CITATION: Eisenberg v. City of Toronto, 2021 ONSC 2776
DIVISIONAL COURT FILE NO.: 043/20
DATE: 20210419

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Penny, Doyle and Favreau JJ.

BETWEEN:	
Lawrence Eisenberg, Behrouz Hadjnourollah Khamza and Sukhvir Thethi Plaintiffs (Appellants/Respondents by Cross-Appeal)	*Michael I. Binetti, Meredith Hayward* and *Alyssa Hall*, for the Appellants/Respondents by Cross-Appeal
– and –	*Michele Wright* and *Matthew Cornett*, for the Respondent/Appellant by Cross-Appeal
City of Toronto Defendant (Respondent/Appellant by Cross-Appeal)	
	HEARD by videoconference: October 19, 2020

REASONS FOR DECISION

Favreau J.

Introduction

[1] The appellants, Lawrence Eisenberg, Behrouz Hadjnourollah Khamza and Sukhvir Thethi, own taxi licences in Toronto. They seek to bring a class proceeding against the City of Toronto (the "City") for economic losses they claim they suffered due to the City's alleged failure to enforce its by-laws against Uber and other similar "private transportation companies".

[2] In a decision dated December 16, 2019, Perell J. dismissed the motion for certification on the grounds that the claim does not disclose a cause of action. In particular, he found that the City does not owe the appellants a private law duty of care because the duty to regulate private transportation companies is a duty owed to the public as a whole and does not impose a duty on the City to protect the appellants' economic interests. He also held that if the claim disclosed a cause of action, he would have found that the other criteria for certifying the action as a class proceeding were met.

[3] The appellants argue that the motion judge erred in finding that the City does not owe them a duty of care. They argue that the motion judge should have followed the decision in *Metro Taxi Ltd. v. City of (Ottawa)*, 2018 ONSC 509, where a similar claim brought in the Superior Court in Ottawa was certified as a class proceeding. The appellants also argue that the pleaded interactions between the proposed class members and the City are sufficient to give rise to a duty of care.

[4] The City argues that the motion judge made no error in finding that the claim does not disclose a cause of action. However, in the event this Court were to find that the claim discloses a cause of action, the City argues that the motion judge erred in finding that the appellants satisfied the common issues certification criterion.

[5] For the reasons below, the appeal is dismissed. I agree with the motion judge that it is plain and obvious that the City does not owe the appellants a private law duty of care. It is therefore not necessary to address the City's cross-appeal.

Background

Licensing of taxicabs and private transportation companies in Toronto

[6] Several sections in the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, grant the City the power to pass licensing by-laws with respect to businesses in Toronto. Section 94 specifically empowers the City to make by-laws that license taxicabs, establish classes of licences, set the rates or fares licensed taxicabs charge and limit the number of taxicabs in Toronto.

[7] Until recently, Chapter 545 of the *Toronto Municipal Code* set out the by-laws that applied to the regulation of taxicabs in Toronto. On July 15, 2016, the City revised the taxicab licensing regime and the new rules are now set out in Chapter 546 of the *Toronto Municipal Code.*

[8] The oldest form of taxicab licence in Toronto is the "standard" plate. It is the least restrictive form of licence and does not require the plate owner to personally operate the taxicab. Operators with standard licences could sell their taxicabs, and the purchaser could apply to the City to be issued a new licence. In 1998, the City introduced Ambassador licences, which required the plate owners to personally own and operate their own taxicabs. In 2014, the City introduced Toronto Taxicab Licences, which could not be held by corporations, required the plate owner to personally drive the taxicab and required the taxicab to be wheelchair accessible.

[9] Uber began operating in Toronto in 2012. Initially, Uber offered its dispatch services to licensed taxicabs. In 2014, Uber expanded its business to non-licensed drivers. The City

subsequently applied to the court for an injunction against Uber, but the court dismissed the application on the basis that Chapter 545 did not require Uber to be licensed.

[10] In 2015, the City amended Chapter 545 of the *Toronto Municipal Code* to require companies such as Uber to be licensed. Uber refused to comply.

[11] In 2016, the City made significant changes to the regulation of taxicabs and private transportation companies such as Uber. The changes were incorporated into Chapter 546 of the *Toronto Municipal Code.* Chapter 546 allows Uber and other similar companies to operate legally by obtaining private transportation company licences. In addition, a number of changes were made to the taxicab licensing system that have the effect of converting Ambassador plates to standard plates and allowing new applicants to apply for standard plates rather than Toronto Taxicab Licences.

Statement of claim

[12] The plaintiffs commenced this action in 2018. They seek to bring a class proceeding on behalf of people who held taxicab licences between 2014 and 2016 under Chapter 545, and people who have held taxicab licences under Chapter 546 from 2016 to the date of certification.

[13] The plaintiffs seek $1,700,000,000 "in respect of the loss in value associated with the sale, transfer or lease of Taxi Plates and loss of income resulting from the operation of the taxicabs resulting from the negligent manner in which the City of Toronto enforced Chapter 545 against drivers of unlicensed private transportation vehicles such as Uber, and against Uber itself, and for adopting Chapter 546 that disregarded the interests of Plate Owners".

[14] The claim states that the City has regulated the taxicab industry since 1957, and that it has required Plate owners to hold some kind of licence since then. The claim alleges that the City has limited the number of Taxi Plates issued for a number of stated purposes, including to avoid too much competition and to ensure that drivers are properly compensated.

[15] The plaintiffs allege that Taxi Plates had significant value, and that the City was aware of this. The plaintiffs claim that the City was not just a regulator of the taxicab industry, but also a "willing participant in the business of taxicabs". The City was allegedly responsible for creating the conditions that gave value to Taxi Plates and led Taxi Plate owners to rely on the plates for their incomes and retirements.

[16] The plaintiffs allege that the City owed them a duty of care. This required the City to consider the plaintiffs' interests in the enforcement of by-laws and in making changes to the regulation of the taxicab industry.

[17] The plaintiffs allege that the City was negligent in its enforcement of Chapter 545 against Uber between 2014 and 2016, by permitting unlicensed private transportation companies to operate in Toronto. The plaintiffs also allege that the City breached its duty of care when it introduced by-law changes that permitted Uber to operate. Finally, the plaintiffs allege that, as of 2016, the City was negligent in the enforcement of Chapter 546 against private transportation companies.

Motion judge's decision

[18] In a decision released on December 16, 2019, the motion judge refused to certify the plaintiffs' action as a class proceeding on the basis that the claim does not disclose a cause of action against the City.

[19] In his decision, the motion judge noted that the City took the position that the action should not be certified because it did not meet the cause of action, common issues and preferable procedure criteria for certification. The motion judge then proceeded to first analyze the common issues and preferable procedure criteria.

[20] With respect to the common issues, the motion judge stated that he would have certified the four following common issues:

a. Whether the City was negligent in enforcing Chapter 545 from September 1, 2014 to July 14, 2016;

b. Whether the City was negligent in adopting Chapter 546;

c. Whether the City was negligent in enforcing Chapter 546 from July 15, 2016 to the present; and

d. Whether it is possible to assess whether the claim in respect of the enforcement of Chapter 545 is statute barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, and, if so, whether the claim is statute barred.

[21] However, he would not have certified aggregate damages. He found that aggregate damages would not be available because each class member would have to individually prove causation and the quantification of damages.

[22] With respect to the preferable procedure criterion, the motion judge held that a class proceeding would be a preferable procedure. He rejected the City's suggestion that individual actions or actions advanced on behalf of small groups of taxicab owners would be preferable. He found that "no meaningful alternative procedure remotely as useful or feasible as the proposed class action … would have satisfied the preferable procedure criterion but for the fact that it fails to plead a legally viable cause of action".

[23] After addressing the common issues and preferable procedure criteria, the motion judge turned to the issue of whether the claim disclosed a cause of action.

[24] He started by distinguishing the decision in *Metro Taxi*. He found that the Ottawa action was of "no assistance" to the appellants because the arguments advanced by the City in this case were not advanced by the City of Ottawa in the *Metro Taxi* decision.

[25] The motion judge went on to note that the appellants' claim is for pure economic loss and that, in order to recover for pure economic loss, the appellants would have to fall within an established category where recovery for pure economic loss is permitted or would have to establish

that a new exception should be established. He found that, in this case, the appellants' claim was not novel, but rather falls into the "category of liability of public authorities". To assess whether a public authority owes a private law duty of care with respect to the appellants' economic losses, the proximity analysis focuses on the statutory scheme and the interactions between the parties.

[26] The motion judge then addressed the two types of negligence alleged by the appellants, namely the City's alleged negligence in passing Chapter 546 to allow private transportation companies to operate and be licensed and the City's alleged negligence in failing to enforce Chapter 545 and Chapter 546.

[27] With respect to the by-law amendments, the motion judge found that this aspect of the claim does not disclose a cause of action because, in accordance with the well established principles in *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, the City does not owe a duty of care to the appellants when exercising its law making authority.

[28] The motion judge then addressed the allegations that the City was negligent in the enforcement of its by-laws. He found that this case falls into the category of cases such as *Cooper v. Hobart*, 2001 SCC 79, and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, where the Supreme Court of Canada held that the public authorities were regulating in the public interest and that they did not owe a private law duty of care to members of the public. He held that this case is similar to the decision in *Vlanich v. Typhair*, 2016 ONCA 517, where the Court of Appeal held that the City of Ottawa did not owe a private law duty of care to plaintiffs injured in a taxicab.

[29] Based on a review of several cases relied on by the appellants, the motion judge also held that the pleaded interactions between the City and the appellants were not sufficient to give rise to a private law duty of care.

[30] The motion judge concluded that, even if he had found that there was a relationship of proximity between the parties, he would have found that there were residual policy considerations that militate against recognizing a duty of care. In particular, he found that the "spectre of indeterminate liability is a solid policy reason to not expand the circumstances for which a public authority should be liable for pure economic losses".

Standard of review

[31] The issue of whether the statement of claim discloses a cause of action is a question of law and is therefore to be decided on a standard of correctness.

[32] The issue of whether the motion judge erred in finding that the claim raises common issues is a question of mixed fact and law to which the palpable and overriding appellate standard of review applies. In addition, substantial deference is owed to the motion judge's finding of common issues and the court should only intervene on matters of general principle: *Fehr v. Sun Life Assurance Co. of Canada*, 2018 ONCA 718, at para. 39.

Issue 1: The statement of claim does not disclose a cause of action

[33] On appeal, the plaintiffs no longer argue that the City was negligent in adopting a by-law that allows Uber and other private transportation companies to operate in Toronto. The appeal only focuses on the claim that the City was negligent in its enforcement of the by-laws both before 2016 and after 2016.

[34] The plaintiffs argue that the motion judge made the following errors in finding that the City did not owe them a private law duty of care to enforce its by-laws:

a. He applied too onerous a test to the issue of whether the claim discloses a cause of action;

b. He erred in not following *Metro Taxi*;

c. He failed to consider the allegations of direct interactions between the plaintiffs and the City; and

d. He erred in finding that, even if the parties were in a relationship of proximity, policy reasons would negate finding a duty of care.

[35] As discussed below, I am not persuaded by any of these arguments. I agree with the motion judge that the claim as pleaded does not disclose a cause of action. Even accepting all the facts pleaded as true, the City does not owe a private law duty of care to plaintiffs in enforcing its by-laws against Uber and other private transportation companies.

The test applied by the motion judge was not too onerous

[36] The appellants argue that the motion judge imposed too onerous a test to determining whether the statement of claim discloses a cause of action.

[37] As a starting point, at paras. 79-83, the motion judge stated the correct legal principles for determining whether the statement of claim discloses a cause of action. These include:

a. The "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, applies to determining whether the statement of claim discloses a cause of action in the context of a class proceeding.

b. In determining whether the claim discloses a cause of action, no evidence is admissible, and the material facts pleaded are to be accepted as true unless they are patently ridiculous or incapable of proof. The pleading is to be read generously.

c. Matters of law that are not fully settled should not be dismissed on a motion to strike.

d. As held by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 19, a motion to strike is a "valuable tool" to weed out claims that have no reasonable prospect of success because it allows the courts to focus on meritorious claims.

[38] To these principles, I would add the Supreme Court's admonition in *Imperial Tobacco*, at para. 22, that a plaintiff must plead the facts relied on:

> It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[39] In this case, the appellants make a general complaint that the motion judge failed to read the statement of claim generously, and, in particular, improperly disregarded or dismissed the allegations that they were in a relationship of proximity with the City. In making this argument, the appellants seem to suggest that the pleading of a duty of care or of facts they say support a duty of care is sufficient. However, the existence of a duty of care is a question of law.

[40] A bald statement in a claim that the City owes the plaintiffs a duty of care or even factual statements about the nature of the relationship between the parties followed by a conclusory statement that the City owes the appellants a duty of care is insufficient. The court is entitled to, and indeed must, scrutinize the facts pleaded in order to ascertain whether they are capable of giving rise to a duty of care. Indeed, there are many cases in which claims against public authorities have been dismissed at the pleadings stage because the plaintiff failed to plead facts giving rise to a private law duty of care: see, for example, *Cooper*, *Edwards* and *Imperial Tobacco.* There are cases in which the issue of whether the claim gives rise to a duty of care owed by a public authority cannot be decided based on the statement of claim, but there are certainly cases, such as this one, where the determination can be made based on the pleading.

[41] Therefore, the motion judge made no error in scrutinizing the statement of claim to ascertain whether the facts pleaded support a finding that the City could owe the appellants a private law duty of care.

Metro Taxi is not binding authority

[42] The appellants argue that the motion judge improperly disregarded the decision in *Metro Taxi*. While the appellants accept that the decision was not binding on the motion judge, they argue that the *Metro Taxi* decision is persuasive and that it is unfair that a claim similar to their claim is allowed to proceed in Ottawa.

[43] In *Metro Taxi*, R. Smith J. certified a class proceeding by a group of taxi drivers in Ottawa against the City of Ottawa for failing to regulate Uber and other similar private vehicle operators. In that context, the plaintiffs alleged negligence and breach of the *Charter*. The defendant did not contest that the statement of claim disclosed a claim in negligence, except for an argument that Uber, and not the City of Ottawa, caused the plaintiffs' damages.

[44] In the circumstances, at paras. 86-89, the motion judge in this case distinguished the *Metro Taxi Ltd.* decision as follows:

> In the Ottawa case, the City of Ottawa agreed that the pleadings disclosed a valid cause of action in negligence but submitted that the negligence could not succeed because a witness for the Plaintiffs had allegedly admitted that the cause of his losses was caused by Uber. This supposedly was an admission that the City of Ottawa was not a cause of the Class Members' damages and, therefore, could not be liable for its negligence.
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> Justice Smith did not think there was any substance to this argument, and very sensibly, he concluded that it did not detract from the City of Ottawa's concession that a viable cause of action had been pleaded. Justice Smith concluded that the cause of action criterion had been satisfied.
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> For present purposes, the point to note is that there was no argument in *Metro Taxi Ltd.* – like the vigorously argued debate in the immediate case – about whether the City has a duty of care when it enacts a bylaw and succumbs to the invasion of Uber into the transportation business.
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> That *Metro Taxi Ltd.* was certified where there was no similar debate as occurred in the immediate case means that the case has no precedential value for the immediate case.

[45] There was no error in the motion judge's analysis. It is evident from the *Metro Taxi* decision that the defendant in that case did not argue that it did not owe the plaintiffs a private law duty of care. The only argument the defendant advanced in that case on the issue of whether the plaintiffs' claim disclosed a cause of action in negligence was with respect to causation. The City in this case was entitled to advance an argument about whether the pleading supports a duty of care, and to have that issue adjudicated on the merits. Neither the City nor the motion judge were bound by any concessions made by the defendant in *Metro Taxi.*

Allegations of direct interactions do not give rise to a duty of care

[46] The plaintiffs argue that the motion judge only focused on the regulatory relationship between the parties in support of his finding that there is no relationship of proximity. They argue that, in doing so, the motion judge ignored the alleged interactions between the parties that they claim give rise to a relationship of proximity. In my view, the motion judge did have regard to the pleaded interactions between the appellants and the City. In any event, the pleaded interactions are not sufficient to create a relationship of proximity.

[47] As referred to by the motion judge, in *Imperial Tobacco,* at paras. 43-46, the Supreme Court directed that determining whether there is a relationship of proximity between a public authority and a plaintiff requires looking at the relevant legislative scheme *and* at the interactions between the parties:

> A complicating factor is the role that legislation should play when determining if a government actor owed a prima facie duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the

> situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.
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> **The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a prima facie duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps* [*Secure Treatment Centre v. B.D.*, 2007 SCC 38]).** In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).
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> **The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care.** In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc*., 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.
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> Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties. [Emphasis added]

[48] In this case, the motion judge reviewed the regulatory scheme and found that it did not give rise to a private law duty of care. The appellants do not appear to dispute this finding. Indeed, as found by the motion judge, at para. 112, while Chapter 545 and 546 of the *Toronto Municipal Code* may have the effect of ameliorating the appellants' financial circumstances, the scheme "does not create a positive duty to enforce Chapter 545 or Chapter 546 to achieve health and safety outcomes and there [is] no obligation to protect the economic interests of those granted taxi licences". Rather, as with many other regulatory schemes, the purpose of these by-laws is to protect the public as a whole and not the private economic interests of the appellants.

[49] The appellants argue that the motion judge failed to take account of their pleaded interactions with the City in determining that the City does not owe them a private law duty of

care. They argue that they have pleaded interactions between the appellants and the City that are sufficient to create a "special relationship" between the parties. The plaintiffs rely on the following specific pleaded interactions in the statement of claim in support of their argument that they are in a relationship of proximity with the City:

> 6. It was a common City practice that when a Taxi Plate was issued, City staff and/or prior City licensing commission staff would congratulate the Plate Owner on being given their "pension" for their retirement. This reference to a pension was commonplace over decades and meant that Plate Owners now held something of value that could be sold, leased, transferred for money, or from which income could be derived by way of the operation of taxicabs. The City knew that Plate Owners were relying on the value of the Taxi Plates and the income derived therefrom for their financial wellbeing, such as into their retirements (the City itself made those promises by calling Taxi Plates "pensions"). The City also knew that any changes thereto would necessarily impact on the financial interests and wherewithal of Plate Owners.
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> 7. The City permitted Taxi Plates to be transferred to widows/widowers of Plate Owners upon the death of a Plate Owner so that the widow/widower would continue to receive income (*i.e.*, a pension) from the Taxi Plate and/or sell, lease, or transfer the Taxi Plate for value to use during their retirement or otherwise.
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> 8. Taxi Plate owners would have never invested in the taxicab industry absent the above circumstances.
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> 9.`The City was more than just a regulator of the taxi industry: it was a willing participant in the business of taxicabs. The City permitted the sale, lease, and transfer of Taxi Plates and charged associated fees. By doing so, the City created the conditions whereby a Taxi Plate came to be treated as both an investment and a form of retirement security for Plate Owners. The City has always been aware that it created a secondary market in which Taxi Plates have been sold, leased, or transferred. The City was directly aware [of] the value of any sales, leases, or transfer and that some Taxi Plates have sold for over $380,000 because the City required that the purchase price or lease amount be disclosed to them in any sale, lease, or transfer of a Taxi Plate. Any and all sales, leases, or transfers of Taxi Plates could not occur without the City's approval. When it approved a sale, lease, or transfer, the City collected vast sums in the form of fees ranging from $3,000 to $5,000 for each sale or transfer of a Taxi Plate and other fees in respect of leases of Taxi Plates.
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> 10. Without limiting the generality of the foregoing, the City owes a duty of care to Plate Owners by virtue of its close relationship with them as described above, and generally. The City was at all times required to take reasonable care to avoid causing foreseeable harm to Plate Owners. The City was under an obligation to be mindful of the legitimate interests of Plate Owners in conducting the City's affairs, which for the reasons below, the City failed to do.

[50] Distilling these alleged interactions to their core, the appellants claim that the City was aware that the plates had value, that the City acknowledged this when transferring plates to new owners and that the City participated in the taxicab business by taking a fee each time plates were transferred.

[51] While the appellants argue that the motion judge disregarded these pleaded interactions, it is evident that he considered them and did not accept that they create a relationship of proximity between the appellants and the City. For example, at para. 123, the motion judge distinguished between the pleaded interactions in this case and the types of interactions that would be sufficient to give rise to a duty of care such as "advice or directions from government officials" or "commercial dealings". He held that congratulating licensees on achieving a licence "is not a specific interaction that would give rise to a duty of care".

[52] I agree with the motion judge's conclusion. In the cases where courts have found that pleaded interactions between a public authority and a plaintiff were sufficient to give rise to a private law duty of care, the courts have found that the public authority has done something more than fulfilling its statutory role. Where the interactions fall within the scope of the public authority's statutory role, without anything more, those interactions cannot form the basis for finding that the regulator owes a private law duty of care to parties subject to the regulatory oversight. As held by the motion judge, this principle was clearly articulated in *Wu v. Vancouver (City)*, 2019 BCCA 23, at para. 65:

> While the relationship between the parties can be described as "direct and transactional", this does not materially advance the proximity analysis because such a relationship is both inherent in and an inevitable and necessary part of the regulatory framework, in which individuals apply for permission to undertake a certain activity. The same applies to virtually any licensing or permitting process. I do not think that the inevitable reality of a specific individual making an application to a regulator, and thereby entering into a direct transactional relationship with the regulator, advances the argument that proximity exists in the sense that the regulator has come under an obligation to have particular regard for the interests of the applicant beyond the regulator's obligation to fulfil his or her statutory duties.

[53] In this case, in my view, the pleaded interactions were nothing more than a manifestation of the regulator/regulated relationship. It goes without saying that a system of transferrable licences creates value in the licences. The City's acknowledgement that it was aware of this value and its collection of fees for the transfer is not sufficient to create a relationship of proximity. There will necessarily be interactions between a regulator and those who are regulated. A casual comment about the value of a licence cannot be sufficient to create a "special relationship".

[54] In support of their position, the appellants rely primarily on the decisions in *Imperial Tobacco* and *Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada*), 2017 ONCA 526, to argue that their pleaded interactions are sufficient to give rise to a relationship of proximity. However, rather than assisting the appellants, these decisions serve to illustrate the distinction between cases such as this one where the interactions fall within the scope of the regulator's role

as regulator and cases where the interactions go beyond that role and serve to give rise to a relationship of proximity.

[55] In *Imperial Tobacco*, tobacco manufacturers alleged that Canada owed them a private law duty of care in relation to advice provided by the federal government about the safety of "light" cigarettes and also in relation to the design of strains of tobacco developed by the federal government. In that context, the Supreme Court found that Canada was in a relationship of proximity with the tobacco manufacturers because its role went well beyond the role of a regulator; based on the pleadings, the Court was satisfied that Canada played the role of expert advisor and that it was in a commercial relationship with the tobacco manufacturers. (While the Court held that the parties were in a relationship of proximity, ultimately the Court found that any duty of care was negated for policy reasons). In this case, there is no allegation that the City provided any kind of expert advice or direction to the appellants or that the City was involved in the appellants' commercial enterprise other than through the collection of fees.

[56] In *Grand River Enterprises Six Nations*, the Court of Appeal for Ontario found that it was not plain and obvious that the federal government did not owe the plaintiffs a duty of care where the plaintiffs alleged that the federal government had failed to protect their economic interests. In that case, the plaintiffs were a First Nations tobacco manufacturer and four individuals who had been operating without the necessary federal licenses for a number of years. They alleged that they agreed to become licensed when the federal government represented that it would investigate and prosecute competing unlicensed tobacco manufacturers. The plaintiffs claimed that the government was negligent in failing to prosecute the other tobacco manufacturers contrary to its undertaking. In that case, the Court of Appeal accepted that the pleadings supported a relationship of proximity because the plaintiffs pleaded a specific undertaking to investigate and prosecute other manufacturers for their benefit. In this case, there is no allegation that the City gave an undertaking to the appellants to prosecute Uber and other private transportation companies for their benefit, and that they relied on such an undertaking in obtaining their own licences.

[57] The appellants also rely on the British Columbia Court of Appeal's decision in *James v. British Columbia*, 2005 BCCA 136. In that case, the Court held that British Columbia may owe a duty of care to a group of employees for failing to include a clause in a forestry licence that would protect their long-term employment. It is important to note that *James* was decided before *Imperial Tobacco* and that the Court of Appeal did not analyze what, if any, pleaded interactions would give rise to private law duty of care. In the circumstances, I do not find that decision analogous or helpful to deciding this case.

[58] In this case, there is nothing about the pleaded interactions that take the appellants beyond their status as a regulated industry. They have not pleaded that the City undertook to enforce the City's by-laws against Uber and other private transportation companies for their benefit and for the purpose of protecting their interests. They have not pleaded that the City and the appellants have any type of separate commercial agreement or arrangement that requires the City to protect their commercial interests. Rather, they rely only on the City's powers to enforce its by-laws, and the City's alleged knowledge that a failure to enforce the by-laws would cause them economic harm. This is not sufficient. As held in *Imperial Tobacco*, if there were facts beyond those pleaded that supported the appellants' contention that they are in a special relationship with the City, it was

incumbent on them to plead those facts. They did not need to prove them; but they needed to plead them. They failed to do so.

[59] Accordingly, I find that the motion judge did not make any errors of law in finding that the claim does not give rise to a relationship of proximity between the parties.

Policy reasons justify finding no duty of care

[60] The appellants argue that the motion judge erred in finding that, even if there was a relationship of proximity, such a relationship would be negated by the prospect of indeterminate liability. They argue that the motion judge should not have decided this issue on the basis of the statement of claim and that it should be left for a trial. I disagree.

[61] At the outset, it is worth pointing out that this finding was not necessary to the motion judge's determination that the claim does not disclose a cause of action. Without proximity, the claim does not disclose a cause of action regardless of any policy reasons for negating such a claim.

[62] In any event, I agree with the motion judge's conclusion that indeterminate liability militates against imposing a duty of care on the City to protect the economic interests of the appellants. The City licenses and regulates many businesses in Toronto. Any number of factors may affect the value of those businesses, including competition from unlicensed or unlawful businesses. To impose a duty of care on the City to protect licensed businesses from competition from unlicensed businesses opens municipalities to the spectre of unlimited liability. Municipalities have limited resources. How they choose to allocate their limited resources to enforce by-laws should not be driven by the risk of claims for economic loss by other businesses. This is not an issue that requires a trial

Issue 2: The issues on the cross-appeal are moot

[63] On the cross-appeal, the City argues that the motion judge erred in finding that the common issues requirement would have been met for four of the common issues proposed by the appellants. The focus of their argument is that the motion judge did not provide any explanation for his conclusion on this point nor did he consider the arguments made by the City.

[64] Given my conclusion that the main appeal should be dismissed on the basis that the claim does not disclose a cause of action, it is not necessary to address the cross-appeal.

[65] However, had I found that the statement of claim disclosed a cause of action, I agree with the City that the motion judge's conclusions on the common issues would have to be revisited. While the motion judge provided an explanation for rejecting the issue of aggregate damages, he provided no explanation for accepting the four other issues proposed by the appellants as common. I expect that the cursory analysis was due to the finding that the claim does not disclose a cause of action. In the circumstances, had the appeal been allowed, the issue of common issues would have been remitted back to the motion judge to be decided afresh.

Conclusion

[66] For the reasons above the appeal is dismissed.

[67] As agreed between the parties, given that the outcome of the appeal is that the action will not be certified as a class proceeding, the City is entitled to costs in the amount of $20,000.

Favreau J.

Favreau J.

I agree

Penny J.

I agree

Doyle J.

Released: April 19, 2021

CITATION: Eisenberg v. City of Toronto, 2021 ONSC 2776
DIVISIONAL COURT FILE NO.: 043/20
DATE: 20210419

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Penny, Doyle and Favreau JJ.

BETWEEN:

Lawrence Eisenberg, Behrouz Hadjnourollah Khazma and Sukhvir Thethi

Plaintiffs (Appellants/
Respondents by Cross-Appeal)

– and –

City of Toronto

Defendant (Respondent/
Appellant by Cross-Appeal)

REASONS FOR DECISION

FAVREAU J.

Released: April 19, 2021