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**User Fee Design by Canadian Municipalities:
Considerations Arising from Case Law**

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Abstract

User fees have become increasingly relied upon by municipal governments in Canada to fund municipal services due to the combined pressures from federal and provincial devolution of responsibility and the political costs of raising property taxes. While there is a substantial body of literature regarding the rationale for user fees, little information exists about how to design and implement a user fee such that it satisfies the Canadian legal requirements that have been established for the formal classification of user fees. We provide a detailed review of the existing Canadian case law to highlight key legal, technical, and administrative issues that present design and implementation challenges for user fees for Canadian municipalities. Through this analysis we highlight the key legal tests for user fees and discuss their application in case law. The application and interpretation of these tests in the case law draw attention to several unresolved issues and inconsistencies that need to be navigated and resolved by the courts.

I. Introduction

Generating sufficient revenue to fund activities using the most appropriate policy instrument, while balancing complex policy challenges is an increasing concern for Canadian municipalities. As “creatures of the provinces”, Canadian municipalities may only raise revenue through means authorized by the provinces, resulting in fewer forms of revenue generating instruments than provincial and federal levels of government. These concerns have increasingly led Canadian municipalities to turn to user fees as an alternative to property taxes.¹

While the literature on the rationale for user fees is well-established,² little information exists about how to satisfy the Canadian legal requirements that have been established for the formal classification of user fees despite the presence of significant relevant case law.³ In fact, the legal requirements for user fees do not appear to be well-understood, if even considered, by the existing literature. There is evidence suggesting that municipalities have experienced legal difficulties in implementing user fees. Not only have municipal user fees in a number of forms, including campground fees,⁴ volumetric gravel removal fees,⁵ and waste disposal fees⁶ faced legal challenges across Canada, but they have also been the subject of negative internal audit reviews.⁷

¹ On average, revenues from municipal user fees have grown at an annual rate of 2% since 1988, surpassing the growth rate in property taxes (Federation of Canadian Municipalities, *The State of Canada's Cities and Communities 2012* (Ottawa: Federation of Canadian Municipalities, 2012), at 4. (http://www.fcm.ca/Documents/reports/The_State_of_Canadas_Cities_and_Communities_2012_EN.pdf).

² For example, see: Richard M. Bird, *Charging for Public Services: A New Look at an Old Idea* (Toronto: Canadian Tax Foundation, 1976); Harry M. Kitchen, *Local Government Finance in Canada* (Canada: Canadian Tax Foundation, 1984); Harry M. Kitchen, *Municipal Revenue and Expenditure Issues in Canada* (Canada: Canadian Tax Foundation, 2002); Harry Kitchen, “Pricing of Local Government Services” in Paul A. R. Hobson & France St. Hilaire, eds., *Urban Governance and Finance: A Question of Who Does What* (Montreal: Institute for Research on Public Policy, 1997); Richard M. Bird and Thomas Tsiopoulos, “User Charges for Public Services: Potentials and Problems” (1997), 45(1) *Canadian Tax Journal* 25; Donald N. Dewees, “Pricing Municipal Services: The Economics of User Fees” (2002), 50(2) *Canadian Tax Journal* 586; David G. Duff, “Benefit Taxes and User Fees in Theory and Practice” (2004) 54 *University of Toronto Law Journal* 391.

³ Catherine Althaus, Lindsay M. Tedds, and Allen McAvoy, “The Feasibility of Implementing a Congestion Charge on the Halifax Peninsula: Filling the ‘Missing Link’ of Implementation” (2011) 37(4) *Canadian Public Policy* 541, briefly summarize key Canadian case law to determine the legal criteria for a user fee in Canada to evaluate if a congestion charge could be designed to satisfy the legal requirements for a user fee; Wisconsin, Legislative Audit Bureau, Joint Legislative Audit Committee, *Best Practices Report: Local Government User Fees* (Madison, WI: Legislative Audit Bureau, 2004) (<http://legis.wisconsin.gov/lab/reports/04-0UserFeesFull.pdf>) provides a brief overview of the statutory and case law that governs the distinction between a tax and a user fee in the state of Wisconsin; Leslie A. Powell, “Comment: User Fee or Tax: Does Diplomatic Immunity from Taxation Extend to New York City’s Proposed Congestion Charge?” (2009) 23 *Emory International Law Review* 231, uses statutes and case law to determine if the City of New York’s proposed congestion charge meets the legal criteria to be considered a user fee and therefore not subject to the Vienna Convention on Diplomatic Relations; and, Hugh D. Spitzer, “Taxes vs Fees: A Curious Confusion” (2003) 38(2) *Gonzaga Law Review* 335, considers the case law for distinguishing a tax and a user fee in the state of Washington.

⁴ *Carson’s Camp Ltd v. Amabel (Township)* (1998), 159 DLR (4th) 180, 47 MPLR (2d) 31 (Ct of Jus, Gen Div).

⁵ *Allard Contractors Ltd v Coquitlam (District)*, [1993] 4 SCR 371, 85 BCLR (2d) 257 (SCC).

⁶ *Antigonish (Town) Waste Disposal Charges Bylaw, Re* (1999), 7 MPLR (3d) 165, 181 NSR (2d) 68 (NSSC).

⁷ For example, City of Ottawa, Office of the Auditor General, *2010 Audit Report* (Ottawa: Office of the Auditor General, 2011)

(http://www.ottawa.ca/city_hall/mayor_council/auditor_general/audit_reports/2011/annual_report_2010_en.pdf), where the Auditor General wrote, first, that there was no comparison of planned amounts to actual costs and

The primary purpose of this paper is to provide a detailed review and critique of the existing Canadian case law to assess the current state of the law and highlight key legal issues that present challenges to Canadian municipal user fees to ensure that user fees are legally appropriate.⁸ The main goal of our work is to provide clarity with respect to the principles developed in the jurisprudence on the topic of user fees, particularly from a municipal implementation perspective. In particular, we set out the legal tests and the components that are relevant for municipal public administrators. While these legal tests may clarify some questions around the legal criteria for user fees, the law on user fees is complex and not definitive. As a result, the case law on user fees still leaves many legal questions unresolved, creating uncertainty in some areas on the specific legal requirements that must be met when designing municipal user fees. A secondary goal of our work is to highlight these unresolved areas. We do so to illuminate the inconsistencies between the tests to not only ensure that municipalities are aware of potential vulnerabilities, but also to guide courts towards providing resolutions to these inconsistencies. An important caveat of our work is, because municipalities derive their authority to charge user fees from their enabling legislation, our work does not supplant careful review of a municipality's enabling legislation.

We begin by outlining the constitutional authority for municipalities to charge user fees. We then explain the tests for user fees and review the leading cases in section III. Section III also elaborates on these tests providing a discussion of cases where elements of the tests have been further described or clarified. It is important to note that we present a selection of relevant case law, but by no means does this section detail all municipal user fee cases and it also includes user fee cases outside municipal law where the judgement would apply to the municipal context. Throughout this review there are issues that are noted for further discussion. Section IV identifies these unresolved issues related to the user fee test and explains and makes recommendations for consideration and clarification of the user fee test. We then address an important complication that arises in case law, the difference between a user fee and a regulatory charge in section V. Again, the case law highlights a number of unresolved issues related to the distinction between a user fee and a regulatory charge and these are discussed in section VI. Section VII concludes the paper.

II. Constitutional Authority for Municipalities to Charge User Fees

As noted in the introduction, municipalities are only allowed to exercise the powers that are delegated to them by the provinces or territories, so it is important to understand the provincial authority to delegate powers. The Constitution Act, 1867⁹ [Constitution Act] sets out the

volumes to validate the user fees charged by the City of Ottawa; second, that the Council was not provided with the details of the costing used to justify the user fees; and finally, that some user fee calculations included costs that are not at all attributable to the service being provided.

⁸ While our work focuses on issues related to municipal user fee design, many of the lessons we expound can also be applied to user fees designed by other levels of government. Municipalities, however, operate within a constrained fiscal environment which serves as a back drop for the application of these legal principles. Other levels of government are not as equally constrained and not all the considerations we outline apply beyond municipal governments. This is not to say that the federal and provincial governments do not face constraints with respect to their fiscal authorities. They are constrained constitutionally and procedurally. Particularly, in order to enact a tax, that tax must be approved by Parliament or provincial legislature. By not following this procedural requirement, this is what is known as 'taxation without representation'.

⁹ Constitution Act, 1867, 30 & 31 Victoria, c. 3 (UK).

division of powers between the federal and provincial governments in sections 91 and 92, respectfully. The federal and provincial governments are only able to pass laws on the matters for which they are given authority. If a law is outside of the jurisdiction of a government, that is, the government is not given constitutional authorization to govern in that area, it is ultra vires; if it is within the jurisdiction of a government it is intra vires.

The broadest revenue raising powers are provided to the federal government, which under section 91(3) of the Constitution Act can raise money by any “[m]ode or System of taxation.”¹⁰ The revenue raising powers of provinces are more limited than those of the federal government. Section 92(2) provides the provinces with the authority to impose direct taxation, which has been interpreted to include the legislative power to impose user fees, according to *Ottawa v. Elec Ry.*¹¹ In addition, section 92(9) authorizes licences and has been found to also provide for the levying of fees in relation to those licences.¹² This authority has been broadened in its interpretation to also include regulatory charges, which will be explained further in section V of this paper.

In addition to their revenue raising powers, provincial governments have jurisdiction over municipalities, pursuant to the Constitution Act, section 92(8); this is why municipalities are known to be ‘creatures of the province’. Municipal governments are not recognized in the Constitution Act as having separate jurisdiction or authority over any areas or matters, consequently they are limited to exercising only the powers that are delegated to them by the provinces.¹³ In general, under section 92(2), user fees and property taxes, and under section 92(9), regulatory charges, are the three main forms of revenue raising powers that are devolved to municipalities.

It is important to understand that provinces exercise the delegation of powers to municipalities in different ways, meaning that all municipalities across Canada will not have the same authorities. In relation to user fees, this means that a municipality in one province may be able to enact a user fee for a particular public good or service and with particular characteristics, while a municipality in another province is not permitted to enact the same user fee or have the same characteristics. This is why careful examination of the provincial or territorial authority is required to establish the authority given to municipalities to charge user fees and if there are any legal limitations on those authorities in the law or if there is other legislation in place governing user fees.¹⁴ Where the governing statute for a municipality or other legislation has not codified a user fee test, the test to determine a user fee will follow legal precedent. These legal principles have been established in case law, discussed next, and inform the interpretation of the municipal legislation.

¹⁰ Ibid.

¹¹ (1929) 64 OLR 537 (ONCA) at 543, “That the fee or charge imposed by the by-law is a tax is, I think, quite clear. It is fixed at ‘one-tenth of a cent per scheduled passenger mile of travel or along all streets traversed by such service within and under the jurisdiction for the City of Ottawa.’ It is not a licence-fee, and the legislative power to impose the ‘fee or charge’ must rest upon the power to make laws in relation to ‘direct taxation within the Province’ given by para. 2 of sec. 92 of the British North America Act.” [Emphasis added].

¹² See for example, *Eurig Estate, Re*, [1998] 2 SCR 565, 1998 Canlii 801 (SCC).

¹³ Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (Saskatoon, SK: Purich Publishing, 1996) at 1.

¹⁴ An example of such legislation is the federal User Fees Act, SC 2004, c. 6.

III. The User Fee Test

One of the main legal challenges to municipal user fees is the argument that a municipality has acted outside of the provincially delegated authority. Typically, this means that the challenging party argues that the user fee is a tax and the taxing power has either not been devolved to the municipality (a form of direct tax) or cannot be devolved as it is ultra vires provincial jurisdiction (a form of indirect tax). As a result, the case law has developed around ensuring that a levy is, in fact, a user fee. There are two tests that have been developed to make this determination. Presently, the tests to determine if a levy is a user fee is the following and is represented Figure 1. First, the levy is evaluated against the criteria established in *Lawson v. Interior Tree Fruit & Vegetable Committee of Direction*¹⁵ [*Lawson*] to determine if it is a tax: that the levy is (1) enforceable by law; (2) imposed under the authority of the legislature; (3) imposed by a public body and; (4) for a public purpose. The *Eurig* test is then applied to further evaluate a levy. The first element in *Eurig* is to determine if there is a nexus between the cost of the service and the fee. If so, the levy is a user fee. There must be a reasonable connection between the cost of the service and the amount charged, but it does not have to exactly correspond.^{16,17}

[Figure 1 here]

In this section we detail these tests and show how these tests have been applied in the case law.

A. Is a levy a tax?

In order to be found a user fee, the levy must be first found not to be a tax, per four criteria established in *Lawson*. In *Lawson*, one of the questions before the SCC was whether the levy fell under provincial jurisdiction, pursuant to the Constitution Act, sections 92(2) or (9). The SCC stated that a levy will be a tax if it meets all of the following four criteria,

- 1) Enforceable by law;
- 2) Imposed under the authority of the legislature;
- 3) Imposed by a public body; and
- 4) Made for a public purpose.

¹⁵ [1931] SCR 357, [1931] 2 DLR 193 (SCC).

¹⁶ One could argue that these two elements in *Eurig* are one requirement for a reasonable cost nexus; however, we chose to keep the two elements separated as it has been how they are described and applied most commonly.

¹⁷ Most recently, the *Lawson* and *Eurig* criteria were restated in the 2008 Supreme Court of Canada decision *620 Connaught Ltd v. Canada (Attorney General)* 2008 SCC 7, which dealt with a question of whether a levy on liquor licences on restaurants operating in Jasper National Park was a regulatory charge or a tax. It was not argued that the levy constituted a user fee. In this case, the SCC provided guidance with respect to the assessment process of determination of fees, using the *Eurig* criteria. The court stated, “[a] user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities. However, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice.” *620 Connaught* demonstrates that the *Lawson* and *Eurig* test remains valid.

This is the test that continues to be applied to determine if a levy is a tax.¹⁸

In *Lawson*, the court found that the levy met all the elements of being a tax. The levy was enforceable because it could be sued for; a certificate demonstrated the amount owed and failure to pay was an offence. The levy was imposed by the authority of the legislature through a public body; it was demonstrated that the Committee was a public body because the Committee Chairman was appointed by the Lieutenant-Governor in Council, had wide powers of regulation over an extensive territory, and was constituted by and acted according to statute. The court also stated that the levy was made for a public purpose, which it found support for by considering that the Committee that imposed the levy was a public body and that the levy affected a wide territory and number of people.¹⁹

B. Is a levy a user fee?

In 1998, the Supreme Court of Canada rendered a decision in *Eurig* that added a second test to distinguish a tax from a user fee. In *Eurig*, the appellant, the executrix of an estate not wishing to pay approximately \$5,700 in probate fees, argued that the probate fees authorized the Province of Ontario were a tax, the authority for which was not procedurally granted by the legislature making the fee ultra vires of the province's jurisdiction.²⁰ Following the test outlined in *Lawson*, the first step for a court in making a decision as to whether a levy is a user fee is to determine if it is actually a tax. In *Eurig*, the court evaluated the probate fee against the four *Lawson* elements and found that the levy appeared to satisfy the *Lawson* criteria.

The court, however, decided that this was not sufficient to determine that the levy was indeed a tax. The seminal point in *Eurig* is a new element the SCC introduced to conduct the user fee analysis. The court wrote at paragraph 21, “[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid.”²² This led the court to provide a second element to its test. In relation to setting the price of user fees the court stated, “[i]n determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. In particular, as long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice.”²³

The court relied on the evidence provided to determine that there was no correlation between the cost of the service provided (the service being issuing of the letters probate) and the amount charged by the province. The court found that the levy was tied to the value of the estate, but the cost for issuing letters probate did not increase or decrease depending on an estate's value. As a

¹⁸ See for example: *Eurig*, supra note 12, at paragraph 15.

¹⁹ *Lawson*, supra note 15, at paragraph 10.

²⁰ For a detailed description, see Paul LeBreux, “Eurig Estate: Another Day, Another Tax” (1999) 47(5) *Canadian Tax Journal* 1126.

²¹ In order to enact a tax, that tax must be approved by Parliament or provincial legislature, supra note 8. The authority for probate fees, however, had been delegated by regulation and did not go through the legislature.

²² *Eurig*, supra note 12 at paragraph 21.

²³ *Ibid.*, at paragraph 22.

result, the SCC found there was no nexus between the cost of the service and the levy charged.²⁴ The court held that the levy was a tax, not a user fee, and was *ultra vires* the jurisdiction of the province as the province had imposed the tax without the proper delegated authority.²⁵

C. *Applications of the Lawson and Eurig tests*

While the *Lawson* and *Eurig* tests may appear straightforward, uncertainties arise when it comes to being able to apply each element of the tests. Examples in municipal law cases provide additional clarification on each of the four *Lawson* criteria and these will be discussed here.

In an Alberta Electric Utility Board [Board] decision, *Grand Prairie (City)*²⁶ [*Grand Prairie*], the first *Lawson* criterion was considered, which requires a levy to be enforceable by law in order to be a tax. In this case, the City of Grand Prairie and its natural gas provider, ATCO Gas, reached an agreement that increased a contractual fee that ATCO was required to pay for the provision of natural gas to the City. The Board concluded that the fee was not a tax because it was imposed through an agreement and not required by law. The Board was persuaded that the arrangement did not meet the first element of *Lawson* as the arrangement for payment was negotiated between the parties in the agreement and thus not enforceable by law. The Board further held that the fee is not compulsory or enforceable by law in the sense that it is charged pursuant to a freely negotiated agreement between the City and ATCO Gas.²⁷ The Board was also persuaded by a provision in the contract that the fees were paid in lieu of a tax, reasoning that the fee cannot be a tax if it is paid instead of a tax.²⁸ *Grand Prairie* is useful to demonstrate a levy that fails on the first *Lawson* element, that is, when a levy is not compulsory but rather arranged by negotiation, it will not be found to be a tax.

The first element of *Lawson* was also discussed by the British Columbia Supreme Court (BCSC) in *Cariboo College v. City of Kamloops*²⁹ [*Cariboo College*]. At issue in this case were development cost charges, imposed for the purpose of providing the municipality with funds to assist in the capital costs of building sewers, water, drainage, highways, and public open space.³⁰ The court concluded that the development cost charge was not a tax³¹ because Cariboo College was not obliged to obtain a building permit from the City unless it chose to construct a

²⁴ *Ibid.*, at paragraphs 22-23.

²⁵ If a user fee is found to be invalid, the court must then decide the appropriate remedy. This issue is taken up in *Kingstreet Investments Ltd v. New Brunswick (Department of Finance)*, 2007 SCC 1. In *Kingstreet*, the Supreme Court of Canada addressed whether restitution was available for the recovery of monies collected under legislation that is later declared to be *ultra vires*. The SCC determined that restitution was generally available and that there is no general immunity affecting recovery of an invalid tax. In particular, the court decided that the government that enacted the *ultra vires* legislation, could amend it to make it valid and ensure that it retroactively was valid, so that the government would not have to pay restitution. See also *Barbour v University of British Columbia*, 2009 BCSC 425.

²⁶ 2003 CarswellAlta 2132 (Electric Utility Board).

²⁷ *Ibid.*, at paragraph 24.

²⁸ *Ibid.*, at paragraphs 29-30.

²⁹ (1982) 133 DLR (3d) 241, 36 BCLR 133 (SC).

³⁰ *Ibid.*, at paragraph 13.

³¹ *Ibid.*, at paragraph 30.

new building, and if it chose to do so it must pay the development cost charges to defray the City's capital cost of providing the services.³²

In 2012, the BCSC offered further insight into the interpretation of the first element of *Lawson* in its judgment in *Canadian Wireless Telecommunications Assn v. Nanaimo (City)*³³ [*Canadian Wireless*]. The issue in this case was a per call fee option that wireless service providers could elect to charge in lieu of charging consumers on a flat monthly rate that was being imposed by the City of Nanaimo to support the 911 emergency call system. For the first *Lawson* element, the court examined if the single call fee was compulsory and enforceable by law. On the basis that the Wireless Service Provider must pay the single call levy if it does not agree to the monthly flat rate, the court found that there was a "practical compulsion" to pay the single charge levy and found the levy to be a tax.^{34,35}

*Antigonish (Town) Waste Disposal Charges Bylaw*³⁶ [*Antigonish*] also considered *Lawson* elements where a university challenged a municipal by-law that imposed a waste disposal charge on land owners, but made an exemption for residents who were paying the waste disposal charge in their property tax. The result was that the charge only applied to tax-exempt entities, which were not paying property tax, such as the university. The court undertook a detailed analysis of all four *Lawson* criteria. As to the first element, that the levy is enforceable by law to be a tax, the court found that the charges would bear interest if they are outstanding, may be registered as a lien, and may be sued for and collected by the town of Antigonish.³⁷ The court concluded that this was sufficient to meet the first *Lawson* element.³⁸

Antigonish also contributes to further understanding of the third and fourth elements of *Lawson*. The third element of *Lawson*, requiring that the levy be imposed by a public body, is rarely considered in any depth as it is generally obvious that the imposing body is a public body, yet was considered by the court in this case. In *Antigonish*, the court summarized its conclusion that the municipality was a public body by stating, "[a] municipal corporation is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purpose of local government."³⁹ Two additional sources are cited to support this position. First, the court cites Rogers in *The Law of Canadian Municipal Corporations*, who writes, "a municipality can also be described as a public corporation created by the government for political purposes and having subordinate or local powers of legislation."⁴⁰ Second, the court cited a 1911 decision that describes municipal corporations as "miniature parliaments, institutions by which the people's will is expressed through elected representatives."⁴¹ The court held that the third *Lawson* element, that the levy is imposed by a public body, was met based on these authorities.

³² *Ibid.*, at paragraph 27.

³³ 2012 BCSC 1017.

³⁴ *Ibid.*, at paragraph 62.

³⁵ This conclusion is particularly interesting as there were two options for the wireless service provider to select from in terms of payment and the court examines this point carefully to reach its final determination.

³⁶ *Antigonish*, supra note 6.

³⁷ *Ibid.*, at paragraph 18.

³⁸ *Ibid.*, at paragraph 19.

³⁹ *Ibid.*, at paragraph 21.

⁴⁰ *Ibid.*, citing Ian MacFee Rogers, *The Law of Canadian Municipal Corporations* (2nd ed.) (Toronto: Carswell, 1971-).

⁴¹ *Ibid.*, at paragraph 22 citing *Dugas v. Macfarlane* (1911), 18 WLR 701 (YT Terr Ct).

The last element of *Lawson* is to establish that the levy is intended for a public purpose. Unfortunately, the interpretation of this element has been inconsistent between two meanings: first, that the revenue generated is intended to benefit the public, or second, that the revenue generated is put into a general account (rather than designated to a particular good or service). The first method of interpretation may be found in *Antigonish*. The municipal by-law in *Antigonish* included a purpose statement, which is referred to by the court. The court wrote, “[i]t is obvious that the By-law was enacted as a means of helping to defray the costs associated with the use of waste processing facilities.”⁴² The conclusion the court reached was that there was a two-fold public purpose; first, to reduce the tax burden on Town taxpayers, and second, to increase the Town’s revenue.⁴³ The court in *Antigonish* found that the by-law was a tax and not a user fee and was inconsistent with the legislative scheme that created tax-exempt institutions. In other words, the Town was attempting to tax the tax-exempt University.

As seen in *Lawson* and *Antigonish* regarding the interpretation of the fourth element, the accounting of the revenue from a user fee was not contemplated; rather the court was concerned with whether the revenue was fulfilling a “public purpose”. However, it is notable that in *Eurig* the nature of public purpose had shifted. In *Eurig* the SCC instead considered the account where the revenue generated by the levy would be held in order to evaluate public purpose. The court wrote,

[P]robate fees do not “incidentally” provide a surplus for general revenue, but rather are intended for that very purpose. The revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate.⁴⁴

The “public purpose” factor can be influential in the analysis, likely because some of the other elements in the *Lawson* test are fairly easily established (for example, most levies of concern will be imposed by a government body). The interpretation of the “public purpose” factor as providing a “public benefit” is also often easily established as most government levies could have found to have some sort of purpose that serves the public. The shift in *Eurig* towards a more “bright line” test focused on where the revenue is accounted, is helpful though not consistently taken in subsequent case law.

An example of the revenue-focused interpretation of the public purpose element is found in *Greater Toronto Apartment Association v. Toronto (City)*⁴⁵ [GTAA]. This case deals with a user fee scheme with the intention of diverting 70% of the garbage away from landfills.⁴⁶ The court examined the levy against the four *Lawson* criteria and found it met all the criteria. The court made specific note of the difficulty of this test, in that a fee may in fact meet all the criteria,⁴⁷ a point we will return to in section IV. The court then went on to consider if the levy was in fact a user fee and undertook significant analysis to determine the nexus between the levy and the

⁴² *Ibid.*, at paragraph 25.

⁴³ *Ibid.*, at paragraph 30.

⁴⁴ *Eurig*, *supra* note 12, at paragraph 20.

⁴⁵ 2012 ONSC 4448.

⁴⁶ *Ibid.*, at paragraph 1.

⁴⁷ *Ibid.*, at paragraph 24, “The problem is self-evident. Based on these criteria, virtually any money collected by the City would be identified as a tax.”

service provided. The court cited *Eurig* and held that the garbage user fees are different from the probate fee, which was not found to meet the nexus element. The court used the evidence provided by the City regarding the costs to support this analysis. The total cost of the program was \$237.5 million, with the base amount of the program being established from the previous year, which the court said, “[i]t cannot be said to be arbitrary or unrelated to the cost of the service for which the fee is being collected.”⁴⁸ Ultimately, the City only intended to recover 83% of the true cost of the service from the residential user fees. The City did not achieve the level of waste diversion it anticipated and therefore collected more revenue from the multi-residential buildings than expected. The GTAA argued that this failure converted the fee to a tax because it eliminated the nexus. The court found that there was in fact a nexus, writing,

The fact that some of the City’s assumptions were wrong is hardly surprising. I would venture to say that this is almost inevitably the case when one is attempting to predict the future in respect of a question that inherently contains a number of variable values. In any event, in determining whether a nexus exists, it is not for the court to look behind the methodology used and question the assumptions made in respect of individual values adopted.⁴⁹

The point made clear in this case is that while a user fee is meant solely to recover costs, this does not preclude surpluses being accrued in any given year provided that those surpluses were not an intentional design element.

IV. Unresolved Issues from *Lawson* and *Eurig*

While the elements of the tests established by *Lawson* and *Eurig* are easily identified, their interpretation and application is more complicated. In particular, despite the establishment of these tests, the legal distinction between a fee and a tax often depends largely on the particular levy being considered. Courts will look beyond the levy’s label to determine whether it meets the elements of a user fee or a tax if the levy is challenged and examine the structure and context of the specific levy under dispute. In addition, the evolution of tests has resulted in inconsistencies between them. The result is significant uncertainty, with many still as yet unresolved questions.

In this section, we ponder these unresolved questions. The first is how exactly to apply the tests – do all elements of these tests, particularly *Lawson*, need to be examined? Is it possible for a user fee to meet all the *Lawson* criteria and still meet the *Eurig* criteria? What exactly does a ‘public purpose’ mean? To what activities can user fee revenues be directed? And, would it be more appropriate to order the test criteria, given the answers to these questions.

We find that the jurisprudence does provide some clarifications to the uncertainties we raise. First, it does not appear that it should be possible for a user fee to meet all of the *Lawson* elements and still be found to be a user fee if the ‘public purpose’ element is interpreted as meaning that revenue generated is put into a general account as set out by *Eurig*, thereby resolving a second question. Second, as a result, it appears there is a more logical way of re-ordering the *Lawson* and *Eurig* tests. While the jurisprudence has not taken this step, we suggest that manipulating the *Lawson* and *Eurig* criteria to allow for a clearer application of the user fee

⁴⁸ *Ibid.*, at paragraph 30.

⁴⁹ *Ibid.*, at paragraph 41.

test would seem appropriate. The first factor to consider should be how the revenues are designated; if the revenues go to a general revenue account, the remaining *Lawson* criteria should be applied to determine if the levy is a tax. If the revenues go to a specific revenue account that is designated for the cost of the service, the *Eurig* test to find a nexus should be applied. The user fee analysis, while clearly articulated in terms of the elements required, leaves gaps in terms of the ordering of the test and which elements must be fulfilled to move onto the next stage. Providing a clear procedure would allow parties to make clearer arguments to a court and for the court to ensure it is considering all factors appropriately. Such a re-ordering would provide support for the notion that not all elements of the *Lawson* test need to be examined.

A. *How do the tests work together in application?*

An initial difficulty in reading and attempting to reconcile the jurisprudence regarding user fees is that the courts rarely fully examine all elements of the tests. Instead, it is more common for a specific element to be the deciding factor while other elements are left unexamined.⁵⁰ The question arises as to whether it is possible for a user fee to meet all the *Lawson* criteria, implying that the levy would be a tax, and still meet the *Eurig* criteria, and then be found to be a user fee? This was a question specifically asked but not answered by the court in *GTAA*. There does not appear to be a case in which a court states whether or not the entire *Lawson* test must be completed before the *Eurig* step can be examined. In fact, as noted above, the court in *GTAA* made specific mention of the difficulty in applying the full test, writing:

Counsel for 373041 Ontario Limited submitted that each of these four characteristics attached to the “fee” set out in By-law 506-2008. They suggested that it was enforceable because the City could sue for any unpaid fees. More importantly, the fee is collected as part of the Utility Bill sent to an owner. It is an offence to fail to pay the account. The fee is imposed pursuant to a provincial statute, the *City of Toronto Act, 2006*, and was levied by a public body. Finally, the proceeds are intended for a public purpose--waste diversion. All four criteria are fulfilled and, on this basis, it was asserted that the payment is a tax and not a fee.

The problem is self-evident. Based on these criteria, virtually any money collected by the City would be identified as a tax. This idea was enunciated in *620 Connaught Ltd. v. Canada (Attorney General)*:

...these characters will likely apply to most government levies.

The true impact of the application of the criteria was explained in *MacMillan Bloedel Ltd. v. British Columbia*:

It was enforceable by law, it was imposed under the authority of the legislature, it was imposed by a public body, and it was made for a public purpose. With great respect, although that case [*Lawson*] is authority for the proposition that an impost cannot be a tax unless it meets those criteria, I do not think the converse necessarily follows, that anything meeting those four criteria must be a tax. I do not, of course, dispute the ruling in that case that the royalty surcharge was a tax, but those four tests would apply to a ferry

⁵⁰ There are, however, exceptions that may be found more recently, such as in *Canadian Wireless* where the BCSC examined all of the factors of a tax, found the charge to be a tax, and then further ruled out the possibility of it being a user fee.

fare in British Columbia, although in my opinion that fare is not a tax but a fee for service imposed under statutory authority.⁵¹

As alluded to by the court in *GTAA*, the nature of the application of the *Lawson* and *Eurig* test makes it uncertain as to how the test should be applied—it is not clear if all of the elements of *Lawson* have to be met before *Eurig* can be applied. Further, as we elaborate on below, there is some confusion in the analysis of the elements of the tests.

B. What is a “public purpose”?

The fourth element of the *Lawson* test is to establish whether the user fee is meant for a “public purpose”. As seen in the discussion in section III.C, the interpretation of this element varies between two possibilities; first, that the revenues generated are put towards the funding of a specific publicly provided good or service or, second, that the revenues generated go to a general account. An example better illustrates this divergence: where a levy is imposed on garbage bags for municipal garbage removal, the revenue generated from that levy could be interpreted as funding a publicly provided good, the removal of garbage, in which case it would be an element weighing in favour of a tax. However, if the court chooses the second interpretation, that whether the garbage bag levies are put into a specific account or general account, then the determination of whether or not the levy is a tax or a user fee may lie in the balance (assuming the other factors are met). Most revenues collected by government are likely to be found to be supporting the provision of a good or service, while user fee revenue must have a nexus indicating that it belongs to a specific account. There is inconsistency in the application of this element and it is our position that, first, the public purpose element should be clarified to establish that it is determined on the basis of where the revenue generated is allocated and, second, that the user fee test should be modified to consider this element first. Below, we examine some municipal user fee cases that demonstrate the different interpretations of this *Lawson* element.

In *Urban Outdoor Trans Ad v. Scarborough (City)*⁵² [*Urban Outdoor*], the Scarborough City Council passed a by-law to limit the number of outdoor signs being erected.⁵³ Under the by-law an annual fee for each third-party billboard sign of \$100 per face for ground-mounted signs and \$200 per face for roof-mounted signs was imposed. The court relied on the fact that the funds generated by the fee were not being deposited into a general revenue account and concluded that the funds were not intended for a public purpose. *Urban Outdoor*, therefore, is an example of the application of the shift in the *Lawson* element which appears to examine only the accounting of the revenue when evaluating whether the fee is levied for a public purpose. Recall that this shift was previously discussed when the same element was considered in *Eurig* and *GTAA*.

It appears, from *Eurig*, *GTAA*, and *Urban Outdoor*, that the public purpose element in *Lawson* is determined by establishing whether the revenue generated goes to a general revenue account or a specific account that funds the service. The court in *Eurig* was persuaded that the levy was for a public purpose because the monies levied from the fee were used as surplus in general

⁵¹ *Ibid.*, at paragraphs 23-25.

⁵² (2001) 52 OR (3d) 593, 196 DLR (4th) 304 (ONCA).

⁵³ *Ibid.*, at paragraph 1.

revenue accounts rather than to directly offset the costs of probate.⁵⁴ If the levy is intended for a public purpose, as in *Eurig*, the revenues from the levy are designated towards general revenues. In contrast, the allocation of the levy to the specific fund that funds the service is an indicator that the revenues are not intended for a public purpose, as in *GTAA* and *Urban Outdoor*.

It is clear that this point has not yet been clarified sufficiently in the case law when one considers the analysis in *Canadian Wireless*. In this case, the BCSC considered arguments that the levy was “provided for the benefit of all residents of the City, and therefore, the fee is intended for a public purpose”⁵⁵ and conversely, that “there is a commercial marketing advantage for a telecommunications operator to be able to offer 911 service to its customers.”⁵⁶ The BCSC found that because the Canadian Radio and Telecommunications Council mandated the provision of 911 services by the Wireless Service Providers, the WSPs could not decline to offer the service and thus that the fee was intended to fund a public service.⁵⁷ Nowhere in this analysis did the BCSC consider the allocation of the revenues.

It is our position that it would be most sensible for the “public purpose” criteria to be based on the designation of account, rather than whether the good or service provides a public benefit. Simply put, an argument that a good or service provides a public benefit is easily crafted as there are no parameters around the element and no case law to suggest that a government funded good or service does not provide any benefit to the public. A clarification that the “public purpose” element is to consider where the revenues are deposited and the service that they fund provides a stronger point to which courts may turn to strengthen their analysis and make a reliable and consistent determination. Relating back to broader economic principles in the user fee analysis, this also supports the principle that the user pay for the good or service they consume.

C. What is the breadth of the spending from the “Specific Account”? Once allocated to a “Specific Account” what can be funded?

A related question arises with respect to the issue of specific accounts and general accounts.⁵⁸ If user fee revenues are directed to a specific account, what programs and services can be funded from that account? It does not appear that this issue has been addressed in the case law to this point, which, given the confusion on this point, is understandable. However, in the practical sense, municipalities must concern themselves with the breadth of the revenue collection and spending from the specific versus the general revenue accounts.

One hint as to the acceptable breadth of spending that appears in the case law may be found in *Urban Outdoor*, where the court listed the use of funds by the Sign Section, which was the administering body in that case that collected and used the specific fund. The court wrote that

⁵⁴ *Eurig*, supra note 12 at paragraph 20.

⁵⁵ *Canadian Wireless*, supra note 33 at paragraph 76.

⁵⁶ *Ibid.*, at paragraph 78.

⁵⁷ *Ibid.*, at paragraph 79.

⁵⁸ While there is no specific requirement in the case law that user fee revenues must be put into a specific account, it is not clear how one would satisfy the *Eurig* test requirements of cost recovery and a tight link between the activity charged for and activities funded by the revenues if revenues were placed in a general account.

the specific fund “cover[s] the operation of the Sign Section”.⁵⁹ However, no additional commentary is made on this point by the court.

A current municipal example demonstrates how this revenue generation and related spending from a specific account may be questioned. In Saanich, British Columbia, a community located on Vancouver Island near Victoria, revenues raised from garbage fees are used to offset other municipal environmental programs.⁶⁰ An April 25, 2012 article quotes the Saanich director of finance, “[t]he current charges also [contribute] to offset the costs of other municipal environmental programs including leaf collection, composting and bus shelter litter pickup.” In this instance, the revenues are generated specifically from garbage fees, but go on to fund broader “environmental programs”. While the programs are arguably related, it has not yet been clarified in the case law as to the breadth that is allowable.

A relevant consideration to this question is the deference that the courts offer to municipalities. Deference refers to the presumption that the municipality has significant expertise in their decision-making capacity and that a court will take that specialized experience into account and not interfere with municipal activity lightly. In a recent decision on the ability of the court to overturn municipal taxation bylaws in *Catalyst Paper Corp v. North Cowichan (District)*⁶¹, the SCC affirms this position in writing, “[t]he case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation.”⁶² This means there is a high threshold to meet for a court to find that a municipality’s policy or decision is verging on improper law. The SCC also comments in *Catalyst* on this point, “the power of the courts to set aside a municipal bylaw is a narrow one [...]”⁶³

D. *Re-ordering the Tests*

A broader question emerges upon examination of the *Lawson* and *Eurig* tests as to whether the order of the criteria may be rearranged to more clearly evaluate a user fee? Though the dates of the cases seem to establish the order in which the tests are applied, with *Lawson* being decided 60 years before *Eurig*, it appears that re-ordering the elements when applying the tests to determine if a levy is a user fee would be appropriate. We suggest that the public policy element, that is the fourth element in the *Lawson* test which states that a levy will be found to be a tax if it is levied for a public purpose, should be the starting point for a user fee analysis, assuming the public purpose element is interpreted as meaning that the revenues are allocated to either a general account (tax) or specific account (user fee) discussed in section IV.B. We argue that this proposed rearrangement provides clarity is provided with respect to the state of the law on user fees.

To this end, it also becomes clear that it should not be possible to meet all the *Lawson* criteria and the *Eurig* criteria. The *Eurig* element requires that there is a reasonable connection between

⁵⁹ *Urban Outdoor*, supra note 52 at paragraph 10.

⁶⁰ Kyle Slavin, “Saanich waives garbage fee for home that recycles all its waste”, *BC Local News*, April 25, 2012, (<http://www.bclocalnews.com/news/148914485.html>).

⁶¹ 2012 SCC 2.

⁶² *Ibid.*, at paragraph 19.

⁶³ *Ibid.*, at paragraph 9.

the cost of the service and the fee. It is implied that the service can only be priced if there is a specific revenue fund for the service. A levy will not be able to be raised for a public purpose and go to general revenues (where it would likely be found to be a tax) and go to specific revenues (where it would likely be found to be a user fee). The fourth element of *Lawson* requires that for a levy to be a tax, it must be allocated to general purposes and the nexus requirement in *Eurig* requires that the levy be allocated to a specific revenue account.

We therefore propose to modify the *Lawson* and *Eurig* tests to assess user fees based on this element. The first step of the test would be to assess whether the revenue collected from the user fee goes to a general revenue account, that is, it is collected for a “public purpose” per *Lawson*, or whether it goes to a specific revenue account, which indicates a “nexus” per *Eurig*. If the levy goes to a general revenue account, the remainder of the *Lawson* test to determine if it is a tax would be applied. Conversely, if the levy goes to a specific revenue account, one would then consider the second element of *Eurig*, which is to determine if the amount is “reasonable”. Figure 2 illustrates this distinction.

[Figure 2 here]

V. User Fees and Regulatory Charges

Having outlined the legal criteria that distinguish a user fee from a nonspecific tax, we now need to expand this analysis and consider the difference between a user fee and a specific type of tax. As noted in section II, provinces, and if properly authorized, municipalities, have the authority to charge direct taxes⁶⁴ pursuant to the Constitution Act, s. 92(2), but not necessarily indirect taxes. Further recall that provinces, and if properly authorized, municipalities, have the authority to charge license fees pursuant to the Constitution Act, s. 92(9).

As we will show, the term “licence fee” becomes synonymous with “regulatory charge” over the course of the jurisprudence. Regulatory charges are an alternative levying method to user fees, but, as will be further discussed, there are overlapping features and similarities between a regulatory charge and a user fee. The issue that arises is what the distinction is between a regulatory charge and a user fee. This is important because given the appropriate authorizing legislation, a regulatory scheme can have a very similar appearance to a user fee.

What exactly are license fees? In addition to providing the four criteria used to establish a tax, the court in *Lawson* held that the jurisdiction of the provincial government, which is limited in the Constitution Act, s. 92(2) to impose direct taxes, does not carry over to s. 92(9) with respect to licence fees. According to the Constitution Act, s. 91(3), only the federal government can charge indirect taxes⁶⁵; however, *Lawson* implies that licence fees may be charged as indirect taxes.

⁶⁴ A direct tax cannot be shifted from the person intended to pay the levy, while an indirect tax can.

⁶⁵ Benjamin Alarie and Richard M. Bird, *Tax Aspects of Canadian Fiscal Federalism* at 12 (Social Science Research Network, September 30, 2009) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689311), comment that the “distinction between what constitutes a direct tax and what constitutes an indirect tax has been a frequently contested one that has given rise to sporadic and inconsistent treatment by the courts.” *Hudson’s Bay Co v Ontario (Attorney General)* (2000), 49 OR (3d) 455 (Ont Sup Ct Jus) is a case that provides significant detail as to the

The question has never yet been decided whether or not the revenue contemplated by this head can in any circumstances be raised by a fee which operates in such a manner as to take it out of the scope of “direct taxation”. *Prima facie*, it would appear, from inspection of the language of the two several heads, that the taxes contemplated by no. 9 are not confined to taxes of the same character as those authorized by no. 2, and that accordingly imposts which would properly be classed under the general description ‘indirect taxation’ are not for that reason alone excluded from those which may be exacted under head 9. On the other hand, the last mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade—even local or provincial trade. Here, such is the primary purpose of the legislation. The imposition of these levies is merely ancillary, having for its object the creation of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade.⁶⁶

In other words, if the levy is found to have an indirect incidence, it will be found to be *ultra vires* the province’s or a municipality’s jurisdiction and will be found invalid because this is not permitted under the Constitution Act, s. 92(9). However, if the indirect tax is found to be “ancillary or adherent to a regulatory scheme”, meaning that it is not the dominant purpose but something that may be thought of as an effect of the dominant purpose, (it may also be called a regulatory charge), then it will be held valid, according to the interpretation of the Constitution Act, s. 92(9).

The case law concerning regulatory schemes has reached the Supreme Court of Canada on a number of occasions, each time receiving additional clarity. Tracing the decisions reveals modest changes in the test and the tone of the courts. The first notable case concerning regulatory charges and schemes is *Coquitlam (District) v. LaFarge Concrete Ltd*⁶⁷ [*LaFarge Concrete*]. Coquitlam amended a by-law from charging a flat annual rate of \$50 for a licence fee to remove soil to 15 cents per cubic yard of soil removed. The design of the permit fee changed from a flat fee to a volumetric fee, meaning that the fee was based on the amount of soil removed, and that LaFarge Concrete Ltd. argued that the incidence would be passed on to the customers.⁶⁸ Consequently, the fee was alleged to be a form of an indirect tax, and would therefore be outside the municipality’s jurisdiction to impose.

The court found that the levy was an indirect tax yet still *intra vires* the municipality and laid the foundation for the test for a regulatory scheme.

It appears to me that the principle that emerges from the authorities is that taxation which can be characterized as other than direct, and hence not falling within the ambit of provincial legislation by s. 92(2) of the B.N.A. Act [*Constitution Act, 1867*], may still be within the scope of provincial competency if contemplated by, and fairly authorized under, another head such as here—s. 92(9). In my view, the key lies in the question as to what is the primary and real purpose, or pith and substance, of the legislation—is the levy or tax (whether direct or indirect by nature) merely ancillary, or adhesive to the licensing scheme of regulating or prohibiting

background of direct and indirect taxation and the Constitution Act and can be consulted for further information on this point.

⁶⁶ *Lawson*, supra note 15 **Error! Bookmark not defined.** at paragraph 11.

⁶⁷ (1972), 32 DLR (3d) 459 (CA).

⁶⁸ These facts are very similar to the facts in *Allard Contractors*, supra notes 5 and **Error! Bookmark not defined.**

trade, or is it essentially a fiscal imposition, or taxation, under a form of disguise or colourable concept?^{69,70}

The court undertook a pith and substance analysis to determine if the by-law was a form of indirect taxation that had been disguised and was therefore invalid, or if the by-law was ancillary to a regulatory scheme, in which case it would be valid. The facts relied upon were that the removal of the gravel raised concerns by the citizens of Coquitlam, was likely to cost taxpayers for road provision and regulatory expenses, and that the 15 cents imposed by the permit fee created a heavy burden on the industry and greatly increased their costs of business.⁷¹ The court concluded that,

The bylaw being amended constitutes a complete and detailed code for the regulation of the gravel and soil extraction and removal trade, including the provision of performance bonds and operation plans and surveys, obviously directed to safety and environmental control.⁷²

This was sufficient to render the levy as ancillary or incidental to the regulatory licensing of a trade or business.⁷³

In 1993, a constitutional challenge reached the Supreme Court in *Allard Contractors*.⁷⁴ *Allard Contractors* required the Supreme Court to rule on the validity of a gravel removal fee. The appellants argued that there was nothing in the statute or by-laws that limited the amount of revenue from licensing to the actual costs of the scheme. The appellant's objective with this argument was to demonstrate that there is potential for surplus to be generated that goes beyond the cost of the regulatory scheme, invalidating the regulatory charge.⁷⁵ In this case, the Court wrote that the line of cases that has developed on indirect taxes have developed a standard that the power of indirect taxation through a regulatory scheme can only be used to defray the costs of regulation stating "[w]hile *Lawson* [...] gave a reading to s. 92(9) which opened up the possibility for indirect taxation within that section, it did so in the context of language suggesting that the possibility would be limited to the recoupment of regulatory expenses."⁷⁶ The court then responded specifically to the appellant's argument by stating,

[I]t is not for this Court to undertake a rigorous analysis of a municipality's accounts. A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme, which is what occurred in this case. It is easy to imagine reasons for the existence of a so-called "surplus" at any given time. For example, changes in forecasted prices might lead to road repair being over-budgeted, or a municipality might choose not to repair a certain road in order to undertake more extensive repairs or reconstruct at a later date.⁷⁷

⁶⁹ *Ibid.*, at paragraph 14.

⁷⁰ The term 'colourability' or 'colourable concept' is used to describe circumstances where a policy or legislative scheme aims to achieve an outcome that it would not otherwise be entitled to achieve.

⁷¹ *Lafarge Concrete*, supra note 67 at paragraph 17.

⁷² *Ibid.*, at paragraph 18.

⁷³ *Ibid.*, at paragraph 18.

⁷⁴ *Allard Contractors*, supra note 5.

⁷⁵ *Ibid.*, at paragraph 70.

⁷⁶ *Ibid.*, at paragraph 58.

⁷⁷ *Ibid.*, at paragraph 83.

Recall that the *Eurig* test for user fees requires that there is a “nexus” between the cost of the service and the fee and that there is a reasonable connection between the cost and the fee, which is to say that the revenues generated by the fee cannot exceed the costs of the service. To this point in the regulatory scheme analysis, the term “nexus” has not been used; however, the same principle is emerging with respect to regulatory charges in that they must be reasonably connected to the cost of the service. This then points to a blurring of the lines between user fees and regulatory charges.

*Westbank First Nation v. British Columbia Hydro & Power Authority*⁷⁸ [*Westbank*] is a cumulative case that summarizes the features of regulatory schemes and reformulates the previously identified characteristics into a test to identify a regulatory scheme. In this case, Westbank First Nation was attempting to assess and impose a levy on BC Hydro, an agent of the provincial Crown; however, section 125 of the *Constitution Act, 1867* essentially prohibits one level of government from taxing another level of government. If the taxation regime was found to be a tax, it would be invalid because of the prohibition in s. 125. However, if the regime was not found to be a tax, but rather some other form of regulation, then s. 125 would be inapplicable, meaning that Westbank First Nation could continue to charge BC Hydro.⁷⁹

In *Westbank*, the court wrote

Certain indicia have been present when this Court has found a “regulatory scheme”. The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for regulation or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.⁸⁰

The most recent SCC case to consider the issue of regulatory charges is *620 Connaught Ltd v. Canada (Attorney General)*⁸¹ [*620 Connaught*]. The issue in *620 Connaught* relates to the licence fees that were charged at Jasper National Park to serve liquor. The Minister of Canadian Heritage was only permitted to charge fees pursuant to the governing legislation. Therefore, if the licence fee was in fact found to be a tax, it would be ultra vires the Minister’s jurisdiction to impose. The SCC concluded that the fee was a regulatory charge and was validly imposed.⁸²

There was no suggestion that the levy in this case was a user fee for the provision of government services or facilities. Rather the question was whether in pith and substance the levy was a tax or a regulatory charge.⁸³ However, the SCC still took occasion to distinguish a

⁷⁸ [1999] 3 SCR 134 (SCC).

⁷⁹ The court makes an interesting comment concerning *Eurig*, supra note 12: “This was a useful development, as it helps to distinguish between taxes and user fees, as a subset of “regulatory charges” (at paragraph 22). The court cites no authority for orienting a user fee as a subset of a regulatory charge. This concept does not make a re-appearance in *620 Connaught*, where it would have been appropriate, so it is possible that this was a deliberate choice and that the court has backed away from the position that user fees are a subset of regulatory charges.

⁸⁰ *Ibid.*, at paragraph 24.

⁸¹ *620 Connaught*, supra note 17.

⁸² *Ibid.*, at paragraph 3.

⁸³ *Ibid.*, at paragraph 17.

user fee and a regulatory charge. This distinction affirmed that these forms of levies are indeed still considered to be different, despite relying on similar elements. The court wrote,

It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost of the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities. However, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice [citing *Eurig*].

By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. [a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic [citing *Westbank*].⁸⁴

After the court set aside the user fee concerns, it proceeded with the regulatory scheme analysis. First, the SCC helpfully restated another consideration that was put forth in *Westbank*, which is that the government levy would be in pith and substance a tax if it was unconnected to any form of regulatory scheme. The court restates the criterion as “[t]his fifth consideration provides that even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.”⁸⁵

This holding makes good sense as it removes the consideration of direct or indirect incidence of a tax from the initial assessment, which is beneficial given the murky test with which to undertake the legal incidence analysis to differentiate direct taxes from indirect taxes.⁸⁶ The parameters of a regulatory scheme are, for the most part, clearer than the legal incidence test and less controversial than those attempting to define an indirect and direct tax. The overall order of the regulatory scheme test is therefore reversed; the four *Lawson* elements comprising the test to determine if a levy is a tax will still apply and the fifth element will be to determine if there is an ancillary regulatory scheme. If there is no regulatory scheme and the levy is found to be a tax then a direct and indirect analysis would likely follow.

The regulatory scheme analysis was restated from *Westbank* in *620 Connaught*. First, the court must consider if the levy has the attributes of a tax (pursuant to the four *Lawson* criteria). Second, the court must consider if the levy is connected to a regulatory scheme which will first require an evaluation of the relevant regulatory scheme to determine if it is sufficient and second to consider the relationship between the levy and the regulatory scheme.⁸⁷ In application, the court found that the business licence fees required by the Minister of Heritage to

⁸⁴ Ibid., at paragraphs 19-20 [references omitted].

⁸⁵ Ibid., at paragraph 24.

⁸⁶ Alarie and Bird, supra note **Error! Bookmark not defined.**

⁸⁷ Ibid., at paragraph 28.

sell liquor in Jasper National Park met all the attributes of a tax. The court also found that the four criteria to determine a regulatory scheme in *Westbank* were met.⁸⁸

Another distinction not carefully drawn out by the court but that becomes apparent when comparing user fees and regulatory charges is the court's treatment of the fourth element in the *Lawson* test, that is that to be a tax the levy will be intended for "public purposes". In the user fee context, it was suggested that this was a significant element that distinguished user fees from taxes and suggested a re-ordering of the *Lawson* and *Eurig* test to first consider whether the revenues generated from a user fee were accounted for in general revenues or in a specific revenue fund. The court did not consider the *Lawson* elements individually in *620 Connaught*, but rather stated, "[t]hese characteristics [referring to the *Lawson* elements] will likely apply to most government levies."⁸⁹ It is unclear what affect this could have on the "public purpose" element of *Lawson*, but a prudent argument would be to consider both the general public purpose and the revenue accounting when examining this element.

Returning to the regulatory scheme analysis, the second step as described in *620 Connaught* is to discern the relationship between the business licence fees and the regulation of Jasper National Park. The court states, "in order for a regulatory charge intended to defray the costs of a regulatory scheme to be connected, the fee revenue must be tied to the costs of the regulatory scheme."⁹⁰ The regulatory charge may comprise two separate intentions, as the court initially described when distinguishing the regulatory charge from the user fee when the court said, "[t]he fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour [...]."⁹¹ The first intention, to match the costs of regulation, seems analogous to there being a nexus between the costs of the service. The second intention, whether separate or in tandem with the first, opens the door to increased revenue beyond the costs of the service if it is meant to alter behaviour. This is a significant shift in the jurisprudence, further differentiating regulatory charges from user fees, and is discussed in the next section.

VI. Unresolved Issues Concerning User Fees and Regulatory Charges

There are two main concerns that arise from the regulatory charge case law. First, a theme arising in section V is that there are shared features between user fees and regulatory charges and it can be hard to definitively distinguish between these two types of levies. For example, a levy imposed on landfill waste may be analogized to a recreation facility and appear to be a user fee or be considered "a per-tonne charge on landfill waste may be levied to discourage the production of waste" which would be interpreted as a regulatory charge.⁹² Unfortunately, the SCC has not provided clarity on this issue. There are, however, two ways to resolve this quandary. The first is to look to the municipality's authorizing legislation to determine if it specifies whether a levy is a user fee or a regulatory charge. The danger by doing so, however, is that you are not examining the purpose of the levy, but rather limiting the analysis to the

⁸⁸ *Ibid.*, at paragraph 37.

⁸⁹ *Ibid.*, at paragraph 23.

⁹⁰ *Ibid.*, at paragraph 38.

⁹¹ *Ibid.*, at paragraph 20 [emphasis added].

⁹² *Ibid.*

wording. The second approach is approach is to apply a pith and substance analysis the intent of which is to examine the purpose of the levy, beyond the wording used to assess the purpose and effect of the levy. As the approach used by the SCC in *620 Connaught* was the pith and substance approach, this is appears to be the preferred approach.

The second concern that arises is the introduction of a behavioural modification objective underlying regulatory charges. Under a behavioural modification objective, it is suggested that the regulatory charge is not necessarily tied to the cost of the good or service being provided, a criteria established by *Westbank*. However, this objective seems to imply that such a regulatory charge would be found to be an indirect tax, making it ultra vires provinces, and by extension, municipalities. This section details these concerns.

A. *What is the distinction between a user fee and a regulatory charge?*

There has not been a case in which it has been before the court to decide whether a levy was a user fee or a regulatory charge, though in *Canadian Wireless* it was argued that were the court not to find that the levy was a user fee, in the alternative, that the levy was a regulatory charge. Such a challenge may be claimed, for example, if the municipality has authority to impose user fees but not regulatory charges and an individual or business that is unhappy paying the levy argues that the user fee is a regulatory charge and is therefore ultra vires. We propose two methods the court may use in attempting to distinguish a user fee from a regulatory charge: examining the authorizing legislation or conducting a pith and substance analysis, each of which we take up in more detail below.

(i) Authorizing Legislation

Authorizing legislation refers to both the provincial legislation, likely found in laws entitled the Community Charter or the Municipal Act, and the municipal by-laws. The provincial legislation delegates and ‘authorizes’ specific powers to municipalities. The municipality may only implement by-laws based on those authorities provided. The by-laws, in turn authorize policy decisions made by municipal council. Both levels of law will be relevant to the discussion on authorizing legislation and certainly require scrutiny at the beginning of the policy design stage to ensure that the municipal council is permitted to pursue the proposed course of action.

Our argument is that the authorizing legislation informs the type of levying scheme that is developed. That is, the specific words in the by-law or the provincial law, as applicable, are the basis for which the parties arguing before the court have suggested the appropriate tests to be applied and, in turn, form the basis for the court’s application of either the user fee test or the regulatory charge test. While this argument may seem simplistic (of course a municipality should only pursue what it was authorized to do by law), one must bear in mind the similarities in the definitions of user fees and regulatory charges. The similarities are such that in some cases either test could be applied. It could be suggested that, in some circumstances, rather than the authorizing legislation informing the interpretation of the levy, the details of the levy are informing the interpretation of the authorizing legislation. Four cases demonstrate how the wording of the levy informs the interpretation of the legislation.

In *620 Connaught*, the relevant legislation provided that the Minister of Canadian Heritage was authorized to “fix the fees or the manner of calculating fees in respect of the products, rights or privileges provided by the [Parks Canada] Agency.”⁹³ The Supreme Court specified in its definition that “regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government.”⁹⁴ A liquor licence was perceived to be a right or privilege, rather than a service provided by government. Neither party in this case made an argument that the ‘fee’ that was authorized was in fact a user fee.⁹⁵ Noticeably, the wording in the legislation is reflected in the definition of the regulatory charge. Additionally, it should be noted that it may not be simply ‘fee’ or ‘charge’ that are the words found in the authorizing legislation, but that scrutiny is required to determine the appropriate test.

Additional support for this hypothesis is found in the decision rendered in *Kirkpatrick v. Maple Ridge*.⁹⁶ In this case, the Supreme Court of Canada was considering the constitutionality of a volumetric fee on the removal of sand and gravel. The enabling bylaw granted the power to “fix a fee for the permit” and because the fee was volumetric and therefore varied with the amount of soil removed, the Supreme Court disallowed the bylaw.⁹⁷ The fixed fee could only be applicable to a flat fee; a variable fee was not permitted. Consequently, the by-law was struck down.

After the decision in *Maple Ridge*, attempts were made to reconfigure the municipal by-law to allow for volumetric fees and the by-law was amended again. The amended by-law was finally successful in being found to grant the appropriate variable rate volumetric permit fee, which was then considered by the SCC.⁹⁸ This fee was considered to be a permit fee, analogous to a licence fee under section 92(9). This series of amendments demonstrates the necessity of careful examination of governing legislation.

A more recent example is the 2008 British Columbia Court of Appeal decision in *Greater Vancouver Sewage & Drainage District v. Ecowaste Industries Ltd.*⁹⁹ [*Greater Vancouver*]. The court in *Greater Vancouver* considered the validity of a waste disposal scheme and whether a disposal fee was a regulatory charge or an unconstitutional tax. The authorizing legislation provided,

Whereas [...]

C. Greater Vancouver Sewage and Drainage District is operating under a Solid Waste Management Plan which defines a regulatory scheme for the management of all privately operated municipal solid waste and Recyclable Material operations. The goal of the regulatory scheme is to ensure proper management of privately operated facilities by specifying operating requirements so as to protect the environment and public health, to protect the region’s land base in accordance with the host municipality’s zoning and land use policies, to ensure that regional

⁹³ *620 Connaught*, supra note 17 at paragraph 1. [Emphasis added].

⁹⁴ *Ibid.*, at paragraph 20. [Emphasis added].

⁹⁵ *Ibid.*, at paragraph 17.

⁹⁶ [1986] 2 SCR 124 (SCC).

⁹⁷ *Ibid.*, at paragraph 10.

⁹⁸ *Allard Contractors*, supra note 5 at para 12.

⁹⁹ 2008 BCCA 126.

and municipal facilities and private facilities operate to equivalent standards and to achieve the objectives of the Solid Waste Management Plan.¹⁰⁰

As such, the court delves into the regulatory scheme analysis from *Westbank* and *620 Connaught* and does not consider the disposal fee, despite its name, under the user fee analysis but rather considered it as a regulatory charge.

The 2001 Ontario Court of Appeal decision in *Urban Outdoor* demonstrates how a court may choose to deal with interpreting authorizing legislation. In this case, the court found that the *Municipal Act* authorized the annual fee in place, levied against sign companies for each third-party billboard sign at a cost of \$100 per face for ground-mounted signs and \$200 per roof-mounted signs.¹⁰¹ The *Municipal Act* authorized both fees and charges. *Urban Outdoor Trans Ad* (the plaintiff) argued that the levy was an indirect tax and therefore the municipality was unauthorized to levy the tax. The City argued that the levy was a fee and was therefore within the authority of the municipality, pursuant to the governing legislation. While the term “user fee” was not explicitly used, the court considered the *Eurig* analysis and held that the levy was indeed a fee. *Urban Outdoor* demonstrates a possible approach a court could take with a levy to determine if it is a user fee or a regulatory charge, by only applying the test that is suggested by the parties, in this case the *Lawson-Eurig* test for a user fee though arguably, given the governing legislation, both tests could have applied.

With an existing levying scheme, or where a scheme is being proposed but it is unclear as to whether it is a user fee or a regulatory charge, courts will have to decide which test to apply to determine the validity of the levy. To this point, there has not been a case where the court has had to distinguish between a user fee and a regulatory charge, therefore opinions must be discerned from the existing case law as to how a court may proceed with this analysis. This section suggests that it is in fact the wording in the delegated legislation that has informed the court as to the test that should apply. In *620 Connaught*, the court used identical wording from the legislation imposing the regulatory charge to inform the definition of a regulatory charge. In *Maple Ridge*, the gravel removal by-law was held invalid because it was based on the volumetric amount rather than a flat fee. Lastly, in *Urban Outdoor*, where both a fee and a charge were authorized by the provincial legislation, the court applied the user fee test.

(ii) Pith and Substance

It has been established that user fees and regulatory charges are indeed different forms of levies and that while they have been described in case law, the courts have not dealt with a case where it was required to establish a means of distinguishing the two forms of levies. As discussed above, one strategy to determine which test should be applied is to carefully review the authorizing legislation. However, the authorizing legislation may not be clear as to the nature of the levy, as in *620 Connaught*, or may authorize both fees and charges, as in *Urban Outdoor*.

In a situation where a court is faced with deciding which test to apply, another method that the court may use is a pith and substance analysis. This section attempts to forecast the types of challenges that may be anticipated by municipalities and then proceed to describe the pith and

¹⁰⁰ *Ibid.*, at paragraph 31. [Emphasis added].

¹⁰¹ *Urban Outdoor*, supra note 52 at paragraph 12.

substance analysis process. We conclude by discussing the application of pith and substance analysis in the case law previously reviewed and discerning the features the courts may rely upon for a user fee and regulatory charge pith and substance analysis.

It is possible to forecast circumstances that may arise in which a user fee and a regulatory charge must be distinguished by a court. In addition to the type of attack that has been seen in the jurisprudence to this point, that is, that the levy is ultra vires, future challenges may come in the form of insufficient authorizing legislation, not meeting the requirements of the test, or not meeting an aspect of either test. Both user fees and regulatory charges are vulnerable to attacks on costing, as this is a key feature in the tests, though as will be discussed below, does not have a significant threshold to overcome. It is also possible that a challenge may involve arguing that a user fee is a regulatory charge, but does not have the authorizing legislation to permit that possibility. Given the decision in *620 Connaught* which arguably authorizes two forms of regulatory charges, for either revenue raising or behaviour modification purposes, a court will not likely be satisfied with simply reading the imposing legislation and may also consider, in addition to a careful reading of the legislation, a pith and substance analysis.

A pith and substance analysis is a legal interpretation technique, often used in constitutional analysis. The technique was described in the dissent in *Ontario Home Builders Assn. v. York Region Board of Education*,¹⁰² but is a commonly used tool and the dissent cites Supreme Court of Canada approval of the technique from another case. La Forest J. wrote,

The identification of the pith and substance of a law involves an analytical process conducted according to the approach carefully described by Sopinka J. in *R. v Morgentaler*. As he explained, the analysis necessarily starts with looking at the legislation itself, in order to determine its legal effect, but courts also will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve its background and the circumstances involving its enactment and, in appropriate cases, will consider evidence of the second form of “effect”, the actual or predicted practical effect of the legislation.¹⁰³

This description points to the close reading of legislation to determine the legal effect of a law, but also describes a second level analysis. This second level refers to the incidence of the legislation and the purposes it was intended to achieve. It is likely that a court would undertake both a careful reading of the legislative authority and a pith and substance analysis if the pith and substance analysis is a method of analysis the court determines to be appropriate.

While not previously used in the context of discerning user fees and regulatory charges, the pith and substance analysis has been used in the broader context of the user fee case law. The test was used by the British Columbia Court of Appeal in the 1972 case of *LaFarge Concrete*, when the court considered whether the volumetric fee on gravel was ancillary to a regulatory scheme or a form of taxation disguised as a regulatory scheme. The court wrote,

[T]he key lies in the question as to what is the primary and real purpose, or pith and substance, of the legislation – is the levy or tax (whether direct or indirect by nature) merely ancillary, or

¹⁰² [1996] 2 SCR 929 (SCC).

¹⁰³ Ibid. **Error! Bookmark not defined.** at paragraph 117. [References omitted].

adhesive, to the licensing scheme of regulating or prohibiting a trade, or is it essentially a fiscal imposition, or taxation, under a form of disguise or a colourable concept?¹⁰⁴

In order to reach a decision in *LaFarge Concrete*, the court examined the rationale for the imposition of the fee. One of the main reasons for the fee increase was because a new road was required for the trucks hauling gravel to be diverted around the neighbourhood.¹⁰⁵ The court also considered the nature of the legislation, in that there was a detailed regulatory scheme enacted which involved safety and environmental controls.¹⁰⁶ As a result of these features, the court determined that the levy was ancillary to the regulatory scheme.¹⁰⁷

The Supreme Court of Canada strongly indicated in *620 Connaught* that the pith and substance analysis may be employed to distinguish between user fees and regulatory charges, demonstrated by the SCC's use of this method to distinguish between a tax and a regulatory charge. The court wrote,

In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme under step two, the pith and substance will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics.¹⁰⁸

The language of the Supreme Court in *620 Connaught* suggests that the test to determine if a regulatory scheme exists is the test that should be applied to determine if the levy is in pith and substance a regulatory scheme.

B. What is the difference between a regulatory scheme and behaviour modification objective?

This section discusses the potential exemption to the reasonable connection or nexus requirement, found as a testable element in both user fees and regulatory charges. The limitation on revenue to the cost of the service appears to be lifted when a regulatory charge is implemented to alter behaviour, pursuant to the decision in *620 Connaught*. However, this section suggests that this exemption is likely only available when found under a federal regulatory scheme. This is a recent development in the law, arising from *620 Connaught*, though alluded to in *Westbank*, and has yet to be challenged or interpreted. This section begins by discussing the intricacies of the development, as found in *620 Connaught* and then considers the rationale behind this exemption being only available to the federal government.

The issue before the Supreme Court of Canada in *620 Connaught* was whether the liquor licence fees charged to the providers of liquor in Jasper National Park are part of a regulatory scheme or if they are a tax. If the levy was found to be a regulatory charge, it would be *intra vires* the jurisdiction of the Minister of Heritage. The court commented, beyond the scope of constitutional distribution of regulatory fees and taxes and included a section distinguishing

¹⁰⁴ *Lafarge Concrete*, supra note 67 at paragraph 14.

¹⁰⁵ *Ibid.*, at paragraph 17.

¹⁰⁶ *Ibid.*, at paragraph 18.

¹⁰⁷ *Ibid.*

¹⁰⁸ *620 Connaught*, supra at note 17 at paragraph 28.

between the application of regulatory charges and user fees. When Rothstein J. described regulatory charges for the court, he wrote,

[R]egulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour.¹⁰⁹

This is a significant clarification to the case law. The Supreme Court not only suggested, but nearly advocated the possibility that a regulatory charge be set at a level to influence behaviour, rather than be measured by the standard that is the test for user fees and the other type of regulatory charge, which is to defray the costs of the regulatory scheme. This phrasing suggested that there are two types of regulatory schemes, one in which costs are defrayed for the administration of a service (“revenue raising”), the other which attempts to influence behaviour through financial incentives (“behaviour modifying”).

Two other paragraphs in *620 Connaught* further this proposition. First, at paragraph 48 the court reinforces its position when Rothstein J. stated that a behaviour modifying regulatory scheme is not being considered in *620 Connaught*,

Whether the costs of the regulatory scheme are a limit on the revenue generated, where the purpose of the regulatory scheme is to proscribe, prohibit or lend preference to certain conduct, is not an issue before the Court in this case, and it is not necessary to answer that question here.¹¹⁰

Second, the court cited *Westbank* directly when describing the test for regulatory fees, writing, “[t]his is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.”¹¹¹ *620 Connaught* demonstrates that the court is opening a door for regulatory schemes to have a charging component that is not tied to the cost of the service; though the contours of such a scheme are yet to be decided. It would be wise to consider though that the second step in the regulatory charge test is titled “the relationship between the licence fees and the regulation”. The title suggests that while the costs do not have to be related to the charges, a ‘reasonable relationship’ is still required in which the regulator would likely have to demonstrate how the behaviour modifying regulatory charges are intended to modify behaviour.

It is possible, however, that there is a limitation on this behaviour modification regulatory scheme. This limitation comes by way of constitutional jurisdiction and suggests that the behaviour modification regulatory scheme is only available to federal regulatory schemes. Referring back to the basis of the constitutional discussion, the federal government is allowed to charge both direct and indirect taxes, pursuant to the *Constitution Act, 1867*, section 91(3). However, the provinces are only allowed to charge direct taxes, pursuant to section 92(2) and licence fees, pursuant to section 92(9). If the behaviour modification regulatory scheme were to be available to the provinces, it has the potential to allow indirect taxation without the limitation

¹⁰⁹ Ibid., at paragraph 20. [Emphasis added].

¹¹⁰ Ibid., at paragraph 48.

¹¹¹ Ibid., at paragraph 26, citing *Westbank*, supra note 78 at paragraph 24.

of cost recovery. Limiting the amount that could be recovered was the rationale for the origin of the cost recovery principle, as the Supreme Court sought to find a way for sections 92(2) and 92(9) to interact without creating unwarranted extensions. Section 92(2) allows for revenues to be raised without limitation to cost recovery. Section 92(9) allows cost recovery methods for indirect taxation, if ancillary to a regulatory scheme. However, if section 92(9) were to be read so as to allow behaviour-modifying regulatory schemes, it could render section 92(2) redundant as the same privileges would be available to both direct and indirect taxation.

This constitutional quandary was contemplated by Professor La Forest (as he then was) in *The allocation of taxing power under the Canadian Constitution*,¹¹² which is cited with approval by Iacobucci J. writing for the majority in *Ontario Home Builders*. Prof La Forest wrote,

If section 92(9) is limited to direct taxation, it adds nothing to the section. 92(2), for there is no doubt that direct taxation may be raised under section 92(2) even though it is framed in the form of a licence. On the other hand if section 92(9) permits a province to levy indirect taxation by means of a licence, there would seem to be no limit on provincial taxing power (there being no restriction of the types of licences falling within the section) so long as a tax is framed in the form of licensing provisions. Yet the *British North America Act* [now the *Constitution Act, 1867*] appears to contemplate that indirect taxation should be within the sole competence of the federal Parliament.¹¹³

It would therefore appear that to avoid the unwarranted extension to the construction that is created by the behaviour modifying regulatory scheme, provinces and the authorities they authorize to municipalities, should be limited to cost recovery regulatory schemes. A potential counter-argument to this point is that the behaviour modification regulatory scheme still requires a relationship to be established between the charge and the regulatory scheme. So while a behaviour modification regulatory scheme is likely not limited to cost recovery, there are limitations in place in terms of justifying the relationship. It is likely to be difficult to discern this costing mechanism from indirect taxation which may have an alternative purpose or effect that is invalid, though on the face appears to be valid, which may be referred to as a “colourable scheme”.

The Supreme Court in *620 Connaught*, appears to clearly open a door for behaviour modifying regulatory schemes. This type of scheme sets aside the cost-recovery foundation of the user fee test and the regulatory charge test described in *Westbank* and appears to allow for charging so long as a relationship may be established with the regulatory scheme. It is likely as well that this charging will require some evidence as to the consideration and reasonability of the charge. Additionally, the behaviour modifying regulatory scheme may only be available to the federal government, as it could be considered that it imposes an unwarranted extension on the constitutional interpretation of ss. 92(2) and 92(9). With that disclaimer, it would certainly be available for a bold municipality to attempt to implement this type of regulatory scheme as a test case.

¹¹² Gerard V. La Forest, *The allocation of taxing power under the Canadian Constitution*, 2nd ed. (Toronto: Canadian Tax Foundation, 1981).

¹¹³ *Ontario Home Builders*, *supra* note 102 **Error! Bookmark not defined.** at paragraph 52 citing La Forest, *ibid.*, at 55-56.

VII. Conclusion

Municipalities are increasingly turning to user fees as an alternative revenue source. The economic literature advocates a “whenever possible, charge” approach, endorsing user fees for many municipal goods and services. The benefits of user fees, from the economic perspective, are that the constituent knows the value of the good or service they are consuming and those who most value the goods and services pay to use them. We sought to add to the general understanding of user fees, well-established in the economic literature, by providing an outline of the legal tests for taxes, user fees, and regulatory charges so as to distinguish between these three revenue generating instruments. This information can be used to inform the design of user fees to survey or avoid a legal challenge. As we traced through some examples of applying these tests, we set out some concerns we had with their application and provided our views on how these concerns could be reconciled. In practical terms however, municipalities are likely to continue to struggle with certainty in their use fee policy until the law is clarified.

Figure 1: Summary of the *Lawson* and *Eurig* Tests

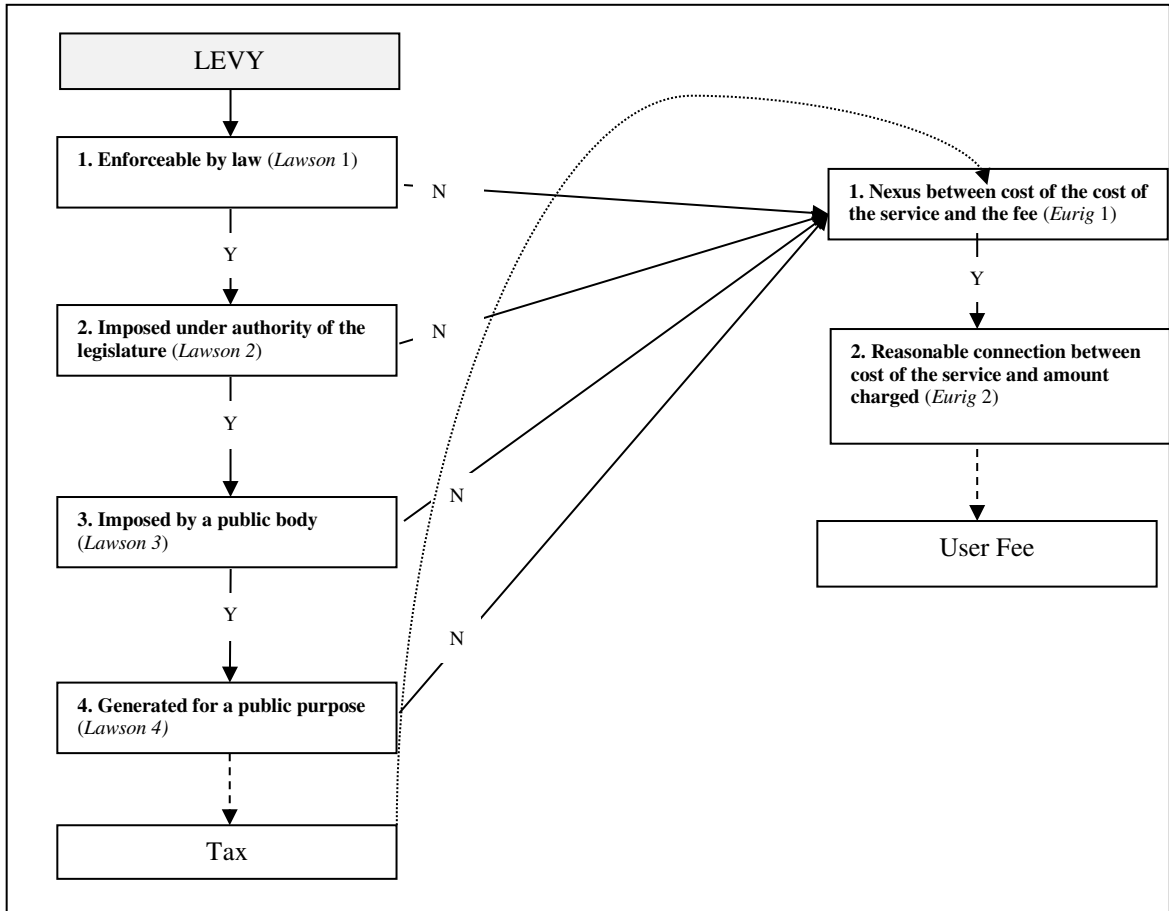


Figure 2: Proposed User Fee Test

