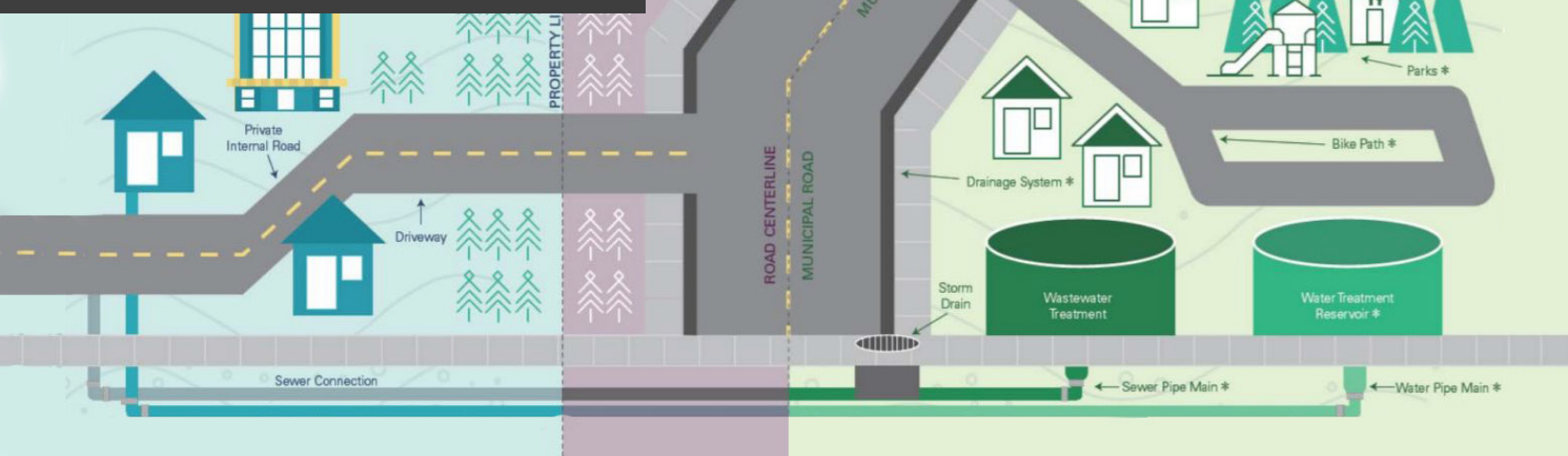


CASE-IN-POINT 2021



DEVELOPMENT COST CHARGES IN BRITISH COLUMBIA

Lessons for the City of Winnipeg

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ABSTRACT

In October 2016, the City of Winnipeg Council passed an Impact Fee By-Law. By May 2017, the City began its collection of impact fees as part of the development approval process for developments set to take place in new and emerging communities. In August 2020, Manitoba’s Court of Queen’s Bench ruled that while the City of Winnipeg has the authority to levy impact fees, the by-law was structured to allow the imposition of a “constitutionally invalid indirect tax” (City of Winnipeg, 2020). The Court ordered the City to suspend the collection of impact fees and reimburse all collected payments with accrued interest (Edmond J., *Ladco Company Limited v. The City of Winnipeg*, 2020). This case-in-point examines British Columbia’s framework for implementing Development Cost Charges (DCCs) to identify potential lessons for the City of Winnipeg, should it decide to pursue a second attempt at introducing a by-law to collect impact fees (known in Canada as development charges, development cost charges and in the United States as impact fees).

1.0

INTRODUCTION

As cities expand, so does their need for public facilities and infrastructure. However, cities can sometimes grow at a rate that is faster than their ability to fund public resources (Evans-Cowley, 2006). As a result, municipal governments do not have the necessary revenues to finance off-site infrastructure at a corresponding pace (Evans-Cowley, 2006). DCCs are a fiscal instrument tied to land use regulation that enable municipal governments to levy developers and builders for a share of the capital costs of off-site infrastructure (Evans-Cowley, 2006). Several Canadian provinces have legislation that authorizes municipal governments to collect DCCs. The legislation outlines conditions under which municipal governments may levy these charges, including when they may collect and for what purposes. These charges act as a fiscal instrument for municipalities to achieve their infrastructure needs related to development (Evans-Cowley, 2006). The relationship between infrastructure needs and development, and the implications it entails, are a matter of long-standing debate and discussion.

DCCs can be specific to a municipal area experiencing new development or re-development projects (see figure 1). Under these conditions such projects assist in funding the infrastructure necessary to sustain them. In this process, the local government's role is to administer the DCC program fairly and equitably (Ministry of Community Services, 2005). By using these fiscal instruments, municipal governments can navigate budget shortfalls, financial cuts to state/provincial aid, and taxpayers' refusal to increase tax rates while still supporting growth (Evans-Cowley, 2006). Without DCCs, some municipalities may need to limit growth due to the inability to supply off-site infrastructure. Although DCCs may appear as the ideal fiscal tool to accommodate rapid growth, there have been critiques over their contribution to rising housing prices and slowing development (Evans-Cowley, 2006).

“The basic principle behind the adoption of an exaction is that it should protect existing residents from the impacts of growth by providing a revenue source to pay for needed public facilities.”

—Jennifer Evans-Cowley, 2006, p.1

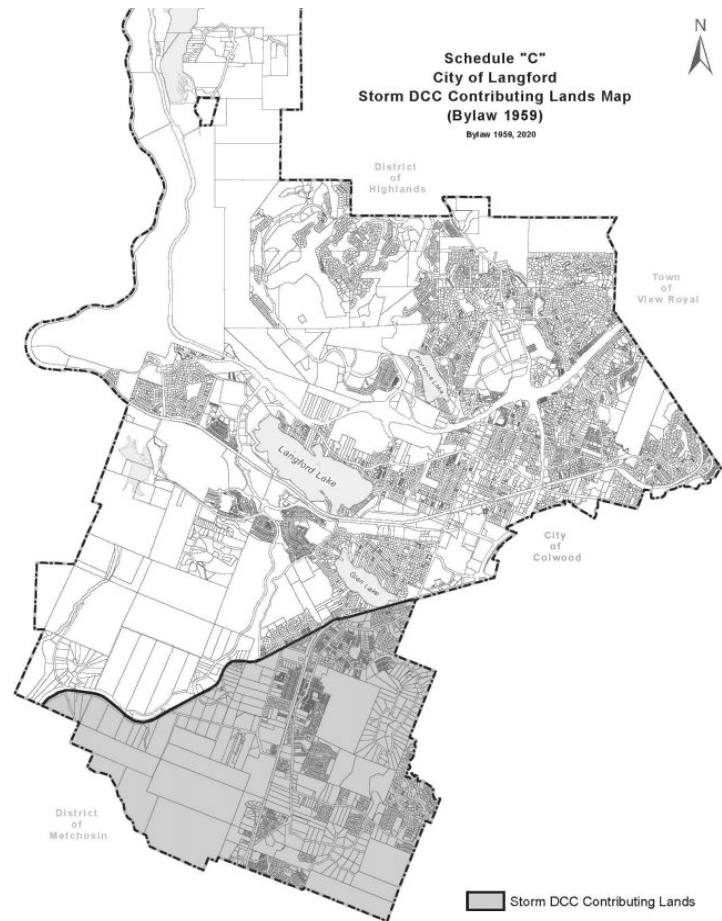


FIGURE 1 | District of Metchosin, City of Langford, BC, Designated DCC Lands

2.0

BACKGROUND

The provinces that created a legislative basis for DCCs enabled municipalities to shift some of the financial burden for providing public infrastructure to new development. Historically, property taxes, water and sewer rates, government grants, and borrowing paid for most of the off-site capital expenditures required for new development in Canada (Slack & Bird, 1991). By the 1970s, municipalities became reluctant to accrue debt for any purpose (Slack & Bird, 1991). The combination of rising interest rates and debt limits required by the provinces made borrowing less desirable for municipal governments (Slack & Bird, 1991). Inevitably, municipal governments turned to the private sector to finance off-site infrastructure.

In the United States, exactions have been part of the development approval process since 1928, when the federal *Standard Planning and Enabling Act* required that developers finance infrastructure as a condition of subdivision approval (Evans-Cowley, 2006). The use of exactions increased during

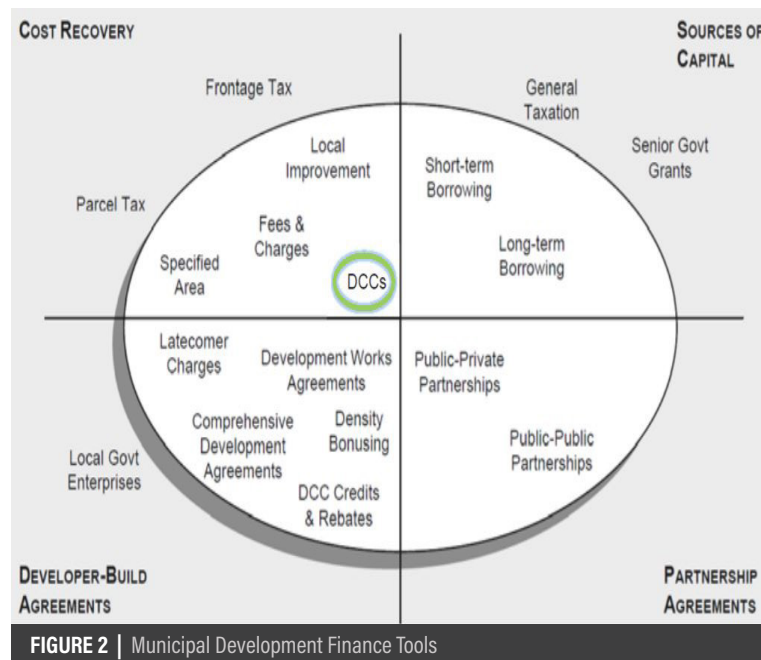
the 1970s and 1980s when the federal and state governments reduced funding to support municipal infrastructure (Evans-Cowley, 2006). Due to financial pressures and the philosophical belief that growth should pay for itself, the 'pay its own way' movement started (Evans-Cowley, 2006).

There have been numerous legal challenges in U.S. courts to the justification and implementation of development exactions. As a result, U.S. legislation and case law require that exactions are reasonably proportional to the effects of development, such that facilities financed by DCCs/impact fees are proportionate and reasonably beneficial given their cost (Evans-Cowley, 2006, p.6-9). As Evans-Cowley notes, in 1994, the U.S. Supreme Court "ruled that there must be a 'rational nexus' between a legitimate state interest and the permit condition" (Evans-Cowley, 2006, p.6). Readers are encouraged to read Evans-Cowley's paper for a full appreciation of the U.S. experience, in contrast to the Canadian context.

3.0 / THE CASE

In 1958, as a result of municipal funding constraints, British Columbia's *Municipal Act* was amended to allow approving officers to deny subdivision applications, if the cost of providing off-site infrastructure to support those subdivisions was excessive (Ministry of Community Services, 2005). To alleviate rejections of subdivisions, municipal councils attempted to enact Excessive Subdivision Cost By-laws to collect funding for infrastructure costs in new development areas (Ministry of Community Services, 2005). The courts ruled that such By-laws were invalid. While the approving officer had the right to reject subdivision applications for funding reasons, municipalities did not have the authority to charge for infrastructure costs (Ministry of Community Services, 2005).

Several *Municipal Act* amendments took place to address the Court's ruling. In 1968, the Province enacted development permit powers, allowing municipal governments to designate development areas and control what was to develop within them (Ministry of Community Services, 2005). In 1971, this legislation was replaced with land-use contract powers, allowing municipal governments to impose fees under a land-use contract (Ministry of Community Services, 2005). However, by 1977, land-use contracts were eliminated and replaced by the current authority to impose DCCs (Ministry of Community Services, 2005) (see figure 2).



Local Government Act, Chapter 1, Part 14, Division 18

Under the *Local Government Act*, DCC By-laws must be presented to the Ministry of Community Services and be approved by the Inspector of Municipalities before legal adoption (Government of British Columbia, 2015). Division 18, Sections 558-570 of the *Local Government Act* address development cost recovery. The *Act* outlines that DCCs can only be collected to establish roads (other than off-street parking), sewage, water, drainage, and parkland (improvement and acquisition) capital expenditures (Government of British Columbia, 2015). The *Act* prohibits the collection of fees for maintenance (Government of British Columbia, 2015).

To determine the charge associated with providing infrastructure, the net capital infrastructure costs attributable to new development are divided by the corresponding number of anticipated development units (or area) (Government of British Columbia, 2015). The *Local Government Act* also outlines circumstances in which developers or builders may be exempt from DCCs. An exemption can be granted based on three components (1) type of development (e.g. building used for public worship), (2) the materiality of the exemption (e.g. construction that does not exceed \$50,000), and (3) equity in exemption (e.g. if the development does not impose new capital costs) (Government of British Columbia, 2015).

Development Cost Charges Best Practices Guide

The Development Cost Charges Best Practices Guide's objective is to build on the *Local Government Act's* general provisions. The guide encourages consistency among municipalities in

their development of DCC programs, especially in the areas of charge calculation and by-law administration (Ministry of Community Services, 2005) (see figure 3). The guide presents six principles to which all DCC by-laws must adhere. The principles are (1) integration, (2) benefiter pays, (3) fairness and equity, (4) accountability, (5) certainty, and (6) consultative input (Ministry of Community Services, 2005).

When developing DCC by-laws, it is the municipal government’s responsibility to adhere to the Guide. Additionally, municipal governments must ensure their DCC program is subordinate to other community plans (Ministry of Community Services, 2005). DCC by-laws need to reflect the intentions outlined within communities’ Financial Plan (FP) and Official Community Plan (OCP) to ensure the advancement of regional growth strategies (Ministry of Community Services, 2005) (see figure 4). Municipal Governments that follow the guide and its requirements are likely to obtain expedited approval (Ministry of Community Services, 2005).

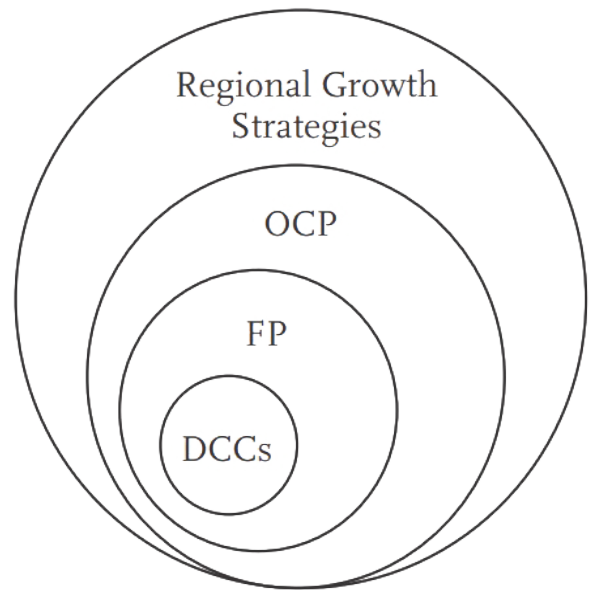


FIGURE 4 | British Columbia DCC By-law Framework

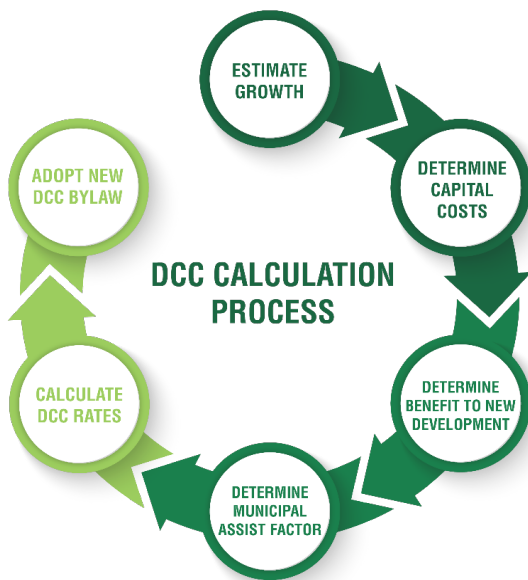


FIGURE 3 | DCC Calculation Process

4.0 LESSONS LEARNED

In *Ladco*, the reasons for judgment identify several key concerns, including but not limited to:

- The City of Winnipeg did not establish a correlation between collected fees and their purpose. In effect, the City collected the fees from specific developments for broader infrastructure expenditures and was charging a type of indirect tax (*Ladco*, paras. 188–189).
- The evidence did “not support that the costs caused by specific development was examined or that the Reserve Fund would be used solely for projects that are growth related” (*Ladco*, para. 190).
- The City’s “Technical Report did not consider the cost associated with specific development and certainly not development within the areas of the City subject to the Impact Fee” (*Ladco* para. 178). As a result, it was not clear that the collected impact charges would vary by development type and/or necessity.

Two key points can be taken from British Columbia’s framework for collecting DCCs. The complications that arose in Winnipeg may not have taken place if the City had:

- Direction and operational parameters for implementing development charges provided by provincial legislation.

“No guidance is provided by the Ministry as to the magnitude of the assist factor; some local governments have set it as low as one percent, while others have set it as high as 50%. This factor reflects Council’s desire to encourage development and is largely a political decision, which is further discussed in the Development Cost Charges Guide for Elected Officials.”

— Ministry of Community Services, 2005, p.48

- A municipal by-law and administrative practices that meet the requirements of such legislation.

5.0 CONCLUSION

Whether the implementation of DCCs is or is not an appropriate method of financing urban development is a question beyond the scope of this case-in-point paper. The British Columbia legislative framework, used by municipalities to create DCC by-laws, offers lessons for Manitoba and Winnipeg. Should the City of Winnipeg choose to re-introduce a DCC/impact fee By-law without provincial legislation, it may be at greater risk of additional court challenges than might otherwise be the case. The *Ladco* ruling shows that the City of Winnipeg has the authority but lacks the guidance necessary to create a development charge by-law that satisfies a nexus test. Provincial legislation that draws on the findings and reasons in *Ladco*, and that explains what can be charged, for what purposes, and at what time, will provide greater certainty for the City and for developers. The legislative frameworks of British Columbia and other provinces provide insight, but it is also not yet clear what impact *Ladco* may have on development charge practices in any of those provinces.

“I am not satisfied that the evidence establishes that there is a sufficient nexus between the estimated costs of the Regulatory Scheme and the revenues raised through the imposition of the Impact Fee.”

— Edmond J. *Ladco*, para. 183

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Image Resources

Cover image: City of Saanich DCC Application. Retrieved from https://www.saanich.ca/assets/Local~Government/Documents/Engineering/DCC_Panels_R2_v7Final.pdf

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