Court File No. 16-69601

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

METRO TAXI LTD., MARC ANDRÉ WAY and ISKHAK MAIL

Plaintiffs

and

CITY OF OTTAWA

Defendant

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFFS' REPLY WRITTEN SUBMISSIONS

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PART I - NEGLIGENCE

A. Duty of Care

1. The City mischaracterizes its duty of care

1. Throughout its submissions, the City characterizes the duty of care at issue as a duty to protect plate values or the economic interests of the plaintiffs.[1] This characterization is wrong. The plaintiffs' claim has always been, and still is, that the City had a duty to take reasonable care in its enforcement of the 2012 By-law.[2] The fact that the City's failure to meet the required standard of care caused damage to the plaintiffs does not transform a duty of care rooted in enforcement into a duty to protect plate value.

2. The City distorts the duty of care framework

2. In its submissions, the City also distorts the governing principles regarding the duty of care in negligence law established by the Supreme Court in *Imperial Tobacco* and *Cooper*.

3. At paragraph 259, the City argues that there is no need for this Court to conduct a complete *Anns/Cooper* analysis, on the basis that the plaintiffs' negligence claim falls into the pure economic loss category of the independent liability of statutory public authorities.[3] In doing so, the City asks this Court to set aside the first *Anns/Cooper* stage and jump to a conclusion that there is no proximity. This is not the law.

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[1] Defendant's submissions at paras 10, 540.
[2] Plaintiffs' submissions at para 182.
[3] Defendant's submissions at para 259, citing *Eisenberg v Toronto,* 2019, ONSC 7312 at para 97.

4. The Supreme Court of Canada has consistently held that the categories of pure economic loss are merely "analytical tools" and not "categories of *proximity*".[4] The standalone invocation of a pure economic loss category "offers no substitute"[5] for a rigorous proximity analysis. These two concepts should not be conflated.

5. Notably, the pure economic loss category of the independent liability of statutory public authorities addresses the government's "unique public power to convey certain discretionary benefits", such as by-law enforcement.[6] There is no single set of factors applicable to this category. Each case must be assessed for proximity on its own unique set of facts. As such, this Court must undertake a full *Anns/Cooper* analysis.

6. At paragraph 367, the City argues that a proximate relationship between a public authority and a plaintiff may only exist where their interactions "go beyond the ordinary scope of the regulatory relationship". To support this proposition, at paragraph 371 the City relies on a statement from the 2009 Court of Appeal decision in *River Valley Poultry Farm* to the effect that "mere targeting" in the context of a statutory scheme is insufficient to establish proximity.[7]

7. However, the City fails to mention that the Court of Appeal in *Aylmer* explicitly disapproves of *River Valley Poultry Farm* in the very paragraphs it cites to. First, the Court of Appeal rejected *River Valley Poultry Farm* as authoritative since it was decided before the Supreme Court's direction in *Imperial Tobacco* that courts must take into account the specific

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[4] *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35 at paras 22-23 (emphasis in original) [***Maple Leaf***].
[5] *Maple Leaf* at paras 22-23.
[6] See *Design Services Ltd. v Canada*, 2008 SCC 22 at para 32.
[7] Defendant's submissions at paras 361 and 367; *River Valley Poultry Farm v Canada*, 2009 ONCA 326 at para 59.

interactions between a plaintiff and a government defendant. Second, the Court of Appeal further held that a judicial finding that "mere targeting" is insufficient to ground proximity would be "inconsistent" with the Supreme Court's holding in *Hill*.[8]

8. To be clear, nothing in *Imperial Tobacco* requires a municipality to step outside of its regulatory role in order to ground a duty of care in negligence. To impose such a high threshold would provide sweeping immunities to municipal corporations not even contemplated in the eighteenth century.[9] More importantly, it also would be contrary to the Supreme Court's direction in *Imperial Tobacco* that courts must examine the specific interactions between the parties. The Supreme Court only asks that the entire constellation of interactions disclose a relationship that is "close" and "direct". To recall, this is a fundamentally contextual inquiry:

> "Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.
>
> The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic."[10]

9. The City's attempt to impose such a "unifying characteristic" to all cases involving government authorities would be contrary to this contextual approach. Once again, the City

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[8] *Aylmer Meat Packers Inc. v Ontario*, 2022 ONCA 579 at paras 48-49 (emphasis added) [***Aylmer***].
[9] *Nelson (City) v Marchi*, 2021 SCC 41 at para 38 [***Nelson***].
[10] *Cooper v Hobart*, 2001 SCC 79 at para 34 [***Cooper***].

evades context in an effort to minimize the interests of the plaintiff classes and to disavow its responsibilities towards them.

3. The supply management system gives rise to proximity and duty of care

10. At paragraphs 512-514, the City argues that the supply management system that it created does not support proximity or a duty of care. This argument should be rejected. Supply management systems are based on three pillars: (1) production control; (2) pricing control; and (3) import control.[11] At its core, a supply management system is one that protects industries through regulation and proper enforcement of those regulations. This is precisely what the City set to do when it created the taxi industry on the basis of a supply management model.

11. Proper enforcement of the taxi by-laws is fundamental and pivotal for this supply management system to work and achieve the purposes that the City intended. In other words, the taxi supply management system hinged on proper enforcement in the context of: (1) production (*i.e.*, how many cars can be used to transport passengers); (2) pricing (*i.e.*, how much consumers are charged for transportation services), and (3) the players who can operate in the market (*i.e.,* only those who are licensed by the City).

12. The City created this system to attract individuals to buy into it and invest in it to ensure that transportation services to the public are safe and of sufficient quality. People bought into the system because it was a supply management system buttressed by the City's enforcement arsenal, which it deployed for years to protect the industry from unlawful intruders. The

[11] Library of Parliament, *Canada's Supply Management System*. These pillars are also discussed in case law that deals with supply management. For example, see: *Nadeau Poultry Farm Limited v Groupe Westco Inc.*, 2011 FCA 188 at paras 9-12.

suggestion that the City's supply management system does not create proximity and duty of care is belied by the purpose of the system and the conduct of all industry participants over decades.

4. *Vlanich* is distinguishable

13. At paragraphs 267-269 and 362, the City argues that the Ontario Court of Appeal judgment in *Vlanich v. Typhair* should persuade this Court to find that no proximity arises from the statutory scheme at issue in this trial. In particular, the City contends that *Vlanich* stands for the proposition that a public authority will only be liable under a statutory scheme where it assumes responsibility for ensuring compliance with a standard intended to reduce the risk of physical harm. However, this argument falls apart when *Vlanich* is viewed in its full context and through the lens of *Imperial Tobacco*.

14. *Vlanich* is distinguishable. In *Vlanich*, two victims of a taxi vehicle collision and insurance company brought claims against a municipality for additional insurance monies. Distilled to its core, the negligence alleged in *Vlanich* was that the Township granted a taxi license without ensuring that the licensee obtained appropriate insurance. In rejecting a duty of care, the *Vlanich* court only referenced the by-law requirements for vehicle insurance and license issuance. The Court of Appeal did not consider the question at issue in this trial: 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.

15. The *Vlanich* court also did not apply the *Imperial Tobacco* proximity framework, whereby a duty of care may arise from a combination of the statutory scheme and specific interactions. The failure to adhere to *Imperial Tobacco* is evident from the Court's statement

that "if a duty of care exists, it must be found in the township's by-law".[12] In *Imperial Tobacco*, McLachlin C.J. declined to adopt such a restrictive and antiquated approach to the proximity analysis. The City cannot belatedly resurrect it. This Court must examine the specific interactions in combination with the statutory scheme under the 2012 By-law.

5. The City misrepresents the evidence about Service Requests

16. At paragraphs 456-461, in an attempt to repudiate the duty of care that it owed to properly enforce the 2012 By-Law, the City mischaracterizes the evidence about the Service Requests that it received. The evidence at trial was that the City does not have any particularized knowledge about the time and resources that the various Service Requests items on the list consume. All the City knows is that some items take longer than others (for example, responding to a complaint about uncut grass is typically dealt with more quickly than complaints in the taxicab industry).[13] Given this evidence, it does not lie in the City's mouth to say, based on the number of Service Requests, that enforcement against bandit cabs was a relatively minor issue. This is particularly so given that Susan Jones explicitly testified that such enforcement was a priority for the City.[14]

6. No policy reasons negate a duty of care

17. At paragraphs 538-542, the City argues that one purported residual policy concern should negate the imposition of a duty of care in this case: indeterminate liability. This argument

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[12] *Vlanich v Typhair,* 2016 ONCA 517 at para 28 [***Vlanich***].
[13] Hartig Cr. Ex., February 6, 2023, 63:17 to 66:9.
[14] Jones Cr Ex., February 9, 2023, 49:2-5.

misreads Supreme Court jurisprudence regarding the definition of indeterminate liability and its role as a policy concern. It should be rejected.

18. As a starting point, any second stage *Anns/Cooper* policy concerns must be "more than speculative", "compelling", and raise a "real potential" of negative consequences sufficient to negate a *prima facie* duty of care.[15] The City bears the burden of proof of establishing this point.[16] Yet there is no evidence in the record that indeterminate liability or any other policy reason could negate the imposition of a duty of care. The City's position and argument are purely speculative.

19. In any event, a proper application of negligence law demonstrates that indeterminate liability is not a compelling concern here. The Supreme Court has recently clarified that indeterminate liability is liability of specific character and not a specific amount.[17] As such, indeterminate liability must not be confused with significant liability.[18] Moreover, indeterminate liability is "nothing more" than just one residual consideration. Even if it exists, it may not preclude a duty of care in all cases.[19] Put differently, indeterminate liability is not a "policy *veto*".[20] Three types of indeterminacy exist: (1) value indeterminacy; (2) claimant indeterminacy; and (3) temporal indeterminacy.[21]

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[15] *Fullowka v Pinkerton's of Canada Ltd.,* 2010 SCC 5 at para 57; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 48.
[16] *Childs v Desormeaux*, 2006 SCC 18 at para 13.
[17] *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63 at para 43 [***Livent***].
[18] *Livent* at para 43.
[19] *Livent* at para 45 (emphasis in original).
[20] *Livent* at para 45 (emphasis in original).
[21] *Livent* at para 43.

20. None of the three kinds of indeterminacy arise in the case at bar. First, the aggregate market value of taxi plates was known to the City.[22] The losses of brokers in relation to negligent enforcement were also reasonably foreseeable. Second, the plaintiff classes are known to the City, who has itemized each and every one of its taxi plate owner and broker's contact information. Moreover, temporal indeterminacy is also inapplicable. Here, the City is only liable for the losses arising from its negligence during a prescribed two year period. This is simply not one of the "rare" cases where the spectre of indeterminate liability remains a concern after the first *Anns/Cooper* stage.[23]

B. Standard of Care

1. The duty of care and standard of care analyses are distinct

21. At paragraphs 550, 553 and 672, the City submits that the applicable standard of care in this case is ultimately subject to its municipal discretion. However, *Nelson* makes clear that any deference this Court may owe to the City remains constrained by the reasonable care standard. Indeed, *Nelson* does not authorize the City to retrospectively determine the standard of care it should have satisfied in this case. Contrary to *Nelson*, the City seeks to conflate the duty of care and standard of care analyses by cloaking its complete inaction with respect to Uber as a "reasonable exercise of municipal discretion".[24]

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[22] Appendix A to Statement of Agreed Facts, Plate Transfer List at F17-F23; Exhibit 1, Plate Transfer List 2006-2012, F8946; Exhibit 138, KPMG Proposal to Serve, dated August 21, 2015, F1044; See generally Exhibit 204, Plate Value Options Paper, dated July 200, A1475-A1505.

[23] *Livent* at para 42-45.

[24] Defendant's submissions at paras 647, 672.

22. In *Nelson,* the Supreme Court reiterated that the reasonableness standard applies to government actors. In doing so, the Supreme Court further held that the duty of care analysis must be kept "separate and distinct" from the standard of care analysis. Specifically, Karakatsanis and Martin JJ. cautioned trial judges that "the standard of care analysis must not be used as another opportunity to immunize governments from liability".[25] In other words, the standard of care analysis is also not a chance for a municipal defendant to raise a disguised policy veto. Indeed, *Nelson* instructs that "the onus is always on the public authority to establish that it is immune from liability because a core policy decision is at issue".[26] As such, whether a decision is immune from reasonableness scrutiny is properly considered at the duty of care stage. To hold otherwise would improperly shift the burden of proof on this point to the plaintiff.

2. No evidence is needed to determine the standard of care

23. The City's argument at paras 544-548 that evidence is required to establish the standard of care is wrong. Evidence is only required in cases in which the subject-matter is technical or involves a claim against a professional, like a surgeon. Evidence is not required where the standard of care can be determined by using "common sense" or where the Court is faced with "non-technical matters or those of which an ordinary person may be expected to have knowledge".[27] This is precisely the case here. There is nothing technical about the standard of care. This Court can use its common sense to determine whether the City acted reasonably. In any event, the plaintiffs tendered evidence about what other municipalities, namely Calgary and

[25] *Nelson* at para 92 (emphasis added).
[26] *Nelson* at para 35 (emphasis added).
[27] *Aylmer* at para 65; *Krawchuck v Scherbak*, 2011 ONCA 352 at para 133.

Toronto, did in similar circumstances. That evidence ought to inform the standard of care analysis, but the plaintiffs are certainly not required to adduce additional evidence.

3. There is no evidence that resource issues affected the City's enforcement

24. The City's argument at paragraphs 616-635 that scarce resources affected its limited or non-existent enforcement is not supported by any evidence. Further, as mentioned above, the City's reliance on the Service Requests to shed light on anything related to the negligence claim is misguided and not supported by the evidence. This Court cannot glean any useful information from these lists other than for the number of calls and the categories. The fact is that the City never quantified the resources that are dedicated to these calls and the City has no idea how long each call took or would take on average. This evidence cannot be relied for anything of import. It is completely lacking in probative value.

25. For example, at paragraph 628, the City makes—for the first time—a "very conservative estimate" that its enforcement efforts against Uber cost $3,402,000. This number appears to have been conjured from a bald assertion by Ms. McCumber on the stand that a simple investigation of an Uber driver would cost $18,000.00 to $20,000.00.[28] However, Ms. McCumber even admitted that she did not have access to the expenses of By-law and Regulatory Services for the relevant time period.[29] This Court should discard this evidence as unreliable. The only "costing" evidence supported by the written record was a throwaway e-mail purporting to claim that $5,432.50 was spent on enforcement.[30]

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[28] See Defendant's submissions at para 621; McCumber Ex., February 7, 2023, 50:27-30.
[29] McCumber Cr Ex., February 7, 2023, 132:1-12; 134:1 to 135:28.
[30] Exhibit 211, E-mail from Christine Hartig to Morgan Tam, dated March 14, 2016, F107-108.

26. There is simply no reliable evidence on the costs of enforcing against Uber, nor whether the City's enforcement effort was constrained by cost.

4. No evidence of decision not to enforce against Uber

27. At paragraphs 646 and 647, the City contends that it made a decision to not enforce the 2012 By-law against Uber or seek an injunction against Uber. The City further implies that such decisions were reasonable and made in light of the *Toronto v. Uber* decision. This attempt to introduce a policy decision into the standard of care analysis is without legal or factual foundation. The City did not tender any evidence whatsoever of a conscious decision not to enforce against Uber or seek injunctive relief against it, let alone evidence explaining its inaction over a two year period. Post-facto legal arguments are not evidence of a decision.

28. The actual evidence before this Court strongly supports an inference that there was no decision. Indeed, the City's lead witnesses could not explain what, if anything, happened with respect to enforcement against Uber. For example, Ms. Hartig testified that she didn't "recall a specific discussion" about whether there was a decision to not enforce against Uber and only enforce against Uber drivers.[31] Likewise, Ms. Jones' testimony revealed that the City had no specific strategy about enforcement against Uber.[32]

29. The evidentiary void continues with respect to the City's failure to seek injunctive relief. The City failed to call any witness that could attest to anyone at the City making a "conscious"[33] decision regarding an injunction. Indeed, Ms. Jones stated in discovery that her main takeaway

[31] Hartig Cr Ex., February 3, 2023, 137:7 to 138:4.
[32] Jones Cr Ex., February 9, 2023, 103:3-6.
[33] *Nielsen v Kamloops (City)*, [1984] 2 SCR 2 at p. 24.

from legal about the *Toronto* decision was that "we would have talked a bit but just that they weren't successful and that there were differences in their by-law definition than Ottawa's".[34] When Ms. Jones was asked directly in discovery if the *Toronto* decision impacted the City of Ottawa's enforcement, she said "not on the front end, no".[35] Following this evasive answer, Ms. Jones was asked whether the *Toronto* decision impacted the "back end", or the question of dispatching charges. In response, Ms. Jones only mentioned the fact that by the time the matter would come to fruition there would have been a new by-law and a new direction.[36] At trial, Ms. Jones could not explain these admissions away.

30. In sum, no coherent conclusion about any decision regarding enforcement and injunctive relief against Uber can be salvaged from the evidence of the City's witnesses. No time. No place. No rationale. The only fact that can be reached on the evidence is that, after the City of Toronto injunction decision was released, the City was of the view that it had a strong case for an injunction and that it did nothing to act on this view.[37]

31. In this regard, the City's legal arguments in May 2023 about the *Toronto* judgment are not evidence of what happened in 2014-2016. Rather, the submissions at paragraphs 653-662 are red herrings devised to distract this Court from the complete absence of evidence regarding any decision-making process at the City of Ottawa in 2014-2016.

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[34] Jones Cr Ex., February 9, 2023, 148:27-30.
[35] Jones Cr Ex., February 9, 2023, 150:18-20.
[36] Jones Cr Ex., February 9, 2023, 150:9 to 151:9.
[37] Exhibit 58, City of Ottawa Taxi Regulation and Service Review, dated December 31, 2015, F2758; Exhibit 149, Draft KPMG Report with Comments from Christine Hartig, dated January 20, 2016, A1817.

32. In any event, a decision as to whether to enforce a by-law must accord with the statutory purpose in order to be reasonable.[38] In *Kamloops*, the Supreme Court held that municipal inaction for no reason or inaction for an improper reason cannot be a conscious decision taken in the *bona fide* exercise of discretion.[39] Correspondingly, a municipality that has not even considered whether a requisite action should be taken, or at the very least not considered it in good faith, has not acted at all with reasonable care.[40] This is a case of complete municipal complacence.

5. The City's deterrence arguments do not assist it

33. The City takes the position that it did not enforce against Uber because it was going to deter Uber through enforcement against drivers. The City then goes on to argue at paragraph 649 that this approach was faster and more cost-efficient. Of course, this argument is inconsistent with the City's position at paragraphs 582- 589 that it was gathering evidence to determine whether Uber was illegally operating in Ottawa.[41] The evidence is clear that, at all times, the City was of the view that Uber was illegally operating. In paragraph 648 of its closing submissions, the City produces an e-mail from Rick O'Connor, the City's Solicitor, that states as much.

34. Placing this contradiction aside, the City's position about deterrence does not assist it. First, the City set the standard of care for itself when it decided that its goal was to deter Uber from starting and continuing its illegal operations. That is what the City itself set to do and, of

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[38] *Ingles v Tutkaluk Construction Ltd.*, 2000 SCC 12 at para 19.
[39] *Kamloops* at p. 24.
[40] *Kamloops* at p. 24.
[41] Jones Cr Ex., February 9, 2023, 102:18-29; 103:20-23.

course, it completely failed. Contrary to the City's argument at paragraph 10, this is not a standard of perfection that the plaintiffs are asking this Court to impose on the City. This is the standard that the City set for itself.

35. Second, the City did not take any meaningful step to achieve this objective. A reasonable municipality who has set a goal for itself of deterring an illegal operator by charging drivers would have charged a multitude more of drivers to achieve this objective. It is plainly obvious that the number of charges that the City laid would not have deterred anyone, let alone a well-resourced multi-national corporation.

36. Third, a reasonable municipality would not have continued with the failed approach at deterrence when it was obvious it was not working. A reasonable municipality would have changed course and pursued Uber directly.

37. Fourth, the suggestion that enforcing against drivers is faster and more cost-efficient than enforcing against Uber is not a serious argument that can be made before this Court. It defies credulity to suggest that laying charges against Uber or seeking an injunction before a Superior Court in Ottawa would take more than two years to complete. Further, the suggestion that an injunction or prosecuting a charge would cost more than 2 year's worth of enforcement against drivers has no air of reality, unless the enforcement is very minimal (as was the case here), which simply amounts to a double failure in meeting the required standard of care.

6. Marc André Way's decisions do not inform the standard of care

38. At paragraphs 673-677, the City argues that Mr. Way's decisions in relation to injunctions are informative of the standard of care. This argument has no merit. Mr. Way is an

individual, not a municipality and, therefore, his decisions have no impact on the standard of care that applies to the City.

PART II - DISCRIMINATION

A. The s. 15 issue is independent of the negligence issue

39. At paragraph 688, the City states that "if this Court rules that the City was not negligent in its enforcement of the 2012 By-law, then the plaintiffs' discrimination claim is narrowed and the impugned regulatory action is limited to the enactment of the 2016 By-law". This is patently not so.

40. The scope of the plaintiffs' s. 15 claim is independent of any finding on negligence. The two causes of action are entirely independent and employ different legal standards. The plaintiffs claim that the City's entire course of conduct—including its lack of enforcement of the 2012 By-law and the enactment of the 2016 By-law—violates s. 15 of the *Charter*.[42] This claim is not tethered to the legal standard for negligence in private law. Thus, this Court's findings on the negligence issue have no effect whatsoever on the scope of the s. 15 claim.

B. There are no "threshold evidentiary requirements" in s. 15

41. At paragraphs 715-781, the City argues that the plaintiffs have not met certain "threshold evidentiary requirements". There are no such "threshold evidentiary requirements" in the s. 15 analysis.

[42] See Amended Amended Statement of Claim at para 28c: "The Amendments and the City's failure to enforce the regulatory scheme impose disproportionate burdens on the minority groups described above, and therefore create a distinction on the basis of race, colour, ancestry, ethnic or national origin, religion or creed, language, place of origin, and citizenship."

42. The City argues that, as a threshold matter, the Court must consider evidence on the full context of the plaintiffs' situation (paragraphs 715-768); and evidence on the actual impact of the regulatory action (paragraphs 769-781). As a matter of law, these are not threshold matters: they are part of the s. 15 analysis. The Supreme Court has been careful to emphasize that the evidence required to make out a s. 15 is flexible, and that claimants should not face unnecessary evidentiary hurdles. For example, in its most recent statement of the law, the Supreme Court emphasized as follows:

> "[t]o give proper effect to the promise of s. 15(1), however, a claimant's evidentiary burden cannot be unduly difficult to meet. In this regard, courts should bear in mind the following considerations:
>
> (a) No specific form of evidence is required. […][43]

43. Imposing two novel "threshold evidentiary requirements" that must be cleared prior to the s. 15 analysis flies in the face of this guidance.

44. The evidence of the impact of the regulatory action is relevant at the first step of the s. 15 analysis.[44] The evidence on the full context of the plaintiffs' situation is relevant at both steps—and the plaintiffs have led compelling evidence on both issues.

C. The individual economic circumstances of plate owners is not necessary to establish discrimination

45. At paragraphs 720-723, the City impugns the plaintiffs' expert evidence as being too broad to be meaningful. It argues that evidence on economic disadvantage of the groups to which

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[43] *R v Sharma,* 2022 SCC 39 at para 49 [***Sharma***].
[44] See *Sharma* at paras 42-50.

the plate owners belong does not establish the individual disadvantage of plate owners. In doing this, the City misconstrues the Supreme Court's clear guidance.

46. The Supreme Court has been consistent and deliberate in casting a broad net for the kind of evidence that can establish discrimination. There is no set formula or requirement for evidence; rather, the Supreme Court has deliberately set a flexible approach. For example, in *Fraser*, the Supreme Court clarified the type of evidence that can be brought in a s. 15 claim:

> [56] Two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group. The second is evidence about the results of the law.
>
> [57] Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation" (Withler, at para. 43; see also para. 64). This evidence may come from the claimant, from expert witnesses, or through judicial notice (see *R. v. Spence*, 2005 SCC 71 (CanLII), [2005] 3 S.C.R. 458). The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group, such as an inability to work on Saturdays or lower aerobic capacity (*Homer v. Chief Constable of West Yorkshire Police*, [2012] UKSC 15, [2012] 3 All E.R. 1287, at para. 14; *Simpsons-Sears*; *Meiorin*, at para. 11). These links may reveal that seemingly neutral policies are "designed well for some and not for others" (*Meiorin*, at para. 41). When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.[45]

47. In any event, the s. 15 analysis does not depend on Dr. Ornstein's evidence alone. To recall, Dr. Ornstein's evidence established that:

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[45] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 56-57 (emphasis added) [***Fraser***].

(a) class members are overwhelmingly from racialized and immigrant groups;

(b) class members belong to racial groups that are disadvantaged; and

(c) race and immigration overlap and reinforce disadvantage.

48. However, Dr. Ornstein's evidence does not attempt to prove the economic circumstances of each individual class member. Nor does his evidence attempt to illustrate the effect of the City's actions. Rather, the plate owner testimony and the myriad evidence on the devastation of the taxi industry establish the results of the City's response to Uber, including the decline in plate values. In tandem, the testimony of individual plate owners qualitatively illustrates the barriers faced by class members on the basis of race and immigration.

49. At paragraph 728, the City argues that evidence of the incomes of individual class members is necessary to establish the s. 15 claim. Similarly, at paragraphs 731-735, the City argues that sociological data about the class members' "actual circumstances" is needed. It is not.

50. The City provides no jurisprudence to support this position. The Supreme Court in *Fraser* did not require evidence of the specific economic situation of the claimants. In *Fraser,* the claimants established that job-sharing participants—predominantly women—were disadvantaged compared to non-participants[46] through tendering evidence that women *as a group* face a disadvantage balancing professional and domestic work.[47] In the case at bar, the sociological evidence from Dr. Ornstein speaks to the social, cultural and other barriers faced by

[46] *Fraser* at para 97.
[47] *Fraser* at paras 98-106.

certain immigrant and racialized groups—the groups to which class members predominantly belong. That is precisely the kind of evidence that the Supreme Court has repeatedly said is useful.

51. In any event, the four plate owners—Ziad Mezher, Iskhak Mail, Yeshitla Dadi, and Antoine El-Feghaly—gave vivid qualitative examples of the type of disadvantage faced by class members. This testimony spoke to the struggles of immigration, the challenges faced in gaining employment, the language barrier, and the range of choices available to class members at each step of their journey. It is completely consistent with the expert evidence. The City ignores these barriers, focusing only on the hard-won economic gains the plate owners have made over many years of struggle. Yet again, the City attempts to erase the struggles of plate owners from the narrative.

D. Race and immigration reinforce disadvantage

52. At paragraph 763, the City states that "as Dr. Galabuzi explained, immigrant precarity fades with time. As an immigrant becomes integrated into Canadian society, their economic status tends to move away from disadvantage." Dr. Galabuzi did not give this evidence, and there is no basis in any evidence for this assertion. Dr. Galabuzi stated categorically "The [Ornstein] Report effectively establishes the claim that the population in question constitutes a historically disadvantaged group of racialized immigrants whose attachment to the labour market is tenuous as documented by various studies."[48] In fact, Dr. Galabuzi's published research proves the opposite of what the City says his evidence was: for racialized immigrants, economic

[48] Galabuzi report at pp 6-7, A933-A934.

disadvantage measurably persists over generations.[49] After reviewing his published research, Dr. Galabuzi testified as follows:

> Q. Okay. Thank you. So can we conclude from this that racialization is one factor, immigration is another factor, and for at least these four groups we've just seen, is it fair to conclude that racialization and immigrant status combine to compound a disadvantage?
>
> A. I, I think the language I'll say is there's an interplay between racialization and immigration, that, that helps explain these disadvantages.[50]

53. Thus, race and immigration combine to reinforce disadvantage, and this disadvantage does not fade with time.

E. The City has conceded that its regulatory action harmed the plate owners

54. At paragraphs 769-773, the City argues that the plaintiffs must establish the "actual impact" of the impugned regulatory action, and at paragraphs 773-780, it correctly states that the expert evidence does not establish the impact of the impugned regulatory action. The City then argues that "the Court does not have the evidence it needs to satisfy the test for discrimination" (at paragraph 781). This is not true. There is plenty of fact evidence establishing the harm from the City's actions.

55. In fact, the City relies on this evidence when it asserts that other market participants have gained power in relation to plate owners. For example, at paragraphs 877—881, the City points to multiple sources of evidence that as a result of the City's regulatory actions, plate owners have diminished bargaining power in relation to Uber and taxi drivers. This has resulted

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[49] Galabuzi Cr Ex., February 16, 2023, 11:25 to 14:20; Exhibit 232, Sheila Block and Grace-Edward Galabuzi, "Persistent Inequality: Ontario's Colour-coded Labour Market," *Canadian Centre for Policy Alternatives* (2018), Table 8, A2576.

[50] Galabuzi Cr Ex., February 16, 2023, 14:15-22.

in lower plate rents, among other things.[51] The City concedes that the harm was caused by the City's regulatory action: "[t]his shift in market power has been caused, in part, by the City's regulatory action with respect to PTC services".[52]

F. There is no "arbitrariness" threshold at the second step

56. At paragraphs 826-887, the City imports an artificial hurdle into the second step of the discrimination analysis. They import an arbitrariness threshold into the test—a threshold the Supreme Court has clearly rejected.

57. At paragraph 828, they state that "[t]he state is entitled to differentiate between groups in legislation or regulation. That differentiation will only constitute discrimination sufficient to meet the burden of step two if it is arbitrary and based on irrelevant personal characteristics". This is not the law.

58. For this, the City purports to rely on the Supreme Court's most recent statement of the test in *Sharma*. Nowhere does the Court set out such a requirement. At step two, the question is: does the state action impose a burden or deny a benefit that reinforces, perpetuates, or exacerbates the group's disadvantage?[53] The focus is mainly on the claimants, not the state. Arbitrariness, stereotyping and prejudice are factors that a court may consider, but they are explicitly not required to make out a claim. A full citation of the *Sharma* Court's description of the burden at step two is instructive:

[51] See especially Defendant's submissions at para 878.
[52] Defendant's submissions at para 881.
[53] See *Sharma* at para 28.

[51] It has never been the view of this Court that every distinction is discriminatory (*Andrews*, at p. 182). Hence the importance of the second step of the s. 15(1) test, requiring the claimant to establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage. The question becomes, what does it mean to reinforce, perpetuate, or exacerbate disadvantage?

[52] Courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirements. Two decisions of this Court demonstrate this point. In *Fraser*, Abella J. observed: "The goal is to examine the impact of the harm caused to the affected group", which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (para. 76 (emphasis added), citing C. Sheppard, Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada (2010), at pp. 62-63). In *Withler*, this Court explained that a negative impact or worsened situation was required:

> Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation. [para. 37]

[53] This Court has outlined several factors that may assist a judge in determining whether claimants have met their burden at step two: arbitrariness, prejudice, and stereotyping. These factors are not necessary components; while "[t]hey may assist in showing that a law has negative effects on a particular group, . . . they 'are neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit'" (*Fraser*, at para. 78, citing *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 329). Nonetheless, courts may usefully consider whether these factors are present:

> (a) Stereotyping or prejudice: These factors played a critical role at step two in *Ontario (Attorney General) v. G*, 2020 SCC 38. There, the Court held that the impugned law had a discriminatory impact because it furthered stereotypes and "prejudicial notions" about persons with disabilities (para. 62), reinforced "the stigmatizing idea that those with mental illness are inherently and permanently dangerous" and, in so doing, perpetuated the disadvantage they experienced (para. 65).

> (b) Arbitrariness: A distinction that does not withhold access to benefits or impose burdens, or that is based on an individual's actual capacities, will rarely be discriminatory (*Andrews*, at pp. 174-75). Abella J. described the role that arbitrariness can play in the analysis in both *Quebec v. A* (at paras. 221 and 331) and *Taypotat* (at paras. 16, 18, 20, 28 and 34). *Taypotat* focused on "arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (para. 20 (emphasis added)).

59. Later, the Court notes that courts "should also consider the broader legislative context" when determining whether a distinction is discriminatory under the second step.[54] In this analysis, a court can consider things such as the objects of the scheme, the policy goals, and whether it is designed to benefit a number of groups.[55] Claimants are not required to demonstrate that the scheme is arbitrary.

60. In any event, even if this Court were to consider arbitrariness, the City's conduct in this case was arbitrary as it most certainly did not respond to the actual capacities and needs of the plaintiffs.

G. The City's arguments on comparators should be rejected

61. At paragraph 794ff, the City argues that any comparison under s. 15 should include "the members of the VFH industry, that is, taxi plate license holders, taxi drivers, and PTC drivers". At paragraphs 832 and 853-865, the City argues that because the scheme had a positive effect on other racialized industry participants, that it did not perpetuate the disadvantage of the plaintiff

[54] *Sharma* at para 56.
[55] *Sharma* at para 59.

class. They argue that "since [taxi and PTC drivers] fall within the same demographic categories as the plate holders, the plaintiffs must lead evidence that these groups also suffered a disadvantage from the City's action in order to establish that any claimed disproportionate effect is based on racialization or immigration status."[56] This type of comparison ought to be rejected for several reasons.

62. First, the comparison to taxi and Uber drivers is based on the assertion that they are also racialized immigrants—in other words, that they share a disadvantage on the basis of race and immigration.[57] Leaving aside that this assertion is unproven, as a matter of law, there is no reason to compare one disadvantaged group to another. In *Sharma*, the Supreme Court clearly stated that "[a]t step one of the s. 15(1) test, claimants must demonstrate a disproportionate impact on a protected group as compared to non-group members".[58] Comparing groups who share a disadvantage would mean comparing the women in *Fraser* who job-shared to women who were forced to take unpaid leave—a comparison explicitly rejected in the majority judgment;[59] or comparing the Indigenous offender in *Sharma* to Black offenders rather than non-Indigenous offenders.[60] In the City's table at page 286 of its submissions, all the examples compare a disadvantaged group to a group that does not share that disadvantage. None of the examples entail comparing one disadvantaged group to another. The City's proposed comparison does not fit the framework of s. 15 at all.

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[56] Defendant's submissions at para 864.
[57] See Defendant's submissions at para 864.
[58] *Sharma* at para 40.
[59] See *Fraser* at paras 93-95.
[60] See *Sharma* at para 76 for comparison to non-Indigenous offenders.

63. Second, there is no evidence upon which to make this comparison. At paragraph 859, the City states that "[t]he evidence in the record suggests that PTC drivers share many of the same demographic characteristics with taxi drivers". However, unlike the detailed analysis of the racial make-up of the plaintiff class based on plate owner names and the survey data, there is no such data or analysis for any group of drivers. Had the City wished to tender fact or expert evidence on the ethnic make-up of other industry participants or the effects of the regulatory change on these participants, it could have done so. The City is in possession of all the relevant raw data. As it stands, there is no comparable data on the racial make-up of taxi drivers or Uber drivers; thus, no basis to conclude that the racial make-up or other demographic characteristics are the same. The City's attempt to rely on Dr. Ornstein's on-the-spot analysis of two names from the Triangle Investigation report [61] as a "sample" of the entire universe of Uber drivers demonstrates the desperate lack of evidence in this regard.

64. Nor is there any basis in evidence to compare the effect of the City's regulatory action on plate owners to that of other industry participants. The City called no evidence from any drivers. There is no evidence whatsoever of the economic conditions (*e.g.*, income, wealth, precarity) of taxi drivers either before or after the introduction of Uber; and no evidence whatsoever of the economic conditions of Uber or Lyft drivers. Thus, there is no evidence of whether the City's regulatory action improved or worsened these conditions. Dr. Galabuzi stated

[61] See Defendant's submissions at paras 861-862, Ornstein Cr Ex., January 24, 2023, 136:28 to 141:13.

that he did not know whether Uber drivers were better or worse off than either taxi drivers or taxi plate owners.[62]

65. Further, while the City correctly notes that under s. 15, comparisons can be made with other people in the context, the City's suggested comparison is not consistent with the City's own characterization of the position of plate owners within the industry. The City correctly notes that, as the "ownership class"[63] in the taxi industry, the plate owners are in a distinctly different position from non-plate-owning taxi drivers and Uber drivers, which the City characterizes as the industry's "labour class".[64] By the City's classification, the appropriate comparator for taxi plate owners would be other "ownership class" industry participants: in this case, the venture capitalists who own Uber.

66. This disjoint illustrates the inappropriateness of the City's proposed comparison between plate owners and drivers: the comparison hangs solely on the premise that these groups are comparable *because they are racialized*. This is typified in the City's statement, unsupported by any evidence, that "[p]resumably, immigrant and racialized taxi drivers and PTC drivers have had similar lived experiences as the plate holders who testified at trial".[65] This is the very definition of stereotyping.

[62] Galabuzi Cr Ex., February 16, 2023, 71:5-14, 73:5-8.
[63] Defendant's submissions at paras 47, 59, 62, 256.
[64] Defendant's submissions at para 256.
[65] Defendant's submissions at para 884.

H. The choices and circumstances of single plate owners do not cease to be shaped by systemic inequality when they decide to become plate owners

67. At paragraphs 844-852, the City argues that the effects of the City's regulatory action are based on plate owners' status as a plate owner and not on personal characteristics. While the City accepts that a taxi driver's decision to become a taxi driver is explained by the phenomenon of ethnic niches, it argues that the decision to become a taxi plate owner is not. Rather, it argues this decision is a "business decision, and it is in no way connected to the economic vulnerability that typifies the new immigrant experiences".[66] This argument should be rejected for four reasons.

68. First, it is irrelevant. As discussed above, it is set within an artificial "arbitrariness" threshold at step two of the analysis.

69. Second, it is absurd. It ignores the obvious path dependence from taxi driver to taxi plate owner. Marc André Way and the single plate owners testified about this path dependence. For example, all the single plate owners who testified started out as drivers. This is typical. Marc André Way described the typical experience of an immigrant who enters the industry as a driver and later becomes a plate owner.[67] It requires a special kind of mental gymnastics to ignore this path dependence—to imagine that an individual's choices are shaped by their circumstances right up to the point where they make a major investment in the industry they have been working in for several years. The City sets up a false dichotomy between circumstances and choice, and between sources of disadvantage (*e.g.*, immigration and racialization) and universal aspirations

[66] Defendant's submissions at para 845.
[67] Way Ex., January 5, 2023, 7:31 to 8:24; 38:26 to 40:17.

(*e.g.*, the desire to generate income and create economic stability). They argue that if a taxi plate owner has a universal aspiration, they are making a choice to pursue that aspiration, and this choice is not shaped by circumstances. This logic flies in the face of common sense and all the evidence.

70. Third, it is based upon logic explicitly and repeatedly rejected by the Supreme Court. For example, in *Fraser*, participants in an RCMP job-sharing program were not eligible for pension credits for the time spent in the program. The participants in the program were predominantly women with children. The claimants argued that the exclusion from pension credits was discriminatory on the basis of sex. The Federal Court of Appeal found that the exclusion from pension credits was the result of the claimants' choices, not because of gender or parental status. The Supreme Court repudiated this logic over seven full paragraphs:

> [86] In relying on Ms. Fraser's "choice" to job-share as grounds for dismissing her claim, the Federal Court and Court of Appeal, with respect, misapprehended our s. 15(1) jurisprudence. This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.
>
> […]
>
> [92] By invoking the "choice" to job-share as a basis for rejecting the s. 15(1) claim, the Federal Court and Court of Appeal removed the "challenged inequality from scrutiny, effectively taking it off the radar screen so as to circumvent examination of the equality issues at stake" (*Majury*, at p. 219). It is an approach that this Court's s. 15 jurisprudence eschews.[68]

[68] *Fraser* at paras 86, 92.

71. Fourth, it inappropriately relies on a decision of the Human Rights Tribunal of Ontario from 2012.[69] In *Addai*, the Human Rights Tribunal rejected a claim of discrimination between two types of licensing regimes in Toronto. It relies on older Supreme Court jurisprudence, much of which has been overtaken by more recent decisions in *Kapp*, *Fraser* and *Sharma*.[70] The Tribunal found that the link between the prohibited ground and the adverse effect was not made out on the facts of that case. However, this finding is not determinative for this Court, given the extensive evidence regarding the racial make-up of Ottawa's taxi plate owners, and the connections between race, immigration, and the taxi industry in Ottawa. In fact, the Tribunal explicitly stated that, in another context, the connections between the prohibited ground, the occupations and the disadvantages experienced can be made out:

> [75] These findings should not be taken to preclude the possibility that a group of people who are working in an occupation which is so notoriously tied to a prohibited ground and questionable working conditions that the Tribunal would be compelled to take judicial notice of the connections between the ground, the occupation and the disadvantages experienced by the complainants. Fundamentally, Mr. Addai argues that he is a member of a group of racialized people who have been of deprived of the benefits of a Standard licence by the respondent. However, he acknowledges that there is no entitlement to the continuation of the pre-1998 taxi licence regime. There was insufficient evidence from which I could draw the inference that the financial circumstances of people who come from different countries and choose to become taxi owners, are so notorious that I could take judicial notice of the fact that it is their personal characteristics which render the Standard licences prohibitive.

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[69] Defendant's submissions at paras 849, 915-919, citing *Addai v Toronto (City)*, 2012 HRTO 2252 [***Addai***].
[70] See *Addai* at paras 49, 66-70, citing to the Supreme Court's 1989 decision in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, among others.

In that case, the Tribunal was unwilling to take judicial notice of the connections. In this case, no judicial notice is needed: the evidence proves the link between the ground, the occupation and the disadvantage.

72. Finally, it goes without saying that a Human Rights Tribunal decision—let alone one that relies on different evidence in a different context and outdated caselaw—is not binding on this Court. This submission also fully responds to the City's contention, at paragraphs 915-921, that the *Addai* decision precludes the claim under the Human Rights Code.

I. The breach of s. 15 is not justified under s. 1

73. At paragraphs 893-912, the City makes submissions on s. 1.

74. The City has not met its burden of demonstrating a justification under s. 1. The City's s. 1 arguments are based mainly on procedural justifications. However, s. 1 review is substantive, not merely procedural.

75. The paltry space devoted to this argument, combined with failure to plead or advance a s. 1 defence at any point prior to trial, demonstrates that the City does not seriously rely on a s. 1 defence. Thus, if a violation of s. 15 is made out, it will not be justified under s. 1.

76. In the event that the Court entertains the City's belated arguments under s. 1, the plaintiffs herein provide submissions on s. 1.

77. The plaintiffs take no issue with the statement of the law at paragraphs 893-900 of the City's submissions.

78. Here, two aspects of the City's conduct must be treated separately: its failure to enforce the 2012 By-Law against Uber and its demolition of plate value through the regulatory regime it created under the 2016 By-Law. 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. The enactment of the 2016 By-law is not justified because it is neither rationally connected, minimally impairing, nor proportional.

1. Failure to enforce the 2012 By-law

(i) Failure to enforce the 2012 by-law is not prescribed by law

79. Section 1 of the Charter provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

80. The section 1 analysis thus involves a preliminary step: determining whether the impugned state action is "prescribed by law."[71]

81. In *R v Therens*, the Supreme Court of Canada stated:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of the statute or regulation or from its operation requirements. The limit may also result from the application of a common law rule.[72]

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[71] See e.g. *Halpern v Canada (AG)*, [2003] OJ No 2268 at paras 109–10.
[72] *R v Therens*, [1985] 1 SCR 613 at para 56.

82. The City failed to enforce its 2012 By-Law against Uber. Rather than constituting a limit prescribed by law, the City's course of action was the opposite: a failure to uphold a by-law that was validly in force.[73]

83. Failure to enforce a valid by-law cannot constitute a reasonable limit prescribed by law. The City's conduct was opposite of what the law required.

(i) The City had no pressing and substantial objective not to enforce the 2012 By-law

84. The City has not advanced any policy objective related to its failure to enforce the 2012 By-law. Thus, the City's conduct fails at the first step of the *Oakes* test: there is no pressing and substantial objective.

2. Enactment of 2016 By-law

85. The remainder of the s. 1 analysis focusses on the by-law change.

86. The City maintains that the By-law review advanced three objectives: consumer protection, accessibility, and public safety. There is no debate that these objectives are pressing and substantial. However, the means the City chose to achieve these objectives were not rationally connected or proportionate to the objectives. The City makes no substantive submissions on why the specific means chosen were rationally connected, minimally impairing, or proportionate. As such, the discriminatory effect of the 2016 By-Law is not justified under s. 1.

(i) There is no rational connection between the City's By-Law objectives and the means chosen to achieve them

[73] See Plaintiffs' closing submissions at paras 246-280.

87. The City's by-law review purportedly centred on three policy objectives: consumer protection, accessibility, and public safety. However, on each front, the City made key decisions that did not align with these objectives. The misalignment between the City's stated objectives and the decisions it made reveal no rational connection between these goals and the 2016 By-law.

a) Consumer Protection

88. Following its review, KPMG produced many recommendations purporting to support consumer protection. However, some of its recommendations arbitrarily distinguished between the taxi and PTC categories in ways unconnected to consumer protection. For example, an examination of the differentiated pricing rules reveals that they have no rational connection to consumer protection. KPMG recommended that PTCs be permitted to use variable pricing regimes while taxis could not do the same.[74] This distinction—which was taken up in the 2016 By-law—has no basis in consumer protection.[75]

89. Further, while KPMG recommended that the variable pricing regime for PTCs be subject to approval by the Chief License Inspector, the City rejected this recommendation, stating that only the pricing regime for the taxi industry should be subject to approval. Thus, taxi fares remained highly regulated while PTC fares were completely unregulated. The rationale for this differential treatment is that "it is important for consumer protection and public safety that a regulated fare be applied in an environment where drivers are not known to customers".[76]

[74] Exhibit 60, Document 5 to the March 16, 2016 Staff Report, F2965.
[75] Bourns Cr Ex., February 1, 2023, 110:29-32; 113:25 to 114:11.
[76] Exhibit 60, Document 5 to the March 16, 2016 Staff Report, F2965.

However, the 2016 By-law permits PTCs to engage in "surge pricing", a business model the City has openly characterized as a "buyer beware" concept.[77] In this regard, the comments made by Bob Brown of the Council for Canadians with Disabilities at the Special Meeting of the Community and Protective Services are particularly apt: "it is not sufficient for the City to say buyer beware. It has a regulatory duty to ensure human rights, equal access to all members of the public, including persons with disabilities". [78]

b) Accessibility

90. Accessibility was a stated objective of the by-law review; however, the 2016 By-law itself undermines this principle.

91. First, Uber is not required to provide accessible service or accessibility training. KPMG recommended that PTCs be required to provide 15% or more of their services by accessible vehicles.[79] However, this recommendation was not taken up.[80] Consequently, Uber does not provide wheelchair accessible service.[81] Moreover, PTCs are not required to provide any accessibility training to drivers.[82]

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[77] Jones Cr Ex., February 10, 2023, 18:5-15. Brian Bourns Cr Ex., February 1, 2023, 119:29, 114:11; Exhibit 60, Document 5 to the March 16, 2016 Staff, F2965.Under surge pricing, PTCs are authorized to charge exorbitant prices at peak times where demand increases. In contrast, taxi brokers may only offer discounted fares through their smartphone applications: Way Ex., January 10, 2023, 16:25-27.

[78] Jones Cr Ex., February 10, 2023, 13:21 to 14:11.

[79] See Exhibit 60, 2016 Staff Report Document 5; Hartig Cr Ex., February 6, 2023, 42:19-43:8.

[80] The 2016 staff report did not carry through this recommendation, citing the impossibility of accurately monitoring the amount of hours dedicated to accessible transit by PTCs, "given the number of affiliated vehicles and the ebb and flow of part time vehicles active at any given time", Exhibit 60, Document 5 to the March 16, 2016 Staff Report, F2962–F2963.

[81] Hartig Cr Ex., February 6, 2023, 43:24 to 44:4.

[82] Under the 2016 By-Law, it is up to the PTC company to decide what, if any, training is given to drivers on accessibility: Hartig Cr Ex., February 6, 2023, 44:5-45:4. According to Ms. Hartig and the 2016 staff report, this is to take into account PTCs' "different business model": Hartig Cr Ex., February 6, 2023, 44:26 to 45:2

92. Second, the 2016 By-law has resulted in fewer accessible vehicles on the road than before. Shortly before the by-law change in April 2016, city staff (Ms. Hartig and Ms. Jones) were aware that accessible plates were already not being used, reportedly because the plate owners could not afford to keep the vehicles in service.[83] At the time, Ms. Hartig believed that this reduction in service was due to the introduction and legalization of Uber.[84]

93. Third, there is no evidence that the voluntary accessibility surcharge has mitigated the widespread losses to accessible services in any way. The surcharge remains far lower than what KPMG recommended.[85] Ms. Hartig testified that an allocation plan from 2019 has been implemented, and that some funds have been expended.[86] However, she could not say how much of the funds have actually been spent.[87] The City has not demonstrated that this fund in any way makes up for the loss of accessible transportation resulting from the 2016 By-law.

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[83] Ms. Hartig had been advised that four plates (three of them accessible) had been returned to the City because the plate owners "cited having financial difficulties" and "because they [plate owners] cannot afford to purchase new vehicles": Exhibit 167, Email chain dated April 8, 2016; Hartig Cr Ex., February 6, 2023, 45:26 to 56:17.

[84] In her email to Ms. Jones, Ms. Hartig stated that "with the introduction of PTCs, the circumstances may increase in frequency." Exhibit 167, Email chain dated April 8, 2016; Hartig Cr Ex., February 6, 2023, 49:20 to 50:5, 52:6 to 52:10. In a follow-up email, Ms. Hartig stressed that "with the introduction of PTC regulation, the turning in of plates may increase in frequency […]":Exhibit 167, Email chain dated April 8, 2016; Hartig Cr Ex., February 6, 2023, 52:25-55:11. Instead of making any change to the upcoming by-law, Ms. Jones suggested that this issue could be dealt with later, when staff report back on accessibility: Exhibit 167, Email chain dated April 8, 2016; Hartig Cr Ex., February 6, 2023, 55:12 to 56:3.

[85] KPMG had recommended 30 cents per ride: Hartig Cr Ex., February 6, 2023,60:13-61:8; City of Ottawa Taxi Regulation and Service Review, dated December 31, 2015, Exhibit 58 at F2728. In 2016, the surcharge was set at 7 cents per trip: Hartig Cr Ex., February 6, 2023, 61:12-61:14. In 2021, council directed staff to negotiate an increase to 30 cents per trip: Hartig Cr Ex., February 6, 2023, 59:30 to 63:17; and Exhibit 155, Memo titled "Renegotiation of the voluntary vehicle for hire accessibility surcharge", dated June 8, 2021, B-1-5838. They were able to obtain an increase to 10 cents per trip; still well below KPMG's recommendation: Exhibit 155, Memo titled "Renegotiation of the voluntary vehicle for hire accessibility surcharge", dated July 8, 2021, B-1-5838; Hartig Cr Ex., February 6, 2023, 61:15 to 61:23; 62:1 to 63:17.

[86] Hartig Cr Ex., February 6, 2023, 60:13 to 61:8.

[87] Hartig Cr Ex., February 6, 2023, 60:13 to 61:8.

c) Public Safety

94. The City's third objective in implementing the 2016 By-Law was the protection of public safety. However, it made several decisions that negated this objective. First, the City chose not to mandate cameras in PTCs while making them mandatory in taxis. Second, the City required taxi cameras to be updated to make use of current technological advancements.[88] The City justified this differential treatment on the basis that taxi drivers pick up people unknown to them, even though Uber drivers are also personally unknown to passengers, who only have access to a first name and a photo of their driver after booking.[89]

95. It is irrational to say that the rationale for cameras in taxis does not apply to Uber. Cameras enhance public safety in all vehicles for hire by providing cogent evidence about passenger incidents that after-the-fact reports simply do not provide. In this regard, two plate owners, Mr. Mezher and Mr. Dadi, testified to the use camera footage from their taxicab had in prosecutions of assault, theft, and other criminal activity.[90]

96. Based on this analysis, a rational connection between the 2016 By-Law and its stated objectives cannot be established. The end result is a By-Law that legalizes Uber while undermining the objectives of consumer protection, accessibility, and public safety.

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[88] Exhibit 60, Document 5 to the March 31, 2016 Staff Report at F2962; Exhibit 59, March 31, 2016 Staff Report at F2836; Bourns Cr Ex., February 1, 108:25-32.
[89] Exhibit 58, KPMG Final Report, dated December 31, 2015 at F2739;
[90] See Dadi Ex., January 23, 2023, 107:29 to 109:25; Mezher Ex., January 18, 2023, 19:29 to 21:14.

(ii) The City's By-Law does not minimally impair the plate owners' s. 15 rights

97. The City does not make any specific submissions on minimal impairment. Thus, it has not met its burden on this part of the test.

98. The City did not have to infringe the class members' s. 15 rights in order to achieve its objectives. A minimally impairing approach would have safeguarded or compensated for the value of taxi plates that the City itself had created and that it knew the plate owners relied upon. Instead, by the City's own admission, it took no account whatsoever of class members' s. 15 rights; thus, the City's actions cannot be said to be minimally impairing of those rights.

(iii) The negative effects of the 2016 By-Law on plate owners outweigh any benefits to the public

99. The City does not make any specific submissions on how the salutary effects of the 2016 By-law outweigh the deleterious effects on the class members. Thus, it has not met its burden on this part of the test.

100. The 2016 By-Law made Uber legally available to consumers—at the expense of the life savings and retirements of many racialized and immigrant plate owners. As set out above, the benefits to the public in terms of consumer protection, accessibility and public safety are marginal or non-existent. As such, the negative effects of the 2016 By-Law outweigh its benefits. On the whole, the City's conduct cannot be saved under s. 1.

PART III - UNLAWFUL TAX

A. The taxi fees are imposed for a public purpose

101. At paragraph 1019-1022, the City raises—for the first time—the argument that the fees are not taxes because they are "not intended for a 'public purpose'".

102. The City did not plead this defence.[91] Rather, as evidenced in the Amended Statement of Defence, the City pleaded that there was a nexus between the fees and the costs of the program:

> 65. The City states that the fees and charges imposed on the Plaintiffs and the members of the proposed Classes for the services delivered and activities carried out by the City in connection with the 2012 Taxi By-law are connected to and imposed in order to permit the City to defray the costs it incurs in connection with the 2012 Taxi By-law and are therefore permissible fees and charges.

103. For this new defence, the City relies on the *Waterloo* case. In that case, Justice DiTomaso's reasons on the "public purpose" criterion overlap considerably with his findings on the "nexus" criterion. He found that the related By-law was intended to be "revenue neutral over the long term", and as such, the fees charged under it were not levied for a public purpose, but rather for cost recovery of the program in question.[92] He then relied on this finding of revenue neutrality to find a nexus between the fees and the cost of providing the service.[93]

104. In any event, no such evidence exists in this case.

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[91] See Amended Statement of Defence at paras 65-66.
[92] *1736095 Ontario Ltd. v Waterloo (City),* 2015 ONSC 6541 at paras 51-53 [***Waterloo***].
[93] *Waterloo* at paras 60-67, 70-71. See in particular paras 70-71, where the findings on "nexus" come directly on the heals of "public purpose".

105. In the *Waterloo* case, the City of Waterloo tendered evidence of a direct comparison between the projected fees and costs of the program being funded by fees. The Court describes the evidence that established the nexus between the costs and the fees in that case:

> [54] The evidence discloses that By-law 047 licence and renewal fees were calculated by the City's Finance Department based on estimated costs associated with the RHL Program, including staffing and non-staffing expenditures relating to processing applications (including certain economics of scale associated with townhouses), rental property inspection and enforcement efforts. The calculations also took into consideration the City's best estimate as to the number of licences that would be issued within the first five years of the RHL Program.
>
> [55] The staff report regarding dated March 31, 2011 presented at the April Council Meeting can be found in the City's Application Record at Volume 1 Affidavit of Jim Barry sworn September 22, 2014 at p. 274. That report includes information concerning projected fees, time and expenses related to the RHL Program. At page 300 can be found Figure 5: Anticipated net Income by year by option (three options) and Figure 6: Fee per category. Figure 6 reflects the fees that would be associated with each class of licence, initial and renewal as well as the fee for a consultation under the three options referred to above. All of the options presented by staff to Council were revenue neutral. At page 348 of the said Application Record can be found Schedule G: Revenue and Expenditures which constitutes page 77 of that same staff report regarding residential rental housing by-law. I am satisfied that the breakdown of all of these numbers reflect considerable and significant good faith efforts on behalf of Council to match the cost of the Program with revenues expected to flow from the licensing fees.[94]

106. Despite the City's ample opportunity to produce such evidence, and despite the voluminous evidence and submissions the City has tendered, evidence of a direct comparison of fees to expenses is notably lacking.

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[94] *Waterloo* at paras 54-55 (emphasis added).

B. The claim for restitution of unlawful taxes is not time-barred

107. At paragraph 1053, the City argues that the plaintiffs are barred by the one-year limitation period under s. 273 of the *Municipal Act*. This limitation period manifestly does not apply. This limitation period applies to applications to quash a by-law. The plaintiffs are not seeking to quash the By-law. Rather, they seek a declaration that the fees are *ultra vires* and restitution for unlawful taxes.[95]

108. At paragraph 1054, the City argues that the restitution claim is subject to the two-year limitation period in the *Limitations Act, 2002*. This limitation period is triggered from the date the claimant knew or ought to have known that the claim arose.[96] In this case, the evidence of the lead plaintiff positively establishes that the claim for restitution of unlawful taxes was discovered in 2016.[97] The City provides no evidence or argument that the plaintiff ought to have known of the claim sooner. This is because it was entirely reasonable for the plaintiffs to only discover the claim in 2016.

109. At paragraph 1055, the City argues that the plaintiffs should only be entitled to recover amounts paid within two years of the initiation of the action. No basis in law is given to support this argument; it should be rejected. The plaintiffs are entitled to restitution for the fees imposed from 2001 onwards. Any issues about how far back the plaintiffs are entitled to restitution can be left to the damages phase.

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[95] See Amended Statement of Claim at paras 29-31, 33, 36.
[96] *Limitations Act, 2002*, SO 2002, c 24, Sched B, s 5(1)(a) and (b).
[97] Way Re Ex., January 20, 2017, 83:5 to 84:16 (rebutting the presumption in s 5(2) of the *Limitations Act*).

C. The City cannot retroactively collect additional fees based on an ex-post costing analysis

110. At paragraph 1050, the City proposes that if this Court finds that the City failed in its obligation to carry out a proper costing analysis, it should be ordered to do so. It further argues that, based on that costing analysis, the City would "collect or return amounts charged to the plaintiffs (as the case may be)." This suggestion defies the rule of law: fees cannot be retroactively adjusted based on a costing analysis that the City should have performed decades ago. It is not a judicial remedy. The only remedy requested by the plaintiffs is restitution.

PART IV - MISCELLANEA

A. The City's articulation of the facts and reliance on evidence should be approached with caution

111. This Court should approach the City's articulation of facts and evidence with caution. This is because the City has: provided inaccurate information;[98] mischaracterized evidence;[99] made assertions that have no evidentiary foundation;[100] included inadmissible hearsay and opinion evidence (if it is being tendered for its truth or substance);[101] relied on findings of fact from a different case as purported proof of facts in this case;[102] and relied on lay testimony for legal conclusions.[103]

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[98] For example, see Defendant's submissions at para 39.
[99] For example, see Defendant's submissions at para 42.
[100] For example, see Defendant's submissions at paras 859, 472.
[101] For example, see Defendant's submissions at paras 57, 147, 152-162, 164-172, 178-188, 211, 213, 214, 216, 239, 240, 289-296.
[102] For example, see Defendant's submissions at paras 557-559.
[103] For example, see Defendant's submissions at paras 389, 1040.

B. The plaintiffs had no obligation to inform the City of its illegal conduct

112. The City complains at paragraphs 174, 231, 241, 963, and 1041 that the plaintiffs did not inform it that it was discriminating against them and that its fees are unlawful. It is unclear why the City is making these complaints. The plaintiffs have no obligation to inform the City that its conduct is illegal. To impose such an obligation on an innocent party would be absurd.

C. The plaintiffs own their plates and have a property interest in them

113. In its closing submissions, the City simultaneously takes the position that the plaintiffs: (1) do not own their plates because the City has exclusive ownership of the plates; and (2) the plaintiffs are the ownership class in the taxi industry. The City cannot have it both ways.

114. The plaintiffs own their plates and have a property interest in them. Plates are considered the property of their individual owners in virtually every legal context, including in family, bankruptcy and probate proceedings.[104] In fact, Justice Kershman has decided a case in which he had to decide who owns a plate and how a plate is going to be disposed of.[105]

115. Financial institutions also treat plates as property by using them as a form of security for lending purposes.[106] Further, the CRA requires plate owners to pay capital gains taxes if they sell their plates at a profit, indicating that the CRA considers plates to be property of the plate holders as well.[107]

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[104] For example, see *Bakshi v Bakshi*, 2011 ONSC 3557 at para 63; *Wehbe v Wehbe*, 2016 ONSC 1445 at paras 63-80; Way Ex., January 10, 2023, 34:9 to 35:1; Way Ex., January 5, 2023, 89:19-23. Also see: *Foster (Re)*, 8 OR (3d) 514 at paras 25-26.
[105] *Al-Ebadi v Zahran*, 2009 CanLII 10985.
[106] Way Ex., January 5, 2023, 88:22 to 89:12.
[107] Way Ex., January 5, 2023, 89:13-16.

116. For years, the City issued certificates to plate owners, which unsurprisingly referred to plate owners as plate owners.[108] It has also allowed plates to be bought and sold on the open market and inherited upon death. The above are only examples of indicia that support the conclusion that plate owners own their plates and have a property interest in them. It does not lie in the City's mouth to now say that plate owners do not have an ownership or property interest in plates.

117. Further, a proper statutory interpretation exercise that takes into consideration the entire context, scheme of the by-laws and their object leads to the conclusion that the plaintiffs have an ownership and property interest in plates.[109] Plainly, a statutory scheme that allows for, among other things: (1) the sale of plates in circumstances where the City was to collect information and record the value of sales; (2) limits the number of plates that are available; and (3) allows for the inheritance of plates is a scheme that intends to vest a property interest in the owners of plates. The City intended to create this property interest to ensure that the taxi industry remains viable and provides effective and safe service to the public.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of June, 2023.

Thomas G. Conway

[108] For example, see Exhibit 9, French Taxi License Certificate, dated 2008, at F465, Exhibit 10, English Taxi License Certificate, dated May 28 2014, at F467, Exhibit 11, English Taxi License Certificate, dated May 29, 2017 at F468.
[109] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21.

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa

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