

THE MUNICIPAL BOARD OF MANITOBA

In the matter of: Aggregate Quarry Appeal regarding NE, SE and SW ¼ 17-12-12
EPM and Resolution of Council 4/18

6901142 MANITOBA LTD.
and LILYFIELD QUARRY INC.
and HUGH MUNRO CONSTRUCTION LTD.

Appellants

-and-

THE RURAL MUNICIPALITY OF ROSSER and
THE SOUTH INTERLAKE PLANNING DISTRICT

Respondents

**SUBMISSION BRIEF OF THE
RURAL MUNICIPALITY OF ROSSER**

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INDEX

INDEX.....	1
SUBMISSION	3
Background	3
Resolution of Council	4
Appeal to Municipal Board of Manitoba.....	5
Municipal and Appellant Consent to Conditions.....	5
Municipal Board Hearing	5
ISSUES/MATTERS RAISED BY THE MUNICIPAL BOARD	6
What is the Standard for Review for a Municipal Board Appeal?	6
The Respondent's Interpretation of The Planning Act Appeal Process.....	7
The Board's Procedures at Aggregate Appeal Hearings.....	9
Decision of Municipal Board and Concurrent Responsibilities in the Appeal	10

What is the Jurisdiction of the Municipal Board to Accept, Modify or Reject Agreed Upon Condition(s)?	14
Should the Board Alter/Modify Agreed Upon Conditions?.....	14
Certainty Principle	18
Cost Principle	19
Settlement Encouragement Principle	19
Submission of the Respondent on the Conditions and Appeal.	20
What is the Impact to Traffic at Hwy 6 and PR 236?.....	21
Analysis	22
Insurance claim data shows that Highway 6 is a dangerous stretch of road	26
Highway 6 is notorious for being a dangerous road.....	28
The Manitoba Legislative Assembly has Noticed the perils of Highway 6	28
A new collision analysis is needed to understand both the qualitative and quantitative nature of the accidents on Hwy 6 and PR 236	29
Slippery Slope Argument	31
Local Residents.....	32
RECOMMENDATIONS	36
CONCLUSION.....	37
REFERENCES LIST.....	39

SUBMISSION

Background

1. The Municipality of Rosser (the “Municipality” or the “Respondent”) is the governing municipal jurisdiction within which Hugh Munro Construction Ltd., 6901124 Manitoba Ltd. and Lilyfield Quarry Inc. (the “Appellants” or the “Developers”) requested a conditional use permit for the development and operation of a limestone aggregate quarry on real property in the NE, SE and SW of Section 17-12-2 EPM (“the Planned Area”) in Municipality.
2. The Appellants are Hugh Munro Construction Ltd., 6901124 Manitoba Ltd. and Lilyfield Quarry Inc. and are the applicants for the conditional use and permit. The Appellants applied for a conditional use permit for an aggregate development for the Planned Area (the “Aggregate Quarry Operation”) under the Lilyfield Quarry Permit Application on June 2018 (the “Application”)¹.
3. South Interlake Planning District, (“SIPD”) is the planning district for the Municipality under *The Planning Act, CCSM cP80* (the “Planning Act”). It is responsible for the adoption, administration, and enforcement of the Development Plan By-law for the entire SIPD District, and the administration and enforcement of the Zoning By-Laws, Secondary Plans, and any other applicable by-laws of its member municipalities and the SIPD.

¹Lilyfield Quarry Permit Application; Hearing Exhibit No. 4

4. SIPD arranges the administrative notices for conditional use hearings for its members and ensures compliance with the Planning Act are adhered to as it relates to public notice of the conditional use hearings.
5. Aggregate developments require a conditional use approval under the Municipality's Zoning By-law 15-14² (the "Zoning By-Law"). A quarry permit is also required under the Municipality's Aggregate By-law 8 -15 ("By-Law 8-15"). The Planned Area is zoned "A80" Agricultural Zone in the Zoning By-Law and Part V – Agricultural Zone, Table V-I Agricultural Use & Bulk Table requires a conditional use for sand, gravel pits and mining operations³.
6. The Respondent is responsible to hold the public hearing for the conditional use under s. 105 of the Planning Act. Council for the Rural Municipality of Rosser (the "Council") held a public hearing on September 7th, 2019 (the "Hearing") to receive representations from the Appellants and any other persons interested. A list of persons affected by the Application and presenting at the Hearing was maintained by the Respondent and was provided to The Manitoba Municipal Board (the "Board")⁴.

Resolution of Council

7. Council, by way of Resolution 4/18 passed on November 19, 2019, denied the conditional use upon completion of the Hearing⁵. Notice of the denied application

² Sections from the Rural Municipality of Rosser Zoning By-Law No. 15-14; Brief Tab 1

³ Rural Municipality of Rosser Zoning By-Law 15-14, Bulk Table; Brief Tab 1, Page 1

⁴ List of persons affected and making presentations at the hearing; Brief Tab 2

⁵ Resolution 4/18; Hearing Exhibit No. 2

was provided to the Appellants by SIPD under cover of letter dated November 25, 2019⁶.

Appeal to Municipal Board of Manitoba

8. The Appellants filed an Appeal under s. 118.2(1) of the Planning Act to the Board on November 27, 2019⁷.

Municipal and Appellant Consent to Conditions

9. The Appellants and the Respondent have agreed on conditions under which the Appellants may operate a Aggregate Quarry Operation should the Board approve the Appeal. The Respondent and the Appellants signed a document titled Municipal and Appellant Consent to Conditions (the "Conditions") in early July 2020⁸.

Municipal Board Hearing

10. The Hearing under s. 118.3(1) of the Planning Act proceeded before the Board on July 27 and 28, 2020. This is the first hearing of an appeal of a conditional use denial for an aggregate development before the Board under 118.2(1)⁹.

Right to appeal

118.2(1)

An applicant may appeal the following decisions of a board, council or planning commission to the Municipal Board:

- (a) for an application for approval of a conditional use made in respect of an aggregate quarry,
(i) a decision to reject the application,
(ii) a decision to impose conditions;

⁶ SIPD Letter dated November 25, 2019; Hearing Exhibit No. 2

⁷ Notice of Appeal; Hearing Exhibit No. 1

⁸ Municipal and Appellant Consent to Conditions; Hearing Exhibit No. 14

⁹ The Planning Act, Section 118.2(1); Brief Tab 3

11. The Hearing was adjourned to August 18, 2020 so the parties could submit briefs/submissions to the Board regarding two issues:
- a. What is the standard for review for a Municipal Board Appeal?
 - b. What is the jurisdiction of the Municipal Board to accept, modify or reject agreed upon condition(s)?

ISSUES/MATTERS RAISED BY THE MUNICIPAL BOARD

What is the Standard for Review for a Municipal Board Appeal?

12. The Municipality submits that the question of what the "Standard of Review" to be applied is inextricably tied to interpreting s. 118.2(1) of the Planning Act¹⁰. The Municipality submits for the reasons following that the Appeal is a hearing de novo and not a judicial review and therefore no standard of review is applicable.
13. The modern rule of statutory interpretation has been cited in many Manitoba cases. In the most recent decision of *Ladco Company Limited v. The City of Winnipeg*¹¹, Justice Edmond writing for the Court of Queen's Bench stated the following regarding the modern principles of statutory interpretation:

117 A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 sec 42, (2002) 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes*

¹⁰ The Planning Act Section 118.2(1); Brief Tab 3

¹¹ *Ladco Company Limited v. The City of Winnipeg*, 2020 MBQB 101; Brief Tab 4

(2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

14. The question of a standard of review will be altered based upon to whether the Board's interpretation of its own legislation and if the Appellants' right to appeal is one of an administrative review of the decision of Council (administrative or judicial review) or a new hearing where the Appellants and others affected may call further and additional evidence before the Board (a hearing *de novo*/appeal).
15. The jurisdiction and role of the Board is changed significantly by the interpretation placed upon the meaning of s. 106(1) and 118.2(1) of the Planning Act¹² and the Board procedures. The Respondent submits that the plain meaning of the Planning Act leads to the conclusion that the appeal contemplated by s. 118.2(1) is one of a **hearing de novo**. That the Planning Act combined with the Board's own jurisdiction under the *Municipal Board Act*, RSM 1987, c. M240 (the "Municipal Board Act") and the Boards' policies and procedures contemplates that the Board members sit as a new panel replacing the municipal council and the Board is hearing the matter afresh.

The Respondent's Interpretation of The Planning Act Appeal Process

16. The Board has jurisdiction to hear the appeal *de novo* and hear new presenters. Sections 118.3(1), (2) and 118.4(1) of the Planning Act provide the Board with the jurisdiction to hear submissions from people previously heard by the municipal

¹² The Planning Act Section 106(1) and 118.2(1); Brief Tab 3

council and those who may not have been heard by the municipal council in the preceding hearing.

17. Under s. 118.3(1) of the Planning Act, the Board must hold a hearing to consider an appeal¹³.

Appeal hearing

118.3(1) The Municipal Board must hold a **hearing** to consider the appeal. (emphasis added)

18. Barron's Law dictionary defines "hearing" as a "proceeding wherein evidence is taken for the purpose of determining an issue of fact and reaching a decision on the basis of that evidence"¹⁴.
19. Section 118.3(2) provides that the Board must give notice of the hearing. No notice of a hearing would be required if the Board were simply to review the decision of Council.

Notice of hearing

118.3(2) At least 14 days before the hearing, the Municipal Board must send notice of the hearing to the appellant, the board, council or planning commission and any other person the Municipal Board considers appropriate.

¹³ The Planning Act Section 118.3(1); Brief Tab 3

¹⁴ Steven H Gifis, *Law Dictionary*, (New York: Barron's Educational Series Inc, 1984) at page 211; Brief Tab 5

The Board's Procedures at Aggregate Appeal Hearings

20. The opportunity to be heard in the appeal proceeding is further enhanced under the Board's *Procedures at Aggregate Appeal Hearings* (the "Procedures"). Under the *Procedures*, published on the Board's website, a person served with a notice of hearing under s 118.3(2) of the Act may make an oral or written submission.

Any other person served with a notice of hearing pursuant to Section 118.3(2) of The Planning Act may make an oral and/or written presentation to the Board. It is recommended that four (4) copies of any written presentations be filed with the Board and that one (1) copy be provided to each of the parties at least ten (10) days prior to the hearing, failing which copies of written presentations must be provided to the Board and the parties at the hearing.¹⁵

21. Under s. 24(1) and (3)¹⁶ of The Municipal Board Act, the Board has the jurisdiction to adopt rules to govern all its hearings and investigations. The Procedures the Board follows are valid if the procedures are published on their website, and they are consistent with the Municipal Board Act.

Procedure governed by rules

24(1) All hearings and investigations conducted by the board shall be governed by rules adopted by the board.

Rules of practice, their publication

24(3) The board may make rules of practice, not inconsistent with this Act, regulating its procedure and the times of its sittings; but the rules do not come into force until they are published on the board's website.

22. Granting jurisdiction to the Board to (i) notify people who may be impacted by the Board's decision (s. 118.2(2) of the Planning Act) and (ii) creating rules and

¹⁵ The Municipal Board of Manitoba - Procedure at Aggregate Appeal Hearings; Brief Tab 6

¹⁶ The Municipal Board Act, Sections 24(1) & (3); Brief Tab 7

procedures about hearing presentation (s 24(1) and (3) of the Municipal Board Act) are essential in the Board's ability to hear the matter under s. 118.4(1) of the Act.

Decision of Municipal Board and Concurrent Responsibilities in the Appeal

23. The Respondent submits that interpreting the Planning Act requires the Board to hold hearings and to hear submissions/evidence from the Appellants and the Respondent. The Board may include others the Board deems appropriate. Section 118.4.(1) also provides that the Board may approve a proposal subject to any conditions it considers appropriate.

118.4(1) The Municipal Board must make an order

(a) rejecting the proposal; or

(b) approving the proposal, subject to any conditions described in the following provisions that it considers appropriate:

(i) subsection 106(2), in the case of an aggregate quarry,.....

24. Concurrent with its task to hear the appeal, the Board is directed to consider the appeal based on s. 106(2) of the Planning Act, the Board may further impose conditions on the approval to meet the requirements of s. 106(1)(b).

106(1) After holding the hearing, the board, council or planning commission must make an order

(a) rejecting the application; or

(b) approving the application if the conditional use proposed in the application

(i) will be compatible with the general nature of the surrounding area,

(ii) will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area, and

(iii) is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.

Conditions of approval

106(2) When approving an application for a conditional use, the board, Council or planning commission may, subject to section 107 and subsections 116(2) and (3) (conditions on livestock operations),

(a) impose any conditions on the approval that it considers necessary to meet the requirements of clause (1)(b); and

(b) require the owner of the affected property to enter into a development agreement under section 150.

25. Because the Board must follow the same test imposed on the Council by ss. 106(1) and (2) of The Planning Act, it is imperative that the Board notify and hear others it considers appropriate in a *de novo* hearing. In *Dupras v. Mason*, [1994] BCWLD 2844 (BCCA)¹⁷ at para 16, the court held that in a hearing *de novo*, the question before the court is the same question before the previous decision maker. It would be difficult for the Board to ensure that the development is compatible, will not be detrimental to local residents, and is consistent with applicable provisions if it does not hear all the evidence directly and from people who might be affected by the Aggregate Quarry Operation.

¹⁷ *Dupras v. Mason*, [1994] BCWLD 2844 (BCCA); Brief Tab 8

26. It is for the foregoing reasons that the Municipality submits the Appeal is a “hearing de novo” and the Municipality’s decision to deny the Application should not be reviewed on any standard of review. The Board sits as a new tribunal looking at all the factors and evidence for the Application supplanting its decision for the Municipality’s. The Municipality and any evidence it wishes to adduce will be given due weight and consideration by the Board as a party to the de novo hearing.
27. In the decision of *Orange Properties Ltd v Winnipeg (City) Assessor*, (1996) 107 Man R (2d) 278, MBCA¹⁸ the Court of Appeal considered a similar question of an Appeal from the Board of Revision. The case decided two issues. First whether an appeal was a hearing de novo with respect to the appeal and whether an assessor may on the appeal from a board of revision to the Board introduce new issues not considered by the Board of Revision.
28. Justice Scott CJM (at para 13) speaking for the majority concluded that the provisions in The Assessment Act could be read together to determine whether an appeal should be heard *de novo but only on the issues raised before the Board of revision*. The Court found the definition of *de novo* presented by Lyons JA (reported at (1995), 100 Man R (2d) 208 at para 27) persuasive. Lyons JA in chambers stated that:

“As the definition of de novo suggests, the Board is to hear the matter afresh.”

¹⁸ *Orange Properties Ltd v Winnipeg (City) Assessor*, (1996) 107 Man R (2d) 278, MBCA; Brief Tab 9

29. On the matter of the issues before the Board of Revision the Court held that while the hearing was a *de novo* hearing that did not mean new issues could be introduced before the Board.

[21] It is only when the revision and appeal process is looked at as a comprehensive whole that it becomes clear that what the legislature must have intended in s. 56(4) was that the "full hearing" before the municipal board be confined to the issues and positions taken at the first round before the board of revision. It is the failure of the city assessor in this case to put the issue before the board of revision that disentitles the municipal board to grant the relief the assessor now seeks. Thus, the municipal board's responsibilities are confined in any other appeal to the matters properly placed before it which do not encompass a position wholly inconsistent with that taken before the board of revision. Fairness demands no less.

30. In a similar case of a statute being silent on the nature of an appeal *Newterm, Re.*, [1988] NJ No 379¹⁹ considered the nature and scope of the of the "appeal" or rehearing. In *Newterm*, the Court also dealt with legislation that did not explicitly state that the appeal is to be heard *de novo*. At para 6, the court stated:

"The conduct of the hearing and the nature and scope of the appeal to the Supreme Court may be ill-defined, but the scheme and spirit of the appeal process in the Act are very evident: to permit a reconsideration of the assessment of the property; another opportunity for the aggrieved party to be heard, to call witnesses, to cross-examine opposing witnesses and make submissions on both fact and law relevant to the assessment.

31. The Municipality respectfully submits that, similar to *Newterm*, the Planning Act requires a hearing, which implies that it is one of a hearing *de novo*. The Planning Act permits reconsideration of the conditional use; it provides another opportunity

¹⁹ *Newterm, Re.*, [1988] NJ No 379; Brief Tab 10

for the parties and community to be heard, to call witnesses, to cross-examine opposing witnesses and make submissions relevant to the development and its approval.

What is the Jurisdiction of the Municipal Board to Accept, Modify or Reject Agreed Upon Condition(s)?

32. Under s. 118.4(1) of the Planning Act the Board is given jurisdiction to make an order rejecting a proposal or approving it subject to any conditions it finds appropriate. The Planning Act further requires the Board to follow the test found under s. 106 of the Planning Act. Given the Board's broad powers to vary the conditions of a development the Municipality submits the Board has absolute jurisdiction to set aside or vary any agreed upon condition. Having the jurisdiction is one thing, the next question is: should the Board alter the agreed upon Conditions?

Should the Board Alter/Modify Agreed Upon Conditions?

33. It is the submission of the Respondent that the agreed upon Conditions are like a withdrawal of the Appeal (as it relates to Conditions) by the Appellants on the Conditions agreed upon.
34. A court or board should only ignore settlement agreements where they are unjust and inappropriate. Unjust meaning unfair, inappropriate meaning not in the context of the decision being made.
35. The accepted Conditions are a settlement agreement. The settlement agreement was reached between two parties at arm's length with an equal bargaining position.

Each party negotiated for an outcome that was certain. The negotiations were completed to save significant time before the Board. Setting aside these Conditions and the negotiations could cause a much more involved hearing. Changing one condition may have dramatic impact for the parties. A change of the agreed Conditions will cause a chilling effect on all future matters before the Board such that any settlement agreed upon could face the risk it would be set aside.

36. The Supreme Court of Canada ("SCC") has dealt with varying settlement agreements, given legislation that gives the court jurisdiction to do so. In *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (SCC),²⁰ the SCC dealt with a family law matter wherein the divorcee husband had a settlement agreement, and subsequently, his net worth increased. The wife had a debilitating illness and could not work. She applied to the court for an award of maintenance under s. 11(2) of the *Divorce Act*. The Court of Appeal accepted the appeal, and the husband appealed further.
37. The SCC opined that the court should not interfere with a trial judge's decision unless there were material errors. However, the act gave the court of appeal jurisdiction under s. 17(2). The case also raised the question of law on what the criteria would be when determining if an agreement should be honored.
38. At para 12, the SCC viewed the settlement agreement as a matter of contract. The SCC cited the principles set by Lambert J of the British Columbia Court of Appeal

²⁰ *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (SCC); Brief Tab 11

in *Pelech v. Pelech* [1985] B.C.W.L.D. 897 for not intervening in the settlement.

(para 13). The relevant principles are set out herein:

(a) there is an agreement for the payment of maintenance as a lump sum or as periodic payments for a set period, and

(b) the agreement releases all claims for future maintenance, and

(c) the agreement was valid and enforceable when it was made, and

(d) the agreement was not an unreasonable or unfair one when it was made, and

(e) the provisions of the agreement for payment of maintenance are incorporated in a court order without any change that has not been agreed to by the parties, and

(f) the agreement and the court order are carried out, and all maintenance payments are made, and

(g) there are no children whose care is directly affected by any subsequent application to vary the maintenance order.

39. The SCC held that where a maintenance agreement has been freely entered into on the advice of independent legal counsel and the agreement is not unconscionable in the substantive law sense, **it should be respected** (*Ibid* at para 83). A maintenance agreement can never totally extinguish the jurisdiction of the court to impose its own terms on the parties (*Ibid* at para 35). However, the court should not vary an agreement by amending an order which incorporates it unless the applicant seeking maintenance or an increase in maintenance establishes there has been a radical change of circumstances that has a causal connection with the former marriage (*Ibid* at para 85).

40. In *Saballoy Inc. v. Techno Genia S.A.* [1993] A.W.L.D. 414 (ABQB)²¹, the Alberta Court of Queen's Bench ("ABQB") dealt with a case of negligent misrepresentation wherein the parties agreed to a settlement after an exchange of affidavit of documents. Then the plaintiff learned of certain correspondence, which the defendant did not produce. The plaintiff obtained a court order directing the defendant to file further affidavit documents. The defendant applied for an order declaring that the settlement was binding.
41. The ABQB held that it should be loathed to interfere with negotiated settlements, but it has an inherent authority to interfere if there is a failure to disclose material relevant information, which a party would rely on and would otherwise not enter to the settlement if it were known (*Ibid* at para 17).

"It is not for the court to interfere with a negotiated settlement only on the basis that it turned out to be a bad economic decision for one side or the other."

"When, then, can or should a court ever interfere to set aside a negotiated settlement?" (*Ibid* at para 18)

42. At para 22-24, the ABQB ruled there is inherent authority in this court to interfere if it can be established:

(a) That the material which was not disclosed until after the settlement agreement was reached was relevant and significant to the resolution of the issues raised in the action and,

²¹ *Saballoy Inc. v. Techno Genia S.A.* [1993] A.W.L.D. 414 (ABQB); Brief Tab 12

(b) The existence of the material was or could reasonably have been within the knowledge of the party seeking to rely upon the settlement agreement.

43. In *Stoewner v. Hanneson*, [1992] O.J. No. 697 (On Crt of Justice Gen Div)²², the dispute was whether the settlement was properly entered between the lawyers. Initial communication of the settlement agreement was made through phone and subsequent letters. The defendant argued that the plaintiff is under a misapprehension of fact relating to the financial circumstances of the defendant, and because of that, the court should set the settlement aside. The court found, in the totality of the correspondence, there was a binding settlement agreement. It also found it should not exercise its judicial discretion to interfere with settlement.
44. At para 14, the court held that it is the court's policy to promote settlement and that refusing to enforce a settlement should be exercised with the utmost consideration.
45. The principles emerging from these cases dealing with the court's discretion to refuse to enforce an agreement are clear. The discretion should be rarely exercised, and utmost consideration must be given to the policy of the courts to promote settlement.
46. The construction of a traffic control devise is the only condition that remains outstanding. It would be disadvantageous for both parties if the issues they settled were disregarded.

Certainty Principle

²² *Stoewner v. Hanneson*, [1992] O.J. No. 697 (On Crt of Justice Gen Div); Brief Tab 13

47. Settlements should be honored unless they demonstrate significant unjust or inappropriate terms. The Board should honor the Conditions as it demonstrates that the Appellants and the Respondent have considered the issues between them and gives each party certainty of outcome.

Cost Principle

48. If the Board or a court does not honor a settlement agreement it would lead to significant additional time before the Board in hearings. If the parties cannot rely upon a settlement agreement, then every condition and term of settlement would need to be vetted before the Board. This would lead to a situation of several weeks of hearing along with the attendant costs of the hearing.

Settlement Encouragement Principle

49. If the Board determines that an interested or affected party has demonstrated a need for the alteration of the Conditions, the Board would be justified under the unjust principle in altering or adding or deleting conditions.
50. With an aggregate development condition change the Respondent submits that the Board should seek the input of the Appellants and the Respondent on the specific alterations of the Conditions. The technical nature of aggregate mining and its impact on surrounding properties is highly driven by expert evidence. If the Board is considering changing the Conditions both the Appellants and the Respondent may want to confirm with their experts that the changes are valid in relation to regulating an aggregate mining operation.

51. The Respondent confirmed that it has had all its relevant experts review the reports of the Appellants and confirm that the Appellant's expert reports, **from a technical review**, were correct as to the impacts of the Aggregate Quarry Operation. The technical review generally takes into account reasonable risks that the events as set out by the local residents are acceptable risks according to engineers and experts (blasting/flying rock, groundwater, highway traffic movement). The Respondent's experts also informed the Respondent and confirmed that the necessary conditions to control the Aggregate Quarry Operation and minimize risk were as set out in the Conditions.

Submission of the Respondent on the Conditions and Appeal.

52. The Respondent presented its position with respect to the approval as a "No" until some consideration was given to an improved intersection at Highway 6 ("Hwy 6") and Provincial Road ("PR 236"). (See submission on Hwy 6 and PR 236.)
53. The Respondent needed to be proactive and confirm acceptable conditions should the Board approve the Quarry Aggregate Development. Therefore, the Respondent and the Appellants entered into the Conditions which relate to what experts were advising the Respondent.
54. The Respondent considered the position of the individuals/local residents who made submission before the Council and before the Board. In considering the submissions of the local residents the Municipal Council developed reasonable conditions to ameliorate as many of the negative effects of the Aggregate Quarry

Operation as could reasonably be implemented. The Appellants have agreed to these Conditions.

What is the Impact to Traffic at Hwy 6 and PR 236?

55. The Municipality submits that Manitoba Infrastructure has the sole jurisdiction and is in control of what upgrades could or should be put in place for this Aggregate Quarry Operation at Hwy 6 and PR 236. The Municipality cannot order Manitoba Infrastructure to complete upgrades for this Aggregate Quarry Operation.
56. As part of the Conditions it is the position of the Respondent that the Appellants should construct a roundabout or other traffic intervention at the intersection of Hwy 6 and PR 236 to improve safety and reduce the risk of death, injury, or damage to property.
57. The MMM Group (now WSP Consulting) completed a Traffic Impact Study ("MMM Traffic Study")²³ that included a Collision Analysis in May 2011. The Collision Analysis analyzed quantitative data on "collisions" on the stretch of highway in question from Manitoba Infrastructure and Technology ("MIT") between 1994 and 2007.
58. WSP conducted a community consultation in January 2019²⁴ wherein a concern was raised regarding the safety of loaded trucks. The reply was that the Province has a point form for calculating the risk of loaded trucks on highways.

²³ MMM Group Traffic Study; Hearing Exhibit No. 3, Page 89 and Appendix E, Section 4.3.1

²⁴WSP Lilyfield Community Consultation Report, Hearing Exhibit No. 5, Tab 1, Page 16

59. Dillon Consulting completed a Traffic Impact Study (“Dillon Traffic Study”)²⁵ in January 2020 under the Manitoba Infrastructure’s Traffic Impact Assessment Guidelines²⁶ . The report does not contain a specific safety analysis on traffic.
60. After filtering accidents, data shows 115 accidents with 39 reported injuries on Hwy 6 between the Perimeter and the west half of PR 236. Manitoba Public Insurance provided the data, which ranges between 1995 and 2020²⁷.

Analysis

61. There are two simple issues the Respondent submits the Board must adjudicate. First is whether the Conditions between the Respondent and the Appellants should require the Appellants to install a roundabout or other traffic intervention at the intersection of Hwy 6 and eastern half of PR 236.
62. The second issue is relevant if the Board finds that a roundabout or other intervention is unnecessary. The Respondent asks the Board to determine whether the Appellants should have to provide a Traffic Impact Study that includes updated traffic safety and collision analysis.
63. The structure of the Municipality’s submission begins by explaining the legislative authority of the Municipality to impose conditions on a developer to ensure safety. Second, are the potential risks of the development. Third, is data from MPI, news,

²⁵ Dillon Traffic Study; Hearing Exhibit No.5, Tab 3

²⁶ Manitoba Infrastructure and Transportation, “General Guidelines for the Preparation of Traffic Impact Studies (April 2010); Hearing Exhibit 16, Tab 1(g)

²⁷ MPI “Data for collisions, injuries and fatalities-Highway 6 between the Perimeter to the Western extension of PR 236; Hearing Exhibit No. 16, Tab 1(f)

and Hansard from the Manitoba Legislative Assembly showing the inherent risk of Hwy 6. Finally, the Municipality submits it should be given deference that their decision to have a roundabout or traffic signal or other intervention prior to this Aggregate Quarry Operation being approved.

64. The Municipality has a duty as elected officials to ensure that the interests of the Municipality and its local residents are protected by the prevention of death and injuries.

(1) Legislated purpose and jurisdiction to prevent injury or death

65. The Municipality submits that the risk of injury or death is not limited to the residents of the Municipality but to all people who use Hwy 6. Therefore, the Municipality has the responsibility, purpose and jurisdiction to ensure the safety of all the people who live, work, or visit.²⁸
66. Under s. 232(1)(a) of Manitoba's *The Municipal Act*, C.C.S.M. c. M225 the Municipality may pass by-laws for municipal purposes respecting "the safety, health, protection and well-being of people, and the safety and protection of property."²⁹ Under this section, the Municipality passed By-law 8-15 to regulate quarry operations regarding enhancing "safety, public health, welfare, protection and well-being of people..."
67. In *Grenier v Piney (Rural Municipality Of)*, 2003 MBQB 74 at para 43, the Queen's Bench confirmed the legislative authority of the Rural Municipality to "legislate and

²⁸ *The Municipal Act*, C.C.S.M. c. M225 - Section 3; Tab 14

²⁹ *The Municipal Act*, Section 232(1)(a); Brief Tab 14

administer standards for businesses and property in respect of safety, health and improvements of and incidental to land use.”³⁰

68. Under the Planning Act, SIPD prepared the Development Plan 2011 for the entire planning district, which included the Municipality. Under the Development Plan, the Municipality has the authority to disallow developments that may have a detrimental impact on the safe operation of a provincial highway unless there are mitigation measures acceptable to the Province. **2.3.6 Transportation Policies**

16. Development that may have a detrimental impact on the safe operation of the provincial highway system shall not be allowed unless mitigation measures acceptable to the Province are incorporated into the development.

19. The costs of any highway improvements deemed necessary by Manitoba Infrastructure to accommodate a proposed development will be the responsibility of the Developer.

(2) Risk concerns raised by the Municipality

69. The selected route option involves fully loaded semi-trailers making left turns at two unsignalized intersections onto high-speed undivided roadways. Both Hwy 6 and PR 236 are two-lane undivided roadways with gravel shoulders and a speed limit of 100 kilometres per hour.
70. According to the 2011 MMM Group Traffic Study³¹ (now WSP) report the development is forecast to:
- generate 80 new truck trips (40 entering and 40 exiting) and 20 new passenger vehicles trips (15 entering and 5 exiting) during the weekday a.m. peak hours;

³⁰ Grenier v Piney (Rural Municipality Of), 2003 MBQB 74 at para 43; Brief Tab 15

³¹ MMM Group Traffic Study; Hearing Exhibit No. 3, Appendix E, Page 16 and 33

- 80 new truck trips (40 entering and 40 exiting) and 20 passenger vehicle trips (five entering and 15 exiting) during the weekday p.m. peak hours; and
- 400 new truck trips (200 entering and 200 exiting) and 60 new passenger vehicle trips (30 entering and 30 exiting during a weekday).

71. According to the 2020 Dillon Traffic Study³² the development is forecast to:

- generate 40 new truck trips (20 entering and 20 exiting) and 15 new passenger vehicles trips (10 entering and 5 exiting) during the weekday a.m. peak hours;
- 40 new truck trips (20 entering and 20 exiting) and 15 passenger vehicle trips (5 entering and 15 exiting) during the weekday p.m. peak hours; and
- 200 new truck trips (200 entering and 200 exiting) and 40 new passenger vehicle trips (20 entering and 20 exiting during a weekday).

72. The Municipality submits that the increase in traffic, coupled with the insufficient traffic signals at the intersection of Hwy 6 and PR 236 increase the risk of accidents that may lead to death, personal injury, and damage to property. The witness for Manitoba Infrastructure confirmed there was a pre-existing concern by the Province about Hwy 6 and PR 236.

73. Based on the Dillon Traffic Study recommendation, a roundabout is the most appropriate traffic intervention. A roundabout is safer than the conventional stop light, which can be ignored and beaten. A roundabout does not move or change, it is simply a physical barrier that slows vehicles. Furthermore a roundabout

³² Dillon Traffic Study; Hearing Exhibit No.5, Tab 3, Page 15

prevents T-bone accidents common in intersections. Vehicle collisions in a roundabout typically only involve impacts on the front fender of the vehicle where the engine is. Therefore, passengers feel less impact. In an accident, the reduced speed in a roundabout also means that trucks and cars are likely to collide at a lower rate of speed.

74. The Municipality, however, submits that constructing a roundabout on that intersection should not be delayed. Rather, it needs to be installed in year one of the quarry's operation because of the inherent dangers of Hwy 6, which we shall elaborate.

Insurance claim data shows that Highway 6 is a dangerous stretch of road

75. A high number of accidents have happened on Hwy 6 between the Perimeter to the west half of PR 236.
76. The data from Manitoba Public Insurance ("MPI")³³ shows there have been 136 accidents and 39 injuries between 1995 and 2020. The highest number of recorded accidents was in 2010, with 12 accidents. And in 2017 and 2019, 10 accidents happened on that stretch of Hwy 6 for each year.
77. Because the MPI data includes a narrative of the accident for insurance, the data may give us better insights on the nature of the accidents. The following are a few notable ones:

³³ MPI Data for collisions, injuries and fatalities-Highway 6 between the Perimeter to the Western extension of PR 236; Hearing Exhibit No. 16, Tab 1(f)

Entry 28 (September 2002): ins south on hwy 236. Stopped on s/s, thought it was clear and pulled out. Hit by t/p who was eastbound on gravel rd that turns into #236. ins front hit t/p left door. t/p no stop sign . no inj, no alcohol, 1 pass

Entry 32 (May 2003): ins stopped at the lights at Hwy 6, 2nd car in line. ins was only stopped about 10 seconds when t/p tractor trailer rearended ins and pushed her into t/p 2 ahead. car was drivable but taillights smashed. ins licenced another car so as not to have to drive this one. no pass, sore neck, left arm, shoulder blades. prev had fractured sacral vertebra, and was going to physio. no alcohol. t/p in front no apparent damage

Entry 37 (December 2003): Clmt was going west on the perimeter going about 60-65 kms per hour came around the corner and was blinded by the sunset and accidentally r/e o/p1. After this impact clmt was tapped from the rear by o/p2 but doesn't appear any damage on that claim. no inj no d or a no pass

Entry 56 (May 2007): Coll: Insd s/b making a left turn from the extension of Hwy 236 onto a road parallel to Hwy 6. T/P was travelling w/b on the road parallel to Hwy 6. (This is an uncontrolled intersection.) Insd had the sun in his eyes and did not see the t/p when turning. When he did see the t/p, he stopped and t/p swerved to avoid him and went into the ditch. As per r/o. No dmg to Insd's veh.

Entry 64 (January 2009): coll: o/p ran a stop sign causing coll: ins' ds veh. flipped

Entry 115 (December 2017): Driver was EB on hwy 6 noticed the half ton truck coming down 236 to the stop sign and the truck rolled through the stop sign and turned onto the highway and TP collided with insured's truck

Entry 126 (February 2019): SVC - Reid was driving SB on hwy 6 and there was 2 semi truck going NB on hwy 6. The 2nd Semi truck started going over Reid lane. Reid had to drive into the ditch in order to avoid hitting the semi truck as it was in the SB lane. According to Country Towing, that Semi caused 2 more vehicle to drive into the ditch in order to avoid being hit. Veh is not driveable, no prop dmg, no CRS

Entry 127 (March 2019): mvc - Shaun was going around curve when she started to skid, sliding into tow truck on side

of road - veh towed - no crs - no psgrs - no witnesses - no prop dmg

Entry 134 (November 2019): Collision - As per Rusty - Paul lost control of the van and went over the meridian and was hit by two trucks, Rusty didn't have any t/p information. No crs, no prop dmg

78. The nature of the accidents above indicates that weather conditions, carelessness, not following traffic rules, and glare from the sun are some of the factors that cause accidents on or around Hwy 6 and PR 236.

Highway 6 is notorious for being a dangerous road

79. The notoriety of Hwy 6 as a dangerous stretch of road has not gone unnoticed by media outlets. There have been numerous articles regarding deaths on Hwy 6. One notable article from the Winnipeg Free Press showcase the efforts of councillor Lee Garfinkel of Rosser was featured. She advocated for intervention following the death of a woman on a head-on-collision accident with a semi in August 2011³⁴.
80. Given the increase in truck traffic the Aggregate Quarry Operation will bring and the history of accidents, the Municipality submits there likely be an increased risk. It is the desire of the Municipality to mitigate these risks and ensure that accidents decrease, and there are no more casualties.

The Manitoba Legislative Assembly has Noticed the perils of Highway 6

³⁴ White crosses for 'highway of death' - Winnipeg Free Press; Submission of the Rural Municipality of Rosser, Tab 1(b)

81. The Manitoba Legislative Assembly (“MLA”) has noticed Hwy 6. In 2007 at the 2nd session, the 39th Legislature debated the need for a traffic light at the intersection of Hwy 6 and PR 236. The Hon. Ralph Eichler (Lakeside) argued:

Mr. Ralph Eichler (Lakeside): Mr. Speaker, this government has a serious safety problem but, in particular, the junction of Highway 6 and 236 where we need a traffic light before someone dies. Chief Terry Nelson who just got permission from this government to build a gas bar and convenience store stated, I quote, statistics says someone will die, end of quote.³⁵

82. The MLA once again broached the perils of Hwy 6 during the 5th session of the 39th Legislature in 2011 and the 1st session of the 40th Legislation in 2012. Mr. Eichler noted there had been 11 vehicle-related fatalities, 165 crashes, including 31 injury-causing collisions from 2006 up to 2011. At the 2012 legislature, Mr. Eichler brought up the 21 crosses erected by Councilor Garfinkel to serve as a memorial for all the lives lost on Hwy 6 and as a warning to travelers³⁶.

A new collision analysis is needed to understand both the qualitative and quantitative nature of the accidents on Hwy 6 and PR 236

83. If the Board finds that a roundabout is unnecessary, the Municipality submits that further studies on traffic and safety are essential to understand the nature of the risk brought by the Aggregate Quarry Operation.

³⁵ Manitoba, Legislative Assembly, 39th Leg, 2nd Sess (7 December 2007) at 293; Submission of the Rural Municipality of Rosser, Tab 1(a)

³⁶ Manitoba, Legislative Assembly, 40th Leg, 1st Sess (May 29, 2012); Submission of the Rural Municipality of Rosser, Tab 1(c)

84. The Dillon Traffic Impact Study assessed the impact of the Aggregate Quarry Operation.³⁷ Dillon conducted the study following the Manitoba Infrastructure's Traffic Impact Assessment Guidelines³⁸ ("Guidelines"). However, their study did not include an analysis of traffic safety.
85. Dillon's recommendation at page 41 of their report is to "monitor traffic volumes, delays, and safety performance at the intersection." This recommendation does not appease the concerns of the Municipality. The Municipality submits that the Guidelines on traffic safety should have been followed and part of the analysis:

3. Traffic Safety

The TIS may include a collision analysis to determine if there are any areas of concern within the immediate area of the proposed access and to be able to support the position that the proposed access will not cause an existing area of concern to deteriorate.

If areas of concern are identified, the TIS should identify their location, discuss any impacts the proposed access (or the overall development or redevelopment) would have, and present possible mitigation measures if appropriate.

The results of the analysis should be presented in the report text and any supporting information should be included in an appendix.

86. The Municipality submits that the Guidelines are permissive and not set in stone. The words used above may also indicate that traffic safety analysis is optional. However, the Municipality submits the Traffic Impact Study conducted by Dillon

³⁷ Dillon Traffic Study; Hearing Exhibit No.5, Tab 3

³⁸ Manitoba Infrastructure and Transportation, "General Guidelines for the Preparation of Traffic Impact Studies (April 2010); Hearing Exhibit 16, Tab 1(g)

Consulting is incomplete and requires more information regarding the impact of the Aggregate Quarry Operation on traffic safety.

87. The traffic impact study completed by the MMM Group as part of the Appellants' first application uses dated data, which may have been incomplete. Therefore, their conclusion stating that the accidents at that intersection is negligible needs to be reanalyzed with complete and reliable data from MPI. The data used by the MMM Group came from Manitoba Infrastructure and may not have contained all the accidents that may have occurred on that stretch of Hwy 6. The data that MPI provided shows there is a far greater number of accidents.
88. There have been numerous accidents on Hwy 6 between the Perimeter and west half of PR 236. The MPI data, the 21 white crosses once planted along the Hwy, the recognition of the perils of Hwy 6 and PR 236 by the MLA, and the potential increase in risk by the Aggregate Quarry Operation all point to the need for better traffic intervention at that intersection.
89. The Municipality submits to the Board it should grant the Municipality and its elected officials' deference on this matter and allow the inclusion of the Conditions that mitigate the risks the Aggregate Quarry Operation may bring.

Slippery Slope Argument

90. Numerous properties surrounding the Planned Area currently have significant untouched aggregate materials.

91. The Respondent submits that should the Board allow the Appellants to proceed with operating the Aggregate Quarry Operation, that the permitting and development of the Planned Area will create a slippery slope in the municipality for other developers to submit applications to mine quarries near the Planned Area. With this approval of the Appellants' Aggregate Quarry Operation it will lead to further applications and a request to approve quarries near the Planned Area? This also raises the question of how will this affect the Respondent and the local residents of the Respondent? The competing arguments are that one approval while considered to be quite intrusive by the local residents if accepted, will have determined effects. If multiple aggregate quarry operations are approved, what is the cumulative impact on the local residents and the Respondent for these multiple aggregate quarry operations? The argument that the Respondent and the local residents want to avoid is that since one aggregate quarry operation is approved that other operations will say they are also compatible. The Respondent is concerned about the multiple of potential development approvals leading to significant impacts on residential, commercial, and agricultural zones in the area. The Respondent is also concerned about significant impacts on municipal resources by effects of multiple quarries (slippery slope). The Respondent does not want one approval to automatically lead to other approvals.

Local Residents

92. The Municipality acknowledges the desire and right of the ratepayers to be opposed to and say "No" to the Aggregate Quarry Operation. The issue for the local residents is very simple, they ultimately do not want their businesses or serenity to

be disturbed with respect to the Aggregate Quarry Operation. For the local residents no condition will protect their businesses or their tranquility. They have detailed in their submissions what they perceive the effects of the Aggregate Quarry Operation will be on their lives including:

- a. Safety and health of their family
 - i. Increased traffic by large trucks
 - ii. Environmental impacts regarding potable water supply and health
 - iii. Increased sound impact
- b. The effects of dust including
 - i. Asthma
 - ii. Health effects of ingestion of dust
- c. Significantly higher traffic risks (240 truck movements)
 - i. The personal risks for their families with increased traffic movement
 - ii. Increased risks for their guests going to their businesses
 1. The potential of flying rock (however minor)
 - iii. Significant increased risks at Road 68N (Lilyfield Road) and PR 236 even with the proposed improvements on that intersection
- d. Risk for their animals and potential effects during blasting

- e. Risk and disturbance to wildlife
 - f. The closure of their business due to the impacts on the business operations and for their guests.
 - i. Loss of property values
 - g. Risk as to losing their “way of life”, serenity and tranquility. They argue First in time; first in right, they express concerns about:
 - i. The Province preferring the rights of the Developers to the rights of the local residents. 13 years of saying “No” by the local residents is being ignored
 - ii. The Province changing the rules to get their way
 - iii. The Province’s lack of commitment to improvements at Hwy 6 and PR 236 placing all local residents at risk.
93. For the local residents the Aggregate Quarry Operation:
- a. **will not** be compatible with the general nature of the surrounding area; and
 - b. **will be** detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area; and

- c. **is not** generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.
94. For the local residents there is no condition which could be implemented to mitigate the risks or to allow them to consider the risks. They propose a "first in time; first in right" approach to development their homes and their business were there first!. Their answer is simply "No" to the approval for the Aggregate Quarry Operation - **it is too risky.**

RECOMMENDATIONS

95. The Respondent recommends that the Board order:
- a. that the Aggregate Quarry Operation not proceed until the Province of Manitoba has implemented a traffic mitigation device at the corner of Hwy 6 and PR 236 such as a roundabout or traffic signals;
 - b. that a traffic impact study that includes updated traffic safety and collision analysis be provided;
 - c. that the Conditions be implemented;
 - d. that a development agreement be confirmed securing the Conditions;
 - e. that the potential for aggregate development is significant and any new aggregate development be required to provide a study confirming that aggregate resources are necessary; and
 - f. that for any future aggregate quarry operations, that the developer(s) commission a study outlining what the cumulative effects of multiple aggregate developments will be.

CONCLUSION

96. The Respondent submits that the Board has the authority and jurisdiction to decide regarding either rejecting the proposal; or approving the proposal, subject to any conditions the Board considers appropriate from subsection 106(2).
97. The Respondent submits the Conditions entered into between the Respondent and the Appellants should be given significant weight and discretion by the Board. They are an agreement in the nature of a settlement agreement and should be honored as such.
98. The Respondent submits the Board should grant the Respondent and its elected officials' deference regarding traffic controls and allow the inclusion of conditions in any development agreement that mitigates the traffic risks the development may bring. The Respondent further submits that in this regard, the Council is most attuned to the values of the community, which is reflected in their numerous denial of the conditional use application. According to Justice L'Heureux-Dubé, "elected officials are leading players in municipal democracy" (*Prud'homme c. Prud'homme*, 2002 SCC 85).³⁹

She further stated:

They are chosen by the residents to look after the community's interests; they take on a variety of responsibilities, some of which are provided by law and others of which are inherent in the nature of their position. Because their office is an elected one, municipal officials are accountable primarily to their

³⁹ In *Prud'homme*, the SCC dealt with the issue of the civil liability of an elected official. A councilor was found liable for defamation after he made a public statement containing malicious insinuations against ratepayers. *Prud'homme c. Prud'homme*, 2002 SCC 85); Brief Tab 16

constituents if they are unable to meet the demands of their position.

99. The SCC further stated that municipal officials resonate the voice of their constituents (*ibid*). The Municipality's Councilors may be characterized as mandataries of the public, representatives, legislators, officers, and trustees (*ibid*).

Elected municipal officials are, in a way, conduits for the voices of their constituents: they convey their grievances to municipal government and they also inform them about the state of that government.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of August 2020.

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REFERENCES LIST

Footnote #	Document	Document Reference
1	Lilyfield Quarry Permit Application	Hearing Exhibit No. 4
2, 3	Sections from Rural Municipality of Rosser Zoning By-Law No. 15-14 and Bulk Table	Brief Tab 1
4	List of persons affected and making presentations at the hearing	Brief Tab 2
5	Resolution 4/18	Hearing Exhibit No. 2
6	SIPD Letter dated November 25, 2019	Hearing Exhibit No. 2
7	Notice of Appeal	Hearing Exhibit No. 1
8	Municipal and Appellant Consent to Conditions	Hearing Exhibit No. 14
9, 10, 12, 13	<i>The Planning Act</i> , Sections 106(1), 118.2(1), 118.3(1)	Brief Tab 3
11	<i>Ladco Company Limited v. The City of Winnipeg</i> , 2020 MBQB 101	Brief Tab 4
14	Steven H Gifis, <i>Law Dictionary</i> , (New York: Barron's Educational Series Inc, 1984)	Brief Tab 5
15	The Municipal Board of Manitoba - Procedure at Aggregate Appeal Hearings	Brief Tab 6
16	<i>The Municipal Board Act</i> , Sections 24(1) & (3)	Brief Tab 7
17	<i>Dupras v. Mason</i> , [1994] BCWLD 2844 (BCCA)	Brief Tab 8
18	<i>Orange Properties Ltd v Winnipeg (City) Assessor</i> , (1996) 107 Man R (2d) 278, MBCA	Brief Tab 9
19	<i>Newterm, Re.</i> , [1988] NJ No 379	Brief Tab 10

20	<i>Pelech v. Pelech</i> , [1987] 1 S.C.R. 801 (SCC)	Brief Tab 11
21	<i>Saballoy Inc. v. Techno Genia S.A.</i> [1993] A.W.L.D. 414 (ABQB)	Brief Tab 12
22	<i>Stoewner v. Hanneson</i> , [1992] O.J. No. 697 (On Crt of Justice Gen Div)	Brief Tab 13
23, 31	MMM Group Traffic Study (2011)	Hearing Exhibit No. 3, Appendix E
24	WSP Canada Group Limited, "Lilyfield Community Consultation Report" (January 2019)	Hearing Exhibit No. 5, Tab 1
25, 32, 37	Dillon Consulting, "Lilyfield Quarry Traffic Impact Study" (23 January 2020)	Hearing Exhibit No. 5, Tab 3
26, 38	Manitoba Infrastructure and Transportation, "General Guidelines for the Preparation of Traffic Impact Studies (April 2010)	Hearing Exhibit No. 16, Tab 1(g)
27, 33	MPI "Data for collisions, injuries and fatalities-Highway 6 between the Perimeter to the Western extension of PR 236"	Hearing Exhibit No. 16, Tab 1(f)
28, 29	<i>The Municipal Act</i> , Sections 3 and 232(1)(a)	Brief Tab 14
30	<i>Grenier v Piney (Rural Municipality Of)</i> , 2003 MBQB 74	Brief Tab 15
34	"White crosses for 'highway of death'" - Winnipeg Free Press	Submission of the Rural Municipality of Rosser, Tab 1(b)
35	Manitoba, Legislative Assembly, 39th Leg, 2nd Sess (7 December 2007)	Submission of the Rural Municipality of Rosser, Tab 1(a)
36	Manitoba, Legislative Assembly, 40th Leg, 1st Sess (May 29, 2012);	Submission of the Rural Municipality

		of Rosser, Tab 1(c)
39	Prud'homme c. Prud'homme, 2002 SCC 85);	Brief Tab 16