CITATION: *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725
COURT FILE NO.: CV-16-69601
DATE: 2024/05/13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
METRO TAXI LTD., MARC ANDRÉ WAY AND ISKHAK MAIL Plaintiffs	Thomas G. Conway, Marion Sandilands, Abdalla Barqawi, and Joseph Rucci, for the Plaintiffs
– and –	
CITY OF OTTAWA Defendant	Todd J. Burke, Matthew S. Estabrooks, Jacob A. Polowin, and Wudassie Tamrat, for the Defendant
	HEARD: January 3-6, 9-13, 17-20, 23-27, 30-31, February 1-3, 6, 10, 13-16, November 28-29, 2023

PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR JUDGMENT

M. SMITH J.

OVERVIEW

[1] The taxi industry has existed in Ottawa since the 1930s. For several decades, the taxi industry enjoyed a collaborative and close relationship with the City of Ottawa ("City"). This relationship ended abruptly in or around early 2015.

[2] Uber started its operations in Ottawa in or around September 2014, disrupting a stable taxi industry.

[3] The City's response to Uber's arrival was negligent, causing harm to the taxi industry.

[4] The City capitulated to Uber's bullying tactics when it entered the Ottawa market.

[5] After permitting Uber to illegally operate for two years in Ottawa, in August 2016, the City enacted a new by-law governing vehicles-for-hire, which included private transportation companies, such as Uber.

[6] On August 12, 2016, stakeholders in the Ottawa taxi industry commenced a legal proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, against the City.

[7] On January 16, 2018, R. Smith J. certified the class action: see *Metro Taxi Ltd. v. City of (Ottawa)*, 2018 ONSC 509, 71 M.P.L.R. (5th) 311. Metro Taxi Ltd. is the proposed representative plaintiff for the class of four taxi brokers and Marc André Way and Iskhak Mail are the proposed representative plaintiffs for 768 taxi plate licensees, who together own 1,188 taxicab plates in Ottawa.

[8] At para. 83 of that decision, R. Smith J. concluded that the following common issues were approved:

> (1) Was the City negligent in enforcing the [2012] 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 [2012] 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?

[9] This class action trial started on January 3, 2023 and ended on February 16, 2023. At the commencement of trial, the parties agreed to dismiss common issue #2.

[10] During the trial, the Plaintiffs brought a motion to defer common issue #5. On January 23, 2023, for oral reasons given, I agreed to defer common issue #5, leaving the three liability common issues to be determined.

[11] The parties made their final submissions on November 28 and 29, 2023.

INTRODUCTORY REMARKS

[12] This trial lasted seven weeks. There were 17 witnesses and over 200 trial exhibits, comprising thousands of pages. The quality of the trial presentation followed by the written and oral submissions were second to none.

[13] All counsel should be commended for the courteous and highly professional manner in which this trial was conducted.

[14] The following were witnesses at trial for the Plaintiffs:

i. Marc André Way, the representative plaintiff and a key figure in the Ottawa taxi industry.

ii. Ziad Mezher, a class member. He drives a taxi and holds one taxi plate license.

iii. Iskhak Mail, a representative plaintiff and a former taxi plate license holder.

iv. Yeshitla Dadi, a class member. He drives a taxi and holds one taxi plate license.

v. Antoine El-Feghaly, a class member. He drives a taxi and holds one taxi plate license.

vi. Dr. Michael Ornstein, an Associate Professor in the Department of Sociology at York University. He was qualified as an expert in sociology with a particular expertise in data analysis and structured inequality.

vii. Christian Bourque, an Executive Vice President and Senior Partner at Leger, which is a full-service market research and public opinion firm. Leger was retained to

conduct a survey of individuals who were plate holders in the City of Ottawa between September 1, 2014 and September 30, 2016.

viii. Gregory McEvoy, a Chartered Professional Accountant. He prepared an expert report to quantify the Plaintiffs' claims. At trial, he was called for the limited purpose of providing evidence in relation to notes taken from a series of meetings that he held with Mr. Way and his associates.

[15] The following were witnesses at trial for the City:

i. Leslie Donnelly, currently the City's Corporate Public Policy Advisor, responsible for dealing with emerging issues. Between 2006 and 2016, she served as the Deputy City Clerk.

ii. Christine Hartig, a Program Manager, Operational Support and Regulatory Services, with the By-law and Regulatory Services ("BLRS"). From 2012 to 2020, she was a Strategic Initiative Project Officer.

iii. Susan Jones, who began her career with the City in 1983 and has held several positions, including Director of By-Law Licensing, Acting General Manager, and Acting Deputy City Manager.

iv. Tania McCumber, a Program Manager for Licensing, Administration and Enforcement for the City. Between 2014 and 2018, she served as the Coordinator for By-law Enforcement.

v. Christopher Powers, a Constable with the Ottawa Police Services. He was previously a By-law Enforcement Officer and Supervisor in the BLRS.

vi. Morgan Tam, the Program Manager of Applications Management within the City's information technology department. He was involved in the City's enforcement efforts against Uber drivers from 2014 to 2016.

vii. Cyril Rogers, the General Manager of Corporate Services and Acting Chief Financial Officer of the City.

viii. Brian Bourns, currently the principal of Maclaren Municipal Consulting. Previously, he was the Project Manager for KPMG's 2015 review of the City's vehicle for hire ("VFH") regulations.

ix. Dr. Grace-Edward Galabuzi, an Associate Professor in the department of Politics and Public Administration at Toronto Metropolitan University. He was qualified as an expert in racialized and immigrant populations in the Canadian labour market.

[16] I was impressed with the trial witnesses. Credibility is not at issue. Although I do not accept the entirety of the evidence presented by all these witnesses, or prefer one testimony over another, these are not negative reflections on the individual or his or her testimony.

[17] In this decision, I do not plan on summarizing all the evidence at trial. That is not to say that the evidence not specifically mentioned in these Reasons for Judgment was not a factor in my decision. Similarly, each argument of the parties and jurisprudence relied upon have not been set out in these Reasons for Judgment, but they have been considered.

[18] This is not a case where the Ottawa taxi industry wanted to restrict competition. Rather, the taxi industry stakeholders were only seeking that it be fair competition. Uber's *modus operandi* was well known to the City regulators. Uber bullied its way into the Ottawa market, and for two years, ignored regulations and operated freely and illegally, without any serious restrictions. Despite forewarning that Uber's bullying tactic would be applied in Ottawa, the City was ill-prepared and negligent, with detrimental results for the taxi industry.

[19] This is not a case about discrimination. While it is not disputed that taxi plate holders are largely drawn from racialized and immigrant groups, the City's conduct was not discriminatory.

[20] And finally, this is not a case where the City has been illegally levying indirect taxes on the class members. For decades, the City has been collecting fees or charges in relation to the provision of services relating to a by-law, and the taxi industry is no different.

OVERVIEW OF THE OTTAWA TAXI INDUSTRY

[21] The parties filed a statement of agreed facts. In the text that follows, I have set out the relevant historical facts that have led the parties to this class action.

Regulatory history

[22] The City is a municipality incorporated on January 1, 2001, pursuant to the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sched. E. It 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.

[23] Since the amalgamation in 2001, the City has exercised its powers to enact by-laws with respect to taxicab and limousine services. It is the regulator that determines the by-laws and policies governing the taxicab industry.

[24] Prior to amalgamation in 2001, the City, as it was then, began issuing licenses for taxicabs as early as the 1930s. Between 1973 and December 31, 2000, the former cities of Cumberland, Gloucester, Kanata, Nepean, and Vanier all enacted taxicab licensing by-laws.

[25] After amalgamation, the taxicab by-laws that had been adopted by the various municipalities that were amalgamated into the City remained in effect, subject to various amendments, until the City enacted a single, harmonized taxicab by-law, By-law No. 2005-481 (the "2005 By-law"). This occurred on November 9, 2005.

[26] On July 11, 2012, the City enacted By-law No. 2012-258 (the "2012 By-law"). The 2012 By-law pertained to the licensing, regulating, and governing of taxicabs, taxicab drivers, taxi plate license holders, and taxicab brokers in the regulated area of the City of Ottawa.

City's policies relating to diversity and inclusion

[27] In 2010, the City published an "Equity and Inclusion Lens". The City updated the Equity and Inclusion Lens in 2015 and 2018.

[28] The City used the Equity and Inclusion Lens as part of the OC Transpo Routes review to assess the impact of policy changes on specific populations.

[29] The City has an Equity and Diversity Policy, which was revised in 2012.

Category of licenses

[30] The City had issued two categories of licences under the 2005 By-law: standard taxi plate holder licenses and accessible taxi plate holder licenses. Taxi plate holders can be broken down into three categories:

i. Single plate license holder-drivers – these are individuals who hold a taxi plate holder license and drive the taxicab to which they affix the taxi plate the City issued to them in connection with the taxi plate holder license. They may also rent the taxi plate to second or third drivers for the time period when the taxi plate license holder is not driving the taxi themselves.

ii. Multi-plate license holders – these are individuals who hold multiple taxi plate holder licenses. They may drive taxicabs to which a plate is affixed or may not drive taxis themselves. They may lease or rent their taxi plate holder license and its connected taxi plate out to taxicab drivers.

iii. Retired (absentee) plate license holders - these are individuals who hold one or more taxi plate holder licenses and are retired from driving. These individuals may rent their taxi plate licenses out to taxicab drivers.

[31] The limits in the City's by-laws on the number of permitted taxi plates led to the relative scarcity of taxi plates that could be affixed to a vehicle to operate it as a taxicab. From 2006 until 2015, the limit on the number of taxi plates was one taxicab per 784 residents. Between 2016 and 2019, it was further limited to one taxicab per 806 residents.

[32] From 2001 to 2019, the number of standard taxi plates issued by the City was limited to 1,001. The City started to issue accessible taxi plates in 2003. In 2003, the City issued 25 accessible taxi plates. Over the years, the City increased the number of accessible taxi plates to 187.

[33] The City's role is limited to the administration and enforcement of the taxicab and VFH regulatory regime set out in the by-laws. Plate license holders can use their license(s) to generate revenue as they consider appropriate, provided they do so in compliance with the taxicab by-law or VFH regulatory regime.

Collective bargaining agreements ("CBAs")

[34] Beginning as early as 1980 and continuing to the present, there have been CBAs in place between fleet owners, such as Capital Taxi and Blue Line, and unions representing taxi drivers.

[35] The City has never had any involvement in the negotiation, nor is it a party to any of these CBAs.

[36] The City has no role in overseeing or enforcing the terms of these CBAs.

Taxi plate licence transfers

[37] The City's involvement in taxi plate transfers was limited to regulatory oversight of the reported transfer within the scope of the by-law and the collection of transfer fees payable to the City. The transfer fee was set by the City's in-force taxi by-law and was payable to the City over and above the consideration paid between the license transferor and transferee.

[38] During the period of 2012 and 2016, there were 156 transfers of taxi plate holder licenses reported to the City. The nature and quantum of consideration was determined by plate license holder transferor and transferee, without the City's input or oversight.

[39] The monetary consideration for the transfers reported to the City varied between $1 and $320,000. These transfers did not necessarily reflect the true consideration agreed upon or paid as between the transferor and the transferee, nor did it describe the circumstances in which the plate holder license transfer requests were made.

Fees charged under the taxicab by-law

[40] The taxicab by-laws of the City (and where applicable, the former cities amalgamated to form the City in 2001) have imposed the following fees with respect to taxicab and taxicab broker licensing since 1998:

i. Plate application fees (standard and accessible) – from 1998 to 2001, the fees varied between $210 and $408, depending upon the municipality; from 2002 to present, the fees varied between $400 and $545, with the exception that between 2002 and 2005, accessible plate application fees were charged at $1 per plate.

ii. Plate renewal fees (standard and accessible) – from 1998 to 2001, the fees varied between $210 and $408, depending upon the municipality; from 2002 to present, the fees varied between $400 and $545, with the exception that between 2002 and 2005, accessible plate renewal fees were charged at $1 per plate.

iii. Plate transfer fees (standard and accessible) – from 1998 to 2001, the fees varied between $1,075 and $5,800, depending upon the municipality; from 2002 to 2005, the fees represented 10 percent of the true consideration in the sale agreement for the plate, to a maximum of $5,800, except in the case of the transfer of a license from a deceased holder to a qualified immediate relative, within three months, in which case the fee was $300; from 2006 to 2012, the fees were $5,800, except for the transfer of a single plate from a deceased taxicab owner to a legal spouse or child, within three months, in which case the fee was $300; from 2012 to 2017, the fees were $3,800, except for the transfer of a single plate from a deceased taxicab owner to a spouse or child, within three months, in which case the fee was $300; from 2017 to present, the fees were $4,033 per plate, except for the transfer of a single plate from a deceased taxicab owner to a spouse or child, within 12 months, in which case the fee was $300 (a transfer fee of $3,800 per plate would be charged upon the death of a plate holder with two or more plates to be transferred).

iv. Broker application or renewal fees – from 1998 to 2001, the fees varied between $575 and $4,000, depending upon the number of taxicabs and the municipality;

from 2002 to 2005, the fees varied between $600 and $5,400, depending upon the number of taxicabs; from 2006 to 2012, the fees varied between $723 and $6,508, depending upon the number of taxicabs; from 2012 to 2017, the fees varied between $741 and $6,671, depending upon the number of taxicabs; from 2017 to present, the fees varied between $807 and $7,253, depending upon the number of taxicabs.

v. Processing fees for license applications and renewals – from 1998 to 2001, the fees varied between $0 and $30, depending upon the municipality; from 2002 to present, the fees varied between $10 and $55.

[41] For the years 2002 to 2019, the City collected $22,808,999 in fees from taxicab licenses (including plate holders, taxicab brokers, and taxicab drivers). As part of this amount, the City collected a total of $2,823,326 in transfer fees.

City's past prosecutions of bandit cabs

[42] In or around June 2006, the City charged individuals operating a company known as "Quest Services" under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, with dispatching taxicabs within the City without a valid broker's license.

[43] In or around September 2007, the City charged four companies with dispatching taxicabs within the City without a valid broker's license.

[44] In 2016, Jamie Heard, a by-law enforcement officer appointed by the City, swore an information alleging that "Oride Technologies", on two occasions (September 23, 2016 and September 28, 2016) committed the offence of dispatching taxicab within the regulated area without a valid taxicab broker license.

Arrival of Uber and the enactment of By-law No. 2016-272

[45] As noted earlier, Uber began operating in the City in or around September 2014. It used a new vehicle-for-hire business model and was already operating in other North American cities.

[46] In September 2014, drivers began accepting requests for rides in Ottawa using the Uber platform. Drivers continued accepting rides on the Uber platform afterwards.

[47] The term "Uber" refers to multiple affiliated corporations incorporated in different jurisdictions, including Uber B.V., Raiser Operations B.V., Uber Canada Inc., and Uber Technologies Inc. In affiliation with each other, these corporations carry on business with an electronic software application and license businesses in relation to facilitating private transportation services for compensation through telecommunications platforms or a digital network.

[48] On April 13, 2016, City Council held its scheduled meeting regarding the proposed VFH by-law. It was an open and recorded meeting. All 24 Councillors were present. Several motions were introduced that pertained to this proposed VFH by-law. The various motions City Council considered addressed topics including due diligence monitoring of the payment of HST by Uber drivers, the mandatory level of liability insurance, age of vehicle restrictions, transferability of newly issued regular and accessible plates, the regulation of fares, the need to continue to monitor the industry and collect data that might be used to make future changes, and decisions regarding imposing a requirement on private transportation companies to install cameras in their vehicles.

[49] The City enacted By-law No. 2016-272, being "A by-law of the City of Ottawa to provide for the regulating, licensing, and governing of vehicles-for-hire in the City of Ottawa, being taxicabs, taxicab drivers, taxicab plate holders, taxicab brokers, limousine services and Private Transportation Companies, and to repeal By-law No. 2012-258 and Schedule 10 of By-law No. 2002-189" (the "2016 By-law"), on August 31, 2016, but delayed its coming into effect until September 30, 2016.

City's actions with respect to enforcement of the 2012 By-law

[50] The City has, since amalgamation on January 1, 2001, appointed by-law enforcement officers to enforce its by-laws.

[51] Between October 3, 2014 and September 30, 2016, no charges were laid against Uber for dispatching a taxicab within the regulated area without a valid taxicab broker license.

[52] The City did not issue an order against Uber under s. 444 of the *Municipal Act, 2001*, S.O. 2001, c. 25 ("*Municipal Act*").

[53] Between October 3, 2014 and September 30, 2016, the City did not seek an injunction against Uber drivers or Uber pursuant to s. 440 of the *Municipal Act.*

[54] In 2016, some of the class members in this proceeding, along with a drivers' union, sought an injunction under s. 440 of the *Municipal Act* against all Uber drivers in Ottawa. They were unsuccessful. The City was not involved and took no position with respect to this proceeding.

COMMON ISSUE #1 - *Was the City negligent in enforcing the 2012 By-law from September 1, 2014 to September 30, 2016?*

[55] The short answer to common issue #1 is yes.

[56] It is agreed amongst the parties that the negligence test is set out in the Supreme Court of Canada case *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3. To succeed, the Plaintiffs must demonstrate the following: (a) the City owed them a duty of care; (b) the City's behaviour breached the standard of care; (c) the Plaintiffs sustained damage; and (d) the damage was caused, in fact and in law, by the City's breach.

[57] As noted earlier, the determination of damages has been postponed to a later stage of these proceedings.

Position of the Plaintiffs

Duty of care

[58] The Plaintiffs argue that the City had a duty of care to act reasonably in exercising its regulatory responsibilities in the enforcement of the 2012 By-law against Uber and its drivers. The City ought to have contemplated that the Plaintiffs would be at risk when it failed to enforce the 2012 By-law.

[59] To determine if a duty of care arises between the City and the regulated class, the Plaintiffs say that I should apply the two-stage *Anns/Cooper* analysis: *Anns v. Merton London Borough*

Council, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. The first stage asks whether the City owes the Plaintiffs a *prima facie* duty of care through an assessment of proximity and foreseeability. The first step of the *Anns/Cooper* test is a relatively low threshold: *Ingles v. Tutkaluk Construction Ltd*., 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 17. The second stage is to determine if there are any policy reasons for declining to impose such a duty.

[60] Since this case involves a legislative scheme, proximity may be established in three ways: (a) a duty of care may arise explicitly or by implication from the statutory scheme; (b) a duty of care may arise from the specific interactions between a plaintiff and government entity; or (c) a duty of care may arise from a combination of the interactions between the parties and the statutory scheme: *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 43-46; *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579, 162 O.R. (3d) 532, at paras. 24-29. The Plaintiffs' position is that all three situations are applicable in this case.

[61] Dealing first with the statutory scheme, the Plaintiffs say that the taxi industry was created and regulated by the City as a supply management system. The City controlled and limited the supply of taxicabs that could operate within the industry. A fundamental pillar of a supply management system is proper enforcement, because without it, the entire statutory scheme is defeated.

[62] The Plaintiffs argue that the City created a closed system to attract investments from the Plaintiffs which would, in turn, ensure that the City achieve the objective of public safety and quality of service.

[63] The purpose of the 2012 By-law was to protect the taxi industry through the supply management system, by having the Plaintiffs invest into the system, all while protecting the quality of service and the safety of the consumers. The City voluntarily created this statutory scheme, and in doing so, it created an obligation to enforce the 2012 By-law in a non-negligent manner.

[64] Turning to the interactions between the Plaintiffs and the City, it is argued that a proximate relationship arose through a long series of specific interactions between each other for several decades. In considering the entirety of the circumstances that give rise to the relationship between the parties, the Plaintiffs say that it is fair and just to impose a duty on the City.

[65] The examples the Plaintiffs cite regarding the closeness of the relationship include the following: (a) the City and the taxi industry partnered to enforce against bandit cabs; (b) during the early part of the 2010s, the parties intensified their collaboration by working closely together on policy changes with respect to by-law enforcement, thereby creating a partnership of mutual reliance and responsibility; and (c) upon Uber's arrival to Ottawa, the City's initial conduct solidified the proximate relationship between the parties.

[66] The Plaintiffs say that the evidence tendered at trial clearly demonstrates the collaborative and cooperative relationship between the City and the taxi industry. The City created an expectation that it would enforce the 2012 By-law against all illegal operators, including Uber.

[67] In terms of the combined effect of the statutory scheme and specific interactions, the Plaintiffs submit that the proximity is obvious. When both are considered together, it becomes even more evident that the parties were partners in a close collaborative joint venture to enforce the by-law against unlicensed operators.

[68] On the foreseeability issue, it was clear to the City that its failure to properly enforce the 2012 By-law would result in harm. The City was aware that the taxi industry suffered losses as a result of the bandit taxis, and with Uber's arrival, it was reasonably foreseeable that losses would also be incurred, but at a significantly higher level.

[69] For the second stage of the *Anns/Cooper* test, the Plaintiffs state that the City failed to meet its burden and that there are no policy reasons that would negate the imposition of a duty of care.

Standard of care

[70] A defendant who fails to exercise the standard of care expected of an ordinary, reasonable, and prudent person in the same circumstances will be liable in negligence. This standard applies with equal force to public actors like the City: *Nelson (City) v. Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1, at paras. 91-92.

[71] The Plaintiffs argue that the City failed to meet the required standard of care with respect to the enforcement of the 2012 By-law against Uber and its drivers because it was unprepared and complacent throughout Uber's first two-years of illegal operations in Ottawa.

[72] The breach of the standard of care occurred in three ways: (a) the City had no specific plan to deal with Uber's arrival; (b) it inadequately enforced against Uber drivers; and (c) it failed to take steps to enforce against the entity Uber.

Cause of the damages

[73] The Plaintiffs say that the City was the legal cause of their damages.

[74] The City could reasonably have foreseen that by failing to enforce against Uber and its drivers, a devastating economic impact on the licensed taxi industry would occur. Furthermore, representatives of the taxi industry alerted City officials to the negative impact that their poor enforcement efforts against Uber had on their livelihoods.

Position of the City

Duty of care

[75] The City argues that it does not owe the Plaintiffs a duty of care with respect to the enforcement of the 2012 By-law because the relationship between the City and the Plaintiffs is and has always been one of regulator and regulated industry.

[76] Context is important to understanding the duty of care alleged by the Plaintiffs. The regulations were put into place for the following reasons: (a) to control the number of taxis that could operate to ensure that vehicles and drivers met standards of safety and quality; (b) to regulate the fares to ensure that consumers were not taken advantage of; and (c) to allow plate transfers between private parties, without the City's involvement.

[77] The City does not owe a private duty of care to protect the economic interests of those it regulates from non-compliant conduct by third parties. This is precisely what the Plaintiffs are seeking, namely, to protect their return on a speculative investment in the obtaining of a taxi plate

licence. During argument, the City confirms that its position is not to argue that a claim for pure economic loss against a public authority eliminates the need for a first stage proximity analysis under *Anns/Cooper*.

[78] The City agrees with the Plaintiffs that a duty of care can only arise in one of three ways, as set out by the Supreme Court of Canada in *Imperial Tobacco.*

[79] For the duty of care arising from the statutory scheme, courts have consistently held that the enactment of a general licensing scheme does not give rise to liability for economic losses that may arise from third parties' failure to comply with that scheme: *Cooper*, at paras. 43-44; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, at paras. 9, 13-14; and *Eisenberg v. Toronto (City)*, 2019 ONSC 7312, 96 M.P.L.R. (5th) 87, at paras. 107-08, aff'd 2021 ONSC 2776 (Div. Ct.).

[80] Furthermore, public authorities are not liable for losses simply because a legislated standard was not enforced. The enactment of a by-law establishes a general standard to benefit the public as a whole: *Vlanich v. Typhair*, 2016 ONCA 517, 131 O.R. (3d) 353, at para. 30.

[81] The City says that the evidence demonstrates that the statutory scheme was enacted to provide general benefits to the public and not to protect the interests of the taxi industry.

[82] The City submits that the 2012 By-law does not impose a standard intended to reduce or avoid the risk of physical harm and it was not enacted for the purpose of ensuring the financial returns of the taxi licenses. It was enacted to provide general benefits for the public. A duty does not arise from the statutory scheme.

[83] With respect to the next category of analysis, the City says that to find proximity, there must be specific, close, and direct interactions, beyond the scope of the ordinary regulatory relationship: *Imperial Tobacco*, at paras. 50-54; *Aylmer*, at paras. 50-54. The City would need to be shown to have stepped outside of its statutory duties.

[84] General consultations between the regulator and members of the regulated industry do not give rise to proximity, and on their own, do not create a duty of care: *Flying E. Ranche Ltd. v.*

Attorney General of Canada, 2022 ONSC 601, at paras. 614-15, aff'd on other grounds 2024 ONCA 72.

[85] The City argues that the evidence does not support proximity based on its interactions or on representations or advice or consultations with the City. The Plaintiffs were aware that they were making speculative investments in the taxi industry, and there was no arrangement or relationship, apart from the regulatory regime, that required the City to protect the Plaintiffs' financial and commercial interests.

[86] The City denies that there was widespread collaboration between the City and the taxi industry. A regulator needs to consult with those who are regulated in order to regulate effectively, which is what the City did in this case. However, the interactions did not go beyond the ordinary scope of the regulatory regime.

[87] Regarding representations made by the City, it says that any general representations made by a regulator to the public and relied upon by the Plaintiffs as members of the public do not give rise to sufficient proximity to find a duty of care. Such representations are made to the public and not specifically to the Plaintiffs: *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 118.

[88] The establishment of a supply management system does not, in and of itself, give rise to a finding of proximity, nor does it alter the standard for finding proximity sufficient to give rise to a duty of care. The City submits that the Plaintiffs have failed to meet the test based on the statutory scheme, on the direct and close interactions, or a combination of the two.

[89] Finally, in the alternative, if a duty of care does exist, the City submits that there are policy reasons sufficient to negate recognizing a duty of care, that is the spectre of indeterminate liability. A recognition of a duty of care would have precedential implications: *Eisenberg*, at para. 138; *Vlanich*, at para. 48.

Standard of care

[90] The City says that municipalities do not have a duty to take measures to enforce their own by-laws: *Eisenberg*, at para. 106.

[91] The City argues that the Plaintiffs have failed to meet their burden to establish the standard of care. They must first establish the applicable standard of care and then show that the City has failed to meet this applicable standard. The City says that the Plaintiffs have not done so, and as such, their claim should be dismissed on that basis.

[92] Alternatively, the City takes the position that it has not breached the standard of care, and that it acted reasonably and in good faith once it chose to enforce the 2012 By-law, especially against a new and unprecedented technological platform like Uber.

[93] Ordinarily, expert evidence is required to prove a professional standard of care, unless the plain facts are enough to meet the test of common sense: *Aylmer*, at para. 65.

[94] In the present case, the unique circumstances of the challenges Uber posed takes the scenario outside of the parameters of ordinary common sense.

Cause of the damages

[95] The City argues that it did not cause the Plaintiffs' damages because it was unable to prevent Uber's entry into the Ottawa market.

[96] With the City's limited ability to combat Uber's demonstrated conduct in flouting municipal by-laws, it is argued that if the Plaintiffs suffered damages, those damages were inevitable from the moment that Uber decided to expand into Ottawa.

[97] Under these circumstances, the City submits that regardless of the actions that it took, the value of the plates would have reacted to the presence of any new and formidable competitor.

Discussion

[98] The proximity between the City and the Plaintiffs does not arise by the statute itself. Rather, it arises from a series of specific interactions between the City and the Plaintiffs, and their decades-long close and direct relationship. The evidence demonstrates a close collaboration between the parties, one which I would qualify as a partnership or joint venture, created for the purpose of combating unlicensed taxicab operators. There were interactions between the parties that created a relationship outside the parameters of ordinary day-to-day regulatory activity. Because of this proximity, I find that the City had a duty of care to enforce the 2012 By-law.

Duty of care

[99] It is undisputed that to establish a private duty of care in negligence, three elements are necessary: (a) the harm complained of must have been reasonably foreseeable; (b) there must be sufficient proximity between the parties; and (c) there are no policy reasons for declining to impose such a duty.

Foreseeability

[100] I accept the Plaintiffs' evidence that taxi plates have historically been recognized as a capital asset and that there was a significant market value to these plates. Mr. Way provided detailed testimony in this regard, including the plate values within different municipalities in the 1990s, how the plates were viewed by financial institutions and used as collateral, and how the plates increased in value from year to year. Furthermore, Mr. Way testified that following the death of his uncle in 2014, the estate paid taxes on the value of the taxi plates.

[101] For decades, the City document entitled "Taxi Plate Holder License" referred to the taxi drivers as "owner" or "propriétaire" in French. It is not until approximately in 2019 or 2020 that the City changed those forms to read "holder" or "titulaire" in French. Mr. Mezher always believed that when he bought the plate, he was the owner of the plate. In my view, despite what may have been written in the by-laws, the City was representing to the taxi industry that taxi plates belonged to them, and as such, these were assets that they owned.

[102] Mr. Mail testified that when he obtained financing to purchase his home, the financial institution considered the value of his taxi plate as an asset.

[103] Also, I note that in family law proceedings, Ontario courts have found taxi plates to be assets in the equalization of the net family property: see e.g. *Bath v. Bath*, 2010 ONSC 1630. In one decision, an expert provided testimony on the fair market value of taxi plates. In estimating the value of the plate, the expert considered the fact that, at the date of separation, the City of Ottawa had restricted the number of plates in circulation. In his opinion, this results in the trade of taxi plates at high value: *Wehbe v. Wehbe*, 2016 ONSC 1445, at para. 42.

[104] There is no question in my mind that the evidence clearly establishes that taxi plates were and are considered an asset. The taxi plates were seen as a retirement fund.

[105] There are multiple examples in the evidence showing that the City's supply management plate system has created a market for the taxi plates. More importantly, the City was not oblivious to the existence of this market or the value of the taxi plates, even though it may not have had any control over same.

[106] As far back as 1975, the old City of Ottawa was put on notice that taxi plates had accrued value. In July 1975, Jim MacKenzie authored the City's first major report on the taxi industry. He noted that plates were trading for up to $8,000 and that the City would be held directly responsible for losses incurred due to changes in regulation.

[107] On December 31, 1990, the City knew or should have known that the street value of plates was increasing. In a report Hickling Corporation prepared for the Regional Municipality of Ottawa-Carleton entitled "Evaluation of Taxi and Limousine Service Demand and Economic Model for Taxi Rate Structure", the author of the report wrote about increasing difficulties with dividing jurisdictions of taxi regulations, including the "climbing 'street' values of taxi plates." The author also reported that "high plate values are a common occurrence among municipalities" and considered the taxi plates as assets.

[108] In June 2001, Steve Kanellakos, General Manager, prepared a report to the Emergency and Protective Services Committee proposing amendments to the taxi regulation and he noted that "the

issuance of new plates confers a substantial value upon the recipients, a value largely created as a result of the municipal regulatory regime."

[109] These are only three examples amongst many others where it was reported to the City that the taxi plates had value and that value had been increasing over time.

[110] For decades, the City observed that taxi plates were increasing in value. Prior to Uber entering the market, plates were being sold for hundreds of thousands of dollars on a regular basis.

[111] In or around 2006, it became abundantly clear to the City that unlicensed taxicab companies, also known as bandit cabs, diminished the value of the taxi plates. Mr. Way testified that in or around this period and beyond, he expressed his concerns to several City officials that ongoing tolerance of bandit taxicab companies would negatively impact taxi plate values.

[112] In her testimony, Ms. Jones acknowledged that during this period of the early 2000s, bandit taxicabs were one of the biggest issues in the taxi industry. She said that they impacted the ability of licensed taxicab drivers and owners to collect their fares, which I interpret to mean that they affected their ability to earn a living. As an example, Ms. Jones said that one of the bandit cab companies, Quest Services, was taking as much as $300,000 a year in business from licensed drivers.

[113] In response to the taxi industry's concerns, the City dedicated additional resources to the enforcement of the taxicab by-laws. In my view, this action taken by the City was necessary because failure to do so would have decreased the incomes and plate values of the taxicab plate holders and brokers. The City understood that enforcement against these bandit cabs ensured the viability of the taxi industry.

[114] Uber was a bandit taxicab company, and the City knew, by experience, that failure to enforce against a bandit company would have a devastating impact on the licensed taxi industry.

[115] Therefore, I have no difficulty in finding that the City knew or ought to have known that failure to enforce the 2012 By-law against Uber resulted in reasonably foreseeable harm to the Plaintiffs.

Proximity

Statutory scheme

[116] As a starting point, it merits mention that in *Imperial Tobacco*, at para. 44, the Supreme Court of Canada held that "it may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care… it may be difficult to infer that the legislature intended to create private law tort duties to claimants."

[117] In my view, the Plaintiffs are not able to overcome these difficulties.

[118] The *Eisenberg* and *Vlanich* decisions are important in my analysis because these cases deal with similar taxi licensing regimes. I am not persuaded by the Plaintiffs' arguments that these two cases are distinguishable when dealing with the statutory scheme analysis. Although I recognize that these matters have some distinctive factual features and there may be some minor differences between the regulatory regimes, they are insufficient. The Divisional Court in *Eisenberg* and the Court of Appeal in *Vlanich* both concluded that the statutory scheme does not impose a duty of care. These decisions are binding.

[119] The Plaintiffs submit that *Vlanich* is distinguishable because the Court of Appeal did not consider whether a duty to take reasonable care in by-law enforcement arises in a supply managed taxicab regime buttressed by expansive enforcement powers and a specific history of intense proximity. There is no question that the *Vlanich* case is factually different than the case at bar because it lacks the specific interactions between the parties that gives rise to a duty of care. It does not, however, eliminate the binding nature of the Court of Appeal's analysis vis-à-vis the Township's taxicab licensing regime, which was also enacted under the enabling provisions of the *Municipal Act.*

[120] In *Vlanich,* the plaintiffs were injured in a motor vehicle accident involving a taxicab. The plaintiffs sued the taxi company and the Township of North-Grenville ("Township"). The claim against the Township was based on its failure to enforce its taxi licensing and regulation by-law that required the taxi company to carry a minimum amount of insurance coverage.

[121] In rejecting the argument that the Township owed a private duty of care, the Court of Appeal, at para. 30, reviewed the purpose of the Township's by-law:

> By enacting the Bylaw, the Township established a general standard to benefit the public as a whole. This is a common feature of legislation and bylaws. Standards are established in the general public interest and public authorities have a duty to the public at large to see to their enforcement. But public authorities are not liable for losses simply because a legislated standard was not enforced: see e.g. *Cooper*; *Kent (Litigation Guardian of) v. Laverdiere*, 2011 ONSC 5411, 85 C.C.L.T. (3d) 296 (Ont. S.C.J.), at paras. 115 and 135; and *118143 Ontario Inc. v. Mississauga (City)*, 2015 ONSC 3691, 39 M.P.L.R. (5th) 231 (Ont. S.C.J.), at paras. 226-27. The added element of proximity must be present.

[122] Regarding *Eisenberg*, the Plaintiffs argue that that case is distinguishable because this certification decision was made on the pleadings only. This distinction is accurate, but I find that it is only relevant to the analysis of the special relationship between the parties, and not the statutory scheme. The pleadings in *Eisenberg* did not particularize the relationship and interactions that give rise to a duty of care, while the evidence before me overwhelmingly supports a finding of proximity based on the specific interactions.

[123] The Plaintiffs say that the *Eisenberg* decision is from a different jurisdiction about a different by-law and, as such, it should have no bearing on how the 2012 By-law affects the duty of care analysis. One of the main differences the Plaintiffs raise is that in our case, unlike the *Eisenberg* case, the pleadings disclosed a valid cause of action. The Plaintiffs submit that the *Eisenberg* matter was improperly pleaded and that is the reason the certification did not occur. The Plaintiffs urge me to not take anything more from *Eisenberg.*

[124] The *Eisenberg* decision goes far beyond the pleading issue. It deals in depth with the duty of care analysis that arises explicitly or by implication from a statutory scheme regulating the taxicab industry. This statutory scheme is strikingly similar to the one in our case, and as such, it must be given due consideration. The Plaintiffs have not persuaded me to the contrary.

[125] In the *Eisenberg* case, the regulation of taxicabs is set out in Chapter 545 of the *Toronto Municipal Code*. Chapter 545 was enacted pursuant to ss. 6, 8, 10, 86, and 94 of the *City of Toronto*

Act, 2006, S.O. 2006, c. 11, Sched. A. In our case, the 2012 By-law was enacted pursuant to ss. 8, 10, 151, and 156 of the *Municipal Act*.

[126] The chart below summarizes the enabling provisions of the *City of Toronto Act* and the *Municipal Act*. This comparison clearly shows that they are essentially identical.

City of Toronto Act	***Municipal Act***
Scope of powers	**Scope of powers**
6 (1) The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues.	**8** (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.
Broad authority	**Broad authority, single-tier municipalities**
8 (1) The City may provide any service or thing that the City considers necessary or desirable for the public.	**10** (1) A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public.
City by-laws	**By-laws**
(2) The City may pass by-laws respecting the following matters: … 6. Health, safety and well-being of persons. … 8. Protection of persons and property, including consumer protection. … 11. Business licensing.	(2) A single-tier municipality may pass by-laws respecting the following matters: … 6. Health, safety and well-being of persons. **...** 8. Protection of persons and property, including consumer protection. … 11. Business licensing.
Scope of by-laws generally	**Scope of by-laws generally**
10 (1) Without limiting the generality of section 6 and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate.	**8** (4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may

differentiate in any way and on any basis a municipality considers appropriate.

Powers re licences	**Powers re licences**
86 (1) Without limiting sections 7 and 8, those sections authorize the City to provide for a system of licences with respect to a business and, (a) to prohibit the carrying on or engaging in the business without a licence; (b) to refuse to grant a licence or to revoke or suspend a licence; (c) to impose conditions as a requirement of obtaining, continuing to hold or renewing a licence; (d) to impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a licence; (e) to impose conditions, including special conditions, as a requirement of continuing to hold a licence at any time during the term of the licence; and (f) to license, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it.	**151** (1) Without limiting sections 9, 10 and 11, a municipality may provide for a system of licences with respect to a business and may, (a) prohibit the carrying on or engaging in the business without a licence; (b) refuse to grant a licence or to revoke or suspend a licence; (c) impose conditions as a requirement of obtaining, continuing to hold or renewing a licence; (d) impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a licence; (e) impose conditions, including special conditions, as a requirement of continuing to hold a licence at any time during the term of the licence; and (f) license, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it.
Licensing taxicabs	**Licensing taxicabs**
94 (1) Without limiting sections 7 and 8, a by-law under those sections with respect to the owners and drivers of taxicabs may, (a) establish the rates or fares to be charged for the conveyance of property or passengers…	**156** (1) Without limiting sections 9, 10 and 11, a local municipality, in a by-law under section 151 with respect to the owners and drivers of taxicabs, may, (a) establish the rates or fares to be charged for the conveyance of property or passengers…

[127] The regulatory regimes at issue in *Eisenberg* and in this case share key features:

i. Both regimes require taxi drivers to be licensed.

ii. Both regimes regulate the fares that taxicabs can charge.

iii. Both regimes require taxicabs to have a plate affixed to the vehicle and prohibit the operation of taxicabs that do not have such a plate.

iv. Both regimes limit the number of taxi plates.

v. Both regimes permit the lease and transfer of taxi plates between licensees.

vi. Both municipalities collect fees from plate license holders, including fees for the transfer of plates.

vii. Both regimes require that the purchase price of any transfer be reported to the municipality.

[128] In *Eisenberg*, Toronto taxicab plate holders sought class action status against the City of Toronto for alleged negligence in enforcing its by-laws against Uber. Perell J. refused to certify the class action because he concluded that the City of Toronto's duty of care is to the public as a whole and it does not require the City of Toronto to protect the financial interests of taxi licensees.

[129] The Divisional Court upheld Perell J.'s decision and agreed with his analysis around the statutory scheme.

[130] Perell J. examined in detail the statutory scheme that is essentially identical to the 2012 By-law. He provided a helpful and comprehensive analysis of the applicable legal principles regarding imposing a private duty of care that arises from the statutory scheme. I do not intend to set out his analysis in my decision.

[131] The *Eisenberg* decision involves the analysis of a substantially identical by-law enacted under substantially identical statutory provisions. Because of the similarities between both regulatory regimes, I adopt the reasoning, rationale, and conclusion of Perell J., upheld by the Divisional Court, that the statutory scheme does not impose a duty of care.

[132] The preamble of the 2012 By-law identifies its purpose as ensuring health, safety, and consumer protection for all persons within Ottawa. The key features of the legislation are present

to ensure that the taxi industry operates in a manner that is safe for and protective of consumers. I find that it was primarily enacted to provide general benefits for the public as a whole.

[133] By enacting the legislation, the City did indeed voluntarily choose to regulate the taxi industry. However, I am not persuaded by the Plaintiffs' submissions that it was enacted to protect the interests of the taxi industry or ensure their economic viability. In the voluminous evidentiary records filed, there are no explicit indications that this was the purpose of the implemented regime.

[134] To the contrary, there are numerous references in the materials to the overall regulatory goals of the regulatory regime, including the 2012 By-law, being consumer protection and public safety. Time and time again, as set out in great detail in the City's written submissions, City staff and consultants have recognized that this was, and continues to be, the goal of the regulatory regime.

[135] It is not disputed that the enactment of the 2012 By-law, like its predecessor, would necessarily have an economic impact on the taxi industry and its financial interests, but such an impact does not make it a purpose. There is a fundamental distinction between impact and purpose. I do not find that the Plaintiffs have led compelling evidence to dispute that the purpose of the regulatory regime is to protect consumers and ensure public safety, as articulated by several City staff and consultants throughout several decades. The Plaintiffs have not convinced me that by enacting the regulatory regime, the City sought to attract investments from those who are granted taxi plate licenses. There is insufficient evidence to support the Plaintiffs' contention.

[136] I agree with the City's position that the evidence led at trial demonstrates that the City enacted the 2012 By-law, as well as the former regulatory regimes, with the intended purpose of establishing general standards of taxicab services for the benefit of the public, all to serve the goals of consumer protection and public safety. Although the 2012 By-law regulates such things as plate limits, plate transferability, and regulated fares, I am of the view that this is not done for the protection of the financial interests of the taxicab stakeholders, but rather for the overarching goals of maintaining a safe and functioning taxicab industry for the general public. Going back to impact versus purpose, the City's decision to maintain a closed market (i.e., plate limits) most certainly had a positive economic impact on taxicab license holders, but its purpose was not to protect those

who invested in the industry. Consumer protection and public safety has always been the purpose of the statutory scheme, not protecting the taxi industry through supply management.

[137] To sum up, I find that the Plaintiffs' claim falls squarely within the binding authority of *Vlanich* and *Eisenberg*. Coupled with the historical evidence presented at trial regarding the purpose of the regulatory regime being to protect the public as opposed to the economic interests of those who are granted taxi plate licenses, I conclude that the statutory scheme does not create a private duty of care.

[138] Given my finding on the statutory scheme, the next step in the analysis is to determine whether such a duty arises from the interactions between the Plaintiffs and the City, or whether it arises from a combination of the statute and specific interactions.

Special relationship

[139] The close relationship that exists between the Plaintiffs and the City is unique and unlike those seen in other cases such as *Eisenberg* and *Vlanich*, and those cases are therefore distinguishable. As described in greater detail below, it is my view that the duty of care arose through a series of specific and extensive interactions between the parties. For this part of the analysis, I prefer Mr. Way's evidence over that of Ms. Jones or Ms. Hartig or any other witness from the City.

[140] When evaluating the relationship, I am guided by the Court of Appeal's comments in *Aylmer*, at para. 29: "Courts determine proximity in new situations by 'looking at expectations, representations, reliance, and the property or other interests involved', in order to 'evaluate the closeness of the relationship between the plaintiff and the defendant', and by asking 'whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant'." I note that there are no definitive lists of factors to consider in this analysis.

[141] The interactions between the City and the Plaintiffs were much more than a simple manifestation of the regulator-regulated relationship, and well beyond the City fulfilling its role in the context of a supply-managed industry. The interactions were not ordinary, day-to-day regulatory contacts between the parties.

[142] The historical context and collaboration between the City and the Plaintiffs are exceptional and evince a rigorous partnership in the context of enforcement.

[143] In the early 2000s, there were a growing number of bandit taxicabs surfacing in the Ottawa area. The taxi industry reported its concerns to the City, asking for more enforcement. The City needed help with enforcement and the taxi industry was more than willing to oblige.

[144] Mr. Way testified that the taxi industry and the City shared the same view on the fight against bandit taxicabs. He said that the relationship with the City was collaborative and cooperative, describing it as an "open door relationship" where the taxi industry, through Mr. Way, would share information with by-law officers, and they would receive quick and positive responses from the City.

[145] There are several examples of this collaborative and cooperative relationship. Shortly after the amalgamation of the municipalities, the taxi industry began to raise the issue of bandit taxicabs in Ottawa. The taxi industry wanted a stronger commitment from the City on enforcement and the City agreed. Two by-law enforcement officers were dedicated to the enforcement of taxicab by-laws. On behalf of the taxi industry, Mr. Way and his team would regularly send information to the City to push enforcement against the bandit taxicab companies, which included evidence demonstrating that the violations of the regulations by these bandit taxicab companies were frequent and rampant. The relationship between the Plaintiffs and the City developed into an open-door, free flowing, collaborative, and cooperative relationship. There were constant and continuous communications and meetings between the parties, all for the purpose of stopping illegal bandit taxicab activities. The City was not required to establish such a close and direct relationship with the taxi industry to regulate effectively, but it chose to do so. For decades, the City nurtured the relationship with the taxi industry, exceeding the scope of a regulator.

[146] The City's responses were always positive, and it welcomed the help being offered by taxi industry, mostly through Mr. Way and his team. As an example of these collaborative enforcement efforts, between 2006 and 2009, the City undertook a mass enforcement operation against a bandit taxicab company known as Quest. The taxi industry brought Quest to the City's attention, and because of the collaborative nature of the relationship, the taxi industry and the City worked

together to eventually shut down Quest's operations. The City invested in a targeted marketing campaign to fight against these bandit taxicab companies.

[147] In May 2008, the City recommended to the Community and Protective Services Committee and to Council that "the Chief License Inspector be required to work with the Taxi Stakeholders Consultation Group and the Taxi Industry to identify and implement a communications and enforcement strategy to eradicate the use of illegal underground taxicab services (e.g. Bandit Cabs)". The reasons given for this recommendation were as follows:

> The proliferation of underground illegal taxicab services has become a serious issue for many cities across the world. Ottawa's licensed taxicab industry has expressed concern about a number of local bandit operations and would like to see additional measures put in place that will permanently eradicate this potentially unsafe illegal business practice. In the past few years, the By-law Enforcement and Regulatory Services Branch has laid several hundred charges and has closed several illegal businesses. In addition, a "Don't Let The Bandit Take You For a Ride" campaign was implemented in 2006 to educate the public and businesses about the problems associated with taking illegal taxis. Staff agrees that additional measures need to be put in place, which includes assigning a dedicated enforcement unit and a Bandit Taxi Hotline to report violations. It is further recommended that consultation with both the Taxi Industry and the soon to be formed "Taxi Stakeholders Consultation Group" be undertaken to identify and implement a new communications and enforcement strategy to eradicate the use of illegal underground taxicab services.

[148] Interestingly, I find that the creation of this Taxi Stakeholders Consultation Group now made this close collaboration mandatory. Not only did this close collaboration continue, but it solidified, up until the time that it was ruptured by the City in 2015.

[149] This new Taxi Stakeholders Consultation Group was important because it included representatives like Mr. Way and City officials such as the Chief License Inspector, by-law officers, and councillors. Previously, there was a Taxi Advisory Committee that facilitated interaction between the City, the taxi industry, and members of the public on taxi issues. This new structure enhanced and ensured more direct and regular communication between the taxi industry and the City.

[150] Other examples of the collaborative and unique enforcement efforts include the following:

i. In December 2012, Mr. Way observed two vans picking up passengers, one of which did not have a limousine sticker. Mr. Way believed that these vans were operating an underground taxi and limousine company. He wrote to Ms. Linda Anderson, the chief of By-law & Regulatory Services at the time, seeking confirmation that the by-laws were being respected vis-à-vis the minimum charge and the booking restrictions. Ms. Anderson was appreciative of these efforts, and she asked Mr. Way to gather additional evidence on these bandit taxicabs in order to secure two convictions on this company which could have led to revoking their limousine licence.

ii. In January 2014, Mr. Way reached out to Ms. Anderson to advise that there was another illegal company using a name that is similar to a limousine company operated by Mr. Way. In his communication to Ms. Anderson, he asked if this company was a licensed operator. Within 30 minutes, Ms. Anderson confirmed that it was not. Mr. Way and Ms. Anderson agreed that they would arrange a pick-up with this company, in the presence of a by-law officer, in order to charge this company. The by-law officer, Mr. Marcel Robert, was added to the email chain to work out the details of this operation.

iii. Once Uber arrived in Ottawa, the City reached out to Mr. Way and asked for his assistance, as it had done in the past. On September 19, 2014, Ms. Anderson wrote the following to Mr. Way:

> Reason I was calling you: we are attempting to get a By-law Officer to go plain clothes to the Uber sign up at the Westin and try to sign up using their personal vehicle. The officers are not comfortable with doing this since Uber will then have all their personal information, including their address. We have sent 2 uniformed officers down to observe what is going on.
>
> Just wondering if there is anyone in your shop willing to attempt to register as a driver and then to provide us with a statement of what transpired.

> In accordance with the established relationship with the City, Mr. Way complied, as he had always done and as one would expect to do when its close partner is seeking their assistance. Mr. Way immediately instructed employees of Coventry Connections (a company that provides services to taxi brokers, and of which Mr. Way is the President and Chief Executive Officer) to attend at the Westin hotel and prepare a witness statement.

[151] These foregoing examples are far different than those described in the *Eisenberg* decision, which was only based on pleaded interactions as opposed to weeks and weeks of testimony and thousands of pages of documentary evidence. The typical personal and unique interactions between the City and the taxi industry go well beyond generic and inherent consultations in the regulatory framework. Mr. Way's testimony regarding the closeness and type of relationship that developed with the City is very compelling and persuasive.

[152] Since the early 2000s, the City has been making clear representations to the taxi industry that it would enforce its by-laws. By creating and developing a close and collaborative relationship with the City, the taxi industry came to rely upon the City's representations and expected that the City would ensure compliance with the taxi by-laws and not permit any illegal activity. These expectations were reasonable.

[153] Publicly, the City made representations indicating that it would target illegal dispatchers. Recall that during the summer of 2006, Ms. Jones was quoted saying the following to the CBC regarding bandit cabs: "Well, we recognize too that just charging the drivers was just treating the symptom, not the problem, and that we have to undertake to investigate the operators, the groups or individuals who are running these businesses on a full-time basis." Ms. Jones went on to publicly comment that bandit taxicabs had been taking as much as $300,000 from the taxi industry. At trial, Ms. Jones confirmed the accuracy of the statement.

[154] In my view, this statement goes well beyond being a general representation of a regulator to the public. It was a direct representation to the Plaintiffs of the City's undertaking that it would safeguard the taxi industry's livelihood and investment.

[155] Even when Uber arrived in Ottawa in September 2014, the City, through Ms. Jones, was continuing to publicly make representations, as it had done several years before, that failure to comply with the taxicab by-laws would result in enforcement proceedings. Again, another direct representation to the Plaintiffs of the City's commitment to the taxi industry.

[156] These types of representations were not only general statements made to the public, but they were directed to the City's partner, the Plaintiffs, whom it had been working collaboratively with towards eliminating illegal taxicab activity. Since the early 2000s, the taxi industry had expectations of the City and they continuously and rightfully relied upon the City's representations and actions taken throughout those years.

[157] The taxi industry and the City worked closely together in trying to convince the Ontario government to make changes to the *Highway Traffic Act*, R.S.O. 1990, c. H.8. Mr. Way explained that in the Niagara Falls area, where he also operated, by-law services was managed by the police officers and they had a stronger set of enforcement tools to combat bandit taxicabs. Mr. Way shared this experience with the City, and together they sought an amendment to the legislation. In August 2012, Ms. Jones drafted a letter to Mr. Bob Chiarelli, Minister of Transportation, as he was then, and sought the input of the taxi industry before sending out the letter. Ms. Jones testified that a group from the taxi industry and the City met with Mr. Chiarelli and they "were all there speaking in one voice, seeking provincial support for changes to the *Highway Traffic Act.*"

[158] The work on seeking the amendment to the *Highway Traffic Act* continued for one year. Meetings took place involving members of the taxi industry, City staff, and Councillor Mark Taylor. As soon as the City took action, Mr. Way and others from the taxi industry were advised immediately that action had been taken, which demonstrates yet again the closeness and collaborative nature of the relationship.

[159] When it came to the development of the City's policy development, City staff often consulted Mr. Way and others from the taxi industry. The City would use them as a sounding board before the commencement of the official process, which I believe exceeds the normal regulator behaviour. This collaborative relationship existed for years and continued until sometime in 2015, when everything changed.

[160] The City was aware that not enforcing the by-law against illegal activity would adversely and financially impact the taxi industry. Ms. Jones acknowledged this publicly in 2006, when she said that the taxi industry was losing hundreds of thousands of dollars because of bandit taxicabs. During the trial, Ms. Jones testified that illegal passenger for-hire vehicles impacted taxicab drivers and owners earning a living. Furthermore, it goes without saying that if the taxi industry is not economically viable, then it would invariably affect service to the public.

[161] The compelling evidence clearly establishes that for many years, there was widespread collaboration between the City and the Plaintiffs, and the relationship was strong and mutually beneficial. Both parties wanted to eliminate illegal activity because it negatively and financially affected the taxi industry as a whole and it undermined the purpose of the statutory regime of consumer protection and public safety.

[162] Uber's arrival initially further entrenched the proximate relationship, and the taxi industry's expectations regarding by-law enforcement remained intact. The City invited Mr. Way to participate in the preliminary investigations against Uber. However, after Uber was starting to solidify its presence in the Ottawa market, to the liking of many citizens of Ottawa, the special relationship between the taxi industry and the City soured and slowly disintegrated. The City began to reject Mr. Way's assistance. In the past, Mr. Way would have retained the services of Triangle Investigation, a private investigator, to take rides from bandit taxicabs. He would gather evidence against bandit taxicabs, and the City gladly accepted his help. The City would act on the information collected by the private investigator to enforce its by-laws as required. However, at one point, in early 2015, the City refused to accept this type of assistance from Mr. Way regarding Uber's illegal activities, stating that such evidence would not be admissible in court.

[163] It becomes abundantly clear that in early 2015, the City and the Plaintiffs were no longer working towards the same goals. Combatting bandit taxicabs such as Uber was no longer the City's priority. Rather, because of public or political pressure, the City was working towards finding a way to legalize Uber's illegal operations, as opposed to stopping it. The City undertook a taxi by-law review, and it hired Mr. Bourns at KPMG. This review was fast-tracked and a final report was delivered at the end of December 2015. Incidentally, the report did not include the potentially devastating financial impact that the recommendations would have on the taxi industry.

[164] In September 2015, Mayor Jim Watson tweeted “That’s why we have fast tracked taxi bylaw review. These cabbies are hurting the reputation of all by their bullying.” Although Mayor Watson was referring only to certain drivers aggressively chasing or videotaping Uber drivers, in my view, it speaks volume as to how the City now perceived the taxi industry. They were plainly no longer a City partner. Mr. Way explained that he felt that the City was stonewalling the taxi industry.

[165] The interactions between the City and the taxi industry went beyond the scope of general consultations between the regulator and members of the regulated industry. The City was also not simply fulfilling its statutory role in the context of a supply managed industry. Having listened to several weeks of evidence and reviewed the documentary record that accurately shows the historical development of the relationship between the City and the taxi industry, I conclude that this special, close, and unique relationship developed into a partnership or a joint venture to maintain the integrity of the taxi regime, giving rise to proximity and creating a duty of care.

[166] Having regard to the evidence as a whole and the close and direct relationship between the City and the taxi industry, I find that it is just and fair to impose a duty of care in law upon the City.

Combined effect of the statutory scheme and specific interactions

[167] Although I concluded that the purpose of the statutory scheme is to protect consumers and ensure public safety, the City nonetheless knew that its regulatory regime had an economic impact on the taxi industry and its financial interests, and it needed to be protected. The economic viability of the taxi industry was a critical component for the successful delivery of taxi services to the public.

[168] Working collaboratively on enforcement efforts with the taxi industry permitted the City to achieve the main purposes of the regulatory regime, namely consumer protection and public safety. The City’s enforcement efforts also ensured that the Plaintiffs’ financial interests were not threatened by illegal activities from bandit taxicab companies. The City was aware that unregulated taxicab companies cost the taxi industry hundreds of thousand dollars, thereby affecting its members’ livelihoods.

[169] Through its conduct, the City entered into a special relationship with the taxi industry and the City assumed the responsibility of ensuring compliance with the 2012 By-law and its predecessors, all to protect the consumers' interests as well as the taxi industry's financial interests. The City knew that without a thriving and economically sound taxi industry, achieving the purpose of the statutory scheme was virtually impossible.

Are there any policy reasons that negate a duty of care?

[170] Having found that a duty of care exists, I must determine if there are residual policy reasons sufficient to negate recognizing a duty of care.

[171] The City argues that if the Plaintiffs succeed in establishing a duty of care, that duty of care should be negated because it presents a spectre of indeterminate liability. This liability would be particularly acute for small municipalities, and such a liability would have implications across the country given how many Canadian municipalities have responded to Uber in a similar manner. The City relies on both *Eisenberg* and *Vlanich.*

[172] The Supreme Court of Canada has held that there are three pertinent aspects to indeterminacy: "(1) value indeterminacy ('liability in an indeterminate amount'); (2) temporal indeterminacy ('liability … for an indeterminate time'); and (3) claimant indeterminacy ('liability … to an indeterminate class')": *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 43.

[173] To trump the existence of a duty of care, the City's residual policy reasons must be more than speculative: *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 57.

[174] The City argues that its argument is not speculative because it is precisely the type of indeterminacy recognized in *Vlanich* and *Eisenberg* as a valid policy reason to negate imposing a private law duty of care on a municipality to enforce its taxi licensing by-law.

[175] I disagree. While those cases deal with the same statutory scheme, the facts of the case at bar as well as my findings are fundamentally different, which impacts the policy consideration analysis.

[176] First, *Vlanich* dealt with a motor vehicle accident. If the Township in that case had been found negligent in the enforcement of the licensing by-law, the plaintiffs would already have a remedy because of the standard OPCF 44R Family Protection Coverage endorsement of a motor vehicle policy.

[177] Second, *Eisenberg* was decided on a motion as opposed to a lengthy trial. Perell J. took judicial notice of the City of Toronto's budget and the relative percentage of that budget that would go to the plaintiffs' claim. Because of the high percentage, Perell J. determined that residual policy considerations militated against the recognition of a duty of care. In the *Eisenberg* case, the Divisional Court decided that it was not necessary to have a trial on this issue. I am not aware of the documentary record that was made available to Perell J. to make such a finding.

[178] In the case at bar, unlike *Eisenberg*, a lengthy trial did take place, and despite having heard weeks of testimony and reviewed thousands of documents, I am unable to come to the same conclusion as Perell J. There is insufficient evidence before me to decide that indeterminate liability could negate the imposition of a duty of care. The City's position and argument are speculative. In any event, as the Supreme Court of Canada clarified, indeterminate liability is liability of specific character and not a specific amount: *Livent*, at para. 43.

[179] Third, applying the *Livent* analysis, none of the three kinds of indeterminacy arises in the case at bar:

i. Value indeterminacy – as described previously, the City was not oblivious to the market value of the taxi plates. For decades, when the taxi plates were transferred, these transfers were reported to the City and recorded, many of which were in the hundreds of thousands of dollars. In my view, it is undeniable that the taxi plates had significant market value and that this value was known to the City.

ii. Temporal indeterminacy – the City is only liable for the losses arising from its negligence during a prescribed two-year period.

iii. Claimant indeterminacy – the plaintiff classes are known to the City, which has itemized each and every one of its taxi plate owners' and brokers' contact information.

[180] Lastly, even if I am incorrect in finding that indeterminate liability is not a residual policy consideration to negate imposing a duty of care, it is not a policy veto. Unlike *Eisenberg* and *Vlanich*, I have concluded that taxi plates are assets, and the City knew that these plates were being treated as assets for decades. With this knowledge in hand, the City was fully aware that a secondary market existed with respect to the sale of taxi plates. It allowed this secondary market to thrive and prosper by not amending the regulation, and it knew that changing the regulation to unlimited plate issuances would have led to substantial elimination of the market value of the taxi plates.

[181] Ms. Donnelly testified that City Council has always been aware of the secondary market. Even if the City did not control the secondary market, nor was it involved in trading the assets, I believe that the City was nonetheless a willing participant in the secondary market. In the circumstances of this case, and given the City's conduct, I am of the view it would be unconscionable to negate the City's duty of care.

[182] In summary, I am not persuaded that there are any residual policy reasons that should negate the finding of a duty of care.

Standard of care

[183] Uber's arrival in Ottawa was foreseeable. It was not a hypothetical scenario.

[184] As the taxi industry predicted, Uber invaded the City with its bullying tactics and predator approach to obtain a significant share of the taxi market.

[185] Uber was a bandit taxicab company. It provided transportation services to customers for compensation, and for two years, it refused to comply with the City's regulations.

[186] Uber was an unlicensed broker. I am aware that in 2015, the court concluded that Uber did not operate a taxicab broker business: *Toronto (City) v. Uber Canada Inc.*, 2015 ONSC 3572, 126 O.R. (3d) 401. However, having heard hours of testimony and reviewed hundreds of pages of evidence regarding the function of a taxicab broker, it is abundantly clear to me that Uber, the corporate entity, was carrying out the role of a broker.

[187] Mr. Way described a broker as follows:

> The broker is traditionally known as the dispatch office. So the dispatcher, the broker is the, is the company that is responsible or capable of accepting calls or taxi requests either through the telephone, the web, emails, text messaging, apps. The broker is also the one that's responsible of the management side of a taxi operation, which includes hiring a driver, managing the collective agreements, management the business as a, what, what involves in a taxi business, accounting, marketing, so on and so forth. And we're also responsible of the cashiering services for the taxi drivers.

[188] In my opinion, it is irrelevant that Uber did not apply the traditional manner of dispatching or that it used an online delivery model. The result was the same. Uber was a dispatcher of services.

[189] Uber was permitted to defy the law openly for two years without suffering any consequences whatsoever. On the other hand, because of Uber's blatant disregard of the law, the Plaintiffs suffered.

[190] The evidence establishes that the City knew that its failure to properly enforce the 2012 By-law would likely cause harm to the taxi industry.

Legal principles

[191] The applicable standard of care, whether the subject is a private or public actor, is the reasonableness standard. The standard of care analysis should not be used to immunize governments. Policy considerations are properly weighed at the duty of care stage, not standard of care: *Nelson*, at paras. 91-92.

[192] The burden is on the Plaintiffs to establish both the standard of care and a breach of that standard: *118143 Ontario Inc. (Canamex Promotions) v. Mississauga (City)*, 2016 ONCA 620, 405 D.L.R. (4th) 338, at paras. 37-38.

[193] Expert evidence is not always needed to establish a standard of care where such a standard can be determined using common sense: *Aylmer*, at para. 65.

Application to the facts

[194] There is no doubt that Uber's business model, its technology, and its unique defiance of the regulations brought different enforcement challenges to the City, but Uber was nonetheless a bandit taxicab company, making this scenario fall within the parameters of common sense. I find it appropriate to use common sense to determine whether the City acted reasonably.

[195] In my view, the City was expected to treat Uber as a bandit taxicab company and enforce the 2012 By-law as it had done in the past with other bandit taxicab companies. Failure to do so fell below the standard of care.

[196] The City knew or ought to have known that Uber was going to operate in Ottawa. The City had been forewarned repeatedly by its partner, the taxi industry. The City was unprepared for Uber's arrival. To boot, rather than continuing its partnership with the taxi industry to fight against this stronger illegal bandit taxicab company known as Uber, the City decided to abandon its partner. The City then chose an ineffective enforcement strategy that it knew or should have known would fail.

The City had no plan

[197] The evidence of Ms. Jones and Ms. Hartig clearly establishes that the City was not going to address the Uber problem until it arrived in Ottawa.

[198] Mr. Way was concerned about Uber as early as 2010, and he became much more concerned in 2012.

[199] The City first learned of Uber in 2012 at a conference held by the International Taxi Regulators in Washington, D.C. Ms. Hartig and Ms. Anderson were present at the conference, along with Mr. Way. During this conference, Mr. Way told City representatives that Uber's services were identical to bandit taxicab companies, and it would become a problem for Ottawa. At this point in time, Uber was operating in the City of Toronto.

[200] At the conference in Washington, the City was taking a "head in the sand" approach. During cross-examination, Ms. Hartig said that she did not pay much attention to Uber in 2012 because it was not operating in Canada. She was hoping that it would never come to Canada. But I believe that Ms. Hartig was mistaken because Uber was already operating in Canada since early 2012.

[201] Mr. Way continued to track Uber's illegal activities and, as he had done in the past with other bandit taxicab companies, he would forward the information to the City. On January 10, 2013, he advised Ms. Anderson of Uber's predatory surge pricing tactics, to show the difference between regulated and non-regulated fares.

[202] In 2013, Mr. Way continued to convey information to the City regarding Uber's illegal activities and he testified on this issue as follows:

> The, the information that we were conveying was that they were operating illegally. That they were no different than Quest that was shut down back in 2009 or so or any of the other banded [*sic*] companies that were advertising through the internet or on the web. The point we were trying to make was that we were the regulated industry and that there was no limits on, on individuals having access to broker's licence. And once you have a broker's licence, your job is to attract taxi plates. So there was a way for a banded [*sic*] company to open and, and try to attract plates over to their company versus one of ours. And the fact that they were continuing to operate so flagrantly in the front of, of the industry and the by-law was, was, was clearly an issue for us.

[203] Mr. Way was very concerned about Uber's entry into the Toronto market and the impact that it was having on the taxi industry in that city.

[204] It is uncontroverted that the City had intimate knowledge of Uber's illegal operation in Toronto in 2012, having been in regular contact with the chief of licensing enforcement in Toronto.

The City was not only aware of Uber's tactics and technological challenges, but it knew that the strategy of issuing tickets to Uber drivers was not having the desired deterrent effect.

[205] During cross-examination, Ms. Hartig acknowledged that she expected Uber's arrival in Ottawa to be a "pretty big deal" and to be "very challenging" for by-law enforcement. With this knowledge, one wonders why the City ignored Mr. Way's warnings about Uber or failed to develop a comprehensive plan to fight the most difficult bandit taxicab company of all time.

[206] For the better part of two years, the City was receiving and gathering information on Uber's illegal activities and the challenges being faced by other municipalities and cities in the United States and Canada. Yet, instead of preparing for Uber's inevitable entry into the Ottawa market, the City continued to ignore all the signs of an eventual and difficult entry into the market by Uber, and it failed to devise a proper and specific plan as to how it was going to address the Uber problem when it arrived in Ottawa.

[207] The City knew that bandit taxicab companies had a negative impact upon the taxi industry and that it was potentially unsafe for consumers. And the City knew that Uber was going to be an even bigger challenge than the bandit taxicab companies it had fought over the years. Yet, again, the City did not turn its mind to enforcement against an entity like Uber when its arrival was foreseeable and almost a certainty.

[208] Ms. Jones admitted that she was aware of Uber's existence in Canada since at least 2012, when it began to operate in Toronto. When asked if she was preparing for Uber's arrival in Ottawa, she indicated that it was not "on [her] radar". Shockingly, it was only brought to her attention when Uber arrived in September 2014. Ms. Jones said that the City had a by-law enforcement group that was prepared to act upon illegal activity. If Uber entered the market and was deemed illegal, the City would enforce. Evidently, Ms. Jones was incorrect.

[209] Uber was clearly a threat to the City, and the City was aware of Uber's *modus operandi*. City staff learned of Uber at the conference in Washington and through the regular meetings and discussions with city officials in Toronto.

[210] With the vast amount of knowledge that the City had regarding Uber, its tactics, its technology, and its blatant defiance of the law when entering a new market, I am of the view that it was entirely unreasonable for the City to take a "wait and see" approach. With proper advanced planning, the result may have been very different.

Inadequate steps to enforce

[211] The City boasts that it issued 273 charges against 189 individuals from October 2014 to December 2016, a 27-month period. On the surface, that sounds impressive, but it is not, even if the City faced challenges with Uber's tactics such as geo-fencing. The City's enforcement strategies were limited to charging Uber drivers when it knew or should have known that these strategies were inadequate and ineffective, as described in the text that follows.

[212] First, from January 21, 2015 to March 8, 2015, Mr. Way commissioned Triangle Investigation to investigate Uber, in a similar manner as he had done in the past with bandit taxicab companies. During this six-week period, Triangle Investigation took 67 rides. By contrast, during this same period of time, the City only charged 15 individuals with offences. If the City had continued to collaborate with the taxi industry, the results could have been different.

[213] The City says that its enforcement efforts against Uber cost $3,402,000, based on Ms. McCumber's estimate that a simple investigation of an Uber driver would cost approximately $18,000. This evidence was uncorroborated and is not reliable. The Plaintiffs suggest that the only costing evidence is a throwaway email from the City purporting to claim that $5,432.50 was spent on enforcement. In my view, these are two extremes. Regardless, in the absence of evidence, I am unable to conclude that the City spent a considerable amount of money in its enforcement efforts against Uber or that its efforts were constrained by costs.

[214] Second, Mr. Way and his team attempted to assist the City, as they had done in the past, with the sole purpose of stopping the bandit taxicab company from illegally operating in Ottawa. Surprisingly, the City rejected this help in 2015. Mr. Way wanted to provide the City with a report from Triangle Investigation that could have easily assisted the City in prosecuting the Uber drivers. This refusal clearly illustrated the fundamental change in the nature of the relationship between the taxi industry and the City. Prior to Uber entering the market, the taxi industry and the City

were aligned on enforcement and had a close and collaborative relationship. Because the City had failed to develop an advance plan to deal with the Uber problem, it needed help from its partners. It was completely unreasonable to reject the assistance from Mr. Way and his team. As mentioned previously, I am of the view that the City acted in this manner because of public or political pressure to legalize Uber's operations.

[215] Third, the City enforced its by-law against Uber drivers when it knew, or should have known, that this was an ineffective manner of dealing with an entity of this magnitude. This was not a minor error in judgment. With the City's historical knowledge and practical experience of combatting bandit taxicabs for decades, as well as the failed approach in the City of Toronto, it defies logic that the City would take the exact same steps against Uber that it publicly said in 2006 was only "treating the symptom, not the problem, and that we have to undertake to investigate the operators, the groups or individuals who are running these businesses on a full-time basis". The City identified the root of the problem as illegal dispatchers, yet the City did not act upon this.

[216] Further, the City knew or should have known that Uber was paying the fines, rendering the enforcement against the Uber drivers entirely useless. On March 17, 2015, an Uber driver by the name of Fayaz Al-Wadaan pleaded guilty to driving a taxicab without a license. In court, Mr. Al-Wadaan confirmed that Uber paid the $615 fine. At trial, Ms. Jones stated that she heard rumours that this was occurring. Ms. Hartig heard it anecdotally. In my view, this was much more than rumours. The City knew that Uber was paying fines and, despite this knowledge, the City carried on with the same approach, kept on issuing tickets to Uber drivers, and failed to adapt its approach.

[217] Charging Uber drivers was ineffective, and the City knew that this strategy was not a deterrent. It was completely unreasonable for the City to only follow this course of action. Even if I was to accept that the City needed to first try enforcement efforts targeting Uber drivers, the City should have realized quickly that this was an error and proceeded to more progressive enforcement options. To this day, the City does not believe that its strategy was flawed. I disagree. Given the high stakes at play, and its failure to deter, the City needed to adapt its approach, as opposed to maintaining the status quo.

[218] Fourth, knowing that the City was only treating the symptoms, it unreasonably chose not to pursue Uber's corporate entity. The City took no steps whatsoever to stop Uber itself and the City completely and utterly succumbed to Uber's will. Why? I come back again to public or political pressure to legalize Uber's operations.

[219] In fairness, Uber and its technology may have scared the City, and it was much easier to go after the low-hanging fruit, namely the Uber drivers, despite its ineffectiveness. Ms. Hartig said that these drivers were "right here in our hot little hands, and they're – you know, it's easier to do the undercover work" as opposed to going after the corporate giant Uber. Ms. Hartig described going after Uber in the following manner:

> Yeah, easier than trying to deal with this thing called an app and, you know, God knows where the people are and who's responsible and, you know, how you identify who you're charging, it's much more straight-forward and clearer in terms of the By-law provisions that you would use, that we would use, in terms of specifically targeting the drivers and then also the, the vehicles.

[220] I do not believe that it would have been difficult for the City to find those responsible for Uber. City officials in Toronto and Calgary were able to find them, but more importantly, the City was meeting with Uber's lobbying representatives from day one. In any event, regardless of the reason for not pursuing Uber itself, it was not reasonable for the City to completely abandon this course of action.

[221] The City never sent Uber a cease and desist letter.

[222] The City never laid charges against Uber for dispatching a taxicab, despite the City's views that Uber was providing broker services. The 2012 By-law gave the City the authority to lay a charge against Uber for operating without a license, and with a successful conviction and continuing non-compliance, the City had additional tools in its arsenal to further stop Uber's illegal operations.

[223] The City could have issued an order against Uber under s. 444 of the *Municipal Act*, but it chose not to pursue this avenue.

[224] The City could have pursued an injunction against Uber. The City claims that it was waiting for the outcome of the legal proceedings in Toronto, where an injunction had been sought by the City of Toronto. When it was determined that the City of Toronto was unsuccessful, the City took the position that it would likely be unable to take successful enforcement action against those entities. But that was not reasonable. Despite the similarities between two municipalities, it is not a *fait accompli* that the City's application for an injunction would have had a similar outcome. The City of Calgary was able to obtain an injunction stopping the entirety of Uber's operation because Uber complied with the court order.

[225] It was not reasonable for the City to completely abandon any pursuits of prosecution against Uber, especially when it knew or should have known that other enforcement proceedings, such as laying charges against Uber drivers, were unsuccessful.

[226] It appears that the City was also receiving advice, legal or otherwise, to pursue an injunction against Uber. KPMG's final report, dated December 31, 2015, noted the following: "Although a Court chose not to support an injunction in Toronto, City Officials indicated that Ottawa's current by-laws are different than those in Toronto, and, as such, would likely support an injunction if it was determined that approach is to be taken." The City chose not to call explanatory evidence on this issue, but it is nonetheless evidence that expresses a view of the City that is not contradicted.

[227] The City did not call any witnesses that could attest with any certainty to the City making a conscious decision regarding an injunction.

[228] The City has not provided any reasons for its inaction against Uber.

[229] The City's enforcement measures against Uber were not the same as those against the bandit taxicab companies. The City did not invest in any marketing campaign warning the public of Uber's illegal activities. In 2007, the City undertook a public marketing campaign in relation to unlicensed bandit taxicab companies. At trial, Ms. Jones provided the following reason for doing so:

> The reason what we were looking at determining based on charges they laid and based on the times and places where the activity deemed to be taking place, it really focused on a lot of the young adult population might be down in the market with the virus on a weekend or coming out of the universities. And so a lot of that focus was on those individuals. We worked with the local BIAs, those are the business improvement areas, to provide information and conduct media blitzes on targeting those audiences and trying to explain to them rationale as to and the potential danger of not getting into a licensed cab and getting into an unlicensed cab. We also took the opportunity to promote everything that was going on within the taxi industry and the initiatives that we're taking place to make it safer, make it better, they were accepting credit cards, there were cameras in cabs, and they were able through, through a broker to, they were able to write their numbers on their vehicles, to be able to identify who they were. And that individuals could be putting themselves at risk getting into a car, which they didn't know who the owner was, didn't know what the fare would be, didn't know if that car was safe, and that was the target of the campaign.

[230] The reasons given for this public marketing campaign in 2007 equally applied to the Uber problem, especially the safety issues, yet this was not even a consideration for the City.

[231] Unlike the past enforcement strategies against the brokers of bandit taxicab companies or those responsible, the City had no specific strategy for enforcement against Uber. I am not convinced that the City gave serious consideration to commencing legal proceedings against Uber, the illegal dispatcher. This was a marked departure from its previous conduct.

[232] Although the City has broad discretion in how it chooses to enforce its by-laws, I am not prepared to accord deference to the City's choices because the City acted unreasonably in its enforcement efforts.

[233] The City failed meet the standard of care with respect to the enforcement of the 2012 By-law against Uber. It took a *laissez faire* approach vis-à-vis the corporate entity Uber and focused on a fruitless driver-only approach that was doomed to fail. The City's actions or inactions did not accord with good governance, and the City's conduct was not reasonable in the circumstances.

Cause of the damages

[234] Even if the determination of damages has been postponed to a later stage of these proceedings and that the Plaintiffs must prove their damages, I must nonetheless, within the context of the negligence analysis, determine if the City's conduct caused the Plaintiffs' loss.

[235] The causation analysis involves two inquiries. The first is that a defendant's breach must be the factual cause of the plaintiff's loss, usually assessed by using the "but for" test. The second is that the breach must be the legal cause of the loss, meaning that the harm must not be too remote: *Mustapha*, at para. 11.

Factual causation

[236] The factual causation inquiry is whether, but for the City's failure to enforce the 2012 By-law, Uber's illegal operations would not have continued, and that failure thereby resulted in damages to the Plaintiffs.

[237] The City's arguments can be summarized as follows: defeat was inevitable. Uber's operations in Ottawa could not have been prevented. I disagree.

[238] Defeat is almost assured when one believes that defeat is inevitable. There are examples where Uber was defeated, and these are not just limited to geographic areas where the taxi industry was regulated by the province (i.e., the City of Calgary). I am not persuaded by the City's arguments. The City had options to stop Uber but chose not to exercise them. With proper planning and an effective enforcement strategy, I am of the view that the City could have stopped Uber from invading the Ottawa market as it did in September 2014. It was not a hypothetical scenario in which the City could have prevented Uber from operating between 2014 and 2016.

[239] The City adopted a defeatist and acceptance approach to Uber's entry into the Ottawa market. A multinational giant was invading Ottawa, and because of the City's unpreparedness and its lack of efforts to develop a plan to enforce the 2012 By-law, the City's enforcement efforts against Uber drivers were ineffective.

[240] Once Uber started to operate illegally in Ottawa, plate owners made the City aware that Uber's illegal operations were making it difficult for them to provide for their families. Uber was illegally saturating the Ottawa market with discounted or free rides to gain a significant market share, resulting in negatively impacting a strong and viable taxi industry.

[241] The City takes the position that if the Plaintiffs suffered any damages, which it denies, those damages were inevitable from the moment that Uber decided to expand into Ottawa. I disagree. The City failed to enforce the 2012 By-law. The City's flawed approach of only targeting Uber drivers and deliberately avoiding Uber, the dispatcher, is directly related to the Plaintiffs' loss. Any loss incurred and proven by the Plaintiffs is directly caused by the City's inaction or ineffective action in the enforcement of its taxi by-laws.

Legal causation

[242] I have thoroughly addressed this aspect of the test in the foreseeability section of this decision and will not repeat it here.

[243] Suffice it to say, any reasonable person would foresee that the failure to enforce the taxi regulations against Uber would have a devastating economic impact on the Plaintiffs. This cannot be described as too remote.

[244] I am satisfied that the City caused the Plaintiffs' damages.

COMMON ISSUE #3 - *Did the City's conduct in allegedly negligently enforcing the 2012 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?*

[245] The short answer to common issue #3 is no.

[246] The applicable test for determining a violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") is composed of two main steps. The Plaintiffs have failed to meet the test at either step.

[247] Regarding the alleged breach of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 ("*Code*"), I conclude that there is no breach of the plate owners' human rights under the *Code.*

Position of the Plaintiffs

[248] The Plaintiffs say that this is an adverse effects case. Taxi plate owners are overwhelmingly drawn from racialized and immigrant groups that face systemic discrimination in Canadian society. The Plaintiffs have been treated adversely by the City in its lack of enforcement efforts against Uber and its decision to change the 2012 By-law. The City's regulatory actions have perpetuated a disadvantage based on race and ethnic origin, thereby violating s. 15(1) of the *Charter* and ss. 1 and 3 of the *Code*.

[249] The Plaintiffs rely upon data from the survey conducted by Leger and Dr. Ornstein's conclusions, which include the following: (1) the class members are overwhelmingly drawn from racialized groups; (2) 90 percent of class members are racialized, in comparison to approximately 25 percent of the Ontario general population; (3) the main four racialized groups were Arab, South Asian, West Asian, and Black, and this level of racialization is disproportionate to the general population; (4) the four racialized groups are economically disadvantaged, and the Plaintiffs refer to this as racialized income inequality; (5) race and immigration overlap and reinforce a disadvantage for the class; and (6) the taxi industry is an ethnic economy, and its ethnic composition is not by happenstance – often, there is a multi-generational component present.

[250] The Plaintiffs say that the evidence provided by Messrs. Mezher, Mail, Dadi, and El-Feghaly illustrate that plate owners are not just immigrants and racialized, but also have experienced struggles that have shaped their journeys to Canada and their entries into the taxi industry. This evidence provides insight into their real stories, and it demonstrates the Plaintiffs' disadvantages and outcomes of the City's conduct on this disadvantage.

[251] The Plaintiffs' assessment of the step one analysis, outlined below, is summarized as follows: (1) the City's regulatory action has had adverse effects on plate owners; (2) plate owners are disproportionately, overwhelmingly, racialized; (3) there is a link between race, immigration, and participation in the taxi industry; and (4) therefore, there is a disproportionate impact on a group that can be identified by factors relating to protected grounds, namely race and ethnic origin.

[252] For step two of the test, the Plaintiffs submit that they have successfully demonstrated that the adverse impact noted above worsens or perpetuates the Plaintiffs' disadvantage. The taxi industry has always existed on the racialized margin of society and its participants have always been in a uniquely vulnerable position. The Plaintiffs argue that their reasons for entering the taxi industry and investing in it are tied to their disadvantage.

[253] The Plaintiffs take the position that because the City has not pleaded s. 1, an automatic finding that the s. 15 breach is not justified should follow. Alternatively, the Plaintiffs argue that the City has not met its burden of demonstrating a justification under s. 1 of the *Charter*. They say that the failure to enforce the 2012 By-law is not justified because it is not prescribed by law and there is no pressing and substantial objective. Regarding the enactment of the 2016 By-law, it is not justified because it is neither rationally connected, minimally impairing, nor proportional.

[254] In terms of a *Code* violation, the Plaintiffs submit that it flows logically from the finding of a breach of s. 15 of the *Charter*. The analyses of the *Code* and s. 15 of the *Charter* have long been intertwined, and as such, the Plaintiffs rely on their s. 15 submissions for the purposes of the *Code* violation.

Position of the City

[255] The City submits that the Plaintiffs' framing of their *Charter* claim departs from the jurisprudence on s. 15(1) of the *Charter*.

[256] The question that must be asked is whether the City's regulatory actions create a distinction, an unequalness, based on the enumerated or analogous grounds. Inherent in the word distinction is the idea that the claimants are treated differently than others.

[257] A comparison is therefore engaged in that the claimants assert that they are denied a benefit that others are granted, or carry a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1) of the *Charter*.

[258] The City argues that using the Plaintiffs' formulation, the only thing that they have demonstrated is that the City's regulatory actions have had an impact on a protected group, nothing

more. Simply proving that the City's regulatory actions have had an adverse effect on a disadvantaged group is insufficient. If the City's regulatory actions have had an adverse effect on the plate holders, then one must ask in comparison to whom? The Plaintiffs need to advance evidence that proves, on a balance of probabilities, that the City's regulatory actions have treated them differently.

[259] The proper formulation of the s. 15(1) test provides that the effects of the City's regulatory action must be assessed by comparing the condition of the claimants (taxi plate licence holders) with the condition of others within the social and political setting in which the question arises. The correct comparison is that of the taxi industry and not the general population. The Plaintiffs have not advanced this evidence.

[260] The City submits that while the Plaintiffs' evidence shows that the plate holder class is disproportionately racialized, it does not mean that they experienced the City's regulatory actions differently from other groups. Put simply, the Plaintiffs' evidence only shows that there are more racialized people in the plate holder class than the general population.

[261] The City takes the position that the Plaintiffs have not satisfied the first step of the test. They have ignored the comparison requirement and they have failed to adduce any evidence about the differential impact of the City's regulatory actions.

[262] For step two, if a distinction has been established, which is denied, the City says that the Plaintiffs have also failed this test. The City submits that it is entitled to differentiate between groups in legislation or regulation. The differentiation will only amount to discrimination if it is arbitrary and based on irrelevant personal characteristics. The City argues that the full regulatory context establishes that the City's regulatory actions were not arbitrary. The regulatory framework was designed to benefit a number of groups, and it was designed to achieve public policy goals of ensuring public safety, accessibility, and consumer protection.

[263] The City disputes the Plaintiffs' criticism that it has not expressly pled s. 1 because it is not a defence, it is an inherent limit on all *Charter* rights. The City submits that there is ample evidence to satisfy its burden under s. 1. The City's regulatory purpose of public safety, accessibility, and consumer protection is pressing and substantial. The City arrived at a regulatory solution that is

rationally connected to its goals, and that is careful to have a minimal effect on any equality rights that may be engaged.

[264] On the issue of the alleged *Code* violation, the City relies upon the decision of *Addai v. Toronto (City)*, 2012 HRTO 2252. Similar to the *Charter* argument, the City says that the plate holders' decisions to acquire a taxi plate license are not so inextricably bound up with their race, colour, ethnic origin, or place of origin that any disadvantage that they may have experienced as a result of the City's regulatory actions could be considered synonymous with disadvantage on the basis of those personal characteristics.

Legal principles

[265] Section 15(1) of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[266] Sections 1 and 3 of the *Code* provide the following:

> **Services**
> **1** Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.
>
> […]
>
> **Contracts**
> **3** Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[267] Section 15 protects substantive equality and does so through the application of a two-step test: *R. v. Sharma*, 2022 SCC 39, 486 D.L.R. (4th) 579, at paras. 37-38.

[268] The Supreme Court of Canada has consistently re-affirmed that the applicable test for s. 15(1) of the *Charter* is comprised of two steps: the claimant must show that the impugned law or state action (1) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Fraser v. Canada*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 27; *Sharma*, at para. 28.

[269] Adverse impact discrimination can occur when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground: *Sharma,* at para. 29.

[270] Evidence of discrimination must be tangibly related to the impugned decision or conduct. "It cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground under the *Charter*": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 88.

[271] At the first step of the s. 15(1) analysis, the question is whether the law or state action creates or contributes to a disproportionate impact on the claimant group based on a protected ground in comparison to other groups. Under this step, the relevant evidentiary considerations are as follows: (a) no specific form of evidence is required; (b) the claimant only needs to demonstrate that the law was a cause of the disproportionate impact; (c) the causal connection may be satisfied by reasonable inference, but where evidence is required, expert testimony may be sufficient; (d) courts should carefully scrutinize scientific evidence; and (e) if the scientific evidence is novel, then the courts should only admit it if it has a reliable foundation: *Sharma,* at paras. 49-50.

[272] Showing that a law impacts a protected group is insufficient, it must be a disproportionate impact. In other words, there must be a gap between a protected group as compared to non-group members. Although a claimant need not adduce any specific evidence, he or she must demonstrate that the impugned provisions created or contributed to a disproportionate impact: *Sharma*, at paras. 40, 76.

[273] Equality is a comparative concept and the role of comparison in the first step is one of distinction. The claimant must be treated differently than others: *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at paras. 41, 62.

[274] The purpose of the second step is to assess the impact of the harm caused to the affected group, namely whether the distinction imposes a burden or denies a benefit in a discriminatory manner. The second step will be met if the challenged law or state action creates a distinction that reinforces, perpetuates, or exacerbates disadvantage. In terms of the evidentiary burden, there are three considerations: (a) the claimant need not prove that the legislature intended to discriminate; (b) judicial notice can play a role; and (c) courts may infer that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence: *Fraser*, at para. 76; *Sharma*, at paras. 51, 55.

[275] Factors to consider, but which are not required, in determining if the burden has been met in the second step include arbitrariness, prejudice, and stereotyping: *Sharma*, at para. 53.

[276] The court should also consider the broader legislative context, including the objects of the scheme, relevant policy goals, and whether the lines are drawn mindful as to those factors: *Sharma*, at para. 59; *Withler*, at para. 67.

[277] If the claimants establish a breach of s. 15(1) of the *Charter*, the burden shifts to the state to demonstrate that a breach is demonstrably justified under s. 1 of the *Charter*. The state must demonstrate that (a) the objective of the impugned provisions is pressing and substantial; and (b) there is proportionality between the state's objective and its chosen means. Proportionality has three components: (i) rational connection between the impugned provisions and the objective; (ii) the impugned provisions are minimally impairing; and (iii) there is proportionality between the effects of the impugned provisions and the objective: *R. v. Brown*, 2022 SCC 18, 472 D.L.R. (4th) 459, at para. 110, citing *R. v. Oakes*, [1986] 1 S.C.R. 103.

[278] Turning to the *Code*, its purpose is meant to provide protection against the result or the effect of discriminatory conduct: *Fraser*, at para. 38, citing *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

[279] The test for establishing discrimination under the *Code* is similar to the *Charter* test. To establish a *prima facie* case, the claimants must prove three elements: (a) they are members of a protected group; (b) they were subject to adverse treatment; and (c) their gender, race, colour, or ancestry was a factor in the alleged adverse treatment: *Peel Law Association v. Pieters*, 2013 ONCA 396, 363 D.L.R. (4th) 598, at para. 56, citing *Shaw v. Phipps*, 2012 ONCA 155, 347 D.L.R. (4th) 616.

Discussion

Section 15 of the *Charter*

[280] If the Plaintiffs are unable to meet either stage of the two-step test of s. 15(1) of the *Charter*, then there is no infringement, or in other words, there are substantively no unequal outcomes.

Step one

[281] At step one, the Plaintiffs must prove that the City's regulatory actions have created a distinction based on an enumerated or analogous ground, on its face or in its impact. It is undisputed that in the case at bar, we are dealing with its impact.

[282] The focus at this step must be on the "disproportionate impact", not the historic or systemic disadvantage. We must consider the difference between "impact" and "disproportionate impact". It is insufficient to only show that a law impacts a protected group. Invariably, to demonstrate the disproportionate impact, there is a requirement to make a comparison to others within the social and political setting in which the question arises: *Sharma*, at paras. 40-41, 71.

[283] The role of comparison is to establish a distinction: *Withler*, at para. 62.

[284] The inquiry requires a comparison of the actual impact of the law on members of the claimant class to the actual impact of the law on others in the social and political setting in which the question arises. The analysis must be grounded in comparing the effects of the City's regulatory actions in practice, and how it affects different groups.

[285] The social and political setting means the taxi industry in the City of Ottawa, and not the general population, as submitted by the Plaintiffs.

[286] If a differential impact is found, then it must be determined if the difference is based on an enumerated or analogous ground. Evidence of broad and statistical trends of historic disadvantage is not sufficient for this case.

The Plaintiffs' evidence

[287] The evidentiary considerations relevant to the s. 15(1) analysis include two types of evidence. The first relates to the "full context of the claimant group's situation". The second is about the "outcomes that the impugned law or policy ... has produced in practice." Claims of adverse effect discrimination, such as the case at bar, should be supported by both: *Sharma*, at para. 49.

[288] The Plaintiffs' expert, Dr. Ornstein, was called to provide the full context of the claimant group's situation. He analyzed the ethnic make-up of plate owners based on two sources: his own analysis of the names of plate owners, and the survey of plate owners by Leger. He concluded that plate ownership is racialized as follows: "53 percent of plate owners are Arab, 25 percent are South Asian, 10 percent are White, 6 percent are Black, and 5 percent are West Asian." In comparing the respective population in the Ottawa-Gatineau Census Metropolitan Area and Ontario, Dr. Ornstein found that the proportion of racialized plate owners are all significantly higher than their respective general population.

[289] Dr. Ornstein opined that the racialized makeup of the plate owners reflects a phenomenon called "ethnic niches". He explained that an industry such as the taxi industry, "is particularly attractive to certain ethnic groups, certain racialized groups, the certain [*sic*] depends on their presence in the economy and it, I think also depends on kind of qualitative differences among groups." The plate owner ethnic niches are a result of an oversupply of racialized individuals in the taxi industry and, on the demand side of things, the taxi industry is welcoming and appealing to racialized groups. Dr. Ornstein concluded that the majority of plate owners are minorities who immigrated to Canada.

[290] Messrs. Mezher, Mail, Dadi, and El-Feghaly provided evidence regarding their actual circumstances. They each had different, yet somewhat similar journeys that led them to the taxi industry. Some encountered more difficult and heroic struggles than others before arriving in Canada. Once they arrived, they all worked hard to make a life, and to eventually invest in plate ownership. They also gave evidence regarding what transpired after the City's regulatory actions, such as drivers needing to work longer hours for fewer fares; night drivers were not able to make money; night drivers stopped working, reducing or eliminating a revenue stream; plate rentals were now free; and the value of plates were significantly reduced.

[291] The Plaintiffs say that Dr. Ornstein's theoretical observations about ethnic niches were also illustrated through the evidence of Messrs. Mezher, Mail, Dadi, and El-Feghaly, the particulars of which are set out in detail in the Plaintiffs' written submissions. The Plaintiffs posit that the ethnic niches theory, coupled with the testimonies of these plate owners regarding their experiences and struggles, explains why people from particular disadvantaged groups enter the taxi industry.

[292] Dr. Ornstein also opined that, broadly speaking, the four racialized groups prominent in the taxi industry, as referred to earlier, are economically disadvantaged. They all had a lower adjusted mean economic family income and had lower mean values of total individual income for people between 20 and 64 years of age when compared to White Ontarians. Dr. Ornstein also reached the following conclusions: "(a) the percentage of Arabs living in poverty in Ontario is about 3.5 times higher than the percentage of White Ontarians; (b) South Asians were only slightly better off than White Ontarians, but still had three times the percentage of poverty compared to White Ontarians; (c) the percentage of Black Ontarians living in poverty was at least double that of White Ontarians; and (d) South Asians experienced about 80 percent more poverty than White Ontarians."

[293] The Plaintiffs submit that Dr. Ornstein's expert evidence shows that most plate owners belong to disadvantaged groups whose disadvantage is not recent, but persistent, and has persisted for decades. And this disadvantage drove these individuals into the taxi industry, an industry that is dominated by immigrants, racialized individuals, and minorities.

Impact vs. disproportionate impact

[294] Recall that in *Sharma*, at para. 40, the Supreme Court of Canada set out the difference between impact and disproportionate impact:

> We start with the difference between impact and disproportionate impact. All laws are expected to impact individuals; merely showing that a law impacts a protected group is therefore insufficient. At step one of the s. 15(1) test, claimants must demonstrate a disproportionate impact on a protected group, as compared to non-group members. Said differently, leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1).

[295] In the Plaintiffs' closing written submissions, they define the disproportionate impact of the City's conduct on the plate owners as follows:

> Within this factual and historical context, what was the impact of the City's conduct in failing to enforce the 2012 By-law and enacting the 2016 By-law? The short answer is that the City's conduct had a disproportionate impact based on race and ethnic origin: for plate owners, who are disproportionately racialized, it has made their situations worse than before. This is true for plate owners on their own and in comparison to the broader population: because of the City's conduct, plate owners are worse off than they were before and worse off when compared to the non-racialized, non-minority, and non-immigrant broader population.
>
> The disproportionate impact is abundantly clear in the demolishment of plate values.

[296] The City's regulatory actions have had an adverse impact on the claimant group. As I determined in the common issue #1 section, the City was aware that not enforcing the by-law against illegal activity would adversely and financially impact the taxi industry.

[297] Messrs. Mezher, Mail, Dadi, and El-Feghaly testified about their diminished livelihoods, diminished plate value, diminished retirement, and diminished quality of life. Examples of these changes after Uber's arrival in the Ottawa market and the City's regulatory actions include, without limitation, the following:

i. Mr. Mezher works 13-14 hours to break even because the call volume dropped significantly.

ii. Mr. Mail bought his plate for a significant price in the six figures but years later, after the City passed the 2016 By-law, he sold his plate for $12,000. Plate values diminished after the City abolished the plate system that it had maintained for decades.

iii. Many accessible plate owners returned their plates to the City. Many others were renting or leasing plates and returned them to the owners. Before 2014, leases were being bought for amounts in excess of $100,000.

iv. Before Uber's arrival, Mr. El-Feghaly was able to balance his work and spend quality time with his family. Like Mr. Mezher, some days he would have to work 14 hours but it was necessary to ensure financial security and the wellbeing of his family.

v. Mr. Dadi is no longer planning to retire. He continues to work 12 hours per day, 6 days a week. The added stress has caused him some medical issues.

[298] I accept that the Plaintiffs' evidence demonstrates that the City's regulatory actions have had an adverse impact on the claimant group.

[299] But in my view, it is incorrect to say that anything that has an adverse impact on the class will have a disproportionately negative impact. This is contrary to the guidance provided in *Sharma* and is therefore insufficient. The s. 15(1) analysis is not limited to showing that there is merely an adverse impact; there must be a disproportionate impact.

[300] Disproportionate is used to mean unequal. To determine if it is disproportionate, the Plaintiffs must show that the City's regulatory actions treat the claimant group differently than other groups that are within the same social and political context.

Comparison

[301] Comparison is not just a tool, it is crucial component in the discrimination analysis. Identifying inequality is an inherently comparative exercise.

[302] The Plaintiffs believe that comparing the plate owner group to the general population (non-minorities and non-racialized groups in the broader population) is appropriate. In their written submissions, they write the following:

> Given that the differences between these groups have driven entry into the taxi industry, it is only appropriate to compare the plate owners – and the disadvantaged groups from which they are drawn – to the population at large and to the non-racialized and non-immigrant population. Any other comparison would be detached from the historical, social, and economic reality that has shaped the taxi industry for decades.

This position ignores the social and political setting in which the claim arises.

[303] The Plaintiffs also say that the mirror comparator approach has been rejected by the Supreme Court of Canada in *Withler*. The Plaintiffs submit that the court should not use comparators to mask discrimination, but rather use it to identify discrimination.

[304] While the Supreme Court of Canada did say in *Sharma* that it did not require a "mirror comparator group", it nonetheless required that the claimant lead evidence on how the impugned provisions created or contributed to a disproportionate impact. At para. 76, the majority explained what was required:

> In short, the Court of Appeal erred by removing Ms. Sharma's evidentiary burden at step one. This is inconsistent with the sentencing judge's finding that Ms. Sharma failed to establish a distinction on the basis of a protected ground (para. 257). The Court of Appeal improperly substituted its own view of the matter. In this case, while Ms. Sharma was not required to adduce a specific type of evidence, she had to demonstrate that the impugned provisions created or contributed to a disproportionate impact. Ms. Sharma, for example, could have presented expert evidence or statistical data showing Indigenous imprisonment disproportionately increased for the specific offences targeted by the impugned provisions, relative

> to non-Indigenous offenders, after the *SSCA* came into force. Such evidence might establish that the removal of conditional sentences created or contributed to a disproportionate impact on Indigenous offenders.

[305] I agree with the City's position that the *Withler* decision does not completely abandon the concept of mirror comparator groups, and it certainly does not preclude the use of comparator groups. As noted in the quote above, the *Sharma* decision is an example of that, and it reaffirms that comparison matters, and that the evidentiary burden must be fulfilled. In my view, the Plaintiffs' use of the general population as a comparator group is not helpful to the s. 15(1) analysis. If the impugned law does not affect the general population, then comparing it to the claimant class says nothing about the impact of the impugned law.

[306] One cannot ignore the "social and political setting in which the question arises", and I believe that the s. 15(1) inquiry must include all market participants. In my opinion, the comparison must be between groups that are in the same social and political circumstances.

[307] Returning to the question that must be answered, namely whether the City's regulatory actions have had a disproportionate impact, I am of the view that any comparison must be among groups that have felt the impact.

[308] In choosing the general population for comparative purposes, the Plaintiffs have not identified a group that was affected by the City's regulatory actions that could be compared to the claimant group. I do not find that the general population is a proper comparison to assess whether the City's regulatory actions had a disproportionate impact on the claimant group.

[309] The City proposes that an obvious comparison is between racialized and immigrant plate holders on the one hand, and plate holders who are not immigrants or racialized on the other. This targeted comparison is appropriate in the circumstances. According to Dr. Ornstein, the claimant group is defined as immigrants and those identifying as "Arabs, Blacks, West Asians, and South Asians" visible minority group. The comparator group would encompass all European ethnic groups (English, French, and Eastern European), which Dr. Ornstein classified as "Whites". Both these groups form part of the taxi industry in the City of Ottawa, and both were affected by the

City's regulatory actions. The City's expert, Dr. Galabuzi, spoke to this issue at trial and I ruled that his testimony was within the scope of his report:

> So in, in a different context, if Dr. Ornstein is writing a sociological paper that simply allows us to understand whether there's a difference in experience in terms of economic wellbeing especially in the labour market, I think he could use the comparison that he was using. But in this context, as I understand it, there's a claim that a particular population was disadvantaged by an action that was undertaken by the City of Ottawa. And in that context, I think you would want to make a comparison between the population that is allegedly disadvantaged and the population that was not disadvantaged. So you would have – you would want to compare people maybe in the industry who are racialized, and those who are not racialized so that you can establish the, the impact of the change in regulation. It's not that useful to compare people who you are alleging were disadvantaged by the impact of the, the regulatory change to the broader population which was not in any way, shape or form likely to be impacted adversely or otherwise because they're not in the, in the industry.

[310] The City also proposes another comparator group, one that would offer a broader comparison, namely the taxi drivers and the private transportation company ("PTC") drivers. These groups are invariably affected by the City's regulatory actions and would form another appropriate comparison.

[311] The Plaintiffs are critical of Dr. Galabuzi's qualifications or his testimony regarding these alternative comparator groups. To the contrary, I find that his evidence is quite helpful on the proposed comparator groups because it allows me to properly assess the impact of the City's regulatory actions on participants who are actually part of the taxi industry.

[312] In this case, the general population is unaffected by the City's regulatory actions. Notwithstanding that the broad objectives of the regulations are public safety, accessibility, and consumer protection, I do not believe that the City's measures in regulating the taxi industry affect the general population. And this is especially so when the Plaintiffs' claim of disadvantage is based on the loss of value of the taxi plates, something that does not affect the general population. But it

does affect the other members of the class, namely the non-racialized plate holders or corporations, which supports using that group as a comparator.

Do the City's regulatory actions create a distinction on the basis of enumerated or analogous grounds?

[313] The Plaintiffs' evidence establishes that the plate holder class is disproportionately racialized. Dr. Ornstein also agreed, despite not having conducted a statistical analysis, that some of the taxi drivers and PTC drivers likely come from the same racialized groups as the plate holders. That is a reasonable assumption. There is evidence that several taxi drivers are now driving for Uber.

[314] The evidence also demonstrates that there are more racialized people in the plate holder class than the general population. But the evidence does not actually show how the City's regulatory actions affect the plate holder class differently than anyone else.

[315] The plate holder class is also made up of a variety of demographic groups, each of which is equally affected by the City's regulatory actions. The plate holder class is not homogenous, and a substantial portion of the taxi industry is controlled by non-racialized class members.

[316] As of March 2016, there were a total of 755 different plate holders in Ottawa, holding a total of 1,188 plates. The 8 largest plate holders, representing just over 1 percent of the ownership population, collectively held approximately 25 percent of all plates. Much of this ownership is associated with the ownership of taxi brokerages:

i. As of 2022, the Szirtes family, who own the plaintiff broker Westway, collectively held 70 plates, representing approximately 5.9 percent of the total plates in circulation.

ii. Coventry Connections, which owns the plaintiff broker Blue Line, held 63 plates in 2022, representing approximately 5.3 percent of the total plates in circulation.

iii. Mr. Way held 99 plates in 2022, representing approximately 8.3 percent of the total plates in circulation.

[317] In my view, the Plaintiffs' evidence fails to show that the plate owner class has experienced the City's regulatory actions differently from other groups. The Plaintiffs' evidence focuses mainly on persistent and historic systemic disadvantages and offers broad statistical data that speaks to the larger demographic groups to which some of the Plaintiffs belong. I find that the Plaintiffs' evidence fails to consider the true full context of the claimant group's situation and the actual impact of the City's regulatory actions in comparison to others within the social and political setting in which the question arises.

[318] Finding the proper comparison groups requires an examination of the subject matter. Here, the subject matter is the City's regulatory actions in the taxi industry. It does not affect doctors, childhood educators, information system professionals, or any other groups in the general population that are not driving a taxi or an Uber. Broadly comparing the racialized plate holders to the general population does not achieve the goal of assessing whether the City's regulatory actions have had a disproportionate impact on the racialized plate holders.

[319] As mentioned earlier, I believe that the proper comparator groups are either the non-racialized plate holders or the industry as a whole. Those two groups would be subject to the City's regulatory actions and could be impacted by same. The evidentiary record before me does not reveal that there are any differences between the racialized plate holders and the non-racialized plate holders or other taxi drivers and PTC drivers in the industry.

[320] It was open to the Plaintiffs to adduce statistical evidence or otherwise to show that there was some difference in the racial makeup between the various participants in the taxi industry that would have resulted in the differential treatment for racialized people in the plate holder class. It was also open to the Plaintiffs to adduce statistical evidence about the demographic composition of the various groups within the taxi industry. The Plaintiffs did not adduce evidence on either of these points. Without this evidence, the Plaintiffs have failed to offer the meaningful comparison that was required to determine whether the City's regulatory actions created a distinction between racial groups.

[321] According to the Plaintiffs, the disproportionate impact on the plate holders is the demolishment of plate values. But as noted above, there are non-racialized plate holders. That

would mean that the non-racialized plate holders would also have experienced the same demolishment of plate values because of the City's regulatory actions. The impact is the same for both of these groups, regardless of race or ethnic origin.

[322] The City does not dispute that certain groups face systemic disadvantage or that several class members identify with a number of visible minority groups. But simple membership in a particular visible minority group is not sufficient to establish discrimination as a result of the City's regulatory action.

[323] Dr. Ornstein's statistical evidence does not speak to the effect of the City's regulatory action on the claimant group. Rather, it focuses on the economic circumstances of broad demographic groups as described by the statistical data gathered through the national census. Dr. Ornstein's evidence is generalized to the statistics derived from the census and none of his evidence relates precisely to the City's regulatory action or speak to the particular circumstances of the claimant group.

[324] Dr. Ornstein's conclusions regarding the economic disadvantage of the four racialized groups stem from the economic wellbeing of demographic groups within the general population, and not the economic wellbeing of the plate holder class members or any other segment of the taxi industry. During cross-examination, Dr. Ornstein confirmed that the census only measures income levels and not wealth.

[325] In specific reference to the plate holder class members, the evidence of Messrs. Mezher, Mail, Dadi, and El-Feghaly demonstrate that they are not experiencing an economic disadvantage, as defined by Dr. Ornstein. Examples of these individuals being at a relative economic advantage include the following: (a) in 2013, Mr. Mail's net household income placed him in the upper end of the "middle class" as described by Dr. Ornstein; (b) in addition to driving a taxi and holding a taxi plate, Mr. El-Feghaly owns a construction company; (c) each of them lives in a single-family suburban home, two of whom have paid off their mortgage, and a third confirmed that it was nearly paid off; (d) Mr. El-Feghaly's adult children live at home and each of them is employed in a professional capacity, which is important because the measure of economic wellbeing includes income earned by the parents and adult children; and (e) both Messrs. Mezher and El-Feghaly

testified that they supported their children's education by covering the cost of their university education. Dr. Ornstein's broad census data conflicts with the specific evidence of the plate holders.

[326] The taxi industry is an attractive option for new immigrants because of the low barrier to entry. The Plaintiffs' evidence does not, however, establish a connection between the decision to purchase a taxi plate license and personal characteristics such as ethnicity or immigration status. I do not find that the class members' status as plate holders is intrinsically tied to their status as racialized people and immigrants. Messrs. Mezher, Mail, Dadi, and El-Feghaly all testified that they were motivated to acquire a plate for investment purposes as well as to generate income. When Mr. Mail arrived in Canada, he first invested in a gas station, and it was not until ten years later that he decided to purchase a taxi plate licence because it was an attractive business opportunity. While I find the stories of Messrs. Mezher, Mail, Dadi, and El-Feghaly impressive, their individual immigrant experiences and journeys do not allow me to conclude that these inevitably led them to the acquisition of a taxi licence plate. There is evidence that shows that immigrants and racialized people work at a wide variety of occupations in the City of Ottawa.

[327] The Supreme Court of Canada has reiterated in *Sharma* that causation is a central issue. To prove discrimination, the Plaintiffs must show a link or nexus between the impugned law and the discriminatory impact.

[328] Although the Plaintiffs do not need to prove the nature of the causation of their discrimination, or adduce a specific form of evidence, the Plaintiffs must nonetheless demonstrate that the City's regulatory actions were a cause that created or contributed to the disproportionate impact. The causal connection may be satisfied by a reasonable inference. Here, I do not find that causation is obvious. The Plaintiffs need to advance evidence that proves, on a balance of probabilities, that the City's regulatory actions treated them differently.

[329] Dr. Ornstein testified that the purpose of his evidence was not to address the disproportionate effects caused by the City's regulatory actions or comment on whether any action by the City caused or contributed to the disadvantage experienced by various visible minority groups in Canadian society.

[330] Dr. Ornstein was unaware of the legal nature of the Plaintiffs' claims. He had not read the 2016 By-law, nor did he have a general idea of what it was about.

[331] Evidence of discrimination against the plate holders by the City must be related to its regulatory actions.

[332] Dr. Ornstein's evidence does not give me any information about the connection between the plate holders and the effects of the City's regulatory actions on the plate holders. His evidence shows that, in general, there is an income gap between certain racialized groups and non-racialized groups in the City of Ottawa. But his evidence does not tell me whether the City's regulatory actions have widened or narrowed the gap, or whether the City's regulatory actions changed the existing social condition. And as the Supreme Court of Canada observed in *Sharma*, at para. 40, "leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1)."

[333] In sum, I am not satisfied that there is a clear and consistent disparity in how the City's regulatory actions have affected the claimant group. The Plaintiffs' evidence does not establish that the City's regulatory actions have created a distinction based on an enumerated or analogous ground. Given my conclusion that the City's regulatory actions do not violate s. 15(1) of the *Charter*, it would be unnecessary to proceed to the next step. However, if I am incorrect in step one, I find that the Plaintiffs have also failed to satisfy step two.

Step two

[334] To satisfy this step, the Plaintiffs must demonstrate that the City's regulatory actions impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the plate holders' disadvantage.

[335] It is undisputed that not every distinction is discriminatory, only the distinctions that perpetuate a disadvantage.

[336] Arbitrariness, prejudice, and stereotyping are factors that the court may consider, but are not required, in determining if the Plaintiffs have met their burden at this step. Also, the court should consider the broader legislative context to determine if a distinction is discriminatory.

Historical disadvantage

[337] The Supreme Court of Canada guides us that at this step, the court must examine the historical or systematic disadvantage of the claimant group and the impact of the harm caused. A contextual approach must be taken, and it must be grounded in the actual situation of the group: *Sharma*, at para. 52, citing *Withler*, at para. 37.

[338] Dr. Ornstein explained how racialization has a temporal aspect that needs to be taken into consideration. He testified as follows:

> I mean, you can do this at a simply, at a simple descriptive level, which is that if you think Canada in the early 20th century, the, the groups we call racialized were barely visible. The prominent groups were German and English and Irish and Scottish, there were a few Jews. They were all, what we now call white. We don't actually worry about them very much, about those distinctions. So how did this, how did this disappear? It disappears as society changes and as the composition changes. So, so the ideas of racialization we have now, I think are, have their origins in the 1960s and '70s and '80s, but they're really a creature, I would say, of the 1980s and '90s, and they will change over time as well.

[339] In other words, groups that were considered racialized at one point in time may no longer be considered racialized now. The definition will change as the society changes. Take, for example Irish immigrants. While this group may once have experienced a historical disadvantage, it does not experience it today. If there were laws that affected the people of Irish descent, it cannot be said that those laws perpetuated a historical advantage.

[340] Applying this concept of time to the case at bar, the Plaintiffs say the following:

> When this aspect of time is applied to the evidence that was tendered at trial, it is obvious that the taxi industry has always existed on the racialized margins of society. For this reason, its participants have always been in a uniquely vulnerable position as racialized individuals in a racialized societal hierarchy. In harming these

> individuals, the City's conduct has perpetuated their racial disadvantage.

[341] The Plaintiffs have only established that the plate holders are mostly drawn from racialized and immigrant groups, not the entire taxi industry. The evidence confirms that there are non-racialized groups within the taxi industry, who collectively hold approximately 25 percent of all plates. Mr. Way falls within this non-racialized group and his heritage is French Canadian. Dr. Ornstein opined that French Canadians' historical economic disadvantages included lower incomes and lower levels of education, with very few French Canadians in managerial positions. But today, in the face of the evidence, it cannot be said that Mr. Way, a plate holder, is in any which way disadvantaged. That is the actual situation of Mr. Way's group and there is no historical disadvantage to perpetuate.

[342] The Plaintiffs' sociological data does not speak to the claimants' situation. For example, Dr. Ornstein presents average income levels, but he has not advanced any data on where plate holders find themselves on these levels. That said, the cross-examination of Messrs. Mezher, Mail, Dadi, and El-Feghaly, strongly suggests that these individuals may be above the average in terms of income and wealth. The Leger survey conducted by the Plaintiffs did not include any information about the incomes of survey respondents, either before or after the City's regulatory action, when it easily could have.

[343] The Plaintiffs' approach is not contextual or grounded in the actual situation of the claimants' group.

Regulatory context

[344] As noted earlier in my decision, the City enacted the 2012 By-law, and its predecessors, with the intended purpose of establishing general standards for taxicab services for the benefit of the public, all to serve the goals of consumer protection, accessibility, and public safety. In drafting the 2016 By-law, I am of the view that the City respected that purpose.

[345] For the enactment of the 2016 By-law, the regulatory context includes many stakeholders, ranging from the plate holders, the taxi drivers, and the PTC drivers, to members of the general

public. All these stakeholders are affected by the City's regulatory actions, in ways that differ from one another.

[346] I agree with the City's position that it is necessary to look at the full regulatory context because the City sought to balance multiple and competing interests. Other than adducing evidence regarding the plate holders, the Plaintiffs have not provided me with any evidence regarding other aspects of the taxi industry that would allow me to consider the full regulatory context.

[347] The 2012 By-law and the 2016 By-law were designed to benefit several groups and balance multiple interests. This becomes clear when one looks at the City's evidence regarding the extensive work KPMG undertook in its review of the taxi and limousine regulation. In the consultation phase, KPMG held seven workshops open to the public. Those that participated included members of the taxi industry (plate holders, current and former drivers), Uber drivers, members of the public (customers), and members of the accessibility community. KPMG also consulted with other key stakeholders, including Unifor, Coventry Connections, Westway, and Uber, and dedicated an email address and telephone line from which it gathered over 6,000 comments from the general public.

[348] Throughout the KPMG process, all stakeholders were given the opportunity to comment on the proposed changes to the regulation, thereby giving the City the necessary tools to determine how the proposed regulation would affect those stakeholders. The City took into account these comments and implemented some of the measures that the taxi industry requested. In drafting the 2016 By-law, the City was required to consider all competing interests, as noted earlier, all while ensuring that the goal of the legislation remained, namely public safety, accessibility, and consumer protection.

[349] The City's choice to enact the 2016 By-law was to respond to the realities of the taxi industry that existed at that time. The City consulted experts, engaged the public and taxi industry participants, and had direct consultations with the leaders of the taxi industry, and all their input was considered in drafting the new regulatory regime.

[350] When looking at the broader regulatory context, I find that the evidence clearly establishes that it was designed to benefit a multitude of stakeholders, in keeping with the City's mandate and

the goal of the regulation. The 2016 By-law was responsive to the circumstances of the various stakeholders; it was not stereotyping them or perpetuating a disadvantage.

Arbitrariness

[351] In describing the disproportionate impact, the Plaintiffs say the following: "By allowing PTCs to operate, the City essentially lifted the restrictions on the number of cars that can operate in the industry. The impact of this decision clearly had a severe adverse impact on the plate owners that was not felt by anyone else." This statement is not entirely accurate because the 2016 By-law affected other stakeholders. All plate holders felt that impact, not only the racialized group. The multi-plate owners, such as Mr. Way, who is part of the non-racialized group, also experienced a financial impact – perhaps a relatively large impact because of his ownership of multiple plates.

[352] The Plaintiffs are also ignoring that other participants in the taxi industry, such as taxi drivers and PTC drivers, who are equally racialized, have been affected by the City's regulatory action. I am satisfied with the evidence presented at the trial regarding the racial composition of taxi drivers and PTC drivers. In my view, they both fall roughly into the same demographic categories as the plate holders.

[353] Taxi drivers and PTC drivers appear to have enjoyed a benefit from the enactment of the 2016 By-law, in comparison to the plate holders. Mr. Way confirmed in his testimony that many night drivers who were working for single plate holders or single plate lessees left to drive for Uber. PTC drivers face lower barriers to entry, without any of the up-front costs associated with driving a taxicab. For those taxi drivers who stayed, there is some evidence showing that following the introduction of the 2016 By-law, they gained power in collective bargaining.

[354] Clearly, the impact is different for the plate holders, taxi drivers, and PTC drivers. They all share the same demographic profile, and these three groups are equally racialized and share an immigration background. There is no evidence of the actual effects of the City's regulatory actions on taxi drivers and PTC drivers, but it is reasonable to presume that they had some similar experiences to those who testified at trial.

Discussion

[355] The City's regulatory actions have affected multiple groups differently. But this differentiation will only constitute discrimination if it can be shown that it was arbitrary and that the differential effect that is based on a protected ground results in stereotyping or the exacerbation or perpetuation of historical disadvantage.

[356] The Plaintiffs' expert evidence focuses entirely on the historic economic circumstances of broad demographic groups and not the actual situation of the claimants' group. Its value is limited because it does not speak to the claimants' situation and the Plaintiffs should and could have obtained evidence in this regard.

[357] The Plaintiffs' theory suggests that the plate holders' choice to purchase a taxi license is explained by the "ethnic niches" phenomenon. I am not convinced that the plate holders purchased their plates because of systemic oppression, inequality, or economic vulnerability. The evidence given by Messrs. Mezher, Mail, Dadi, and El-Feghaly does not persuade me that their identities as racialized persons or as immigrants factored into their decisions to acquire taxi plates. Prior to purchasing a taxi plate, these individuals worked in other occupations and accumulated capital that eventually allowed them to invest in a taxi plate. Acquiring a taxi plate was an informed business decision motivated by an ability to generate income and invest in an asset that would accumulate value. And yes, as a result of the City's regulatory actions, they have been harmed, but it is not because of their race or immigration status.

[358] The Plaintiffs' narrow focus on the racialized plate holders who have been affected by the City's regulatory actions ignores that there are other participants in the taxi industry who are equally racialized, but differently affected by the City's regulatory actions. These other participants fall within same demographic categories as the plate holders.

[359] When I examine the City's full regulatory context, it leads me to conclude that it was designed to benefit several groups as well as maintain the public policy goals of public safety, accessibility, and consumer protection. The City engaged the services of KPMG to conduct an extensive review and consultation with the various stakeholders affected by the taxi industry. In

creating the 2016 By-law, the City had to balance competing interests coming from multiple groups and tailor the new regulation to correspond to the reality of these multiple affected groups.

[360] The introduction of the 2016 By-law resulted in benefits to other participants in the taxi industry, such as taxi drivers and PTC drivers, some of whom also tend to be racialized and typified by the same visible minority groups as the plate holders. If these racialized industry participants benefited from the City's regulatory actions when the racialized plate holders were denied a benefit, this suggests the plate holders' adverse impact was not arbitrary or based on any personal characteristics. Rather, it demonstrates that the plate holders experienced an adverse impact because of their status as plate holders.

[361] Although the participants in the taxi industry may have had historical disadvantages, I question the Plaintiffs' description of the disadvantages felt by the plate holders today. The Plaintiffs argue that the plate owners were "sent 'back in time' by the City's conduct, to a point at which they are even more disadvantaged than they were before." The evidence does not support this assertion. Francophones are no longer considered a marginalized group. Mr. Way is not at risk losing his business. Mr. Mail has a mortgage-free home and drives for Uber Eats. Mr. El-Feghaly owns a construction company. The plate holders who testified were able to debt-finance their plate purchase. All these examples do not lead me to the conclusion that the plate holders are economically disadvantaged. With that being the case, there is no disadvantage to perpetuate.

[362] In 2016, the landscape of the taxi industry was changing, and the City's regulatory response needed to reflect this new reality for the different stakeholders, including the plate holders. By considering the specific circumstances of all stakeholders, I do not find that the City engaged in invidious stereotyping. The 2016 By-law was tailored to meet the circumstances of various stakeholders that were affected. Clearly, the 2016 By-law was not arbitrary.

[363] The Plaintiffs have not established that the City's regulatory actions impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the plate holders' disadvantage.

Human Rights Code

[364] The analysis of discrimination under the *Code* has some similarities to the analysis of discrimination under the *Charter*.

[365] The three-part test for establishing discrimination under the *Code* requires the Plaintiffs to prove the following: (a) they are members of protected groups; (b) they were subject to adverse treatment; and (c) their gender, race, color, or ancestry was a factor in the alleged adverse treatment.

[366] Based upon my finding and analysis set out in the analysis of s. 15 of the *Charter*, I have no difficulty in concluding that the Plaintiffs have proven the first two criteria of the test.

[367] The real issue is the lack of connection between the adverse treatment and the prohibited grounds.

[368] While the case the City relies upon is dated, it is nonetheless relevant and directly on point. The facts in *Addai* are well known to the parties and will not be summarized here. Vice-chair Reaume appropriately stated that "[i]t is not sufficient to demonstrate that a group of racialized taxi drivers is experiencing adverse consequences as a result of changes to the structure of the taxi industry without making that connection": at para. 71. That is precisely what is lacking in the case at bar.

[369] The decisions the class members made to acquire their taxicab plates are not so inextricably bound up with their race, color, ethnic origin, or place of origin that any disadvantage they may have experienced because of the City's regulatory actions could be considered synonymous with disadvantage on the basis of those personal characteristics.

[370] As I explained in my earlier s. 15 analysis, the Plaintiffs have not convinced me that the identity of the racialized member class factored into its members' decisions to acquire taxi plates. I believe those decisions were informed and voluntary. I do not find that there is compelling evidence in the record to conclude that there is a connection between the personal characteristics

of the racialized member class and ownership of a taxi plate, insofar as to make the one the proxy of the other.

[371] In sum, the Plaintiffs have not established a connection between the prohibited grounds alleged and the disadvantages that the racialized member class claims that it experienced on this basis.

Disposition

[372] For the reasons set out above, I find that the City's regulatory actions do not violate s. 15 of the *Charter*. Accordingly, in the absence of a violation under s. 15 of the *Charter*, I find that there is no need to consider whether any infringement is justified under s. 1 of the *Charter*.

[373] For similar reasons, the Plaintiffs' claim under the *Code* is dismissed.

COMMON ISSUE #4 - *Did the fees collected by the City under its taxi by-law constitute an unlawful tax?*

[374] The short answer to common issue #4 is no.

[375] Since the amalgamation in 2001, the City has been collecting fees under its taxi by-laws, all of which were approved by Council. Between 2012 and 2016, the City collected between $1,360,000 and $1,600,000 in fees from taxicab licensees annually.

[376] These fees were imposed to regulate the taxi industry, nothing more. The evidence establishes a reasonable nexus between the fees levied by the City and the costs associated with the service provided to the taxi industry.

Position of the Plaintiffs

[377] The Plaintiffs take the position that the fees collected by the City are both unlawful and *ultra vires* taxes.

[378] First, the Plaintiffs say that under the *Municipal Act*, a specific costing is required to justify user fees that municipalities charge. A municipality must, at a minimum, make reasonable efforts to match the revenues from levies to the associated costs of the services provided.

[379] If the City levies a fee, it has a duty to substantiate that fee by tying it to the costs incurred. It is argued that despite being given ample opportunity to do so, the City has not put forward any evidence of a specific costing exercise. The City has not provided any evidence detailing the actual spending on services that it claims to be financing with the fees that were levied.

[380] The Plaintiffs state that the evidence does not demonstrate a nexus, a correlation, or a connection between the fees and the costs of the service provided. As a result, the Plaintiffs submit that the fees are unlawful.

[381] Second, the Plaintiffs submit that the City does not have the constitutional power to impose an indirect tax. They say that the fees constitute an indirect tax because the fees that are imposed by the City are passed onto the consumer.

Position of the City

[382] The City submits that the evidence makes it clear that the taxi fees constitute fees that a municipality may lawfully impose pursuant to the *Municipal Act*.

[383] The City says that the evidence overwhelmingly supports the City's intentions and objectives vis-à-vis the cost recovery. The setting of the fee amounts dates to the pre-amalgamation period, they have been adjusted and reviewed over the years, and they address the City's ongoing services and activities regarding the administration and enforcement of the taxi by-law.

[384] The City has tendered extensive budget documentation and provided testimony from key witnesses who are directly involved in the administration and enforcement of the taxi by-law. It argues that this evidence demonstrates the close correspondence between the City's actual annual revenue against its actual incurred expenditures on a yearly basis.

[385] The City denies that the level of granularity demanded by the Plaintiffs, namely a specific costing analysis, is required by law.

[386] The City further submits that the Plaintiffs' claim is statute-barred.

Legal principles

[387] Section 17(1)(a) of the *Municipal Act* provides that municipalities are not authorized to impose taxes.

[388] Section 391(1) of the *Municipal Act* says that municipalities are authorized to impose fees or charges.

[389] A fee will constitute a tax if the five-part test is satisfied: (a) it is enforceable by law; (b) it is imposed under the authority of the legislature; (c) it is levied by a public body; (d) it is levied for a public purpose; and (e) there is no nexus between the charge and the cost of providing the service or program to those subject to the fee: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at paras. 15, 21; *1736095 Ontario Ltd. v. Waterloo (City)*, 2015 ONSC 6541, 46 M.P.L.R. (5th) 1 (Div. Ct.), at para. 45; *Angus v. Corporation of the Municipality of Port Hope*, 2016 ONSC 3931, 57 M.P.L.R. (5th) 170, at para. 29.

[390] Additional factors to consider in determining if an impugned fee is a tax include the following: (a) whether the fee was designed to be revenue neutral; (b) whether the calculation of fees were based on best estimates of the costs associated with the service – including staffing and non-staffing expenditures relating to processing applications and enforcement efforts; (c) whether the fees were used to defray expenses or raise revenue; and (d) whether the fees were intended for a public purpose: *Angus*, at para. 30.

[391] To establish a reasonable connection between the fees charged and the services provided, municipalities must lead some evidence that is beyond "statements of intent and reports containing no values or monetary comparisons": *Angus*, at paras. 32-33. "Best estimates based on work experience are simply insufficient to establish a nexus": *Angus*, at para. 41. The court will generally defer to the municipality's methods and not look beyond the methodology used: *Greater Toronto Apartment Assn. v. Toronto (City)*, 2012 ONSC 4448, at para. 41.

Discussion

Unlawful tax

[392] It is undisputed that the City is permitted, under s. 391 of the *Municipal Act*, to collect fees for the provision of services.

[393] It is also undisputed that, other than property taxes, the City is prohibited from levying taxes on their constituents.

[394] It is uncontroverted that the City provided services in relation to the administration and enforcement of the 2012 By-law.

[395] The main dispute between the parties turns on whether the fees levied by the City are permissible because there exists a nexus or a connection between the amount of the fee and the cost to the municipality for providing that service.

Historical background

[396] Prior to amalgamation in 2001, there were six municipalities that had enacted taxicab by-laws: Cumberland, Gloucester, Kanata, Nepean, Ottawa, and Vanier. The City was required to consider the various fee structures that were set out in each by-law. In December 2001, Mr. Kanellakos prepared a report to the Emergency and Protective Services Committee and to Council recommending the harmonization of the taxi-related license fees. The report noted that there were over "60 different taxi related fees in 22 different categories".

[397] The proposal was to reduce the range to a single fee for several categories, such as licensing application, annual fee, and vehicle re-inspection, to name a few. In specific reference to the plate transfer fee, the City kept the structure from the previous City of Ottawa, namely 10 percent of the true consideration in the sale agreement up to a maximum of $5,800.

[398] In 2001, Ms. Jones was intimately involved in the harmonization of taxi-related license fees. She testified that the goal was to establish a fee that the City deemed to be more reflective of the costs associated with the administration and oversight of the by-laws. Admittedly, in

establishing these fees, the City did not conduct a line-by-line granular analysis of its costs. Ms. Jones explained the reason for not doing so in this manner:

> Well, if if you go back in time and take a snapshot of what was going on at amalgamation, 11 lower tier, by-law and licensing offices and one upper tier. Collective agreements were different in each of those municipalities. Office environments were different. Legal issues were different. And then as we were moving forward over the next time, when you look at 2005 to actually [*indiscernible*] then come up with a brand new by-law, a number of things were changing and evolving. And so it was very difficult to pinpoint on a line by line item as to what the exact cost would be.

[399] In 2002, the Council approved the proposed harmonized taxi fees.

[400] In August 2005, Mr. Kanellakos prepared a report to the Emergency and Protective Services Committee and to Council recommending replacing the existing taxicab by-laws, which included a review of the existing taxi fees. Most of the taxi fees remained unchanged with exceptions to certain categories, including the reduction of the plate transfer fee from a cap of $5,800 to $3,800, to better reflect the City's current costs associated with the service provided. A new by-law was enacted, and it remained until the 2012 By-law.

[401] In 2007, City Council endorsed a fiscal framework regarding all financial decisions being made at the City. Mr. Cyril Rogers testified that this framework represents the guidelines to be followed for decision-making, allocation of budgets, and fiscal management improvements of the organization. This fiscal framework remains in force today.

[402] In 2012, the City undertook another comprehensive review of the taxi fees. Mr. Kanellakos submitted a report to the Community and Protective Services Committee (formerly known as the Emergency and Protective Services Committee) and to Council recommending the re-enactment of the 2005 By-law along with amendments, including the establishment of a licence transfer fee totalling $3,800 per plate upon the death of a plate holder with two or more plates. It was increased because, upon closer scrutiny, the City realized that providing an exception for compassionate grounds should not apply to someone who owned two or more plates, which represented a business. This was the only change pertaining to taxi fees.

Application to the facts

[403] The parties agree that the first three criteria of the *Eurig* test are satisfied.

Public purpose

[404] The fourth criterion pertains to determining if the fee was levied for a public purpose. I do not believe that it was. The evidence establishes (as detailed below) that the taxi fees are clearly intended for a specific purpose. I accept the evidence of Ms. Jones, Ms. Hartig, and Mr. Rogers that the licensing fees were levied for the specific purpose of defraying the City's costs associated with the services provided.

[405] I find that based on the totality of the evidence heard, the revenue generated from the taxi fees was intended to be used to regulate the taxi industry, and not for any other general purpose. The fees are designed to exclusively fund the administration and enforcement of the taxi by-law.

Nexus between the fees and costs

[406] The focus of my analysis will be on the last criterion.

[407] The crux of the Plaintiffs' argument is that the City has never performed a full costing analysis of the fees and one is required.

[408] The Plaintiffs submit that a specific analysis regarding the fees and costs is possible and points to other municipalities (i.e., City of Toronto, City of New Tecumseth, and the City of Milton) that have performed full costing assessments. Without such a detailed costing analysis, the Plaintiffs say that it is not possible to determine if there is a relationship between the fees charged and the costs of carrying out the service.

[409] I do not agree with the Plaintiffs' position that the City is required to provide a specific costing to justify the user fees that the municipality is charging. While there are some municipalities that have undertaken such an analysis and it may have simplified my review and analysis, I do not believe that it is the evidentiary standard needed to determine if a nexus exists. In any case, I am not persuaded that these examples presented by the Plaintiffs of other municipalities

has any bearing to the issues at hand. They are not comparable to the City because of its size, scope, service, and reasons for conducting such a granular exercise.

[410] The City is not required to provide a dollar-for-dollar accounting analysis. It must provide evidence to support that its intention is to recover its costs associated with the provision of the taxi licensing services. It is sufficient to demonstrate that a reasonable connection is shown between the costs of the service provided and the amount charged. In my view, the City has met its evidentiary burden.

[411] I found the evidence of the City witnesses to be compelling and consistent with the vast amount of documentary evidence. I was impressed with the detailed testimonies of Ms. Jones, Ms. Hartig, and Mr. Rogers. Combined, they possess a wealth of knowledge and information on the historical context regarding the establishment and review of the fees and costs of the service and its purpose, as well as the practical and significant effort that is required by City staff to assess and prepare annual budgets.

[412] Determining whether a reasonable nexus exists is a contextual, fact-based exercise. The evidence tendered at trial convinces me that the City's key objective in establishing the fees related to the taxi industry was (is) to defray the costs associated with the administration and enforcement of the taxi by-law. These fees are not designed to create or generate revenues for the City. For decades, the City has consciously and diligently attempted to correlate the amount of fees to the costs of the services, to the best of its abilities. These efforts were reasonable. In the following paragraphs, I review some of the evidence that has led me to these conclusions.

[413] Although this common issue deals with the 2012 By-law, a review of the historical context is important because it provides the evolution of the taxi fees and the approach taken by the City in matching the fees to the costs of the service.

2001-2005

[414] Prior to the amalgamation, six cities had enacted taxicab licensing by-laws (Cumberland, Gloucester, Kanata, Nepean, Ottawa, and Vanier), and each had their own categories of licence fees with different expiry dates.

[415] There is no question that the process of amalgamation in 2001 was a huge task for City staff because it necessitated the review and harmonization of 500 different by-laws, including the fees related to taxi licensing. Ms. Jones explained the challenges that the City faced at that time with respect to the amalgamation:

> Well, at the time and in terms of appreciating what was going on in terms of the city, we were still trying to, first of all, figure out what by-laws would look like. We were still trying to we were taking staff that existed from former municipalities and and bringing them over. A number of positions were eliminated during that period. There were a number of different enforcement models that existed in the former municipalities. I can give an example. Ottawa, for example, had officers and staff just dedicated to noise only. Nepean had more of a generalist model whereby — and Ottawa had licensing inspectors, an auto hit license in inspectors, I'm going to give you that example — Nepean, a smaller municipality, had more of a generalist model whereby that officer who may be do taxi licensing, may also do noise enforcement, may also do property standards. And when we carried those responsibilities over, we, we also knew those tasks were still important. We determine more at a high level. We looked at fees that existed previously, and and we stuck pretty close to those fees in terms of what they were and we averaged out what the cost would be. We recognized as well we still had work to do as we're moving forward and making changes to organizational models and what the responsibilities would be and how, how it would be applied and what our enforcement issues would be that, that actual fee might, might change.

[416] Although the City did not conduct a granular line-by-line analysis, it did not hastily accept the fees that had been previously levied by the six municipalities. City staff conducted a comparative review of the fees charged in all the amalgamating municipalities. Ms. Jones' testimony sets out the careful review that took place vis-à-vis the fees:

> In terms — we looked at a line by line analysis of what each each of the fees were, but in terms of a line by line and an actual accountant sheet that factored in every cost, we didn't. I'm not sure if that, that was possible. And, and we also, we recognized too, that, you know, I was part of that *Municipal Act* change in the previous 10 years that a number of things the municipalities have done that, for example, early, I believe, was it 1991 *Municipal Act* changed, first time it had changed in years. All of a sudden, municipalities started licensing, licensing every activity. There were even licensing lawyers and

> ATM machines and dentists and things like that. And it, it was really radical in the approach. And I think in some respects, some municipalities might have been doing it for revenue purposes. Province changed that, went way back and actually then it was very clear and specific that we needed when we came up with licensing fees to take our our costs that were reasonable into account. So we tried to be reasonable without, to go line by line and factor in every type of activity that would be involved to support licensing. We didn't do that.

[417] The City retained the services of KPMG to undertake a comprehensive review of the taxi regulations and make recommendations, including a proposal for the harmonized plate transfer.

[418] Upon completion of its review and consultation, the City decided that the harmonized proposed fee structure for the new City would be similar to those fees that had been previously enacted by the amalgamating cities because a thorough review of those fees had already occurred in the mid to late nineties. Speaking about those fees that had been established prior to amalgamation, Ms. Jones said that "we recognized that the fees that we were approving were essentially a carryover of fees that had already been reviewed and approved by previous councils."

[419] Ms. Jones further testified that in or around early 2002, based on its analysis, the total estimated cost to the City for the administration and the enforcement of taxi regulations was higher than the amounts the City received in revenue from the collection of taxi fees.

[420] In 2004-2005, City staff once again revisited the existing taxi fees. The City retained the services of Hara Associates as well as KPMG to review and revise the Taxi Cost Index, which provides the basis for taxi meter rate adjustments. This index, in existence since the early 1990s, is intended to help the City set meter rates that are a just and reasonable return for the drivers, all while protecting the consumers. The goal is to ensure that costs such as stand rent, licences, and union dues are recovered through the meter rates. The City hired experts to ensure that the revised Taxi Cost Index was accurate.

[421] While most of the fees remained unchanged, there were some exceptions, including, without limitation, the following:

i. Introduction of a $50 fee (up from $10) to be charged if you wished to be added to the City's Accessible Priority. It was estimated that this would increase revenues by $10,000 to cover the costs of maintaining the list.

ii. An increase of the annual fee for Accessible Taxicab Plate Holders from $1 to $420. It was estimated that this would generate additional revenue of $10,500 to offset some of the costs of enforcing and administering the by-law.

iii. Introduction of a surcharge of $0.10 to the drop rate of taxi fare to cover the costs incurred by taxi plate owners for the installation of new safety equipment.

[422] The City also looked at the plate transfer fees and reduced them from $5,800 to $3,800. Ms. Jones explained that these fees were reduced to reflect the costs associated with the service. Mr. Kanellakos' 2005 report to the Emergency and Protective Services Committee and to Council noted the following:

> [T]he transfer fees, as with all business licensing related fees, are authorized by the *Municipal Act* when these cover the costs related to the administration and enforcement of the business being regulated. This fee reflects costs associated with the administration and maintenance of the by-law, public consultation, consulting fees, license committee, vehicle inspection fees, and prosecution and enforcement of both licensed and unlicensed activities.

[423] Between 2001 and 2005, the City's revision to the taxi fees was never done in isolation. The City always consulted with members of the taxi industry regarding the proposed fees. The evidence does not reveal that there were any complaints from the taxi industry that the City's proposed fees were not reflective of its costs associated with the administration and enforcement of the City's taxi regulations.

2007-2012

[424] In 2007, the City established a fiscal framework, as endorsed by City Council. It provided the fundamental framework for the overall finances of the City and set out guidelines to be used in the preparation and planning of the budget.

[425] Mr. Rogers said that the fiscal framework has specific guidance regarding the establishment of fees. He explained it as follows: “So it provides the guidance in terms of recovery for rates of service, so it’s what we consider full cost recovery to ensure we’re recovering the costs of the applicable services to provide that service to make sure we, you know, have full cost recovery.”

[426] In the fiscal framework document filed with the court, I note that there is a section on user fees and service charges. Some of the guiding principles include that recovery rates for services consider, amongst other things, the operating and capital costs, that fees are subject to periodic study and review, and that changes in user fees need to be transparent.

[427] In 2012, the City undertook yet another comprehensive assessment of the taxi by-law, including the fees as part of a broader review of the 2005 By-law. City staff recommended that the fee associated with the transfer of a taxicab plate upon death be increased from $300 to $3,800 where the deceased plate holder held two or more plates. Ms. Jones explained that City staff had discovered that the administrative burden was more significant when dealing with the death of a plate holder with multiple plates. She equated it to more of a business operation.

[428] On a yearly basis, the BLRS, which is the branch responsible for the administration and enforcement of the City’s taxi by-law, undertakes an analysis and review of its costs at a high level. This type of analysis predates amalgamation and has been the City’s methodology since the harmonization of taxi fees. Ms. Hartig explained that such an approach is taken because the BLRS branch is not structured by program but by function.

City’s methodology

[429] As mentioned earlier, amalgamating the various municipalities was a huge task. The City’s approach of keeping a similar taxi licensing fee regime to those that existed in previous municipalities was logical because they had gone through a series of reviews and were approved by the municipalities’ respective councils. Even though the City implemented a similar harmonized taxi licencing fee regime as had existed pre-amalgamation, the City continued to ensure on a regular basis that the fees correlated to the services provided.

[430] The Plaintiffs argue, as an example, that pre-amalgamation transfer fees (and post-) have no relationship whatsoever to the costs of administering and enforcing the taxi by-law. This fee formula was carefully considered by the City and was temporary. In 2005, as noted above, the City eliminated this fee formula and opted for a lower amount because it was determined that it reflected the City's costs recovery. This amendment to the transfer fee clearly demonstrates that the City was actively working towards ensuring a correlation between the fees and services provided.

[431] After amalgamation, there were two additional formal reviews of the taxi licensing fee structure, one in 2005 and the other in 2012. These reviews were comprehensive, and one of them involved experts who were asked to thoroughly assess some of the licensing fees. During these reviews, City staff, and subsequently Council, were keenly aware that any fee enacted needed to be tied to the City's costs in providing the service. The documentary evidence tendered at trial is filled with numerous statements regarding the purpose of the fees, such as found in City staff reports, and these were confirmed during the testimonies of several City witnesses.

[432] All formal reviews eventually led to the creation of the baseline taxi licensing fees, which are set out in Schedule C of the 2012 By-law. There are four categories of fees: (a) application processing fees; (b) renewal application; (c) late fees; and (d) licence transfer fees.

[433] Ms. Hartig, Ms. McCumber, and Mr. Rogers described the direct and indirect costs incurred to provide the services that are tied to the taxi licensing fees. These can be categorized in five distinct groups:

i. Costs associated with processing the applications and renewals of the taxi licenses at the City's public counter. The City maintains a physical premise as well as a taxi management information system where all taxi licensing information is stored.

ii. Costs associated with taxi administration, including costs associated with the City's Property Standards and Licence Appeal Committee. This Committee hears and decides appeals regarding the City's licensing decisions, one of which includes taxi licensing.

iii. Costs associated with taxi-related policy development and public consultation. The policy unit stayed within by-law for several years until the creation of a specific policy branch. The costs included salaries of staff and external consultants who were hired for certain more complex matters.

iv. Costs incurred in relation to the enforcement of the taxi by-law, such as staffing, vehicles, equipment, and training needed to carry out the inspections and investigations of the complaints.

v. Indirect support services costs that are incurred by various City departments to assist the various initiatives of the taxi licensing group, including the Finance Department, Human Resources Department, and Information Technology Services.

[434] The City budget is reviewed on an annual basis using a base-budget approach, which requires looking at the previous years' budget and considering the anticipated costs for each service area. The City must engage in a year-to-year consideration of its incremental costs and anticipate the costs for each service area. Typically, the annual changes reflect an approximate increase of two percent, consistent with an adjustment for the cost of living. Each department will make its own decisions as to the appropriate increases to be applied for each.

[435] In its annual reviews, the City is guided by the fiscal framework guidelines. The goal is to achieve full cost recovery of both direct and indirect costs. Mr. Rogers provided a detailed explanation of this annual review:

> So during each annual budget process, we do what we would consider a bottom-up build of the budget. We review all of our head count resources, so the FTEs. As an example, for bylaw services, we would have all the details behind every position within bylaw. We would correlate that back to the existing collective agreements, to ensure that any incremental increases, as previously mentioned, from a collective agreement perspective, are put forward and captured for the increase in costs, as an example.
>
> We also review various material contracts, so any vendor contracts that we would have. Again, this is globally service wide. If I use winter operations, as an example, we have year-over-year contracts

> with external providers. We would review those contracts to ensure we capture any incremental inflationary costs, as per the contracts.
>
> We also do historical analysis of performance to budget in previous years, which, you know, the sole purpose of that would be identifying any potential outliers. So if there's a significant increase or decrease in the cost through, through that review, we would identify that as a, you know, further review with the client, the department, to ensure that we're aware of what caused that increase, as an example. So we pretty much go line by line in terms of reviewing the existing budget, and then, of course, the existing pressures, compensation-related pressures, market inflationary pressures, changes in service delivery, et cetera, to put forward a budget that represents those increased requirements for existing services.
>
> …
>
> In that same review, user fees are also reviewed in terms of, you know, if, if the department or service area costs are increasing, those factors would also go into consideration for the increases, such as you have seen on the page right here.

[436] The Plaintiffs are critical of the City's methodology because there has never been a full costing analysis of the fees and costs associated with the 2012 By-law. But the evidence is overwhelming that the City's intentions and objective vis-à-vis the fees were clear. It was full cost recovery. Nothing more, nothing less. Considering the evidence as a whole, a granular costing analysis is not necessary.

[437] In any event, there are several reasons why a granular analysis is not undertaken for BLRS. Take for example a by-law officer who carries out several tasks touching a variety of user fees or services within a specific day. It would be difficult to allocate this by-law officer's day to a very specific task. Another example would be a senior financial analyst who could be supporting the by-law function as well as the emergency protective services function. Allocating every component of this senior analyst's day to specific tasks would be an extremely administrative and time-consuming endeavour. Furthermore, a senior financial analyst or another member of the finance department may be supporting a variety of services but not unique to one particular task.

Allocating the costs in such a circumstance would not only be terribly difficult and challenging, but it would invariably increase the costs, thereby requiring an increase of the taxi licensing fees.

[438] Having reviewed and analyzed the detailed budgets that have been filed with the court, I can certainly appreciate the challenge that would exist if one was required to provide a granular costing analysis of both the direct and indirect costs.

[439] The City's methodology of assessing the fees and correlating them to the services provided is not an exercise of "best estimates" or the "musings" of City staff. It is also not limited to "statements of intent and reports". The figures and reports that were filed and reviewed during trial are established by a team of individuals who are directly involved in the administration and enforcement of the taxi by-law. I accept their explanations and calculations of the fees because they reasonably tie into the services the City provides. Since the amalgamation to present, City staff have regularly and diligently undertaken exhaustive and comprehensive reviews of the taxi licensing fees to ensure that they correlate to the services being provided. The evidence demonstrates that the City does perform a full costing analysis, but not to the granular level desired by the Plaintiffs.

[440] I am convinced that the City staff and Council were aware that any fee enacted must be tied to the City's costs in providing the service. There were numerous examples given during the trial as to the type of work that is required in relation to a specific service. Administrating the taxi by-law has many components, ranging from processing applications and maintaining a centralized taxi information system to policy development. Enforcing the taxi by-law requires staff, training, and equipment. Clearly, to administer and enforce the taxi by-law, the City incurs both direct and indirect costs in providing the various services. During Mr. Way's cross-examination, it was not disputed that the City must incur these types of costs in relation to the administration and enforcement of the taxi by-law.

[441] This trial has allowed me to review and consider an abundance of evidence regarding the City's budgetary processes, including how the City calculates the taxi licensing fee structure and ensures that this fee structure is, to the best of its abilities, revenue neutral. The City did not act alone. It relied on experts in the field. And, as importantly, the City consulted with its partner in

the taxi industry regarding the proposed taxi fees. It is worth repeating that there is no evidence that any of the consultations with taxi stakeholders raised any concerns that the fees were not reflective of its costs associated with the administration and enforcement of the taxi by-law.

[442] To conclude on the nexus question, in the grand scheme of things, the revenues generated from taxi licensing fees represent a very small percentage of City's overall budget. In this regard, the City relies on a Court of Appeal decision called *Urban Outdoor Trans Ad v. Scarborough (City)* (2001), 52 O.R. (3d) 593. Without getting into the details of this case, suffice it to say that the court needed to determine if an annual fee for sign permits was an indirect tax. In finding that it was not, the court also noted the following: "Further, like the applications judge, I place particular emphasis on the fact that the fees are relatively modest when compared to the entire budget of the Signs Section": at para. 35. In that case, the fees represented approximately 15 percent of the annual budget. In our case, the evidence tendered at trial shows that the taxi fees represent only 5-7 percent of the branch's overall revenue and approximately 0.05 percent of the City's overall operating budget. This could be interpreted as less than modest.

[443] In sum, I find that the City's methodology is sound and there is sufficient evidence to establish a connection between the taxi license fees and the associated costs. The City has met its obligations pursuant to the *Municipal Act.*

Indirect tax

[444] According to s. 92 of the *Constitution Act, 1867*, provinces only have the authority to impose direct taxes, meaning that they cannot impose an indirect tax: *Eurig*, at para. 14.

[445] If the provinces do not have the constitutional authority to impose indirect taxes, then municipalities are also prohibited from doing so.

[446] The Plaintiffs contend that the fees levied by the City are unlawful because they are an indirect tax. They are an indirect tax because the fees are being passed onto the consumer by way of the meter rates, which are set by the City.

[447] The Plaintiffs' argument regarding indirect tax is intrinsically tied to my previous analysis and must fail for that reason.

[448] As noted above, I concluded that the City taxi fees are not *ultra vires* the City's authority under the *Municipal Act*. In other words, the fees are permitted. If the fees are permitted, then they are not deemed to be a tax.

[449] Because I have determined that the fees are permitted under the *Municipal Act* and are therefore not a tax, I am of the view that it is unnecessary to embark on an analysis as to whether the tax is direct or indirect. It becomes a moot exercise because my conclusion will not change. It is not a tax, regardless of the label that it is given.

Statute-barred

[450] The City takes the position that the Plaintiffs' claim is statute-barred for two reasons. The first is that the Plaintiffs ought to have brought an application to quash the 2012 By-law within the one-year limitation period stipulated under s. 273 of the *Municipal Act*. The second is that the Plaintiffs' claim for restitution and return of amounts paid are subject to the two-year limitation period set out under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

[451] Dealing first with the *Municipal Act*, I agree with the Plaintiffs that this limitation period does not apply. The Plaintiffs are not seeking to quash the 2012 By-law. Rather, they are seeking a declaration that the taxi licensing fees are *ultra virus* and restitution for unlawful taxes.

[452] Turning to the City's second argument, the two-year period and principle of discoverability are codified in ss. 4 and 5 of the *Limitations Act.* In *Fennell v. Deol*, 2016 ONCA 249, 97 M.V.R. (6th) 1, the Court of Appeal summarized the discoverability test at para. 20:

> The basic two-year limitation period begins to run on the day the claim was discovered. The date of discovery is the earlier of the two dates under s. 5(1) – when (a) the person with the claim had knowledge of, or (b) a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have had knowledge of, the matters referred to in s. 5(1)(a)(i) to (iv).

[453] The City submits that the Plaintiffs, through Mr. Way, would have had knowledge of this claim as early as when the 2012 By-law was enacted because of the following:

i. Mr. Way has been extensively involved in the industry. He has been one of the central figures (if not the central figure) in the Ottawa taxi industry for over 30 years.

ii. He is the president of the Canadian Taxi Association, and he has held this position since 2015. This organization was formed in response to the enactment of the former GST.

iii. He is a sophisticated businessperson, being the CEO of Metro Taxi Ltd., a broker, and CEO of Coventry Connections Inc., a dispatching company with operations across the province.

iv. He is familiar with the corridors of power, having been involved in lobbying efforts to amend the *Highway Traffic Act*. He has participated in public consultations and reviewed City staff reports.

[454] The City argues that if Mr. Way believed that the taxi licensing fees were an unlawful tax, he would have had knowledge at the time of the enactment of the 2012 By-law. The claim is statute-barred because it was commenced four years later, in 2016.

[455] The City's position is flawed and lacks an evidentiary foundation.

[456] Although the Plaintiffs do not need knowledge of the elements of the legal test for the claim, there must be evidence showing that they had knowledge of material facts upon which a plausible inference of liability could be drawn: *Levac v. James*, 2023 ONCA 73, at para. 105, citing *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613, at para. 42.

[457] It is not controverted that Mr. Way's abilities and experience in the taxi industry are significant. It is also not controverted that the taxi licensing fees have been in existence for decades. Yet, there is no evidence before me showing that Mr. Way or any other members of the Plaintiffs'

class possessed the necessary knowledge of these material facts upon which there was a plausible inference of the City's liability vis-à-vis the taxi licensing fees being unlawful taxes.

[458] The only evidence that may be drawn from the testimony heard at trial is evidence of a general nature regarding Mr. Way's abilities and experience. There is no conclusive evidence or argument that the Plaintiffs ought to have known of the claim sooner.

[459] I agree with the Plaintiffs that it was entirely reasonable for them to only discover the claim in 2016.

[460] Therefore, I reject the City's position that the Plaintiffs' claim is statute-barred.

FINAL DISPOSITION

[461] For the foregoing reasons, the common issues are answered as follows:

i. Common issue #1 – the City was negligent in enforcing the 2012 By-law from September 1, 2014 to September 30, 2016.

ii. Common issue #3 – the City's conduct in allegedly negligently enforcing the 2012 By-law or in amending the taxi by-law in 2016 did not infringe on the rights of the taxi plate holders under s. 15 of the *Charter* or under s. 3 of the *Code*.

iii. Common issue #4 – the fees collected by the City under its taxi by-law do not constitute an unlawful tax.

[462] Once the parties have had an opportunity to consider these Reasons for Judgment and discuss them amongst themselves, they shall contact the trial coordinator's office to schedule an appearance before me to determine the next course of action, including the continuation of the trial in relation to common issue #5, whether damages assessed in the aggregate is an appropriate remedy.

M. Smith J

Released: May 13, 2024

CITATION: *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725
COURT FILE NO.: CV-16-69601
DATE: 2024/05/13

SUPERIOR COURT OF JUSTICE

BETWEEN:

METRO TAXI LTD., MARC ANDRÉ WAY AND ISKHAK MAIL

Plaintiffs

– and –

City of Ottawa

Defendant

REASONS FOR JUDGMENT

M. Smith J.

Released: **May 13, 2024**