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- I have read and understand that my name and comments will be made publicly available in the Council agenda. My email address will not be included in the public record.

First name (required)	Darin
Last name (required)	Hannaford
Are you speaking on behalf of a group or Community Association? (required)	Yes
What is the group that you represent?	Steve Dimant, Westcan Recyclers Ltd., and 664078 Alberta Ltd.
What do you wish to do? (required)	Request to speak
How do you wish to attend?	Remotely
You may bring a support person should you require language or translator services. Do you plan on bringing a support person?	No
What meeting do you wish to attend or speak to? (required)	Standing Policy Committee on Infrastructure and Planning
Date of meeting (required)	Jun 10, 2022

What agenda item do you wish to comment on? (Refer to the Council or Committee agenda published [here](#).)



(required - max 75 characters)

Item 7.7 - Point Trotter Off-Site Improvements – Access Bylaw for 8919 68 S

Are you in favour or opposition of the issue? (required)

In opposition

If you are submitting a comment or wish to bring a presentation or any additional materials to Council, please insert below.

Comments - please refrain from providing personal information in this field (maximum 2500 characters)

Darin Hannaford of Miller Thomson LLP will be making oral submissions on behalf of Steve Dimant, Westcan Recyclers Ltd. and 664078 Alberta Ltd. ("Westcan") regarding Item 7.7 on the Agenda.

It is Westcan's position that what is being presented and recommended by Infrastructure Services in its Presentation to the Infrastructure and Planning Committee, being to recommend that Council: (1) give three readings to the proposed Bylaw to close Westcan's two main accesses, and to (2) direct Administration to construct an alternative access on to 90 Ave, is inaccurate, improper and premature. There is currently a court-ordered review of the proposed alternative accesses being done by an independent, third party engineer, which is still in progress. This independent review was ordered by the Court of Queen's Bench for the purposes of an ongoing court injunction in favour of Westcan, which is in place until such time as the Court is satisfied that safe and adequate alternative access has been provided. This has yet to be determined by either the independent engineer or the Court.

Each iteration of previous proposals made by the City for alternative accesses have been shown by Westcan's engineering consultants to be deficient, unsafe and inadequate. Westcan fully expects that the independent engineer will likewise find this latest iteration unsafe and inadequate as well. To proceed with steps to legally close Westcan's main accesses prior to receipt of this independent report, which was specifically ordered by the Court to assist it with determining the safety and adequacy of such proposed alternative access, is improper and an abuse of process. Further, the process adopted by the City with respect to this bylaw passing has been prejudicial and procedurally unfair to Westcan, particularly in light of the inadequate notice provided, our client being unavailable to attend, and the unanswered requests for an adjournment from the City's legal counsel, amongst other things.

We are asking that the Infrastructure and Planning Committee defer what has been recommended by Infrastructure Services until such time that this matter has been determined by the Court.

COURT DOCUMENTS RE: COURT ACTION NO. 2101 09833

NO.	DESCRIPTION	PARTY	DATE FILED
1.	Statement of Claim	Miller Thomson	August 9, 2021
2.	Notice of Application	Miller Thomson	August 9, 2021
3.	Affidavit of Steve Dimant	Miller Thomson	August 9, 2021
4.	Transcript of Questioning on Affidavit of Steve Dimant	City of Calgary	April 8, 2022
5.	Order of Justice Yamauchi		August 12, 2021
6.	Order of Justice Neufeld		September 10, 2021
7.	Application	Miller Thomson	December 10, 2021
8.	Affidavit of Steve Dimant	Miller Thomson	December 10, 2021
9.	Cross-Application	City of Calgary	March 4, 2022
10.	Affidavit of Jason Rumer	City of Calgary	March 4, 2022
11.	Amended Application	Miller Thomson	March 28, 2022
12.	Supplemental Affidavit of Steve Dimant	Miller Thomson	March 28, 2022
13.	Affidavit of Patrick Ryan (incl. video appendices)	Miller Thomson	March 28, 2022
14.	Supplemental Affidavit of Jason Rumer	City of Calgary	April 1, 2022
15.	Supplemental Affidavit of Patrick Ryan	Miller Thomson	April 8, 2022
16.	Questioning Transcript of Jason Rumer – April 7-8, 2022 and Exhibits	Miller Thomson	April 11, 2022
17.	Answers to Undertakings of Jason Rumer	City of Calgary	<i>To be filed</i>
18.	Questioning on Answers to Undertakings Transcript of Jason Rumer – May 26, 2022	City of Calgary	June 2, 2022
19.	Order of Justice Yamauchi		June 3, 2022

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

WESTCAN RECYCLERS LTD. and
664078 ALBERTA LTD

Plaintiffs

and

THE CITY OF CALGARY

Defendant

P R O C E E D I N G S

Calgary, Alberta
April 14, 2022

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

4 April 14, 2022 Afternoon Session

6 The Honourable Justice Yamauchi Court of Queen's Bench of Alberta
7 (remote appearance)

9 D.J. Hannaford (remote appearance) For Westcan Recyclers and 664078 Alberta Ltd.
10 M. Preston (remote appearance) For Westcan Recyclers and 664078 Alberta Ltd.
11 K. Colborne (remote appearance) For City of Calgary
12 R. Neale Court Clerk

15 THE COURT: All right. We will get started. If you could
16 introduce yourselves for the record, if you do not mind.

18 MR. HANNAFORD: Certainly, my name is Darin Hannaford and I'm
19 here with Ms. Preston, my partner and we are here on behalf of the plaintiffs and applicants
20 Westcan Recyclers Ltd. and 664078 Alberta Ltd.

22 THE COURT: All right.

24 MR. HANNAFORD: I should also mention, Sir, that Mr.
25 (INDISCERNIBLE) is also attending and he is the (INDISCERNIBLE) --

27 MR. COLBORNE: Good morning, Sir, boy I'm going to keep saying
28 that aren't I? Good afternoon, Sir, Kelly Colborne with the City of Calgary Law Department
29 on behalf of the defendant/applicant, City of Calgary.

31 THE COURT: All right. Well, there are two applications before
32 me today and I have received now five binders of materials and I should mention that I
33 have read every single affidavit in the materials. I received the transcript a couple of days
34 ago of the cross-examination which I -- I must confess, I read about -- I got to about the
35 halfway point of reading the transcript and realized, Mr. Hannaford, that I was reading
36 them in a bit of vacuum, in the sense that it is all very interesting reading, but unless I can
37 put them into some sort of a context, it seemed like a bit of a fruitless exercise for me.

38
39 Just so everyone knows, last week I spent the entire week in a sexual assault jury trial which
40 the jury came down at 6:15 on Friday and so I confess that I did not have as much time to
41 read the materials as I would have liked. I did spend the weekend reading the affidavits and

1 the other pleadings in the four volumes and then, of course, this week was my commercial
2 week. So, I had a whole bunch of other reading to do and other things to hear.

3
4 So, I think that -- I do not know if you all expected me to read every piece of paper in there
5 and every expert report that you provided to me, but I confess to you that I did start reading
6 one of the expert reports, I think it was the Ryan Report, and I got into that -- I mean the
7 Ryan Report was perhaps the shortest of all of them. But I did read about -- I did read the
8 entire report and again, like the transcript itself, I was reading it in a bit of a vacuum and
9 there is nothing on which that report has been tested.

10
11 So, again, I am giving you that introduction just to let you know that I have -- I did wade
12 through -- probably given that the affidavits make up probably about a third of the materials
13 that you provided to me, I did get through all of the affidavits and some of the other expert
14 reports, but I did not get through all of them, I must confess and again, I would be reading
15 them in a vacuum.

16
17 So, with that said, perhaps you can give me an idea where you -- and I do not mean to say
18 this in a negative way, but where you expect me to go with this today. I think that is the
19 gentlest way of putting it.

20 21 **Discussion**

22
23 MR. HANNAFORD: Yes, certainly. Given that it is two applications,
24 I'll certainly let Mr. Colborne respond, as well. Sir, it's a question I've been grappling with,
25 as well, and we certainly can't blame you for not having read through the reams of materials
26 that have been filed. It sounds as though you at least read the most important ones.

27
28 And, you know, I've struggled with what I'm asking you to do this morning or this
29 afternoon, as well. Essentially though, Sir, our initial application was a request for further
30 documents and further information that we've been requesting from the City, in order to
31 allow our experts to adequately assess what they're proposing. That was the initial
32 application filed back in December, we felt we weren't getting proper production on those
33 and we said, if you don't provide that, we're going to make an application and that's what
34 we did in December.

35
36 The City, of course, then made a cross-application, I believe in February saying, listen we
37 don't want to give you those documents and, as well, we don't want to have a third-party
38 expert review this anymore. And, of course, I'm being simplistic, but that's essentially what
39 the application is and then we got that and also saw, the City has also said and we intend
40 to start construction work again on June 1st, in front of your place, close the accesses off
41 and we'll be back to where we were in July of 2021.

1
2 And so, we brought a second application which is the third application, in total, which says
3 we need to extend or reinstate that injunction application that was granted by Justice
4 Neufeld back in August and have a third-party engineer review this in order to determine
5 the safety and adequacy and suitability of the accesses.

6
7 So, when you ask what do we want? Well, essentially I think when you hear the
8 submissions and I think when you see the things that have been filed, I think you'll agree,
9 this -- it's very, very difficult for you, Sir, as it for any of us, to sit here and determine
10 whether this access is adequate, whether the road is safe, whether it's going to provide my
11 clients with anything nearing a suitable access.

12
13 And we'll go through those things with you, but you know, I will tell you all of the things
14 that my experts have said, including Mr. Ryan, who you did read his affidavit, his is
15 probably the most important one. It's the only sworn evidence before you and it's very, very
16 clear in saying that the proposed access, all of the accesses have serious issues with respect
17 to the passing of traffic and the safety and the potential for collision that are going to be
18 caused thereby.

19
20 That's really the only evidence before you, Sir, other than evidence from Mr. Rumour
21 (phonetic) of course, who has no traffic safety background whatsoever. So, what I think is
22 just very clear is what's need is, there's been a volley back and forth of reports, of drawings
23 of -- and the parties simply disagree. It's just very clear and quite frankly, we think there's
24 a backing of evidence on behalf of the City, but they will object to that.

25
26 But ought -- today's date, what do we need? Well, it seems clear that we need some
27 independent third-party to step in and tell us and help us and help you determine whether
28 these accesses being proposed by the City do any good and are safe, adequate and suitable
29 for Westcan's operations. I don't see any other way around it.

30
31 My clients -- and this is important, you know my clients are not the City or a big
32 institutional client. They're a very successful metal recycling business. They have had
33 spend hundreds of thousands of dollars trying to get to where we are today, and as we'll
34 go through it -- the accesses have changed. When we were before you in July of last year
35 the proposal was to have two accesses of 68th Street and those accesses were by the City's
36 estimation going to be safe. I think it's been very clear that we've shown that those accesses
37 are designed were not safe -- are not safe and in order to make them safe they would require
38 portion of Westcan's property.

39
40 And so, that's what we said in July and that's what we say today, and I think the City now
41 agrees with us, their -- even their expert reports suggest that those accesses as presently

1 constituted aren't very safe and aren't suitable and I think the words they used are not
2 usable. And so, we've got there and every step along the way we have to convince the City
3 that what they're proposing isn't safe, isn't adequate.

4
5 And we've been successful on a number of those occasions, but this is getting -- you know
6 the fact that we've gotten so many of these back and forth, I think we need to have a third-
7 party come in and set this -- shine some light on what is -- is accurate because we don't
8 believe that that's going to happen as between the City and ourselves. That was a long
9 answer to your question, and I apologise but that's -- that's what I see as the way to do it
10 and the interim of course until those accesses are safe and proven safe we have to ensure
11 that -- that my clients get the adequate access until such time as the new accesses if possible
12 are done.

13
14 The last thing I would like to just say is just to give you a little sense of this. Last night in
15 -- you -- you do not have these in front of you, Sir, we -- we received them last night and
16 this morning. In answers to undertakings given at the questioning on -- on the affidavit of
17 Mr. Rumour we received documents, Sir, that -- they're quite troubling in some ways. They
18 obviously -- our consultants will have to review them, we just -- we just got them last night
19 to see -- to see if there's anything new or material but we do certain things which do appear.

20
21 At first glance they appear to be the same as those in what was referred to as the submitted
22 design in March but in fact some of the drawings in this new drawing set have been
23 restamped as of March 25th, 2012 (sic). We -- we don't know if has there been any
24 revisions made to those drawings. There's nothing in their revision history book. I said
25 2012, that should've been 2022, sorry.

26
27 But the point is we -- we don't know what's going on with these new drawings that have
28 just been sent to us last night. Importantly, four new drawings appear to be included in this
29 latest set that we've never seen, and they purport to show truck turns and sweep paths for
30 Recycle Calgary that we've never seen before. And all of those drawings, Sir, are dated
31 February 23rd, 2022, and stamped March 25th, 2022. And for -- from my perspective it's
32 inexplicable why this set of drawings was not contained in Mr. Rumour's April affidavit
33 since the predate it and include different drawings that what we were provided previously.

34
35 And they -- they also show multiple sweep paths with WB-21s and WB-26-2s which we'll
36 talk about, and we know that Westcan's expert Mr. Ryan as you know from reading his
37 report, he's already identified a number of issues with those. So, you can see the problem.
38 We've now got a new set of drawings, at least new drawings. They're stamped differently
39 but we're going to now have to send to our client's consultants again at great expense for
40 them to review and no doubt say these still don't meet what is required because I don't see
41 them to have any change, but we'd have to do that.

1
2 And so, you can see this volleying back and forth. It doesn't appear it will end and that's
3 why I think we have to have a third-party who steps in and tells -- assesses the various
4 usability of those accesses being proposed 'cause it doesn't seem to be working as between
5 the clients. And quite frankly, unfortunately this is what Justice Neufeld had perceived
6 would happen or could happen and set forth in his all order. So, sorry for the long
7 introduction, Sir.

8
9 THE COURT: All right, Mr. Colborne?

10
11 MR. COLBORNE: Sir, it's funny, Mr. Hannaford and I see eye to
12 eye on a lot of these things, it's the things we don't see eye to eye that -- you know that
13 sort of us bring us for you today obviously. A couple things I need to take Mr. Hannaford
14 to task one. Mr. Hannaford suggested to you, Sir, that the City intends to close Westcan's
15 68th Street accesses in any event thereby effectively landlocking him and carry on with
16 this work in front of the Westcan's access site. That is utter not -- utterly not true.

17
18 The City has always represented that we would never -- the City would never close Mr.
19 Dimant's Westcan's 68th Street accesses until such time as he has been provided with safe
20 and adequate alternative accesses. That's the City's -- that's always been the City's position
21 and on the record that's the City's position today. So, that's the first thing.

22
23 In terms of Mr. Hannaford's that he -- he finds it troubling that he continues to get sort of
24 updated documents, Sir, that's the nature of the construction business. This is -- this is a
25 work in progress here. Much of this information didn't exist before at least not right until
26 the -- the questioning on affidavits took place. So, when Mr. Hannaford asks for some
27 additional information -- some additional documentation of course we provided him with
28 the most up to date documents available.

29
30 I had not seen them; Mr. Rumour had not seen them. They were in possession of either the
31 Transportation Infrastructure Department or they were in the possession of the
32 Development Approvals Department. So, my practice is always going to be to give Mr.
33 Hannaford the most updated design documents that we have, that's the only way this is
34 going to work. And yes, it's going to -- as Mr. Hannaford suggests, there's this volley back
35 in forth but without their constructing or at least designing these accesses and it's an
36 ongoing process. So, there are modifications that are being made in large part due to
37 comments that are being received from Westcan's consultants.

38
39 And I suppose I will end by saying that Mr. Hannaford puts a lot of stock in the reports of
40 -- of Mr. Ryan from Ryan Consulting, Sir, and you said you've had an opportunity to
41 review that. I would like to just bring the Court's attention to the fact that Mr. Ryan very

1 much like Mr. Rumour, although Mr. Ryan is an engineer he is not a transportation
2 infrastructure engineer. He's a -- he's an accident reconstructionist. And so, the Court needs
3 to keep that in mind when assessing Mr. Ryan's evidence against that of other
4 transportation infrastructure specialists who the City has retained to -- to provide
5 commentary on these designs as well so.

6
7 Now, moving forward. I -- I'm intending to make a pitch to the Court although I -- I admit
8 it will be somewhat of a half-hearted pitch that we dispense with the requirement for this
9 third-party engineer. And it will be a half-hearted pitch mostly because I want to give the
10 Court some -- some context, although that context appears in the affidavits of Mr. Rumour
11 in terms of the steps the City has taken to try, try, try to get an independent engineer in
12 place. We -- we gave Westcan our list of proposed engineers back in November, then again
13 in December. We've heard nothing -- nothing from Westcan in terms of who they would
14 like to see brought on board as an independent engineer here.

15
16 And so, I -- I would be disingenuous if I didn't say I agree that we should have an
17 independent engineer in place to -- to review this stuff. I think that -- I think that that would
18 certainly assist the parties but perhaps most importantly it would assist the Court. The Court
19 has to one day sort of bring its judgment to bear on whether these proposed designs are
20 safe. I think it would be very helpful for the Court to have a neutral third-party engineer
21 you know make some -- make some -- some assessment on that piece.

22
23 So, I perhaps won't even make the half-hearted attempt to tell you why we should dispense
24 with that. I think -- I think we should proceed with getting an independent engineer in place
25 immediately. My one concern, Sir, is -- is timing, okay. Timing in terms of the very, very
26 tight construction window that -- that we're facing -- or the City is facing in terms of getting
27 this -- this roadway built. And compounded of course -- they're compounding that is the --
28 the capacity of the Court obviously to hear -- to hear these matter and -- and the capacity
29 of the Court to hear these matters doesn't necessarily jive with the -- the tight timelines that
30 we're operating in from a construction perspective.

31
32 So, Sir, maybe this is as good a time as any to ask the Court -- ask you, Sir, when can we
33 appear back in front of you? I -- I believe that you're -- you're sitting duty -- commercial
34 duty the week of June 13th and ideally we -- we could get an independent engineer in place
35 to -- to review the City's design in light of Westcan's various comments from its
36 consultants and appear back before you in -- in a month or 2 months time to -- to discuss
37 that at that time. So, I suppose that's a question for you, Sir, are you going to have capacity
38 you believe to hear us in a --

39
40 THE COURT:

Well, okay. In fact, I had a conversation with

41 Justice Neufeld today because he is just down the hall from me, so we just had a bit of a

1 chat. Both of us wondering why the parties that we are seized with this matter? I mean I
2 heard the initial injunction application, granted it for an interim basis and then Neufeld
3 heard the August 25th hearing and he ultimately granted it and set out his follow-up order.
4

5 When I got the materials last week, the four binders to start with, it was apparent to me that
6 really only one of the binders contained information that was before me, and the other three
7 binders are new. And so, the concern that both Justice Neufeld and I have is if we are
8 indeed seized with it that is a problem as you have already learned. To try to get time before
9 us is not an easy task because we do not have control over our lives, someone else controls
10 our lives and whatever they assign to us we are stuck with it.
11

12 And in fact, I have a 4-week trial starting not next week but the week after which is going
13 to completely indispose me for that 4-week period. So, I understand that you did look at
14 the schedule and I am sitting commercial duty, but I guess the question, and this is more of
15 a rhetorical question at this point is why Neufeld and I are sort of the lucky people that
16 came out of the bull's chute to ride on this thing?
17

18 And I think the answer is because we have some knowledge of it, but I think Neufeld put
19 it quite correctly that you are dealing with middle-aged men here whose memories are not
20 as great as a young person's memories and because of the volume and eclectic nature of
21 what we hear things do not necessarily fit in our hard drives for a long period of time. So,
22 I am just putting that out there as to whether you feel that we are seized with it for whatever
23 reason and we will work around that if we can.
24

25 But the problem that we run into is if we cannot then both of you, your respective clients,
26 are stuck with well why cannot this Judge just hear this on a Sunday morning. You know
27 what I mean, and I do not want the parties to feel that the Court is letting them down. I
28 mean if somebody else could hear this and anyone of us up here is capable of hearing a
29 complex matter such as this then why not put it on somebody else's desk if we are not
30 available. Now that is my first comment.
31

32 My second comment is if I were to order the appointment of an independent engineer to
33 analyse whatever we have got so far it may faster for both of you to appear before an ADR
34 specialist. In other words, you have out here right now as we are speaking one of the
35 strongest arbitrators/mediators in our community and that is former Chief Justice Wittmann
36 and I have kept in touch with him.
37

38 If you look at his website he deals with, among other things, construction litigation. Why?
39 Because when he was over at Code Hunter decades ago that is what he did. And so, if you
40 want someone who is able to read an expert report on construction he is the guy and he
41 could probably deal with it more quickly than the Court could deal with it, although I do

1 not know what his schedule is. So, I am just throwing that out as a possibility.

2
3 So, let us get back to the original point, which is where we want to go today, and I guess
4 that you know when I look at the materials that you provided to me and in particular my
5 starting place was not my order because my order was just a band aid. But when I look at
6 Neufeld's order the trouble I have is that we have already been through this. In other words,
7 we have set a timetable. The timetable kind of was not met and I do not blame the parties,
8 I am blaming the parties as well as the Court because we were not available.

9
10 In other words, if you wanted to make an application on I do not know sometime after
11 November 1st, Mr. Hannaford. For Neufeld and I to be able to accommodate you was not
12 possible, I guess anything is possible, but it was infeasible at that time. And so, that is why
13 things fell backwards but when you look at Neufeld's order he had a timetable, and the
14 timetable was hoping to meet the 2022 construction season deadline that Mr. Colborne is
15 talking about.

16
17 Now, what happened in the middle? What happened in the middle was there was apparently
18 a lack of information provided by the City to Westcan. Okay, well then there were letters
19 back forth, I mean there are pages and pages of emails and letters going back and forth.
20 This is what we need, we did not get this, we need more detail on this and so on. And Mr.
21 Colborne, you are saying to me that look we have provided everything that needs to be
22 provided, what more can we provide?

23
24 So, here is the question that I am going to pose to you. If I were to say okay we are going
25 to appoint an independent engineer today, let us just say that. And you take these five
26 volumes of material and say to the expert here you look at all this stuff that is in here and
27 give us your thoughts on it. Now, if Mr. Colborne is correct and all of the information
28 necessary for the expert to provide a neutral objective evaluation of the materials then great,
29 we are there.

30
31 If the expert says yes I can give you a report, but this is what I need, Mr. Colborne, this is
32 what I need from the City, independent expert remember, then I think the City might be
33 more inclined to say yes we will provide that information because the if the operations
34 expert says he or she or they need it we will provide that information. But at least it gets us
35 rolling in the right direction rather than having the table tennis match going on between
36 Mr. Hannaford and Mr. Colborne and we are moving forward in a positive way.

37
38 But I guess the starting point is we have got these volumes and materials, pile them up,
39 take them to the expert, drop them on the expert's desk and say here have at it, give us your
40 report and see what happens. All of you have a better idea of how long it would take an
41 expert to analyse this stuff. I mean an expert, not a judge, an expert could look at these

1 materials at the expert reports and the cross-examinations on the affidavits that have been
2 provided and make some sense out of it.

3
4 You know to me a WB-21 and a WB-23 is just something, it is just numbers. I understand
5 what they are, I am giving you a bad time, but I understand kind of what they are but when
6 I first started reading them they made no sense to me. But now I am not an expert but I
7 kind of have an idea, that is what we are supposed to do, have an idea of what they mean.
8 So, I guess at least it would get us going in the right direction and then I am posing the
9 question, how long would I take an expert to do an analysis of these four volumes?

10
11 MR. COLBORNE: I can tell you, Sir, because I anticipated that this
12 was going to go this way and so just back to your -- your earlier point, Sir. I think you --
13 you hit the nail on the head about the -- the additional information that Westcan is saying
14 they didn't have and therefore they couldn't -- we couldn't you know get an independent
15 engineer in place.

16
17 My goodness, isn't that exactly the kind of thing that an independent engineer was going
18 to assist the parties with, to say I've seen your comments and I've seen your design and I'm
19 going to need some more information. At that point, we -- we -- and you're right, I think a
20 plain reading of Justice Neufeld's order, I think the -- I think the idea is clear in -- in terms
21 of the -- the dates that are set out. I think this was all supposed to happen over the winter
22 months when -- when things were idle. It's not supposed to be happening now.

23
24 This -- the delay, whether it's -- whether it's because of the capacity of the Court or the --
25 or the refusal to engage an independent engineer is essentially an injunction. So, Westcan
26 essentially has its injunction based -- just by virtue of the fact that we -- we can't resume
27 construction until this has been dealt with. So, that's been a frustration.

28
29 Now, so interestingly enough, I -- so again I -- I anticipated that -- that I may need to be
30 called upon to do this so I did some very sort of I wouldn't call it research so much as kind
31 of poking around on the internet and I found somebody that I think would really suit the
32 bill and I -- and I would hope that Mr. Hannaford and I can -- can come -- come to terms
33 on the fact that this might be the -- the exact person we need.

34
35 So, I've done this because again the City had about -- I think it was a list of six proposed
36 engineering firms that could have provided us with this kind of assistance. Unfortunately,
37 most of those firms, they're working engineering firms, they had time in the winter, they
38 don't have time now -- they simply don't have time now. But there is an engineering firm
39 in Toronto called 30 Forensic Engineering. Again, I came across this place totally randomly
40 on the internet. My people in the Real Estate Development in the City of Calgary have
41 never heard of these people.

1
2 Now, full disclosure apparently their City -- their City office -- their City of Calgary office
3 has done some work or is doing some work for some department in the City of Calgary. I
4 don't know the details, I didn't ask. But in any case, the team handling the assessment
5 would be the Toronto office who have had no dealings with the City of Calgary at all. And
6 so, the transportation operations and safety groups are of this engineering company. They
7 specialise in traffic engineering and safety regulations, intersection collision assessments,
8 (INDISCERNIBLE) movements, visibility and safety assessments, road curvatures, area
9 safety studies, et cetera and so forth. It goes on and on.

10
11 So, I spoke very briefly with Mr. Karim (phonetic) who leads the group. He has a master's
12 degree in civil engineering, he has a master's degree in infrastructure planning engineering.
13 Very impressive individual, very impressive firm. They would do a thorough job and they
14 would do a very impartial job for us, and I got his certainty on that, and I think perhaps Mr.
15 Hannaford and I can have a joint conversation with this fellow and I think -- I hope that
16 Mr. Hannaford would feel the same way.

17
18 Now, crucially from the City's perspective this firm has the capacity to take on this work.
19 They would be able to give a complete and full review of all the materials that have been
20 exchanged to date in the next 4 to 5 weeks and would have a report -- could have a report
21 ready for us by the end of May, first week of June, give or take. And we'd have to work
22 out the details, obviously in terms of retaining these people and -- and giving them their
23 joint instructions and that sort of thing, that's something that has to be worked out.

24
25 But you know I fear that if we walk away from this today with an agreement that we're
26 going to jointly retain an independent engineer we're going to be back before the Court in
27 2 or 3 weeks fighting over about who that's going to be. And so, Sir, one of the things I
28 would ask of you today instead of dispensing with the requirement for an independent
29 engineer that you appoint this particular 30 Forensic Engineering firm to act as the
30 independent engineer in this case.

31
32 THE COURT: Okay, Mr. Hannaford?

33
34 MR. HANNAFORD: Well, Sir, it's unfortunate that this is the first
35 time I'm hearing of this obviously. I -- I had actually understood that I was preparing for a
36 full out injunction tripartite test again. It's great that we're on the same page now but I
37 asked on Friday the City's position on this was told they were not interested in this at all,
38 and they would not agree to this. So, this is news to me.

39
40 Now, having said that where do we go from here you know, and I don't want to get into an
41 argument with Mr. Colborne as to why these names that were provided didn't work. As it

1 turns out, many of them act for the City of Calgary on a number of things and we found
2 that out not -- well before he sent those names because we tried to get some of them, and
3 they said not we can't because we have a conflict with the City of Calgary.
4

5 So, but there is one individual that we had in mind who it's funny because all of the people
6 that told us they were in conflict told us you should check with this individual because he
7 taught me, he's the guy, he's knows his stuff and that's a guy named Dr. John Morrall. If
8 you google him he's the guy. Now, unlike Kelly -- Mr. Colborne, I didn't -- I haven't had
9 any contact with Mr. Morrall, I haven't checked to see if he is available or not or he's willing
10 to do it, but he is sort of you know the guy that was given to us by all the parties -- sorry,
11 all of the other engineers.
12

13 So, I have no -- I have nothing against 30 Forensic Engineering, I just have no idea who
14 they are. I'd want to make sure that this retainer that they have with the City, what that
15 involves but I just haven't had a chance to look. I share Mr. Colborne's concern that I don't
16 want to have to go back and forth for 3, 4 weeks and determine who's the right person but
17 I certainly can't agree to having appointed given that no information about what they are
18 and what they do. I can certainly look at that and in good faith determine that, but I can't
19 do that today. I just heard -- I just wrote the name down right now. I can agree to Dr.
20 Morrall, but I can't tell you what his availability is like. So, you know --
21

22 THE COURT: Well, they are in the middle of exams right now,
23 so he is going to free all summer I suspect.
24

25 MR. HANNAFORD: That's what I was hoping. I think he might even
26 be -- he might be retired even like now but unfortunately the last time -- you know everyone
27 says well he's -- he's always publishing things and he's always doing things. Anyways, the
28 fact that he teaches everybody, it was funny because the name kept popping up and up and
29 up but anyways, I -- that's a name that I --
30

31 THE COURT: I'm sorry to interrupt you, Mr. Hannaford, but it
32 is funny that you should mention this because that thing that occurred to me as I was kind
33 of thinking about where this is going to go over the next few weeks was you know
34 obviously it is going to be difficult for both of you to agree on an independent engineer and
35 so it is going to ultimately be up to the Court to make a determination as to who that person
36 is going to be based on qualifications and so on. But the thing that jumped out to my mind
37 and again it is funny you should mention I am assuming it is Dr. Morrall --
38

39 MR. HANNAFORD: It is.

40
41 THE COURT: -- from the University of Calgary because the

1 thing that popped into my mind was of course Queen's University is known for its
2 engineering department, my nephew is a graduate of that but that is neither here nor there.
3 I mean probably most of the engineers in this city are graduates from Queen's University
4 and so the thing that popped into my mind was what about someone from Queen's
5 University because the engineering department because that is completely independent of
6 either of you because I know where Mr. Colborne went to school. I do not know where you
7 went to school, Mr. Hannaford, but perhaps you went to Queen's but if you did that is fine.
8

9 But the thing that jumped into my mind was Queen's because it has got such a reputable
10 engineering department and you know if you are looking to me to appoint someone
11 completely independent that is about as independent as you can get. The closest I get is my
12 nephew graduated there about 20 years ago, that is about as close as I get to Queen's. So,
13 I mean I am just throwing that out as another idea because that is the thing that popped into
14 mind just because I did not think that you and Mr. Colborne would be able to agree on who
15 the independent engineer should be.
16

17 So, I thought well then maybe it is up to me, and I am just going to pull a name out of the
18 Kingston hat and maybe go that direction. And who knows maybe the engineer at Queen's
19 would say well I do not know why you are calling me, Dr. Morrall is the guy to talk to.
20 You know I mean that sort of thing which kind of confirms that. Mr. Colborne, what do
21 you think about all this?
22

23 MR. COLBORNE: Well, I mean -- I -- we have -- listen if -- if Dr.
24 Morrall has capacity to take this work on and can turn us around a report in a timely fashion
25 that does not interfere or delay the crucial upgrading work that we're trying to get -- we're
26 trying to get completed than I would certainly make that recommendation to my client. I
27 don't care. Mr. Hannaford said this is the first time I've heard of this guy's name; this is
28 literally the first time Mr. Hannaford has ever given me any name. And so, it's thrilling to
29 hear frankly and -- and we're -- and we're -- I'd be happy to make that recommendation.
30 Our concern is --
31

32 THE COURT: Timing --
33

34 MR. COLBORNE: -- the timing issue, absolutely.
35

36 THE COURT: Okay, well you know I think this is the direction
37 this should go and the reason I am saying that is because you may get the report from
38 whoever the independent engineer is. That may do one of two things. It may cause the three
39 of you to sit down and come to some resolution as to where this thing is going. I mean
40 look, when you get an independent report that may answer the questions and you may not
41 even need the Court.

1
2 Or if you need the Court and the Court cannot accommodate you timely than go and talk
3 to Neil Wittmann and see if he can help you out because once he has an independent report
4 that is neutrally prepared he may be able to help massage the parties to appoint where they
5 can resolve this matter and get started, get Volker Stevin out there digging holes.
6

7 So, I mean, I am sensitive to the time issue, Mr. Colborne, because look, even though you
8 say it is not winter anymore, just look outside but that is a different Calgary story, at least
9 we are not Winnipeg. So I think that is perhaps a way you can go now. Whether you talk -
10 - whether you hire Dr. Morrall or 30 Forensic, I mean, I do not care. I think, frankly, I do
11 not think anybody cares except Mr. Dimant and the City. I mean, they are the ones that
12 care.
13

14 And so if Mr. Hannaford is satisfied after he does his research and chats with the
15 individuals at 30 Forensic, maybe that is the place you go. Or, if you are satisfied with Dr.
16 Morrall, Mr. Colborne, maybe that is the way you go. But either way, I think that it should
17 be one of the two or the third that I recommended. See, it is always nice to get an
18 independent party saying go to Queen's University and talk to someone in Kingston.
19

20 But, either way, someone should be appointed and they should be appointed quickly. Like
21 I would -- if today was not the end of the week, I would say get a consent order over to me
22 tomorrow and I will sign it. In fact, get a consent order to me tomorrow and I will sign it.
23 That is the sort of thing -- I am prepared to sign whatever you need me to sign to get this
24 thing moving timely.
25

26 And, again, I am not sure that we need anymore material, Mr. Hannaford. Let's let the
27 expert tell us that we need more material. There is a ton of material here and I do not know
28 if we want to kill anymore trees. I am prepared to just leave this at the front desk and, Mr.
29 Hannaford, you can send an articling student over to pick it up and take the five volumes
30 and have at it because I suspect that our clerks will just simply put it in they shredder. At
31 least you have got a fresh set of documents here.
32

33 MR. HANNAFORD: Yeah. And, Sir, I will say this, since we filed our
34 application in June of course, we have been receiving further information so the list -- we
35 still have a list of things that we think are required but we have further information from
36 the City including stuff from yesterday and this morning which, you know, go to some of
37 those questions. So, we're getting there. I hear you.
38

39 The only other thing I would like to -- in the consent order if we could, and obviously I
40 haven't talked to Mr. Colborne about this but, you know, I would like to have it so there --
41 part of the order of course is to have them review the accesses and their safety and utility,

1 et cetera, and, you know, as part of that, and this won't surprise my friend, we would like
2 to have that expert do a workflow analysis with the Westcan's operations. The reason for
3 that of course is the access is just a paper access if it doesn't accord with what is happening
4 within the Westcan access -- Westcan site, for example. So I just would want to make sure
5 that we don't limit his review to simply the access itself or the street intersection itself, but
6 also the interface with the Westcan operations --

7
8 THE COURT: Well, I am sorry to interrupt you, but when you
9 look at Mr. Dimant's first affidavit it contains a lot of that information and so it is kind of
10 interesting because I knew nothing about the business in which Mr. Dimant is involved but
11 having read his first affidavit it gives me a fairly good idea of what he does for a living. I
12 mean, certainly I could not go in and explain what every piece of machinery does in there
13 but I have a good sense, overall sense, of what is being done and those materials will be
14 provided to the expert. So it will be a full-on expert opinion on the whole ball of wax. But
15 if you want to articulate that in the order then you and Mr. Colborne can figure out wording
16 that will accommodate that.

17
18 MR. HANNAFORD: I'm sure we can, yeah. I just want to raise that.
19 And I guess the only other thing, Sir, so that -- and perhaps Mr. Colborne and I can also
20 agree to this, but the wording with respect to there is -- my friend gave us notice that work
21 would be starting on May 1st and of course we would need some sort of extension or
22 reinstatement of that injunction order just to determine, you know, until such time as this
23 expert and the Court has had an opportunity to take a look at it. So I know he's very -- the
24 timing is very important but of course we would also have to have that because he has
25 triggered that 45-day notice already and I just want to make sure that any consent order we
26 would have coming out of today would address that as well.

27
28 THE COURT: Mr. Colborne, I think that is implicit in our
29 discussion, is it not?

30
31 MR. COLBORNE: No question. But I would certainly -- the wording
32 of that -- the injunction that was in place prior to Christmas was very, very onerous in
33 terms of what the City could not -- could and could not do on 68th Avenue at all. We would
34 certainly want to sort of loosen that language as little bit. Understanding always, and I'm
35 going to assure my friend of this on the record, understanding always that the City, if it
36 was to resume construction, we would ask the Court to allow us -- allow the City to resume
37 construction on the northbound east lanes of 68th Street in the interim. But in all cases, in
38 a manner that does not interfere with Westcan's business operations or impede access to its
39 site. We take that very seriously. But there -- but given the timing crunch that we're in right
40 now, we would ask the Court that the City be allowed to resume construction on the -- on
41 the east -- northbound lanes of 68th Street. (INDISCERNIBLE) can talk about that. But

1 that's -- that's going to be crucial to the City.

2

3 THE COURT: Well I do not want you to talk about it, I want to
4 resolve that right now because we need to -- I do not want you running back and saying
5 well we cannot agree on this. We need to know which direction this is going. So, Mr.
6 Hannaford?

7

8 MR. HANNAFORD: Yes, Sir. I appreciate my friend's caveat that
9 there would be the same wording with respect to no interference or impediment of my
10 client's accesses. My only concern, and I haven't had a chance to talk to my client about
11 this, but my understanding is currently there is a need, that's what makes it work, is their
12 ability to go into the other lanes as well. I don't know if that is a problem, to be quite honest
13 with you. With the caveat that it does not impede or restrict his accesses to and from 68th
14 Street, I'm fine with that. I'm with Mr. Colborne though, I don't want fights over this and I
15 don't want my client phoning me and saying, They're impeding with my access because
16 they're constructing on the east side of that. I would just want some confirmation from my
17 client that that's a possibility.

18

19 THE COURT: Well, if the access wording is in there, then I do
20 not think Mr. Colborne's client has any option but to allow Mr. Dimant and his operation
21 to continue as if nothing is happening. So I understand what Mr. Colborne is saying, he
22 wants to start, at least get moving on this because we are in construction season, and being
23 confident I think, Mr. Colborne, that the expert is going to flow your way. But if it does
24 not flow your way, then you have done a whole bunch of work on the northbound road for
25 someone else's use.

26

27 MR. COLBORNE: And my client is willing to take that risk, Sir.

28

29 THE COURT: Yes. Yes. But, again, I have heard your wording
30 on the record that you have no intention -- or your client has no intention of impeding Mr.
31 Dimant's operations or his access to his sites.

32

33 MR. COLBORNE: I confirmed as recently as yesterday that the City
34 doesn't need to do that work right now, certainly not until we've had an opportunity to get
35 the independent engineer to complete his review. So I think that's easily -- and if there's
36 going to be a work all in front of Mr. -- Westcan's access, that would be done after hours
37 or on the weekends with notice to Mr. Dimant to ensure that's -- there will be no
38 requirement to access the sites during those hours. So the City takes that very seriously and
39 we have, again, no intention whatsoever to interfere with Mr. Dimant's operations out there.
40 At some point -- at some point those accesses, Sir, are going to be closed, you probably
41 saw that in our affidavits, but not until we have provided Westcan with safe and adequate

1 alternative accesses away from 68th Street and we're working on that now. And that's --
2 that's what the independent engineer is going to help us accomplish.

3

4 THE COURT: That's what the expert's being hired for.

5

6 MR. COLBORNE: Right. May I just make a couple more comments,
7 Sir? I would also ask that if Westcan's lawyers intend to question Mr. Rumour further on
8 his undertaking responses, that that also be completed prior to returning before the Court
9 so that all the ducks are in a row and so that there isn't an issue of, you know, we didn't --
10 we weren't able to question Mr. Rumour and therefore we're seeking an adjournment until
11 we've done that. So that's one of the steps I think that needs to be accomplished certainly
12 before we appear back before the Court. And I don't --

13

14 THE COURT: Well you are going to have six weeks or
15 thereabouts to do all of that , so.

16

17 MR. COLBORNE: It shouldn't be a problem. I agree. These are just
18 the things that I've contemplated just to ensure that there's nothing hanging out there that's
19 going to delay this further.

20

21 Now, while we're here, I will tell Westcan's lawyers, and I think Mr. Dimant is on the line,
22 I've talked to my people, Mr. Hannaford, and we are going to get you a set of stamped
23 approved drawing for 86th Street -- I mean, sorry, 68th Street. I know that's been an issue.
24 We are going to provide you with that, that's in the works. And the City's also going to
25 place a sign at the intersection of 86th and 68th preventing large tractor trailers from
26 attempting a right-hand turn there. I know that was also a concern. And so those things are
27 in the works.

28

29 THE COURT: At least with respect to WB-23 trucks; right?

30

31 MR. COLBORNE: Right. I don't think the sign says exactly that but,
32 you know, the people that (INDISCERNIBLE) I think they understand the implication. So,
33 Sir, I guess I will -- I take (INDISCERNIBLE) that I think Justice Wittmann -- former
34 Justice Wittmann would do a good job for us. Again, not having talked to him about his
35 availability, I would still ask, Sir, if there's some way that we can, as a stop gap, have access
36 to you the week of June 13th. Is there any way we can make that happen?

37

38 THE COURT: Well you --

39

40 MR. COLBORNE: Just so it doesn't get away from us.

41

1 THE COURT: Yes, you can book a time if you wish. I do not
2 know if Neufeld is sitting also during that period but he is not up to date on what we are
3 talking about today. I mean, he is up to date only insofar as he knows what he granted and
4 then we just had a chat about where this thing is going today. I just was trying to keep him
5 up to date just in case, you know, I get hit by a bus or something in the interim. I guess
6 what we might want to do though, Mr. Colborne, is put in some flexibility in there. So it
7 could be attended before Neufeld or me, or any other person, any other Judge. And this is
8 a commercial matter. I think you first appeared in commercial chambers so or any other
9 Judge on the commercial list. Because you know we are dealing with people like Justice
10 Sidnell who did this kind of work and we are dealing, you know, we are dealing with all
11 these folks that know this stuff. It is not just insolvency folks; it is people that know civil
12 litigation stuff. So any one of us is capable of looking at whatever you are providing and
13 dealing with it.

14
15 But I guess the question then becomes even if we get the independent engineer's report,
16 whether that will be sufficient for the Court to be able to make a ruling on. And I just put
17 that out there because I do not know what the expert report is going to say, it may be
18 something where the parties want to establish or question the expertise of the expert given
19 the content of the report. And so it may come down to, I will not say credibility, but it is
20 not really credibility as much as it is kind of an integrity kind of question. So, I do not
21 know.

22
23 So, yes, you can book the time but I do not know what the report is going to say so I am
24 not sure if that gets us over the line. Whereas, you know, someone like, you know, if this
25 is being done by way of like an arbitration or something like that then at least you both
26 have the expert report and you know what to do with it to convince the other side as to the
27 propriety of your position. I am just throwing that out. But I am throwing out Wittmann's
28 name because there are a whole bunch of Judges out there that, former Judges out there,
29 that are doing this kind of work. I mean, another one would be Terry McMahan, Justice
30 McMahan, I mean, he knows this stuff backwards and forwards. But I would not hire
31 someone like, for example, former Justice Rawlins. I mean, she was not a construction
32 litigator, she was a wills and estates type person so what is the point in hiring her? With all
33 due respect to her. There are people out there that have this expertise like McMahan,
34 Wittmann, and even former Justice Mason. Those folks, they know this stuff. And so I am
35 just throwing that out. Not trying to sort of take away from the Court's role in this but I am
36 just trying to figure out a way that will get all parties over the line in a more efficient and
37 fast way. That is the only reason I am throwing that out, Mr. Colborne.

38
39 MR. COLBORNE: Yes. Understood. Thank you.

40
41 MR. HANNAFORD: One further thing that I don't think we've

1 addressed and I think we have to, there was the issue in the previous consent order about
2 the 45 days' notice of the intention to construct and resume construction, once we get the
3 engineer's report obviously everyone I think agrees, including the City, there's a -- it takes,
4 if possible, and as you know from reading Mr. Dimant's affidavit it may not be possible
5 depending on what the engineer finds, but if possible it takes -- it takes some time to
6 reconfigure the site and we're talking about moving major buildings, major changes
7 internally if that -- if that is what the engineer finds. I'm wondering if there has to be
8 something implanted in the consent order to acknowledge that and provide the notice on
9 that that they will be, you know, doing this in 35 days, or 50 days, or 60 days. I think it was
10 45 in the old one. I'm just wondering if that same notice period would apply for the same
11 reasons in this new consent order.

12
13 THE COURT: Mr. Colborne?

14
15 MR. COLBORNE: Yeah. No, I think -- I think that's important. Now,
16 I think we can get into the discussion as to the City's obligation which is to provide adequate
17 access to Mr. Dimant. The saying is you can lead a horse to water; right? So the accesses
18 can be there but Mr. Dimant has to be comfortable in using them. And so I would -- so I
19 think that's important. We would have a timeline and that timeline may actually accord
20 with the City's plans to actually close the accesses on 68th Street via bylaw. And so I
21 anticipate that when we're back before the Court again, and this is something that an ADR
22 person hearing this, Sir, wouldn't be able to do, is I -- there may be argument as to an
23 extension of the injunction period for instance and so we would need the Court's assistance
24 with that.

25
26 THE COURT: Yes, of course. I mean, that is what we do.

27
28 MR. COLBORNE: Right.

29
30 **Decision**

31
32 THE COURT: Yes. Yes. Okay. Well, so on a go-forward then,
33 so what I am expecting from you, from both of you, is a consent order dealing with the
34 appointment of the independent engineer. And I do not -- it does not matter to me who it is
35 but you now have at least a couple of names and then a suggestion if those names do not
36 work from me. So, that is extremely important. I would suggest that you get moving on
37 that and hopefully -- the consent order itself is -- the order is extant now so I am making
38 that order and so get moving on that. And I would suggest that be done -- the appointment
39 of that individual or that entity be done -- can it be done by the end of next week?

40
41 MR. COLBORNE: It certainly can if we use my guy. I shouldn't say

1 that, I didn't mean that, that was a complete (INDISCERNIBLE) my suggestion.

2

3 MR. HANNAFORD: I think we have our answer that we can't accept
4 (INDISCERNIBLE). That's fine. We'll certainly make our efforts to do that as well.
5 Obviously there's no reason to delay it so we'll make our best efforts on that. Perhaps we
6 can say by Monday, Sir, that might give us a little bit more breathing room than Friday.
7 But, yes, let's --

8

9 THE COURT: Sure. Sure. Well Monday, that would be the 18th
10 -- no, no, the 25th.

11

12 MR. HANNAFORD: Right. Yeah.

13

14 THE COURT: Yes. Okay. And then cross-examination on
15 undertakings, I think if we were to set that six weeks from today's date, have those all done.
16 Have all the undertakings been complied with? There were not that many.

17

18 MR. COLBORNE: No, there were 12.

19

20 MR. HANNAFORD: Yeah. I believe, Sir, I'm not trying to be funny,
21 but I haven't had a chance to review each of them. I know -- I think ostensibly they've been
22 answered and, you know, so there's nothing outstanding I don't believe but I haven't
23 reviewed them in any great detail.

24

25 THE COURT: But if we were to say cross-examination on the
26 undertakings happened by the end of, you know, by the end of six weeks, on or before six
27 weeks from now?

28

29 MR. HANNAFORD: Absolutely is fine.

30

31 THE COURT: Okay. Well, needless to say, the injunction itself
32 or whatever you want to call it remains in effect until you next appear before the Court.

33

34 MR. COLBORNE: Sir, yes, but I would ask the Court to -- the
35 language that currently exists is far too -- it's far too onerous. It goes far beyond what the
36 City would be comfortable with. Because what the order says now is no work whatsoever
37 adjacent to his property or that impedes which means that we can't do either of those things.
38 We can't do work even, you know, in the proximity of the -- of the accesses. Whereas we
39 would ask that the injunction now says that we wouldn't do work that impedes or interferes
40 with access.

41

1 THE COURT: I think Mr. Hannaford heard the wording that
2 you used previously and I did not think that he was adverse to that wording simply because
3 it was housed in such language that Mr. Dimant could continue his operations unimpeded
4 or he would have access to his premises. So, you can work on that wording but I was just
5 making the general comment that --

6
7 MR. COLBORNE: Yeah.

8
9 THE COURT: -- the City is enjoined from doing anything that
10 interferes with Mr. Dimant's business but is entitled to start working on that part of the road
11 that you discussed earlier. I will let you and Mr. Hannaford sort of work on the
12 wordsmithing of that and I am sure it will be satisfactory to both of you. Mr. Hannaford
13 has an idea, and Ms. Preston, I am sorry, has an idea of what you are saying and I am not
14 sure that they are adverse to any of that.

15
16 MR. COLBORNE: Thank you, Sir.

17
18 THE COURT: And then the parties can come back either to me
19 or to Neufeld, or to any Judge sitting on the commercial list, as they see fit. Again, I do not
20 want to tie your hands. I think that is causing a lot of difficulty because looking at the
21 applications that you were intending to file was causing some difficulty because you were
22 having trouble getting us and so I think we should leave it a little more open so that you
23 can have access if need be.

24
25 All right. Anything else, Mr. Hannaford?

26
27 MR. HANNAFORD: Other than I, personally now having -- now that
28 you've gone through it, I would prefer you, but we can discuss that, I appreciate your order
29 and I would, as I say, now that you -- now that you know what a WB-23 is, not to re-
30 educate a new Judge, but I appreciate that. No, I think -- I think that's it. I believe those are
31 the issues that we wanted dealt with.

32
33 As far as the -- the only thing I guess is -- this is the only problem I'm trying to get and
34 perhaps Mr. Colborne has already dealt with it but I wasn't listening closely enough, of
35 course Mr. Dimant cannot reconfigure his site until the accesses have been approved and
36 determined to be safe because, you know, maybe it's a different access, maybe it's over
37 here, maybe it's there. I would just -- is there anything in this order to sort of address what
38 the timing will be with the construction in that order? In other words, I don't recall if it's --
39 if he's giving 60 days' notice or what the period of time is. I appreciate the injunction
40 continues until such time as we appear before the Court again but that certainly wouldn't
41 help my client if we have to appear on a Tuesday and his accesses are closed on a

1 Wednesday and he hasn't made any internal arrangements. I just don't recall how we dealt
2 with that and I don't want that to --

3

4 THE COURT: Well, okay, I am not sure that we can deal with
5 it right now and I will tell you why. Because it depends on what the expert report says. If
6 the expert report says that 90th Avenue will be reconfigured in such and such a way and it
7 is going to take two months to do that --

8

9 MR. HANNAFORD: Yes.

10

11 THE COURT: -- then that will -- the expert report will drive the
12 time that it is going to take Mr. Dimant to reconfigure his operation. So if indeed Mr.
13 Dimant says, Okay, well it is going to take 60 days to get the 90th Avenue exchange done,
14 or exit and entry done, then Mr. Dimant in the meantime will probably be working on that.
15 But if it is going to take Mr. Dimant 90 days to reconfigure his operation, then he is going
16 to have 90 days to do it. I mean, I do not think the City's intent is to cut off the access and
17 the work of one of its taxpayers. That does not make sense. So I think that the time within
18 which the City begins its construction of whatever that is will drive how Mr. Dimant is
19 going to have to reconfigure his operation, if at all.

20

21 So, I think if I were to say well the City has to give 60 days' notice, or 45 days' notice, or
22 30 days' notice, I think that is putting the cart before the horse because we do not even
23 know what the cart looks like; right? Does that make sense?

24

25 MR. HANNAFORD: Yeah, it certainly does. It certainly does to me
26 because depending on what comes back, the dates could -- but I just want to make sure that
27 my client's, you know, provided for and it's understood that there's -- he's got to have some
28 sort of advance notice as to what he has to do before those accesses ever get closed. That's
29 my -- my point.

30

31 MR. COLBORNE: Why don't we do this, counsel, why don't you tell
32 us, you can speak with your client, why don't you tell us how long it would take for him to
33 reconfigure? I mean, is it going to take a month?

34

35 MR. HANNAFORD: Well, sorry to interrupt, but as Mr. Justice
36 Yamauchi has indicated, I think it is the cart before the horse because it depends on what
37 is being proposed. If this exact -- if the third party expert agrees entirely with you, the
38 answer is one thing. If it's something else or some machination thereof, it may be another
39 thing. And one of the things we've asked the expert to do is to take a look at that and that
40 may also drive what has to be done internally within the operation. So I'm comfortable with
41 that, I just wanted to make sure that we have that. So I'm fine with Justice Yamauchi's

1 suggestion.

2

3 THE COURT: Well, from my perspective, I am sorry to
4 interrupt you, Mr. Colborne, we will let you talk in a minute, but from my perspective the
5 injunction is in place with the exception that we talked about concerning construction, but
6 the injunction is in place until I say it is no longer in place. So if you appear before me, or
7 whoever it is, and Mr. Colborne says once the injunction is done we are going to go ahead
8 in 45 days, well then the Court is going to have to make that assessment as to whether that
9 is reasonable. And if Mr. Dimant says, look, I need 60 days or 90 days to get this done,
10 then that will make the determination easy for the Court.

11

12 So, you know, I think we have to wait. The injunction is in place, subject to the exceptions,
13 the injunction is in place until it is no longer in place and if the City says well we are giving
14 45 days' notice and we are going to start our construction, my answer to that is that is a
15 breach of my injunction. So, and Jonathan Dennis knows what that is all about.

16

17 MR. COLBORNE: Sir, I have a little bit of a problem with that,
18 respectfully, in that the City is amenable to suspending the construction activities to, you
19 know, no intention of landlocking Westcan and its site. My concern is that what you're
20 saying is we would have to appear before the Court and rather than the onus being on the
21 person seeking the extension of the injunction, the onus is now on the City of Calgary to
22 demonstrate the injunction should not be lifted. And that, respectfully, my position is that
23 sort of turns the burden of proof on its head when it comes to something as, you know, sort
24 of onerous as an injunction.

25

26 THE COURT: Well the point I am making, Mr. Colborne, is that
27 the injunction is in place and, no, I am with you on that, Mr. Hannaford is going to have to
28 convince me that it should remain in place when you next appear before me or whoever it
29 is. But the injunction is in place until you next appear before the Court and then the Court
30 will make a determination. Not putting the onus on you, putting the onus on the applicant
31 to say that it should continue. But I can tell you that if Mr. Dimant needs an extra 30 days
32 or whatever it is to get his business reconfigured or his buildings reconfigured to
33 accommodate the new exit/entry, then I do not think the Court is going to be really adverse
34 to entertaining that type of submission.

35

36 MR. COLBORNE: We've managed to do this by consent from the
37 outset so I sure hope that will continue.

38

39 THE COURT: Yes.

40

41 MR. HANNAFORD: Sir, one last thing and I hate to do this to you on

1 a long weekend in particular, because all of this has been moving and there are certain
2 issues that weren't expected to happen, would it please the Court if we could have just a
3 five-minute adjournment? I know my client wants to make some submissions to me. I don't
4 think you wanted them directly to you. But I just wanted to talk to my client very, very
5 briefly about some of these machinations in the order just in case there's something I'm
6 missing; is that okay?

7
8 THE COURT: That is absolutely fine. I have got Mr. Jukes
9 appearing before me in about 15 minutes so let's take ten minutes and you can chat with
10 Mr. Dimant and then we will come back; okay?

11
12 MR. HANNAFORD: That's perfect. That's great. Thank you so much.

13
14 THE COURT: You are welcome.

15
16 MR. COLBORNE: Thank you, Sir.

17
18 (ADJOURNMENT)

19
20 THE COURT: (INDISCERNIBLE).

21
22 MR. HANNAFORD: Two years in, you think you'd figure this out.
23 (INDISCERNIBLE) just a couple things (INDISCERNIBLE). We had a few problems
24 previously with the wording of the former order and some of the things
25 (INDISCERNIBLE) something that occurred at the site. My clients (INDISCERNIBLE)
26 do have off-hour service, they do operate on the weekends, and so (INDISCERNIBLE)
27 didn't really help us. I think we should be abler to make it (INDISCERNIBLE) drive-
28 through traffic problems at all (INDISCERNIBLE) weekends don't help our client. That
29 was one issue that -- that was a problem with Justice Neufeld's order and I would prefer
30 that we not repeat that.

31
32 THE COURT: Do they work overnight, Mr. Hannaford?

33
34 MR. HANNAFORD: I don't believe they do like, you know, in
35 between the hours of midnight and 6 AM. I don't believe there's a lot of things going on
36 there at that hour, but certainly at 7 PM and on Saturdays and Sundays they do. So, you
37 know, true nighttime, I don't believe there's activity going on there on a regular basis. There
38 might be a one-off I believe. But my main concern is evenings and weekends.

39
40 THE COURT: You are muted, Mr. Colborne. Mr. Colborne,
41 you are muted.

1
2 MR. COLBORNE: So maybe there's something that we can do
3 whereby, I'm just thinking out loud here, 24-hours' notice just to ensure that Westcan's
4 operations aren't going to be continuing, you know, in a specific timeframe and sort of --
5 what am I trying to say. That permission can't be reasonably withheld or something like
6 that. I am just spit balling here but certainly the intention is not to interfere with Mr.
7 Dimant's operations but if Mr. -- if Westcan isn't there and we can do a couple hours worth
8 of work that's not going to interfere, I don't think that's an unreasonable thing to ask. So,
9 maybe we can -- Mr. Hannaford and I can work something out in terms of notice provision
10 and permission granted if it's a reasonable request. Something along those lines.

11
12 THE COURT: I cannot comment on that because I do not know
13 what is reasonable and what is not in this business, so.

14
15 MR. HANNAFORD: Yeah. I'm just a little concerned about it, as I say,
16 because it arose before and I know that -- what the City may feel is unreasonable versus us
17 is a bit of a problem. I was just hoping that the City would not have to go in front of Mr.
18 Dimant's -- block his access at any point in time. It also goes this idea of these median
19 barriers that are currently in place that would remain in place to avoid exactly that issue.
20 That might get over this hump about, you know, what's going on in front of my client's
21 property.

22
23 MR. COLBORNE: Okay. Well, send me your proposed form of
24 consent order and, I mean, I don't know that there would be work necessitated in front of
25 Westcan's site at all. I'm just trying to -- sort of trying to see my way around the various
26 corners but we can talk about that.

27
28 THE COURT: Yes. I mean, you will have to consult with your
29 client, Mr. Colborne.

30
31 MR. COLBORNE: Of course. Yeah.

32
33 MR. HANNAFORD: I believe those were the main points that came
34 out of my discussion with my client offline so I'll turn it back to you, Sir.

35
36 THE COURT: Okay. Well, here is what I am going to ask you
37 to do if you do not mind, and that is when you come to, well, when you come to the consent
38 order, you can send it to Mr. Dufault, the commercial coordinator, because that is probably
39 the fastest way to get it to me because I may not be around next week so they can just get
40 it to me wherever it is, wherever I am, and I can sign it and get it back to you. The only
41 place I may be is Saskatchewan. I am not going anywhere warm.

1
2 MR. HANNAFORD: May have to dig you out. Sir, the only last thing
3 --
4
5 THE COURT: Yes.
6
7 MR. HANNAFORD: -- I don't want to throw this in, I haven't talked to
8 Kelly about it at all, but I'm wondering if -- should we, you know, given the Queen's on is
9 the independent one, I'm just wondering if we go through our three that we've decided and
10 no one at Queen's can do it, I'm wondering should we have some sort of default thing where
11 whoever Queen's recommends who's not conflicted can do it? Is that something that -- that
12 -- I'm just trying to think of a way if God forbid the three that we've put forward, the three
13 being the guy that Mr. Colborne put forward, Mr. Morrall, and the Queen's individual
14 whoever that is, assuming that none of those people can or are willing to do it, should we
15 have some sort of default situation where the person at Queen's can refer us and we have
16 to agree to the person at Queen's as long as there's no conflict? I just throw that out as a
17 last -- as one of the last things to discuss.
18
19 THE COURT: Mr. Colborne, thoughts on that? You do not care
20 probably.
21
22 MR. COLBORNE: We don't -- who this person is, is not as important
23 to us as how fast can this person get the work done?
24
25 THE COURT: Yes. Yes. I do not think that is an unreasonable
26 request because, who knows, the folks at Queen's may say, well, we cannot do it in the time
27 period but there is somebody down at, you know, Dartmouth or someone that can do it, or
28 whatever; right?
29
30 MR. HANNAFORD: Yeah. So we can work on that. I just wanted to
31 float that idea around. But we can -- we can deal with that. So, those were all my comments,
32 Sir.
33
34 THE COURT: Okay. Mr. Hannaford, the other thing I suggest
35 is that perhaps I should send the package of materials back to you but just in case I end up
36 -- it ends up back before me, I am going to want to have this stuff so I am going to keep
37 this pack of paper for now.
38
39 MR. HANNAFORD: I would very much prefer you do that, Sir. I hope
40 we don't have to appear but I would prefer to have it in front of you, to be honest. So, I
41 appreciate that.

1
2 THE COURT: Okay. Mr. Colborne, anything else?

3
4 MR. COLBORNE: Very quickly. I just want to be clear about my
5 understanding of the expert report so it doesn't look like I acquiesced anything in this
6 conversation here. Justice Neufeld's order is very clear that the independent engineer was
7 to review and comment. There was no suggestion this was going to be binding on either of
8 the parties. And so my understanding would be that the expert report would then become
9 sort of further evidence in support one way or the other, safe or unsafe, not that it's binding
10 on either party.

11
12 THE COURT: No, I do not think so. It is an expert report and
13 either party can challenge the veracity of the expert report if they see fit to do so.

14
15 MR. COLBORNE: Thank you, Sir. And my last thought, I promise,
16 is that I think it may be helpful before we appear before the Court next time, that we agree
17 to maybe put something in writing in terms of written submissions and caselaw on which
18 we may be relying. And I say this in particular because we may not be before you, Sir, and
19 it would be very helpful I think to a new Judge hearing this if we could, you know, a ten-
20 page written sort of bench brief setting out the law, the facts that we're relying on and that
21 sort of thing. I think that would be very, very helpful.

22
23 THE COURT: You know what, I can tell you without question
24 that would be very helpful and the reason I am saying that is because, frankly, I know what
25 the application said but it was wading through the affidavits to get a sense of exactly where
26 we were going on this. So that would be extremely helpful to whoever is hearing it, even
27 if it is me. It would be extremely helpful to know what direction we are going with it; all
28 right? So, I would appreciate that. Or whoever is hearing it would be appreciate it. Neufeld
29 would appreciate that.

30
31 MR. COLBORNE: Okay.

32
33 THE COURT: Yes. He does sit on the commercial court so if I
34 am not available, he could hear it certainly. He is as up to date as I am.

35
36 Okay. Is there anything else folks?

37
38 MR. HANNAFORD: None from me, Sir.

39
40 THE COURT: Okay. Mr. Colborne?

41

1 MR. COLBORNE: No.

2

3 THE COURT: Thank you. I think we made some progress today
4 and hopefully the next time we meet, if we have to meet at all, we can just move this thing
5 forward whatever way it is going; all right?

6

7 MR. HANNAFORD: Thank you for your time today, Sir.

8

9 THE COURT: Yes. Thank you, folks. Have a nice Easter.

10

11 MR. COLBORNE: Thank you. Bye-bye.

12

13 THE COURT: Thank you, madam clerk.

14

15

16 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

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I, Rena Neale, certify this recording is a record made of the evidence in the proceedings in the Court of Queen’s Bench, in courtroom 1602, at Calgary, Alberta, on the 14th day of April, 2022, and I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

2
3 I, Nicole Carpendale, certify that

4
5 (a) I transcribed the record, which was recorded by a sound recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record and

8
9 (b) the Certificate of record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

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17 TEZZ TRANSCRIPTION, Transcriber
18 Order Number: TDS-1009169
19 Dated: June 9, 2022

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CERTIFIED *E. Wheaton*
by the Court Clerk as a true copy of the
document digitally filed on Jun 3, 2022

Clerk's Stamp

COURT FILE NUMBER	2101 09833
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY
APPLICANTS/PLAINTIFFS	WESTCAN RECYCLERS LTD. and ALBERTA LTD.
RESPONDENT/DEFENDANT	THE CITY OF CALGARY
DOCUMENT	<u>ORDER</u>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyers' Darin J. Hannaford Names: Melissa J. Preston Lawyers' dhannaford@millerthomson.com; Emails: mpreston@millerthomson.com File No.: 0262576.1



DATE ON WHICH ORDER WAS PRONOUNCED:	<u>APRIL 14, 2022</u>
LOCATION WHERE ORDER WAS PRONOUNCED:	<u>CALGARY LAW COURTS VIRTUAL COURTROOM 60</u>
NAME OF JUSTICE WHO MADE THIS ORDER:	<u>THE HONOURABLE MR. JUSTICE YAMAUCHI</u>

UPON reviewing the Amended Application by Westcan Recyclers Ltd. and 664078 Alberta Ltd. (collectively, "**Westcan**") filed March 28, 2021 (the "**Amended Application**"), and the various affidavits and materials filed in support; AND UPON reviewing the Cross-Application by The City of Calgary (the "**City**") filed March 4, 2022, and the various affidavits filed in support; AND UPON reviewing the Court Order of Justice Yamauchi filed August 12, 2021, and the Court Order of Justice Neufeld made on September 10, 2021 (the "**Neufeld Order**"); AND UPON hearing submissions of counsel for Westcan and the City;

IT IS HEREBY ORDERED THAT:

1. The Amended Application is adjourned *sine die*.

- 2 -

2. The City shall be permitted to resume road upgrading and construction work on the northbound (east) lanes of 68 Street SE, however, the City shall not, pending further Order of this Court, perform any road upgrading or construction work adjacent to Westcan's two (2) site accesses on 68 Street SE (the "**68 Street Accesses**") and/or in any manner that would impede or negatively impact the 68 Street Accesses or Westcan's operations.
3. The median barriers currently in front of the 68 Street Accesses preventing through-traffic shall remain in place indefinitely.
4. No later than April 25, 2022, the parties shall appoint and jointly engage the services of an independent third party engineer (the "**Independent Engineer**") to review and provide comments on the revised design being proposed by the City for accesses to and from Westcan's property, municipally described as 8919 68 Street SE (the "**Submitted Design**").
5. The Independent Engineer shall be one of the following (in no particular order):
 - (a) 30 Forensic Engineering;
 - (b) Dr. John Morrall; or
 - (c) A suitably qualified individual from the Engineering Department of Queen's University ("**Queens**").
6. In the event that none of the entities or individuals listed in paragraph 5 are able to act as the Independent Engineer due to a conflict or lack of capacity to review and provide comments on the Submitted Design within a reasonable timeframe, the parties will ask Dr. Morrall, or alternatively, the assigned representative at Queen's, to refer a suitably qualified individual or entity and the individual or entity so referred will be retained to act as the Independent Engineer, subject to availability and conflicts.
7. The Independent Engineer shall be provided with:
 - (a) The final drawings for the Submitted Design that have been approved by Development Approvals, and the formal approval for same;
 - (b) The issued-for-construction drawings for the Submitted Design;
 - (c) The court materials that have been filed, or that may be filed, in this matter, together with any additional engineering reports, past drawing sets, or other design-related commentary that the parties may wish to provide;
 - (d) Any further information or documentation as may be requested by the Independent Engineer to conduct his review;
 - (e) Commentary on the Submitted Design from Westcan and its consultants.
8. Further to paragraph 7, the City shall use all reasonable efforts to provide Westcan with the final approved drawings for the Submitted Design on or before May 13, 2022, failing which on such later date as may be agreed to as between the parties, acting reasonably. Once received, Westcan shall have 15 business days to review and provide commentary on the final approved drawings for the Submitted Design to the Independent Engineer, or such longer timeframe as may be agreed to as between the parties, acting reasonably. If

– 3 –

agreement cannot be reached with respect to alternative deadlines, either party may apply to this Honourable Court for advice and direction.

9. Examinations on answers to Undertakings of Jason Rumer shall be completed no later than May 26, 2022.
10. Should the parties need to attend before the Court for further direction in relation to this matter, including to have the re-scheduled Amended Application heard, either party may attend on reasonable notice before any sitting Queen's Bench Justice on the Calgary Commercial List, including Justice Yamauchi or Justice Neufeld.
11. In advance of the hearing of the re-scheduled Amended Application, the parties shall file and serve a written "bench brief", not to exceed 10 pages in length, excluding supporting authorities. The timing for the exchange of bench briefs shall be determined either by the Court Coordinator or by the Justice hearing the re-scheduled Amended Application.
12. The fees of the Independent Engineer for his/her review and comment on the Submitted Design shall initially be paid equally as between Westcan and the City.

13. The determination of entitlement to court costs and the ultimate responsibility for payment of the Independent Engineer's fees shall be reserved and determined by the Court at a future motion brought by either of the parties, or alternatively, at the ultimate hearing or disposition of the Application.
14. This Order may be signed in counterpart and endorsed by way of facsimile signature or electronic means.




Justice of the Court of Queen's Bench of Alberta

CONSENTED AS TO FORM BY:

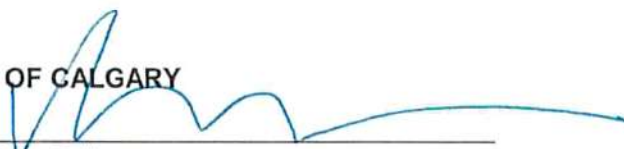
MILLER THOMSON LLP

Per:


Darin Hannaford and Melissa Preston
Counsel for the Plaintiffs/Cross-
Applicants/Respondents

THE CITY OF CALGARY

Per:


Kelly Colborne
Counsel for the Defendant/Cross-
Applicant/Respondents

IN THE MATTER OF COURT OF QUEEN'S BENCH ACTION NO. 2101 09833

Between:

Westcan Recyclers Ltd. and 644078 Alberta Ltd.

Plaintiffs/Applicants

- and -

The City of Calgary (the "City")

Defendant/Respondents

INDEPENDENT ENGINEER RETAINER AGREEMENT

I. BACKGROUND

1. 664078 Alberta Ltd. ("**664**") owns an industrial site situated in South East Calgary, located southwest of the intersection of 68 Street SE and 86 Ave SE (the "**Westcan Site**"), out of which Westcan Recyclers Ltd. operates a large scrap metal recycling, processing and brokerage business. 664 and Westcan Recyclers Ltd. are hereinafter referred to collectively as "**Westcan**".

2. Westcan and the City (each of Westcan and the City, hereinafter referred to individually as a "**Party**" and collectively as the "**Parties**") are currently involved in litigation (the "**Action**") relating to the expansion of 68 Street SE in Calgary from a two-lane road to a four-lane divided industrial arterial road from 76 Ave to 108 Ave (the "**68 Street Expansion**"), and more specifically, the impact of the 68 Street Expansion on the safety and adequacy of the Westcan Site's two (2) existing main accesses located on 68 Street SE between 86 Ave and 90 Ave (the "**68 Street Accesses**"), and the City's and its consultants' proposals and drawings for alternative accesses to same, the latest iteration of which is currently being revised and will be submitted to Development Approvals for final approval (the "**Submitted Design**").

3. Pursuant to the Order of Justice Yamauchi of April 14, 2022 (the "**April 2022 Order**"), the City is permitted to resume road upgrading and construction work on the northbound (east) lanes of 68 Street SE, however, the City shall not, pending further Order of this Court, perform any road upgrading or construction work adjacent to the 68 Street Accesses and/or in any manner that would impede or negatively impact the 68 Street Accesses or the Plaintiffs' operations.

4. The April 2022 Order requires the Parties to appoint and jointly engage the services of a third party independent engineer ("**Independent Engineer**") to review and provide comments on the City's Submitted Design. The Parties collectively agree to appoint Dr. John Morrall as the Independent Engineer.

II. SCOPE

5. The Independent Engineer is to review and provide comment on the City's Submitted Design and shall provide a written report (the "**Report**") with respect to same. The Independent Engineer shall be permitted to perform a formal road safety audit and safety and operational assessment of the 68 Street Expansion from 86 Ave SE to 90 Ave SE (the "**Audit**"), should the Independent Engineer determine the Audit as being required to properly evaluate the City's Submitted Design (collectively, the "**Scope of Work**").

6. Per Transportation Association of Canada requirements, a second auditor is required to perform an Audit and the Independent Engineer shall arrange for the appointment of same, if needed.

7. Pursuant to the April 2022 Order, the Independent Engineer shall be provided with the following to perform the Scope of Work:

- (a) The final drawings for the Submitted Design once approved by Development Approvals, and the formal approval for same;
- (b) The court materials that have been filed, or that may be filed, in this matter, together with any additional engineering reports, past drawing sets, or other design-related commentary that the Parties may wish to provide;



- (c) Any further information or documentation as may be requested by the Independent Engineer to conduct his Scope of Work;
 - (d) Commentary on the final approved drawings for the Submitted Design from Westcan and its consultants.
8. The Independent Engineer may commence his Scope of Work forthwith.
9. The Independent Engineer may be provided with further joint directions and instructions with respect to this work from time to time by counsel for the Parties.

III. CONFLICTS AND RELATIONSHIP

10. The Independent Engineer confirms that he has no conflicts with respect to this matter, and nor does the second auditor.
11. The Independent Engineer will perform his services hereunder as an independent contractor and not as an agent, employee or affiliate of either of the Parties. In providing his opinions, it is the Independent Engineer's duty to assist the Court and not to be an advocate for any party. The Independent Engineer acknowledges that his report may be served, filed and relied upon in the Action and that the Independent Engineer may be required to provide oral testimony.

IV. COMPENSATION

12. The Independent Engineer shall charge an hourly rate of \$270.00, to be paid for jointly by the Parties.
13. The second auditor for an Audit, if needed, shall charge an hourly rate of \$270.00, to be paid for jointly by the Parties.
14. It is agreed that any court room testimony required by the Independent Engineer, if needed, including waiting time, is subject to the same above hourly rate as the other services to be provided by the Independent Engineer.



15. The Independent Engineer shall seek the Parties' prior approval for all travel-related expenses. The Parties shall not unreasonably withhold consent with respect to the approval of such costs.

16. Additional charges will be as follows:

- (a) Mileage will be charged at CDN \$0.60/km; and
- (b) Expenses will be charged at cost. Any individual expense items in excess of CDN \$500 shall be pre-approved by the Parties.

17. The Independent Engineer will provide the Parties with an invoice(s) for professional fees and expenses, including the second auditor's fees, incurred at the end of each calendar month and at the end of the Independent Engineer's engagement hereunder.

V. ENTIRE AGREEMENT

18. This agreement is the entire agreement between the Parties with respect to its subject matter, supersedes all prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter hereof and cannot be waived, amended, otherwise modified or terminated except in writing executed by each party to be bound thereby.

VI. GOVERNING LAW

19. This agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein, and without regard to conflict of laws principles.

[Balance of page is intentionally left blank]

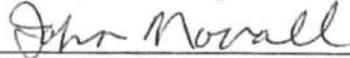


VII. EXECUTION

20. This agreement may be executed and delivered by facsimile and all facsimiles shall together constitute one and the same agreement.

ACCEPTED AND AGREED ON APRIL 26, 2022

Per: **Independent Engineer**



Dr. John Morrall

Per: **Miller Thomson LLP**



Darin Hannafor/Melissa Preston
Counsel for the Plaintiffs/Applicants

Per: **Legal Services, The City of Calgary**



Kelly Colborne
Counsel for the Defendant/Respondent





June 2022

Delivered via email

The City of Calgary
Office of the Councillors (8001)
700 Macleod Trail S.E.
Calgary, AB T2G 2M3

Steve Dimant, President & General Manager
Westcan Recyclers Ltd.
Tel (Office) – 403.279.6743
Tel (Mobile) – 403.899.8083

Attention:

Mayor Jyoti Gondek
Councillor Sonya Sharp
Councillor Jennifer Wyness
Councillor Jasmine Mian
Councillor Sean Chu
Councillor Raj Dhaliwal
Councillor Richard Pootmans
Councillor Terry Wong
Councillor Courtney Walcott
Councillor Gian-Carlo Carra
Councillor Andre Chabot
Councillor Kourtney Penner
Councillor Evan Spencer
Councillor Dan McLean
Councillor Peter Demong

Dear Mayor Gondek and Councillors:

Re: Update on RE&DS' Expansion of 68 Street SE and its Adverse Impacts on Road Users and Westcan Recyclers Ltd.

This letter is further to my March 2022 letter correspondence, a copy of which is attached [TAB 1]. I did not receive any response to that letter, despite the serious concerns set out therein; namely, the City's design and construction of the 68 Street SE upgrade from two lanes to four lanes, the resulting impacts to the safety and operability of Westcan's main accesses on 68 Street SE, the safety risks posed to Westcan's employees and customers and to general users of the road, and the numerous flaws, inconsistencies, and misrepresentations in the City's various proposals for alternative accesses.

As set out in my March 2022 letter, in Spring/Summer 2021, my engineering consultants observed that the City failed to properly construct the intersection of 86 Ave and 68 Street SE in accordance with City standards, as a result of the City's failure to properly centre the new four lanes on the existing 68 Street SE R.O.W. as contemplated in road widening plans registered by the City in 2013 and 2019, as against lands to the east of 68 Street SE. These plans created additional road right of way that was added to the existing 68 Street SE original R.O.W. As a result, no lands from the Westcan Site needed to be obtained, whether via expropriation or otherwise, to satisfy one of the subdivision approval conditions for the 68 Street upgrade, being a required 36 metre R.O.W. distance width.

Despite these land dedications taking place in 2013 and 2019, the road improvements that were designed and ultimately approved and constructed (namely the four new lanes) were not properly centred on the

**8919 68 Street S.E., Calgary, AB, T2C 2X6
Phone (403) 279-6743 Fax (403) 279-6753**

existing 68 Street SE R.O.W. lands as contemplated in the road widening plans, but rather, were aligned as though the portions of land from the eastern boundary of the Westcan Site were in fact, obtained, which they were not. This was identified by Development Approvals in August 2020, who recommended the consultant to accordingly revise the design, as detailed in my March 2022 letter. No such revision was ever done and the road was approved.

The resulting configuration of 68 Street results in the road being disproportionately close to the property line of the Westcan Site and Westcan's two main accesses along 68 Street SE, which in turn, created substantial safety risks to Westcan's employees, customers, contractors and general users of 68 Street SE. Despite relaying these safety concerns to the City in Summer 2021, the City insisted on proceeding with the proposed construction work impacting Westcan's 68 Street main accesses. Accordingly, Westcan's lawyers had to necessarily seek injunctive relief from the Court of Queen's Bench to prevent such construction. An injunction was granted by the Court, first on an interim basis and later, for the entirety of the 2021 construction season (the "2021 Injunction").

The 2021 Injunction restrained the City from all road upgrading and construction work along 68 Street SE adjacent to, and/or in any manner that would impede and negatively impact, Westcan's two main accesses on 68 Street SE for the remainder of the 2021 construction season.

Under the 2021 Injunction, the City was to provide Westcan with a proposal for alternative accesses by October 1, 2021 and for the parties to retain a third party, independent engineer ("**Independent Engineer**") to review and provide comment on the proposal. Following the injunction, the City separately assured in writing to Westcan that it would only proceed with the road if it was safe to do so.

As set out in detail in the March 2022 letter, the City's various iterations of proposed alternative accesses for the Westcan Site have contained numerous flaws, inconsistencies, vehicle misrepresentations and safety risks, including a substantial risk of vehicle collision. Since October 2021, each iteration of the City's proposed design has only contained minor tweaks – none even addressing, let alone solving, Westcan's most serious concerns, nor the overall issue, of providing safe or adequate access for Westcan. Furthermore, since at least Fall 2021, the City has failed or refused to provide pertinent information requested by Westcan's consultants in their review of the City's proposals – such as complete drawing sets, development approval documents, traffic impact assessments for adjacent developments, and issued for construction drawings for the 68 Street SE upgrade, amongst other things. Accordingly, Westcan and its consultants maintained to the City that an Independent Engineer could not be appointed to meaningfully review the proposed design until such relevant information had been provided.

Notwithstanding the concerns set out by Westcan and its engineering consultants, in February 2022, the City advised that it would be commencing construction of the proposed alternative accesses in May 2022. At the same time, the City filed an application to dispense with the requirement of having an Independent Engineer review the proposed alternative accesses, due to alleged timing issues given impending construction and the opening of the adjacent Amazon facilities in late Summer 2022.

Accordingly, Westcan was required to file a further application for injunctive relief, extending the 2021 Injunction. A copy of this application, filed March 28, 2022, is enclosed [TAB 2]. Westcan was also forced to resist the City's application to dispense with the Independent Engineer. Affidavits were exchanged, including from Westcan's consulting experts, Patrick Ryan of Graham Ryan Consulting Ltd., whose alarming findings are already detailed in my March 2022 letter. For unknown reasons, the City chose not to examine me on my affidavits, nor Mr. Ryan, despite him being the only engineering expert who filed evidence from either Westcan or the City.

During his examination on affidavit on April 7 and 8, 2022, the transcripts from which are enclosed [**TABS 3a and 3b**], the City's sole representative, Mr. Jason Rumer, Manager of Development, RE&DS, admitted to having little to no direct or personal knowledge of anything stated in his various affidavits, nor had he had any direct correspondence with the City's consultants, Morrison Hershfield and McElhanney Engineering. Rather, the vast majority of his information came from Mr. James Loran, Project Inspector from RE&DS (*pages 120, 159-160, 212-213 of Jason Rumer's Examination Transcript – TAB 3a and 3b*). For unknown reasons, Mr. Loran did not swear any affidavit on behalf of the City, despite apparently being the primary employee having direct knowledge of the 68 Street upgrade and its impact on Westcan's accesses. Further, while Mr. Rumer admitted that RE&DS had overall responsibility at the City for the 68 Street upgrade, he variably advised throughout his examination that Transportation & Infrastructure and Roads were also responsible (*pages 19-23 of Jason Rumer's Examination Transcript – TAB 3a*). To date, it is still unclear what specific responsibilities or role each department has with respect to the 68 Street SE upgrade. For unknown reasons, despite having apparent responsibilities for the upgrade, nobody from either of Roads or Transportation & Infrastructure swore affidavits either in response to Westcan's injunction application, nor in support of the City's application to dispense with the Independent Engineer.

On April 14, 2022, the Court granted Westcan an indefinite injunction, restraining the City from performing any road upgrading or construction work adjacent to Westcan's main accesses on 68 Street (subject to work being done on the northbound (east) lanes of 68 Street SE), or, in any manner that would impede or negatively impact the 68 Street accesses or Westcan's operations. **In other words, the injunction is indefinite until the Court has been satisfied that the safe and adequate access has been provided to Westcan.** Enclosed is a copy of the signed Court Order [**TAB 4**].

During the Court hearing, without explanation, the City abandoned its position to dispense with the requirement to appoint an Independent Engineer. This was after forcing Westcan to expend substantial time and legal fees to resist that application over several months, all the way up to the actual hearing itself.

The Court ordered that the Independent Engineer be appointed no later than April 25, 2022, to review and provide comments on the revised design being proposed by the City for alternative accesses. During the hearing, the Court advised that Westcan would be provided with sufficient time (which is to be considered and assessed by the Independent Engineer) to re-arrange its Site should the alternative accesses be deemed safe and adequate, prior to the 68 Street main accesses closing.

Accordingly, Dr. John Morrall was jointly retained by the parties to review the proposed alternative accesses, and perform a formal road safety audit. Enclosed is a copy of his retainer letter [**TAB 5**].

Pursuant to the Court Order, on May 24, 2022, the City provided final approved drawings for the proposed alternative accesses, which Westcan's consultants are in the process of reviewing. Westcan is to provide its comments to Dr. Morrall by June 15, 2022. Dr. Morrall has advised that he expects to complete his report at the end of July, as he away from June 13 to July 14. (The City's legal counsel was made aware of Dr. Morrall's planned vacation in advance of agreeing to retain him).

We understand from Westcan's consultants' preliminary review of the final approved drawing set that it continues to fail to address the basic safety concerns that have been repeatedly raised by Westcan and its consultants. Moreover, multiple documents referenced in the drawing set are missing and have had to be requested via undertaking from Mr. Rumer. Westcan is still awaiting receipt of these documents, amongst other relevant information that the City advised it would provide.

Despite the April Court Order for the injunction, and the Court-mandated process to have Dr. Morrall review the proposed alternative accesses, Westcan's legal counsel received two emails from the City's legal counsel on June 1st, advising that construction would be commencing on the proposed alternative accesses the following day, June 2, 2022. Most alarmingly, the third paragraph of the first email indicates that the City intends to pass a closure bylaw by July 5, 2022, permanently and physically closing Westcan's accesses. After being advised by Westcan's legal counsel that this was in direct violation of the April Court Order, the City's legal counsel retracted and "clarified" in a second email that it does not intend to "physically" close Westcan's accesses until the Court is satisfied that Westcan has been provided with adequate alternative accesses and the injunction has been vacated.

However, it would appear that the City still intends to pass the closure bylaw to permanently close the 68 Street main accesses on July 5, 2022, *despite the injunction that is currently in place and despite the Court ordering that Dr. Morrall is to review the safety and adequacy of the proposed alternative accesses*. It appears the City is flagrantly disregarding the intent and terms of the April Court Order by pushing ahead with a bylaw to permanently close Westcan's current accesses before the court-ordered independent expert or court has had a chance to even determine whether the alternative access proposed by the City are safe and adequate. It is my view that the passing of the bylaw in such circumstances would be contrary to the April Court Order.

Shockingly, I have heard that members of RE&DS have been inaccurately representing to Councillors and adjacent development owners that construction is still permitted to proceed along 68 Street SE adjacent to Westcan. This could not be further from the truth, in light of the April Court Order.

As outlined in my March 2022 letter, the design, approvals and construction process for the 68 Street SE upgrade has been *highly* unusual, and deviates significantly from what would normally be required of a private developer, consulting engineer and contractor. One would think that this process would be the same for both RE&DS and a private developer, given that RE&DS "stepped into the shoes" of Walton regarding the various development agreements Walton had with the City concerning Point Trotter. Mr. Rumer admitted this at his examination on affidavit (*pages 210-211 of Jason Rumer's Transcript – TAB 3b*).

In this regard, Mr. Rumer's examination on affidavit, his answers to undertakings [TAB 6], and further examination on answers on undertakings [TAB 7], revealed as follows:

- (a) Mr. Rumer advised that he was not aware of any functional planning study report being prepared for the 68 Street upgrade (*page 30 of Jason Rumer's Transcript - TAB 3a*). This is despite one having been prepared in 2018 for Glenmore Trail East. A functional planning study report determines access and land acquisition requirements from adjacent landowners for municipal infrastructure;
- (b) Mr. Rumer advised that that no issued-for-construction (IFC) drawings were ever issued for the 68 Street SE upgrade, because "there is no requirement for IFC drawings in circumstances where, as here, The City of Calgary's own Transportation Infrastructure department is in charge of building City-owned infrastructure on City-owned lands" (*Jason Rumer's Answer to Undertaking No. 1 – TAB 6*). It is unclear how the City's engineering consultant or the construction contractor were permitted to proceed in the absence of IFC drawings being issued. I am advised by multiple engineers that this is highly unusual and deviates from standard engineering requirements. Furthermore, I have enclosed what appears to be a photo of an IFC drawing for the 68 Street Expansion from the City's Field Surveying Services [TAB 8]. Accordingly, it is entirely unclear as to whether

there is an IFC set of drawings and if so, why RE&DS would represent to Westcan that there was no IFC drawings, and if not, why construction was permitted to proceed.

- (c) I have been advised that a consulting engineer for a private developer is required to apply for, and obtain, a Permission to Construct Surface Improvements from the City prior to construction commencing. Such permission is not to be issued until after final approval of the drawings. This was admitted by Mr. Rumer (*page 333 of Jason Rumer's Transcript – TAB 7*). However, Mr. Rumer advised that no Permission to Construct Surface Improvements document was issued prior to construction commencing for the 68 Street SE upgrade, or at any time, for the same reason that no IFC drawings were issued – because the Transportation Infrastructure department is in charge of building City-owned infrastructure on City-owned lands (*Jason Rumer's Answer to Undertaking No. 7 – TAB 6*). However, at his examination on answers to undertakings, Mr. Rumer admitted this was incorrect and provided two Permission to Construct Surface Improvements ("PCSI") documents for the 68 Street SE upgrade (*pages 325-326 of Jason Rumer's Transcript – TAB 7, see also enclosed PCSI documents – TAB 9*). The first PCSI document provided is dated December 27, 2017, which pre-dates the June 2020 drawings that governed construction of the 68 Street SE upgrade. Accordingly, it is entirely unclear which approval drawing set was being reviewed in issuing the PCSI document. Mr. Rumer did not know himself (*pages 328-330 of Jason Rumer's Transcript – TAB 7*). Furthermore, the permission expired December 2018, *prior* to construction commencing on the 68 Street SE upgrade. At his examination, Mr. Rumer was unaware if any extension of the PCSI was sought or received (*page 331-332 of Jason Rumer's Transcript – TAB 7*). A further PCSI document was ever not issued until May 11, 2022. Accordingly, it appears that no permission to construct surface improvements was granted for the June 2020 drawings, being the drawings that the City says governed construction of the 68 Street SE upgrade (*see Jason Rumer's Answer to Undertaking #1 – TAB 6*). Such construction largely took place between 2020 and 2022;
- (d) Mr. Rumer advised at his examination that the four lane upgrade was not centred on the existing 36 metre R.O.W. contemplated on the 2013 and 2019 road widening plans for lands to the *east* of 68 Street SE due to various considerations, including the location of the existing wetland, existing overhead power lines, and the bridge over the canal. As stated earlier above, the resulting configuration of 68 Street results in the road being disproportionately close to the property line of the Westcan Site and Westcan's two main accesses along 68 Street SE, which in turn, resulted in the substantial safety risks giving rise to the initial injunction. *This could have been entirely avoided had the City simply acquired a portion of Westcan's lands instead, whether via expropriation or otherwise.* To date, it has refused to do so and up until mid-April 2022, the City repeatedly insisted over the course over 1.5 years that it did not require any of Westcan's R.O.W. to complete the 68 Street SE upgrade. It was only when engineering drawings for the proposed accesses were put to Mr. Rumer during his examination in April 2022, indicating that the Ultimate 68 Street R.O.W. was **inside** Westcan's property line, that he admitted that Westcan's R.O.W. will be required "in the long term" to complete the upgrade. He admitted that the City has not indicated when it plans to do so (*page 373 of Jason Rumer's Transcript – TAB 7*). Mr. Rumer did not know who or what assumptions were given to the City's engineering consultant, if any, with respect to the ultimate 68 Street SE R.O.W. (*pages 375-378 of Jason Rumer's Transcript – TAB 7*).

Further, as indicated above, since October 1, 2021, Westcan and its consultants have made various requests for pertinent pieces of information so as to properly assess the safety and adequacy of the design. This process has been needlessly drawn out and made unnecessarily difficult due to the City's arbitrary refusals or delays in providing such information. The following are just a few examples of relevant and material information that was requested, and either not provided at all, or not provided in any timely manner, or provided entirely deficiently, by the City:

- (a) Westcan requested traffic impact information regarding adjacent developments, as increased traffic volume will obviously have an impact on the safety and adequacy of the proposed alternative access(es). The City refused to provide such information, on the basis of it being irrelevant. This is despite the fact that Mr. Rumer acknowledged in his examination that the information in traffic impact assessments speaks to the safety and adequacy of impacted roads (*page 205 of Jason Rumer's Transcript – TAB 3b*) and that increased traffic could have an effect on the safety and adequacy of accesses (*page 209 of Jason Rumer's Transcript – TAB 3b*). Mr. Rumer advised that RE&DS made no attempts to obtain or review the requested traffic impact information from the relevant business unit within the City, being Transportation and Infrastructure, as "it was not the place of RE&DS to make that request" (*page 210 of Jason Rumer's Transcript – TAB 3b*). The City appears to pick and choose the situations in which it is acting as a land developer versus a municipal regulator when it suits them.
- (b) This of course is an issue that affects not only Westcan. Even though the entire Section 23 development area is clearly directly affected by the new Amazon "Project Violin" facility, it was inexplicably excluded from the Facility's traffic impact assessment.
- (c) The City did not even address, let alone resolve, Westcan's concerns with respect to the significant 1m grade differential between the curb of expanded 68 Street and Westcan's Property at the North 68 Street Main Access, and the risk of a rollover occurring, until Mr. Rumer's examination in April 2022, despite this issue having been raised repeatedly in Westcan's reports since July 2021 (*pg 232-234 of Jason Rumer's Transcript – TAB 3b*).
- (d) Similarly, despite Westcan raising concerns about an inadequate culvert installed at the 86 Ave Access as early as November 2021, the City only advised in April 2022 that the design of the culvert was under review by Development Approvals;
- (e) The February 2022 drawing set for the proposed alternative accesses is stamped and signed by the City's consultant, Morrison Hershfield, but is not indicated in the Revision Block in any further iterations of the design that were issued. Further, the February 2022 drawing set, which the City initially advised was being sent for final approval and would govern the intended construction, was missing various drawings which appear in subsequent iterations of the design, such as turning templates into and out of the Westcan Site. Mr. Rumer had no explanation at his examination as to why such drawings, which are also dated February 2022, were excluded from the February 2022 drawing set or were otherwise not provided to Westcan for review.
- (f) In its first iteration of the Proposed Design, the City's consultant, Morrison Hershfield, used a WB-23 for its sweep paths, indicating that all turns could be successfully done on the road access designed. It was only after Westcan's consultants pointed out that WB-23 is not the correct City standard that the City eventually provided revised drawings on

December 21, 2021, this time using the standard WB-21 for the sweep paths. Those December drawings, and the recent iterations of the Proposal, show that, contrary to what was shown to be the case in the City's and Morrison Hershfield's October 1st drawings, a WB-21 cannot in fact turn right (southbound) from 86 Ave to 68 Street. Rather, as identified by Morrison Hershfield, and later by McElhanney (the City's other consultant), a 5 m by 6 m portion of Westcan's lands is needed to be acquired in order for a standard truck to make this turn. Mr. Rumer said in his examination on affidavit that he personally knew about this issue about the inability of standard trucks to turn south onto 68 Street from 86 Ave since July 2021, yet inexplicably failed to tell Westcan about this (pgs 140-142 of Jason Rumer's Transcript – TAB 3a).

The City's conduct to date in designing and constructing the 68 Street upgrade, including its interactions with Westcan and its proposals for alternative accesses, have been completely at odds with the City's goal that "all community members are encouraged and able to participate in a diverse and strong economy", under the City's Resilient Calgary strategy, Pillar 1: The Future of Calgary's Economy, the relevant portions of which are enclosed [TAB 10]. Of particular note is the following excerpt from this publication:

Our City can also strengthen resilience through business continuity. Small/midsize businesses and non-profit organizations contribute to Calgary's economy and vibrant communities. However, they are vulnerable groups who have limited resources to deal with prolonged shocks. Our economic resiliency improves when these groups are prepared to survive and thrive during and after disruptions.

Contrary to this goal, it is clear that the City has taken an obstinate, "scorched earth" approach to these issues, creating excessive amounts of work on the part of Westcan and its consultants through its lack of transparency and its inability to properly design safe and adequate accesses, with little to no regard to economics or good faith. Despite being in an perpetual informational vacuum, Westcan has made tremendous efforts over the last 7 months to provide comments to the City from its engineering consultants in relation to each of its design iterations for the alternative accesses, which have consistently either not been up to City Standard, or have been missing information, or are unsafe, or inadequate and non-viable for Westcan's extensive recycling operations. I have been forced to spend hundreds of thousands of dollars to date investigating and exposing the improper steps taken by the City and its forced road design, which have either been continuously validated by the Court, and/or, conceded by the City at the 11th hour at the various court applications or examinations on affidavit.

Even if the City is ever able to provide safe and adequate alternative access to Westcan, Westcan will still have to significantly reconfigure its Site and entirely alter its extensive commercial operations in order to be able to utilize any proposed access at 90 Ave and the existing 86 Ave Access. These site reconfigurations, if possible at all, would require significant advance planning in order to allow for permitting, physical organization of the site, arranging for sufficient personnel and required crane rentals, and difficult supply chain issues. Without significant advanced planning, Westcan risks breaching its contractual obligations and harming its well-earned commercial reputation as a dependable service provider with some of its largest industrial customers. None of this evidence, which is included in my March 2022 Affidavit, a copy of which is enclosed [TAB 11], was challenged or refuted by the City. Further, numerous operational inefficiencies and concerns will arise in having to utilize the proposed access at 90 Ave and the existing access at 86 Ave, and approximately 2 acres of land will effectively be lost, out of the total of 7 acre parcel that is the Westcan Site, in order to accommodate the site reconfigurations, which will compel Westcan to significantly downsize its operations. Again, this evidence was never even

challenged or refuted by the City. The necessary site configurations, and resulting concerns and impacts on Westcan's operations, are detailed at pages 17-19 of my March 2022 Affidavit.

After over a year and a half of denials, the City has only very recently admitted that it will ultimately require Westcan's R.O.W. to complete the 68 Street SE upgrade. Mr. Rumer has not advised when this will take place. Should the portion of land be acquired, Westcan's office will need to be torn down to accommodate the 90th Ave Access. Accordingly, I do not know how I will be able to entirely re-configure the Westcan Site to accommodate the alternative access at 90 Ave, without knowing if or when that further portion of land will be acquired.

I am seriously concerned about the harm this will have on Westcan's operational viability and commercial reputation, let alone the out of pocket of expenses that have been spent to date, and that will need to be spent to entirely re-configure Westcan's site and downsize its operations, which will inevitably result in loss of employees. Further, Westcan's site cannot reasonably be re-configured until water is properly contained by neighbouring properties by Water Resources, as it currently drains into Westcan's Site. There is no stormwater containment on any adjacent properties. We have not heard back from Water Resources with respect to a remedy for this.

The City's handling of this matter raises so many fundamental and important questions. For example, as iterated in my March 2022 letter, who were the approving authorities that allowed for basic elements of this road design and construction to be overlooked? How did this road receive approval to be constructed as it has been? How was construction of this major infrastructure project allowed to proceed, in the absence of IFC drawings and Permission to Construct Surface Improvements? What scope did the City provide to Morrison Hershfield in designing the road in 2020, and in designing proposed alternative accesses for Westcan? Why did the City repeatedly advise Westcan throughout 2021 and early 2022 that it did not require its R.O.W. to complete the 68 Street SE upgrade, when the engineering drawings indicate the ultimate 68 Street SE R.O.W. as being inside Westcan's property line? Why did the City only acknowledge in April 2022 that Westcan's R.O.W. will ultimately be required to complete the 68 Street SE expansion? Why has the City refused to acquire that property to date? Why is the City acting as if the April Court Order for the injunction is not in place? What has Council been advised of in this regard by RE&DS?

This all leads to the question as to what else has been overlooked in the design and construction of not only this road, but also others, and the safety to its users and to business owners that are to be serviced by it. Most Calgary taxpayers do not have the time and resources to spend on engineering consultants and lawyers to warn the City of safety issues and design/construction flaws that it has created and/or approved. I am gravely concerned about RE&DS' self-interest in having certain developments be completed, regardless of identified safety risks, and the ability of the City to properly carry out its independent function as an approving body and municipal regulator. I do not believe any of this would have been allowed to occur had an independent developer been involved, instead of RE&DS. It appears to me that it was only by making unfounded assumptions, altering the typical approvals process, and restricting the scope of the engineering enquiries, that the 68 Street SE upgrade, and the unsafe alternative accesses now being unilaterally imposed on Westcan, could have been approved.

I am confident that the Independent Engineer jointly appointed by the City and Westcan pursuant to the April Court Order will reach the same conclusions that Westcan and its various consultants have identified and communicated to the City over the last 10 months. The City needs to wait to see what the independent consultant says about the safety and adequacy of its accesses before passing any bylaw. Enough is enough. The City needs to listen and respond to these concerns and not simply disregard findings of qualified experts and the Court itself and let RE&DS "handle it". This whole issue needs to be

made much more transparent and not simply “quarantined” within the RE&DS department. The affected parties need to be consulted and made aware of what is happening in Section 23 along 68 Street, and matters should not merely be shuffled under the rug of a different City department.

I would kindly request the courtesy of a substantive response from a City Councillor about these issues, and for you to make relevant inquiries to have these concerns with RE&DS and Transportation Infrastructure reviewed and addressed as soon as possible.

Yours truly,

WESTCAN RECYCLERS LTD.

Per:

A handwritten signature in black ink, appearing to read "S. Dimant", written over a circular scribble.

Steve Dimant



The City of Calgary

LAND USE PLANNING & POLICY (LUPP) #8117

2012 February 16

Our File: SB2010-0467

Arlin Amundrud
MORRISON HERSHFIELD LTD.

RE: Subdivision Application for	10762 68 ST SE	4;29;23;13;NW
	10762 68 ST SE	4;29;23;13;NW
	7295 106 AV SE	4;29;23;13;NW
	7295 106 AV SE	4;29;23;13;NW
	7307 106 AV SE	4;29;23;13;NW&4;29;23;1
	7307 106 AV SE	4;29;23;13;NW&4;29;23;1
	9220R 68 ST SE	9412550;L
	9620 68 ST SE	4;29;23;24;SW
	9620R 68 ST SE	4;29;23;24;SW
	9717R 84 ST SE	4;29;23;24;SW&4;29;23;2

The subject application was approved on February 16, 2012. The approval is valid for one year.

Any of the conditions of the subdivision approval may be appealed. An appeal along with reasons must be submitted, together with payment of \$25.00 fee, to the Subdivision and Development Appeal Board (4th floor, 1212 31 Ave N.E., Calgary T2E 7S8) within 14 days of receipt of this letter. An appeal may also be filed online at www.calgary.ca/sdab/onlineappeal. To obtain an appeal form, for information on appeal submission options or the appeal process, please call (403) 265-5312.

In order to obtain separate titles, submit all the required plan(s) for Endorsement using the City's online application process. The digital file of the subdivision (PDF and DWG formats), and addressing plan (PDF format), must be prepared by an Alberta Land Surveyor.

After the linen has been endorsed by the Subdivision Authority, your surveyor will be contacted to pick it up for registration at the Land Titles Office.

If you have any questions, please contact me at (403) 268-5446.

Yours truly,

Jill Thomson
File Manager

enclosures



The City of Calgary

LAND USE PLANNING & POLICY (LUPP) #8117

Address Listing for SB2010-0467

Address : 10762 68 ST SE

Legal : 4;29;23;13;NW

Address : 10762 68 ST SE

Legal : 4;29;23;13;NW

Address : 7295 106 AV SE

Legal : 4;29;23;13;NW

Address : 7295 106 AV SE

Legal : 4;29;23;13;NW

Address : 7307 106 AV SE

Legal : 4;29;23;13;NW&4;29;23;13;NE

Address : 7307 106 AV SE

Legal : 4;29;23;13;NW&4;29;23;13;NE

Address : 9220R 68 ST SE

Legal : 9412550;L

Address : 9620 68 ST SE

Legal : 4;29;23;24;SW

Address : 9620R 68 ST SE

Legal : 4;29;23;24;SW

Address : 9717R 84 ST SE

Legal : 4;29;23;24;SW&4;29;23;24;SE



The City of Calgary

CORPORATE PLANNING APPLICATIONS GROUP APPLICATION FOR SUBDIVISION APPROVAL

REGISTERED OWNER(S) OF LAND TO BE SUBDIVIDED APPLICATION NO: SB2010-0467

WALTON INTERNATIONAL GROUP INC..
2300 605 5 AVE SW
CALGARY AB CANADA T2P 3H5

THE CITY OF CALGARY..
PO 2100 Station M
CALGARY AB CANADA T2P 2M5

THE CITY OF CALGARY..
PO 2100 Station M
CALGARY AB CANADA T2P 2M5

THE CITY OF CALGARY..
PO 2100 Station M
CALGARY AB CANADA T2P 2M5

THE CITY OF CALGARY..
PO 2100 Station M
CALGARY AB CANADA T2P 2M5

WALTON INTERNATIONAL GROUP INC..
2300 605 5 AVE SW
CALGARY AB CANADA T2P 3H5

WALTON INTERNATIONAL GROUP INC..
2300 605 5 AVE SW
CALGARY AB CANADA T2P 3H5



THE CITY OF CALGARY

Corporate Planning Applications Group (CPAG) Conditions of Approval – Subdivision by Plan

Application #: SB2010-0467
Section #: 24SE
Existing Use: Agricultural
Proposed Use: Commercial
Site Address: 9620, 9620R, 10120 and 10762 68 Street SE; 7295 and 7296 106 Avenue SE; 7307 and 7308 106 Avenue SE; 9717R 84 Street SE
Related Files: LOC2008-0046
Community: East Shepard Industrial
Applicant: Morrison Hershfield Ltd.
Review Date: 2012 February 15
DTR1 2011 March 09 , DTR2 2011 November 17 , DTR3 2012 February 14 , DTR4 2012 February 15

CPAG Team:

LUPP - Subdivision Services	Jill Thomson 403-268-5446
Urban Development	Ben Smith (403)-268-6779
Parks	Kent Morelli 403-268-5635
Transportation	Dan Doupovec 268-2849

This review is based on the application(s) and plans received 2011 January 03.

The review is an evaluation of the application(s) to determine compliance with the Municipal Government Act, the Planning and Development Regulations, the Land Use Bylaw and applicable City of Calgary policies. Any variance from the above noted legislation, regulations, or policies will require further discussion and/or revision prior to a decision for approval or refusal by the City of Calgary on the proposed application.

Applicants are encouraged to contact the respective team members to resolve outstanding issues identified. Revisions to the proposed plans should not be submitted until the City is able to provide comments from all circulation referees.

If you have questions or concerns, please contact me at 268-5446.

Yours truly,

Jill Thomson 403
File Manager

P.O Box 2100 Stn. M, Calgary, Alberta T2P 2M5

Conditions of Approval

The City of Calgary has the authority, granted by Section 656 of the Municipal Government Act to approve or refuse a subdivision application, subject to conditions outlined in Section 655 of the Municipal Government Act.

The conditions listed below comprise the conditions of approval of the subdivision. These conditions will form the basis of the decision by the Subdivision Authority and can be appealed by the applicant to the Subdivision and Development Appeal Board.

The conditions that need to be addressed prior to the endorsement of the final instrument by the City and conditions that are to be addressed concurrent to the registration of the final instrument have been identified and listed first.

Prior to Endorsement Conditions

1. The payment in lieu of reserve dedication as approved by the Calgary Planning Commission shall be received in full, **prior to endorsement of the final instrument**. Payment must be in the form of a bank draft or certified cheque made payable to the City of Calgary, and shall be submitted directly to the File Manager.

Concurrent with Registration Conditions

2. A deferred reserve caveat in the amount of 0.370 ha shall be registered on Area "L" Plan 941 2550 title number 011 319 105 **concurrent with the final instrument**.
3. A deferred reserve caveat in the amount of 0.51 ha shall be registered on SW1/4 Sec 24, Twp 23, Rge 29 W4M title number 111 041 888 **concurrent with the final instrument**.
4. A deferred reserve caveat in the amount of 1.90 ha shall be registered on SW1/4 Sec 24, Twp 23, Rge 29 W4M title number 811 098 986 **concurrent with the final instrument**.
5. A deferred reserve caveat in the amount of 2.29 ha shall be registered on S1/2 Sec 24, Twp 23, Rge 29 W4M title number 101 063 882 **concurrent with the final instrument**.
6. A caveat Re: Restrictive Covenant shall be registered on Lots 10-16, Block 1 and Lots 8 and 9, Block 8, **concurrent with the final instrument** to prohibit vehicular access to Stoney Trail SE.
7. Access to 68 Street SE is restricted to right turns in and out only. Restrictive covenants shall be registered **concurrent with the registration of the final instrument** on Block 1, Lots 1 and 2; Block 2, Lots 6-8; and Block 3, Lots 1, 11 and 12 adjacent to 68 Street SE restricting vehicular access to right turns in and out only.

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8. A restrictive covenant shall be registered on Lots 2, 6 and 15, Block 1; Lots 1, 8, 12 and 16, Block 2; Lots 1 and 7, Block 3, and Lot 9 Block 8 **concurrent with the final instrument** prohibiting vehicular access across the bus loading area.
9. MPL 2011-0067 creating 68th Street road widening is to be registered, **concurrent with the final instrument**.

Conditions of Approval

Urban Development:

10. Prior to Release of any permits or Permissions to Construct, the Developer shall enter into a Construction Access Roads Agreement with Roads Maintenance.
11. Prior to issuance of Building Permits, off-site watermains are required to be installed within 90th / 94th AV SE from an existing connection on 60th ST and 90th AV SE. This watermain shall continue east to 68 ST SE then connect south (under the WID canal) to the Point Trotter Development or an alternative servicing to the satisfaction of Water Resources.
12. Any proposed backsloping or surface disturbance of T.U.C lands requires Ministerial consent from the Province of Alberta.
13. The developer is responsible for decommissioning and abandonment of all water wells located on the subject property according to the Alberta Water Act - Water Regulation (AR205/98). The City of Calgary does not inspect, approve, manage or regulate the decommissioning and abandonment of water wells.
14. The developer is responsible for the decommissioning and abandonment of all private sewage systems located on the subject property. The City of Calgary does not inspect, approve, manage or regulate the decommissioning and abandonment of private sewage systems.
15. Development of this site will be subject to the terms and conditions of a Subdivision Development Agreement(s).
16. Prior to Stripping and Rough Grading approval, an erosion and sedimentation control plan for the site is to be submitted to the Urban Development Business Unit for review and approval.
17. The developer shall make satisfactory cost sharing arrangements with 764916 Alberta Ltd for part cost less any payment of oversize for the existing storm sewer, sanitary sewer, and water mains installed in 68 Street SE which crosses the Canadian Pacific rail right-of-way shown on Plan RY11, on a per hectare contributing basis, installed as part of the East Shepard Industrial Park Phase 2 development (2006-002).
18. The developer, at its expense but subject to normal oversize, endeavor to assist and boundary cost recoveries, will be required to:

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- a) Install any offsite sanitary sewers, storm sewers and water mains and construct the offsite temporary and permanent roads required to service the Land Use Redesignation and Outline Plan Area. The Applicant will be required to obtain all rights, permissions, easements or rights-of-way that may be required to facilitate these offsite improvements;
 - b) Construct any Storm Water Retention/Sedimentation Ponds and associated storm water management facilities required to service the Outline Plan Area to the satisfaction of the Manager, Urban Development and in accordance with current City policy on storm water wet/dry pond construction;
 - c) Install the underground utilities subject to oversize and endeavour in 68 Street SE from the south boundary of the Outline Plan Area northward to the irrigation canal;
 - d) Construct the irrigation canal bridge crossing with no recovery;
 - e) Construct the full width of the four lane divided roadway in 68 ST SE (36 metre R.O.W) from the south boundary of the Outline Plan Area northward to the irrigation canal, subject to oversize on the full width and boundary cost recoveries on the westerly two lanes, less the payment of oversize;
 - f) Construct the full width of the four lane divided roadway in 68 Street SE (36 metre R.O.W) from the irrigation canal northward to Glenmore Trail SE, subject to oversize on the full width and endeavour to assist cost recoveries on the full width of the roadway, less the payment of oversize;
 - g) Construct signals at the intersection of 68 Street SE and 100 Avenue SE, together with a 60 metre southbound left turn lane.
 - h) Construct a dedicated 60 metre southbound left turn lane at the intersection of 68 Street SE and 106 Avenue SE;
 - i) Construct a dedicated 60 metre southbound left turn lane at the intersection of 68 Street SE and 107 Avenue SE;
 - j) Install the underground utilities and construct the surface improvements, in 72 Street SE and in 74 Street SE;
 - k) Construct the regional pathway within and along the boundary of the Outline Plan area;
 - l) Pay a deposit to The City of Calgary for the cost of storm sewer, sanitary sewer, and water mains, and surface improvements from the boundary of the Outline Plan area to the projection line of the TUC, plus an additional 20 metres for half of the TUC crossing, at unit rates in effect in the Development Agreement;
 - m) Rehabilitate any public and private lands, and any landscaping or infrastructure by and during construction.
19. The developer, at its expense, but subject to cost recovery through the special Clauses Agreement/Master Development Agreement, as a condition of initial Tentative Plan or

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Development Permit approval, whichever comes first:

- a. Construct the intersection of 68 Street SE and Glenmore Trail SE with the following improvements:
 - i. Eastbound dual left turns (60 metres per lane)
 - ii. Eastbound right turn lane (30 metres)
 - iii. Westbound dual left turn (140 metres per lane)
 - iv. Westbound right turn lane (60 metres)
 - v. Northbound dual left turns (110 metres per lane)
 - vi. Northbound right turn lane (60 metres)
 - vii. Southbound dual left turn lanes (195 metres per lane)
 - viii. Southbound right turn lane (30 metres)
 - b. Construct 68 Street as a divided major street (36 metre R.O.W.) from Glenmore Trail to 100 Avenue SE.
 - c. Rebuild the intersection of 68 Street and 84 Avenue SE shall be rebuilt to current City standards.
 - d. Rebuild the intersection of 68 Street and 86 Avenue SE shall be rebuilt to current City standards.
 - e. Rebuild the intersection of 68 Street and 90 Avenue SE shall be rebuilt to current City standards.
 - f. Install any other necessary utility upgrades require for the above improvements.
 - g. Construct the 68 Street SE bridge crossing the WH Canal as a 4 lane divided major to the satisfaction of Calgary Roads; and any other necessary utility upgrades required for the above improvement.
 - h. Construct the west side of 68 Street SE from the WH Canal to the southerly Outline Plan boundary.
 - i. Construct the east side of 68 Street SE along the western edge of the existing I-O parcel located south of 100 Avenue SE.
20. The developer, at its expense, but subject to cost recovery from off-site levies under the offsite levy Bylaw, as a condition of approval of the initial Tentative Plan or Development Permit, whichever comes first:
- a. Obtain the necessary right-of-way for the improvements identified under Condition No. 11;
 - b. Pay all administrative, land acquisition and legal costs, including possible expropriation of all additional right-of-ways required for the necessary off-site infrastructure improvements.
21. Utility easements shall be provided as required; and a utility right-of-way plan and an

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accompanying City of Calgary General Utility Easement document be registered concurrent with the final instrument;

22. Servicing arrangements shall be to the satisfaction of the Manager, Urban Development.
23. The developer shall develop the parcels in accordance with the recommendations outlined in the Geotechnical Report, prepared by McIntosh Lalani Engineering Ltd. (File No. ML3767), dated February 2008;
24. A 0.6 metre easement shall be registered on properties fronting the regional pathway where there isn't the required 1 metre spacing between PL and pathway.

Transportation:

25. Access location and design for all subdivided parcels will be to the satisfaction of the Director, Transportation Planning.

Parks:

26. The developer shall ensure that all site grading matches the grades of adjacent S-SPR/MR lands to the satisfaction of the Director of Calgary Parks.
27. The applicant shall strictly comply with the provisions of the *Wetland Compensation Agreement*. Each obligation therein shall constitute: (i) a specific condition of subdivision or development approval which shall be enforceable under the *MGA* and (ii) a condition of the *Water Act* approval which shall be enforceable under the *Water Act* (Alberta).
28. Until receipt of the *Water Act* approval by the applicant from Alberta Environment, the wetland(s) shall not be developed or disturbed in anyway and shall be protected in place.

Advisory Comments

The following advisory comments are provided by the City of Calgary as a courtesy to the applicant and property owner. These comments will not form the basis of the decision to approve or refuse the proposed subdivision application. They are simply provided for information purposes.

Urban Development:

29. Gravelled and oiled turnarounds are required for all temporary dead end streets. Post and cable fence is required where the temporary turnaround is anticipated to be required for a period greater than 1 year.
30. Superelevation is required on all major- and collector-standard roads.
31. All intersection angles shall be minimum 75 degrees.
32. All intersections shall be designed to the appropriate City standard and to the satisfaction of Calgary Roads.

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33. Submit a geotechnical soil stability report for slopes exceeding 15 %.
34. Prior to acceptance of any construction drawings in the plan area, a Stormwater Management Report is required. The Stormwater Management Report is to illustrate the overall stormwater management plan for the entire plan area and should include areas upstream that currently drain to the area. Refer to Water Services' currently applied Stormwater Management and Design Manual for details.
35. The existing lot has a single set of services connections from the public mains in the adjacent road. The proposed subdivision will require a set of service connections for **each lot** as per Alberta Building Code. Contact the Construction Services Estimator with Water Services at either 403-268-5006 or 403-268-5739 for further details.
36. A dual 250mm looped main is required (since more than 1 hydrant will be needed) on 104 Av SE. However, if only a single main instead of said dual main can be installed, a 9m UR/W must be registered within proposed lot 11 of Block 3 to accommodate a 250mm main to link proposed 250mm main on 104 Av SE to proposed 400mm main on 68 St SE.
37. If during construction of the development, the developer, the owner of the titled parcel, or any of their agents or contractors becomes aware of any contamination,
 - a. the person discovering such contamination shall immediately report the contamination to the appropriate regulatory agency including, but not limited to, Alberta Environment, Alberta Health Services and The City of Calgary (311).
 - b. on City of Calgary lands or utility corridors, the City's Environmental Assessment & Liabilities division shall be immediately notified (311).

Parks:

38. Class I and Class II wetlands are not considered ER in accordance with the provisions of the City of Calgary's *Calgary Wetland Conservation Plan* and are subject to separate approvals between the applicant and Alberta Environment, at the applicant's sole cost and expense, for which The City of Calgary has no responsibility. The applicant shall be solely responsible to obtain any other approvals or permits which may be required from another government authority, including Alberta Environment, in order to impact or develop any wetland(s).

OCTS



1. 86 Avenue - No ability to make south turn for WB-21 on 68th South using City Standard Design Vehicle
2. OCTS and Yellow Dog Trucking(Green) Yellow Dog Trucking within 50 meters of each other. B&R Eckel's a large trucking operation within 50 meters of Yellow Dog. These trucking operations will heavily supply Point Trotter and Dufferin Developements
3. Are all of these businesses aware of the construction and that they will be losing their ability to turn south from 86 Ave onto 68 Street?
4. Has REDS considered this amount of traffic, which is to now be re-routed to 90th? REDS has insisted they will put up a sign.

Point Trotter Off-Site Improvements – Access Bylaw for 8919 68 Street SE IP2022-0145

June 10, 2022


Recycling Calgary Landfill

592301 Alberta Ltd.

South City Truck Centre

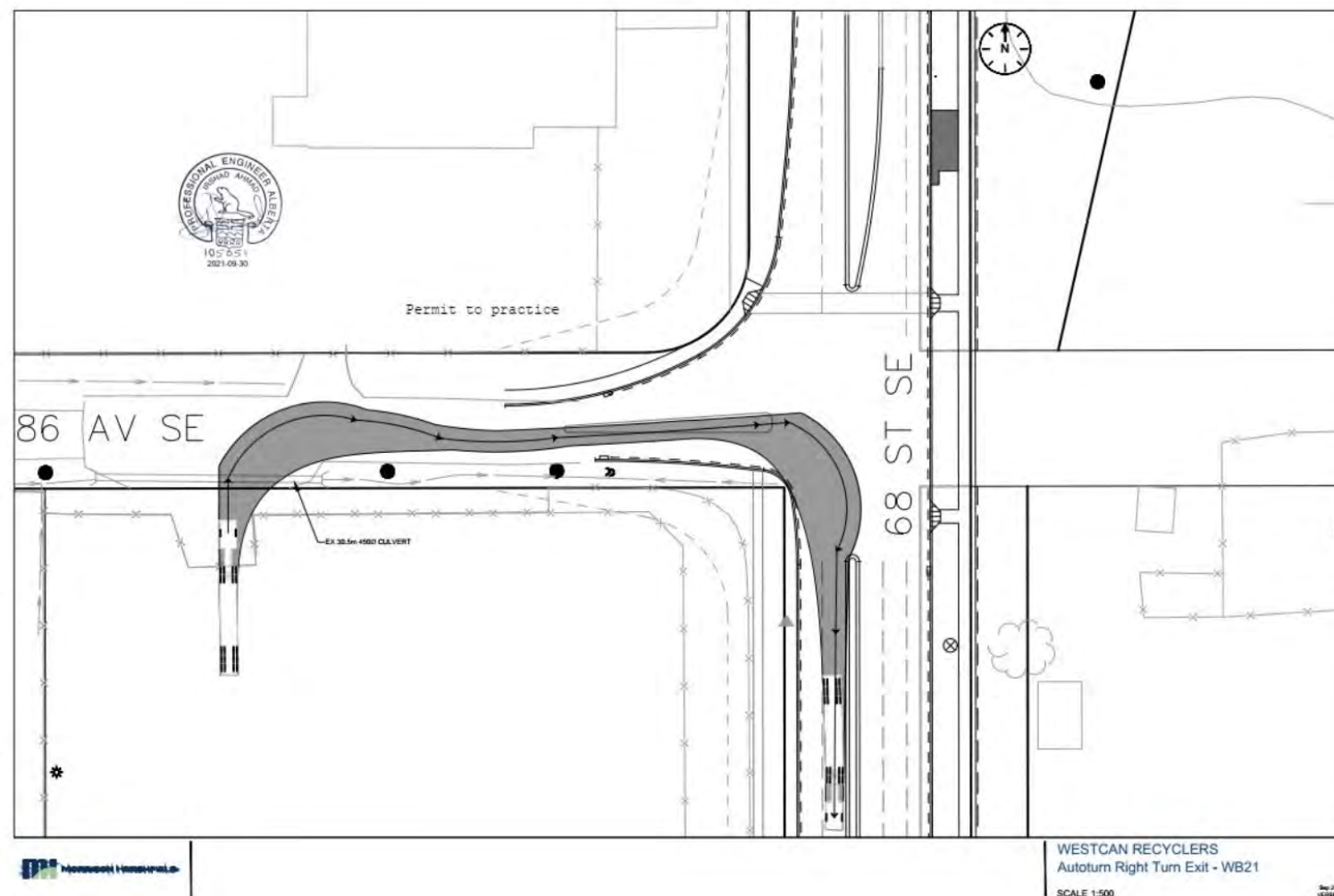
IP2022-0145
Attachment 6

OCTS

- 
5. All Adjacent properties(Highlighted) have no stormwater containment.
 6. Wood and LGN studies provided by City make the assumption stormwater is managed on site. Water Flow in Section 23 is West-East. All properties drain into Westcan Property
 7. Recycling Calgary(Landfill) is releasing runoff at multiples above Alberta Environment Guidelines (with no containment). Test Results were provided to Sarah Ferguson and requested to be provided to Waste and Recycling and Water Resources who had requested this Data and other data when they were onsite for a unscheduled Drop-in Site tour.

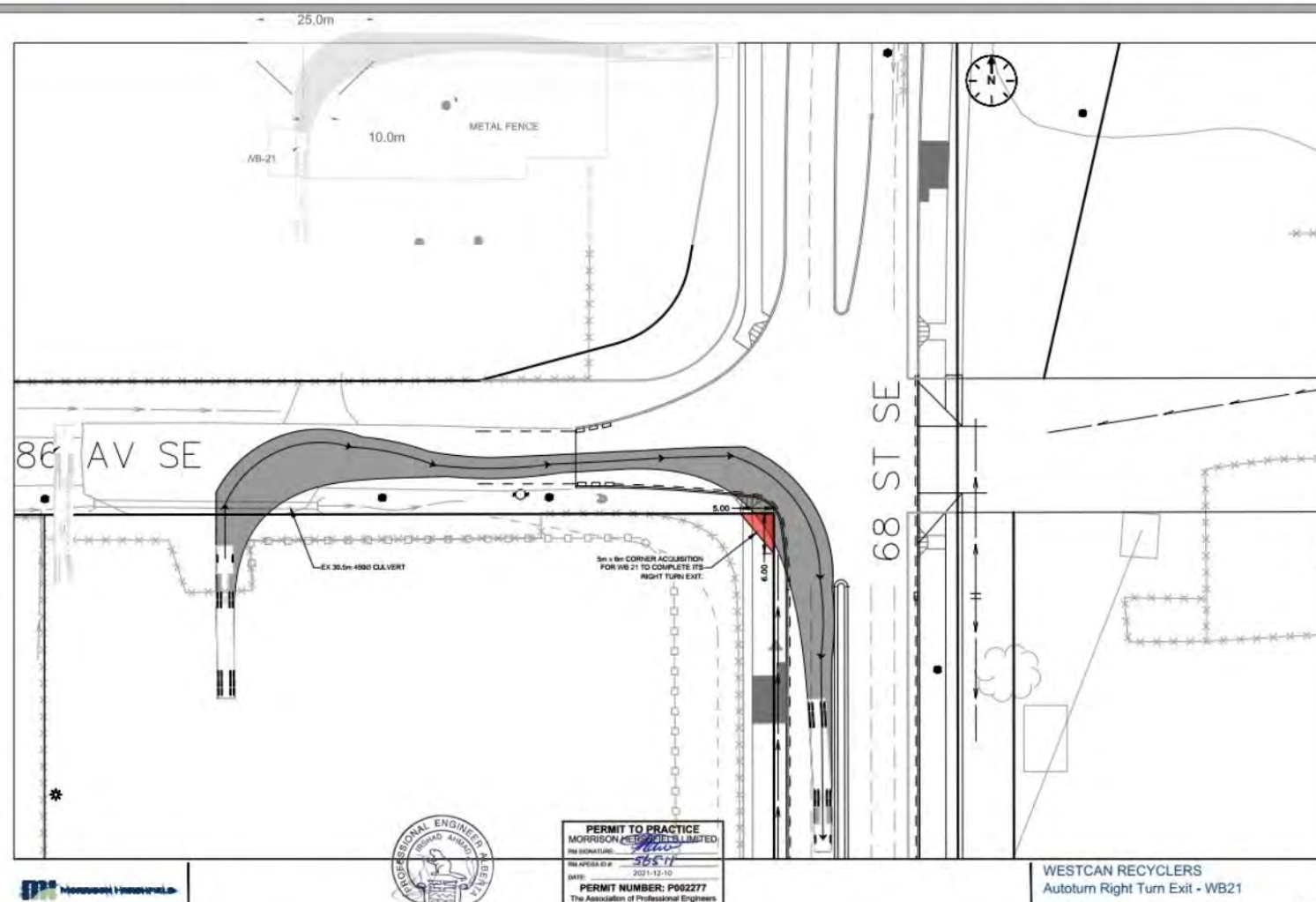
Point Trotter Off-Site Improvements – Access Bylaw for 8919 68 Street SE IP2022-0145

June 10, 2022



Sept 30, 2021

It took several months for the City to admit, after being identified by Westcan's consultants, that the City's Final Design, a City Standard Design Vehicle (WB-21) cannot make right turns from 86 Ave onto 68 Street, without taking a corner parcel of Westcan's Site (red corner portion). See Sept 2021 drawing vs. Dec 2021 drawing.



Dec 10, 2021

There is still no signage at 86 Ave intersection to indicate that this is a no-large trucks turn.

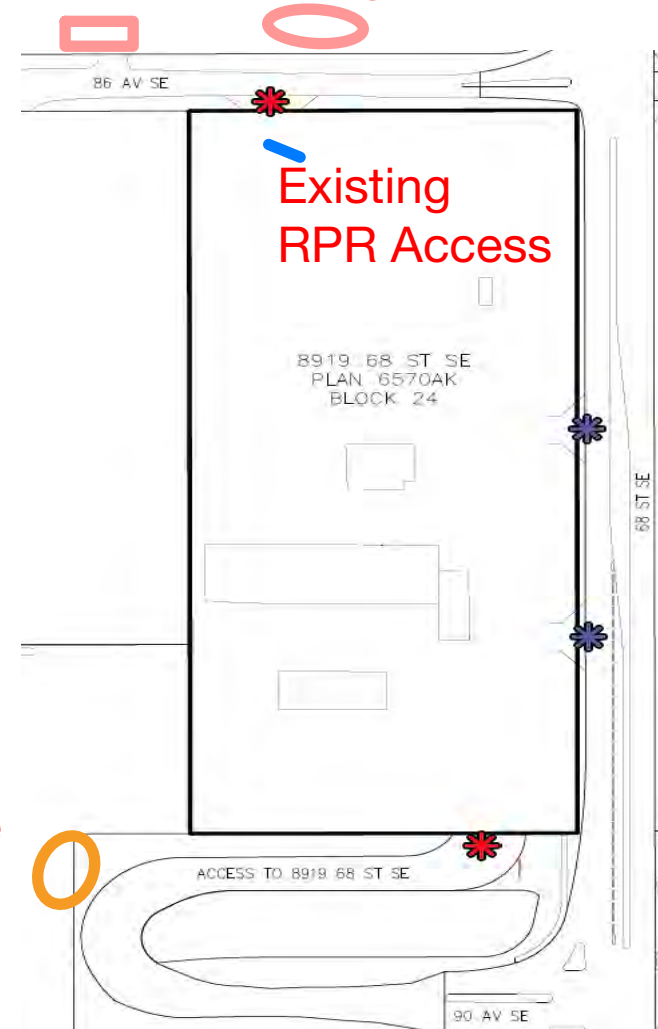
Westcan's consultants have also identified a substantial risk of collision at the proposed 90 Ave serpentine road. We expect this to similarly be noted by the Independent Engineer once they have a chance to review.

Recommendations

- Give three readings to the proposed Bylaw to close the two existing accesses for 8919 68 Street SE directly on to 68 Street SE
- Direct Administration to construct an alternative access for 8919 68 Street SE on to 90 Avenue SE

South City
Truck Access
Missing

Recycle
Calgary
Access
Missing



Westcan's 86 Avenue
Access to 68 Street
(Existing RPR 86 Ave
Access)

South City Truck 86 Avenue Accesses (2) - City's drawing only
shows one (1)



ndations

South City
Truck Access
Missing

ndings to
Bylaw to
existing
919 68
ctly on to

tration to
ternative
9 68
p 90

Recycle
Calgary
Access
Missing





86 Ave East and 68 Street South
Trucks cannot turn south on 86 Avenue.
This intersection does not meet City standards.
It does comply with the Development
conditions.

South City Truck is pumping water onto 86 Ave



Recycle Calgary Landfill along the
proposed 90 Ave serpentine road. Its
access is not shown on Calgary
drawing.

- iii. westbound right turn lane (30 metres)
 - iv. Northbound left turn lane (60 metres)
 - v. Southbound left turn lane (60 metres)
- b. Construct the intersection of 68 Street SE and Glenmore Trail SE with the following improvements:
- i. Eastbound dual left turns (60 metres per lane)
 - ii. Eastbound right turn lane (30 metres)
 - iii. Westbound dual left turn (140 metres per lane)
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- e. Rebuild the intersection of 68 Street and 86 Avenue SE shall be rebuilt to current City standards.
- f. Rebuild the intersection of 68 Street and 90 Avenue SE shall be rebuilt to current City standards.
- g. Construct signals at the intersection of 68 Street and 90 Avenue SE together with a 60 metre northbound left turn lane.
- h. Install any other necessary utility upgrades require for the above improvements.
- i. Construct the 68 Street SE bridge crossing the WH Canal as a 4 lane divided major to the satisfaction of Calgary Roads; and any other necessary utility upgrades required for the above improvement.
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- a. Obtain the necessary right-of-way for the improvements identified under Condition No. 11; and
 - b. Pay all administrative, land acquisition and legal costs, including possible expropriation of all additional right-of-ways required for the necessary off-site infrastructure improvements.



MILLER THOMSON
AVOCATS | LAWYERS

MILLER THOMSON LLP
COMMERCE PLACE
10155 - 102 STREET, SUITE 2700
EDMONTON, AB T5J 4G8
CANADA

IP2022-0145
Attachment 6
T 780.429.1751
F 780.424.5866

MILLERTHOMSON.COM

June 6, 2022

Delivered via Email

The City of Calgary
Law, Legal Services
Floor 12, Municipal Building - 12-H2-4
800 Macleod Tr. S.E.
P.O. Box 2100, Station M,
Calgary AB T2P 2M5

Attention: Kelly Colborne

Dear Sir:

**Re: Westcan Recyclers Ltd. and 644078 Alberta Ltd. v. The City of Calgary
Court of Queen's Bench Action No. 2101 09833**

Darin J. Hannaford
Direct Line: 780.429.9714
dhannaford@millerthomson.com

File: 0262576.0001

This letter is further to our telephone and email correspondence of June 1, 2022, copies of which are enclosed, wherein you initially advised that Westcan's accesses would be permanently closed by July 5th, and later clarified that you would not be "physically" closing Westcan's accesses, so as to not disregard Justice Yamauchi's Order from April 14, 2022 (the "**April Court Order**"), a filed copy of which is also enclosed.

Accordingly, I am writing to confirm that the Committee Presentation currently scheduled before the Transportation and Planning Committee on June 10, 2022, and the further approval hearing before Council on July 5, 2022, will be adjourned.

The City is flagrantly disregarding the intent and/or terms of the April Court Order by pushing ahead with a bylaw to permanently close Westcan's current accesses before the court-ordered independent expert or the Court has had a chance to even determine whether the alternative access(es) proposed by the City are safe and adequate. The passing of the bylaw in such circumstances would be contrary to the April Court Order. It is entirely pre-emptive. As we indicated to you during our call last week, the April Court Order outlines the process for the future of those accesses, and the City is not permitted to close the 68 Street Main Access, either physically or legally, unless and until it has provided safe and adequate alternative access(es).

Dr. Morrall is currently undertaking a review of the design, at the direction of the Court, and may not only find the design for the alternative access(es) unsafe or inadequate, but also the road itself, given that he is conducting a formal road safety audit. If a bylaw is passed, our client will necessarily have to apply to the Court of Queen's Bench to have the bylaw repealed, and will be seeking punitive costs in that regard. Causing our client to respond to the bylaw presentation and hearing at this juncture, the eventual effect will undoubtedly be moot in light of the April Court Order, is forcing our client to participate in an unreasonable proceeding or process. This is a clear example of an abuse of process.

Furthermore, the notice that you have given us for the Committee Presentation on June 10th is inadequate and the date was selected without the courtesy of consulting Westcan. You indicated in your letter of October 27, 2021 that Westcan would have an "opportunity to make written submissions to Council [for the passing of the bylaw] addressing any concerns it may have." There is insufficient time to prepare such written submissions, particularly when we have yet to even receive City administration's report and the draft bylaw for review. Further, and importantly, our client is scheduled to be out of the province on Friday and is unable to attend.

Accordingly, please confirm forthwith that the bylaw presentation and hearing(s) on June 10th and July 5th, respectively, will be adjourned, pending the outcome of the current proceedings in the Court of Queen's Bench.

Yours truly,

MILLER THOMSON LLP

Per:


Darin J. Hannahford
MJP/mkf

Enclosures (3)

- c. Westcan Recyclers Ltd.
Attention: S. Dimant (via Email)
M. Preston (via Email)



Fehr, Melinda

From: Colborne, Kelly P. <Kelly.Colborne@calgary.ca>
Sent: Wednesday, June 1, 2022 3:50 PM
To: Hannaford, Darin; Preston, Melissa
Cc: Wigglesworth, Lindsay
Subject: [**EXT**] Westcan Recyclers

Hi Darin and Melissa. I was asked to pass along the following:

Construction of the new Westcan accesses via 90th Avenue SE and 86th Avenue SE will commence on Thursday June 2, 2022, starting with demolition of the original gravel road. Construction of the new road will follow once we have our permission to construct, which we anticipate receiving this coming Monday (June 6, 2022).

Concurrent with construction, the bylaw to close the existing Westcan accesses directly onto 68th Street SE will be proceeding to the Infrastructure and Planning Committee of The City of Calgary on June 10, 2022 and then onto Council on July 5, 2022. Westcan will have an opportunity to speak to this bylaw at Infrastructure and Planning Committee. Information on how to register to speak at Infrastructure and Planning Committee will be provided to Westcan when the agenda is published on June 7, 2022.

We anticipate that the new accesses will be completed by July 5, 2022 and, should Council approve the closure bylaw, Westcan's accesses to 68th Street SE will be physically closed that same day. Westcan is hereby given notice that they must make any reconfigurations to their site that are necessary for this access change by July 5, 2022.

Should the new accesses not be completed by July 5, 2022, the City will grant Westcan temporary permission to continue using its current accesses directly on to 68 Street SE until such time as the new accesses have been completed.

Regards,

Kelly Patrick Colborne

Barrister & Solicitor
Law, Legal Services

The City of Calgary | Mail code: #8053

T 403.268.2450 | C 403.370.6978 | F 403.268.4634 | calgary.ca

Floor 12, Municipal Building – K3-9, 800 Macleod Tr. S.E.

P.O. Box 2100, Station M, Calgary, AB Canada T2P 2M5

NOTICE -

This communication is intended ONLY for the use of the person or entity named above and may contain information that is confidential or legally privileged. If you are not the intended recipient named above or a person responsible for delivering messages or communications to the intended recipient, YOU ARE HEREBY NOTIFIED that any use, distribution, or copying of this communication or any of the information contained in it is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and then destroy or delete this communication, or return it to us by mail if requested by us. The City of Calgary thanks you for your attention and co-operation.

[EXTERNAL EMAIL / COURRIEL EXTERNE]

Please report any suspicious attachments, links, or requests for sensitive information.

Veuillez rapporter la présence de pièces jointes, de liens ou de demandes d'information sensible qui vous semblent suspectes.

Fehr, Melinda

From: Colborne, Kelly P. <Kelly.Colborne@calgary.ca>
Sent: Wednesday, June 1, 2022 5:10 PM
To: Hannaford, Darin; Preston, Melissa
Cc: Wigglesworth, Lindsay
Subject: [**EXT**] RE: Westcan Recyclers

Darin/Melissa –

I have now had some internal discussions, and need to clarify:

The earlier notice re: closing Westcan's accesses existing accesses on July 5, 2022 assumed that the injunction would no longer be in place as of that date (i.e., that we would have been back to court and settled matters by then). The City agrees that Justice Yamauchi's Order prevents physical closure of the accesses until the injunction has been lifted.

The City does not intend to, and will not, physically close Westcan's existing 68th Street Accesses until the Court is satisfied that Westcan has been provided with adequate alternative accesses and the injunction has been vacated.

I trust this clarifies matters, and apologize that I wasn't able to articulate this more clearly earlier.

Kelly Patrick Colborne

Barrister & Solicitor

Law, Legal Services

The City of Calgary | Mail code: #8053

T 403.268.2450 | **C** 403.370.6978 | **F** 403.268.4634 | calgary.ca

Floor 12, Municipal Building – K3-9, 800 Macleod Tr. S.E.

P.O. Box 2100, Station M, Calgary, AB Canada T2P 2M5

From: Colborne, Kelly P.
Sent: Wednesday, June 1, 2022 3:50 PM
To: dhannaford@millertthomson.com; mpreston@millertthomson.com
Cc: Wigglesworth, Lindsay <Lindsay.Wigglesworth@calgary.ca>
Subject: Westcan Recyclers

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We anticipate that the new accesses will be completed by July 5, 2022 and, should Council approve the closure bylaw, Westcan's accesses to 68th Street SE will be physically closed that same day. Westcan is hereby given notice that they must make any reconfigurations to their site that are necessary for this access change by July 5, 2022.

Should the new accesses not be completed by July 5 2022, the City will grant Westcan temporary permission to continue using its current accesses directly on to 68 Street SE until such time as the new accesses have been completed.

Regards,

Kelly Patrick Colborne

Barrister & Solicitor

Law, Legal Services

The City of Calgary | Mail code: #8053

T 403.268.2450 | **C** 403.370.6978 | **F** 403.268.4634 | calgary.ca

Floor 12, Municipal Building – K3-9, 800 Macleod Tr. S.E.

P.O. Box 2100, Station M, Calgary, AB Canada T2P 2M5

NOTICE -

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[EXTERNAL EMAIL / COURRIEL EXTERNE]

Please report any suspicious attachments, links, or requests for sensitive information.

Veillez rapporter la présence de pièces jointes, de liens ou de demandes d'information sensible qui vous semblent suspectes.

CERTIFIED *E. Wheaton*
by the Court Clerk as a true copy of the
document digitally filed on Jun 3, 2022

Clerk's Stamp

COURT FILE NUMBER	2101 09833
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY
APPLICANTS/PLAINTIFFS	WESTCAN RECYCLERS LTD. and ALBERTA LTD.
RESPONDENT/DEFENDANT	THE CITY OF CALGARY
DOCUMENT	<u>ORDER</u>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyers' Darin J. Hannaford Names: Melissa J. Preston Lawyers' dhannaford@millerthomson.com; Emails: mpreston@millerthomson.com File No.: 0262576.1



DATE ON WHICH ORDER WAS PRONOUNCED:	<u>APRIL 14, 2022</u>
LOCATION WHERE ORDER WAS PRONOUNCED:	<u>CALGARY LAW COURTS VIRTUAL COURTROOM 60</u>
NAME OF JUSTICE WHO MADE THIS ORDER:	<u>THE HONOURABLE MR. JUSTICE YAMAUCHI</u>

UPON reviewing the Amended Application by Westcan Recyclers Ltd. and 664078 Alberta Ltd. (collectively, "**Westcan**") filed March 28, 2021 (the "**Amended Application**"), and the various affidavits and materials filed in support; AND UPON reviewing the Cross-Application by The City of Calgary (the "**City**") filed March 4, 2022, and the various affidavits filed in support; AND UPON reviewing the Court Order of Justice Yamauchi filed August 12, 2021, and the Court Order of Justice Neufeld made on September 10, 2021 (the "**Neufeld Order**"); AND UPON hearing submissions of counsel for Westcan and the City;

IT IS HEREBY ORDERED THAT:

1. The Amended Application is adjourned *sine die*.

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2. The City shall be permitted to resume road upgrading and construction work on the northbound (east) lanes of 68 Street SE, however, the City shall not, pending further Order of this Court, perform any road upgrading or construction work adjacent to Westcan's two (2) site accesses on 68 Street SE (the "**68 Street Accesses**") and/or in any manner that would impede or negatively impact the 68 Street Accesses or Westcan's operations.
3. The median barriers currently in front of the 68 Street Accesses preventing through-traffic shall remain in place indefinitely.
4. No later than April 25, 2022, the parties shall appoint and jointly engage the services of an independent third party engineer (the "**Independent Engineer**") to review and provide comments on the revised design being proposed by the City for accesses to and from Westcan's property, municipally described as 8919 68 Street SE (the "**Submitted Design**").
5. The Independent Engineer shall be one of the following (in no particular order):
 - (a) 30 Forensic Engineering;
 - (b) Dr. John Morrall; or
 - (c) A suitably qualified individual from the Engineering Department of Queen's University ("**Queens**").
6. In the event that none of the entities or individuals listed in paragraph 5 are able to act as the Independent Engineer due to a conflict or lack of capacity to review and provide comments on the Submitted Design within a reasonable timeframe, the parties will ask Dr. Morrall, or alternatively, the assigned representative at Queen's, to refer a suitably qualified individual or entity and the individual or entity so referred will be retained to act as the Independent Engineer, subject to availability and conflicts.
7. The Independent Engineer shall be provided with:
 - (a) The final drawings for the Submitted Design that have been approved by Development Approvals, and the formal approval for same;
 - (b) The issued-for-construction drawings for the Submitted Design;
 - (c) The court materials that have been filed, or that may be filed, in this matter, together with any additional engineering reports, past drawing sets, or other design-related commentary that the parties may wish to provide;
 - (d) Any further information or documentation as may be requested by the Independent Engineer to conduct his review;
 - (e) Commentary on the Submitted Design from Westcan and its consultants.
8. Further to paragraph 7, the City shall use all reasonable efforts to provide Westcan with the final approved drawings for the Submitted Design on or before May 13, 2022, failing which on such later date as may be agreed to as between the parties, acting reasonably. Once received, Westcan shall have 15 business days to review and provide commentary on the final approved drawings for the Submitted Design to the Independent Engineer, or such longer timeframe as may be agreed to as between the parties, acting reasonably. If

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agreement cannot be reached with respect to alternative deadlines, either party may apply to this Honourable Court for advice and direction.

9. Examinations on answers to Undertakings of Jason Rumer shall be completed no later than May 26, 2022.
10. Should the parties need to attend before the Court for further direction in relation to this matter, including to have the re-scheduled Amended Application heard, either party may attend on reasonable notice before any sitting Queen's Bench Justice on the Calgary Commercial List, including Justice Yamauchi or Justice Neufeld.
11. In advance of the hearing of the re-scheduled Amended Application, the parties shall file and serve a written "bench brief", not to exceed 10 pages in length, excluding supporting authorities. The timing for the exchange of bench briefs shall be determined either by the Court Coordinator or by the Justice hearing the re-scheduled Amended Application.
12. The fees of the Independent Engineer for his/her review and comment on the Submitted Design shall initially be paid equally as between Westcan and the City.

13. The determination of entitlement to court costs and the ultimate responsibility for payment of the Independent Engineer's fees shall be reserved and determined by the Court at a future motion brought by either of the parties, or alternatively, at the ultimate hearing or disposition of the Application.
14. This Order may be signed in counterpart and endorsed by way of facsimile signature or electronic means.




Justice of the Court of Queen's Bench of Alberta

CONSENTED AS TO FORM BY:

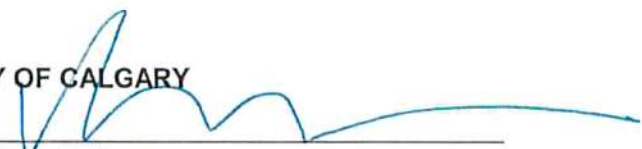
MILLER THOMSON LLP

Per:


Darin Hannaford and Melissa Preston
Counsel for the Plaintiffs/Cross-
Applicants/Respondents

THE CITY OF CALGARY

Per:


Kelly Colborne
Counsel for the Defendant/Cross-
Applicant/Respondents



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CANADA

IP2022-0145
Attachment 6
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F 780.424.5866

MILLERTHOMSON.COM

June 8, 2022

Delivered via Email

The City of Calgary
Law, Legal Services
Floor 12, Municipal Building - 12-H2-4
800 Macleod Tr. S.E.
P.O. Box 2100, Station M,
Calgary AB T2P 2M5

Darin J. Hannaford
Direct Line: 780.429.9714
dhannaford@millerthomson.com

File: 0262576.0001

Attention: Kelly Colborne

Dear Sir:

**Re: Westcan Recyclers Ltd. and 644078 Alberta Ltd. v. The City of Calgary
Court of Queen's Bench Action No. 2101 09833**


This is further to our letter correspondence to you on Monday, June 6th. We have not yet received a reply from you to that letter, nor any confirmation that the Committee Presentation meeting on June 10th, and the hearing before Council on July 5th, will be adjourned, pursuant to the April 2022 Order in place and the process directed by the Court with respect to determining the safety and adequacy of Westcan's accesses. Rather, inexplicably, we have been advised by our client that he received an email this morning directly from your client, Mr. Campbell Berry, about the process for registering for the June 10th meeting, a copy of which is enclosed. We are uncertain as to why this communication circumvented our office, particularly when we have yet to receive any reply from you.

We reiterate the position taken in our June 6th letter that the City's intended course of action on Friday constitutes an abuse of process and is in breach of the intention and terms of the April 2022 Order. Please provide a reply, iterating the City's position on the adjournment of the Committee Presentation on June 10th, and the hearing on July 5th, no later than end of business today, failing which we have instructions from our client to take necessary steps to enforce his rights and the process that was dictated by Justice Yamauchi on April 14, 2022, including enhanced costs.

Yours truly,

MILLER THOMSON LLP

Per:


Darin J. Hannaford
MJP/mkf

c. M. Preston (via Email)

Enclosure
62886265.2

Fehr, Melinda

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: "Berry, Campbell G." <Campbell.Berry@calgary.ca>
Date: June 8, 2022 at 8:11:12 AM MDT
To: Steve Dimant <Steve@westcanrecyclers.com>
Cc: "Rumer, Jason" <Jason.Rumer@calgary.ca>
Subject: City of Calgary - Standing Policy Committee on Infrastructure and Planning, June 10 - Public Submission Instructions

Mr. Dimant,

Last week, you were notified of The City of Calgary Standing Policy Committee on Infrastructure and Planning to be held on June 10, 2022.

To send comments relating to a Committee matter, or to request to speak at Committee, please complete the form at the following link:

<https://forms.calgary.ca/content/forms/af/public/public/public-submission-to-city-clerks.html>

Under the heading: What meeting do you wish to attend or speak to? (required) the selection is: Standing Policy Committee on Infrastructure and Planning

Under the heading: What agenda item do you wish to comment on? the selection is: Point Trotter Off-Site Improvements – Access Bylaw for 8919 68 Street SE, IP2022-0145

The remainder of the form should be self-explanatory.

After submitting this request, the City Clerks Office will reach out with the contact information to dial-in to the meeting.

Yours truly,

Campbell Berry

The City of Calgary | Mail code: #195

T 403.268.2394 | calgary.ca

P.O. Box 2100, Station M, Calgary, AB Canada T2P 2M5

ISC: protected

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[EXTERNAL EMAIL / COURRIEL EXTERNE]

Please report any suspicious attachments, links, or requests for sensitive information.

Veillez rapporter la présence de pièces jointes, de liens ou de demandes d'information sensible qui vous semblent suspectes.
