serves to denounce conduct that requires denouncing and thereby deter the contemnor specifically and others more generally who might contemplate breaches of court orders. …
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> [72] Our court system and the rule of law itself would not long survive if litigants considered themselves free to disobey court orders at will. If a party has disagreements or issues with an order that has been made, it must nevertheless be complied with unless validly stayed or reversed on appeal in accordance with the rules. There is no self-help after an order has been issued.
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> [73] In considering the appropriate sentence in an individual case, I have had regard to the list of factors cited by Shaugnessy J. in *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569 (CanLII). … The factors, listed at para. 25, are the following:
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> a. The nature of the contemptuous act;
>
> b. Whether the contemnor has admitted his breach;
>
> c. Whether the contemnor has tendered a formal apology to the Court;
>
> d. Whether the breach was a single act or part of an on-going pattern of conduct in which there were repeated breaches;
>
> e. Whether the breach occurred with the full knowledge and understanding of the contemnor such that it was a breach rather than a result of a mistake or misunderstanding;

f. The extent to which the conduct of the contemnor has displayed defiance;

g. Whether the order was a private one affecting only the parties or whether some public benefit lays at its root.

[48] Additional factors to consider include specific and general deterrence (***Boily***, paragraph 105), the ability of the contemnor to pay[1] any attempts made to comply with the order in question[2], and willful and stubborn disobedience of the court order.[3]

Position of the applicants

[49] The applicants sought an order:

a) that the Applications be heard concurrently by City Council at its next regularly scheduled meeting;

b) for payment of a fine of $250,000, plus $37,500 per day commencing September 6, 2019 until the Applications are heard; and

c) for payment of solicitor and client costs.

[50] The applicants pointed to ***Re Axelrod et al. and City of Toronto*** (1984), 48 O.R. (2d) 586, where the court ordered a fine of $100,000, plus $15,000 per day until a *mandamus* order was complied with. After the order was complied with, however, the court ordered that the payment be returned to the contemnor, on the basis that a finding of contempt and an award of costs constituted an adequate penalty. Here, the applicants argued that the respondents remain defiant and unrepentant, and that they should be fined accordingly.

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[1] *Boucher v. Kennedy* (1998), 60 O.T.C. 137 (Ont. Gen. Div.), aff'd (1999), 124 O.A.C. 151 (Ont. C.A.).
[2] *Calgary (City) v. Chisan*, 2002 CarswellAlta 1099.
[3] *Supra.*

[51] The applicants argued that senior City administrators, who are custodians of public power and the public purse, think they are in a world of their own, conducting themselves for personal reasons. The applicants submitted that a strong message must be sent that defiance of a court order by any level of government strikes at the heart of the rule of law, by undermining the authority of the court and encouraging others to flout the authority of the judicial system.

[52] The applicants argued that the respondents had multiple opportunities to purge their contempt, and did not do so despite requests by the applicants. In the result, the applicants' development has been delayed, which is prejudicial to them, as well as to the general public.

[53] The applicants also argued that the filing of the reconsideration motion should be considered as an aggravating factor, on the basis that it was an attempt to intimidate me into changing the Contempt Finding.

<u>Position of the respondents</u>

[54] The respondents submitted that no fine should be imposed, or alternatively a fine of no more than $5,000.

[55] The respondents pointed to ***Chicago Blower Co. v. 141209 Canada Ltd*. *and Transregent Holdings Ltd. et. al.*** (1987), 44 Man. R. (2d) 241, where a $10,000 fine for a "massive and prolonged" breach was reduced to $5,000.

[56] They also pointed to ***Apotex Fermentation Inc. v. Novopharm Ltd.***, [1998] M.J. No. 297 (QL), where the court determined that a fine of $1.25 million should be set aside, and ***Professional Institute of the Public Service of Canada v. Bremsak***,

2013 FCA 214, where the court stated that a fine of $400,000 was at the very high end of the range (paragraph 82).

Analysis

[57] It is significant that the Meeting was held on the date that I ordered it be held, after notice to the public. Submissions were heard from the applicants and from others who opposed the Applications. In other words, efforts were made to comply with the *Mandamus* Order and move the Applications forward, which is a mitigating factor.

[58] Having said that, the applicants' counsel issued a warning to the respondents prior to the Meeting that proceeding under the statutory (by-law) approach was not in compliance the *Mandamus* Order. The respondents disagreed and persisted with their proposed course of action. The respondents have still not explained their conduct prior to and at the Meeting relative to the statutory (by-law) approach, but I am not satisfied that on the whole, they acted with willful disobedience as opposed to a lack of understanding or attention to the *Mandamus* Order. Certainly, there was inconsistency in the approach taken by different City personnel, on which I commented at paragraph 30 of the Contempt Reasons, and there is no evidence that any of the individuals involved were motivated by personal reasons as the applicants have alleged.

[59] After the Contempt Finding, the applicants' counsel requested a meeting to discuss purging the contempt, among other things. The respondents advised that they had no intention to delay matters, but that they needed to consider the Contempt Finding carefully. No meeting occurred, and within a couple of months the respondents retained new counsel who later filed the reconsideration motion. In the meanwhile, the

Committee continued to hold meetings in the normal course of its business, and the Secondary Plan Application was not revisited. In other words, the actions of the respondents were inconsistent with advancing the Applications. The respondents could have engaged with the applicants and purged their contempt, but elected not to do so prior to the outcome of the reconsideration motion. In my view, these events constitute a pattern of conduct on the part of the respondents, which is an aggravating factor.

[60] I have also considered the lack of merit of the reconsideration motion. I accept that the respondents pursued the motion in good faith, and I give them the benefit of the doubt that the arguments raised were the result of a review by their new counsel, with a new perspective on the issues. I will not, therefore, treat the reconsideration motion as an aggravating factor for the purposes of sanction. I will, however, make an order of costs against the respondents with respect to that motion, as set out below.

[61] I am not satisfied that the respondents' contempt is quasi public in nature, in the sense argued by the applicants. While the applicants' development, if and when it proceeds, will necessarily impact members of the public, I have no specific evidence of the impact of the respondents' contempt upon the public, including with respect to rapid transit access, lost tax revenue or otherwise. Certainly, every contempt finding involves an element of public involvement, as set out in ***Apotex***, and that impact is intensified in this case given that the respondents are government bodies.

[62] Although the respondents have not purged their contempt, they filed evidence that if the reconsideration motion is denied, the City will do so, by forwarding the

Secondary Plan Application to be dealt with by the City Standing Policy Committee, without delay. This committee is the next body that should address the Applications pursuant to the non-statutory (policy) approach.

[63] The applicants challenged the admissibility of this evidence, on the basis that the affiant admitted on cross-examination that his source of information and belief as named in the affidavit was not the person with whom he actually spoke prior to swearing it. Instead, there was an intermediary as between them. I agree with the applicants that on this basis the evidence constitutes double hearsay, and does not comply with Queen's Bench Rule 39.01(4). It is not, therefore, properly admissible.

[64] Having said that, in my view this "evidence" is more properly characterized as the respondents' position in any event. Accordingly, despite the manner in which it was put before the court, I accept the substance of the statement as a position that the respondents have undertaken, and from which they cannot and will not resile.

[65] I do not agree with the applicants' request that the Applications now be referred directly to City Council to be heard, because I appreciate that the planning of a new development is a process that involves many factors and nuances that require analysis and discussion. An additional step in the process prior to a decision by City Council will require the parties to further consider, and hopefully discuss, any substantive issues with the Applications.

[66] I am ordering that the Applications be considered and dealt with by the City Standing Policy Committee, pursuant to the non-statutory (policy) approach, without delay. The Secondary Plan Application should be addressed first, followed by the

applicants' zoning application. I previously set aside the decisions that the Committee made at the Meeting, and it is logical that the Applications continue to be dealt with concurrently, and in sequence.

[67] I have also considered what amount the respondents should be fined, which must be fair, and over which I have discretion.

[68] I appreciate the argument of the applicants that any fine to be imposed should not be absorbed easily, because the respondents must face consequences for their actions. Having said that, and even though the respondents have the ability to pay a fine, I have concluded that the taxpayers should not ultimately bear that financial burden. I am also mindful, as was done in ***Axelrod***, that both the Contempt Finding itself and any orders of costs against the respondents should be taken into account in determining the overall sanction. In my view, both of those components are weighty in this case. In addition, I note that the City's conduct in ***Axelrod*** was held to be flagrant, deliberate, and "a mockery of law and order" that would not be tolerated. The conduct of the respondents in this case was not nearly that serious, particularly given that the Meeting was held.

[69] I am also mindful of the principle of proportionality, which requires that the punishment fit the wrongdoing, and of the need for the similarity of sanctions in like circumstances. There is no support in the case law for the amount of the fine requested by the applicants, and this case is not so extraordinary that a precedent should be set. Taking all factors into account, and in accordance with the case law, I

have determined that the respondents need not pay a fine to obtain compliance and to restore the court's authority. Accordingly, I make no order for the payment of a fine.

[70] I will add that if I was prepared to order the payment of a fine, I would not have ordered a *per diem* fine for several reasons. The main sanctioning objective is compliance with the Contempt Finding, not punishment of the respondents. While the Applications will now proceed without delay pursuant to the non-statutory (policy) approach, the fact remains that the land development and the Applications generally have progressed slowly for many reasons, with delay attributable to both sides. It would not be fair in that context to impose an ever-increasing fine upon the respondents, the expiry of which would depend upon the timing of a Standing Policy Committee meeting. This is so particularly given that the parties should engage in discussions about the substance of the Applications prior to that meeting.

[71] In addition, at present, many people in Winnipeg are in isolation because of the COVID-19 pandemic, and generally speaking, business is not being conducted as usual. The timeframe for a return to normalcy is unknown and these external factors may interfere with upcoming meetings of the Standing Policy Committee. Under normal circumstances, I would have imposed a deadline or a timeframe by which the meeting must take place, but it is not appropriate to do so in the current climate. To be clear, while I am ordering that the Applications be considered and dealt with without delay, I recognize that the pandemic may impact the timing of the process.

Conclusion

[72] The respondents will forward the Applications to the Standing Policy Committee to be considered and dealt with pursuant to the non-statutory (policy) approach, without delay.

COSTS

[73] The court has a general discretion to award costs, under Queen's Bench Rule 60.10(5)(e), including on a lawyer and client basis, having regard to a series of factors set out in Rule 57.01(1), which include the importance of the issues, the conduct of the parties in the litigation, and the relative success of a party in the litigation.

[74] Typically, lawyer and client costs may be awarded where there has been reprehensible, scandalous or outrageous conduct (***Young v. Young***, [1993] 4 S.C.R. 3, ***Judges of the Provincial Court (Man.) v. Manitoba et al.***, 2013 MBCA 74). The court in ***Judges of the Provincial Court (Man.),*** stated that a finding of bad faith is not necessary to make an order of lawyer and client costs. A finding of reprehensible conduct is sufficient, which can include conduct deserving of reproof or rebuke.

[75] In ***1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant)***, [2001] O.J. No. 585 (QL), the court stated:

> [5] … the costs of a successful motion for a finding of contempt should be awarded on a solicitor and client scale. There ought to be something approaching a complete indemnity to the successful party in such motions since to do otherwise would involve some cost or punishment to the successful party arising solely out of the conduct of the other party in violating a court order.[4]

[4] *Rogers Cable T.V. Ltd. v. International Brotherhood of Electrical Workers (IBEW), Local Union 33*, [1994] B.C.J. No. 1035 (S.C.) at para. 8, *Leo Sakata Electronics (Canada) Ltd. v. McIntyre*, [1996] O.J. No. 1437 (Gen. Div.) and *Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Works of Canada, Local 2693*, [2000] O.J. No. 3510 (S.C.J.).

> [6] Having said that, however, an award of solicitor and client costs does not mean that the successful party can claim whatever costs might have been charged to it by its solicitors for the work done on the matter.

[76] I accept that an order of lawyer and client costs will typically flow from a contempt finding, but costs are always in the discretion of the court.

[77] In this case, the applicants requested an order for lawyer and client costs for each of the *mandamus* application, the contempt proceedings and the reconsideration motion. I had ordered costs payable to the applicants in the *Mandamus* Order, but not on a lawyer and client basis. That order will remain because I see no reason to change it retroactively.

[78] With respect to the Contempt Finding, the applicants argued that they were deprived of the benefit of the *Mandamus* Order, which caused them to incur substantial legal expenses for the first phase of the contempt proceedings. They seek payment of $31,238.71 inclusive of fees, taxes and disbursements, and they have provided a calculation supporting that amount. I am satisfied that the amount is reasonable, and I award these costs to the applicants because the respondents should have complied with the *Mandamus* Order. This is so particularly given that the language of the order was clarified by me after issuance of the *Mandamus* Reasons, the nature of the order was understood by some of the respondents' personnel, and the respondents were warned by the applicants' counsel that the process to be undertaken at the Meeting would be a breach of the *Mandamus* Order.

[79] Similarly, I am ordering lawyer and client costs in favour of the applicants with respect to the reconsideration motion and the sanction phase of the contempt

proceeding. The reconsideration motion lacked merit, should not have been filed, and necessitated an adjournment of the sanction hearing to allow an adequate review of the materials filed. While the respondents were successful at the sanction phase of the contempt proceeding, the evidence they filed was both irregular and unnecessary, which also led to increased costs.

[80] If the parties cannot agree on the quantum of these costs, I will set the amount upon receipt of a bill of costs for my review. When making those submissions the parties should be mindful of the above-referenced principles from ***1307347 Ontario Inc.***

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J.