CITATION: Metro Taxi Ltd. et al. v. City of Ottawa, 7468
COURT FILE NO.: 16-69601
DATE: 2018/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
METRO TAXI LTD., MARC ANDRÉ WAY, ISKHAK MAIL	)	Thomas G. Conway, Colin S. Baxter, Benjamin K. Grant and Julie Mouris, Counsel for the Plaintiffs
Plaintiffs	)	
– and –	)	
CITY OF OTTAWA	)	Benoit M. Duchesne, Roberto Aburto and Jacob Polowin, Counsel for the Defendant
Defendant	)	
	)	**HEARD:** November 23 & 24, 2017

DECISION ON MOTION TO CERTIFY A CLASS PROCEEDING

R. SMITH J

Overview

[1] The 768 taxi plate license holders and the 4 taxi brokers of the City of Ottawa ("City") seek to certify this action as a class proceeding against the City. They claim that the City is responsible for damages they have suffered, including the loss of the value of their taxi plate licenses, as a result of the negligent manner in which the City enforced By-law No. 2012-258 ("2012 Taxi By-law") against Uber drivers and for unlawfully amending its Taxi By-law through

By-law No. 2016-272, *Vehicle for Hire By-law*, to permit Uber to operate in the City. In addition, the plaintiffs claim that the City's action of amending its Taxi By-law in 2016 to allow Uber to operate in the City has had the effect of discriminating against the taxicab license holders, of whom over 90% are members of minority groups, contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and s. 3 of the *Human Rights Code*, R.S.O. 1990, c. H.19 ("the *Code*"). Finally, the plaintiffs claim that the fees charged to them by the City under the Taxi By-law constitute illegal taxes.

[2] The City submits that the plaintiffs' proposed class definitions are overbroad; that it is empowered to but not required to pass by-laws with respect to "taxicab" services; that there is no basis in fact to support the plaintiffs' proposed common issues of negligence in enforcing its Taxi By-law or to support the plaintiffs' claim of discrimination by the City under the *Charter* or the *Code*; and finally that damages are an individual and not a common issue.

Background Facts

[3] The facts are largely uncontested and I have adopted some of the facts from the materials filed by the parties. Metro Taxi Ltd. ("Metro") is the proposed representative plaintiff for the class of Taxi Brokers and is one of four taxi brokers that have licenses in Ottawa. Marc André

Way and Iskhak Mail are proposed as representative plaintiffs for 768 taxi plate licensees, who together own 1,188 taxicab plates in the City.

[4] The plaintiff Marc André Way is a director of Metro, is the Chief Operating Officer of Coventry Connections and is the current president of the Canadian Taxi Association. Mr. Way holds a one-year term standard taxicab plate license ("Taxi Plate License") for each taxi plate he holds as a licensee in accordance with the 2012 and 2016 By-laws.

[5] Iskhak Mail ("Mr. Mail") is also a Taxi Plate Licensee in the City of Ottawa. Mr. Mail received a transfer of the Taxi Plate License for Plate No. 525 effective September 11, 2013. The agreement which resulted in the transfer of the Taxi Plate License for Plate No. 525 was negotiated and entered into by Mr. Mail as transferee from the prior Taxi Plate Licensee, without the City's knowledge, oversight or involvement.

[6] The City is a body corporate incorporated on January 1, 2001, pursuant to the *City of Ottawa Act, 1999*, S.O 1999, c. 14, Sched. E. The City is the successor corporation to the Regional Municipality of Ottawa-Carleton, the City of Cumberland, the City of Gloucester, the Township of Goulbourn, the City of Kanata, the City of Nepean, the Township of Osgoode, the City of Ottawa, the Township of Rideau, the Village of Rockcliffe Park, the City of Vanier and

the Township of West Carleton. The City is delegated by-law making authority by the Province of Ontario pursuant to the *Municipal Act, 2001*, S.O. 2001, c. 25, and other statues.

[7] The City has regulated taxi services for five decades under a well-established scheme, which strives to deliver reliable and safe taxi services to the public and reasonable revenue to the taxi industry. In 2014, Uber began operating in Ottawa. In 2016, the City amended its Taxi By-law and created a new category of license for Uber to allow it to continue operating in Ottawa.

[8] For many years, the City has regulated taxicab services by requiring all taxi operators to hold a plate license ("Plates") and all taxi dispatching companies ("Brokers") to obtain a broker license. The City has consistently limited the number of Plates issued. As of September 2014, there were four Brokers operating in the City, and there were 1,188 Plates held by approximately 768 licensees ("Plate Licensees"). The City collects fees on the transfer and renewal of Plates. The statement of claim alleges that the City has permitted the sale or lease of Plates and that as a result it is aware that the Plates have a market value.

[9] The City is empowered but not required by ss. 8, 9, 10 and 151 of the *Municipal Act, 2001* to pass by-laws to provide for a system of licenses with respect to businesses operating within its territory, including businesses for the sale or hire of services on an intermittent or onetime basis.

[10] The City is also empowered but not required by ss. 8, 9, 10, 151 and 156 of the *Municipal Act, 2001* to pass by-laws with respect to the "taxicab" services contemplated by the *Act*. The City is empowered but not required by ss. 8, 9, 10 and 390 to 399 of the *Municipal Act, 2001* to impose fees and charges on persons for services or activities provided or done by or on behalf of the City, including, without being exhaustive, fees and charges upon the plaintiffs for the licensing, regulatory, and enforcement system enacted by the City through by-laws with respect to taxicab services as contemplated by the *Municipal Act, 2001*, as well as for other businesses regulated by the City.

[11] Uber B.V., Raiser Operations B.V., Uber Canada Inc. and/or Uber Technologies Inc., referred to by the plaintiffs collectively as "Uber", are corporations incorporated in different jurisdictions. In affiliation with each other, these corporations carry on business with an electronic software application ("App") and license businesses in relation to facilitating private transportation services for compensation through telecommunications platforms and/or a digital network.

[12] The plaintiffs allege that, in or around September 2014, Uber began operating within the City. It engages drivers to provide transportation services for hire within Ottawa and uses electronic means to dispatch these drivers to customers.

[13] The plaintiffs allege that Uber and its drivers fell within the relevant definitions of the 2012 Taxi By-law:

> "dispatch" means the act or service of sending or directing a taxicab, by electronic or any other means, to a person or persons who have requested taxicab service but does not include a request made directly to a taxicab driver;
>
> "taxicab" means a motor vehicle with seating capacity of not more than seven (7) individuals, including the driver, that is intended to be used or is actually used for hire for the purpose of transporting a person and includes an accessible taxicab and a standard taxicab but does not include a limousine;
>
> "taxicab broker" means a person who accepts calls in any matter for the dispatch of taxicabs and which taxicabs are not owned by that person or that person's immediate family or employer;
>
> "taxicab service" means the transportation of a passenger by taxicab from a point in the regulated area to any point within or beyond the regulated area.

[14] The plaintiffs allege that neither Uber nor Uber's drivers obtained licenses or Plates from the City to deliver these services, nor did they pay any of the fees under the Taxi By-law as discussed above. Although the Class Members asked the City to enforce the regulatory scheme against Uber and its drivers, the plaintiffs allege that the action taken by the City against Uber's drivers was vastly inadequate and, with respect to Uber itself, entirely lacking.

The 2012 Taxi By-law

[15] On July 11, 2012, the City passed the 2012 By-law for the following purpose:

> A by-law of the City of Ottawa to provide for the licensing, regulating and governing of taxicabs, taxicab drivers, taxi plate holders and taxicab brokers in the regulated area of the city of Ottawa, and to repeal By-law No. 2005-481.
>
> WHEREAS Section 151 of the *Municipal Act*, 2001, S.O. 2001, Chap. 25, as amended, authorises a municipality to license, regulate and govern any business carried out wholly or partly within the municipality, and Section 10(2) of the *Act* also authorizes the City to pass by-laws for the health, safety and well-being of persons and protection of persons and property including consumer protection;
>
> AND WHEREAS Section 156 of the *Municipal Act*, 2001 provides further authority for the licensing, regulating and governing of the owners and the drivers of taxicabs;
>
> AND WHEREAS City Council has determined that it is appropriate and desirable to license taxicab drivers, taxi plate holders and taxicab brokers for the purpose of ensuring the health and safety of passengers and drivers alike, to ensure consumer protection, and to ensure that an efficient taxicab service is available to all persons within the regulated area of the city of Ottawa …

[16] Under the 2012 By-law, the licensing process for Taxi Plate Licensees included and required:

> (a) Compliance with policies applicable to taxicabs as set out in sections 43 to 58, and with the regulations/requirements set out in sections 29 to 42 of By-Law No. 2012-258; and
>
> (b) Completion of the Taxicab Driver Education Program (as required by s. 83).

[17] Taxicab plates must be affixed to taxicab vehicles as defined in the 2012 By-law for those vehicles to be used for the provision of taxicab services. Taxicab plates are and remain the property of the City. The Taxi Plate Licenses are required to be renewed annually in

consideration of the payment of a license renewal fee prescribed in Schedule C of the 2012 By-law and in compliance with the Taxi Plate License renewal process.

[18] Taxi Plate Licenses may also be transferred. These licenses are transferred by way of an agreement of purchase and sale between the transferor and transferee. The City's Chief License Inspector is charged with ensuring that the transfer provisions of the 2012 By-law were complied with and that the license transfer fee was paid before a license transfer could be effective. The plaintiffs only hold fixed-duration licenses to use taxicab plates, which are renewable on an annual basis provided the By-law is otherwise complied with.

2016 Amendments to Taxi By-law

[19] Uber commenced operations in Ottawa on or around October 2014. In May of 2015, City Council approved a comprehensive review of the City's taxicab and limousine regulations.

[20] The review included potential regulations to recognize the emergence of new transportation hailing technologies and transportation-for-a-fee service models. The City engaged KPMG to conduct the review. KPMG engaged three groups to assist in its review: 1) The Mowat Centre; 2) Hara Associates; and 3) Core Strategies Inc. The review engagement had three guiding principles:

(a) Public Safety – vehicle condition, insurance coverage, driver and other screening processes;

(b) Accessibility – service delivery model that considers the aging population and meets the needs of the accessible community; and

(c) Consumer Protection – measures to protect both the passenger and the driver; means by which to establish reasonable fares for service; and thorough complaint resolution processes.

[21] As part of its review, KPMG first researched the industry and major issues within it, and produced six discussion papers that were released to the public in October 2015. Following the release of the discussion papers, KPMG held seven (7) workshops with stakeholders from the taxi industry and app-based ride service providers, as well as members from the public.

[22] The City kept the public updated on the review process and solicited feedback through various mechanisms, including the Ottawa.ca website and social media. These discussions let to the development of a Policy Options paper which was released on November 28, 2015. Two subsequent webinars were held.

[23] On April 13, 2016 the City enacted amendments to the regulatory scheme in the form of the 2016 By-law, which came into force on September 30, 2016. Part III of the 2016 By-law creates a new class of license for "Private Transportation Companies". Part I of the 2016 By-law eases the regulations applicable to traditional taxicabs, but otherwise maintains the industry privileges associated with the taxicab business as it existed under the 2012 By-law.

[24] A large percentage of the proposed class are members of minority groups. Ninety four percent (94%) of the Plate Licensees are members of a linguistic minority group, while 93% have a national or ethnic origin other than Canadian and 91% were born outside of Canada.

Admissions

[25] The City has made the following admissions:

(a) The City admits that a class proceeding is the preferable procedure under s. 5(d) of the CPA to resolve the common issue of whether the City was negligent in enforcing the Taxi By-law, now that the common issues have been reduced to five in number.

(b) The City agreed that the pleadings alleging negligence disclosed a valid cause of action, but disputed that a valid cause of action had been pleaded alleging a breach of s. 15 of the *Charter* and the *Code* by the City when it amended the Taxi By-law in 2016. The City argues that it is plain and obvious that the plaintiffs cannot be successful on their claim for discrimination against the City.

Analysis

[26] Section 5(1)(a)-(e) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"), sets out the five criteria that must be fulfilled to certify a class proceeding. Section 5(1) reads as follows:

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

a) the pleadings or the notice of application discloses a cause of action;

b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

c) the claims or defences of the class members raise common issues;

d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

e) there is a representative plaintiff or defendant who,

i. would fairly and adequately represent the interests of the class,

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[27] If these five criteria are met, s. 5(1) provides that the Court "shall" grant the motion for certification. The first criterion – that the pleadings disclose a cause of action – is determined based on the pleadings alone. For the remaining four criteria, in s. 5(1)(b)-(e) of the CPA, the plaintiff must show "some basis in fact" in the certification motion materials. This standard does not require proof on a balance of probabilities.

Issue #1: Do the pleadings disclose a cause of action (s. 5(1)(a))?

[28] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), the Ontario Court of Appeal affirmed that the "plain and obvious" test established in *Hunt v. T&N plc*, [1990] 2 S.C.R. 959, applied to determine if a cause of action has been pleaded. In determining whether the plaintiffs have established a cause of action, as in a Rule 21 motion, all of the facts pleaded are assumed to be proven, claims that are unsettled in the jurisprudence should be

allowed to proceed, and the pleadings should be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of discovery information.

[29] The threshold under s. 5(1)(a) of the CPA is modest. No evidence is admissible in respect of this criterion, and the material facts pleaded by the plaintiffs are accepted as true, unless patently ridiculous or incapable of proof. As noted by the Supreme Court in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, this modest threshold recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success" (at para. 45, quoting *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 (Eng. C.A.), at p. 1102). Indeed, a claim should not be struck out because it is novel. If the law is uncertain in respect of a claim, it is inappropriate for the court to reach a conclusion about the existence of a claim at the certification stage, without a complete factual foundation.

[30] In *Hollick v. Toronto (City)*, 2001 SCC 68, the Supreme Court stated that the representative plaintiff must show some basis in fact to meet the requirements of s. 5(1) of the CPA, other than the requirement that the pleadings disclose a cause of action. The Chief Justice stated as follows at para. 25: "In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5(1) of the Act, other than the requirement that the pleadings disclose a cause of action."

[31] The City does not dispute that the plaintiffs' pleadings have satisfied the requirements of s. 5(1)(a), except with respect to the claims for damages for discrimination under the *Charter* and the *Code*. The City submits that it is plain and obvious that the claims against it for discrimination cannot succeed.

Claim of Negligence

[32] The City agreed that the plaintiffs have validly pleaded causes of action in negligence, by alleging that the City's 2016 amendments to its Taxi By-law were unlawful and by alleging that the fees charged by the City under its Taxi By-law constitute an illegal tax on the plaintiffs. However the City argued that it was plain and obvious that the claim that the City was negligent in the manner that it enforced the Taxi By-law could not succeed because of the statement by Mr. Way his affidavit at paragraph 29, where he stated that the statement of claim sought damages "caused by Uber's operations in Ottawa since September 2014". The City submits that this is an admission against interest which cannot be withdrawn, namely that the plaintiffs are alleging that the damages they have suffered were caused by Uber and not by the City.

[33] I find that Mr. Way's statement in his affidavit does not make it "plain and obvious" that the claim against the City in negligence will not succeed, for the following reasons:

(a) No evidence can be considered under the s. 5(1)(a) criterion and the pleadings are deemed proven. As a result Mr. Way's affidavit evidence cannot be considered under s. 5(1)(a) of the CPA. If the pleadings are deemed to be true then it is not plain and obvious that the claim for damages in negligence against the City will not be successful; and

(b) When Mr. Way's statement is read in context I am satisfied that he was saying that the damages he suffered were caused both by Uber commencing operations in Ottawa in 2014 and the City's alleged negligence in failing to enforce the Taxi By-law and by making alleged unlawful amendments to the By-law in 2016 to allow Uber to operate in the City. Mr. Way's affidavit does not state that Uber was the only cause of the damages they suffered, and when read with the pleadings the City could also be found to have caused damages to the plaintiffs.

[34] This situation is similar to the case of *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Div. Ct.), where the Divisional Court permitted a claim to proceed against the police, notwithstanding the fact that a serial rapist, not the police, had sexually assaulted the plaintiff. In that case, like here, the allegation was that the police had failed in the duty they owed to the plaintiff to prevent the harm. The cause of the harm was shared, as the rapist was a cause of the harm as well as the police's failure to warn the plaintiff of the presence of a serial rapist in the area.

[35] The City introduced evidence to demonstrate that the City took reasonable steps to enforce the Taxi By-law against Uber drivers, and that there was no lack of good faith in its enforcement efforts, but this evidence is not admissible under the s. 5(1)(a) criterion. This

evidence relates to the merits of the action which are not to be decided on a certification motion, where the pleadings are deemed to be proven.

[36] As a result I am satisfied that the plaintiffs' pleadings of negligence against the City disclose a cause of action under s. 5(1)(a) of the CPA.

Claim of Discrimination by the City Under the Charter and Human Rights Code

[37] The City states that it is unfortunate that many taxi drivers have been unable to obtain employment in their field since they immigrated to Canada, but argues that this is not the City's fault. The City submits that the only common characteristic of the Taxi Plate Licensees is their field of employment, which is not a protected ground of discrimination under either the *Charter* or the *Code*.

[38] The acts and alleged omissions of the City, with respect to the enforcement of the Taxi By-law and its amendment of the Taxi By-law in 2016, must respect the provisions of the *Charter* and comply with the *Code*. The *Charter* applies to municipalities, their activities, and the by-laws they promulgate. The *Code* applies to the enforcement (or lack thereof) of the Taxi By-law Section 1 of the *Code* provides that "[e]very person has a right to equal treatment with respect to services … without discrimination". The term "services" must be construed broadly,

and includes law enforcement. Remedies for breaches of the *Code* can be pursued in civil proceedings as long as the action is not based solely on the infringement of a *Code* right.

[39] In the case of *Withler v. Canada (Attorney General)*, 2011 SCC 12, the Supreme Court held that the test to be applied to determine if a measure was discriminatory under s. 15(1) of the *Charter* is as follows:

> (a) Does the law create a distinction based on an enumerated or analogous ground? and;
>
> (b) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In other words, is the impact of the distinction discriminatory?

[40] The City points to an answer given by Mr. Mail during cross-examination where he stated that he was discriminated against by persons other than the City of Ottawa when he was applying for jobs "as an engineer". Mr. Mail's answer is evidence which is not admissible under the s. 5(1)(a) criterion as the pleadings are deemed to be proven for purposes of the s. 5(1)(a) analysis.

[41] In addition, Mr. Mail's answer does not respond directly to the plaintiffs' pleading, which alleges that the City's amendments to the Taxi By-law in 2016 allowing Uber to operate and its failure to enforce the regulatory scheme have imposed a disproportionate burden on minority

groups and thus have created a distinction on the basis of race, colour, ancestry, ethnic or national origin, religion or creed, language, place of origin, or citizenship.

[42] The above are prohibited grounds of discrimination. The plaintiffs claim that the burden imposed by the City's actions on the Taxi Plate Licensees, who are members of minority groups, constitutes substantive discrimination under s. 15 of the *Charter* and *prima facie* discrimination or unequal treatment under the *Code*.

[43] The plaintiffs' pleadings, set out at paragraphs 28(a) to (d) of the Amended Amended Statement of Claim, follow the language used in the Supreme Court decision of *Withler*, at paras. 35-37. Paragraph 35 of the decision reads as follows:

> The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C. R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.: *Law*, at paras. 40-51.

[44] The plaintiffs allege that the 2016 By-law Amendment allowing Uber to operate in the City has had the effect of perpetrating disadvantage to members of a minority group, namely the group of existing Taxi License Holders, over 90% of whom are members of minority groups.

[45] At paragraph 37 of *Withler* the Supreme Court stated that the s. 15 analysis looks at the circumstances of members of the group and the negative impact of the law on them, in this case the 2016 amendment of the Taxi By-law.

[46] The case of *Falkiner v. Director, Income Maintenance Branch* (2002), 159 O.A.C. 135, leave to appeal to SCC granted, [2002] S.C.C.A No. 297, dealt with a 1995 amendment which changed the definition of a "spouse", which had the effect of removing family benefits for many sole support parents. The Court of Appeal stated that even though the definition of "spouse" applied equally to single fathers and single mothers and was neutral on its face, a neutral provision could still give rise to differential treatment.

[47] At paragraph 75, the Court of Appeal stated: "But a formally neutral provision may still give rise to differential treatment on the basis of sex if the provision has a disproportionate adverse or negative effect on women. A disproportionate adverse effect is still a form of differential treatment."

[48] For purposes of the s. 5(1)(a) analysis the pleadings are deemed to be proven and no other evidence is admissible. Given the principles referred to in the Supreme Court of Canada and Ontario Court of Appeal decisions referred to above, I find that it is not plain and obvious that the plaintiffs' claim for damages for discrimination based on the *Charter* and the *Code* will

not be successful. At this stage I am not making any decision on the merits of this claim. Therefore this pleading discloses a cause of action and meets the s. 5(1)(a) criterion.

Disposition of Issue #1

[49] For the above reasons, I find that the plaintiffs' claims – based on allegations of negligent enforcement of the Taxi By-law, the alleged unlawfulness of the 2016 Taxi By-law amendments to allow Uber to operate, the allegations that fees collected under the Taxi By-law constituted an unlawful tax, and the allegation that the negligent enforcement of the 2012 Taxi By-law and the 2016 amendments have had a disproportionately adverse discriminatory effect on members of minority groups and breached the *Charter* and the *Code,* disclose a cause of action.

Issue #2: Is there an Identifiable Class of two or more Persons (s. 5(1)(b))?

[50] The plaintiffs propose the following two classes:

(1) all persons who were Plate Owners (Licensees) under the Taxi By-law on or after September 1, 2014, and;

(2) all persons who were Taxi Brokers under the Taxi By-law on or after September 1, 2014.

There are 4 Taxi Brokers, and 1,188 Taxi Plates in the City which are held by 768 Plate Owners (Licensees).

[51] The City submits that the proposed class is too broad because each member does not have the possibility of being successful on the proposed common issues. The City objects on this basis because the plaintiffs initially proposed 18 common issues. The Plaintiffs have now reduced the number of proposed common issues to four common legal issues and one possible common damage issue. I agree with the City's submission that the Taxi Plate Owners are more accurately referred to as "Taxi Plate Holders".

[52] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII), [2001] 2 S.C.R. 534 at para 38 the Supreme Court set out the class definition requirement as follows:

> "While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because is identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identifies. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C (4th) 172 (Ont. Ct. (Gen Div.)), at paras. 10-11."

[53] The City argues that the effect of the 2016 Taxi By-law amendments cannot be discriminatory for disproportionately affecting members of minority groups because there is no adequate comparator group. The plaintiffs compare members of the proposed class to "the

population of Canada". This is an evidentiary issue and relates to the merits of the action, which is not being decided at this time.

[54] The City also objects to including any individuals who acquired a taxicab license after September 1, 2014 as members of the class, because Uber had commenced operations in the City on about this date. A large part of the plaintiffs' claim for damages is based on the City's alleged failure to enforce the Taxi By-law from September 1, 2014 until 2016 when it passed amendments to the Taxi By-law to regulate and allow Uber to operate in the City.

[55] The proposed class definition must have a rational connection with the common issues. In *Hollick*, the Supreme Court held that the plaintiff must define the class by reference to objective criteria so that a person can determine if they are a member of the class without reference to the merits of the action. The class must also be "bounded" in the sense that is it not unlimited.

[56] It is possible that a Taxi Licence was sold between September 1, 2014 and the 2016 amendments. The value of the taxi licence may have been reduced if it is found that the City was negligent in the enforcement of the Taxi By-law. The purchaser may also have also suffered damages if the 2016 amendments are found to be unlawful.

[57] In order to provide a boundary or limit to the class membership definition I find it should be defined as follows:

(1) All persons who were Taxi Plate Holders under the Taxi By-law on September 1, 2014 or who became a Taxi Plate Holder between September 1, 2014 and September 30, 2016; and

(2) All persons who were Taxi Brokers under the Taxi By-law on September 1, 2014 or who became a Taxi Broker between September 1, 2014 and September 30, 2016.

[58] The City argues that the claim of discrimination under the *Charter* and the *Code* is not common to all class members because 6-7% of the License Holders are not members of a minority group and therefore they cannot be successful on a claim for a breach of their *Charter* or *Code* rights. In the decision of *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Gen. Div.), the Court held that a class definition is not overbroad because it may include persons who will ultimately be found not to have a claim on one of the common issues. The fact that 6-7% of the Taxi License Holders do not have a claim for discrimination does not make the class definition overbroad, as 93-94% of the taxi plate holders may have a claim for discrimination.

Disposition of the Class Definition

[59] I am satisfied that the class definition as amended is sufficiently bounded is not overly broad, even though it includes 6-7% who do not have a claim for discrimination which is one of the common issues. Membership in the class is also defined by objective criteria that are not determined by reference to the merits of the action.

Issue #3: Does the claim raise common issues (s. 5(1)(c))?

[60] The plaintiffs have reduced the number of proposed common issues from 18 to 5. This has had the effect of simplifying matters and making the claim more manageable as a class proceeding.

[61] The City does not dispute that the issues of whether the City was negligent in the manner it enforced the Taxi By-law, whether the 2016 amendment to the Taxi By-law was unlawful, or whether the fees collected by the City under the Taxi By-law constitute an unlawful tax are valid common issues.

[62] The City disputes the merits of those three common issues but that is not for me to decide on this certification motion, as some basis in fact has been provided for each of these issues.

Is the Plaintiffs' allegation of Discrimination by the City a Common Issue?

[63] The City submits that there is no basis in fact to support the claim for damages for discrimination under the *Charter* or the *Code.*

[64] Section 1 of the CPA defines a common issue as an issue involving "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical issues of fact".

[65] In *Hollick, supra*, at para. 18, the Supreme Court stated as follows: "Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial … ingredient" of each of the class members' claims".

[66] A number of decisions have held that a proposed class is not overbroad because it may include persons who ultimately will not have a claim against the defendants, including *Bywater*, at para 10; *Boulanger* v, *Johnson & Johnson Corp.* (2007), 40 C.P.C (6^{th}) 170 (Ont. S.C.J.), at para 22, leave to appeal refused, [2007] O.J. No. 1991 (S.C.J. (Div. Ct.)); *Ragoonanan* v. *Imperial Tobacco Inc.* (2005), 2005 CanLII 40373 (ON SC), 78 O.R. (3d) 98 (S.C.J.), leave to appeal refused (2008), 2008 CanLII 19242 (ON SCDC), 54 C.P.C. (6^{th}) 167 (Ont. S.C.J. (Div. Ct.)); Silver V. Imaz Corp. (2009), 86 C.P.C (6^{th}) 273 (Ont. S.C.J.), at paras. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (CanLII), 105 O.R. (3d) 212 (Div. Ct.).

[67] In *Western Canadian Shopping Centres supra* at paras. 39 and 40, the Supreme Court of Canada addressed the commonality question, stating that the following factors needed to be considered:

> The commonality questions should be approached purposively… an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Not is it necessary that common issues predominate over non-common issues… however, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.
> … success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[68] In this case the issues of whether the City was negligent in the manner in which it enforced its Taxi By-law, whether the By-law amendment in 2016 was unlawful, whether the fees charged by the City under the Taxi By-law were an unauthorized tax are common to all class members. Success for one class member would mean success for all class members on each of these issues as well as whether damages can be assessed in the aggregate.

[69] With regards to the claim for discrimination by the City, the evidence is uncontroverted that 6-7% of the holders of taxi licenses are not members of minority groups and therefore they have no claim for discrimination against the City. However, the proposed class members, who

are not members of a minority group, share substantial, if not identical, common ingredients with all the members of the class on the common issues of whether the City was negligent in failing to enforce the By-law, whether the 2016 amendments were unlawful, whether the fees collected under the By-law were an unlawful tax and whether damages can be assessed on an aggregate basis..

[70] In *Cloud v. Canada (Attorney General), supra*, at para. 53, the Ontario Court of Appeal stated that:

> … an issue can constitute a substantial ingredient of the claims and satisfy s. s. 5(1)(c) even if it makes up a very limited aspect of the liability question, and even though many individual issues remain to be decided after its resolution.

[71] The goals of access to justice and the efficient use of judicial resources will be met by having the discrimination issue determined in one proceeding, and without creating a sub class for those class members who are members of minority groups.

[72] The plaintiffs' claim for damages for discrimination will not apply to 6-7% of the proposed class members who are not members of a minority group. The City proposed that a subclass be created for those class members who are not part of a minority group. The 6-7% of the class members who are not members of a minority group do not have a claim for discrimination. I find that establishing a subclass and appointing a separate representative

plaintiff for them is not required in order to protect their interests at this time as they have no interest in this issue. In addition there is no conflict between the subclass suggested by the City and the proposed class. If a conflict develops this matter may be reconsidered. All class members share identical common ingredients in 4 of the 5 proposed common issues, and a small number simply have no claim under one of the common issues.

[73] I find that it is not plain and obvious that the plaintiff's claim for discrimination against the City will not be successful for those class members who are members of minority groups, and that some basis in fact to support the allegation has been provided. For these reasons this issue is approved as a common issue.

Is the Question of whether Aggregate Damages are Appropriate in This Case a Common Issue?

[74] While damages are normally an individual issue and not a common issue, the plaintiffs submit that the issue of whether damages claimed for the loss of the value of their Taxi Plate Licenses as a result of the City's actions can be determined in the aggregate for the class members. As a result they submit that this is a common issue.

[75] The City argues that whether aggregate damages are appropriate cannot be a common issue because taxicab licenses have been purchased and sold for different amounts at different

times. The City has filed a list of the prices allegedly paid for taxicab licenses reported to it when the licenses were transferred. The list of reported sale prices varies from $4.00 to $320,000 and with many sales prices reported between these amounts.

[76] Mr. Way stated in cross-examination that he actually paid $340,000 or $350,000 but signed a bill of sale for $150,000 which he reported to the City. He said that he did this because of a Chartered Accountant's recommendation.

[77] The plaintiffs submit that there is, and the City acknowledges that it is aware of, a secondary market in which Taxi Plate Licenses are bought and sold. The City is also aware that the stated value of those sales varies from $1.00 to $320,000.

[78] The plaintiffs submit that they have all suffered damages that can be determined in the aggregate, because the value of their taxicab licenses have been reduced for every class member as a result of the City's alleged failure to enforce the Taxi By-law and making the amendments to the Taxi By-law in 2016 to regulate and permit Uber to operate in the City. They submit that the aggregate amount of their damages for the loss in value of their taxi licenses can be determined by an expert appraiser.

[79] Section 24(1) of the CPA states that the court may determine the aggregate amount of damages where monetary relief is claimed by all class members, no questions of fact or law other

than monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and the aggregate or part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. In this case all class members have claimed monetary relief for the decline in the value of their City taxicab license from September 1, 2014 until September 30, 2016. This issue may well be capable of being proven by an appraiser for all taxicab licenses in the City over that period of time.

[80] In *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57, at para. 134, the Supreme Court stated that "[t]he question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue."

[81] The plaintiffs have not provided any evidence of an expert methodology that has a realistic prospect of determining the loss on a class-wide basis, as was the case in *Pro-Sys*, however, I need not decide this at this stage. The only question is whether this is a common issue. The plaintiffs seek to have the question of whether aggregate damages are an appropriate remedy as a common issue. This issue can be answered for all class members either in the affirmative or negative and therefore success for one member will result in success for all. This would enhance access to justice and make efficient use of the courts' resources.

[82] If determining damages on an aggregate basis is not found to be appropriate then the damages will be determined on an individual basis, if liability is proven. Such an approach would move the case forward for each class member one way or the other and would be common to all members. For these reasons, this issue is also approved as a common issue.

Disposition of Common Issues

[83] For the above reasons, the following common issues are therefore approved:

(1) Was the City negligent in enforcing the Taxi By-Law from September 1, 2014 to September 30, 2016?

(2) Were the 2016 amendments to the City's Taxi By-law unlawful?

(3) Did the City's conduct in allegedly negligently enforcing the Taxi By-law or in amending the Taxi By-Law in 2016 infringe on the right of the Taxi Plate Holders under s. 15 of the *Charter of Rights and Freedoms* or under s. 3 of the *Human Rights Code*?

(4) Did the fees collected by the City under its Taxi By-Law constitute an unlawful tax?

(5) Are damages assessed in the aggregate an appropriate remedy?

Issue #4: Is a Class Proceeding the Preferable Procedure for Resolution of the Common Issues (s. 5(1)(d))?

[84] The preferability inquiry is viewed through the lens of achieving three goals, namely access to justice, judicial economy, and behaviour modification, and by taking into account the

importance of common issues to the claims as a whole, including the individual issues (*Pro-Sys*, at para. 137; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, at para. 69; and *Cloud*, at para. 73).

[85] The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

Disposition

[86] The City admits that a class proceeding is the preferable procedure for resolving the common issues. I agree that a class proceeding is the preferable procedure to determine the common issues rather than having separate trials of the same issue. The goals of access to justice and judicial economy will both be achieved by proceeding as a class proceeding. Behaviour modification is less important in this case.

Issue #5: Are the Plaintiffs Appropriate Representative Plaintiffs (s. 5(1)(e))?

[87] Section 5(1)(e) of the CPA requires that there be a representative plaintiff who will fairly and adequately represent the interests of the class, who has produced a suitable litigation plan, with a workable plan of advancing the proceeding, and who does not have a conflict of interest on the common issues with other class members.

[88] In *Western Canadian Shopping Centres Inc.*, at para. 41, the Supreme Court stated that the standard is not perfection, but that the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interests of the class."

[89] The plaintiffs propose Metro Taxi Inc., a Taxi Broker in Ottawa, as a representative plaintiff for the class of Taxicab Brokers. Marc André Way and Iskhak Mail, the other proposed representative plaintiffs, are both holders of Taxi Licenses and members of minority groups. They do not have any interest in conflict with the class members. They have produced a litigation plan that may have to be revised after this decision is released, but which meets this requirement.

Disposition of Representative Plaintiffs

[90] I am satisfied that the plaintiffs are appropriate representative plaintiffs.

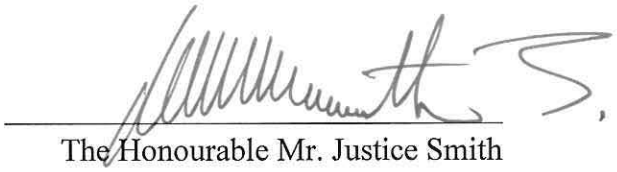
Litigation Plan

[91] I have not received submissions on the proposed litigation plan or on the terms of the notice to be provided to class members. The parties should attempt to negotiate the terms of the litigation plan, the terms of the notice, and method of giving notice. If necessary, a further case conference or motion may be set before me, either by teleconference, or in person, to resolve any

issues related to the litigation plan now that the action has been certified and the terms of the class definition and common issues have been determined.

Costs

[92] The plaintiffs may make submissions on costs within 15 days, the City shall have 15 days to respond, and the plaintiffs shall have 10 days to reply.



The Honourable Mr. Justice Smith

Released: January 16, 2018

CITATION: Metro Taxi Ltd. et al. v. City of Ottawa, 7468
COURT FILE NO.: 16-69601
DATE: 2018/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

METRO TAXI LTD., MARC ANDRÉ WAY, ISKHAK MAIL

Plaintiffs

-and-

CITY OF OTTAWA

Defendant

DECISION ON CERTIFICATION MOTION

R. Smith J.

Released: January 16, 2018