

**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*

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## **PART I - OVERVIEW AND ROADMAP**

### **A. Overview of the plaintiffs' claim**

1. For decades, taxi plate owners and brokers planned their livelihoods based on the supply management system set up by the City of Ottawa. The social contract between the municipalities and the generations of taxi plate owners and brokers ended abruptly in 2014 when the City allowed the system to disintegrate overnight. Class members' livelihoods are decimated because the City reneged on its duties. The City is responsible.

2. The City—and its predecessor municipalities—chose to regulate the taxi industry for over seven decades under a well-established regulatory scheme. Through licensing and enforcement, the regulatory model tightly controls who can operate and dispatch a taxi. In fact, it creates the plaintiff class: taxi plate owners and taxi brokers.

3. In its statement of defence, the City describes the scheme as a “supply management regulatory model.” For sound policy reasons, the City limited the number of taxi plates in circulation. The City also made taxi plates transferrable. In so doing, the City created a scarce commodity, and naturally, a market for this commodity. As early as 1975, the former City of Ottawa knew that this scheme created plate value.

4. The City's regulation creates plate value. Further, the capital created through plate value is essential to the system: it creates the incentive for owners to invest in quality of service. By creating conditions of financial stability for those who invested in the industry, the City created the regulatory conditions to allow the necessary capital to enter the market safely and securely.

5. To ensure the efficacy of the regulatory scheme, the City imposed restrictions on those who work in the taxi industry. It also collected millions of dollars in fees from them. And up until 2014, the City worked closely with the taxi industry to enforce the terms of this social contract, and to enforce the regulatory scheme it chose to impose on the class. The City and the taxi industry were in a symbiotic relationship: the industry needed its livelihoods protected in order to be viable, and City needed a well-functioning and viable industry to provide quality service to the public.

6. Today, plate owners are overwhelmingly immigrants and racialized individuals. This phenomenon is tied to the nature of the industry. By its nature, the business of privately transporting individuals from one place to another has always been an exchange between those with wealth, and those without. For this reason, the taxi industry has always attracted individuals who were without capital to invest, seeking a livelihood in which to advance. As such, the taxi industry has attracted individuals from disadvantaged groups: Francophones in the 1930's, Hungarian Jews in the 1950's, Lebanese Christians in the late 1970's and 1980's, Somalis and Ethiopians in the 1980's and 1990's, as well as Iranians, Iraqis, and Kuwaitis in the 1990's and 2000's.

7. Many of these people survived and escaped devastating conflicts as refugees. Facing barriers to employment in Canada, they were drawn to the industry as an opportunity to earn a living, hustle, elevate their status, and give their children a better life. The plate system was a central part of that opportunity. A person can start out as a renter of a taxi plate. They begin to accumulate capital through their labour and eventually accumulate sufficient capital to buy a taxi

plate, which they can then use to generate a return. They learned the practical effect of the rules, and depended on the City to enforce the rules. Generations of plate owners invested in the industry on the common assumption, based on representations by the municipal regulators, that their capital investment would be safe.

8. Being well aware that class members depended on the system, the City had a duty to defend the integrity of the system. When faced with the abrupt entry of global venture capital in 2014, the City grievously failed to do so. In the face of intense lobbying, the City sat on its hands when Uber rolled into town. The City's reaction was chaotic and unplanned. Although City staff knew that Uber was a massive and disruptive illegal taxi service and had plenty of notice that Uber would come to Ottawa, it had no plan to deal with this existential threat to the regulatory framework. The only enforcement was to charge Uber drivers in a futile effort to "deter" them. Although it was quickly apparent that charging Uber drivers was ineffective, and that targeting Uber itself was the only viable way to stop Uber in its tracks, the City made no attempts to enforce against Uber. There is no evidence that the City ever seriously considered this option, and no evidence of any conscious decision in this regard. The result was that from 2014 to 2016, Uber and its drivers did not suffer any real or serious consequences for flouting the law.

9. Instead of enforcing the by-law, the City simply abandoned its half-century-long commitment to the taxi industry. Eight months after Uber barged into town, the City began a review of its by-law to find ways to legalize Uber. In order to appear impartial, the City hired a purportedly "external" consultant—one with long-time ties to key city Councillors and staff. This consultant promised—and delivered on that promise—to manage a regulatory change and deal

with the City's plate value problem. While plate values were identified as a key consideration at the outset of the by-law review, the topic inexplicably disappeared from the consultant's final report and the City staff's recommendation. Through this process, class members were deliberately written out of the script—made invisible by the City's own pen. As a result, the City was able to ignore its responsibility for the decimation of hundreds of millions of dollars in plate value created by its regulations.

10. The City betrayed the plate owners and brokers who depended on the system for their livelihoods. As a class, plate owners are overwhelmingly members of disadvantaged groups. In betraying the class, the City worsened the disadvantage faced by class members based on their race and immigrant status. Whether the City intended to discriminate is irrelevant. The *Charter* guarantees substantive equality. In worsening this disadvantage, the City breached s. 15 of the *Charter* and ss. 1 and 3 of the *Human Rights Code*.

11. Over the decades, the City charged fees to plate owners and brokers. These fees are unlawful because there is no nexus between the fees charged and the cost of providing the services. Having failed to carry out any analysis of the relationship between the fees and the costs, the City has failed to demonstrate the required nexus. The fees imposed by the City were also an indirect tax because they were passed on to consumers. The City does not have the constitutional authority to impose indirect taxes. As such, the fees are unlawful and should be repaid to the class members.

## B. Litigation history and roadmap to submissions

### 1. Procedural history

#### (i) *Certified issues*

12. Justice Robert Smith certified this class action on January 16, 2018.<sup>1</sup>
13. He certified the following class:
  - (1) All persons who were Taxi Plate Holders under the Taxi By-law on September 1, 2014 or who became a Taxi Plate Holder between September 1, 2014 and September 30, 2016; and
  - (2) All persons who were Taxi Brokers under the Taxi By-law on September 1, 2014 or who became a Taxi Broker between September 1, 2014 and September 30, 2016.<sup>2</sup>
14. He certified the following common issues to be decided at this phase of the proceeding:
  - (a) Was the City negligent in enforcing the Taxi By-Law from September 1, 2014 to September 30, 2016?
  - (b) Were the 2016 amendments to the City's Taxi By-law unlawful?
  - (c) Did the City's conduct in allegedly negligently enforcing the Taxi By-law or in amending the Taxi By-Law in 2016 infringe on the right of the Taxi Plate Holders under s. 15 of the *Charter of Rights and Freedoms* or under s. 3 of the *Human Rights Code*?
  - (d) Did the fees collected by the City under its Taxi By-Law constitute an unlawful tax?
  - (e) Are damages assessed in the aggregate an appropriate remedy?<sup>3</sup>

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<sup>1</sup> *Metro Taxi Ltd v City of (Ottawa)*, [2018 ONSC 509](#) [*Metro Taxi*].

<sup>2</sup> *Metro Taxi* at para [57](#).

<sup>3</sup> *Metro Taxi* at para [83](#).

**(ii) Discovery process**

15. Discovery proceeded by way of a limited scope process, according to a litigation plan approved by Justice Robert Smith dated April 23, 2018.<sup>4</sup>

16. To ensure efficiency, the litigation plan deviated from typical documentary production. Instead of placing an obligation on the plaintiffs and the City to produce all relevant documents, the litigation plan required parties to produce the documents that they intend to rely on at trial and to produce the documents that are requested by the opposing party, while reserving the right to refuse productions on established legal grounds, such as privilege.

17. To save time and truncate the extent of oral examinations for discovery, written interrogatories were exchanged between the plaintiffs and the City in 2018. After this, oral discoveries were held in 2019 to address issues that were not covered in the written interrogatories or required follow-up. Undertakings and follow-ups were exchanged after oral discoveries were completed.

18. Expert reports were obtained and exchanged in 2019 and 2020.

**(iii) Procedural decisions at trial**

19. Several decisions at trial determine the scope of these submissions.

20. First, on consent of the parties, the plaintiffs discontinued the second certified issue.<sup>5</sup>

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<sup>4</sup> Order of Justice Robert Smith dated April 23, 2018, endorsing litigation plan dated April 16, 2018, A743-A745.

<sup>5</sup> Order of Justice Marc Smith, dated January 5, 2023.

21. Second, on the plaintiffs' motion, the fifth certified issue was adjourned until a second phase of the trial.<sup>6</sup>

22. Third, at the City's request, the question of whether the plaintiffs are entitled to *Charter* damages in the event that the City has breached the *Charter* (pursuant to the third certified issue) was also adjourned until the second phase of the trial.<sup>7</sup>

23. As such, these submissions address neither the fifth certified issue, nor whether the plaintiffs are entitled to *Charter* damages, should this Court find that the City breached the *Charter*. Because the *Human Rights Code* issue is related to the *Charter* issue, the question of damages under the *Code* is also deferred to the damages phase. In other words, the scope of this phase of the trial and these submissions are limited to the liability of the City. Issues relating to damages and remedies have been adjourned for future phases of the trial.

**(iv) Certified issues to be decided in this phase of the proceeding**

24. Due to the procedural decisions at trial, the following certified issues remain to be decided in this phase of the proceeding:

- (a) Was the City negligent in enforcing the Taxi By-Law from September 1, 2014 to September 30, 2016?
- (b) Did the City's conduct in allegedly negligently enforcing the Taxi By-law or in amending the Taxi By-Law in 2016 infringe on the right of the Taxi Plate Holders under s. 15 of the *Charter of Rights and Freedoms* or under s. 3 of the *Human Rights Code*?

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<sup>6</sup> Trial Ruling, January 24, 2023 transcript, 1:20 to 9:5.

<sup>7</sup> February 14, 2023 transcript, 29:28 to 30:22.



*Except the question of whether the plaintiff are entitled to damages if a Charter or Code breach is made out; that question was deferred to the second phase.*

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

**2. Roadmap to these submissions**

25. The remainder of these submissions are organized as follows.

26. Part II, “From Montreal Road to City Hall: 90 Years of Taxi Regulation in Ottawa” provides an overview of the history of taxi regulation in Ottawa as proven at trial. It sets out the basics of the industry, describes the class members, and describes the evolution of taxi regulation up to the arrival of Uber. It then describes the City’s complacency after the arrival of Uber, the fast-tracked by-law review, and the devastating effects of the City’s abandonment of its supply management system on the class members.

27. The remaining Parts III, IV and V deal with the three remaining certified issues.

28. Part III deals with the negligence issue. It argues that the City was negligent in enforcing the by-law after the arrival of Uber: it owed a duty of care to class members to enforce the by-law, and it did not meet the standard of care.

29. Part IV deals with the discrimination issue. It argues that the City’s conduct with respect to enforcement and regulatory change constituted discrimination under s. 15 of the *Charter* and ss. 1 and 3 of the *Human Rights Code*.

30. Part V deals with the unlawful fees issue. It argues that the fees charged under the by-law are unlawful and unconstitutional. They are unlawful because there is no reasonable nexus

between the fees charged and the cost of providing the service. They are unconstitutional because they are indirect tax, which municipalities are not constitutionally empowered to levy.

**PART II - FROM MONTREAL ROAD TO CITY HALL: 90 YEARS OF TAXI REGULATION IN OTTAWA**



*Exhibit 4, Picture of Capital Taxi Office, Montreal Rd, circa 1938-1941, F1114*

*Mon grand-père était originalement un laitier. Donc il avait plusieurs routes à Eastview, et puis à un moment La Compagnie Sealtest a pris, a acheté les routes qui a fait que mon grand-père a dû trouver une autre façon de gagner les sous pour garder sa famille. Donc la première idée, une des idées, était de commencer une compagnie de taxi dû au fait qu'il connaissait plusieurs familles à Eastview. Donc il a commencé la compagnie de taxi en 1937.*

-- Examination in chief of Marc Andre Way, January 4, 2023, 112-113 (transcription by counsel).

*3. Every owner of a taxi-cab before operating or permitting the same to be operated for hire shall obtain a license from the Council of the Corporation of the Town of Eastview, and shall pay the Chief Constable an annual license fee of Five Dollars, (\$5.00).*

-- By-law No. 677, Town of Eastview, F4901

## **A. How the taxi industry works today**

31. The taxicab industry in Ottawa is regulated at the option of the City of Ottawa.<sup>8</sup> In order to drive or dispatch a taxi, a person needs the appropriate license from the City. The City also regulates the number of taxis by way of the taxi plate system.

32. The City's regulatory framework creates three main types of participants in the taxi industry: taxi drivers, taxi plate owners, and brokers. The plaintiff class is drawn from the second two types—plate owners and brokers.

### **1. Taxi drivers**

33. Taxi drivers hold a license to drive a taxi. Some taxi drivers own their own taxi plate (discussed below), while others rent or lease a plate.

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<sup>8</sup> Statement of Agreed Facts at paras 4-5, F1.

## 2. Taxi plate owners

34. Taxi plate owners own licenses issued by the city of Ottawa. These licenses are limited in number and transferable. Therefore, these licenses are traded as property and have market value.

35. Today, there are two kinds of taxi plates: standard and accessible.<sup>9</sup> Both are issued by the City and both are transferrable.

36. If a person wishes to obtain a plate, they must either obtain one directly from the City (if any are available), or, must more typically, buy one from an existing plate owner. The plate is transferred through a Contract of Sale between the seller and the buyer.<sup>10</sup> The City does not monitor these transactions, but requires certain documents to be submitted to transfer the plate from the seller to the buyer.<sup>11</sup> It also charges a transfer fee to change the plate registration from the former owner to the new one.

37. Plate owners make their living from driving and from renting or leasing their plates. Plate rentals deal with short periods of time, such as renting out the plate for the night or morning shift. Under this type of arrangement, the plate owner typically drives at certain times of the day and rents out the plate for the periods when it is not in use. Leasing arrangements are more long-term and would give the exclusive right to the lessee to use the plate by driving, sub-leasing or renting.<sup>12</sup> Lease payments are made monthly.<sup>13</sup> Additionally, it is typical for lessees to pay an

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<sup>9</sup> Statement of Agreed Facts at paras 6-7, F1.

<sup>10</sup> Agreement of purchase and sale for taxi plate of Antoine El Feghaly, dated August 18, 2011, Exhibit 98, F1143.

<sup>11</sup> ss. 92-91, By-law 2012-258 ("**2012 By-law**"), Exhibit 2, F3935-F3936.

<sup>12</sup> Way Ex., January 5, 2023, 8:7-24.

<sup>13</sup> Way Ex., January 5, 2023, 94:16-17

upfront lump sum to in order to get a lease.<sup>14</sup> Before the arrival of Uber, these lump sums were significant and exceeded \$100,000.<sup>15</sup>

38. Up until 2014, plates were a sought-after asset and were sold for hundreds of thousands of dollars. As will be discussed in more detail below, the high value of plates was a direct result of the City's supply management regulatory regime that limited the number of plates that are available for vehicles for hire.

### **3. Brokers**

39. Brokers oversee dispatching. They establish the various banners under which taxicabs operate. They are responsible for the dispatching of taxicabs in the City, engage in marketing activities to promote their banner, secure accounts or contracts with institutions like the government. Brokers also play a managerial role vis-à-vis drivers.<sup>16</sup>

40. Because of the requirements that the City has imposed, brokers have made significant investments in the taxi industry. For example, the 2012 By-law required brokers to "provide or ensure that taxicab dispatch service is provided twenty-four (24) hours per day, seven (7) days per week to persons requesting taxicab service".<sup>17</sup> As a result, brokers have had to invest in the infrastructure, which includes buildings and sophisticated electronic systems, as well as the

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<sup>14</sup> Way Ex., January 5, 2023, 94:21-23.

<sup>15</sup> For example, Iskhak Mail paid \$125,000 upfront to get a lease. Mail Ex., January 18, 2023, 114:17-19.

<sup>16</sup> Way Ex., January 5, 2023, 97:27 to 98:13.

<sup>17</sup> s. 59(3), 2012 By-law, Exhibit 2, F3923; See also s. 38, By-law 2005-481, F3804.

human resources that enable the provision of taxicab services as required by the applicable by-law.<sup>18</sup>

41. Over the decades, brokers have invested in telecommunications systems. Ottawa taxicab brokers have had computerized dispatching since the 1970s, which kept up with technological change and allowed customers to request taxi service through text, web booking, apps, telephones, fax, and e-mail.<sup>19</sup>

42. Taxi brokers have various sources of revenue. Traditionally, taxi brokers owned taxi plates and would receive monthly rent.<sup>20</sup> In addition, brokers receive monthly amounts on dispatching fees (including stand rent), administration fees on different accounts, as well as margins on credit card transactions.<sup>21</sup> Stand rent is the monthly payment that drivers pay to taxicab brokers for the services that the brokers provide.<sup>22</sup>

#### **4. Industry players: the plaintiff class**

43. While these submissions refer to class members, two classes were actually certified. The first class is the plate owners who owned a standard or accessible plate between September 1, 2014 and September 30, 2016.<sup>23</sup> Standard plates are those affixed to cars that could transport individuals who do not use a wheelchair. Accessible plates are those affixed to cars that could transport individuals who use a wheelchair.

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<sup>18</sup> Way Ex., January 5, 2023, 98:27 to 99:2; 99:27 to 100:7.

<sup>19</sup> Way Ex., January 5, 2023: 96:23-32.

<sup>20</sup> Way Ex., January 10, 2023, 6:20-21.

<sup>21</sup> Way Ex., January 10, 2023, 6:21-23.

<sup>22</sup> Way Ex., January 5, 2023, 97:12-16.

<sup>23</sup> *Metro Taxi* at para [57](#).

44. Plate owners can be categorized into three groups:

- (a) **Single plate owners:** These individuals own one plate. Single plate owners typically drive the car on which the plate is affixed and may rent the car or lease the plate to others.
- (b) **Multi-plate owners:** These individuals own more than one plate. They may drive the car on which their plate is affixed. They may also rent their car(s) or lease their plates.
- (c) **Absentee plate owners:** These individuals own a plate but are retired from driving. They rent or lease their plates.<sup>24</sup>

45. The second class is the brokers who had the required license from the City between September 1, 2014 and September 30, 2016.<sup>25</sup> The brokers in Ottawa are those companies that provide dispatching services. They include, among others, Capital Taxi, Blueline Taxi, and Westway Taxi. Coventry Connections is a company that provides services to brokers. It is not a broker itself, thus it is not a class member.

#### **B. The taxi industry is the “poor man’s industry”**

46. Historically, the taxi industry has been characterized as a “poor man’s industry”.<sup>26</sup> This characterization is consistent with all the evidence tendered at trial. Those who enter the taxi

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<sup>24</sup> See Statement of Agreed Facts at para 8, F2.

<sup>25</sup> *Metro Taxi* at para 57.

<sup>26</sup> Cited in Eric M. Tucker, “Uber and the Unmaking and Remaking of Taxi Capitalisms: Technology, Law and Resistance in Historical Perspective” in Derek McKee, Finn Makela and Teresa Scassa, eds., *Law and the “Sharing Economy”*: Regulating Online Market Platforms (Ottawa: University of Ottawa Press, 2017), Exhibit 93, B-1-7623.

industry do not do so for the privileges or niceties it brings. Rather, they enter the industry because of their circumstances—and because of the regulatory structure the City has created—in the hopes of supporting their families and securing their future.

**1. Today's taxi industry captains were yesterday's underdogs**

47. Plate owners today are predominantly from minority immigrant and racialized groups. However, the industry is not limited to immigrants and racialized groups. One of the lead plaintiffs, Marc André Way, who is a Franco-Ontarian, is the ideal example. He is the third generation in a family business that began in Vanier back in the 1930s.

48. Mr. Way was born in Ottawa to a Francophone family and grew up speaking French at home.<sup>27</sup> His mother was a laboratory technician and taught hematology at Algonquin College.<sup>28</sup> His father was a teacher who ultimately became a principal at a Francophone school.<sup>29</sup>

49. Mr. Way's involvement with the taxi industry traces back to his maternal grandfather, Claude Thivierge, who was a Francophone. Mr. Thivierge started his career as a milkman. He was a milkman until Sealtest bought the milk run he was operating. At that point, Mr. Thivierge had to find another way to support his family and, in 1937, he decided to start a taxi company in Vanier.<sup>30</sup> That company was Capital Taxi. Mr. Thivierge operated the taxi company until he

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<sup>27</sup> Way Ex., January 4, 2023, 110:22 to 111:3.

<sup>28</sup> Way Ex., January 4, 2023, 111:9-13.

<sup>29</sup> Way Ex., January 4, 2023, 111:14-19.

<sup>30</sup> Way Ex., January 4, 2023, 112:28 to 113:2.



passed away suddenly. Mr. Way's uncle, Paul Thivierge, then left college to take over the family business.<sup>31</sup>

50. Mr. Way was involved in the taxi business from a very young age. When he was ten years old, Mr. Way would count the money from the business with his grandmother after finishing school for the day. In his teenage years, Mr. Way worked in a variety of operational roles: gas station attendant, phone agent, dispatcher, accounting clerk, and taxi driver. After learning the business, he started working on the management side.<sup>32</sup>

51. Mr. Way attended the University of Ottawa and graduated with a Business Administration Degree in the early 1990s. He completed his studies in French. Mr. Way was the first member of his family to have university education. After he graduated, Mr. Way was offered a job with Hewlett-Packard in California. However, after discussing with his uncle, Mr. Way decided to remain in the family business.<sup>33</sup> Mr. Way worked with his uncle in the family taxi business until his uncle passed away in 2014.<sup>34</sup> When his uncle passed away, Mr. Way and his cousin became the owners of Capital Taxi.<sup>35</sup>

52. The reason that Mr. Way's family entered the taxi industry reflects the disadvantage that Francophones experienced at the time. The expert evidence of Dr. Ornstein (addressed in more detail at paragraphs 297-301 below) discusses the historical disadvantage of Francophones.<sup>36</sup>

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<sup>31</sup> Way Ex., January 4, 2023, 114:14-20.

<sup>32</sup> Way Ex., January 4, 2023, 114:24 to 115:7.

<sup>33</sup> Way Ex., January 4, 2023, 115:8-31.

<sup>34</sup> Way Ex., January 4, 2023, 116:3-6.

<sup>35</sup> Way Ex., January 4, 2023, 116:27-29.

<sup>36</sup> Expert Report of Michael Ornstein ("**Ornstein Report**"), dated September 4, 2019, Exhibit 77, A843-A846. Also see: Ornstein Ex., January 20, 2023, 95:19 to 97:6, 98:13-16.

Specifically, Dr. Ornstein found that up until 1980, French Canadians were economically disadvantaged. From that point forward, their disadvantage began to attenuate.<sup>37</sup> One of the reasons that underpinned French Canadian disadvantage is that they had lower levels of education than Canadians of British origin. As Dr. Ornstein explains:

In 1961, more than half of French-Canadian men employed outside of agriculture, 54.2 percent, had *no* high school education, compared to 30.9 percent of Canadians of British origin, a startling 71.0 percent of Italian Canadians, and between 26.8 and 46.7 percent of the other groups. Almost twice the proportion, 12.5 percent of British Canadians, had attended university at this time before the 1960s expansion of post-secondary education, compared to 6.3 of French-Canadians. Finally, 5.9 percent of the French-Canadian men were in professional and technical occupations, and 7.6 percent in managerial occupations, compared to 9.3 and 12.1 percent for British Canadians, respectively.<sup>38</sup>

53. These findings are consistent with Mr. Way's personal and family story. Mr. Way was the first one in his family to graduate from university. Clearly, Mr. Way's family belonged to the group of French Canadians who have been historically disadvantaged. Indeed, the very reason his family entered into the taxi industry is because of the disadvantage that they were facing—it was an option of last resort. Mr. Way's grandfather, a laid-off milkman, entered the taxi industry to ensure that his family could survive.

54. After starting in the taxi industry, Mr. Way's family worked hard to build and grow the family business. In the 1950s, the family grew its business by increasing the number of cars and plates that it was operating. At the time, Vanier did not have a limit on the number of plates that

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<sup>37</sup> Ornstein Report, Exhibit 77, A843-A846. Eventually, it was difficult to measure because collected data ceased to differentiate between European groups.

<sup>38</sup> Ornstein Report, Exhibit 77, A844.

can be issued. As the family business grew, the family obtained more plates from the City.<sup>39</sup> Over the years, the family kept on growing and acquiring more plates in Vanier and other former municipalities of the City to ensure that they remain economically viable and strong.<sup>40</sup> The family was able to grow in the taxi industry not because of a position of privilege that they were born into, but because of hard work of three successive generations of the family.

55. Today, Mr. Way is the President and CEO of Metro Taxi (carrying on business as Capital Taxi), the President and CEO of Coventry Connections,<sup>41</sup> and is the current President of the Canadian Taxi Association.<sup>42</sup> Mr. Way and the holding company A-Metro Taxi own a number of standard and accessible plates.<sup>43</sup> He also operates other businesses in the transportation field.<sup>44</sup> He is also an active member of the Vanier community and the Ottawa community at large.<sup>45</sup>

## **2. Waves of immigrants populated the taxi industry starting in the 1950's**

56. For decades, Ottawa's taxi industry has attracted immigrants and racialized groups. This is evident from the waves of immigrants that have entered the taxi industry. The first wave of immigrants who began working in the taxi industry and buying plates were Hungarian Jews who immigrated to Canada in the aftermath of World War Two. These people, including the Szirtes, Nador, and Kramer families, all "started from scratch" in the taxi industry so that they can save

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<sup>39</sup> Way Ex., January 4, 2023, 142:1-7.

<sup>40</sup> Way Ex., January 5, 2023, 11:1-15.

<sup>41</sup> Way Ex., January 5, 2023, 68:20-70:25.

<sup>42</sup> Way Ex., January 4, 2023, 118:24-118:30.

<sup>43</sup> Way Ex., January 10, 2023, 21:4-22:8.

<sup>44</sup> Way Ex., January 5, 2023, 71:15-73:15.

<sup>45</sup> Way Ex., January 5, 2023, 73:15-74:1.

enough money to buy plates.<sup>46</sup> Like the Thivierge family two decades prior, the Szirtes, Nador and Kramer families entered the taxi industry and began to accumulate plates.<sup>47</sup>

57. The taxi industry in the 1970s reflected the Greek and Italian wave of immigration that occurred in Canada at the time.<sup>48</sup> In the late 1970s and early 1980s, a wave of Lebanese Christians came to Canada and started to work in the Ottawa taxi industry, and ultimately bought plates.<sup>49</sup> The 1980s witnessed an immigration wave of individuals who were from Ethiopia and Somalia.<sup>50</sup> The 1990s and 2000s witnessed a wave of immigrants from Kuwait, Iraq, Iran, and the Middle East.<sup>51</sup>

58. These waves of immigrants typically followed wars, turmoil and persecution in their home countries.<sup>52</sup> In some instances, immigration to Canada combined forces with domestic migration. For example, a wave of immigrants from India had initially settled in Quebec, but then migrated to Ottawa after the Quebec referendum.<sup>53</sup> These people bought plates as well.<sup>54</sup>

59. Thus, the ethnic make-up of the industry today reflects the industry's origins and these successive waves of immigrants.

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<sup>46</sup> Way Ex., January 5, 2023, 10:10-15; Way Re Ex., January 17, 2023, 29:28-31; 30:27-28.

<sup>47</sup> Way Ex., January 4, 2023: 20 to 149:16; Way Cr Ex., January 10, 2023, 97:20 to 99:16; Way Cr Ex., January 10, 2023, 27:20 to 34:20; 2012-2022 Plate Holders Renewal, Exhibit 1, F84.

<sup>48</sup> Way Ex. January 5, 2023, 10:18-20.

<sup>49</sup> Way Ex., January 5, 2023, 38:4-7.

<sup>50</sup> Way Ex., January 5, 2023, 38:2-3.

<sup>51</sup> Way Ex., January 5, 2023, 38:14-15.

<sup>52</sup> Way Ex., January 5, 2023, 38:10-12.

<sup>53</sup> Way Ex., January 5, 2023, 68:20-25.

<sup>54</sup> Way Ex. January 5, 2023, 68:25.

### 3. The taxi industry provides an opportunity for advancement

60. The immigrants who ultimately became plate owners did not ordinarily start out as plate owners. Rather, they would typically start out as drivers to get a feel for the business and the industry. Some would then lease a plate. Subsequently, they would buy a plate.<sup>55</sup>

61. This progression was not only because of the need to become familiar with the industry. Many who bought plates also had to secure the financial resources to buy them. Many had to buy plates through vendor take-back arrangements under which those seeking to buy a plate would have to pay the seller a deposit and make monthly payments for the remaining amount.<sup>56</sup> Many could not afford the deposits for and had to borrow money from family or rely on funds that their communities had put together to allow their members to buy plates.<sup>57</sup> Many others had to rely on financing from financial institutions.<sup>58</sup> Some immigrant plate owners, after working in the industry and becoming familiar with it, invested the money that they had brought to Canada after selling their assets in their home countries.<sup>59</sup>

62. In the heyday of the taxi industry, the sale of plates was of such importance and the demand for plates was so high that the sale of plates by multi-plate owners was covered in collective agreements. For context, since the early 1980's, there have been collective bargaining agreements ("**CBA**") between brokers and unions representing taxi drivers.<sup>60</sup> In the 1990's, the

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<sup>55</sup> Way Ex. January 5, 2023: 38:10-31. Also see: Dadi Ex., January 23, 2023, 98:20-23; El-Feghaly Ex., January 25, 2013, 83:16 to 85:12.

<sup>56</sup> Way Ex., January 5, 2023, 39:28 to 40:2

<sup>57</sup> Way Ex., January 5, 2023, 40:2-5. See also: Mezher Ex., January 18, 2023, 9:18-28.

<sup>58</sup> Way Ex., January 5, 2023, 40:5-8. Also see: Dadi Ex., January 23, 2023, 103:2-4; Mail Ex., January 18, 2023, 115:14-22; Mail Cr Ex., January 19, 2023, 56:23-32; El-Feghaly Ex., January 25, 2023, 94:1-2, 92:11-16.

<sup>59</sup> Way Ex., January 5, 2023, 40:8-12.

<sup>60</sup> Statement of Agreed Facts at para 9, F2.

selling price for plates was fixed in the CBA's.<sup>61</sup> The price is no longer fixed in the CBA's. The recent CBA's have included a provision that provides a right of first refusal to the most senior lessee of a plate.<sup>62</sup> In other words, this provision requires multi-plate owners to sell their plates based on seniority.<sup>63</sup>

63. In any event, the immigrant, racialized and minority plate owners poured everything that they have, whether in terms of hard labour or money, to make sure they have a vested interest in the industry, based on a plate system that was created and regulated by the City. As set out in more detail below, this Court heard convincing evidence from a small sample of plate owners about how hard they worked in order to succeed in the taxi industry and having the ability to buy a plate. This evidence was corroborated by Ms. Jones who recounted a story where an individual attended a meter check after driving for 16 or 17 hours and fell asleep during a meter check when he was driving with Ms. Jones in his vehicle.<sup>64</sup> This is the kind of investment and effort that the plate owners have dedicated because of the plate system that the City created and maintained for decades.

### **C. The City's supply management model**

64. The City has pleaded that taxi plates are regulated based on a "supply management" model.<sup>65</sup> The plaintiffs agree. In limiting the number of taxi plates and in making these plates transferrable, the City (and its prior municipalities) created a scarce commodity. The evidence

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<sup>61</sup> For example, see Article 24.05 of the 1990-1993 Blue Line CBA, Exhibit 1, F5665.

<sup>62</sup> For example, see Article 20.11(3) of the 2016-2019 CBA with Capital Taxi, Tab 9 of Part A of Joint Book of Documents, Exhibit 1, F5325.

<sup>63</sup> Way Ex., January 5, 2023, 104:23 to 105:5.

<sup>64</sup> Jones Ex., February 8, 2023, 8:24-32.

<sup>65</sup> Amended Statement of Defence at para 22.

demonstrates that the market for that commodity is the inevitable result of this “supply management” system.

### **1. The supply management system was born in the old City of Ottawa**

65. Before amalgamation, the former municipalities of Ottawa, Cumberland, Gloucester, Kanata, Nepean and Vanier all regulated taxis. The former City of Ottawa had a fixed number of plates based on population. In 1969, the old City of Ottawa assumed control of regulation of the taxi industry from the police commission. In doing so, it enacted By-law L-1 and introduced a limit on the number of taxi plates that may operate.<sup>66</sup> In 1971, the old City of Ottawa enacted By-law L-6, which authorized the transfer and selling of plates as commercial transactions.<sup>67</sup>

66. Other municipalities, like the City of Vanier, did not limit the number of plates.<sup>68</sup> Yet other municipalities did not regulate the industry at all.<sup>69</sup>

67. The municipalities that had no plate limits experienced problems with the oversupply of plates. For example, Vanier introduced plate limits in the mid-1990s because the over-supply of plates was problematic.<sup>70</sup>

68. The Vanier experience was not unique. The City has consistently recognized that an open system that does not limit the numbers of cars that can operate has historically caused serious problems. In the immediate period after amalgamation, the City considered the issue of plate

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<sup>66</sup> See s. 7, Schedule No. 11 to By-law L-1, Exhibit 2, F4113 (1 license per every 700 persons in Old Ottawa, Vanier, Rockcliffe Park, Nepean, and Gloucester) and s. 17 (no transfers except in case of death) at F4117.

<sup>67</sup> See s. 25, Schedule No. 19 to By-law L-6, Exhibit 2, F4730-F4731 and s. 32 (1 license per every 540 residents in Old Ottawa) at F4735.

<sup>68</sup> Way Ex., January 5, 2023, 11:1-5.

<sup>69</sup> Jones Ex., February 8, 2023, 5:32 to 6:8.

<sup>70</sup> Way Ex., January 5, 2023, 11:1-5, 36:11-17.

limits and City staff explained the serious consequences that arise if the industry is opened. Specifically, in 2001, City staff prepared a report explaining the history and disastrous experience of an open system in other jurisdictions.<sup>71</sup>

69. As explained in a 2001 staff report, the reason why an open system leads to serious problems is due to the nature of supply and demand in the taxi industry:

in most industries, an economic slowdown results in lower demand for the product, and this results in a lower supply as firms reduce production or exit the industry. In the taxi industry, an economic slowdown reduces demand, but the industry tends to serve as an employer of last resort, so the supply of service actually increases as workers let go in other industries seek employment in the taxi industry.<sup>72</sup>

70. The 2001 staff report tied the concept of plate limits to the economic viability of the taxi industry. As the report put it, “[t]here appears to be wide agreement that removing limits on the numbers of plates issued will not lead to higher driver incomes (through lower plate rental fees) but rather to reduced income due to more drivers pursuing [sic] the same business.”<sup>73</sup> The 2001 report goes on to connect plate limits to attracting investments in the industry and quality of service. In particular, the report noted that “the research suggests this approach [that is based on no plate limits] often leads to less investment in cars (and poorer quality vehicles) and a less attractive trade (less skilled drivers).”<sup>74</sup>

71. The report further elaborated on the effect of an open industry and how such a model would affect investments in the industry and, in turn, the quality of service provided:

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<sup>71</sup> Report to Emergency and Protective Services Committee and Council, June 11, 2001, Exhibit 7, F2234-2236.

<sup>72</sup> Report to Emergency and Protective Services Committee and Council, June 11, 2001, Exhibit 7, F2234.

<sup>73</sup> Report to Emergency and Protective Services Committee and Council, June 11, 2001, Exhibit 7, F2234.

<sup>74</sup> Report to Emergency and Protective Services Committee and Council, June 11, 2001, Exhibit 7, F2234.



This [open entry model] results in higher supply as demand is reduced, and rapidly dropping incomes, encouraging the most experienced and competent drivers, those who have other options, to leave the industry, reducing the general quality of service available. Open license systems also tend to feature many more part-time drivers which can contribute to the lower level of knowledge and experience among drivers. The reduced income per taxi also makes investment in cars, dispatch and other infrastructure more difficult, leading to worse quality taxis as well.<sup>75</sup>

72. Ms. Jones provided similar testimony about the rationale for plate limits and how it relates to the economic viability of the taxi industry as a precondition to ensuring the quality of service:

the rationale, based on my understanding and involvement as a licensed inspector and chief license inspector over the years, was the rationale for limiting the plates was to ensure that — our, our main rationale, first of all, in terms of licensing, was public safety, consumer protection — later on, we talked about accessibility — and our main rationale was to, first of all, ensure we had an adequate supply of taxis to provide transportation services to those who need it. We recognize taxi services as an integral part of the city and the region's transportation network. And rationale for limiting plates is, we certainly had seen evidence in the past whereby if there were too many plates in operation, that an individual couldn't necessarily earn an adequate living and, thereby, that had an impact on the ability to provide service. So being able to limit plates and, and being able to correspond the limitation of those plates with their ability to have a complement already what was in existence for public transportation was seen as, as a best practice and the way to go.<sup>76</sup>

73. In short, the supply management system created by the former City and adopted by the amalgamated City was based on decades of experience and research that suggested that opening the industry in a free-for-all manner was not conducive to providing effective or even adequate service. For decades, the City realized that the provision of effective and adequate service hinges on imposing plate limits and ensuring the economic viability of the taxi industry. Simply put, the

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<sup>75</sup> Report to Emergency and Protective Services Committee and Council, June 11, 2001, Exhibit 7, F2234.

<sup>76</sup> Jones Ex., February 8, 2023, 7:2-21.

City deliberately designed the taxi industry in a way that seeks to protect the economic interests of the taxi industry through plate limits to ensure the quality of service to the public.

## **2. The plate system creates the plate market and plate value**

74. The City's supply-management plate system is the foundation for the market of plates. The system combines the limited supply of plates with the transferability of plates: it creates a scarce and tradeable commodity, automatically generating a market for plates. This is borne out in the evidence. The market for plates began immediately after plate limits and transferability were introduced in 1969<sup>77</sup> and 1971<sup>78</sup> respectively. The combination of plate limits and transferability directly resulted in the creation of plate value.

## **3. Failed attempts to abolish or reform supply management**

75. A mere four years after plate limits and transferability were introduced, the old City of Ottawa was put on notice that taxi plates had accrued value. In 1975, the former City of Ottawa released its first major report on the taxi industry, authored by Jim Mackenzie. Mr. MacKenzie noted that plates were trading for up to \$8,000 and considered the possibility of removing the taxi plate limits. He concluded that the City would be "directly responsible" for losses incurred due to changes in regulation:

The City charges an initial fee of \$300 for a taxicab license and an annual renewal fee of \$100. The license is transferrable after 3 years and current market price is in the neighbourhood of \$8,000. (The City received 10% of this as a transfer fee). This high artificial value of a license has been established by virtue of the limit on the number of plates available. Removal of the limit would automatically result in almost total loss of value.

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<sup>77</sup> See s. 7, Schedule No. 11 to By-law L-1, Exhibit 2, F4113.

<sup>78</sup> See s. 32, Schedule No. 19 to By-law L-6, Exhibit 2, F4735 (1 license per every 540 residents in Old Ottawa).

As a result of its actions in allowing the transfer of licenses, the City has condoned the investment of up to \$8,000 in a commodity that it issues for \$300 and that has no direct value in itself. If it removed the limit or made the license non-transferrable, the City would be directly responsible for causing substantial financial loss. I suggest that the City is now obliged to protect the investment it has encouraged. For this reason I do not recommend removal of the limit.<sup>79</sup>

76. At a City Council meeting on December 15, 1975, the old City expressed its agreement with Mr. MacKenzie's statement by voting to maintain the plate limits.<sup>80</sup>

77. An opportunity to reform the supply management system arose once again in the late 1980s and early 1990s. In 1989, the Regional Municipality of Ottawa Carleton ("**RMOC**") considered an overhaul of the industry across the lower-tier municipalities through a report of its Licensing Committee, also known as the Cameron Report. The Cameron Report endorsed the elimination of municipal boundaries and plate transfers. In recognition of plate owner investments, the Cameron Report also recommended that plate limits be maintained and a system of compensation for existing plate owners should be established.<sup>81</sup> The recommended compensation system would ultimately "establish a street value at a future stage at an acceptable level for expansion of ownership in the industry".<sup>82</sup> Even though the City did not adopt the suggested elimination of plate boundaries, plate transferability and compensation, the City maintained the closed plate system.

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<sup>79</sup> City of Ottawa Report – Report on the Taxi Industry, dated July 15, 1975, Exhibit 5, F1200-F1201.

<sup>80</sup> City Council Minutes, December 15, 1975, Exhibit 151, A1689-A1690. Notably, two motions were brought, including one by Alderman Brian Bourns, to remove the number of plate limits either gradually or immediately "for the purpose of allowing each licensed taxi driver to own his or her own taxi". These motions were defeated.

<sup>81</sup> Regional Municipality of Ottawa-Carleton, Licensing Committee, Final Report, Exhibit 30, F8399-F8400.

<sup>82</sup> Regional Municipality of Ottawa-Carleton, Licensing Committee, Final Report, Exhibit 30, F8418 (emphasis added).

78. These are just examples. The City and many of the former municipalities have consistently studied and upheld the supply managed plate system.

#### **4. The amalgamated City reaffirms its commitment to supply management**

79. In 2000, the Ottawa Transition Board, which was responsible for facilitating the amalgamation process, established the Taxi Project Team with a view to harmonizing the industry upon amalgamation.<sup>83</sup>

80. As part of its study, the Taxi Project Team commissioned a confidential and in-depth study of taxi plate values from Hara and Associates.<sup>84</sup> This study considered various compensation scenarios in the event that plate limits were removed. None of these studies appeared in any public reports of the Taxi Project Team. However, the studies are cogent evidence that the Transition Board took note of plate values and seriously considered the issue of compensation.

81. On September 8, 2000, the Taxi Project Team released a draft report recommending an “open-entry” system that would abolish plate limits.<sup>85</sup> In response to a negative reaction from the public, the Transition Board recharacterized its recommendation as one of “controlled entry” in its final report of December 2000.<sup>86</sup>

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<sup>83</sup> Jones Cr Ex., February 9, 2023, 36:7-20. Andrew Haydon, a Nepean politician previously quoted describing Ottawa taxi drivers as ‘dirty and slovenly’, was appointed to head the team.

<sup>84</sup> Hara Associates - Plate Value Option Paper prepared for Ottawa Transition Board, dated July 2000, Exhibit 204 A1475; Working Paper – Scenario E – Compensation at Purchase Price Plus CPI August 21, 2000, Exhibit 205, A1467.

<sup>85</sup> Ottawa Transition Board, September 8, 2000, Exhibit 148, A1439.

<sup>86</sup> Ottawa Transition Board Report, dated December 5, 2000, Exhibit 34, F2133; Bourns Cr Ex., February 1, 2022, 128 to 131:15.

82. The recommendations for an open entry system were not adopted. As mentioned above, the City upheld the closed plate system once again by reaffirming its commitment to plate limits and transferability in 2001.<sup>87</sup> Brian Bourns was the consultant who recommended this way forward.

83. Following a transition period after amalgamation, all former municipal taxi by-laws were harmonized in By-law 2005-481 ("**2005 By-law**"), which maintained plate limits and transferability.<sup>88</sup> With this regulatory change, the City merged all the zones into one and maintained the closed (supply managed) plate system.<sup>89</sup> As a result, plates from the former cities continued to have value as Ottawa plates.

#### **5. The City introduces accessible plates**

84. The City began issuing accessible plates in 2002. Initially, the accessible plates were distributed via a waiting list and were transferrable after a five-year period.<sup>90</sup>

85. In 2004, the City contracted Mr. Brian Bourns and Dr. Dan Hara to review the taxi cost index as well as the plate limit ratio. As part of that mandate, Mr. Bourns was required to review the accessible taxi plate per population ratio.<sup>91</sup> Mr. Bourns noted that the uptake of accessible plates was successful due to their high plate value. The implication of this was that high plate values lead to increased accessible services, which was of public benefit.<sup>92</sup>

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<sup>87</sup> Bourns Cr Ex., February 1, 2022, 129:10-20, 131:18-22; Jones Cr Ex., February 9, 2023, 58:29 to 59:2.

<sup>88</sup> ss. 62-64, s. 21, By-law 2005-481 ("**2005 By-law**"), Exhibit 2, F3784, F3794, F3812.

<sup>89</sup> Way Ex., January 5, 2023, 64:32 to 65:2. The airport remained separate from the Ottawa zone.

<sup>90</sup> Report to CPCS and Council, dated March 22, 2012, Exhibit 13, F2379.

<sup>91</sup> Replacement for a Taxi Cost Index Presentation to EPSC, dated 2004, Exhibit 150, A1512.

<sup>92</sup> Replacement for a Taxi Cost Index Presentation to EPSC, dated 2004, Exhibit 150, A1516; Bourns Cr Ex., February 1, 2022, 25:1 to 28:27.

86. Despite these findings, the Taxi By-law was amended in 2007 to require all future accessible plate owners to be the primary driver and prohibit the transfer of the plates. The drivers who received accessible plates after 2007 wanted them to be transferrable and urged the City to make the plates transferrable. These drivers, who ultimately became plate owners when they were given accessible plates by the City, wanted the plates to be transferrable to ensure that they can sell their plates in the future to recoup their investments and secure their retirements.<sup>93</sup>

87. In response to industry concerns, the City re-enacted the 2005 By-law as By-law No. 2012-258 (“**2012 By-law**”). In doing so, the City permitted all accessible plates to be transferable after a five-year period and removed the primary driver requirement.<sup>94</sup> The rationale at the time was to allow all accessible plate owners to be able to “recover the large capital investment that they make in their business” in light of the high costs of operating an accessible taxicab.<sup>95</sup> Council made clear that it sought to maintain a “uniform and equitable structure for plate ownership”.<sup>96</sup>

#### **D. The City partnered with the taxi industry to maintain the integrity of the system**

88. The City and class members had a long-standing partnership to maintain the integrity of the plate system. This partnership began upon amalgamation and culminated in an initial collaborative investigation of Uber in the fall of 2014.

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<sup>93</sup> Way Ex., January 5, 2023, 110: 2-14.

<sup>94</sup> City Council Minutes, April 11, 2012, Exhibit 52, F3757.

<sup>95</sup> Report to CPCS and Council, dated March 22, 2012, Exhibit 13, F2379.

<sup>96</sup> Ottawa City Council Minutes, dated April 11, 2012, Exhibit 52, F3759.

89. In the early 2000s, the taxi industry began raising the issue of bandit cabs with the new City. In doing so, the taxi industry would regularly provide By-law and Regulatory services with information regarding unlicensed activity.<sup>97</sup> Susan Jones, the Chief License Inspector at the time, testified that the industry provided enforcement tips with a view to protect the licensed industry and its investments.<sup>98</sup> In turn, the City undertook to investigate such activity.

90. With this continued assistance from the industry, the City charged, prosecuted, and convicted unlicensed operators and bandit cab drivers.<sup>99</sup> The City accepted investigative reports and witness statements from class members in the taxi industry, including Mr. Way.<sup>100</sup> As these enforcement efforts were successful in shutting down unlicensed operators, the City was able to prevent substantial economic losses to the industry. City staff made public representations to this effect.<sup>101</sup>

91. The City continued to enforce proactively against bandit cab operators even in the face of technological change. The City would adapt its enforcement strategies to new technologies and it would change its “approach and focus” in light of such developments.<sup>102</sup>

92. Collaboration with the industry with regards to enforcement against bandit cabs intensified into the late 2000s. After the City dedicated two by-law officers to taxi licensing

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<sup>97</sup> Way Ex., January 9, 2023, 3:30-32.

<sup>98</sup> Jones Ex., February 8, 2023, 78:27-32; Jones Cr Ex., February 9, 2023, 52:20-26; 52:27 to 53:5.

<sup>99</sup> Jones Cr Ex., February 9, 2023, 54:5 to 56:17; CBC, “Firm operated ‘bandit’ cab service, city says”, Exhibit 193, F475-476; Way Ex., January 9, 2023, 2:4-8; Jones Ex., February 8, 2023, 78:23-27.

<sup>100</sup> Way Ex., January 6, 2023, 37:32 to 38:3; Way Cr Ex., January 11, 2023, 110:31 to 111:1.

<sup>101</sup> CBC, “Firm operated ‘bandit’ cab service, city says”, Exhibit 193, F476.

<sup>102</sup> Jones Cr Ex., February 9, 2023, 51:1 to 52:20; Jones Cr Ex., February 9, 2023, 44:20-26; Way Ex., January 6, 2023, 37: 11-20; Jones Cr Ex., February 9, 2023: 51:30 to 52:6.

enforcement, it had established the Taxi Stakeholders Working Group.<sup>103</sup> Through regular meetings, industry representatives would regularly discuss the issue of bandit cabs with the City. As bandit cab operations increased, the Council directed the City and the taxi industry to collaborate together on enforcement strategies and public awareness campaigns.<sup>104</sup>

93. During the two-year period prior to the entry of Uber in Ottawa, the City and the taxi industry intensified their partnership. The City would receive and act on evidence submitted by the industry, respond to specific requests for information on unlicensed operators, and arrange for undercover pickups of bandit cabs to be ticketed.<sup>105</sup> In 2012, the City and Coventry Connections had even joined forces to lobby for more extensive enforcement powers through proposed legislative amendments.<sup>106</sup> In 2014, class members and the City continued to meet on a regular basis with the goal of increasing enforcement against bandit cabs and operators.<sup>107</sup>

94. The City continued to collaborate with the taxi industry upon the arrival of Uber into Ottawa. In fact, the City enlisted Coventry to assist during the first investigation of Uber at its recruitment event at the Westin Hotel in late September 2014.<sup>108</sup>

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<sup>103</sup> Way Ex., January 5, 2023, 128:28 to 129:2; Hartig Ex., February 2, 2022, 89:24 to 89:4; Way Ex., January 6, 2023, 41:1-25; Jones Cr Ex., February 9, 2023, 46:1-6.

<sup>104</sup> City Council Minutes May, 28, 2008, Exhibit 159, A1952; See also Report to CPSC and Council, dated May 14, 2008, Exhibit 14, A662-A663.

<sup>105</sup> Way Ex., January 9, 2023, 7:15 to 8:5; Way Ex., January 9, 2023 2:19 to 9:17; E-mail chain between Marc Andre Way and Linda Anderson, dated January 8, 2013, Exhibit 22, A741; E-mail chain between Marc Andre Way and Linda Anderson, dated January 28, 2014, Exhibit 23, A738.

<sup>106</sup> Letter from Susan Jones to Bob Chiarelli dated August 2 2012 with attached proposed legislative amendments, Exhibit 25, A697; Draft version of Letter from Sue Jones to Bob Chiarelli, dated August 2, 2012, with attached proposed legislative amendments, Exhibit 26, A703; See also Letter from Mark Taylor to Yasir Naqvi, November 14, 2012 with enclosures, Exhibit 27, A709; E-mail from Susan Jones to Marc Andre Way, dated November 14, 2012, Exhibit 28, A720.

<sup>107</sup> Tweet from Susan Jones, dated April 15, 2014, Exhibit 16, F1119.

<sup>108</sup> E-mail re Uber at Westin from Marc Andre Way to Linda Anderson, dated September 19, 2014, Exhibit 17, F490-F491; Attachments to e-mail dated September 19, 2014, Exhibit 18, F493-F505.



95. This long-standing collaboration was based on a basic understanding between the industry and the City. The industry, heavily dependent on the City's regulatory framework and enforcement efforts, needed to be economically viable in order to continue operating. The City needed an economically viable industry to ensure safe and adequate taxi service to the public. To ensure economic viability and public safety, the City needed to enforce the by-law against unlicensed operators.

**E. Although the City was aware that Uber would disrupt the system, the City had no plan and did not take any serious steps to enforce against Uber**

**1. Uber flouts the law everywhere**

96. "Uber" refers to multiple affiliated corporations incorporated in different jurisdictions, including Uber B.V., Raiser Operations B.V., Uber Canada Inc. and/or Uber Technologies Inc. In affiliation with each other, these corporations carry on business with an electronic software application and license businesses in relation to facilitating private transportation services for compensation through telecommunications platforms and/or a digital network.<sup>109</sup>

97. Uber began operating in Ottawa in or around September 2014.<sup>110</sup> Around that time, Uber accelerated its activities by launching campaigns to attract drivers to join its operation.<sup>111</sup> The operation of Uber and its drivers directly contravened the unlicensed driving and dispatching provisions of the 2012 By-law.<sup>112</sup>

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<sup>109</sup> Statement of Agreed Facts at para 28, F6.

<sup>110</sup> Statement of Agreed Facts at para 29, F6.

<sup>111</sup> Statement of Agreed Facts at para 29, F6.

<sup>112</sup> ss. 3-6, 2012 By-law, F3904.

98. Uber and its drivers provided the same services as bandit cab operators and bandit cab drivers. Just like taxi brokers, Uber dispatched taxicabs to the individuals requesting a ride.<sup>113</sup> Just like taxi drivers, Uber drivers picked up passengers from one location and dropped them off at another in exchange for compensation.<sup>114</sup> This is the exact same service that taxicab drivers and brokers provide and have provided since the former City of Eastview (now Vanier) began to regulate the taxi industry in 1933.<sup>115</sup> Uber just cloaked these services in the guise of “ridesharing” and wrapped them up in a shiny app.

## **2. The City was unprepared for Uber’s arrival**

99. In the fall of 2014, the City was aware that Uber had been operating in Ontario for at least two years. The City knew that Uber would disrupt the licensed taxicab industry. The City had ample opportunities to take reasonable care and prepare for Uber’s arrival in Ottawa. However, it failed to take any steps to prepare for Uber’s arrival.

100. The evidence led at trial revealed that the City did nothing until the last minute. After being made aware of Uber’s existence at an international conference in 2012, the City’s reaction was to merely “hope” that Uber would not come Ottawa.<sup>116</sup>

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<sup>113</sup> Way Ex., January 6, 2023, 44:5-9.

<sup>114</sup> Way Ex., January 6, 2023, 48:1-2.

<sup>115</sup> Way Ex., January 6, 2023, 48:3-5.

<sup>116</sup> Hartig Cr Ex., February 1, 2023, 109:1-27.

### **3. The City's reaction was chaotic and unplanned**

101. As part of its chaotic and unplanned response, the City began to dedicate meager resources to enforce against Uber drivers. It began planning for the so-called enforcement effort only around the weekend before Uber came to Ottawa.<sup>117</sup>

102. There was no plan.<sup>118</sup> The City allowed Uber and its drivers to launch an uncontrolled invasion of Ottawa for over two years.

103. Historically, bandit taxicab businesses would operate through word of mouth and small advertisements.<sup>119</sup> Uber's approach differed in that it was funded by venture capitalists with access to significant amounts of financing.<sup>120</sup> For example, Uber would subsidize the trips upon entry into a City.<sup>121</sup> Although customers would receive promotional discounts of up to 50-60% percent of the ride, drivers would still be paid the full amount of the ride.<sup>122</sup> This predatory approach allowed Uber to gain traction quickly in markets like Ottawa where it operated outside the regulatory framework.

104. City staff believed that Uber operated illegally from the moment it intruded into Ottawa.<sup>123</sup> To this end, Susan Jones, now Deputy city Manager, met with Uber representatives in September 2014. She provided Uber with a copy of its by-law and requested that it review the by-law and comply with it.<sup>124</sup> The same day, she made public statements to the media to the

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<sup>117</sup> Hartig Cr Ex., February 3, 2023, 119:1-20.

<sup>118</sup> Jones Cr Ex., February 9, 2023, 63:12-22.

<sup>119</sup> Way Ex., January 10, 2023, 14:32 to 15:4.

<sup>120</sup> Way Ex., January 10, 2023, 15:4-8;11:27-28.

<sup>121</sup> Way Ex., January 10, 2023, 15:8-10.

<sup>122</sup> Way Ex., January 10, 2023, 15:10-14.

<sup>123</sup> Jones Cr Ex., February 9, 2023, 83:6-10.

<sup>124</sup> Jones Cr Ex., February 9, 2023, 71:28 to 72:3.

effect that Uber required a broker's license to operate in Ottawa.<sup>125</sup> The message the City sent to Uber and the public that day was loud and clear: charges would be laid against Uber for non-compliance.<sup>126</sup>

105. Despite these early alarm bells, the City focused its initial enforcement efforts only on drivers. As part of the City's first undercover operation, Ms. Hartig opened up the Uber app for the first time on October 4, 2014 to take a ride with Uber.<sup>127</sup> Armed with a Bluetooth microphone, Ms. Hartig pressed a button, waited for a car, and took a seat during the nine minute ride.<sup>128</sup> A by-law officer waited at the destination to charge the driver as Ms. Hartig exited the vehicle towards her salon appointment.<sup>129</sup> The deed was done and the first charge was laid.

106. At the time, Ms. Hartig was of the view that Uber was an unlicensed broker.<sup>130</sup> Her view on this point did not change over time.<sup>131</sup> After that operation, which resulted in an immediate charge, Ms. Hartig was blocked from accessing the Uber app.<sup>132</sup> Uber quickly adapted to thwart enforcement efforts against drivers.

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<sup>125</sup> Ottawa Citizen Media Interview with Susan Jones, dated September 22, 2014, Exhibit 195, A2351.

<sup>126</sup> Jones Cr Ex., February 9, 2023, 80:29 to 81:4.

<sup>127</sup> Hartig Cr Ex., February 3, 2023, 34:4 – 34:14, 112:30 – 113:5; 119:21-120:32.

<sup>128</sup> Enforcement Strategy Unlicensed Taxi Driver, October 4, 2014, Exhibit, B-1-8543; Hartig Ex., February 2, 2023, 124:1 to 128:15.

<sup>129</sup> Hartig Ex., February 3, 2023, 126:6-121:1.

<sup>130</sup> Hartig Cr Ex., February 3, 2023, 110:1 – 112:25; Hartig Cr Ex., February 3, 2023, 121:1-121:3.

<sup>131</sup> Hartig Cr Ex., February 3, 2023, 112:27 – 112:29.

<sup>132</sup> Hartig Cr Ex., February 3, 2023, 121:1-121:3.

**4. Despite knowing that Uber thwarted enforcement efforts against drivers, the City never turned its enforcement efforts toward Uber**

107. The ostensible goal of the City's enforcement effort was deterrence.<sup>133</sup> Yet Uber and its drivers continued to flout the law after the initial fall "blitz" and blocked accounts made by by-law officers. Around January or February of 2015, Ms. Hartig heard anecdotally that Uber was paying the drivers' fines.<sup>134</sup> There is no evidence that City took any steps to actually investigate or act upon this information beyond ordering a court transcript.<sup>135</sup> Further, the City did not change its ineffective practice of charging drivers only; it simply carried on with the same approach.<sup>136</sup>

108. Indeed, the City had clear information from the outset to suggest that Uber was taking active measures to circumvent enforcement against drivers: by blocking enforcement officers from the app and by paying drivers' fines. Yet the City did not modify its overall strategy at any time.

109. In early 2015, the City persisted in its failure to deter Uber through charging its drivers. As such, Mr. Way continued to offer the City help with the enforcement after the City requested his assistance to investigate Uber at the Westin Hotel in the fall of 2014.<sup>137</sup> Just as Mr. Way had done in the past in relation to bandit cab services, he retained the Triangle Investigation firm to take and document Uber rides as evidence for by-law enforcement in January 2015. The results

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<sup>133</sup> Hartig Cr Ex., February 3, 2023, 128:14-129:24.

<sup>134</sup> Hartig Cr Ex., February 3, 2023, 129:25-130:2.

<sup>135</sup> Hartig Cr Ex., February 3, 2023, 130:28-130:31.

<sup>136</sup> Hartig Cr Ex., February 3, 2023, 130:3-130:12; 130:32-131:17; 131:28-132:30.

<sup>137</sup> Way Ex., January 6, 2023, 64:20-25.

of the investigation were provided to the City. However, the City did not accept the evidence from Mr. Way with open arms as it had done in the past.<sup>138</sup>

110. Triangle Investigation encountered similar difficulties as the City in the investigation it was conducting because Uber would block its investigators' accounts.<sup>139</sup> Despite these hurdles, Triangle was able to take more rides and gather almost double the evidence than the City did during the same period.<sup>140</sup>

111. The City further encouraged Uber's illegal activity by taking zero steps to enforce the by-law against Uber even though it believed and knew it was illegal.<sup>141</sup> At trial, Ms. Jones claimed that the City was "gathering evidence" and trying to understand "who and what" Uber was.<sup>142</sup> None of this alleged work or fact-finding was demonstrated at trial: no witness testified to any actual investigation or fact-finding about Uber itself.

112. It was plain and obvious what Uber was and what Uber did. By-law employee Mr. Tam testified that his understanding of how Uber works was easily obtained from its website -- "Uber had everything on their website on how to use their application".<sup>143</sup>

113. Despite the fact that Uber's illegality was open knowledge at the City, the City never charged Uber. The City never prosecuted Uber. The City never sent a cease and desist letter against Uber. The City of Ottawa never sought an injunction against Uber drivers.<sup>144</sup> As

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<sup>138</sup> Way Ex., January 6, 2023, 64:30 to 66:2.

<sup>139</sup> Way Cr Ex., January 11, 2023, 144:28-32.

<sup>140</sup> Triangle Investigation (Uber Rides) January 21, 2015 and February 22, 2016, Exhibit 47, B-1-6014-B-1-6337.

<sup>141</sup> Jones Cr Ex., February 9, 2023, 70:6-16.

<sup>142</sup> Jones Cr Ex., February 9, 2023, 102:25-29; Jones Cr. Ex., February 9, 2023, 103:19-23.

<sup>143</sup> Powers Cr Ex., February 13, 2023, 56:27 to 57:5.

<sup>144</sup> Hartig Cr Ex., February 3, 2023, 136:7-136:10.

demonstrated in paragraphs 121-125 below, the City did nothing vis-à-vis Uber besides throw out a welcome mat at City Hall.

114. Throughout the two-year conquest of Ottawa, the City believed Uber was illegal at all relevant times. In fact, the City added a statement regarding its likelihood of success to obtain an injunction against Uber into the draft report of the by-law review by KPMG. This report was published as part of a regulatory review which will be discussed in further detail below. The text added by the City is underlined :

Although a Court chose not to support an injunction in Toronto, City Officials indicated that Ottawa's current by-laws are different than those in Toronto, and as such, would support an injunction if it was determined that the approach to be taken.<sup>145</sup>

This is compelling and cogent evidence of the City's view of Uber's operations at the time. There is nothing in the written record to contradict it.

##### **5. The City turns its back on the class, and the class begins to suffer**

115. Compared to its previous enforcement efforts against bandit taxi services, the City enforcement against Uber was not the same. The relationship between the City and the taxi industry began to change. The City did not want to maintain the same type of collaboration and cooperation with the industry. Before Uber's entry into Ottawa, the City would have non-

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<sup>145</sup> Draft KPMG Report with Comments from Christine Hartig, dated January 20, 2016, Exhibit 149, A1817; Bourns Cr Ex., February 1, 2023, 90:5-9;24-28;91:4-7; Bourns Ex., January 31, 2023, 97:4 to 98:19. This change was made on January 20, 2016 after review from the City's legal staff: Hartig Cr Ex., February 6, 2023, 27:31 to 29:7; Jones Cr Ex., February 9, 2023, 12:22 to 13:20. It then made its way into the final KPMG report released to the public in the spring: City of Ottawa Taxi Regulation and Service Review, dated December 31, 2015, Exhibit 58, F2758.

scheduled discussions with the industry to ensure effective enforcement. After Uber's entry, the discussion became formal and structured.<sup>146</sup>

116. The City's attitude toward enforcement in the pre- and post- Uber's era is exemplified by the conduct of some by-law officers. After Uber started operating in Ottawa, Marcel Robert, who was a by-law officer with the City at the time, encouraged taxi drivers to join Uber.<sup>147</sup>

117. Because of the City's lax enforcement against Uber, the taxi industry began to suffer financially. Drivers began to express that it was difficult for them to earn enough to cover their rent, fuel, and food in a day's work.<sup>148</sup> The amount of hours for a driver to earn a living increased from an average of 8-10 to an average of 12-14.<sup>149</sup> The most notable losses occurred with the evening and overnight business.<sup>150</sup> As such, night drivers became the first group of drivers to stop working.<sup>151</sup> Many were forced to exit the industry to join Uber.<sup>152</sup>

118. As fleets began to shrink, many plate owners returned their plates to the City.<sup>153</sup> The majority of plates that were returned were accessible plates.<sup>154</sup> Single plate owners would not work to avoid paying insurance, stand rent or dispatch fees as well as other costs.<sup>155</sup>

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<sup>146</sup> Way Ex., January 6, 2023, 76:29 to 77: 6.

<sup>147</sup> Way Ex., January 6, 2023, 78:12-13; 79:17-27; 94:30 to 95:7.

<sup>148</sup> Way Ex., January 10, 2023, 4:13-17.

<sup>149</sup> Way Ex., January 10, 2023, 5:11-16.

<sup>150</sup> Way Ex., January 10, 2023, 4:10-13.

<sup>151</sup> Way Ex., January 10, 2023, 5:5-6.

<sup>152</sup> Way Ex., January 10, 2023, 5:7-9.

<sup>153</sup> Way Ex., January 10, 2023, 11:22-25.

<sup>154</sup> Way Ex., January 10, 2023, 11:25-26.

<sup>155</sup> Way Ex., January 10, 2023, 11:27-29.



119. This devastating impact was exacerbated by the City of Ottawa's continued tight regulation of the taxi industry. Meter rates are set by the City and taxi industry participants were not permitted to discount according to the by-law at the time, leaving them unable to compete with Uber's fares.<sup>156</sup>

120. The City's failure to adequately enforce the by-law led some drivers and plate owners in the summer of 2015 to start documenting Uber rides by taking videos and posting them online.<sup>157</sup> Around the same time, there was a labour disruption that involved the taxis that serviced the Ottawa airport. Taxi drivers and plate owners continued to make their concerns known to the City that the by-law was being inadequately enforced. The turmoil that was occurring at the time in the face of the City's inaction against Uber ultimately led Mayor Watson to tweet that the City had fast tracked the taxi by-law review.<sup>158</sup>

## **F. Sausage-making: the City changes the by-law, wilfully ignoring the effects on plate value**

### **1. Uber lobbies aggressively from day one**

121. Once Uber entered the Ottawa market, it was no stranger to those at City Hall. Ms. Hartig testified that one of the reasons the City did not pursue enforcement against Uber was that the City did not know where to find Uber.<sup>159</sup> However, Uber introduced itself to City Hall as soon it began operating in Ottawa, and the City rolled out the welcome mat. Uber lobbied City Hall

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<sup>156</sup> Way Ex., January 10, 2023, 11:12-21.

<sup>157</sup> Way Ex., January 6, 2023, 96:19-29.

<sup>158</sup> Way Ex., January 6, 2023, 99-103; Tweet from Jim Watson, dated September 12, 2015, Exhibit 21, F1085.

<sup>159</sup> Hartig Cr Ex., February 6, 2023, 75:6-17.

continuously and aggressively from September 2014 up to the by-law change in April 2016, and well afterward.

122. Uber Canada had six registered lobbyists active between September 2014 and April 2016.<sup>160</sup> According to the City's lobbying registry, officials from the City met with two city councillors and city staff, including Susan Jones, on September 22, 2014.<sup>161</sup> This was 3 days after Uber's recruiting event at the Westin Hotel. After this meeting, Susan Jones stated that Uber was welcome to operate in Ottawa so long as it obtained a broker's license.<sup>162</sup>

123. The welcome mat soon became a red carpet. Chris Schafer, the Canada Policy Lead for Uber, reported 41 separate meetings with city councillors and staff between October 2014 and April 2016.<sup>163</sup> Mr. Schafer reported 57 communications with Mayor Jim Watson and 36 communications with Councillor Diane Deans, including emails, telephone calls and meetings.<sup>164</sup> Representatives of Uber met with Mayor Jim Watson five separate times between January 2015 and April 2016—including three times in April 2016, leading up to the by-law change.<sup>165</sup> Uber

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<sup>160</sup> City of Ottawa Lobbying Registry, Exhibit 1, JBD Tab 132 (List A). Uber registered lobbyists were Chris Schafer (Canada Policy Lead, Uber) (F3560); Jeremy Millard (Legal Director, Uber) (F7937); Ian Black (General Manager, Uber) (F7935); Michael Westcott, Crestview Strategies (F7943); Joseph Finkle (f7939), National Public Relations; Chris Froggatt, Loyalist Public Affairs (F7908).

<sup>161</sup> City of Ottawa Lobbying Registry, Exhibit 1, JBD Tab 132 (List A); F7943 Attendees: Michael Westcott (Crestview Strategies for Uber) and Shad Qadri (Councillor), Eli El-Chantiry (Councillor), Susan Jones, Linda Anderson, Valerie Bietlot.

<sup>162</sup> Ottawa Citizen Media Interview with Susan Jones, dated September 22, 2014, Exhibit 195, A2351.

<sup>163</sup> City of Ottawa Lobbying Registry, Exhibit 1, JBD Tab 132 (List A), F7910-F7934.

<sup>164</sup> City of Ottawa Lobbying Registry, Exhibit 1, JBD Tab 132 (List A), F7910-F7934.

<sup>165</sup> Meeting dates were February 24, 2015 (Ian Black, Chris Froggatt; F7936); April 1, 2016 (Chris Schafer, Chris Froggatt, F7909); April 6, 2016 (Chris Schafer, with all councillors, F7923); April 12, 2016 (Chris Schafer, F7922).

representatives also met five times<sup>166</sup> and held four phone calls<sup>167</sup> with Councillor Diane Deans during this same period.

124. Tim Hudak, a brand ambassador for Uber, also met with city staff in December 2015.<sup>168</sup>

125. This extensive lobbying does not only negate the City's implausible position that it did not know who Uber was, but it also sheds light on the City's conduct in allowing the decimation of the taxi industry after it had tightly regulated it for decades.

**2. After a 3-year delay, City staff answer controversial Council questions and recommend a comprehensive by-law review, seeking ways to legalize Uber**

126. After the 2012 By-law was passed, Council asked City staff to answer a series of questions about the taxi industry.

127. Staff avoided reporting back on these questions for three years. A draft of the answers was available in 2013,<sup>169</sup> but the staff report—virtually identical—was not presented to Committee until May 2015. Ms. Hartig testified that staff were holding onto the answers until after the 2014 municipal election.<sup>170</sup> This is likely due to the sensitive nature of the questions: Three of the five questions pertained to plate value.<sup>171</sup>

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<sup>166</sup> Meeting dates were January 22, 2015 (Chris Froggatt, Joseph Finkle, F7909), January 22, 2015 (Chris Schafer, F7933); February 24, 2015 (Ian Black, Chris Froggatt; Jim Watson present F7936); April 1, 2016 (Chris Schafer, Chris Froggatt, Jim Watson present F7909); April 5, 2016 (Chris Schafer, Ian Black, Chris Froggatt F7908-F7909).

<sup>167</sup> Phone call dates were July 6, 2015 (Chris Froggatt, F7909) February 4, 2016 (Chris Froggatt; F7909); March 29, 2016 (Chris Froggatt, F7909); April 11, 2016 (Chris Froggatt, F7908).

<sup>168</sup> Capture from Uber Website dated November 15, 2015, Exhibit V, A2327; E-mail from Ryan Kennery Dated December 11, 2015, Exhibit 171, A2324; Hartig Cr Ex., February 6, 2023, 90:25-95:14.

<sup>169</sup> Draft report to Community and Protective Services Committee and Council, March 4, 2013, Exhibit 29, A732; shared with Mr. Way in 2013; Way Ex., January 9, 2023, 40:30 to 41:15.

<sup>170</sup> Hartig Ex., February 2, 2023, 86:26-87:3.

<sup>171</sup> City Council Minutes, April 11, 2012, Exhibit 52, F3759-F3760; Report to Community and Protective Services Committee and Council, dated May 1, 2015, Exhibit 53, F2657. Hartig Cr Ex., February 3, 2023, 146:22-148:30.

128. The arrival of Uber, and the desire to legalize Uber, provided the impetus to report back—and kick off a comprehensive by-law review. Ms. Hartig was the main author of the 2015 report. In addition to answering the questions posed by Council in 2012, the report recommended a comprehensive by-law review.<sup>172</sup> At the time (May 2015), Uber had been illegally operating in Ottawa for about nine months, and enforcement had not been effective at shutting it down.<sup>173</sup>

129. The staff report stated as follows:

Given the information and general conclusions contained in this report, as well as the emergence of new technology and other service models since the time of council's 2012 motions and directions to staff, the Emergency and Protective Services Department proposes to commission a consultant to undertake a comprehensive review of the City of Ottawa's taxi and limousine regulations, including potential regulations to recognize the emergence of new hailing technologies and transportation-for-a-fee service models.<sup>174</sup>

130. The references to emerging technologies were references to Uber.<sup>175</sup> It is clear from the report that at this point, the City was looking for ways to legalize or regulate Uber.<sup>176</sup> At the same time, the issue of plate values remained very much unresolved.

**(i) Why did the City elect to retain a consultant?**

131. The City procured a consultant to perform the heavy lifting in the by-law review. The reasons for engaging a consultant are murky. Ms. Hartig testified that a consultant was hired

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<sup>172</sup> Report to Community and Protective Services Committee and Council, dated May 1, 2015, Exhibit 53, F2661-2663; Hartig Cr Ex., February 3, 2023, 144:20-146:1.

<sup>173</sup> Hartig Cr Ex., February 3, 2023, 142:26-142:2.

<sup>174</sup> Report to Community and Protective Services Committee and Council, dated May 1, 2015, Exhibit 53, F2661-2662.

<sup>175</sup> Hartig Cr Ex., February 6, 2023, 2:19-23.

<sup>176</sup> Hartig Cr Ex., February 6, 2023, 2:24-30.

because the City did not have the staff, time or expertise to deal with the issue.<sup>177</sup> She stated that the City would have hired Dan Hara in any event for his expertise in number crunching.<sup>178</sup> She further testified that a consultant was helpful to provide someone external from the City who is not perceived as having “any preconceived notions of things”.<sup>179</sup>

132. These reasons are not convincing. To begin, the City had staff who were experts in the regulation of the taxi industry, such as Ms. Jones.<sup>180</sup> Further, the evidence at trial showed that the City had the resources to undertake complex research and analyses. The City had conducted complex research about the prevalence of COVID-19 in racialized communities<sup>181</sup> and systemic racism generally.<sup>182</sup>

133. With respect to the purported justification that it would helpful to provide someone external from the City who is not perceived as having “any preconceived notions of things”, such a proposition is belied by the ultimate choice of consultant.

### **3. The City procures a consultant who promises to manage expectations around plate values**

#### ***(i) Who is Brian Bourns?***

134. Brian Bourns of KPMG was chosen as the consultant and project manager for the by-law review. He is a former politician and City Councillor.

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<sup>177</sup> Hartig Cr Ex., February 3, 2023, 154:26-154:14.

<sup>178</sup> Hartig Cr Ex., February 3, 2023, 155:10-13.

<sup>179</sup> Hartig Cr Ex., February 3, 2023, 155:16-155:31.

<sup>180</sup> Jones Cr Ex., February 9, 2023, 11:25 to 12:3.

<sup>181</sup> COVID-19 in Ottawa Report – The relation to racialized communities and deprivation, Exhibit 128, A1041.

<sup>182</sup> City of Ottawa Anti-Racism Strategy, Exhibit 135, A1190.

135. Mr. Bourns became a consultant after over a decade in Ottawa municipal politics.<sup>183</sup> Mr. Bourns candidly admitted that he monetized his political career into a consultancy service.<sup>184</sup> Unsurprisingly, over half of his business during his consultancy career has come from the City of Ottawa.<sup>185</sup>

136. Diane Deans was again the Chair of the Community and Protective Services Committee in 2015. She had also chaired this committee in 2001, when Brian Bourns and KPMG were hired by Susan Jones to consult on the topic of plate limits at amalgamation.<sup>186</sup> Mr. Bourns and Diane Deans are cut from the same political cloth. As City Councillors, they represented the same neighborhoods at different points in time.<sup>187</sup>

137. Mr. Bourns is the antithesis of an individual who had no preconceived notions of things. In fact, there was overwhelming evidence at trial that, as a politician, Mr. Bourns had extensive involvement in the taxi industry since the 1970's and had expressed his views on how the industry should be organized.<sup>188</sup>

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<sup>183</sup> Bourns Cr Ex., February 1, 2023, 6:23-28; 7:3-4.

<sup>184</sup> Bourns Cr Ex., February 1, 2023, 19:29 to 20:9.

<sup>185</sup> Bourns Cr Ex., February 1, 2023, 24:9-13.

<sup>186</sup> Bourns Cr Ex., February 1, 2023, 24:17-19; see June 11, 2001 Report to EPSC and Council, Exhibit 7, F2244-F2289.

<sup>187</sup> Bourns Cr Ex., February 1, 2023, 24:14-20;25:6-9.

<sup>188</sup> Bourns Cross-Ex., February 2, 2023, 1-50. For example, Mr. Bourns was present at the 1975 City Council meeting where the MacKenzie report was presented. At that meeting, Mr. Bourns moved Council to eliminate the plate limits: Bourns Cross-Ex., February 2, 2012, 37:18-21. He later expressed his opinion that the City should be monitoring plate values in order to ensure that individuals have a chance to buy plates: Bourns Cr Ex., February 2, 2023, 40:10 to 41:32.

**(ii) KPMG promises to be “careful not to raise expectations” regarding compensation for lost plate value**

138. KPMG submitted a proposal in July, and a revised proposal in August. The proposal included a section called “Plate Values”, with a discussion of the value of taxi plates on the secondary market. The discussion raises the prospect of compensation for the \$200 million in plate value, signals its understanding that this would be “inconsistent with the legislative environment”, and notes that a key success factor in the review will be managing expectations in this regard:<sup>189</sup>

**Plate Values:** There has already been public discussion, including an editorial in the Citizen, suggesting that the City should take responsibility for the value that has been attributed to taxi plates, and compensate holders for the value that might be lost if a new system is implemented. The value of the plates likely exceeded \$200M before the ABSMs began their services. There are certainly improvements to the vehicle-for-hire industry that can be achieved, but it is hard to imagine benefits that would warrant that type of expenditure. It is also hard to imagine a rationale that would justify the taxpayers of the City of Ottawa taking responsibility to repay the gains owners have achieved - or at least had achieved before circumstances changed. One can conceive of an approach that could compensate current owners from an unlimited but not cost free lease model, however we understand that is inconsistent with the legislative environment. It is important that the approach to this review, the discussions during the review, and the solution are careful not to raise expectations.<sup>190</sup>

139. Ms. Hartig, who reviewed the proposal at the time,<sup>191</sup> confirmed that, on her understanding, KPMG was signalling that the by-law review would “for sure” involve a discussion about plate values, and that this was one of the project success factors or risks.<sup>192</sup> She also

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<sup>189</sup> KPMG Response to Request for Proposal, Exhibit 147, A1340; Hartig Cr Ex., February 6, 2023, 9:16-11:29.

<sup>190</sup> KPMG Response to Request for Proposal, Exhibit 147, A1340.

<sup>191</sup> Hartig Cr Ex., February 3, 2023, 160:2-160:4.

<sup>192</sup> Hartig Cr Ex., February 6, 2023, 10:24-11:2.

understood that KPMG was signalling that it is hard to imagine a rationale to justify compensation, and that it is important not to raise expectations in this regard.<sup>193</sup> Further, she understood that in the proposal, it “seems to be the suggestion” that the solution would not involve compensation to plate owners.<sup>194</sup>

140. This proposal was not shared with the public.<sup>195</sup>

**(iii) The procurement process was murky**

141. While the procurement was set up as a competitive bid process, it is unclear whether there were other proponents. No witness confirmed whether there were other proponents, who scored the proposals, when the scoring was performed, or when precisely KPMG was selected as the winning bid.

142. The City made the RFP publicly available.<sup>196</sup> It was released on July 9, 2015 with a closing date of July 30, 2015.<sup>197</sup> KPMG submitted its first proposal on July 30, 2015,<sup>198</sup> and Ms. Hartig reviewed that proposal.<sup>199</sup> Ms. Hartig stated that she “presumably”<sup>200</sup> reviewed proposals from other proponents, although she later stated that she “did not recall that there were” other bidders.<sup>201</sup>

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<sup>193</sup> Hartig Cr Ex., February 6, 2023, 11:3-2.

<sup>194</sup> Hartig Cr Ex., February 6, 2023, 11:13-23.

<sup>195</sup> Hartig Cr Ex., February 6, 2023, 11:26-28.

<sup>196</sup> Hartig Cr Ex., February 3, 2023, 157:2-8.

<sup>197</sup> Request for Proposal, Taxicab and Limousine Regulations and Services Review (“**Request for Proposal**”), dated July 9, 2015, Exhibit 110, F1060.

<sup>198</sup> KPMG Proposal, July 30, 2015, Exhibit 162, A2197; Hartig Cr Ex., February 3, 2023, 160:5 to 161:3.

<sup>199</sup> Hartig Cr Ex., February 3, 2023, 161:3-6.

<sup>200</sup> Hartig Cr Ex., February 3, 2023, 161:6-8.

<sup>201</sup> Hartig Re Ex., February 6, 2023, 103:1-6.



143. In August, the City met with KPMG and requested KPMG to submit a revised proposal. No other proponents were asked for a revised proposal. It is not clear whether KPMG had been selected as the winning bid at that point. Ms. Hartig was copied on correspondence between the City and KPMG dated August 21, 2015, referring to a meeting the day before.<sup>202</sup> She does not have a clear recollection of attending the meeting. The email correspondence following the meeting refers to some changes KPMG made to its proposal at the City's request, regarding French language requirements and a shorter timeline. After this email exchange, KPMG immediately submitted a revised proposal, dated August 21, 2015.<sup>203</sup>

144. Brian Bourns recalls that prior to staff being advised that KPMG had been selected as the winning bid, KPMG met with City staff. He stated that at that point, "I don't think they had indicated during that period that we were actually necessarily selected to do the work, but it was fairly clear that we needed to get into gear [...] I believe it was late August that the City actually issued the first email to Council indicating that KPMG had been appointed."<sup>204</sup>

145. Three business days after KPMG submitted its revised proposal, a memo to staff announced that KPMG was selected as the winning bid.<sup>205</sup> Although she was involved in the scoring of proposals, Ms. Hartig did not recall when the scoring of proposals was done.<sup>206</sup> She also could not recall whether KPMG was selected as the winning bid before or after they

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<sup>202</sup> Hartig Cr Ex., February 3, 2023, 161:9-164:4; Email chain between Brian Bourns and Philip Powell dated August 21, 2015, Exhibit 163, A2206.

<sup>203</sup> Hartig Cr Ex., February 6, 2023, 2:32-3:5, Revised KPMG proposal dated August 21, 2015, Exhibit 147, A1324.

<sup>204</sup> Bourns Ex., January 31, 2023, 24:15-25:27.

<sup>205</sup> Memo to staff dated August 25, 2015, Exhibit 111, B-1-7867; Hartig Cr Ex., February 6, 2023, 11:29-13:14

<sup>206</sup> Hartig Cr Ex., February 6, 2023, 13:15-13:29.

submitted their revised proposal.<sup>207</sup> She did not believe that the City met with any other proponents, nor did other proponents submit revised proposals.<sup>208</sup>

146. The evidence indicates that this was either a sole-source or effectively a sole-source contract, with the winning proponent pre-determined.

**4. The by-law review is “fast-tracked” and the topic of plate values is written out of the script**

**(i) The by-law review was fast-tracked**

147. Sometime during the procurement process in summer 2015, the deadline for the project was moved up by a month. Susan Jones testified that the Mayor directed her personally to fast-track the by-law review.<sup>209</sup>

148. In the RFP, the consultant’s work was expected to last until January 2016.<sup>210</sup> KPMG’s initial proposal listed January 2016 as the end date.<sup>211</sup> KPMG’s revised proposal included an earlier end date: December 2015.<sup>212</sup> At the City’s request, KPMG compressed their timeline. Ms. Hartig confirmed that, sometime between releasing the RFP (on July 9, 2015) and August 21, 2015, the City had decided to compress the timeline for the by-law review.<sup>213</sup>

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<sup>207</sup> Hartig Cr Ex., February 6, 2023, 13:30 to 14:10. When Ms. Jones was directed to the date of the staff memo, she indicated August 25, 2015 as the date KPMG was selected: Jones Re Ex., February 10, 2023, 98:17-98:25. However, she was not directly involved in the procurement. Ms. Hartig was most closely involved and could not recall the timeline.

<sup>208</sup> Hartig Cr Ex., February 6, 2023, 14:8-13.

<sup>209</sup> Jones Cr Ex., February 9, 2023, 159:17-24.

<sup>210</sup> Request for Proposal, dated July 9, 2015, Exhibit 110, F1073; Hartig Cr Ex., February 3, 2023, 156:15-19.

<sup>211</sup> KPMG Proposal, dated July 30th, 2015, Exhibit 162, A2252.

<sup>212</sup> Revised KPMG Proposal to Serve, August 21, 2015, Exhibit 147, A1378.

<sup>213</sup> Hartig Cr Ex., February 6, 2023, 3:25 to 4:18.

149. This coincides with the Mayor's tweet in September 2015, stating that the by-law review had been "fast-tracked".<sup>214</sup>

**(ii) The initial scope was a comprehensive review**

150. The 2015 staff report set out the scope of the consultant's work: it was to be a comprehensive review. It included "review and analysis of the existing regulatory framework."<sup>215</sup>

Ms. Hartig confirmed that based on this report, the scope of the consultant's work did not exclude the topic of plate value insofar as it was relevant to the review of the regulatory framework.<sup>216</sup>

151. The RFP also set out the comprehensive scope of the consultant's work.<sup>217</sup> The Terms of Reference reflected the broad scope in the 2015 staff report.<sup>218</sup> The consultant was to "complete a review and analysis of the existing regulatory framework, including [...] the formula for determining the number and type of taxi plates issued and the manner in which plates are managed."<sup>219</sup> The Terms of Reference also stated that "The consultant is to identify major issues and concerns regarding Ottawa's taxi cab and limousine industry."<sup>220</sup> Ms. Hartig agreed that issues of plate value and issues of enforcement against illegal taxis were both issues of major concern regarding the taxi industry at the time.<sup>221</sup> The Terms of Reference also stated that the consultant would "conduct research to evaluate the advantages and disadvantages of open entry

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<sup>214</sup> Tweet from Jim Watson, September 12, 2015, Exhibit 21, F1085; Way Ex., January 6, 2023, 99:1-5, 102:1-32.

<sup>215</sup> Report to Community and Protective Services Committee and Council, May 2015, Exhibit 53, F2662.

<sup>216</sup> Hartig Cr Ex., February 3, 2023, 149:13-153:28.

<sup>217</sup> Request for Proposal, dated July 9, 2015, Exhibit 110, F1054, F1071; Hartig Cr Ex., February 3, 2023, 157:26-158:21.

<sup>218</sup> Hartig Cr Ex., February 3, 2023, 158:4-158:21.

<sup>219</sup> Request for Proposal, dated July 9, 2015, Exhibit 110, F1072.

<sup>220</sup> Request for Proposal, dated July 9, 2015, Exhibit 110, F1072.

<sup>221</sup> Hartig Cr Ex., February 3, 2023, 159:5-159:23.

and closed taxi cab markets”. Ms. Hartig confirmed this was a reference to plate numbers and plate values.<sup>222</sup>

152. Ms. Hartig evaluated KPMG’s proposal. Based on her understanding of KPMG’s proposal, the scope of their proposed review was a comprehensive review of the regulatory framework.<sup>223</sup> On her understanding as the proposal reviewer, this included the topic of “the value of consideration on the secondary market”.<sup>224</sup>

153. Brian Bourns shared this understanding of his mandate. According to him, the City directed KPMG to consider open and closed taxi markets and KPMG identified the economic impacts on plate owners as part of the review process.<sup>225</sup>

***(iii) Plate values were on the table for the consultation and discussion papers***

154. The City provided close oversight to KPMG. Ms. Hartig was the main point of contact for Brian Bourns and his team throughout the by-law review.<sup>226</sup> The KPMG team provided weekly updates to the City.<sup>227</sup> The City provided advice and information on who to consult during the consultations.<sup>228</sup>

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<sup>222</sup> Hartig Cr Ex., February 3, 2023, 159:21-160:2.

<sup>223</sup> Hartig Cr Ex., February 6, 2023, 4:19 to 8:6.

<sup>224</sup> Hartig Cr Ex., February 6, 2023, 8:7-24.

<sup>225</sup> Bourns Cr Ex., February 1, 2023, 40:2-16.

<sup>226</sup> Hartig Cr Ex., February 6, 2023, 14:13-23.

<sup>227</sup> Hartig Cr Ex., February 6, 2023, 14:24-25.

<sup>228</sup> Hartig Cr Ex., February 6, 2023, 14:31 to 15:9.

155. Mr. Bourns testified that a part of the consulting process is to “sell the result” of its review.<sup>229</sup>

156. The topics of economic well-being and plate values were showcased in the discussion papers: an entire discussion paper was devoted to the topic.<sup>230</sup> The discussion paper by Hara Associates, entitled “Taxi Economics – Old and New” discusses the importance of “entry management” (in the form of plate limits), the origins and consequences of high plate value as rooted in plate limits,<sup>231</sup> and the factors influencing driver income. The paper notes that “once high plate values are established in the market, they are not easy to reverse”—mainly because of a fairness issue.<sup>232</sup> The paper articulates the acute fairness issue if Ottawa were to add new supply:

Ottawa's current substantive taxi plate values create a fairness issue when adding new supply to the industry, especially if there are no limits to the new supply. Ottawa plates are widely held, with many single plate holders, including some drivers, some of whom may have paid the peak market price for a plate.<sup>233</sup>

157. The report details the fairness issue as follows:

Plate values will fall as the fleet is expanded to meet demand. The plate holders will experience losses. Many of these will be individuals who bought into the industry at full market price, purchasing plates from other individuals rather than receiving a plate from the City at nominal cost. In particular, there will be

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<sup>229</sup> Bourns Cr Ex., February 1, 2023, 153:6-23. Indeed, Representatives for Coventry Connections met with KPMG on two occasions. They left with the impression that the legalization of Uber was a “*fait accompli*”: Way Ex., January 9, 2023, 22:9-16.

<sup>230</sup> “Taxi Economics – Old and New”, discussion paper by Hara Associates (“**Taxi Economics Paper**”), Exhibit 55, F3111.

<sup>231</sup> “As cities grow, the limit is rarely increased fast enough to keep pace with demand. The limited taxis become busier and more profitable; creating and increasing a market value for the rights to the vehicle permit itself.” (Taxi Economics Paper, Exhibit 55, F3092).

<sup>232</sup> Taxi Economics Paper, Exhibit 55, F3094.

<sup>233</sup> Taxi Economics Paper, Exhibit 55, F3116.

taxi drivers who saved for many years to purchase their own plate and commit to the business. These individuals may see their life's savings, and retirement plan, threatened. Ottawa will have some cases like this. Of Ottawa's 1,188 taxi plates, more than half (667) are held singly by individuals.<sup>234</sup>

158. Similarly, the topic of plate values was discussed in the KPMG Policy Options paper. Ms. Hartig confirmed that, on her understanding, the scope of the Policy Options paper included the topic of plate value, and that this was within the scope of KPMG's engagement.<sup>235</sup> Indeed, the Policy Options paper discusses plate value in several places.<sup>236</sup> It evaluates the policy options based on, among other things, their effect on plate value.<sup>237</sup> It notes that plate owners signalled they might seek compensation from the City for the loss of plate value as a result of regulatory change.<sup>238</sup> After initially evading the question,<sup>239</sup> Brian Bourns admitted that taxi driver livelihood and plate value were "of importance" and "within the scope" of KPMG's review.<sup>240</sup>

***(iv) KPMG Report inexplicably writes out plate values***

159. Despite these clear pronouncements in the Hara report and the Policy Options paper, the KPMG final report discusses neither taxi economics nor plate values—except to resile from the City's responsibility for them.<sup>241</sup>

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<sup>234</sup> Taxi Economics Paper, Exhibit 55, F3094.

<sup>235</sup> City of Ottawa Taxi and Limousine Regulation and Service Review – Policy Options ("**Policy Options Paper**"), Exhibit 56, F3140, Hartig Cr Ex., February 6, 2023, 15:23-17:26, 17:26-18:6.

<sup>236</sup> Policy Options Paper, Exhibit 56, F3147, F3150, F3162-F3163.

<sup>237</sup> Policy Options Paper, Exhibit 56, F3150: regarding Strategy B and Strategy C: "this approach might also eliminate the values associated with transferring taxi plates, which may lead to hardship".

<sup>238</sup> Policy Options Paper, Exhibit 56, F3150: "Some plate owners have indicated during the consultation process that they may seek damages from the City should this step be taken and result in significant reduction in taxi plate values".

<sup>239</sup> Bourns Cr Ex., February 1, 2023, 33:6 to 34:1-12.

<sup>240</sup> Bourns Cr Ex., February 1, 2023, 50:1-10, 85:7-14.

<sup>241</sup> KPMG Final Report, Exhibit 58, F2722. The report notes that "taxi plate owners express[ed] concern for plate value", but that "Although the City issues taxi plates for a nominal fee, it does not regulate values associated with the subsequent private sales of those plates, which have occurred in return for substantial consideration" (F2726).

160. After extensive consideration in the Hara report, Policy Options paper, and consultations, the KPMG report had only this to say:

This document does not address the subject of plate values which is a secondary market, neither established by nor under the control of the City. The taxi industry indicated frequently through the review process that the value of taxi plates has been impacted by Uber's operation and may be impacted further if TNCs are allowed to continue operations. Taxi industry leaders, representatives and members also spoke to the broader economic impact of the Uber entry into the Ottawa market. The consideration of such issues was outside the scope of this engagement.<sup>242</sup>

161. At this point, the sausage was cooked, and handed to the City on a silver platter.

162. Mr. Bourns admitted that he made a conscious decision not to discuss the issues of plate value in his final report.<sup>243</sup> This served to obscure the potentially devastating impact that the proposals would have on the taxi industry and plate owners in particular. These crucially important aspects of the taxi industry fall in “a whole range of things [KPMG] left out of the script”.<sup>244</sup> Mr. Bourns agreed that high plate values were a direct consequence of the regulator’s actions.<sup>245</sup> Yet he could not credibly explain why plate values fell outside the scope of the review.

163. KPMG submitted a draft report on December 16, 2015.<sup>246</sup> City staff—including the legal department—reviewed the document and suggested changes.<sup>247</sup> The document was shared with

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<sup>242</sup> KPMG Final Report, Exhibit 58, F2728.

<sup>243</sup> Bourns Cr Ex., February 2, 2023, 61:14-26 to 62:1.

<sup>244</sup> Bourns Cr Ex., February 2, 2023, 59:10-18.

<sup>245</sup> Bourns Cr Ex., February 1, 2023, 30:29-30; 65:14 to 66:3.

<sup>246</sup> KPMG Draft Final Report, December 16, 2015, Exhibit 116, F2668.

<sup>247</sup> Hartig Ex., February 2, 2023, 149:15-30, Hartig Cr Ex., February 6, 2023, 22:17 to 22:25, 23:1 to 23:3; 24:3 to 24:15; Jones Cr Ex., February 9, 2023, 12:14-18.

Diane Deans.<sup>248</sup> On December 17, 2015, the City hosted a meeting between the KPMG consultants and a number of key city staff.<sup>249</sup>

164. City staff discussed feedback internally, and after the December 17 meeting, Ms. Hartig submitted revisions to the KPMG draft report, based on input from City staff.<sup>250</sup> The draft report included a number of suggested wording changes.<sup>251</sup> Ms. Hartig was unable to say which staff members provided which revisions. City staff revised the report to further resile from the City's responsibility for plate values. The original draft text read "This document does not address the subject of plate values, which is the secondary market not under the control of the City." The suggested (and adopted) change was that the secondary market "is neither established by nor under the control of the City."<sup>252</sup> Ms. Hartig was not able to specify who suggested the change, but confirmed that legal had reviewed it.<sup>253</sup>

165. KPMG delivered its final report dated December 31, 2015.<sup>254</sup> The report recommended that the City adopt a new licensing category for companies like Uber (although it purposely avoids naming Uber),<sup>255</sup> and adopt a number of reforms to the existing regulatory framework.

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<sup>248</sup> Hartig Cr Ex., February 6, 2023, 22:31, 23:4.

<sup>249</sup> Hartig Cr Ex., February 6, 2023, 24:25-26:11. Meeting request dated December 1, 2015, Exhibit 165, A2041. Invitees to that meeting included Diane Deans, Susan Jones, Christine Hartig, Anthony DiMonte, KPMG consultants including Brian Bourns, staff from the Deputy Assistant Manager's office, and two staff from the mayor's office.

<sup>250</sup> Hartig Cr Ex., February 6, 2023, 22:26-23:4; 27:3-27:20; 30:7-30:32; Draft KPMG Report with comments from Christine Hartig, January 20, 2016, Exhibit 149 A1768.

<sup>251</sup> Hartig Cr Ex., February 6, 2023, 27:20-27:31.

<sup>252</sup> Draft KPMG Report with Comments from Christine Hartig, Exhibit 149, A1777.

<sup>253</sup> Hartig Cr Ex., February 6, 2023, 29:8-29, 30:10.

<sup>254</sup> KPMG Final Report, Exhibit 58, F2722.

<sup>255</sup> Bourns Ex., January 31, 2023, 16:21-16:29.



166. Mr. Bourns stated that issues of legality, morality, and fairness were part of considerations of the 2001 taxi by-law review in relation to plate values.<sup>256</sup> However, he admitted that while reasonable fairness was a consideration for KPMG in the 2001 review, it was not during the 2015 review.<sup>257</sup>

167. Allegedly around the time of delivering his final report, Brian Bourns penned a text—ostensibly for private purposes, but tendered by the City at trial—explaining his view of why compensation for plate value losses was inappropriate.<sup>258</sup> This text was not part of his work product for KPMG and was not shared with the public until trial. The text discusses how plate values are a product of the City’s regulation, yet the City is unable to capture any benefit from plate values. It predicts a fall in plate values as a result of the KPMG recommendations. It sets out a rationale for the City to resile from its responsibility for the destruction of plate value. It considers models, calculation methods, and amounts of compensation to taxi plate owners.<sup>259</sup> It contains a discussion—conspicuously missing in the KPMG and City reports—as to why the City should or should not compensate plate owners for the loss of plate value.

**5. During the by-law review, the City turned a blind eye to the obvious equity concern: that taxi industry participants are overwhelmingly racialized**

168. A number of city witnesses stated that no equity concerns related to the racialized make-up of the taxi industry arose during the by-law review. This is because the City turned a blind eye.

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<sup>256</sup> Bourns Cr Ex., February 1, 2023, 144:19-29, F1000.

<sup>257</sup> Bourns Cr Ex., February 1, 2023, 147:18-20.

<sup>258</sup> “Plate Values”, Brian Bourns, undated, Exhibit 143, F1000-F1002; Bourns Ex. January 31, 2023, 108:7-112:29; Bourns Cr Ex., February 2, 2023, 48:30-59:15.

<sup>259</sup> “Plate Values”, Brian Bourns, undated, Exhibit 143, F1000-F1002.

169. KPMG was not directed to perform its consultation through the lens of the City's equity, diversity, and inclusion policy.<sup>260</sup> The City never provided Mr. Bourns with a copy of the Equity and Inclusion Handbook, its equity and inclusion policies, or contact information for its equity and inclusion staff during the 2015 KPMG Review.<sup>261</sup>

170. In contrast to Ms. Donnelly, Ms. Hartig testified that no equity concerns were raised with respect to the ethnic make-up of the taxi industry in the course of the by-law review, either by consultation participants, staff or KPMG.<sup>262</sup> She confirmed that KPMG was not provided a copy of the Equity Lens Handbook in the course of this review, and to her knowledge, KPMG did not apply any of the Equity Lens principles in their mandate, including with respect to the ethnic make-up of the taxi industry.<sup>263</sup> In her view, these concerns are not germane to the City's regulatory approach.<sup>264</sup> She stated that these issues were also not germane to the 2016 staff report.<sup>265</sup> By contrast, Ms. Donnelly stated that while neither the KPMG report nor the 2016 staff report discuss these equity concerns, they were apparent in the discussion at the Committee and Council meeting.<sup>266</sup>

171. KPMG and the City were aware of the immigrant and racialized make-up of the industry. Indeed, Ms. Jones admitted that the majority of taxi plate owners are racialized.<sup>267</sup> After Coventry advised KPMG of the immigrant make-up of the industry and the investments they stood to lose

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<sup>260</sup> Bourns Cr Ex., February 1, 2023, 88:12-15.

<sup>261</sup> Bourns Cr Ex., February 1, 2023, 48:29 to 49:20.

<sup>262</sup> Hartig Cr Ex., February 6, 2023, 33:21-34:3.

<sup>263</sup> Hartig Cr Ex., February 6, 2023, 34:4-34:25.

<sup>264</sup> Hartig Cr Ex., February 6, 2023, 34:26-34:30.

<sup>265</sup> Hartig Cr Ex., February 6, 2023, 34:31-35:5.

<sup>266</sup> Donnelly Cr Ex., January 30, 2023, 82:27-83:20.

<sup>267</sup> Jones Cr Ex., February 9, 2023, 88:24-27.

during the review, Mr. Bourns made no inquiries into the matter.<sup>268</sup> There was a complete omission with respect to immigration and racialization in the final report, or the 2016 Staff Report.

**6. The 2016 staff report largely adopts the KPMG recommendations, and ignores plate values and equity concerns**

172. Drawing on KPMG's report, City staff drafted a report that largely took up KPMG's proposal.

173. The main "pen" for the report, Ms. Donnelly,<sup>269</sup> did not start drafting the staff report until well after KPMG finalized its report.<sup>270</sup> Other City staff drafted the supporting documents.<sup>271</sup> The City's choice to have Ms. Donnelly draft the staff report is curious: as the Deputy Clerk, drafting a substantive staff report that pertains to a regulatory review was not within her normal course of duties.<sup>272</sup> Ms. Donnelly's explanation for why she was the one to draft the report is because she could explain things in plain language that is easily understandable.<sup>273</sup> Even though this explanation is unconvincing (surely, there was at least one staff member who can write clearly and whose typical role involves writing reports related to the taxi industry), Ms. Donnelly's explanation indicates the City's awareness that this by-law review was unlike others: the result needed to be "sold" to the public and to the industry who would be decimated.

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<sup>268</sup> Bourns Cr Ex., February 1, 2023, 121:17 to 122:2; Coventry Connections Submission to KPMG City of Ottawa Review, dated October 22, 2015, Exhibit 24, F39.

<sup>269</sup> Hartig Cr Ex., February 6, 2023, 31:16-31:19.

<sup>270</sup> Donnelly Cr Ex., January 30, 2023, 1: 19-30.

<sup>271</sup> Donnelly Cr Ex., January 27, 2023, 62:11-24.

<sup>272</sup> Donnelly Cr Ex., January 27, 2023, 59:7 to 61:32, 62:1-10; 65:26 to 66:12

<sup>273</sup> Donnelly Cr Ex., January 27, 2023, 62:25 to 63:16.

174. The KPMG recommendations were the starting point for the staff report: any divergence needed to be explained.<sup>274</sup> One of the appended documents is a chart summarizing the KPMG recommendations, whether staff accepted each recommendation, and the rationale for accepting or rejecting each recommendation.<sup>275</sup> The goal was to maintain the integrity of the KPMG recommendations and provide a rationale for every divergence. Ms. Hartig reviewed the staff report to ensure “the integrity of the recommendations made by KPMG”.<sup>276</sup>

175. The staff report was selective in the way it addressed previous staff reports. It included only information that is supportive of the recommendations that were put forward in the staff report.<sup>277</sup> Given the importance of the review that was underway and the significant manner in which it deviated from the previous regulatory regimes that had been stable for decades, one would have expected the staff report to explain the history of the regulatory regime, the rationale(s) that underpinned the way the taxi industry was regulated, and the reasoning behind why the City ought to fundamentally change the regulatory regime without causing the harms that were deliberately avoided in the past. This is particularly the case because, according to Ms. Donnelly, there were many councillors present for the by-law review that were not at Council when the previous by-laws were passed, meaning they would have little to no knowledge or understanding of the industry or its regulatory history.<sup>278</sup>

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<sup>274</sup> Hartig Cr Ex., February 6, 2023, 32:16 to 33:1.

<sup>275</sup> Document 5 to the 2016 to the March 16, 2016 Staff Report, Exhibit 60, F2958; Hartig Cr Ex., February 6, 2023, 31:18-32:15.

<sup>276</sup> Hartig Cr Ex., February 3, 2023, 68:5-26.

<sup>277</sup> Donnelly Cr Ex., January 30, 2023, 9:15 to 10:2.

<sup>278</sup> Donnelly Cr Ex., January 30, 2023, 8:28 to 9:4.

## **7. Council approves the new by-law**

176. The 2016 staff report and its recommendations were adopted first at Committee and by Council, on April 13, 2016.<sup>279</sup> When the 2016 By-law was passed, it was met with an emotional outcry from a plate owner who was attending the Council meeting a to the effect that the new by-law would ruin households.<sup>280</sup> This plate owner was Tony Hajjar.<sup>281</sup> Given his non-native English, he was clearly an immigrant. As will be described below, he was most certainly not far from being accurate in relation to the substance of his outburst.

### **G. The 2016 By-law has decimated the taxi industry**

177. The 2016 By-law transformed the taxi industry from one within which immigrants and racialized groups could make a living, support their families and secure their retirement, to an ailing industry with class members struggling to make ends meet.

178. The decimation of the industry is evident from the value of plates. Before 2014, the demand for plates was so high that the industry had to resort to collective bargaining to create a structure under which multi-plate owners could sell their plates. Plates that were not owned by multi-plate owners were being sold for hundreds of thousands of dollars and the trend was for plates to increase in price year after year. After the 2016 By-law, plate owners were lucky to find someone who would buy their plates for a low price.

179. The evisceration of the taxi industry is also evident from the return of plates. Indeed, the 2016 By-law crumbled the industry to such an extent that many plate owners, and in particular

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<sup>279</sup> Council Meeting Minutes 29, April 13, 2016, Exhibit 123, F3703-F3734.

<sup>280</sup> Video clip from City of Ottawa Council Meeting, April 13, 2016, Exhibit C, A668.

<sup>281</sup> Way Ex., January 9, 2023, 50:32.

those who held accessible plates, did not see any point in continuing to operate them. This is made evident by the fact that about 84 of the 187 accessible plates have been returned to the City since the 2016 By-law was passed.<sup>282</sup>

180. The return of plates was also felt by plates owners who were renting or leasing their plates. Similarly, many single plate owners who were leasing or renting their plates could no longer do so.<sup>283</sup> Such an outcome stands in stark contrast to when the taxi industry was vibrant: plate owners were able to lease their plates and get significant lump sums in addition to monthly payments. They also did not face any impediments to renting their plates.

181. The City once considered the taxi industry to be “an adjunct or enhancement to public transportation”.<sup>284</sup> For decades, it enacted by-laws and deployed its enforcement arsenal to ensure that those who operate in the industry not only have the required skills and knowledge to provide effective and safe transportation to the public, but that they remain economically viable to ensure that the services they provide are effective and safe. This economic viability was protected through the limited number of plates, tight regulation on who can operate in the industry and under what conditions, and enforcement in collaboration with the taxi industry. This ensured that the fundamental pillars of the regulatory scheme that the City created—the core of which is the economic viability of the taxi industry—were protected and enforced. The non-enforcement of the 2012 By-law and the passing of the 2016 By-law effectively transformed the

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<sup>282</sup> Way Ex., January 5, 2023, 121:12-13.

<sup>283</sup> Way Ex., January 10, 2023, 12:1-22.

<sup>284</sup> Hartig Ex., February 3, 2023, 7:26-28.

taxi industry from the adjunct and enhancer of public transportation to an ailing industry that was toppled, crumbled and destroyed.

### PART III - NEGLIGENCE

Q.[...] Were members of the taxi industry involved in these efforts to lobby for stronger enforcement power?

A. Absolutely, they were.

Q. In what way were they involved?

A. Well, the dates are blurry. [...] I also know that I was involved in a meeting at Queen's Park. We met with Minister Chiarelli at the time. I know Mr. Way was there, [...], we were all there speaking in one voice, seeking provincial support for changes to the Highway Traffic Act.

-- Susan Jones Examination in chief, February 8, 2023, 85:7-85:22

\* \* \*

Q. Okay. I want to go back to, to when you bought your plate. Did, did you think that there would be a risk [...] to the value of the plate being destroyed?

A. No.

Q. Why not?

A. Well, from what I thought maybe, there is a number of plates compared with population, they don't go over. And especially when I bought, before I bought, I asked if there is any plate that I can rent from the city or something. They told me, we don't have any, we don't, we don't remember when was the last time they issued plates. I bought and I thought I'm doing a safe way, and this is from the city, everything is regulated, like number of taxis, the way they run, you can't drive a taxi without going to school. Like, there is steps you have to do it before you get onto the taxi business. I thought I'm doing something that when I exit out of it, I have retirement, like, I have something in my, that I can sell.

-- Ziad Mezher Examination in chief, January 18, 2023, 26:26-27:11.

\* \* \*

Q. I think you said this earlier, By-law only ever charged drivers of Uber. Is that right?

A. Yes.

Q. It never tried to charge Uber itself?

A. I'm not aware that we did.

Q. Is that because it's easier to go after the drivers?

A. Well, they're, they're right here in our hot little hands, and they're — you know, it's easier to do the undercover work, well, easy is not word, that's not the right word, but....

Q. Easier?

A. Yeah, easier than trying to deal with this thing called an app

-- Christine Hartig Cross examination, February 3, 2023, 127:24 -128:13.

\* \* \*

*Q. Ms. Hartig, was there — to your knowledge, was there ever a decision made in the City of Ottawa to go after Uber drivers only and not to go after Uber itself?*

*A. I don't recall a specific discussion.*

-- Christine Hartig Cross examination, February 3, 2023, 137:7-137:11.

182. Through enacting a legislative scheme and through its decades-long relationship with the class members, the City owed class members a duty of care to act reasonably in enforcing the 2012 By-law. But in the face of the biggest threat to the integrity of the taxi system it had developed over half a century, the City sat on its hands.

183. Despite being well aware of Uber's eventual arrival in Ottawa, the City had no plan to deal with the arrival of Uber. Its enforcement was against drivers only—a strategy it quickly knew (or ought to have known) was wholly ineffective. The City never considered taking more effective steps beyond its enforcement against drivers. For these reasons, the City was negligent in enforcing the 2012 By-law between September 1, 2014 to September 30, 2016.

184. Through the evidence tendered at trial, the Class Members have established the four main elements of a successful negligence claim, namely: (a) the City owed the Class Members a duty of care; (b) the City breached the standard of care; (c) the Class Members sustained damage; and (d) the City's breach caused that damage in fact and law.<sup>285</sup>

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<sup>285</sup> *Mustapha v Culligan of Canada Ltd.*, [2008 SCC 27](#) at para 3 [*Mustapha*].



**A. The City owed class members a duty of care**

185. The City owed Class Members a duty of care to act reasonably in exercising its regulatory responsibilities with respect to by-law enforcement against Uber and its drivers.

186. The duty of care in modern negligence law is anchored in the neighbour principle first enunciated in *Donoghue v Stevenson*: “parties owe a duty of care to those whom they ought to have in contemplation as being at risk when they act”.<sup>286</sup> Recently, the Supreme Court in *Nelson* reaffirmed that the neighbour principle binds public authorities such as municipal corporations.<sup>287</sup> Accordingly, the traditional duty of care analysis applies to a municipality, like the City, in the same way it applies to an individual.<sup>288</sup>

187. The Court of Appeal for Ontario in *Aylmer* recently summarized the governing principles regarding the duty of care of public authorities. To determine whether a duty of care should be recognized between a municipality and a regulated class, courts apply the two-stage *Anns/Cooper* analysis. The first stage of the *Anns/Cooper* framework asks whether a municipal defendant owes the plaintiff a *prima facie* duty of care through an assessment of proximity and foreseeability.<sup>289</sup> The second *Anns/Cooper* stage asks if there are residual policy reasons for declining to impose such a duty.<sup>290</sup>

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<sup>286</sup> *Rankin (Rankin’s Garage & Sales) v J.J.*, [2018 SCC 19](#) at para [16](#); *Donoghue v Stevenson*, [\[1932\] A.C. 562 \(H.L.\)](#).

<sup>287</sup> *Nelson (City) v Marchi*, [2021 SCC 41](#) at para [15](#) [*Nelson*].

<sup>288</sup> *Nelson* at para [41](#).

<sup>289</sup> *Aylmer Meat Packers Inc. v Ontario*, 2022 ONCA 579 at para [22](#) [*Aylmer*].

<sup>290</sup> *Aylmer* at paras [22](#), [33](#).

**1. First Anns/Cooper stage: the City and class members are in a proximate relationship**

188. The Court of Appeal has clarified that the first *Anns/Cooper* stage is a “relatively low threshold” for a plaintiff to surpass.<sup>291</sup> Proximity is the key focus of the first stage.

189. The proximity inquiry poses the question: who is my neighbour in law?<sup>292</sup> Proximity is made out where the parties are in such a “close and direct” relationship that it would be “just and fair” to require a defendant to be mindful of a plaintiff’s legitimate interests.<sup>293</sup>

190. Where a relationship falls within an analogous or a previously established category, the first stage of the analysis is complete so long as harm was reasonably foreseeable.<sup>294</sup> If, as is the case here, a relationship does not fall into a previously established or analogous category, a full proximity analysis must be conducted.

191. Whether a proximate relationship exists is a “necessarily fact-specific” inquiry that requires an examination of all relevant factors arising from the nature of the relationship.<sup>295</sup> The essential task of the court is to look at the “expectations, reliance, and the property or other interests”<sup>296</sup> at play. The analysis also takes into consideration whether the “*actions*” of the wrongdoer had a close and direct effect on the victim.<sup>297</sup> However, proximity is not an “all-or-

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<sup>291</sup> *Garratt v Orillia Power Distribution Corporation*, [2008 ONCA 422](#) at para [44](#); *Ingles v Tutkaluk Construction Ltd.*, [2000 SCC 12](#) at para [17](#); see also *Carson v Kearney*, [2016 ONSC 1940](#) at para [131](#), aff’d *Carson v Kearney*, [2016 ONCA 975](#).

<sup>292</sup> *Cooper v Hobart*, [2001 SCC 79](#) at para [32](#) [**Cooper**].

<sup>293</sup> *Cooper* at paras [32](#), [34](#).

<sup>294</sup> *Cooper* at paras [31](#), [36](#).

<sup>295</sup> *Cooper* at para [30](#); *Taylor v. Canada*, [2012 ONCA 479](#) at para [80](#) [**Taylor**].

<sup>296</sup> *Cooper* at para [34](#); see also *Taylor* at para [69](#).

<sup>297</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007 SCC 41](#) at para [29](#) [emphasis in original].

nothing” proposition, and the “typical factors” need not be present.<sup>298</sup> Indeed, the factors to be considered are “diverse” and “depend on the circumstances of the case”; there is “no definitive list”.<sup>299</sup> In other words, the proximity analysis is a contextual one that takes all the relevant circumstances into consideration.

192. Since this case involves a legislative scheme, the analysis is framed according to the Supreme Court's decision in *Imperial Tobacco*.<sup>300</sup> In that case, McLachlin C.J. (as she then was) identified three ways in which a legislative scheme and interactions between a government entity and plaintiffs may play a role in determining whether proximity is established. First, a duty of care may arise explicitly or by implication from the statutory scheme.<sup>301</sup> Second, a duty of care may arise from the specific interactions between a plaintiff and government entity.<sup>302</sup> The third situation involves a combination of the interactions between the parties and the statutory scheme.<sup>303</sup>

193. All three situations from *Imperial Tobacco* are applicable in this case and all three support a finding of proximity. Proximity is established through (i) the statutory scheme and its history; (ii) the specific interactions between the City and the class; and (iii) the combined effect of the statutory scheme and the interactions.

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<sup>298</sup> *Williams v Toronto (City)*, [2016 ONCA 666](#) at para [35](#).

<sup>299</sup> *Cooper* at para [35](#); *Odhavji Estate v Woodhouse*, [2003 SCC 69](#) at para 50; *Syl Apps Secure Treatment Centre v B.D.*, [2007 SCC 38](#) at para [30](#).

<sup>300</sup> *R v Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#) [*Imperial Tobacco*].

<sup>301</sup> *Imperial Tobacco* at paras [43-44](#).

<sup>302</sup> *Imperial Tobacco* at paras [44-45](#).

<sup>303</sup> *Imperial Tobacco* at para [46](#).

**(i) *The statutory scheme and its history support a finding of proximity***

194. The relationship of proximity between the City and the taxi industry is evident from the statutory scheme and its history. Four aspects of the legislative scheme and its history support this conclusion. First, the City regulated the taxi industry voluntarily and not because it was obligated to do so. Second, the City limited entry into the taxi industry with a view to ensuring its economic viability. Third, the statutory scheme required significant economic investment from class members. Fourth, to achieve its purposes, the statutory scheme legislated prohibitions that were coupled with enforcement tools that were part of a broader package of enforcement mechanisms available to the City to halt the activities of unlicensed actors. When these four aspects are considered together, proximity is obvious.

***a. The City regulated the industry voluntarily***

195. The City is not obliged to regulate the taxi industry. The City chose to regulate the taxi industry to achieve objectives that it deemed of sufficient importance to warrant regulation. The optional nature of regulation of the taxi industry has a long history. Before amalgamation, some of the former municipalities regulated the taxi industry. However, many others did not.<sup>304</sup> In other words, the regulation of the taxi industry was, from a historical perspective, not mandated by provincial legislation. The discretionary nature of regulating the taxi industry persisted after amalgamation and continues to this day. The City admitted that it is not mandated to regulate

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<sup>304</sup> Jones Cr Ex., February 9, 2023, 5:1-8.

the industry and, indeed, there is nothing in the *Municipal Act* that requires the City to regulate.<sup>305</sup>

196. The voluntary nature of taxi regulation enhances proximity between the City and the plaintiff classes. Indeed, the City elected to create the regulatory categories of taxi plate owner, taxicab broker, and taxi driver. In doing so, the City targeted each actor in the taxi industry and established each of their interdependent roles in the plate system.

197. Put another way, the regulation itself creates the class.

198. The City voluntarily chose to regulate the taxi industry, who can operate in it, and under what conditions. It did so to protect the interests of the industry as a way of ensuring adequate service to consumers. It then voluntarily decided to buttress its choice with enforcement measures or rely on other enforcement measures that were available to it (to be discussed below). Class members invested in the industry because of the voluntary scheme that the City created and counted on the City to properly enforce it. This is the kind of situation under which it would be just and fair to conclude that the City is in a proximate relationship with the class members.

***b. The City limited entry through the closed plate system***

199. The plate limits in the 2012 By-law further increase proximity between the City and the plaintiff class. The limits are based on a supply management model that limited the number of cars that can operate in the industry. As discussed in paragraphs 65-73 above, at least one of the

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<sup>305</sup> Donnelly Cr Ex., January 27, 2023, 73:3-10; see also the discretionary language (“may”) at ss. [151](#), [156](#) of [Municipal Act, 2001, SO 2001](#), c 25 (“Municipal Act”).

rationales behind limiting the plate numbers was to ensure the economic viability of the industry so that service to consumers is maintained at an acceptable level.<sup>306</sup> In a case like this, where: (1) a municipality voluntarily creates a statutory scheme that limits the participants who can lawfully operate in it, (2) does so to ensure, at least in part, the economic viability of an industry, and (3) that scheme is buttressed by comprehensive enforcement measures, the only conclusion that can be reached is that there is at least an implied duty on the City to properly enforce the by-law against unlawful intruders. This is particularly the case when the City created the system to ensure that individuals invest in the industry.

200. It simply cannot be the case that the City went out of its way to create a closed plate system in order to attract and maintain investment in the industry without an implied duty to enforce and ensure the integrity of the system. Without enforcement, the City's core objective would be undermined. No investments would have been made in the industry and service to consumers would have been detrimentally affected. In short, the closed plate system that the City has voluntarily created and maintained for decades hinges on proper and effective enforcement that protects the industry.

***c. The scheme required investments by class members***

201. The statutory regime also strengthens proximity by requiring class members to make substantial investments to enter the taxi industry. Plate owners and brokers have made substantial investments in the taxi industry. The City not only knew of these investments, but it also created a statutory scheme that was intended to secure them. The integrity of the statutory

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<sup>306</sup> Jones Ex., February 8, 2023, 7:2-21.

scheme and the class members' investments hinged on the City's proper enforcement to ensure that the closed market would not succumb to unlawful intruders. If that were not the case, no one would have invested in the industry.

***d. The scheme coupled prohibitions with enforcement tools***

202. To achieve its objectives in taxi regulation, which include ensuring the taxi industry remains viable and protected from unlawful intruders on the closed plate system, the City enacted a comprehensive scheme that combined prohibitions and enforcement mechanisms as part of a package of enforcement tools.

203. The 2012 By-law prohibited: (1) the use of a vehicle for the provision of a taxicab service unless that vehicle had a taxi plate affixed to it; and (2) the dispatching of vehicles that provide a taxi service unless the dispatcher has a broker's license.<sup>307</sup> Anyone who contravened these prohibitions committed an offence.<sup>308</sup> These prohibitions and offences were not unique to the 2012 By-law: they were present in the City's by-laws and the by-laws of the former municipalities who chose to regulate the taxi industry.<sup>309</sup> In other words, the City and former municipalities maintained these prohibitions for decades.

204. These prohibitions are accompanied by various enforcement tools in both the *Municipal Act* and the 2012 By-law (and the by-laws that preceded it) that allow the City to properly enforce the By-law against those who violate its prohibitions. The *Municipal Act* provides the City with

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<sup>307</sup> See 2012 By-law, Exhibit 2, at s. 4, F3904, s. 6, F3904.

<sup>308</sup> See 2012 By-law, Exhibit 2, at s. 126, F3948, s. 127, F3948.

<sup>309</sup> See s. 42, Schedule No. 19 of By-law L-6 2000, Exhibit 2, F4057; s. 2, Township of Cumberland By-law No. 47, Exhibit 2, F4201; s. 2, Corporation of the City of Nepean By-law No. 25-94, Exhibit 2, F4172; s. 2, City of Vanier By-law No. 33-94, Exhibit 2, F4139; s. 2, City of Gloucester By-law No. 41-1998, F4283-F4284.

two powerful tools to enforce. First, the City can issue an order requiring a person who contravenes a by-law to discontinue its unlawful activity.<sup>310</sup> Second, the City can restrain any contravention of its by-laws by application to a court of competent jurisdiction.<sup>311</sup>

205. The 2012 By-law also contains enforcement measures. Specifically, section 127 provides that any person who is convicted of an offence under the By-law is liable to a fine between \$500 and \$100,000.<sup>312</sup> Section 128 provides the City with the ability to seek a prohibition order against anyone who has been convicted of an offence under the By-law. This kind of order “prohibit[s] the continuation or repetition of the offence by the person convicted.”<sup>313</sup>

206. The offences in the 2012 By-law are buttressed by a complete statutory regime governing provincial offences. Specifically, convictions under the 2012 By-law were prosecuted under the auspices of the *Provincial Offences Act*, which allows by-law officers to press charges and for the City to prosecute these charges in court.<sup>314</sup>

207. The legislative intent was plainly to enforce these by-laws against those who commit violations, and to do so in an effective manner. This is the only inference that can be drawn from the existence of a voluntarily created comprehensive statutory regime that tightly controlled who can operate in the industry and under what conditions, buttressed with enforcement powers that operated in tandem with the powers provided by the *Municipal Act*. Without the active and proper enforcement of the by-law, the City could not achieve the objectives that it sought: (1)

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<sup>310</sup> [s. 444](#), Municipal Act.

<sup>311</sup> [s. 440](#), Municipal Act.

<sup>312</sup> 2012 By-law, s. 127, F3948.

<sup>313</sup> 2012 By-law, s. 128, F3948.

<sup>314</sup> For example, see the Information issued against Oride Technologies, Exhibit 177, A2342.



the limited plate system would be superfluous, (2) no one would make an investment in the industry, and (3) ultimately service to consumers would not be adequate to the standards that the City wished. Simply put, the efficacy of the regulatory regime hinged on its proper enforcement. Indeed, enforcement is of such critical importance in the context of this by-law that the only conclusion that can reasonably be reached is that the statutory scheme imposed an implied duty on the City to properly enforce.

***e. Conclusion on statutory scheme***

208. In *Kamloops*, Wilson J. summarized the potential impact of two types of legislation on the duty of care analysis. The two types of legislation are as follows:

- 1) statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but has done it negligently;
- 2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.<sup>315</sup>

209. As the statutory scheme created an implied duty on the City to enforce the 2012 By-law, the statutory scheme in this case falls within the first *Kamloops* category. The City voluntarily created a scheme that hinges on enforcement in order to protect the taxi industry and the public. In so doing, the City created an obligation on its enforcement staff to enforce the 2012 By-law

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<sup>315</sup> *Nielsen v Kamloops (City)*, [1984] 2 SCR 2, citing *Anns v. Merton London Borough Council*, [1978] A.C. 728.

and, indeed, the taxi by-laws previously enacted. As such, the City had a duty to enforce the 2012 By-law and to do so in a non-negligent manner.

210. Even if this case does not fall within the first *Kamloops* category, it most certainly falls within the second. That is, if the City had the discretion to decide whether to enforce the 2012 By-law, the City clearly elected to enforce the 2012 By-law against unlicensed operators. This is evident from the long history of the City charging and prosecuting unlicensed operators, which will be discussed below.

211. The clear legislative intent was to create an obligation on the City to enforce the by-law. As detailed further below, this is how the City itself viewed its obligation as and this is how it has actually acted for years. Indeed, the City's views of its obligations to enforce the by-law continued up until the moment Uber was on the cusp of formally commencing operations in Ottawa. In such circumstances, proximity is clearly established.

**(ii) *The specific interactions between the City and class members disclose a proximate relationship***

212. In the case at bar, a proximate relationship also arose through a long series of specific interactions between the City and class members.

213. Consistent with prior jurisprudence that does not impose a high hurdle for proximity to be established, the Court of Appeal in *Aylmer* held that the analysis should not take “too narrow a view of what constitutes relevant specific interactions”.<sup>316</sup> The specific interaction criterion is at its core an inquiry into the relationship between the parties. As discussed above, this is a

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<sup>316</sup> *Aylmer* at para [50](#).

contextual inquiry that takes into consideration the entirety of the circumstances that give rise to the relationship between the parties to determine whether it is fair and just to impose a duty of care on the defendant.

214. In this case, the nature of the relationship between the class members and the City was informed by extensive interactions over two decades. Accordingly, this section divides the specific interactions over three time periods all of which reflect the closeness of the relationship between the City and the taxi industry in the enforcement context: (1) the post-amalgamation period, (2) the early 2010s, and (3) the arrival of Uber in Ottawa.

***a. Post-amalgamation: the City and the taxi industry partnered to enforce against bandit cabs***

215. The evidence shows that a close relationship between the City and the taxi industry regarding unlicensed enforcement arose around amalgamation. At that time, the taxi industry began to raise the issue of bandit cabs with the City.<sup>317</sup> The taxi industry wanted stronger engagement from the City, since a lack of enforcement would negatively impact the ability of licensed cabs to collect fares.<sup>318</sup> A failure to enforce would also decrease broker incomes and plate values. In this regard, the taxi industry specifically made the City aware of its concern that tolerance of bandit cabs would impact plate values.<sup>319</sup>

216. In response to the concerns raised by class members about bandit cab enforcement and plate values, the interactions between the City and the taxi industry became more rigorous.

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<sup>317</sup> Jones Cr Ex., February 9, 2023, 48:12-15.

<sup>318</sup> Jones Cr Ex., February 9, 2023, 48:16-21.

<sup>319</sup> Way Ex., January 5, 2023, 129:9-25.

Shortly after amalgamation, the City dedicated two by-law officers to the enforcement of the taxicab by-laws. This commitment was done in part because of the increase in bandit taxi services.<sup>320</sup> Through meetings, vehicle inspections, and correspondence, by-law officials and officers came to know certain class members on a personal level.<sup>321</sup> And as two by-law officers tailored their work to the taxi industry, the relationship between the City and the taxi industry became increasingly interactive with respect to unlicensed enforcement.

217. In this regard, the evidence shows that the “open-door” relationship between the City and the industry with respect to by-law enforcement was “collaborative and cooperative” in the early 2000s.<sup>322</sup> The industry met regularly with the City and “continually” brought the issue of bandit cabs to their attention.<sup>323</sup> In response, Ottawa by-law would readily share information on bandit taxi services with industry members and request their assistance in investigations and evidence gathering to prosecute illegal brokers and drivers.<sup>324</sup>

218. Unsurprisingly, Ms. Jones admitted that the taxi industry was the primary source of information regarding unlicensed taxi activity to the City.<sup>325</sup> She further recognized that drivers and owners of taxicabs were motivated to report on illegal activity because it directly affects their ability to earn a reasonable return on their investment.<sup>326</sup> When members of the taxi industry provided information regarding bandit cabs, the City would undertake to enforce against such

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<sup>320</sup> Way Ex., January 5, 2023, 128:28 to 129:2; Hartig Ex., February 2, 2022, 89:24 to 89:4.

<sup>321</sup> Jones Cr Ex., February 9, 2023, 2:16 to 3:24.

<sup>322</sup> Way Ex., January 9, 2023, 2:4-8.

<sup>323</sup> Jones Ex., February 8, 2023, 78:23-27.

<sup>324</sup> Way Ex., January 9, 2023, 8:28 to 9:17.

<sup>325</sup> Jones Ex., February 8, 2023, 78:27-32; Jones Cr. Ex., 52:20-26.

<sup>326</sup> Jones Cr Ex., February 9, 2023, 52:27 to 53:5.

illegal activity.<sup>327</sup> These enforcement efforts reinforced the closeness between the City and the taxi industry by protecting plate values and broker revenues.

219. In these collaborative enforcement efforts, the City connected enforcement to the economic integrity of the industry. For example, in 2006, the City undertook a mass enforcement operation against a bandit taxi company called Quest and the bandit taxis that operated for it. The taxi industry brought this unlicensed company to the City's attention and provided information so that the City could enforce the by-law against it.<sup>328</sup> The City ultimately used the tips provided by the taxi industry to lay more than a hundred charges and shut Quest down.<sup>329</sup> After the operation was completed, the City publicly commented that Quest had been taking as much as \$300,000 a year from the taxi industry;<sup>330</sup> thereby directly linking the enforcement operation to the viability of the regulated taxi industry. In this regard, the Court of Appeal in *Taylor* held that public representations by a municipality as to its duties and obligations are part of the proximity factual matrix.<sup>331</sup> The shutdown of Quest Services is but one example of the close relationship between the City and the taxi industry on the enforcement front.<sup>332</sup>

220. Viewed in context, these representations further solidified proximity between the City and the class members. Indeed, why would the City comment about the losses that the taxi industry was facing from an unlawful taxi operation? The only plausible answer is that the City

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<sup>327</sup> Jones Cr Ex., February 9, 2023, 53:25-30.

<sup>328</sup> Jones Cr Ex., February 9, 2023, 78:21 to 79:4.

<sup>329</sup> Jones Cr Ex., February 9, 2023, 54:5 to 56:17.

<sup>330</sup> CBC, "Firm operated 'bandit' cab service, city says", dated June 22, 2006, Exhibit 193, F475-476. See also CBC, "Ottawa cracks down on 'bandit' cabs", dated September 10, 2007, Exhibit 194, F473.

<sup>331</sup> Taylor at para [96](#).

<sup>332</sup> Jones Ex., February 8, 2023, 78:22-27.

itself viewed its voluntary statutory scheme and the enforcement arsenal that it has as (1) giving rise to a duty on the City properly enforce the taxi by-law; and (2) that proper enforcement is necessary to protect the economic viability of the lawful taxi industry. Ms. Jones made this sense of obligation clear in public comments: she stated that the City “recognize[s] ... that just charging the drivers was just treating the symptom, not the problem, and that we have to undertake to investigate the operators, the groups or individuals who are running these business on a full-time basis”.<sup>333</sup> These statements were made in the context of a collaborative effort and served to solidify expectations of class members regarding enforcement.

221. In addition to reactive enforcement, the taxi industry expected that the City would also proactively enforce the taxicab by-laws against unlicensed actors. At trial, Mr. Way testified that City officials told the taxi industry that it was concerned about bandit cab services and “felt [it had] an obligation to enforce the by-law”.<sup>334</sup> To this end, Ms. Jones also reaffirmed that the City “was very proactive in terms of enforcement [because it had] a lot of concerns and problems associated with ... the bandit cab industry”.<sup>335</sup> The City and the taxi industry were *ad item* about the City’s obligation to enforce the by-law.

222. Notably, the close collaboration between the City and class members with respect to unlicensed enforcement was not just voluntary. The City made it mandatory. On May 28, 2008, City Council passed a motion that “required the Chief License Inspector to work with the Taxi Stakeholders Consultation Group and the Taxi Industry to identify and implement a

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<sup>333</sup> CBC, “Firm operated ‘bandit’ cab service, city says”, dated June 22, 2006, Exhibit 194, F476 [emphasis added].

<sup>334</sup> Way Ex., January 6, 2023, 39:21-23; Way Ex., January 6, 2023, 42:5-31.

<sup>335</sup> Jones Ex., February 8, 2023, 78:2-4.

communications and enforcement strategy to eradicate the use of illegal underground taxicab services".<sup>336</sup> This resulted in a new public awareness campaign that expanded upon a previous "Don't Let the Bandit Take You for A Ride" program from 2006.<sup>337</sup>

223. As part of this required consultation and collaboration, the City also created the Taxi Stakeholders Consultation Group in 2008 as a forum to directly address specific concerns of the taxi industry. This group included industry representatives like Mr. Way and City officials such as the Chief License Inspector, by-law officers, and councillors. Previously, the City had established the Taxi Advisory Committee to facilitate interaction between the City, the industry, and members of the general public on taxi related issues. However, the new group was comprised solely of taxi industry stakeholders and City officials for the purpose of creating a forum of direct and regular communication between the industry and the City.<sup>338</sup> The Taxi Stakeholders Consultation Group met on a regular basis to address, among other things, enforcement related issues such as bandit cabs.<sup>339</sup>

***b. Early 2010's: the City and the taxi industry intensified their collaboration***

224. In the 2010s, the City and the industry continued to build their proximate relationship. Indeed, Mr. Way testified that the City and the industry approached the issue of enforcing against illegal participants "from the same position".<sup>340</sup> What is more, Ms. Jones testified that the City

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<sup>336</sup> City Council Minutes, May,28, 2008, Exhibit 159, A1952.

<sup>337</sup> Way Ex., January 6, 2023, 75:30-32, Jones Ex., February 8, 2023 85:28 to 86:2; see Exhibit 14, Report to CPSC and Council, dated May 14, 2008, Exhibit 14, A662-A663.

<sup>338</sup> Jones Cr Ex., February 9, 2023, 45:20 to 46:6.

<sup>339</sup> Way Ex., January 6, 2023, 41:1-25; Jones Cr. Ex., February 9, 2023, 46:1-6.

<sup>340</sup> Way Ex., January 5:2023, 132:17-21.

and the industry wanted to collaborate with each other.<sup>341</sup> Cooperation and collaboration on policy changes with respect to by-law enforcement was frequent.<sup>342</sup> Enforcement against unlicensed actors became a partnership of mutual reliance and responsibility.

225. For example, the City and the taxi industry acted in concert to seek more expansive enforcement powers in 2012. The industry suggested to the City that issuing fines under the *Highway Traffic Act* would be a more effective measure of enforcement because of the higher fines.<sup>343</sup> To that end, the City sent a letter to Member of Provincial Parliament Chiarelli to ask for assistance in enforcement under the *Highway Traffic Act* because by-law officers did not have the authority to issue fines under that statute.<sup>344</sup> Not only did the City provide Coventry with a draft of this letter in advance, it enclosed a support letter from Coventry.<sup>345</sup> Indeed, Ms. Jones testified that the City and the industry were “speaking in one voice” regarding the need for strong unlicensed enforcement as of 2012, the very year Uber began operating in Ontario.<sup>346</sup>

226. In the mid-2010s, the City continued to collaborate with class members on the enforcement front.<sup>347</sup> At trial, Mr. Way testified to two “typical” interactions he had with Linda

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<sup>341</sup> Jones Cr Ex., February 9, 2023, 50:21-27.

<sup>342</sup> Way Ex., January 9, 2023, 37:15-24, 24:25 to 25:2, 28:30 to 29:10.

<sup>343</sup> Way Ex., January 6, 2023, 38:8-25.

<sup>344</sup> Way Ex., January 6, 2023, 38:25-29.

<sup>345</sup> Letter from Susan Jones to Bob Chiarelli dated August 2 2012 with attached proposed legislative amendments, Exhibit 25, A697; Draft version of Letter from Sue Jones to Bob Chiarelli, dated August 2, 2012, with attached proposed legislative amendments, Exhibit 26, A703; See also Letter from Mark Taylor to Yasir Naqvi, November 14, 2012 with enclosures, Exhibit 27, A709; E-mail from Susan Jones to Marc Andre Way, dated November 14, 2012, Exhibit 28, A720.

<sup>346</sup> Jones Ex., February 8, 2023: 85:7-18.

<sup>347</sup> Way Ex., January 9, 2023 2:19 to 9:17; E-mail chain between Marc Andre Way and Linda Anderson, dated January 28, 2014, Exhibit 23, A738; E-mail chain between Marc Andre Way and Linda Anderson, dated January 8, 2013, Exhibit 22, A741.



Anderson in 2013 and 2014.<sup>348</sup> By e-mail dated January 8, 2013, Ms. Anderson advised Mr. Way that by-law officers were able to issue charges against an unlicensed company “based on the witness statement” from Mr. Way’s employee. Ms. Anderson further stated to Mr. Way that “you had mentioned you might be willing to have additional trips arranged, evidence gathered and submitted to us. It would be helpful”. She indicated that her intent was to obtain two convictions against the company. Mr. Way testified that he would send this information to Ms. Anderson on a “regular basis”.<sup>349</sup>

227. The collaboration between the City and class members also extended to joint enforcement operations in the 2010s. By e-mail dated January 27, 2014, Mr. Way brought the website of a seemingly unlicensed limousine company to the attention of Ms. Linda Anderson. He asked if the company had a limousine license and Ms. Anderson responded in the negative. When Mr. Way asked if they could jointly set up a pick-up of a vehicle for by-law officers to enforce, Ms. Anderson replied that Marcel Robert would be happy to do so.<sup>350</sup>

228. The taxi industry continued to generally assist the City in addressing illegal activity.<sup>351</sup> For example, the taxi industry, through Mr. Way, would retain the services of Triangle Investigation, a private investigator, to take rides from bandit cabs. Mr. Way would report the results of this investigation to the City so that it could enforce effectively against unlicensed actors.<sup>352</sup> The City

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<sup>348</sup> Way Ex., January 9, 2023, 2:19 to 9:17.

<sup>349</sup> Way Ex., January 9, 2023, 3:30-32.

<sup>350</sup> Way Ex., January 9, 2023, 7:15 to 8:5; E-mail chain between Marc Andre Way and Linda Anderson, dated January 28, 2014, Exhibit 23, A738.

<sup>351</sup> Jones Cr Ex., February 9, 2023, 53:31 to 54:4.

<sup>352</sup> Way Ex., January 6, 2023, 37:32 to 38:3.

would then act on the information collected by Triangle Investigation to enforce as appropriate.<sup>353</sup>

229. The above evidence is uncontradicted. It is compelling and persuasive evidence that establishes the proximate relationship between the City and the taxi industry on the enforcement front: the City undertook to enforce the taxi by-laws and the taxi industry, to the extent that it was capable, lent a helping a hand to the City and counted on the City to implement the enforcement, as it always did.

230. When viewed universally, the continued interactions between the City and the taxi industry in the 2010s created the expectation that the City would: (1) consider information about by-law offenders, such as Uber and its drivers, regardless of whether that information was provided by the taxi industry or emerged from investigations conducted by the City, and (2) properly enforce the by-law.<sup>354</sup> Given the history, nature, and extent of collaboration between the industry and the City, these expectations were reasonable and placed the City in proximate relationship with the taxi industry.

***c. Arrival of Uber: the City's initial conduct solidified the proximate relationship***

231. When Uber appeared on the horizon, the City's initial conduct and interactions with the taxi industry further entrenched the proximate relationship with the taxi industry on the enforcement front against Uber. The collaboration between the City and the taxi industry to "up enforcement on illegal taxicab operations" carried on into the year Uber entered Ottawa.<sup>355</sup> On

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<sup>353</sup> Way Cr Ex., January 11, 2023, 110:31 to 111:1.

<sup>354</sup> Way Ex., January 9, 2023, 9:15-17.

<sup>355</sup> Tweet from Susan Jones, dated April 15, 2014, Exhibit 16, F1119.

the eve of Uber's arrival in Ottawa, the taxi industry's expectations regarding by-law enforcement remained intact.

232. Indeed, the City invited Mr. Way to participate in its preliminary investigations against Uber.<sup>356</sup> In late September 2014, Uber had its first driver recruitment event in Ottawa at the Westin Hotel.<sup>357</sup> Ms. Anderson had reached out to Mr. Way via e-mail and phone to ask if anyone from Coventry would be willing to attempt to register as an Uber driver and provide By-law Services with a witness statement. Ms. Anderson further indicated that By-law Services had attempted to have their own officers go to the Westin in plain clothes to sign up with Uber. However, the by-law officers were "not comfortable" disclosing their personal information to Uber and refused to do so.

233. In accordance with his established relationship with the City, Mr. Way immediately instructed Coventry employees to attend at the Westin hotel and prepare a witness statement.<sup>358</sup> One of his employees had "done this before" as a part of a by-law investigation.<sup>359</sup> Coventry provided a witness statement to Ms. Anderson and Ms. Jones within four hours of the request.

234. This interaction is evidence of the proximity between the City and class members regarding unlicensed taxi enforcement. The City's request for assistance was akin to its previous collaborations with the industry against other bandit cab operations. As it had done in the past,

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<sup>356</sup> E-mail re Uber at Westin from Marc Andre Way to Linda Anderson, dated September 19, 2014, Exhibit 17, F490-F491.

<sup>357</sup> Way Ex., January 6, 2023, 56:20-29.

<sup>358</sup> Way Ex., January 6, 2023, 56:3 to 59:32.

<sup>359</sup> E-mail re Uber at Westin from Marc Andre Way to Linda Anderson, dated September 19, 2014; Exhibit 17, F490-F491. Attachments to e-mail dated September 19, 2014, Exhibit 18, F493-F505.

industry leaders participated in the enforcement effort because “we wanted to protect our industry”.<sup>360</sup>

235. The City’s public representations regarding Uber also fortified its established relationship with class members regarding enforcement. In September 2014, Susan Jones appeared in a news interview with the Ottawa Citizen shortly after meeting with Uber representatives. The interview made clear that the City viewed Uber’s services as being illegal unless they obtain a broker’s license and that the City will enforce the 2012 By-law against Uber just like it had done in the past against illegal operators. Ms. Jones made the following comments:

**Reporter:** Are all of their different systems [*i.e.*, Uber’s] that they have in different cities right now and Ottawa they would require both a broker’s license and for drivers to be licensed?

**Ms. Jones:** Uber, based on the concept they described to me today would require a broker’s license. They would also have the legal requirement to ensure that if they are going to dispatch fares, they’re dispatched to drivers who are licensed and using vehicles that are licensed by the City of Ottawa as a taxicab.

**Reporter:** What did they say when you told them that [Uber needs a broker’s license]? Will they be applying for any license?

**Ms. Jones:** I think right at this point in time, they’re in Ottawa. It’s a fact-finding mission for them to determine the interest. We’ve certainly provided them with a copy of the by-law and they understand what the rules and regulations are. And did ask if they are intending to come and operate that they would not do so until they can assure us that they are going to be fully compliant.

**Reporter:** And will you pursue charges if they start up?

**Ms. Jones:** We pursue charges [against] any illegal taxicab that is operating currently in the City of Ottawa. We pursue charges currently. We’ve laid several hundred charges over the past few years. We will continue to do so. We will continue to work with our partners in police to lay charges under the *Highway Traffic Act*. So, I think, for us, it’s to give Uber notice that they’re welcome,

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<sup>360</sup> Way Ex., January 6, 2023, 57:16-21.

provided they're complying and that Uber can take this information away and, hopefully, they'll be able to make the right decisions and ensuring that, if they are going to come forward, that they do so in compliance with all of our regulations.<sup>361</sup>

236. The City's public statements regarding enforcement against Uber, coupled with the collaborative investigation at the Westin Hotel and the extensive history of enforcement and collaboration with the taxi industry, reinforced its closeness with class members up to the point Uber illegally entered the Ottawa market. In the circumstances of this case, the City created the expectation that it would enforce the 2012 By-law against illegal operators, including Uber. This is the kind of situation in which it would be just and fair to impose a duty of care on the City to properly enforce the taxi by-laws.

***(iii) The combined effect of the statutory scheme and specific interactions make proximity obvious***

237. The statutory scheme and the interactions between the City and the class members, each on their own, illustrate the closeness between the City and the industry vis-à-vis enforcement. When the two are considered together, it is even the more evident that the City was not the mere "neighbour" of the class members: the City and the class were tied at the hip. They were close collaborators in a joint venture to enforce the by-law against unlicensed operators. They partnered over decades within a comprehensive statutory regime where the economic integrity of the taxi industry and its licensed participants was a critical component for the successful delivery of taxi services to the public. They each played their respective parts in this collaborative

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<sup>361</sup> Ottawa Citizen Media Interview with Susan Jones, dated September 22, 2014, Exhibit 195, A2351. Note that this exhibit was entered in video format. It has been transcribed by class counsel.

relationship. The industry, to the extent possible, provided information to the City about illegal operations. The City, for its part, would investigate, consider the information and concerns provided by the industry, and enforce the taxi by-laws that were in effect at any given point in time.

238. To what purpose was the cooperative enforcement exercise geared? It was to achieve the City's purpose of having a vibrant taxi industry so that service to consumers is kept at levels that the City deemed acceptable. For decades, the City structured the taxi industry on a supply management model in which it controlled who can operate and under what conditions. It controlled the number of plates that can operate. It controlled who can be a broker. It controlled under what conditions services have to be provided. It is this tight regulatory regime, and the critical nature of the plate owners' and brokers' economic interests to make it operational and effective, that forms the backdrop for the extensive collaboration between the City and the industry on enforcement. Based on all the evidence, it cannot legitimately be argued that the City and the class members were not in a proximate relationship.

**(iv) The harm to the taxi industry was reasonably foreseeable**

239. The next step in the first stage of the *Anns/Cooper* test involves an inquiry into foreseeability. To assess foreseeability, a court must determine whether the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct.<sup>362</sup> This necessarily involves an evaluation of likelihood.<sup>363</sup> However, only the general kind of harm and not its manner of incidence must be foreseeable.<sup>364</sup>

240. The class members have established that the harm suffered was a foreseeable result of the City's conduct. It is obvious that harmful consequences to class members would result if the City failed to reasonably enforce the 2012 By-law against Uber and its drivers. At the time, the City was aware of the high value of plates and that unlicensed activity would diminish plate values.<sup>365</sup> Moreover, the City knew that unlicensed activity resulted in decreased earnings across all actors within the taxi industry, and the City knew that the lack of enforcement against an unlicensed operator (*i.e.*, Quest) that had a smaller operation compared to Uber caused significant losses to the taxi industry.<sup>366</sup> The City knew that by-law enforcement could prevent that harm, as it had done so in the past, by enforcing directly against illegal dispatchers and drivers. The City was aware that a failure to reasonably enforce against Uber would result in harm to the taxi industry. Any reasonable person would foresee the harm that would be inflicted on the taxi industry if the 2012 By-law was not enforced.

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<sup>362</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at [para 30](#).

<sup>363</sup> *Garratt v. Orillia Power Distribution Corporation*, 2008 ONCA 422 at [para 48](#).

<sup>364</sup> *Bingley v Morrison Fuels*, [2009 ONCA 319](#) at para [24](#).

<sup>365</sup> KPMG Proposal to Serve, dated August 21, 2015, Exhibit 138, A1340, Bourns Cr Ex., 39:6-10.

<sup>366</sup> CBC Article, Entitled "Firm operated 'bandit' cab service, city says", dated June 22, 2006, Exhibit 193, F476.

**2. Second Anns/Cooper stage: no policy considerations negate a duty of care**

241. There are no policy considerations that would negate recognizing a duty of care in this case. Since the City bears the burden of proof on this issue,<sup>367</sup> the plaintiffs will address it in reply.

**3. Eisenberg is distinguishable**

242. The City may rely on the class certification decision in *Eisenberg v City of Toronto*<sup>368</sup> to argue that no duty of care is owed. The certification decision made on the pleadings in *Eisenberg* is not binding on this Court and is distinguishable on both the law and the facts. As demonstrated above, *Anns/Cooper* and its progeny require that this Court conduct a full proximity analysis that is tailored to the circumstances of this case.

243. First, the statutory scheme regulating the taxicab industry in *Eisenberg* is different from the scheme at issue in this litigation. As discussed above, the statutory scheme is relevant to the duty of care analysis. As the City itself has acknowledged, “Ottawa’s current by-laws are different than those in Toronto”.<sup>369</sup> It cannot be the case that a decision from a different jurisdiction about a different by-law would have any bearing on how the 2012 By-law affects the duty of care analysis. *Eisenberg* does not stand for the proposition that there is never a duty of care between a taxi industry regulator and participants in the regulated industry.

244. Second, the evidence of specific interactions in this case, which overwhelmingly supports a finding of proximity, was absent from the pleadings in *Eisenberg*. Because *Eisenberg* was a certification of a class action decision, no evidence was brought (or indeed admissible) for the

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<sup>367</sup> *Childs v. Desormeaux*, 2006 SCC 18 at [para 13](#).

<sup>368</sup> [2019 ONSC 7312](#) (per Perell J), aff’d [2021 ONSC 2776](#) (Ont Div Ct).

<sup>369</sup> KPMG Final Report, Exhibit 58, F2758.



purposes of determining whether the pleadings disclose a cause of action. The pleadings in *Eisenberg* did not particularize the relationship and interactions that give rise to a duty of care in Toronto. The case at bar is different and the facts are distinct. Indeed, as argued above, the historical context and collaboration between the City of Ottawa and class members are unique and evince a rigorous partnership in the context of enforcement. On its face, then, this case is distinguishable from *Eisenberg*.

245. Finally, the binding Supreme Court and Court of Appeal jurisprudence require that this Court conduct a full proximity analysis that is both “fact-specific”<sup>370</sup> and contextual. *Eisenberg* was decided on a limited factual record in a different legal context. By contrast, there is an ample factual record before this Court. Since the facts of this case and the context of the relationship between the City and the taxi industry is different from *Eisenberg*, it follows that *Eisenberg* is distinguishable and a full duty of care analysis based on first principles is required.

#### **B. The City failed to meet the standard of care**

246. The City failed to meet the required standard of care with respect to by-law enforcement against Uber and its drivers. The totality of the evidence demonstrates that the City was unprepared and complacent throughout the two year invasion of Uber in Ottawa.

247. It is well-established that a defendant who fails to exercise the standard of care expected of “an ordinary, reasonable and prudent person in the same circumstances” will be liable in negligence.<sup>371</sup> This standard applies with equal force to public actors like the City.<sup>372</sup> To assess

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<sup>370</sup> *Cooper* at [para 34](#); *Taylor* at [para 80](#).

<sup>371</sup> *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 28.

<sup>372</sup> *Nelson* at [para 92](#), citing *Just* at p. 1243.

the standard of care, a court will consider the facts of the case, the likelihood and gravity of the harm, as well as the cost of preventative measures.<sup>373</sup> Courts may also look at custom, industry practice, or regulatory standards.<sup>374</sup>

248. The City breached the standard of care in three ways: (i) The City had no plan to enforce against Uber and its drivers; (ii) The City inadequately enforced against Uber drivers; and (iii) The City took no steps to enforce against Uber.

### **1. The City had no plan**

249. A reasonable municipality in the City's position would have properly devised a specific plan to deal with Uber and its drivers prior to their arrival. Ottawa is the capital city of Canada and the second largest city in Ontario. Uber had been flouting the law and disrupting taxi regulation throughout North America for at least two years prior to its arrival in Ottawa. The City should, and easily could, have planned for Uber's arrival. It did not.

250. At trial, Ms. Jones confirmed that the City had no plan to address the Uber problem: Uber would only be addressed "when it arrived".<sup>375</sup> In similar vein, Ms. Hartig testified that By-law Services only discussed with the legal department about "how we were going to about this prior, like just prior to their, their starting to operate in Ottawa that first weekend in October".<sup>376</sup>

251. No City witness offered an explanation for why the City had no plan to address the Uber problem. The City knew about Uber and its tactics long before it started operating in Ottawa. The

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<sup>373</sup> *Nelson* at [para 91](#).

<sup>374</sup> *Ryan* at [para 28](#).

<sup>375</sup> *Jones Cr Ex.*, February 9, 2023, 63:12-22.

<sup>376</sup> *Hartig Cr Ex.*, February 3, 2023, 119:1-20.

City first learned of Uber at a 2012 conference held by the International Taxi Regulators in Washington. Uber made a presentation at the conference about its services and its plans to expand into different markets. City representatives, including Christine Hartig and Linda Anderson, were present at the conference.<sup>377</sup> Mr. Way, who was also in attendance, told the City's representatives that Uber's services were identical to bandit cab services and that Uber would become a problem if and when it comes to Ottawa.<sup>378</sup>

252. Uber started operating in Toronto in 2012 (the same year as the Washington conference). At this time, Mr. Way expressed his concerns to the City about Uber's dismissive attitude to consumer protection and the rule of law.<sup>379</sup> Mr. Way had numerous other communications with the City about Uber.<sup>380</sup> For example, by e-mail dated January 10, 2013, Mr. Way advised Linda Anderson of Uber's predatory surge pricing tactics. In his discussions with the City, Mr. Way also informed City staff that Uber's services are no different than the previous bandit cab services that the City had prosecuted and shut down. Mr. Way also discussed with the City the fact that, unlike plates, there are no limits on how many brokers can operate in the City. If Uber wished to do so, it could obtain a broker's license, compete with existing brokers and attempt to attract licensed taxicabs to work with it.<sup>381</sup>

253. Further, the City communicated with other municipalities about Uber. In 2014, City staff were in regular contact with the chief of licensing enforcement in Toronto, Tracey Cook. Through

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<sup>377</sup> Way Ex., January 6, 2023, 48:19-30.

<sup>378</sup> Way Ex., January 6, 2023, 49:4-8.

<sup>379</sup> Way Ex., January 6, 2023, 49:4-8; 49:12 to 52:23; Way Re Ex., January 17, 2023, 68:1-17.

<sup>380</sup> Way Ex., January 6, 2023, 49:12 to 52:7.

<sup>381</sup> Way Ex., January 6, 2023, 52:11-23.

its conversations with Ms. Cook, City officials had knowledge that Uber began operating outside the Toronto regulatory framework since 2012, and that Toronto had failed to achieve sufficient deterrence levels after laying charges against Uber drivers for over two years.<sup>382</sup> In 2014, the City convened with other municipalities to specifically discuss Uber.<sup>383</sup> Leading up to Uber's arrival, Ms. Hartig was also having conversations with her counterparts in Toronto about how to deal with Uber.<sup>384</sup>

254. Not only did the City know about Uber and the disruption it would create, but it had formed the view in September 2014 that Uber's operations would be unlawful unless it obtained a broker's license. As mentioned above, Ms. Jones was so sure of this conclusion that she was prepared to make a public statement about it. Similarly, in 2014 Ms. Hartig was of the view that Uber was an unlicensed broker.<sup>385</sup> Her view on this point did not change over time.<sup>386</sup> The City recognized that Uber's entry into Ottawa would be a significant event that would cause havoc. In fact, Ms. Hartig expected Uber's arrival in Ottawa to be a "pretty big deal" and to be "very challenging" for by-law enforcement.<sup>387</sup>

255. In light of the information that it had about Uber's operations and conduct in other jurisdictions, its expectations about the difficulties it would encounter on enforcement, and its view about Uber's illegality, the City should have devised a proper and specific plan for how it

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<sup>382</sup> Jones Cr Ex., February 9, 2023, 111:14-25; See also, Email from Rick O'Connor to the Mayor's Office and Others, dated November 18, 2014, with attachment, Exhibit 198, F439.

<sup>383</sup> Jones Cr Ex., February 9, 2023, 63:31 to 65:31; 66:2-21.

<sup>384</sup> Hartig Cr Ex., February 3, 2023, 113:20 to 114:8.

<sup>385</sup> Hartig Cr Ex., February 3, 2023, 110:1 – 112:25; Hartig Cr Ex., February 3, 2023, 121:1-121:3.

<sup>386</sup> Hartig Cr Ex., February 3, 2023, 112:27 – 112:29.

<sup>387</sup> Hartig Cr Ex., February 3, 2023, 113:13-19.

was going to address the Uber problem well in advance for the problem actually arising. This is what a reasonable municipality would do in the circumstances. By not doing so, the City breached the standard of care. Instead of devising a proper and specific plan, the City did not turn its mind to enforcement against an entity like Uber. It ignored the issue. The result was a last-minute enforcement effort that was chaotic, unplanned and ineffective.

## **2. The City inadequately enforced against Uber drivers**

256. The City did not meet the standard of care through its enforcement efforts against Uber drivers. The rushed and ad hoc strategy of enforcing against Uber drivers only was futile from the outset.

257. The unreasonableness of the steps the City took in enforcing against drivers on an individualized basis can be gleaned from what other municipalities who were successful at curbing Uber's illegal operations did. For example, the City of Calgary was able to obtain an injunction against Uber drivers to stop the entirety of Uber's operations in Calgary.<sup>388</sup> After the injunction was issued, Uber stopped operating in Calgary until it was authorized to do so.<sup>389</sup>

258. Even if it is assumed that it would have been reasonable for the City to enforce against drivers on an individualized basis, the City clearly failed to take reasonable steps to do so. Between, October 2014 and November 19, 2016, the City had only charged 152 bandit cab Uber drivers.<sup>390</sup> The 2016 By-law came into effect on October 1, 2016. If that date is taken as that date on which Uber drivers would have been authorized to operate, the City would have only charged

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<sup>388</sup> Statement of Agreed Facts at para 42, F8.

<sup>389</sup> Statement of Agreed Facts at para 43, F8.

<sup>390</sup> Unlicensed Taxi Charge, Tab 118 of Part of A of Joint Book of Documents, Exhibit 1, F80.

149 bandit cab drivers.<sup>391</sup> The following table summarizes the number of charges on a per month basis from 2014 to 2016:

<b>Month</b>	<b>Number of Charges</b>
October 2014	18
November 2014	7
December 2014	0
January 2015	10
February 2015	4
March 2015	1
April 2015	0
May 2015	12
June 2015	1
July 2015	30
August 2015	12
September 2015	0
October 2015	13
November 2015	4
December 2015	0
January 2016	3
February 2016	0
March 2016	22
April 2016	2
May 2016	9
June 2016	1
July 2016	0
August 2016	0
September 2016	0
October 2016	0
November 2016	3
December 2016	0

259. The above table shows that, in most months, the City only laid a handful of charges and in many months did not lay charges at all. On average, if the entire 2016 year is taken into

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<sup>391</sup> Unlicensed Taxi Charges, Tab 118 of Part of A of Joint Book of Documents, Exhibit 1, F80.

consideration, the City laid about 5.6 charges a month between October 2014 and December 2016. If October 1, 2016 is taken as the date that is relevant because of the coming into effect of the 2016 By-law, the average would be about 6 charges a month.

260. The number of charges against driver raise four main points. First, the City was clearly not exerting any reasonable effort to enforce the 2012 By-law against Uber drivers. If it did, the number of charges would have been exponentially higher, given the large number of Uber drivers who were operating.

261. There is a strong inference that the number of individuals charged is equal to the number of undercover rides taken. The reasonableness of the City's effort at taking rides and charging drivers can be assessed in comparison to the volume of undercover rides that other entities were able to take. To that end, it is appropriate to compare the number of rides taken by the City's by-law officers compared to the number of rides that Triangle Investigation took. For context, Mr. Way commissioned Triangle investigators in early 2015 to investigate Uber and provide evidence to the City, as he had done with bandit cabs in the past. Triangle took 67 Uber rides over a period of six weeks (from January 21<sup>st</sup> 2015 to March 8<sup>th</sup> 2015) and extensively documented them. By contrast, the evidence shows that, in the roughly same period of time (December 2014 to April 2015), the City only charged 15 individuals with offences. The number of rides taken by Triangle surpasses the number of rides taken by the City in any given month or

6 week period between 2014-2016. Notably, Triangle faced the same challenges in taking undercover rides as the City did.<sup>392</sup>

262. Second, just as he had done in the past, Mr. Way attempted to provide the Triangle report to the City to assist in prosecutions. Even though it had previously relied on Triangle reports that Mr. Way provided to assist with enforcement, the City refused to accept the report this time around.<sup>393</sup> This refusal illustrates the fundamental change in the nature of the relationship between the City and the taxi industry on the enforcement front. Before Uber's unlawful entry into Ottawa, the City and the taxi industry were aligned on enforcement and had a cooperative relationship. When it came to enforcement against Uber drivers, there was a paradigm shift: the City no longer accepted the industry's assistance. The refusal to accept the Triangle Report also illustrates that the City was not taking enforcement seriously.

263. Third, it is no wonder why Uber and its drivers kept unlawfully operating. It is obvious that the City was not taking the enforcement issue seriously. This is particularly evident in the months where there were no charges laid, but it is also obvious from the other months where, at best, only a few other charges were laid. If the City's plan was to stop Uber through enforcement against drivers, it should have been obvious to the City that such a plan was nothing short of a failure and that there is a need to go back to the drawing table to come up with a different plan, which was never done.

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<sup>392</sup> Way Cr Ex., January 11, 2023, 144:28-32.

<sup>393</sup> Way Ex., January 6, 2023, 64:26 to 66:5.



264. Fourth, the low number of charges reflects the meager resources that the City dedicated to the enforcement against Uber drivers. The only accounting evidence tendered by the City is an e-mail that shows that that a mere \$5,432.50 was spent on enforcement.<sup>394</sup> There is no mystery about why the City's enforcement efforts against Uber drivers were not successful: in order to have any hope of deterrence in this strategy, the City would have had to devote more than scant resources to the effort. The City did not dedicate nearly sufficient resources to have any hope of success.

**3. The City took no steps to enforce against Uber—treating only the symptoms, not the problem**

265. The City knew, based on its experience with previous bandit taxi enforcement operations, that enforcing against the drivers was insufficient to stop the illegal activity. As discussed above, the City made this clear in its public statements in relation to the enforcement operation against Quest. As Ms. Jones mentioned at the time, the City “recongize[s] that just charging drivers was just treating the symptom, not the problem, and that we have to undertake to investigate the operations, the groups or individuals who are running these business on a full-time basis”.<sup>395</sup> In other words, from its previous experience, the City knew that only going after drivers would not be sufficient to address the root of the problem and that it had to enforce against the operator who was running the illegal operation.

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<sup>394</sup> E-mail from Christine Hartig to Morgan Tam, dated March 14, 2016, Exhibit 211, F107-108

<sup>395</sup> CBC, “Firm operated ‘bandit’ cab service, city says”, Exhibit 193, F476.

266. The City also knew that, in other jurisdictions, the mere enforcement against drivers on an individualized basis was not sufficient to stop Uber's illegal operations. Indeed, the City was aware that this approach was tried in Toronto and it failed.<sup>396</sup>

267. Remarkably though, the City did not take any step to enforce the 2012 By-law against Uber. The City completely succumbed to Uber's will. It did nothing to stop Uber itself until Uber's operations were authorized under the 2016 By-law. The City never laid a charge against Uber. It never issued an order to stop Uber's illegal activities. And it never sought an injunction. Simply put, when it came to enforcement against Uber between 2014 and 2016, the City was merely a spectator to Uber's invasion of Ottawa. Surely, in the circumstances of this case, such an approach fell below what a reasonable municipality would have done.

268. Between October 3, 2014 and September 30, 2016, the City did not lay any charges against Uber for dispatching a taxicab.<sup>397</sup> The failure to do so is quite shocking and constitutes a gross departure from what a reasonable municipality would do. As mentioned above, Ms. Jones met with Uber in September 2014. Uber provided her with information about what their services are and how they operate. Based on this information, Ms. Jones (who has worked with the City for decades and is highly experienced in the taxi industry and the governing by-laws), concluded that Uber was dispatching and providing broker services and, therefore, must obtain a broker's license in order for its operations to be lawful. Ms. Jones was so sure of her conclusions that she made them public.

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<sup>396</sup> Jones Cr Ex., February 9, 2023, 109:24 to 111:25.

<sup>397</sup> Statement of Agreed Facts at para 37, F8.

269. One of the enforcement steps that a reasonable municipality would have undertaken once Uber started operating without a broker's license (after it was educated about the regulatory regime in Ottawa and told that it cannot lawfully operate without a broker's license) is to charge Uber for illegal dispatching under the 2012 By-law.<sup>398</sup> As mentioned above, the 2012 By-law and that the overall taxi statutory scheme provided the City with the authority to lay a charge against Uber for operating without a license. All the City needed to lay a charge was reasonable and probable grounds to believe that Uber was violating the by-law. At trial, the City admitted that this threshold is quite low and merely requires reasonable grounds to believe that a party is committing, or has committed, the breach in question.<sup>399</sup>

270. When Uber started operating in Ottawa, the City not only had reasonable grounds to believe that Uber was illegally dispatching, the City knew that Uber's operations were unlawful. It was plain and obvious that Uber dispatched in that it sent and directed cabs to customers. Ms. Jones told Uber as much. Yet, the City never charged Uber. Had the City charged Uber and ultimately been successful in obtaining a conviction, the 2012 By-law, as mentioned above, would have provided the City with the tools to obtain a prohibition order that would ensure that Uber seized its operations. Had the City done so, the taxi industry would have been spared the damages that it sustained, at least for the 2014-2016 period in which Uber's operations were unlawful.

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<sup>398</sup> s. 3, 2012 By-law, F3989, F3904.

<sup>399</sup> McCumber Cr Ex., February 7, 2023, 66:16-23.

271. The City has never provided evidence of an explanation, let alone a reasonable or convincing one, as to why it did not charge Uber even when it knew that it was illegally dispatching.

272. Further, the City also did not issue an order against Uber under s. 444 of the *Municipal Act*.<sup>400</sup> This section allows a municipality who “is satisfied that a contravention of a by-law ... has occurred” to “make an order requiring the person who contravened the by-law ... to discontinue the contravening activity”. Had the City issued a s. 444 order, Uber would have likely ceased its operations, just as it had when there was an order issued in Calgary for Uber drivers to stop operating.<sup>401</sup> While Uber’s pattern of conduct reflected its apathy toward the laws of the jurisdictions in which it operated, Uber complied with formal orders, like the court order in Calgary. There is no reason to suggest that Uber would not have complied with a s. 444 order. Yet, the City did not even take the minimal step of issuing a s. 444 order.

273. In its evidence, the City provided no explanation, let alone a good one, as to why it did not make such an order against Uber.

274. The City also did not pursue an injunction against Uber. The failure to pursue an injunction illustrates the patent and palpable unreasonableness in the City’s conduct. The City knew exactly what Uber’s services were. Uber had provided that information to City staff. Ms. Jones, one of the most experienced and senior staff members on issues relating to the industry, concluded and told Uber that their service is dispatching and, therefore, it is required to have a broker’s license.

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<sup>400</sup> Statement of Agreed Facts at para 38, F8.

<sup>401</sup> Statement of Agreed Facts at paras 42-43, F8.

Ms. Hartig reached the same conclusion. As such, when Uber started operating without the license that the City told it was required and was operating in a way that violated the 2012 By-law, the City knew that Uber was unlawfully dispatching.

275. The City consistently held the view that Uber was in violation of the 2012 By-law and that a court would issue an injunction against it. This is clear from the KPMG final report, which expressed the City's view that the decision relating to an injunction that the City of Toronto sought under its different by-law supported the City's chances of being able to get an injunction. The portion in the final KPMG report was added by the City and approved by its legal staff. The text that was added by the City to the report is underlined below:

Although a Court chose not to support an injunction in Toronto, City Officials indicated that Ottawa's current by-laws are different than those in Toronto, and as such, would support an injunction if it was determined that the approach to be taken.<sup>402</sup>

276. The City continued to hold the view that Uber's operations were unlawful after the KPMG Report was released. On April 11, 2016, before the 2016 By-law was passed, Diane Deans wrote an e-mail to Ian Black, who was the General Manager of Uber, to inquire about whether Uber would continue to operate in Ottawa in the interim period between City Council approving the 2016 By-law (if it passed) and it coming into effect in October 2016. Ms. Deans highlighted the importance of Uber's illegal operations: "As you are likely aware, the issue of continued illegal operations in Ottawa by Uber and its driver partners, is of great importance to me and to my

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<sup>402</sup> Draft KPMG Report with Comments from Christine Hartig, dated January 20, 2016, Exhibit 149; A1817; Bourns Cr Ex., February 1, 2023, 90:5-9;24-28;91:4-7; Bourns Ex., January 31, 2023, 97:4 to 98:19. This change was made on January 20, 2016 after review from the City's legal staff: Hartig Cr Ex., February 6, 2023, 27:31 to 29:7; Jones Cr Ex., February 9, 2023, 12:22 to 13:20. It then made its way into the final KPMG report released to the public in the spring: City of Ottawa Taxi Regulation and Service Review, dated December 31, 2015, Exhibit 58, F2758.

colleagues on both the Committee and Council.”<sup>403</sup> In response, Mr. Black confirmed to Ms. Deans that Uber intended to continue its illegal operations. This correspondence makes clear that Council members, who are advised and informed by City Staff, also viewed Uber’s activities as unlawful. In other words, everyone at the City agreed about Uber’s illegality.

277. Indeed, when confronted with this letter in discovery, Ms. Jones testified that she believed that Uber was operating illegally under the by-law as of April 11, 2016.<sup>404</sup> At trial, Ms. Jones attempted to recast her comment as only referencing the illegal activity of the drivers.<sup>405</sup> This explanation is unavailing in light of: (1) the City’s statements to Mr. Bourns regarding the City’s views on the success of an injunction in late January 2016 and (2) the timing of Ms. Jones’ attempt to explain away the clear and overwhelming evidence.

278. At the end of the day, the situation that the City was facing with Uber was not from a Sherlock Holmes mystery series. It was quite straightforward. Uber forced itself into Ottawa and was going to operate unless the regulatory regime refused to tolerate it. The City knew that Uber’s services were unlawful. It told Uber and the public as much. Meanwhile, the City knew that the class members were being harmed. And it knew that the regulatory regime that it created, maintained and protected for decades was being torn to shambles by a transnational corporate entity that was acting as what can only be described as an outlaw.

279. The evidence at trial clearly showed that the lack of enforcement against Uber bore all the hallmarks of “bureaucratic ineptitude” that the Court of Appeal scathingly condemned in

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<sup>403</sup> E-mail from Ian Black to Diane Deans, dated April 11, 2016, Exhibit 191, F346-F348.

<sup>404</sup> Jones Cr Ex., February 9, 2023, 143:10 to 145:25.

<sup>405</sup> Jones Cr Ex., February 9, 2023, 145:27 to 147:11.

*Aylmer*.<sup>406</sup> In *Aylmer*, the Province could not proffer reasonable explanations as to why it occupied a meat plant of its licensee for over 19 months. Similarly, the City's witnesses were "unable to explain" straightforward questions at trial about their failure to enforce against Uber for a two-year period because they simply "just did not put their minds to them".<sup>407</sup>

280. This is not a close case when it comes to the standard of care. No reasonable municipality would have taken no steps to enforce the 2012 By-law, especially given: (1) the history of regulation in the industry, (2) the purposes that this regulation attempted achieve, chief among which is the protection of the economic viability of the taxi industry to ensure acceptable and safe service to consumers, (3) and the history of its enforcement efforts and strong collaboration with the taxi industry prior to the entry of Uber.

### **C. The City's negligence caused damages to the class**

281. This Court postponed the determination of damages in this proceeding to a later stage. As such, this Court should proceed under the assumption that damages have been sustained until the determination of the quantum is ultimately resolved.

282. Assuming that damages have been proven, the City's failure to exercise reasonable care with respect to by-law enforcement caused the class members' losses in fact and law. The body of evidence clearly demonstrates that the plate owners and brokers suffered severe losses as a direct result of the City's conduct. The plate owners have seen plate values plummet while brokers have experienced dramatic reductions in revenue.

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<sup>406</sup> *Aylmer* at para [71](#).

<sup>407</sup> *Aylmer* at para [81](#).

## 1. Factual causation

283. The test for showing factual causation is the “but for” test.<sup>408</sup> The plaintiff must establish on the balance of probabilities that its injury would not have occurred without the defendant’s negligence.<sup>409</sup> In this regard, the court is entitled to draw common sense inferences as to the cause of the harm.<sup>410</sup>

284. In the present case, but for the negligence of the City in enforcing the 2012 By-law, Uber’s illegal operations would not have gone unchecked. As such, the City’s negligence resulted in significant losses to both taxicab brokers and plate owners, including but not limited to diminished plate value, stand rent, credit card processing fees and corporate account administration fees.

## 2. Legal causation

285. The test for showing legal causation is the “remoteness” inquiry.<sup>411</sup> To examine remoteness, the court must assess whether the harm is “too unrelated to the wrongful conduct to hold the defendant fairly liable”.<sup>412</sup> Where the actual harm suffered is reasonably foreseeable, a court will find legal causation and permit recovery.<sup>413</sup> The degree of probability required to satisfy the “reasonable foreseeability” threshold is that there be “a real risk” of the injury. Put

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<sup>408</sup> *Clements v Clements*, [2012 SCC 32](#) at para [8](#) [*Clements*].

<sup>409</sup> *Clements* at para [9](#).

<sup>410</sup> *Clements* at paras [9-10](#).

<sup>411</sup> *Mustapha* at para [12](#).

<sup>412</sup> *Mustapha* at para [12](#).

<sup>413</sup> *Mustapha* at paras [11-14](#).



differently, the risk of harm should not be “brushed aside as far-fetched” to a reasonable person in the position of the defendant.<sup>414</sup>

286. The City was the legal cause of the plaintiff’s damages. In this case, the City could reasonably have foreseen the economic harm experienced by the plate owners and brokers. Any reasonable person would foresee that a failure to enforce against Uber and its drivers would have a devastating economic impact on the licensed taxi industry. Indeed, representatives of the taxi industry made City officials aware of the impact that their poor enforcement efforts Uber had on their livelihoods.<sup>415</sup> The losses experienced by the plate owners and brokers resulted from a real, foreseeable risk. This risk of harm would have been obvious to the City and any reasonable person. After all, one of the main purposes for which the limited plate system was created was to protect the economic interests and viability of the industry to ensure there are sufficient investments made by participants in the industry so that adequate and safe service to consumers is maintained. It follows, then, that failing to protect those economic interests by allowing illegal actors to operate within an otherwise closed system would cause significant damage to those who made investments in the taxi industry and, indeed, entered it in the first place because of the regulatory structure that was created by the City.

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<sup>414</sup> *Mustapha* at para 13, citing *Overseas Tankship (U.K.) Ltd. v Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.).

<sup>415</sup> Ottawa Citizen Video dated September 21, 2015, Exhibit 200, A2352.

**PART IV - DISCRIMINATION**

Q. *[W]hat does plate ownership mean to you?*

A. *From day one I bought my plate, till last year, April 4th, 2022, and this is update every year, they give me invoice. The invoice, it said I am the plate owner. I can sell, I can rent, I can do something. That's to me what's called plate owner.*

Q. *Okay. Do you, do you own a home.*

A. *I do, I do have a home. [...] I'll be done my mortgage in, in five years, and I'm hoping in five years from now I become a homeowner, not as much as they say now, a, a home holder.*

-- Ziad Mezher Examination in chief, January 18, 2023, 27:10-27:25

\* \* \*

Q. *Can [...] you speak more about the impact that's had on you, postponing your retirement?*

A. *Oh, yes. [...] I just - I miss all my future. I'm not written (ph) in this country like other Canadians because they take away my retirement, that was my plan. So this is, I want to say, for other Canadian.*

Q. *Could you clarify what you mean about other Canadians?*

A. *Yes. Because – that is – that is a good question. The majority of the plate owners or taxi drivers were immigrant. If you are a real Canadian born here, White people, nobody just bother us like this. We are not - we don't lose our money like that - \$220,000. I put him in [...] – in the garbage. I don't – I don't have nothing to, to count. Nothing.*

-- Yeshitla Dadi Examination in chief, January 23, 2023, 110:12-11:8

\* \* \*

Q. *So, Dr. Ornstein, you've taken us through most of the deciles. [...] what phenomenon are we looking at here?*

A. *Well, if I had to say it abstractly, I'd say it's the, it's racialized income inequality.*

- Michael Ornstein Examination in chief, January 20, 2023, 92:6-92:14

\* \* \*

Q. *So we know that taxi plate owners are predominantly from groups that face a disadvantage based on race and immigrant status. Correct?*

A. *Yes, we do.*

*[...]*

Q. *If it is proven that their livelihood has become more precarious, would you agree that that would increase their disadvantage?*

A. *Yes.*

-- Grace-Edward Galabuzi Cross-examination, February 16, 2023, 73:27-74:7

\* \* \*

Q. *You understand that you don't just put all your eggs in one basket. Right?*

A. *I don't have too many eggs to put in any baskets.*

-- Ziad Mezher Cross examination, January 18, 2023, 70:21-70:24

287. Plate owners are overwhelmingly drawn from racialized and immigrant groups who face a systemic disadvantage in Canadian society. This is no coincidence: it arises from the nature of the industry. It is also no coincidence that the City could so easily disregard the interests of the class—being drawn from these disadvantaged groups. In worsening the disadvantage faced by class members, the City’s conduct was discriminatory, and violated s. 15 of *the Canadian Charter of Rights and Freedoms*, and ss. 1 and 3 of the *Ontario Human Rights Code*.

**A. The *Charter* applies to the City**

288. The *Charter* applies to municipalities, their activities, and the by-laws they pass.<sup>416</sup> Therefore, the *Charter* applies to the City’s conduct and the by-laws that it passes. The City does not contest this point.

**B. The test for s. 15 of the *Charter***

289. Section 15 of the *Charter* provides that “every individual is equal before the law” and has the right to “equal benefit of the law without discrimination” based on “race, national or ethnic origin, colour,” and other grounds.

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<sup>416</sup> *Godbout v Longueil (City)*, [1997] 3 SCR 844 at paras 50-55.

290. The Supreme Court has, for several years, consistently re-affirmed the applicable test for s. 15 of the *Charter*.<sup>417</sup> The test is composed of two main steps. At the first step, the claimant must show that the impugned law or state action “creates a distinction based on enumerated or analogous grounds, on its face or in its impact”.<sup>418</sup> At the second step, the claimant must show that the impugned law or state action “imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage”.<sup>419</sup> As will be shown, this test is met in this case.

291. Substantive equality is the animating norm of the s. 15 framework, as the Supreme Court articulated in *Fraser*:

[42] Our subsequent decisions left no doubt that substantive equality is the “animating norm” of the s. 15 framework; and that substantive equality requires attention to the “full context of the claimant group’s situation”, to the “actual impact of the law on that situation”, and to the “persistent systemic disadvantages [that] have operated to limit the opportunities available” to that group’s members.<sup>420</sup>

292. Intent is irrelevant to the analysis. There is no requirement to show that the City intended to discriminate—a law or governmental action can be discriminatory without an intention to discriminate.<sup>421</sup>

293. In the same vein, a facially neutral law or policy can be discriminatory. This is referred to as adverse effects discrimination and is tied to substantive equality. The adverse impact analysis

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<sup>417</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at [179–81, 182](#); *R v Kapp*, [2008 SCC 41](#) at para [17](#); *Fraser v Canada*, [2020 SCC 28](#) at para [27](#) [*Fraser*]; *R v Sharma*, [2022 SCC 39](#) at para [28](#) [*Sharma*].

<sup>418</sup> *Sharma* at para [28](#).

<sup>419</sup> *Sharma* at para [28](#).

<sup>420</sup> *Fraser* at para [42](#); citations omitted.

<sup>421</sup> For example, see *Sharma* at para [55\(a\)](#): “The claimant need not prove that the legislature *intended* to discriminate”.

is fundamental to the purpose of s. 15 and ensuring that its protections are properly safeguarded.<sup>422</sup> As the Supreme Court held in *Fraser*, the “[i]ncreased awareness of adverse impact discrimination has been a ‘central trend in the development of discrimination law’, marking a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups”.<sup>423</sup> Examples of adverse effect discrimination are presented in paragraphs 393-404 below.

### C. Evidence for the s. 15 claim

294. The Supreme Court of Canada recently reviewed the evidentiary considerations relevant to the s. 15 analysis. Two types of evidence are ideal: first, evidence related to the “full context of the claimant group’s situation”; second, evidence about “the outcomes that the impugned law or policy ... has produced in practice”.<sup>424</sup> However, both types of evidence are not required. This is because “to give proper effect to the promise of s. 15(1) ... a claimant’s evidentiary burden cannot be unduly difficult to meet.”<sup>425</sup> To ensure a claimant’s evidentiary burden is not insurmountable, courts must also be aware, under step 1 of the s. 15 analysis, that:

(a) No specific form of evidence is required.

(b) The claimant need not show the impugned law or state action was the *only* or the *dominant* cause of the disproportionate impact – they need only demonstrate that the law was *a* cause (that is, the law created *or contributed* to the disproportionate impact on a protected group).

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<sup>422</sup> *Fraser* at para 31.

<sup>423</sup> *Fraser* at para 31.

<sup>424</sup> *Fraser* at para 57, cited in *Sharma* at para 49.

<sup>425</sup> *Sharma* at para 49.

(c) The causal connection may be satisfied by a reasonable inference. Depending on the impugned law or state action at issue, causation may be obvious and require no evidence. Where evidence is required, courts should remain mindful that statistics may not be available. Expert testimony, case studies, or other qualitative evidence may be sufficient. In all circumstances, courts should examine evidence that purports to demonstrate a causal connection to ensure that it conforms with standards associated to its discipline.<sup>426</sup>

295. Under step 2 of the analysis, courts “may *infer* that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence.”<sup>427</sup> However, “that inference is not mere assertion; nor is it *a priori* reasoning.”<sup>428</sup>

296. In this trial, two types of evidence inform the s. 15 analysis. The first is expert evidence demonstrating the statistical and theoretical reality of the structured inequality faced by the plate owners. This provides a “full context” for the plaintiff class’ situation. The second is fact evidence by plate owners about their actual circumstances: these provide examples of the “full context” of the plaintiff class’ situation, and they also demonstrate the “outcomes” that the City’s conduct has “produced in practice”.

### **1. Expert evidence: Dr. Michael Ornstein**

297. Dr. Michael Ornstein is an Associate Professor in the Department of Sociology at York University. He earned his PhD in 1971 from the Department of Social Relations at Johns Hopkins

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<sup>426</sup> *Sharma* at para [49](#) (emphasis added).

<sup>427</sup> *Sharma* at para [55](#).

<sup>428</sup> *Sharma* at para [55](#).

University.<sup>429</sup> He teaches statistics at the graduate level and economic sociology at York University.<sup>430</sup> His expertise is twofold.

- (a) **Methodological:** his methodological expertise is data analysis and statistics. He is the author of numerous works on quantitative methodology, including a book, *A Companion to Survey Research*.<sup>431</sup>
- (b) **Substantive:** his substantive expertise is in structured social inequality.<sup>432</sup> This was the topic of his doctoral thesis and his research afterward.<sup>433</sup>

298. Dr. Ornstein has done work for the Law Societies of Ontario and British Columbia to study the racial make-up of licensees and to identify structural barriers to progression in the legal profession.<sup>434</sup> He has also served as a consultant for Statistics Canada on the Census.<sup>435</sup>

299. Dr. Ornstein was qualified in this proceeding as an expert in sociology, with particular expertise in data analysis and structured inequality.<sup>436</sup>

300. Dr. Ornstein provided evidence on the ethnic make-up of taxi plate owners in Ottawa. He analyzed the ethnic make-up of plate owners based on two sources: his own analysis of the names of plate owners, and the survey of plate owners by Leger.<sup>437</sup> Using census data, he then

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<sup>429</sup> Michael Ornstein CV, Ornstein Report, Exhibit 77, B-1-5796.

<sup>430</sup> Ornstein Voir Dire Ex., January 20, 2023, 4:14-16, 6:28-32.

<sup>431</sup> Ornstein CV, Ornstein Report, Exhibit 77, B-1-5796; Ornstein Voir Dire Ex., January 20, 2023, 10:1-3.

<sup>432</sup> Ornstein Voir Dire Ex., January 20, 2023, 11:2-12, 29:25-31.

<sup>433</sup> Ornstein Voir Dire Ex., January 20, 2023, 11:10 to 12:19.

<sup>434</sup> Ornstein Voir Dire Ex., January 20, 2023, 13:6 to 19:18.

<sup>435</sup> Ornstein Voir Dire Ex., January 20, 2023, 4:31 to 5:4.

<sup>436</sup> Ornstein Voir Dire Ex., January 20, 2023, 29:25-31.

<sup>437</sup> Ornstein Report, Exhibit 77, B-1-5773.

analyzed the economic disadvantage of the four ethnic groups most prominent in Ottawa's industry.<sup>438</sup>

301. Based on his expertise in economic sociology and structured social inequality, he also theorized about the "ethnic niches" of the taxi industry.<sup>439</sup> Dr. Ornstein's evidence on ethnic niches provides an explanation for the unique makeup of the taxi industry and plate owners. It also provides a lens through which to understand how the experiences and struggles of plate owners led to the make-up we see today.

## **2. Individual testimony: Single plate owners**

302. In addition to the lead plaintiff, Iskhak Mail, four other racialized and immigrant single plate owners gave fact evidence. The stories of the single plate owners provide the real-life and concrete examples to ground the expert evidence provided by Dr. Ornstein and the generalized evidence provided by Mr. Way. These stories illustrate that plate owners are not just immigrants and racialized, but also have experienced struggles which shaped their journey to Canada and their entry into the taxi industry. Importantly, this is not just anecdotal evidence. It is evidence that provides some insight into the real stories of the *Charter* claimants. It is also evidence about their disadvantage and the outcomes of the City's conduct on this disadvantage, which will be discussed in more detail below.

### **D. Step one: the City's conduct created a distinction based on enumerated grounds**

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<sup>438</sup> Ornstein Report, Exhibit 77, B-1-5787-88.

<sup>439</sup> Ornstein Report, Exhibit 77, B-1-5781-82; Ornstein Ex., January 20, 2023, 79:14 to 82:26.



303. The focus of this step of the analysis is on whether the impugned law or action “created or contributed to a disproportionate impact on the claimant group based on a protected ground”.<sup>440</sup>

304. Discrimination may arise from the effects of a facially neutral law. A law or governmental action can be discriminatory without an intention to discriminate.<sup>441</sup> This is known as adverse effects discrimination. As the Supreme Court held in *Fraser v Canada (Attorney General)*:

[30] ... Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground ... Instead of explicitly singling out those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage ...<sup>442</sup>

305. For example, in *Eldridge v British Columbia (AG)*, the Supreme Court found that British Columbia’s failure to provide funding for the costs of sign language interpretation constituted discrimination.<sup>443</sup> A group of claimants with hearing impairment brought forward a claim against British Columbia for the unavailability of funding and the resulting disparity in quality of insured care available to them on the grounds of disability. On its face, the funding of health services did not differentiate on the basis of disability, but it had an adverse effect on persons with disabilities.

306. A further example is the Supreme Court’s recent decision in *Fraser*, where the pension treatment of a job-sharing program used mainly by female employees with children was found

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<sup>440</sup> *Sharma* at para [31](#); *Fraser* at para [52](#).

<sup>441</sup> For example, see *Sharma* at para [55\(a\)](#): “The claimant need not prove that the legislature *intended* to discriminate.”

<sup>442</sup> *Fraser* at para [30](#).

<sup>443</sup> *Eldridge v British Columbia (AG)*, [\[1997\] 3 SCR 624](#) [*Eldridge*].

to be discriminatory. Specifically, a job-sharing program that permitted multiple employees to ‘share’ the job of one full-time employee was deemed ineligible for pension credits otherwise available when employees paused full-time service. The differential effects of the program—used mainly by women—exacerbated historical disadvantage and thus constituted discrimination.

307. Most recently, two adverse effect (or “systemic”) discrimination claims succeeded against the province of Ontario in *Ontario Teacher Candidates' Council v The Queen* (“**OTCC**”),<sup>444</sup> and *Ontario (Health) v Association of Ontario Midwives*.<sup>445</sup> Both were upheld at the Court of Appeal for Ontario. The latter case was brought under the *Human Rights Code* but is relevant to discrimination under the *Charter*. Jurisprudence under the *Charter* and the *Code* is substantially intertwined, with decisions under one legal regime often used to guide and shape decisions in the other.<sup>446</sup>

308. In *OTCC*, a group of racialized candidates to become teachers challenged the province’s Math Proficiency Test, a recently introduced aspect of the qualifying process for Ontario teachers. The applicants claimed that the imposition of the test violated s. 15 of the *Charter* because it disproportionately impacted racialized candidates who had significantly lower pass rates on the test than non-racialized candidates. Because this represented a disproportionate impact on a historically marginalized group by barring racialized teachers from entering the teaching profession, the test constituted a form of systemic discrimination.

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<sup>444</sup> *Ontario Teacher Candidates' Council v The Queen*, [2021 ONSC 7386](#).

<sup>445</sup> *Ontario (Health) v Association of Ontario Midwives*, [2022 ONCA 458](#) [*Midwives*, ONCA].

<sup>446</sup> See *Midwives*, ONCA at paras [10–11](#); *Fraser* at paras [37–40](#).

309. In *Midwives*, the Association of Ontario Midwives (“AOM”) succeeded in a gender discrimination claim against the Ministry of Health and Long-Term Care that funds the province’s midwifery program. The AOM sought compensation for wages back to 1997, alleging that gender discrimination had resulted in pay discrepancies between midwives and other health professions, given midwifery is a profession held almost exclusively by women. The case turned on the province’s progressive weakening of safeguards originally implemented to protect against “harmful assumptions and stereotypes concerning the value of women’s work” in 1993.<sup>447</sup> Over the years, the province allowed these safeguards to be weakened, and in the same time period, significant pay disparities arose. Thus, a disproportionate impact on a historically disadvantaged group, caused by state action, constituted discrimination. The midwives were awarded compensation for lost wages due to discrimination.

310. The present case is analogous to these examples of systemic discrimination, particularly *Fraser* and *Midwives*. In both of those cases, state conduct worsened the historically disadvantaged position of a protected group. The plate owners are also comprised of overwhelmingly racialized and immigrant groups, and the City’s conduct toward them exacerbated historical disadvantage by demolishing plate values and livelihoods. *Fraser* and *Midwives* thus act as useful precedents for a finding of discrimination in this case.

311. The first step of the section 15 analysis can be divided into two inquiries. The first focuses on the makeup of the plate owners to discern whether they belong to a protected group. Since

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<sup>447</sup> *Midwives*, ONCA, at para 3.

the claim put forward in this case is rooted in adverse impact discrimination, the second inquiry focuses on the impact of the City's conduct.

**1. The vast majority of plate owners are racialized immigrants**

312. The evidence at trial clearly demonstrates that plate owners are overwhelmingly from immigrant and racialized groups. All these groups are protected under the enumerated grounds of s. 15 of the *Charter*.

**(i) *The City has admitted that plate owners are made up of immigrants and racialized groups***

313. While the City pleaded it had no knowledge of the racial make-up of the class,<sup>448</sup> the City's evidence at trial belies this pleading. The City's own evidence was that the makeup of the plate owners was obvious to the City. Ms. Jones admitted that the majority of taxi plate owners are racialized.<sup>449</sup> Indeed, to Ms. Donnelly, this is not a debatable issue.<sup>450</sup>

314. The evidence demonstrates that as early as the 1990's, the City knew that taxi drivers and plate owners were predominantly immigrants and racialized. For example, the Algonquin Language English test was established in the early 1990s out of concerns that drivers operating in the Ottawa-Carleton area may not have sufficient command of either English or French.<sup>451</sup> Clearly, the City was aware since at least that time that a large proportion of taxi plate owners do not have English or French as their first language.

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<sup>448</sup> Amended Statement of Defence at para 66(a).

<sup>449</sup> Jones Cr Ex., February 9, 2023, 88:24-27.

<sup>450</sup> Donnelly Cr Ex., January 30, 2023, 39:7-23.

<sup>451</sup> Jones Cr Ex., February 9, 2023, 84:23 to 85:4. The test assessed whether a driver could speak English at a grade 8 level in order to pass an understand the training module: Jones Cr Ex., February 9, 2023, 85:15-22.

315. By way of another example, in 1993, the City of Ottawa, and later the Regional Municipality of Ottawa-Carleton, recommended that a three-week training course be instituted for taxi drivers. This course was to include a component on “cross-cultural training and attitudes toward women”.<sup>452</sup> Upon being shown this recommendation, Ms. Hartig agreed that the City of Ottawa, at the time, specifically identified that a cross-cultural training and attitudes toward women course should be included.<sup>453</sup> This is strong evidence that the City of Ottawa was aware, going back to 1993, that a large proportion of taxi industry participants were from other cultures.

**(ii) Dr. Ornstein provided definitive and uncontested evidence about the immigrant and racialized makeup of plate owners**

316. This reality is buttressed by Dr. Ornstein’s uncontradicted expert evidence. Dr. Ornstein’s analysis of the plate owners’ names demonstrates that “plate owners are overwhelmingly non-European” and men.<sup>454</sup> According to Dr. Ornstein’s analysis:

- About 53% of plate owners are Arab.
- About 25% of plate owners are South Asian.
- About 6% of plate owners are Black.
- About 5% of plate owners are West Asian.
- About 10% of plate owners are White.<sup>455</sup>

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<sup>452</sup> June 30, 1993 City of Ottawa Council Minutes, Exhibit 166, A2315.

<sup>453</sup> Hartig Cr Ex., February 6, 2023, 39:13 to 40:21.

<sup>454</sup> Ornstein Report, Exhibit 77, B-1-5774.

<sup>455</sup> Ornstein Report, Exhibit 77, B-1-5776; Ornstein Ex., January 20, 2023, 36:29 to 37:4, 72:18-23.

317. The proportion of racialized plate owners (Arab, South Asian, Black, and West Asian) are all significantly higher than their respective population in the Ottawa-Gatineau Census Metropolitan Area and Ontario.<sup>456</sup> In other words, there is a higher proportion of racialized plate owners compared to the proportion that these groups represent in the community. By contrast, compared to their proportion in the Ottawa-Gatineau Census Metropolitan Area and Ontario, White plate owners only comprise a small proportion of plate owners.<sup>457</sup>

318. By any measure—and this point should not be contested—the taxi industry in general, and plate ownership in particular, is racialized. As Dr. Ornstein put it, the taxi industry is an “ethnic economy”.<sup>458</sup>

319. The majority of plate owners are minorities who immigrated to Canada.<sup>459</sup> The uncontradicted evidence is that plate ownership, and the taxi industry more generally, is not merely racialized, but have been dominated by immigrants and marginalized groups. Mr. Way’s uncontested evidence establishes that for the past five decades, the composition of the taxi industry, including plate owners, has reflected waves of immigration that Canada faced. Mr. Way testified that a number of waves of immigrants were attracted to the taxi industry, beginning with Hungarian Jews in the 1950’s.<sup>460</sup>

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<sup>456</sup> Ornstein Report, Exhibit 77, B-1-5776.

<sup>457</sup> Ornstein Report, Exhibit 77, B-1-5776.

<sup>458</sup> Ornstein Ex., January 20, 2023, 72:23-25, 79:1-3, 26-30.

<sup>459</sup> Ornstein Report, Exhibit 77, B-1-5778, B-1-5780.

<sup>460</sup> Way Ex., January 5, 2023, 10:10-15; Way Re Ex., January 17, 2023, 29:28-31, 30:27-28.

320. As set out in paragraphs 56-59 above, the taxi industry attracted several waves of immigrants. Common patterns emerged.

321. This high-level evidence was confirmed at trial through the lived experiences of the single plate owners who testified. This testimony illustrated not just the fact of immigration or the act of coming to Canada, but the struggles that immigrants face in their home countries and the struggle of the journey of coming to a new country. While the single plate owners who testified had different stories and different pathways of coming to Canada, the struggle in their home countries, the persecution, and the struggle of coming to Canada are common themes that were evident at the trial. What follows is a brief summary of their evidence about the events in their home countries and how they came to Canada.

***(iii) Single plate owners' journeys to Canada***

322. The following are the uncontradicted accounts of the four single plate owners who testified at trial.

***a. Ziad Mezher's journey to Canada***

323. Mr. Mezher was born to a Christian family in Bramiyeh, a village in the South of Lebanon.<sup>461</sup> Mr. Mezher came to Canada on August 26, 1989 when he was 24 years old<sup>462</sup> to escape the Lebanese Civil War. The Lebanese Civil War began as a conflict between Christian and Muslim groups in 1975.<sup>463</sup> Tensions between Muslims and Christians started in the capital city

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<sup>461</sup> Mezher Ex., January 17, 2023, 110:31 to 111:4, 114:9-12.

<sup>462</sup> Mezher Ex., January 17, 2023, 112:13-17.

<sup>463</sup> Mezher Ex., January 17, 2023, 112:25-29.

of Beirut and divided the city into two zones.<sup>464</sup> Whereas Christian groups dominated West Beirut, Muslims communities controlled East Beirut.<sup>465</sup> The sectarian unrest eventually spread across the country and triggered the involvement of neighbouring countries.<sup>466</sup>

324. Mr. Mezher came from a majority Christian zone that was surrounded by a Muslim majority region.<sup>467</sup> By 1982, the conflict expanded to Mr. Mezher's native region.<sup>468</sup> In 1985, Mr. Mezher and his family were forced to leave their village for West Beirut after it was destroyed and burned down.<sup>469</sup> Mr. Mezher and his family travelled to West Beirut by boat to avoid crossing a land border into an unfriendly zone.<sup>470</sup> They had to do this because, during the war, Lebanese citizens would have to stay in zones controlled by their own religious group.<sup>471</sup> Those who cross the border to a zone dominated by another religious group could risk their life.<sup>472</sup> This risk was exacerbated by the fact that Lebanese identification documents identified citizens based on their religion and would be inspected at crossing points.<sup>473</sup> Around this time, there was an exodus of Christians from many villages of Southern Lebanon to West Beirut due to the conflict.<sup>474</sup>

325. The war had a significant impact on Mr. Mezher's education and career path. At the time Mr. Mezher moved to Beirut, he was in high school and working occasionally in construction.<sup>475</sup>

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<sup>464</sup> Mezher Ex., January 17, 2023, 113:1-9.

<sup>465</sup> Mezher Ex., January 17, 2023, 113:8-9, 18-21.

<sup>466</sup> Mezher Ex., January 17, 2023, 112:30-31, 113:22-30.

<sup>467</sup> Mezher Ex., January 17, 2023, 113:11-12.

<sup>468</sup> Mezher Ex., January 17, 2023, 113:28-30.

<sup>469</sup> Mezher Ex., January 17, 2023, 114:13-19.

<sup>470</sup> Mezher Ex., January 17, 2023, 115:23-30.

<sup>471</sup> Mezher Ex., January 17, 2023, 113:12-15.

<sup>472</sup> Mezher Ex., January 17, 2023, 113:30 to 114:1.

<sup>473</sup> Mezher Ex., January 17, 2023: 114:2-8.

<sup>474</sup> Mezher Ex., January 17, 2023, 114:16-26.

<sup>475</sup> Mezher Ex., January 17, 2023, 113:27 to 115:4, 13:15-22.



However, school attendance would vary depending on how the war was developing.<sup>476</sup> Students would attend during the summer, at night, or day depending on the risk.<sup>477</sup> If there were shootings, bombings, or rockets, students would stay at home.<sup>478</sup> When he and his family arrived in Beirut, Mr. Mezher began working at a factory and a gas station.<sup>479</sup> He went back to college for accounting but did not finish his degree.<sup>480</sup>

326. Mr. Mezher began his journey to Canada in 1988. Mr. Mezher's older brother had already come to Canada as the Civil War worsened in Lebanon.<sup>481</sup> His older brother sponsored him to come to Canada.<sup>482</sup> Mr. Mezher had to submit the immigration paperwork at the Canadian Embassy.<sup>483</sup> At the time, the Canadian Embassy in Lebanon had been closed and moved to Syria.<sup>484</sup> As travelling to Syria was too dangerous, Mr. Mezher boarded a small boat to Cyprus to submit his papers at the Embassy there.<sup>485</sup> In Cyprus, an immigration officer interviewed Mr. Mezher and he underwent a medical examination.<sup>486</sup>

327. The journey from Lebanon to Cyprus was unsafe.<sup>487</sup> Due to the small size of the boat, men would have stand up so that women and children could sit.<sup>488</sup> After submitting their paperwork in Cyprus, applicants would wait for people to come back to Lebanon and advise them that their

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<sup>476</sup> Mezher Ex., January 17, 2023, 115:6-8.

<sup>477</sup> Mezher Ex., January 17, 2023, 115:8-9.

<sup>478</sup> Mezher Ex., January 17, 2023, 115:10-12.

<sup>479</sup> Mezher Ex., January 17, 2023, 116:9-14.

<sup>480</sup> Mezher Ex., January 17, 2023, 116:14-22.

<sup>481</sup> Mezher Ex., January 17, 2023, 112:19-23.

<sup>482</sup> Mezher Ex., January 17, 2023, 112:22-24.

<sup>483</sup> Mezher Ex., January 17, 2023, 116:28-29.

<sup>484</sup> Mezher Ex., January 17, 2023, 116:29-31.

<sup>485</sup> Mezher Ex., January 17, 2023, 117:4-7.

<sup>486</sup> Mezher Ex., January 17, 2023, 117:7-9.

<sup>487</sup> Mezher Ex., January 17, 2023, 117:13-14.

<sup>488</sup> Mezher Ex., January 17, 2023, 117:14-18.

name was on the approval list.<sup>489</sup> Mr. Mezher waited a month before he was approved.<sup>490</sup> Finally, on August 29, 1989, Mr. Mezher came to Canada with no money.<sup>491</sup> He did not even have money to buy the plane ticket to Canada— he borrowed \$3,000.00 from his cousin who was working in Saudi Arabia to purchase the ticket.<sup>492</sup>

***b. Antoine El-Feghaly's journey to Canada***

328. Antoine El-Feghaly's story of coming to Canada is very similar to that of Mr. Mezher's. Mr. El-Feghaly was born in Lebanon, along with his five siblings.<sup>493</sup> Mr. El-Feghaly came to Canada in 1988. He was about 25 years old at the time. Like Mr. Mezher, he came to Canada to escape the Lebanese Civil War. The war had a significant mental and physical toll on Mr. El-Feghaly, because he and some of his family members (including his mother and sister) were wounded and he lost family members in the war.<sup>494</sup>

***c. Iskhak Mail's journey to Canada***

329. Iskhak Mail was born and raised in Mazar-i-Sharif, a city in the north of Afghanistan.<sup>495</sup> Mr. Mail grew up in an intellectual family. His father pushed him and his ten siblings to be educated so that they can have a good future.<sup>496</sup> After finishing from high school, he attended the Road and Bridge Tunnel Construction Institute in Uzbekistan, which was part of the Soviet

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<sup>489</sup> Mezher Ex., January 17, 2023, 118:4-14.

<sup>490</sup> Mezher Ex., January 17, 2023, 117:25-27.

<sup>491</sup> Mezher Ex., January 17, 2023, 119:3-9.

<sup>492</sup> Mezher Ex., January 17, 2023, 120:24-26.

<sup>493</sup> El-Feghaly Ex., January 25, 2023, 74:1-23.

<sup>494</sup> El-Feghaly Ex., January 25, 2023, 75:23 to 77:7.

<sup>495</sup> Mail Ex., January 18, 2023, 80:1-5.

<sup>496</sup> Mail Ex., January 18, 2023, 84:2-13.

Union at the time.<sup>497</sup> Mr. Mail graduated with an engineering master's degree in roads, bridges and tunnel construction,<sup>498</sup> which is the equivalent to a civil engineering degree in Canada.<sup>499</sup>

330. Mr. Mail graduated in 1985 and went back to Afghanistan after his graduation with his wife and children.<sup>500</sup> At the time, Afghanistan had mandatory military service. Therefore, Mr. Mail enrolled in the military for one and a half years to complete the required service.<sup>501</sup> After completing his military service, Mr. Mail worked as a civil engineer in Mazar-i-Sharif. He then became the director of construction for the city—a high ranking position that was considered to be at the deputy mayor level.<sup>502</sup>

331. Mr. Mail met his wife when he was in the third year of his university studies. Her family did not accept him as a partner because they were Jewish and Mr. Mail was Muslim.<sup>503</sup> They married nonetheless. When Mr. Mail went back to Afghanistan, his wife worked as a professional hair dresser and she taught technical hair drawing.<sup>504</sup> Life, at the time, was not normal for the couple though. This was because they were worried that, if people in Afghanistan found out that Mr. Mail's wife is Jewish, it was “going to be a big problem”. As such, they tried to hide her Jewish identity to protect her safety.<sup>505</sup>

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<sup>497</sup> Mail Ex., January 18, 2023, 85:8-18; 87:30.

<sup>498</sup> Mail Ex., January 18, 2023, 88:9-15

<sup>499</sup> Mail Ex., January 18, 2023, 88:16-23.

<sup>500</sup> Mail Ex., January 18, 2023, 89:1-14.

<sup>501</sup> Mail Ex., January 18, 2023, 89:13-17.

<sup>502</sup> Mail Ex., January 18, 2023, 89:21-25; 90:2-8.

<sup>503</sup> Mail Ex., January 18, 2023, 90:12-24.

<sup>504</sup> Mail Ex., January 18, 2023, 91:18-28.

<sup>505</sup> Mail Ex., January 18, 2023, 91:18 to 92:3.

332. At the end of the 1980s, Afghanistan was experiencing political turmoil and a change in the governing regime. This turmoil led the Soviet consulate to advise Mr. Mail's wife to leave Afghanistan. However, the Soviet consulate refused to assist Mr. Mail and his children in fleeing the country.

333. Given the dire situation and the immediate danger to his family, Mr. Mail decided that he must leave the country even through illegal means. Mr. Mail's father knew an individual who worked at the border with Uzbekistan and bribed him to allow Mr. Mail and his family to enter Uzbekistan. Mr. Mail was given a one-month visa. When he and his family reached Uzbekistan, he was not allowed to live there because his visa was temporary. To address this issue, Mr. Mail went to Moscow to get a transit visa to go to Romania. Mr. Mail headed to Romania and then got a transit visa for Bulgaria. From Bulgaria, they got a transit visa to Poland. From Poland they got a transit visa to Yugoslavia. Once they arrived in Yugoslavia, Mr. Mail started planning to go a Western European country. The closest one was Austria. At the time, it was illegal for Mr. Mail and his family to go to Austria for settlement purposes. They were, in effect, looking to smuggle themselves into the country to ensure their survival and the survival of their family. Mr. Mail found a motorcycle gang who could get them into Austria through the forests and mountains. The gang member who took them to Austria left them in the middle of nowhere. Eventually, and with great difficulty and great risk (including hitching a ride with a drunk driver), Mr. Mail and his family arrived in Vienna.<sup>506</sup>

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<sup>506</sup> Mail Ex., January 18, 2023, 92 to 98.

334. Once in Vienna, Mr. Mail ultimately found a refugee camp in Traiskirchen, Austria. However, the refugee camp did not initially accept Mr. Mail and his family. With the help of the United Nations, they were able to stay at the refugee camp and, in fact, stayed there for a year. In that year, Mr. Mail worked as an interpreter at the camp and his wife worked in the laundry room. While they were at the camp, the Austrian government interviewed Mr. Mail and his wife. The Austrian government decided not to accept them as refugees, but provided them assistance by referring them to a Jewish community organization in Austria, called HIAS, that could help them. The HIAS community was eventually able to sponsor Mr. Mail and his family to come to Canada in December 1990.<sup>507</sup>

***d. Yeshitla Dadi's journey to Canada***

335. Yeshitla Dadi was born in Ethiopia and comes from a Christian family.<sup>508</sup> In the late 1970's, the military took control of Ethiopia following a coup d'état against the Emperor.<sup>509</sup> A revolution ensued. Schools began to close as intellectuals rose against the government and students began to participate in politics.<sup>510</sup> Teachers and intellectuals were jailed.<sup>511</sup>

336. Mr. Dadi was involved in politics and was against the government.<sup>512</sup> Around the late 1970s, the government began randomly arresting and killing students and regime opponents.<sup>513</sup>

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<sup>507</sup> Mail Ex., January 18, 2023, 99 to 103:10.

<sup>508</sup> Dadi Ex., January 23, 2023, 80:29-30.

<sup>509</sup> Dadi Ex., January 23, 2023, 81:21-25, 17-24.

<sup>510</sup> Dadi Ex., January 23, 2023, 81:29 to 82:1-5.

<sup>511</sup> Dadi Ex., January 23, 2023, 82:17-25.

<sup>512</sup> Dadi Ex., January 23, 2023, 82:7-11.

<sup>513</sup> Dadi Ex., January 23, 2023, 82:25-32.

Around the same time, there was also an invasion from Somalia.<sup>514</sup> Given this escalation, Mr. Dadi began to fear for his life and decided to escape from Ethiopia.<sup>515</sup>

337. To escape Ethiopia, Mr. Dadi travelled with clandestine smugglers towards Djibouti.<sup>516</sup> The journey to Djibouti was a difficult 10-12 day trip on foot.<sup>517</sup> Due to the desert heat, Mr. Dadi had to walk at night.<sup>518</sup> He was thirsty and ate little food besides corn.<sup>519</sup>

338. Mr. Dadi was captured at the Djibouti-Ethiopia border by Somali soldiers.<sup>520</sup> Mr. Dadi identified himself to the soldiers by name and disclosed that he was Christian in response to their questions.<sup>521</sup> Due to their anti-Christian sentiment, the soldiers debated whether to kill Mr. Dadi but decided to bring him to Somalia.<sup>522</sup>

339. Mr. Dadi encountered hostility upon arrival in Somalia. He was interrogated and then imprisoned.<sup>523</sup> Mr. Dadi was imprisoned in Somalia for three years.<sup>524</sup> He was held in a jail in Hargeisa before being transferred to the Mandera Prison.<sup>525</sup> At the time, many Ethiopians were

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<sup>514</sup> Dadi Ex., January 23, 2023, 83:2-9.

<sup>515</sup> Dadi Ex., January 23, 2023, 82:31.

<sup>516</sup> Dadi Ex., January 23, 2023, 83:15-21.

<sup>517</sup> Dadi Ex., January 23, 2023, 83:21-28.

<sup>518</sup> Dadi Ex., January 23, 2023, 83:26-28.

<sup>519</sup> Dadi Ex., January 23, 2023, 83:22-23.

<sup>520</sup> Dadi Ex., January 23, 2023, 83:30 to 84:4.

<sup>521</sup> Dadi Ex., January 23, 2023, 84:1-5.

<sup>522</sup> Dadi Ex., January 23, 2023, 84:5-12.

<sup>523</sup> Dadi Ex., January 23, 2023, 84:15-29.

<sup>524</sup> Dadi Ex., January 23, 2023, 84:2-3.

<sup>525</sup> Dadi Ex., January 23, 2023, 86:6-8.

held at Mandera as war prisoners.<sup>526</sup> Many of them died due to hunger.<sup>527</sup> The prisoners were served a small amount of bread and soup made with corn that was filled with worms.<sup>528</sup>

340. Mr. Dadi was able to reach the United Nations High Commissioner for Refugees (“UNCHR”) through a connection he made in prison.<sup>529</sup> After his years in Somalia, Mr. Dadi became a fluent Somali speaker.<sup>530</sup> Mr. Dadi explained his arbitrary detention to the UNCHR workers and with their help, he was released from the jail after two months.<sup>531</sup>

341. After Mr. Dadi was released from the jail, he travelled alone from Mandera to Hargeisa.<sup>532</sup> He could not find a place to stay in Hargeisa, so he slept on cardboard in a construction site.<sup>533</sup> During the day, he worked as a labourer at the construction.<sup>534</sup> In the evenings, he continued to sleep at the construction site until a friend offered him a place to live.<sup>535</sup>

342. Mr. Dadi began to make plans to move to a refugee camp in Djibouti.<sup>536</sup> To travel to Djibouti, Mr. Dadi paid a truck driver to take him from Hargeisa to Zeila, a city at the Somalia-Djibouti border.<sup>537</sup> Upon arrival in Zeila, he paid a smuggler to transport him clandestinely into Djibouti.<sup>538</sup> Mr. Dadi arrived in Djibouti peacefully and registered as a refugee in Djibouti City.<sup>539</sup>

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<sup>526</sup> Dadi Ex., January 23, 2023, 86:10-14.

<sup>527</sup> Dadi Ex., January 23, 2023, 86:15-16.

<sup>528</sup> Dadi Ex., January 23, 2023, 86:16-25.

<sup>529</sup> Dadi Ex., January 23, 2023, 86:26 to 87:10.

<sup>530</sup> Dadi Ex., January 23, 2023, 88:9-10.

<sup>531</sup> Dadi Ex., January 23, 2023, 87:10-24.

<sup>532</sup> Dadi Ex., January 23, 2023, 87:25-30.

<sup>533</sup> Dadi Ex., January 23, 2023, 87:32 to 88:5.

<sup>534</sup> Dadi Ex., January 23, 2023, 88:5-10.

<sup>535</sup> Dadi Ex., January 23, 2023, 88:10-16.

<sup>536</sup> Dadi Ex., January 23, 2023, 88:20-22.

<sup>537</sup> Dadi Ex., January 23, 2023, 88:22-29.

<sup>538</sup> Dadi Ex., January 23, 2023, 88: 29-32.

<sup>539</sup> Dadi Ex., January 23, 2023, 89:1-2.

343. Mr. Dadi obtained refugee status in 1982 and began to live at a refugee camp in Dikhil, Djibouti.<sup>540</sup> He finished a two-year auto-mechanic training course at a vocational training centre in Ali Sabieh with distinction before returning to Dikhil.<sup>541</sup>

344. Mr. Dadi came to Canada as a refugee on March, 27 1990.<sup>542</sup> Mr. Dadi had previously met with Canadian immigration officers through the UNHCR at the Dikhil camp.<sup>543</sup> He was accepted as a refugee through a sponsor. Mr. Dadi described the day he arrived in Canada as his “lucky day”.<sup>544</sup> He came to Canada with his wife and first child.<sup>545</sup>

***(iv) The makeup of the taxi industry is explained by the phenomenon of ethnic niches***

345. According to Dr. Ornstein, the racialized makeup of the plate owners reflects a phenomenon called “ethnic niches”. This concept refers to “industrial or occupational clusters of coethnics in excess of 150 percent of the expected number ... [who] often turn to self-employment because of disadvantage”.<sup>546</sup> As Dr. Ornstein explained, the plate owner ethnic niches are a result of two main forces. First, there is an oversupply of racialized individuals who turn to self-employment in the taxi industry because of factors that include their education and the non-recognition thereof as well as language skills.<sup>547</sup> Second, on the demand side of the

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<sup>540</sup> Dadi Ex., January 23, 2023, 89:10-14.

<sup>541</sup> Dadi Ex., January 23, 2023, 89:15-20, 91:4-19.

<sup>542</sup> Dadi Ex., January 23, 2023, 93:29-31.

<sup>543</sup> Dadi Ex., January 23, 2023, 93:11-29.

<sup>544</sup> Dadi Ex., January 23, 2023, 94:11-15.

<sup>545</sup> Dadi Ex., January 23, 2023, 95:8-17.

<sup>546</sup> Ornstein Report, Exhibit 77, B-1-5781. Also see: Ornstein Ex., January 20, 2023, 80:3-12, 82:14-17.

<sup>547</sup> Ornstein Report, Exhibit 77, B-1-5781.



equation, the taxi industry is welcoming and appealing to racialized groups, especially because there were already members of their communities working in the industry.<sup>548</sup>

346. Dr. Ornstein's theoretical or doctrinal observations are consistent with the evidence that Mr. Way provided, based on his practical experience and observations of the taxi industry. In particular, Mr. Way testified that immigrants and racialized individuals would typically decide to work in the taxi industry because it provided them an opportunity to generate an income in a new country where their educations, skills, and experience from their home countries were not recognized in Canada.<sup>549</sup> Working in the taxi industry was a way for these individuals to support their families and secure their livelihoods.<sup>550</sup> Another barrier that these individuals faced when they came to Canada, and continue to face, is that English is not their mother tongue. While some may have some knowledge of English when they came to Canada, others did not and had to learn it as part of the training they received to enter the taxi industry.<sup>551</sup>

347. As Dr. Ornstein observed from the survey data, almost all of the immigrant plate owners came to Canada as young adults or older.<sup>552</sup> He further noted that those who immigrate to Canada as adults (as opposed to children) face an additional disadvantage—mainly related to the language barrier. While there is almost no difference in income between non-immigrants and

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<sup>548</sup> Ornstein Report, Exhibit 77, B-1-5781.

<sup>549</sup> Way Ex., January 5, 2023, 39:4-7.

<sup>550</sup> Way Ex., January 5, 2023, 39:22-24.

<sup>551</sup> Way Ex., January 5, 2023, 39:11-18.

<sup>552</sup> Ornstein Ex., January 20, 2023, 76:25-77:18.

immigrants who come to Canada as young children, those who immigrate as adults have lower income than non-immigrants.<sup>553</sup>

348. As Mr. Way testified, those who bought their plates, especially those who had immigrated to Canada in the 2000s, were influenced by the regulatory regime that was in place when they bought their plates. Given the by-laws that were in effect at the time and how the industry operated in practice, it was clear to anyone who was in the industry that a plate was an income generating asset.<sup>554</sup> This clarity arose because of, among other things, the City: (1) allowed the sale of plates and charged transfer fee when plates were sold, which for some time, was set at a percentage of the sale price; (3) issued certificates that recognized plate ownership; and (4) never changed the number of the plate that was issued to the plate owner.<sup>555</sup>

349. It was clear to those in the industry that buying a plate was like buying property that can generate an income until it is sold for a profit in the future. In fact, numerous witnesses at the trial likened buying a plate to buying real estate. The regulatory regime that was created by the City was, of course, not a secret. Members of immigrant and racialized communities knew about it. In a form of assistance or solidarity, those who were looking for ways to improve their lives consulted with members of their community who told them about their experience in the industry and their ability to buy and sell plates.<sup>556</sup>

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<sup>553</sup> Ornstein Ex., January 20, 2023, 76:25-77:26.

<sup>554</sup> Way Ex., January 5, 2023, 42:6-9.

<sup>555</sup> Way Ex., January 5, 2023, 42:6 to 43:2.

<sup>556</sup> Way Ex., January 5, 2023, 42:12-18.

350. Dr. Ornstein's theoretical observations about ethnic niches were also illustrated through the evidence of all the plate owners at trial. In terms of language, it was obvious that English is not their first language. Their use of English is not sophisticated or advanced. This makes sense because they only encountered English in their everyday lives after immigrating to Canada. And it is not surprising that their language skills would have been a significant barrier for them to secure employment in their respective fields of study or employment that requires extensive use of English.

351. In fact, Mr. Mezher, who did not know any English when he came to Canada,<sup>557</sup> had to take the Algonquin College taxi course.<sup>558</sup> This course taught participants safety, customer services, and the key landmarks and roads in the city.<sup>559</sup> The applicable by-law at the time required those who wanted to become taxi drivers to take this course and pass it. To enroll in this course, he had to pass an English language test.<sup>560</sup> Even though he had taken English as a second language course when he first came to Canada,<sup>561</sup> Mr. Mezher failed the first test that he took. Nevertheless, he persevered and passed the test on his second try.<sup>562</sup> Similarly, Mr. Mail, who enrolled in English as a second language course when he came to Canada, clearly still does not have a sophisticated understanding of English.<sup>563</sup> This was obvious during the trial.

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<sup>557</sup> Mezher Ex., January 17, 2023, 119:30.

<sup>558</sup> Mezher Ex., January 18, 2023, 1:29-30.

<sup>559</sup> Mezher Ex., January 18, 2023, 2:8.

<sup>560</sup> Mezher Ex., January 18, 2023, 1:30-32.

<sup>561</sup> Mezher Ex., January 17, 2023, 120:4-6, 121:4-9.

<sup>562</sup> Mezher Ex., January 18, 2023, 2:12-20.

<sup>563</sup> Mail Ex., January 18, 2023, 105:6-8.

352. In terms of the non-recognition of qualifications or barriers to entry into professions, the evidence of the single plate owners illustrates Dr. Ornstein's observations about ethnic niches. For example, after coming to Canada, Mr. Mail started working various jobs, beginning with delivering pizza. He also did other jobs, like distributing flyers,<sup>564</sup> and stocking shelves at a dollar store.<sup>565</sup> At some point, he opened a small convenience store, but that only lasted about a year.<sup>566</sup> After spending some time in Canada, Mr. Mail sought to renew his career as a civil engineer. When he applied for jobs in civil engineering, he was told that he needed Canadian experience and education.<sup>567</sup> In or around 2001 or 2002, Mr. Mail was working for a company called JDS, which was a subcontractor to Nortel. The company was not doing well financially and Mr. Mail was laid off. At the time, a part of the unemployment insurance government program offered laid off individuals the chance to enhance their education. Mr. Mail decided to attend the engineering technology program at Algonquin College.<sup>568</sup>

353. While at Algonquin College, Mr. Mail became concerned about being able to find a job in his field after he graduated from the program. He found out about a taxi course run at Algonquin College. He enrolled in the course and completed it. He then got a taxi driver's license from the City as a backup in case he could not find employment based on his engineering technology degree.<sup>569</sup>

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<sup>564</sup> Mail Ex., January 18, 2023, 105:9-12.

<sup>565</sup> Mail Cr Ex., January 19, 2023, 9:7-20.

<sup>566</sup> Mail Cr Ex., January 19, 2023, 11:6-24.

<sup>567</sup> Mail Ex., January 18, 2023, 107:13-30.

<sup>568</sup> Mail Ex., January 18, 2023: 107:32 to 109:17.

<sup>569</sup> Mail Ex., January 18, 2023, 110:9-21.

354. After he finished the engineering technology program, Mr. Mail looked for work in that field. However, he could not find employment in this area.<sup>570</sup> For a while, Mr. Mail worked with another person from Afghanistan at a gas station. After some time, Mr. Mail and his friend bought the convenience store at a gas station and became partners.<sup>571</sup> Ultimately, Mr. Mail sold his share in the gas station and decided to work in the taxi industry. Once he started, Mr. Mail got advice from members of his community.<sup>572</sup>

355. Mr. El-Feghaly faced similar barriers. Before he came to Canada, Mr. El-Feghaly completed his university education and obtained an undergraduate degree in accounting.<sup>573</sup> He also worked as an accountant for about a year and a half before coming to Canada.<sup>574</sup> When he first came to Canada, Mr. El-Feghaly went to the University of Ottawa to enquire about whether his education from Lebanon would be recognized in Canada. He took a test. After the evaluation process was completed, he was told that he would need to complete two additional years of schooling in Canada. At the time, Mr. El-Feghaly was still a refugee and he needed to support himself financially. In the face of this barrier, he began working with his brother-in-law in construction. When he was working in construction, Mr. El-Feghaly heard from his Lebanese friends that working in the taxi industry is a good option, but that he would need to learn the city by driving. He also realized that, he could only work in construction for a few months a year,

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<sup>570</sup> Mail Ex., January 18, 2023, 110:27 to 111:5.

<sup>571</sup> Mail Ex., January 18, 2023, 111:14 to 112:1; Mail Cr Ex., January 19, 2023, 15:4-7.

<sup>572</sup> Mail Cr Ex., January 19, 2020, 29:22-25.

<sup>573</sup> El-Feghaly Ex., January 25, 2023, 77:17-22.

<sup>574</sup> El-Feghaly Ex., January 25, 2023, 77:23-27.

when weather permitted. To make ends meet, Mr. El-Feghaly also started delivering pizza. After delivering pizzas and learning the city, Mr. El-Feghaly decided to enter the taxi industry.<sup>575</sup>

356. Mr. Dadi also faced similar barriers. When he arrived in Canada, Mr. Dadi's sponsor was in Kingston. So, Mr. Dadi initially settled there and started taking vocational training courses at St. Lawrence College.<sup>576</sup> He finished with a certificate as an auto mechanic.<sup>577</sup> Despite his best efforts, Mr. Dadi was unable to find a job in Kingston.<sup>578</sup>

357. Mr. Dadi then moved to Ottawa in the hopes that it would be easier to find a job as an auto mechanic in a larger city.<sup>579</sup> He first stayed at the YMCA and relied on social assistance.<sup>580</sup> Mr. Dadi was able to find a job as a mechanic in East Ottawa with a Somali man. He wanted to become a licensed mechanic.<sup>581</sup> However, to become a licensed mechanic at the time, one had to complete 5,000 hours in an apprenticeship under another licensed mechanic.<sup>582</sup> Unfortunately, the garage where Mr. Dadi worked did not have a licensed mechanic and the owner refused to pay Mr. Dadi for his work.<sup>583</sup>

358. Mr. Dadi tried to apply to many places to get a job in the auto mechanic field.<sup>584</sup> He put his resume "everywhere", but never received a call back. Following his experience at the garage, Mr. Dadi used his connections in the Ethiopian community to begin working as a gas attendant

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<sup>575</sup> El-Feghaly Ex., January 25, 2023, 79:12 to 83:6.

<sup>576</sup> Dadi Ex., January 23, 2023, 94:19-30.

<sup>577</sup> Dadi Ex., January 23, 2023, 94:31 to 95:4.

<sup>578</sup> Dadi Ex., January 23, 2023, 95:4-7.

<sup>579</sup> Dadi Ex., January 23, 2023, 95:20-23.

<sup>580</sup> Dadi Ex., January 23, 2023, 95:24-28.

<sup>581</sup> Dadi Ex., January 23, 2023, 96:1-8.

<sup>582</sup> Dadi Ex., January 23, 2023, 96:7-12.

<sup>583</sup> Dadi Ex., January 23, 2023, 96:13-17.

<sup>584</sup> Dadi Ex., January 23, 2023, 105:25 to 106:5-9.

and a cashier.<sup>585</sup> In 1997, Mr. Dadi entered the taxi industry due to his connections in the Ethiopian community.<sup>586</sup> Other Ethiopian taxi drivers advised him to drive a taxi and enroll in the Algonquin college course to become a driver.<sup>587</sup>

359. For his part, three days after his arrival in Canada, Mr. Mezher began working at a bakery making pita bread.<sup>588</sup> The bakery would pay him a fixed salary of fifty dollars a day.<sup>589</sup> Due to the long hours, his wage equivalent to an hourly wage of three to four dollars.<sup>590</sup> Mr. Mezher left the bakery and began working at a grocery store, Ayoub's Mini Market.<sup>591</sup>

360. When he came to Canada, Mr. Mezher had planned to go back to school for accounting after he completed his English courses.<sup>592</sup> However, in 1990 he had to sponsor his younger brother to come to Canada.<sup>593</sup> At the time, though, a person could only sponsor an immigrant if they work and make over \$20-25,000 annually.<sup>594</sup> When Mr. Mezher worked at the grocery store, he did not make enough. So, he began to work as a cleaner overnight on the weekends and ultimately earned enough money to sponsor his brother.

361. In 1991, Mr. Mezher again planned to go back to school.<sup>595</sup> However, at that time Mr. Mezher and his brother had to sponsor their parents to come to Canada.<sup>596</sup> Mr. Mezher's parents

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<sup>585</sup> Dadi Ex., January 23, 2023, 96:20-28.

<sup>586</sup> Dadi Ex., January 23, 2023, 96:29 to 97:6.

<sup>587</sup> Dadi Ex., January 23, 2023, 97:2-6.

<sup>588</sup> Mezher Ex., January 17, 2023, 119:14-23.

<sup>589</sup> Mezher Ex., January 17, 2023, 119:21-23.

<sup>590</sup> Mezher Ex., January 17, 2023, 119:20-29.

<sup>591</sup> Mezher Ex., January 17, 2023, 119:31 to 120:2.

<sup>592</sup> Mezher Ex., January 17, 2023, 121:8-12, 28-30.

<sup>593</sup> Mezher Ex., January 17, 2023, 121:12-15.

<sup>594</sup> Mezher Ex., January 17, 2023, 121:13-14.

<sup>595</sup> Mezher Ex., January 17, 2023, 121:23-24.

<sup>596</sup> Mezher Ex., January 17, 2023, 121:24-25.

immigrated to Canada in 1992 and lived with him.<sup>597</sup> Given they were sponsors, Mr. Mezher and his brother worked to support his parents.<sup>598</sup> As a sponsor, Mr. Mezher had an obligation to support his parents as he agreed they would not seek any government assistance.<sup>599</sup>

362. From that point forward, Mr. Mezher worked in a number of jobs to support his family. In 1992, Mr. Mezher began to work at a food distribution company called Sysco.<sup>600</sup> After leaving Sysco in 1993, Mr. Mezher began working at gas stations in Ottawa for seven years.<sup>601</sup> He worked at the gas station from open to close in order to sponsor his future wife to come to Canada from Lebanon.<sup>602</sup>

363. Mr. Mezher explained that he left the gas station business to enter the taxi industry because “family comes first”.<sup>603</sup> Indeed, Mr. Mezher worked long hours in the gas business to support his family.<sup>604</sup> Mr. Mezher has three children.<sup>605</sup> At the time, Mr. Mezher’s wife wanted to go back to school but was responsible for taking care of the children.<sup>606</sup> It was difficult for Mr. Mezher to not spend time with his children outside of their visits to see him at the gas station.<sup>607</sup>

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<sup>597</sup> Mezher Ex., January 17, 2023, 122:1-3.

<sup>598</sup> Mezher Ex., January 17, 2023, 122:4-26.

<sup>599</sup> Mezher Ex., January 17, 2023, 122:8-12, 17-25.

<sup>600</sup> Mezher Ex., January 17, 2023, 123:11-23.

<sup>601</sup> Mezher Ex., January 17, 2023, 124:13-14, 125:20-28.

<sup>602</sup> Mezher Ex., January 17, 2023, 124:22-29.

<sup>603</sup> Mezher Ex., January 17, 2023, 127:24-27.

<sup>604</sup> Mezher Ex., January 17, 2023, 126:21 to 127:1.

<sup>605</sup> Mezher Ex., January 17, 2023, 126:26-29.

<sup>606</sup> Mezher Ex., January 17, 2023, 127:1-6.

<sup>607</sup> Mezher Ex., January 17, 2023, 126:29-31.



364. Mr. Mezher wanted a career with a more flexible schedule so that he could spend time with his family.<sup>608</sup> He spoke to his friends in the taxi industry and understood that it gave more freedom in setting one's schedule.<sup>609</sup>

365. Dr. Ornstein's evidence on ethnic niches provides an explanation for the unique makeup of the taxi industry and plate owners. It also provides a lens through which the experiences of the plate owners and their struggles led certain groups to dominate the taxi industry and plate ownership. Notably, Dr. Ornstein's observations about the social, ethnic or national ties that lead individuals to enter the taxi is present in every one of the single plate owners' stories about their entry and experience in the taxi industry. As Dr. Ornstein explains, these kinds of ties further entrench the ethnic niches in the industry.

366. The ethnic niches theory—illustrated in the experiences of the plate owner witnesses—explains why people from particular disadvantaged groups enter the taxi industry in droves.

**(v) Dr. Galabuzi agrees that plates owners are overwhelmingly members of racialized groups**

367. Dr. Ornstein's evidence about the racialized makeup of the taxi industry is not contradicted. The City's own expert, Dr. Galabuzi, agrees with Dr. Ornstein's analysis of the racialized makeup of taxi plate owners. Specifically, in his report, Dr. Galabuzi stated: "I concur with the observation that in comparison to the population of Canada, a disproportionate number

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<sup>608</sup> Mezher Ex., January 17, 2023, 126:31 to 127:6.

<sup>609</sup> Mezher Ex., January 17, 2023, 127:1-23.

of Plate Owners are members of minority groups in terms of race, colour, ancestry, ethnic or national origin, religion or creed, language, place of origin, and citizenship.”<sup>610</sup>

## **2. The City’s conduct had a disproportionate impact on disadvantaged groups**

### ***(i) The appropriate comparator is the general population***

368. The City’s conduct disproportionately impacted plate owners, who faced disadvantage on the basis of race and ethnic origin. In *Sharma*, the Supreme Court reiterated that the adverse impact analysis is a comparative exercise.<sup>611</sup> The comparative analysis can look at other groups or the general population.<sup>612</sup> The claimant “must demonstrate a disproportionate impact on a protected group, as compared to non-group members.”<sup>613</sup>

369. The s. 15 claim put forward in this case is that the City’s conduct in enforcing the 2012 By-law and enacting the 2016 By-law violates s. 15 of the *Charter* because of the disproportionate impact that such conduct had on the plate owners, the vast majority of whom are racialized, immigrants and minorities who are protected by s. 15. The appropriate comparator group in this context is those non-minorities and non-racialized groups in the broader population. This is the most appropriate comparator group for four reasons.

370. First, this comparator group is appropriate for the claim being put forward in this case. It is only natural for a case that deals with adverse impact discrimination on the basis of immigrant, racialized and minority status to focus on how those groups are treated in comparison to the

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<sup>610</sup> Galabuzi Report, Exhibit 230, A932; Galabuzi Cr Ex., February 6, 2023, 19:31 to 21:28.

<sup>611</sup> *Sharma* at para [31](#).

<sup>612</sup> *Sharma* at para [31](#).

<sup>613</sup> *Sharma* at para [40](#) [emphasis in original removed].

broader population who is not immigrant, racialized, or a minority. These are, as the Supreme Court frames it, the “non-group members”.

371. Second, academic research in this area, including research from both experts, focuses the comparative analysis on the differences between racialized, immigrant and minority groups and the non-racialized, non-immigrant and non-minority population. Indeed, Dr. Galabuzi agreed that comparing racialized, immigrant and minority groups to those who are not is a common benchmark.<sup>614</sup>

372. In fact, in his research, Dr. Galabuzi adopts this type of comparative methodology. For example, in his study of racial issues in Canadian universities, Dr. Galabuzi analyzes racialization in Canadian academia in comparison to Whites, their dominance and influence, and the way Whiteness detrimentally affects and marginalizes racialized groups.<sup>615</sup> Similarly, in his research on the economic wellbeing of racialized groups, Dr. Galabuzi has compared racialized to non-racialized groups and found that racialized groups, as of 2016, continue to be economically disadvantaged compared to non-racialized groups.<sup>616</sup> Dr. Galabuzi confirmed this comparative approach and findings in his evidence at trial. To put it in his words, “racialized groups are predominantly in the lower income deciles versus non-racialized groups whose distribution is quite different.”<sup>617</sup>

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<sup>614</sup> Galabuzi Cr Ex., February 6, 2023, 10:12-17

<sup>615</sup> Grace-Edward Galabuzi, “Post-Racialism and the ‘Equity, Diversity, and Inclusion’ Project” in Janine M. Brodie, ed, *Contemporary Inequalities and Social Justice in Canada* (Toronto: University of Toronto Press, 2018), Exhibit 231, in particular A2592-A2595.

<sup>616</sup> Sheila Block and Grace-Edward Galabuzi, “Persistent Inequality: Ontario’s Colour-coded Labour Market,” *Canadian Centre for Policy Alternatives* (2018), Exhibit 232, A2560.

<sup>617</sup> Galabuzi Cr Ex., February 16, 2023, 9:3-6.

373. Third, because of the make-up of the industry, it does not make sense to compare industry participants to one another. This is because the overwhelming majority of participants, including plate owners, are racialized, immigrants and minorities. In that sense, this case is not like (1) gender discrimination cases where the impact on women in the context of a legislated pension plan can be compared to that on men,<sup>618</sup> (2) cases where the impact of how hospital services are provided to disabled individuals can be compared to those who are not,<sup>619</sup> (3) or cases in which it is possible to analyze a discriminatory impact on homosexuals compared to heterosexuals in the context of underinclusive human rights legislation.<sup>620</sup> In other words, the homogenous makeup of the industry necessitates an *inter* as opposed *intra* comparative analysis that looks outside the class, at the general population.

374. Fourth, selecting non-minority, non-immigrant, and non-racialized groups in the broader population for comparison purposes is anchored to substantive equality, which underpins the s. 15 analysis.<sup>621</sup>

375. A proper s. 15 analysis that is consistent with substantive equality and the full contextual inquiry that it requires can only be done by comparing the situations of the racialized and immigrant groups from which plate owners are drawn to the broader non-racialized and non-immigrant population. As discussed above, the reason that racialized and immigrant groups enter the taxi industry and ultimately become plate owners is because of the adverse conditions that inhibit their ability to engage in other types of employment that would allow them to support

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<sup>618</sup> For example, see [Fraser](#).

<sup>619</sup> For example, see [Eldridge](#).

<sup>620</sup> For example, see *Vriend v Alberta*, [1998] 1 SCR 493.

<sup>621</sup> *Fraser* at para 42.

themselves and their families. It is these conditions and general disadvantage that have driven generations of immigrants, racialized and minority groups to resort to the taxi industry in droves. That is, it is the differences in the circumstances of immigrant, racialized and minority groups compared to those who do not belong to these groups, in combination with the regulatory structure that was created by the City to attract these groups into the taxi industry, that has led them to enter and stay in the industry.

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

***(ii) The City has recognized that plate owners belong to disadvantaged groups***

377. The City has recognized that the plate owners belong to disadvantaged groups. This recognition is reflected in the City’s Equity and Inclusion Lens (the “**Lens**”) and the Handbook that accompanies as well as the Anti-Racism Strategy that it recently passed.

***a. The Lens and Handbook recognize that plate owners are disadvantaged***

378. The roots of the Lens and the Handbook date back to the early 2000s.<sup>622</sup>

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<sup>622</sup> Specifically, in the early 2000s, there was pressure on the City by an organization called the City for All Women Initiative (“CAWI”) to have formalized equity and inclusion policies. In the beginning, this initiative focussed on gender issues, but it was then broadened to include other grounds of discrimination. At the time, CAWI and the City did not believe that an initiative that was based solely on gender provided enough intersectionality. The CAWI initiative ultimately led to the development and implementation of the Lens in or around 2010: Donnelly Cr Ex., January 30, 2023, 10:7-11:4, 13:10-23. Also see Equity and Inclusion Lens Handbook (2015), Exhibit 125, F3303.

379. The Lens provides the general equity and inclusion principles that everyone at the City, including staff, management and Council, must apply.<sup>623</sup> The Lens is intended to do what a lens does—allow the City to see people who are typically unseen and not considered in municipal decision-making, in order to achieve equity and inclusion.<sup>624</sup> The Lens is based on the premise that the first step toward achieving diversity, equity and inclusion is to recognise and see those who are excluded and experience inequity.<sup>625</sup>

380. The Lens is accompanied by a handbook that provides practical guidance on how to implement the Lens.<sup>626</sup> The Handbook contains 11 “Snapshots” about groups who are at risk of exclusion. The City has admitted that these groups are ones that have been historically disadvantaged and excluded.<sup>627</sup> These groups include Francophones, immigrants and visible minorities. The Snapshots make clear that the City has been aware of and recognizes the following:

- Between 2006 and 2008, many immigrants in Ottawa moved to other Canadian cities or back to their home countries because, of among other things, lack of employment opportunities, lack of affordable housing and systemic discrimination against visible minorities.<sup>628</sup>

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<sup>623</sup> Donnelly Cr Ex., January 30, 2023, 30:16-21; 2015 Handbook, Exhibit 125, F3305.

<sup>624</sup> Donnelly Cr Ex., January 30, 2023, 31:18-22. Also see 2015 Handbook, F3305.

<sup>625</sup> Donnelly Cr Ex., January 30, 2023, 31:23-27.

<sup>626</sup> Donnelly Cr Ex., January 30, 2023, 13:28 to 14:2.

<sup>627</sup> Donnelly Cr Ex., January 30, 2023, 27:18-21.

<sup>628</sup> Immigrants Snapshot, Exhibit 131, A1283.

- Even though immigrants are, on average, more educated than Canadians and bring professional experience, they face difficulties in finding work because: (1) their education and experience are not recognized in Canada; (2) they face racial bias that views their credentials as inferior to Canadian education and experience; (3) of the lack of fair and consistent criteria that enable them to work in their professions; (4) the absence or lack of mentorship and networking opportunities; and (5) they often face racial harassment in the workplace.<sup>629</sup>
- As a result of the barriers that they face, about half of immigrants work in fields that are unrelated to their education, skills and experience.<sup>630</sup> As a result, “many immigrants experience deskilling, downward mobility, and lower incomes”.<sup>631</sup>
- Even though 90% of immigrants come to Canada with knowledge of one official language, they still face linguistic barriers.<sup>632</sup>
- Visible minority immigrants and their Canadian-born children and grandchildren face racial exclusion. As such, generations of visible minority immigrants are negatively affected by the way they are treated and, because they are often treated as outsiders, their sense of belonging is jeopardized.<sup>633</sup>

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<sup>629</sup> Immigrants Snapshot, Exhibit 131, A1283.

<sup>630</sup> Immigrants Snapshot, Exhibit 131, A1283.

<sup>631</sup> Immigrants Snapshot, Exhibit 131, A1284.

<sup>632</sup> Immigrants Snapshot, Exhibit 131, A1285.

<sup>633</sup> Immigrants Snapshot, Exhibit 131, A1286.

- Racial discrimination is one of the major barriers that visible minorities face in Ottawa.<sup>634</sup> Indeed, “[r]acial prejudice and racism are a historical reality that still persists in Ottawa ... among individual attitudes and institutional practices.”<sup>635</sup>
- Racial discrimination is present in the norms and assumptions that underpin institutional practices or the way these institutions operate.<sup>636</sup>
- The racial discrimination that exists in Ottawa’s institutions “results in advantages for those who are considered ‘white’ and inequities for those who are considered be the ‘other’ or ‘non-white’”.<sup>637</sup>
- It is difficult for those who do not experience racial discrimination to identify it. Indeed, “[w]hen a person is white, they often do not realize the privilege they have, simply because they have not had the experience of being a person of colour”.<sup>638</sup> When combined with the difficulty of discussing racial discrimination, “one of the biggest barriers that visible minorities encounter is the denial of racism, or ‘colour-blindness’— i.e., ignoring the racial aspect in social problems or inequities”.<sup>639</sup>
- Given the existence of racial discrimination and its oft lack of recognition, “[v]isible minorities are often expected to prove that racism exists—by providing personal

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<sup>634</sup> Visible Minorities Snapshot, Exhibit 132, A1078.

<sup>635</sup> Visible Minorities Snapshot, Exhibit 132, A1076.

<sup>636</sup> Visible Minorities Snapshot, Exhibit 132, A1078.

<sup>637</sup> Visible Minorities Snapshot, Exhibit 132, A1078.

<sup>638</sup> Visible Minorities Snapshot, Exhibit 132, A1079.

<sup>639</sup> Visible Minorities Snapshot, Exhibit 132, A1079.



anecdotes and evidence. They must prove that they don't have a personal agenda while managing the pain these discussions evoke."<sup>640</sup>

- Visible minorities represent almost 50% of Ottawa's poorer citizens.<sup>641</sup> Both Canadian-born and immigrant visible minorities "experience a disproportionate rate of poverty compared with non-visible minority families."<sup>642</sup>
- A "[h]igher proportion[] of visible minorities face labour market exclusion and turn to self-employment—but this often results in long hours, lack of benefits and lower incomes."<sup>643</sup>
- Black, Arab and Southeast Asian students "are disproportionately represented among early school leavers compared to their percentage in the general population".<sup>644</sup>
- Because of higher levels of poverty, "many visible minorities experience housing difficulties, such as lack of access to capital for home ownership; poor housing conditions; over-crowding and stress for larger or extended families; and risk of eviction and homelessness."<sup>645</sup>
- Visible minority groups tend to be active and have strong ties to their own communities. However, "[c]ircumstances such as poverty, work and family responsibilities (can't afford to hire caregivers), an unwelcoming political and cultural environment and discriminatory

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<sup>640</sup> Visible Minorities Snapshot, Exhibit 132, A1079.

<sup>641</sup> Visible Minorities Snapshot, Exhibit 132, A1079.

<sup>642</sup> Visible Minorities Snapshot, Exhibit 132, A1079.

<sup>643</sup> Visible Minorities Snapshot, Exhibit 132, A1080.

<sup>644</sup> Visible Minorities Snapshot, Exhibit 132, A1082.

<sup>645</sup> Visible Minorities Snapshot, Exhibit 132, A1082.

processes in mainstream institutions, experience of exclusion at the personal and community level, and fear of being rebuffed, dismissed or misunderstood contribute to people's hesitance to enter into political, social or community activities."<sup>646</sup>

381. The above is how the City has described the disadvantage of racialized, immigrant and minority groups in Ottawa, which make up the majority of the taxi industry. Not by coincidence, many of the circumstances that were highlighted by the City in the Snapshots, like the non-recognition of credentials and their limited networks outside the context of certain industries (like the taxi industry), are features that were highlighted by Dr. Ornstein as an explanation for the ethnic niches in the taxi industry.

382. Notably, in the Snapshots, the City itself compares the conditions of immigrant, racialized and minority groups to those who are not. There can be no doubt, therefore, that the appropriate comparator group for the purposes of the disproportionate impact analysis is the broader non-racialized, non-immigrant, non-minority group. This is how the City itself conducts the same kind of analysis. There can also be no doubt that plate owners are from racial groups that face disadvantage in virtually every realm of life—economically, socially, and politically. Indeed, as the Snapshots recognize, the disadvantaged situation that immigrant, racialized and minority groups find themselves in forces them into jobs in which their skills cannot be maximized and that tend to take the form of self-employment that require long hours (*e.g.*, owning a taxi plate and driving

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<sup>646</sup> Visible Minorities Snapshot, Exhibit 132, A1082.

a taxi). Those who are not racialized, immigrant or a minority, as the City recognizes, do not have to face these experiences and, in the context of the taxi industry, never have.

***b. The City has recognized plate owners' disadvantage in the Anti-Racism Strategy***

383. The Snapshots are not the only documents in which the City has recognized the disadvantage of the immigrant, racialized and minority plate owners. The City has also recognized their disadvantage in the Anti-Racism Strategy.

384. The Anti-Racism Strategy was passed in 2022, at least in part, because the Lens and the Handbook were not used in a way that would achieve their intended purpose of curbing inequity and exclusion.<sup>647</sup> Indeed, the City has been aware that racialized groups and minorities in Ottawa have and continue to face inequitable outcomes and opportunities that result from systemic discrimination.<sup>648</sup>

385. The City's objective in passing the Anti-Racism Strategy is to remedy and remove the disadvantages that racialized people and minorities have and continue to face.<sup>649</sup> These inequities did not, of course, appear for the first time in 2022. As the Strategy itself notes:

Historical and ongoing racism has created and maintained inequities and disparities among Indigenous, Black and other racialized populations impeding quality of life, mental health and well-being, safety, and hindering access to opportunities, and outcomes. These structural barriers translate into social, political and economic inequities.<sup>650</sup>

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<sup>647</sup> Donnelly Cr Ex., January 30, 2023, 74:27 to 78:15.

<sup>648</sup> Donnelly Cr Ex., January 30, 2023, 71:30 to 72:1; 78:26 to 79:15.

<sup>649</sup> Donnelly Cr Ex., January 30, 2023, 72:17-21.

<sup>650</sup> Anti-Racism Strategy, Exhibit 135, A1196.

386. The Anti-Racism Strategy identified groups in Ottawa that have been historically disadvantaged. These include, among others, Black, Asian, Arab, Muslim, and Indian groups.<sup>651</sup> As mentioned above, the majority of plate owners belong to these groups. In the Anti-Racism Strategy, the City has recognized, yet again, that they have faced and continue to face disadvantage, inequities and systemic discrimination.

***(iii) Expert and social evidence affirms that plate owners are members of disadvantaged groups***

387. The fact that plate owners belong to disadvantaged groups is affirmed by expert and social science evidence. This is also uncontroversial. As Dr. Ornstein notes, “[a] broad literature examines the impact of Indigeneity and racialization on material wellbeing ... Universally, the research shows that non-White groups, both Indigenous and racialized, are disadvantaged relative to self-identified White persons.”<sup>652</sup>

388. Dr. Ornstein conducted a further analysis of disadvantage in the context of the plate owners by focussing on the largest racialized groups. Broadly speaking, Dr. Ornstein, whose evidence was cogent and persuasive, is completely certain that the 2016 census data provides compelling evidence that the four racialized groups prominent in the taxi industry (Arabs, Blacks, West Asians, South Asians) are economically disadvantaged.<sup>653</sup> Specifically, Dr. Ornstein found that the percentage of Arabs living in poverty in Ontario is about 3.5 times higher than the percentage of White Ontarians.<sup>654</sup> South Asians were only slightly better off than White

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<sup>651</sup> Anti-Racism Strategy, Exhibit 135, A1199, A1205.

<sup>652</sup> Ornstein Report, Exhibit 77, B-1-5783.

<sup>653</sup> Ornstein Ex., January 20, 2023, 92:15-93:13.

<sup>654</sup> Ornstein Report, Exhibit 77, B-1-5785.

Ontarians, but still had three times the percentage of poverty compared to White Ontarians.<sup>655</sup>

The percentage of Black Ontarians living in poverty was at least double that of White Ontarians.<sup>656</sup> South Asians experienced about 80% more poverty than White Ontarians.<sup>657</sup>

389. Dr. Ornstein also found that Arabs, Blacks, West Asians and South Asians all had a lower adjusted mean economic family income (the adjustment takes into consideration the higher cost of maintaining a larger family at a given living standard, which is a better measure compared to unadjusted mean income).<sup>658</sup> West Asians, Arab, Blacks, and South Asians also had lower mean values of total individual income for people between 20 and 64 when compared to White Ontarians.<sup>659</sup> Other economic measures also show that White Ontarians are more economically well-off compared to the immigrant and racialized groups that make up the plate owners.<sup>660</sup>

Based on his analysis, Dr. Ornstein concluded:

Using a variety of measures, the 2016 Census provides compelling evidence of the economic disadvantage of the four racialized groups accounting for the great majority of Ottawa taxi plate owners. The Arab and West Asian groups are most disadvantaged, followed by Blacks and South Asians. While the level of disadvantage depends on the measure of income, due in part to group differences in family size, family composition and age, the disparities are not merely statistical – with the very large Census sample, quite small differences are statistically significant – but point to dramatically lower living standards. Arabs, the largest group of plate owners, are also the most disadvantaged; in Ontario they are more than three and a half times more likely than Whites to be poor; and by the market basket measure, nearly half are below the poverty line. Overall, the West Asians are slightly better off than Black Ontarians, who have two and half times the White rate of poverty, personal incomes averaging a third less than Whites and less than one-third the chance of being in the top

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<sup>655</sup> Ornstein Report, Exhibit 77, B-1-5785.

<sup>656</sup> Ornstein Report, Exhibit 77, B-1-5785.

<sup>657</sup> Ornstein Report, Exhibit 77, B-1-5785.

<sup>658</sup> Ornstein Report, Exhibit 77, B-1-5784-85.

<sup>659</sup> Ornstein Report, Exhibit 77, B-1-5785.

<sup>660</sup> Ornstein Report, Exhibit 77, B-1-5786-87.

income group. South Asian Ontarians are measurably disadvantaged, but not so dramatically. Still, they experience 50 percent more poverty than Whites and their personal incomes are nearly 30 percent lower.<sup>661</sup>

390. Based on his analysis, Dr. Ornstein concluded that the “data reveal the disadvantage of racialized groups beyond doubt”.<sup>662</sup> These results are consistent with other research that has compared the economic status of racialized, immigrant and minority groups compared to Whites.<sup>663</sup>

391. Dr. Galabuzi’s research and evidence at trial supports Dr. Ornstein’s evidence on this point.<sup>664</sup> Indeed, his research demonstrates “the persistence of patterns of employment and income inequality along racial and gender lines in the Ontario labour market. The employment and income gap between racialized and non-racialized workers remains in place.”<sup>665</sup> At trial, Dr. Galabuzi went even further: he agreed that the research shows that racialized, immigrant and minority groups suffer from systemic racial inequality, which is a persistent phenomenon that makes their livelihoods even the more precarious and “increase[s] their vulnerability”.<sup>666</sup>

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<sup>661</sup> Ornstein Report, Exhibit 77, B-1-5787-88 (emphasis added).

<sup>662</sup> Ornstein Report, Exhibit 77, B-1-5792 (emphasis added).

<sup>663</sup> Ornstein Report, Exhibit 77, B-1-5787. Also see: Naomi Lightman and Luann Good Ginrich, “Measuring economic exclusion for racialized minorities, immigrants and women in Canada: result from 2000 and 2010”, *Journal of Poverty* (2018), Exhibit 91, B-1-7777, B-1-7778, B-1-7788, B-1-7793, B-1-7794. The authors of this article conclude that Black, South Asian, Arabs, recent immigrants, and women face the most economic exclusion in Canada and, indeed, fare the worst. Also see: Krishna Pendakur and Ravi Pendakur, “Color by Numbers: Minority Earning in Canada 1995-2005”, *Int. Migration & Integration* (2011) 12, Exhibit 94, B-1-7521 to B-1-7523, B-1-7540. This paper finds that Canadian-born visible minorities (*i.e.*, not immigrants) are also economically disadvantaged compared to the White population.

<sup>664</sup> Sheila Block and Grace-Edward Galabuzi, “Persistent Inequality: Ontario’s Colour-coded Labour Market,” *Canadian Centre for Policy Alternatives* (2018), Exhibit 232, A2560. Galabuzi Cr Ex., February 16, 2023, 9:17 to 16:20.

<sup>665</sup> Sheila Block and Grace-Edward Galabuzi, “Persistent Inequality: Ontario’s Colour-coded Labour Market,” *Canadian Centre for Policy Alternatives* (2018), Exhibit 232, A2577.

<sup>666</sup> Galabuzi Cr Ex., February 16, 2023, 16:1-20.

392. In short, the expert evidence at trial, supported by social research evidence (some of which was entered into evidence), clearly shows that the majority of plate owners belong to disadvantaged groups whose disadvantage is not recent, but persistent, and has indeed persisted for decades. The expert evidence and the evidence from the single plate owners also clearly shows how this disadvantage has resulted in the taxi industry being dominated by immigrants, racialized individuals and minorities: it is their disadvantage that results from the barriers and systemic discrimination that they have faced, combined with the City's taxi regulatory regime that was relatively stable for decades, that drove these individuals into the taxi industry.

***(iv) The disproportionate impact of the City's conduct on the plate owners***

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

394. The disproportionate impact is abundantly clear in the demolition of plate values. While the evidence that will prove the significant impact on the class members' plate values has been adjourned to a future phase of the trial, the evidence that has already been tendered illustrates the demolition of plate value.<sup>667</sup> By way of example, Mr. Mail bought his plate for

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<sup>667</sup> For example, see: Way Ex., January 5, 2023, 121:3-5.

a significant price in the six figures.<sup>668</sup> A few years later, and after the City passed the 2016 By-law, Mr. Mail sold his plate for \$12,000.<sup>669</sup> That was the best price that he could sell his plate for. Plate values were demolished because the City, in effect, abolished the plate system that it had maintained for decades. By allowing PTCs to operate, the City essentially lifted the restrictions on the number of cars that can operate in the industry. The impact of this decision clearly had a severe adverse impact on the plate owners that was not felt by anyone else.

395. Further, the effect of the City's conduct crippled the taxi industry. This is obvious from the fact that many accessible plate owners returned their plates to the City. Many others who were renting or leasing plates returned the plates to the owners. This is a remarkable adverse impact. Whereas before 2014, leases were being bought in excess of \$100,000, plate owners could not even maintain leases because of the City's conduct.<sup>670</sup>

396. The City's conduct also had a direct and significant impact on the lives of plate owners. The single plate owners who testified at the trial provided the Court with a glimpse about the impact that the City's conduct had on their daily lives. Before Uber started operating in Ottawa, Mr. El-Feghaly was able to balance his work and spend quality time with his family. After Uber, Mr. El-Feghaly had to work more hours. Some days he would have to work 14 hours. This change took a toll on his family, but he was forced to do it to ensure the financial security and wellbeing of his family.<sup>671</sup>

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<sup>668</sup> Mail Ex., January 18, 2023, 117:6-27.

<sup>669</sup> Mail Ex., January 18, 2023, 123:25-28.

<sup>670</sup> For example, Mr. Mail paid \$125,000 to get a lease. Mail Ex., January 18, 2023, 114:17-19.

<sup>671</sup> El-Feghaly Ex., January 25, 2023, 92:11-26.



397. Mr. Dadi, who is well into his sixties and who bought a plate to (at least in part) secure his retirement, no longer has retirement plans.<sup>672</sup> Mr. Dadi continues to work 12 hours a day, six days a week.<sup>673</sup> The impact of the stresses caused him to lose the pigmentation of his skin.<sup>674</sup> Mr. Dadi provided compelling testimony as to the differential impact of the City's actions on plate owners. He felt that White Canadians would never have their retirement money taken away so easily.<sup>675</sup>

398. After Uber started its illegal operations in Ottawa, Mr. Mail had to increase his hours to afford paying his family's bills and to minimize the harm on his credit history. That meant that he had to be away from his family, which increased the pressure that he and they were facing from the City's failure to curb Uber's illegal operations.<sup>676</sup> Mr. Mezher recounted a similar story: because of the City's conduct, he had to work long days to make sure that he can support his family.<sup>677</sup> It would be no surprise that such a toll was significant on all plate owners.

**(v) *The disproportionate impact is tied to the existing disadvantage based on race and ethnic origin***

399. The disproportionate adverse impact on the plate owners is directly tied to their existing disadvantage based on race and immigrant status. It cannot be properly understood without the full context about why they entered the taxi industry, their progression in it, and the investments

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<sup>672</sup> Dadi Ex., January 23, 2023, 110:8-12.

<sup>673</sup> Dadi Ex., January 23, 2023, 109:26 to 110:12.

<sup>674</sup> Dadi Ex., January 23, 2023, 110:23-29.

<sup>675</sup> Dadi Ex., January 23, 2023, 110:28-31, 111:4-6.

<sup>676</sup> Mail Ex., January 18, 2023, 121:6-13.

<sup>677</sup> Mezher Ex., January 18, 2023, 22:4-12.

that they have made in the industry so that they can generate a living and secure their livelihoods and future of their families.

400. Most plate owners bought plates for two main reasons. The first was to ensure that they “earn enough money to raise ... [their] famil[ies] and do what everyone else would do when they have kids ... bring them to university or college”.<sup>678</sup> In other words, a plate was “an income generating asset”.<sup>679</sup> Single plate owners testified with pride about the education that their children have attained and it was evident that education was important for them to ensure that their children do not have the same kind of lives as they did.<sup>680</sup> The second reason was to have an asset that can be sold to secure plate owners’ retirement.<sup>681</sup> This goal hinged on the reality that plates are appreciating assets: historically, plate owners have sold plates for more than they bought them for. As Mr. Way put it, “it has always been the case where year after year, the taxi plate would increase in value”.<sup>682</sup>

401. The City was aware that taxi driving was an entry-level job mainly geared for new Canadians.<sup>683</sup> Likewise, the city knew that the overwhelming majority of participants in the taxi industry included new Canadians and immigrants.<sup>684</sup> Plate ownership became a means for immigrants to invest in a business and their new community.<sup>685</sup>

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<sup>678</sup> Way Ex., January 5, 2023, 41:1-6.

<sup>679</sup> Way Ex., January 5, 2023, 41:6-8.

<sup>680</sup> For example, see: Mezher Ex., January 18, 2023, 24:11-17; Mail Ex., January 18, 2023, 121:14 to 122:3; El-Feghaly Ex., January 25, 2023, 91:2 to 92:4.

<sup>681</sup> Way Ex., January 5, 2023, 41:10-13. Also see: Mezher Ex., January 18, 2023, 5:9-17; Dadi Ex., January 23, 2023, 105:9-11; Mail Cr Ex., January 19, 2023, 51:19-20.

<sup>682</sup> Way Ex., January 5, 2023, 41:13-15.

<sup>683</sup> Way Ex., January 9, 2023, 18:9 to 19:13.

<sup>684</sup> Way Ex., January 9, 2023, 20:2-15.

<sup>685</sup> Way Ex., January 9, 2023, 18:9-26.

402. In other words, the reasons why plate owners entered the taxi industry and invested in it are rooted in their disadvantage as immigrants and racialized individuals. The regulatory regime was premised on the plate system: a deliberate choice the City made to ensure that the taxi industry remains vibrant, flourishing, and effective at serving the public. Yet upon the arrival of Uber, the City succumbed to the will of transnational corporate interests to the detriment of the plate owners who had invested into the industry and depended on the City's persistent regulation to maintain its stability. The City's conduct disproportionately impacted plate owners who joined the industry because of factors rooted in their disadvantage. Adding insult to injury, the City demolished the taxi industry without any consideration whatsoever of the equality rights of the plate owners.

403. The effect of the City's conduct has the effect of sending all industry participants—those who are racialized and those who are from historically marginalized groups such as Francophones and Hungarian Jews—back in history by destroying plate values and gutting their business. Mr. Way's grandfather lost his milkman business because of a major corporation coming into town and causing upheaval in the industry and no government stepped up to prevent the harm. Ironically, a transnational corporation and governmental failure to respect legal obligations has also demolished his family's fall-back business too.

404. The City's conduct annihilated the investments that the plate owners, who were already disadvantaged, had made in terms of their money, time, and effort. When viewed in the overall context, plate owners entered the taxi industry because of the disadvantage that they were living in and because of the regulatory regime created by the City. They invested precious capital in the

plate system. The City then exacerbated their disadvantage by demolishing the industry and plate system that they depended on. If this is not evidence of disproportionate impact on a group of disadvantaged individuals, it is hard to imagine what would be.

**E. Step two: the City's conduct imposed burdens and denied benefits in a manner that reinforced, perpetuated or exacerbated disadvantage**

405. The focus of the analysis at the second step of the s. 15 test is on whether the impugned law or action “has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”<sup>686</sup> The purpose of this inquiry is “to examine the impact of the harm caused to the affected group. The harm may include ‘[e]conomic exclusion or disadvantage, [s]ocial exclusion ... [p]sychological harms ... [p]hysical harms ... [or] [p]olitical exclusion’ and must be viewed in light of any systemic or historical disadvantages faced by the claimant group.”<sup>687</sup>

406. At trial, Dr. Ornstein provided an insight about racialization and racial discrimination that should be used as a guide to this stage of the analysis. In particular, Dr. Ornstein explained that racialization, and inequality more generally, always have a temporal aspect that must be taken into consideration.<sup>688</sup> When this aspect of time is applied to the evidence that was tendered at trial, it is obvious that the taxi industry has always existed on the racialized margins of society. For this reason, its participants have always been in a uniquely vulnerable position as racialized individuals in a racialized societal hierarchy. In harming these individuals, the City's conduct has perpetuated their racial disadvantage.

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<sup>686</sup> Fraser at para 76.

<sup>687</sup> Fraser at para 76.

<sup>688</sup> Ornstein Ex., January 20, 2023, 36:24-29; Ornstein Report, Exhibit 77, B-1-5772.

407. As discussed above, the groups to which plate owners belong have been disadvantaged for a long time. The City's conduct in not enforcing the 2012 By-law and in passing the 2016 By-law made plate owners, as a class, worse off. The value of the plates that they bought to secure their and their families' future has been demolished because of the City's conduct. Instead of retiring like they planned, they have kept on working long hours, despite their advanced age and the physical demands of the job.

408. In many respects, the City's conduct sent plate owners back to a time where they were more disadvantaged. This is not only evident from the reality that plate owners have lost the value of plates in which they had invested significant sums of time and money that was debt-financed, but also by the fact that many of them have had to resort to jobs that they were doing when they first came to Canada to make sure they could survive. Mr. Mail, who delivered pizza when he first came to Canada to make sure that he and his family can survive has, since he sold his plate, gone back to delivering food again, but now with Uber Eats.<sup>689</sup> Mr. El-Feghaly, whose first job in Canada as a young man was in construction, has had to go back to construction work so that he can cover his and his family's expenses.<sup>690</sup> Governmental action that sends disadvantaged groups to a previous era in which they were even more disadvantaged is the very kind of conduct that s. 15 intends to address and remedy, and this Court should do so.

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<sup>689</sup> Mail Ex., January 18, 2023, 124:6-11.

<sup>690</sup> El-Feghaly Ex., January 25, 2023, 122:2-25.

**F. Dr. Galabuzi's expert evidence ought to be given no weight**

409. To the extent that Dr. Galabuzi's evidence is inconsistent with that of Dr. Ornstein, and to the extent that he provided new evidence at trial outside the scope of his report, it should be given no weight.

410. By his own admission, Dr. Galabuzi is not a statistician.<sup>691</sup> Thus, he is not qualified to comment on Dr. Ornstein's statistical methods. These findings by Dr. Ornstein are thus uncontested.

**1. Alternative comparisons should be given no weight**

411. Contrary to his prior work, Dr. Galabuzi offered some alternative comparisons for a discrimination analysis. First, in his report, he suggested comparing of plate owners to non-taxi driving immigrants. Second, in his report, he suggested comparing plate owners to Uber drivers. Third, in examination in chief, he offered a further alternative comparison: white taxi plate owners to racialized taxi plate owners.<sup>692</sup> This third alternative was not discussed in his report.<sup>693</sup> As such, it improperly opened up a new field of inquiry without adequate notice to the plaintiff class. For that reason alone, this Court should not give it any weight.<sup>694</sup>

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<sup>691</sup> Galabuzi Cr Ex., February 15, 2023, 46:27 to 48:13.

<sup>692</sup> Galabuzi Ex., February 15, 2023, 34:10-22.

<sup>693</sup> Galabuzi Cr Ex., February 16, 2023, 45:13-32.

<sup>694</sup> See [Rule 53.03\(3\)](#), Rules of Civil Procedure, RRO 1990, Reg 194; *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA) at [para 38](#) ("An expert may not testify about matters that open up a new field not mentioned in the report.").

412. The alternative comparisons that Dr. Galabuzi suggests ought to be given no weight for three reasons. First, his analytical framework is unclear. Second, they are based on a mischaracterization of Dr. Ornstein’s report. Third, they are based on pure speculation.

413. First, Dr. Galabuzi’s analytical framework is unclear. He provided a definition of “discrimination”, but had difficulty grounding that definition in an academic discipline.<sup>695</sup> It is unclear whether he is basing his alternatives in a social science framework or a legal framework. When probed about his knowledge of the legal definition of discrimination, he stated that he was generally familiar with the definition, but he had not read the latest seminal Supreme Court decisions on the topic.<sup>696</sup> When probed about his alternative comparisons, he was unable to identify whether these alternatives were based on the legal definition or the political economy definition.<sup>697</sup> Thus, his framework of analysis is unclear.

414. Further, neither of the two alternative comparisons set out in his report align with Dr. Galabuzi’s own method for identifying discrimination. It is not clear what disciplinary perspective grounds these comparisons: in his own work, he compares racialized groups to white groups; further, he admitted that according to his understanding of the legal test, a comparison of White to racialized would be most appropriate. Dr. Galabuzi admitted that the comparison that most closely aligns with his usual methods is the third comparison—White plate owners to racialized plate owners—which was raised for the first time in his examination in chief.<sup>698</sup> He admitted that comparing two racialized groups or two groups that share a disadvantage, as he

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<sup>695</sup> Galabuzi Cr Ex., February 15, 2023, 54:9 to 56:18.

<sup>696</sup> Galabuzi Cr Ex., February 16, 2023, 37:1-24.

<sup>697</sup> Galabuzi Cr Ex., February 16, 2023, 35:31 to 36:23.

<sup>698</sup> Galabuzi Ex., February 15, 2023, 13:15-27.

suggests with the two alternative comparisons in his report, is contradictory to his usual method of comparing disadvantaged groups to non-disadvantaged groups.<sup>699</sup>

415. Second, as Dr. Galabuzi admitted, he mischaracterized Dr. Ornstein's methods and conclusions in numerous places in his report.<sup>700</sup> For example, he stated that the comparison between plate owners and non-taxi driving immigrants would be useful to identify the effect of a specific regulation; but admitted that this is not what Dr. Ornstein purported to do. Thus, his purported alternative comparisons are not responses to Dr. Ornstein's actual methodology or conclusions.

416. Third, the alternative comparisons are not accompanied by any evidence: they are pure speculation. Dr. Galabuzi's report does not provide any insights on what these alternative comparisons would yield. Thus, the comparisons are purely thought experiments. Aside from the Ornstein report itself, Dr. Galabuzi was not provided any information specific to the taxi industry in Ottawa, except for a list of Uber drivers, for which he did not complete his analysis.<sup>701</sup> He did not perform any quantitative or qualitative analysis related to his alternative comparisons, either in his report or in his testimony.

## **2. Testimony outside scope of the expert report should be given no weight**

417. Dr. Galabuzi also offered a number of new observations in his examination in chief that were not discussed in his expert report. These should be given no weight: first, they are not based

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<sup>699</sup> Galabuzi Cr Ex., February 16, 2023, 43:9 to 44:30, 45:2 to 46:25.

<sup>700</sup> Galabuzi Cr Ex., February 16, 2023, 33:10 to 35:15, 38:12 to 43:6, 47:17 to 48:2.

<sup>701</sup> For example, he was not provided with the by-law or the Equity lens. He stated that the Xu paper contains information about the Ottawa taxi industry; it does not.



in his expertise or knowledge; second, under Rule 53.03(3), they are not admissible because they are outside of the expert's report.

- (a) Dr. Galabuzi posited a spectrum of precarity of different players in the taxi industry in Ottawa (i.e. taxi plate owners, taxi drivers, and Uber drivers).<sup>702</sup> On cross-examination, he admitted that this was not discussed in his expert report.<sup>703</sup> He also admitted that it was not based on any specific data about the taxi industry in Ottawa.<sup>704</sup>
- (b) Dr. Galabuzi testified in chief about data that he felt was missing from the Leger survey.<sup>705</sup> On cross-examination, he admitted that this was not discussed in his expert report, and that to his knowledge, the City had not carried out its own survey to collect the missing information.<sup>706</sup>
- (c) Dr. Galabuzi testified in chief that Dr. Ornstein's Table 5 did not provide information on where plate owners fall in the income deciles.<sup>707</sup> On cross-examination, he admitted that this critique was not raised in his expert report.<sup>708</sup>
- (d) Dr. Galabuzi testified in chief that Dr. Ornstein does not establish that the plate owners are economically disadvantaged, but rather that they come from groups

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<sup>702</sup> Galabuzi Ex., February 15, 2023, 11:19 to 12:20.

<sup>703</sup> Galabuzi Cr Ex., February 16, 2023, 24:14-32.

<sup>704</sup> Galabuzi Cr Ex., February 16, 2023, 25:1-21.

<sup>705</sup> Galabuzi Ex., February 15, 2023, 23:1-21.

<sup>706</sup> Galabuzi Cr Ex., February 16, 2023, 29:12 to 30:1.

<sup>707</sup> Galabuzi Ex., February 15, 2023, 35:28 to 36:4.

<sup>708</sup> Galabuzi Cr Ex., February 16, 2023, 30:26 to 31:17.

that are economically disadvantaged.<sup>709</sup> On cross-examination, he admitted that this contradicts the following statement in his report: “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.”<sup>710</sup>

### **3. Testimony unsupported by evidence should be given no weight**

418. Dr. Galabuzi made a number of statements in his report and testimony that are wholly unsupported by evidence. These should be given no weight.

- (a) Dr. Galabuzi stated in his report that “It is possible that the social economic effect experienced by the plaintiff class is a general condition shared among these cohorts because of the changes in the economy over time”.<sup>711</sup> However, he admitted he had not presented any data to support this claim.<sup>712</sup>
  
- (b) Dr. Galabuzi stated in chief that some people “speculate that the opening up of the industry in this way may create benefits for some of the drivers”.<sup>713</sup> He stated in his report that the opening up of the taxi industry to platform economics may provide benefits.<sup>714</sup> However, he admitted that this is outside his core expertise.<sup>715</sup> He further admitted that he had not studied the effects of platform

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<sup>709</sup> Galabuzi Ex., February 15, 2023, 43:3-5.

<sup>710</sup> Galabuzi Cr Ex., February 16, 2023, 31:17 to 32:17; Galabuzi Report, Exhibit 230, A933-34.

<sup>711</sup> Galabuzi Report, Exhibit 230, A931, A938; Galabuzi Cr Ex., February 16, 2023, 51: 16-27.

<sup>712</sup> Galabuzi Cr Ex., February 16, 2023, 51:28-30, 52:1-6, 55:18-29.

<sup>713</sup> Galabuzi Ex., February 15, 2023, 41:8-11.

<sup>714</sup> Galabuzi Report, Exhibit 230, A931.

<sup>715</sup> Galabuzi Cr Ex., February 16, 2023, 52:7-24.

capitalism in Ottawa.<sup>716</sup> He referenced the Tucker paper in his report as support for the proposition that platform economics may yield benefits.<sup>717</sup> However, he admitted that this paper describes the increased level of surveillance and control of Uber.<sup>718</sup> He further agreed that taxi plate owners are part of the local capital system, whereas Uber is a multinational company which is highly capitalized.<sup>719</sup> He further agreed that Tucker makes the argument that the employment of Uber drivers is actually more precarious and subordinated than that of taxi drivers.<sup>720</sup> Ultimately, he agreed that he does not know whether Uber drivers in Ottawa are better off or worse off than taxi plate owners.<sup>721</sup>

419. Other courts have rejected Dr. Galabuzi's expert evidence based on it being pure speculation;<sup>722</sup> this court ought to do the same.

#### **G. The City has not pleaded s. 1 of the *Charter***

420. The city has not pleaded s. 1 of the *Charter*. Thus, it has not relied on s. 1 to justify a *Charter* breach.

421. In its plain wording, s. 1 of the *Charter* provides that the *Charter* guarantees rights "subject only to such reasonable limits" that are "demonstrably justified in a free and democratic

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<sup>716</sup> Galabuzi Cr Ex., February 15, 2023, 48:14-22, February 16, 2023, 52:16 to 53:4.

<sup>717</sup> Galabuzi Report, Exhibit 230, A939; Galabuzi Ex., February 15, 2023, 18:29 to 19:12.

<sup>718</sup> Galabuzi Cr Ex., February 16, 2023, 62:27 to 63:11.

<sup>719</sup> Galabuzi Cr Ex., February 16, 2023, 63:12-32.

<sup>720</sup> Galabuzi Cr Ex., February 16, 2023, 64:11-22.

<sup>721</sup> Galabuzi Cr Ex., February 16, 2023, 64:23 to 65:8.

<sup>722</sup> *Begum v Canada*, [2018 FCA 181](#) at paras [64-69](#), Exhibit 233, A2651-A2653.

society” [emphasis added].<sup>723</sup> The word “demonstrably” clearly puts the onus on the state to justify limits to fundamental rights and freedoms.<sup>724</sup>

422. The *Charter* guarantees the individual certain rights and freedoms opposable to the state. In this framework, the party claiming that government legislation violates the *Charter* bears the onus of demonstrating the *Charter* breach. Once a Court finds that a *Charter* breach has occurred, “the party seeking to uphold the limitation”<sup>725</sup>—i.e. the state—bears the burden of justification.

423. Where a *Charter* breach is made out, the burden is on the state to justify an infringement of a *Charter* right under s. 1:

[120] In order to justify an infringement of a *Charter* right under s. 1, the state is required to show that the impugned law addresses a pressing and substantial objective and that the means chosen to achieve that objective are proportional to it (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 13640; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 986). A law is proportionate when the following conditions are met: “(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law” (*Nur*, at para. 111; *Oakes*, at pp. 13940).<sup>726</sup>

424. Where the state does not plead s. 1, a Court should not make s. 1 findings. There are principled and practical reasons for this. First, as a matter of principle, the state bears the onus of invoking—and making out—a s. 1 justification. Second, as a practical matter, where s. 1 is not pleaded, this restricts the scope of the trial and the evidence that all parties adduce. This deprives

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<sup>723</sup> *Charter*, s. 1.

<sup>724</sup> *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 128.

<sup>725</sup> *R. v Oakes*, [1986] 1 SCR 103, p 137.

<sup>726</sup> *R v Bissonnette*, 2022 SCC 23 at para 120.

the Court of the evidentiary basis upon which to make s. 1 findings and puts the Court in the perilous position of conducting a s. 1 analysis in a vacuum.

425. Where a governmental actor does not plead s. 1 justification, it cannot rely on s. 1 to justify a *Charter* breach. As the Court of Appeal has held, “[a]ctions are decided on the basis of pleadings.”<sup>727</sup> Indeed, the City not pleading s. 1 explains why it is not certified as a common issue in this proceeding. Further, there is a fairness issue: had s. 1 been properly pleaded and been included in the certified issues, discoveries would have been conducted differently to ensure that evidence relevant to s. 1 was produced and probed.

426. Since the City has not pleaded s. 1, an automatic finding that the s. 15 breach is not justified should follow.

#### **H. The City breached the *Human Rights Code***

427. The purpose of Ontario’s *Human Rights Code* is to protect against discriminatory conduct.<sup>728</sup> As human rights legislation, the *Code* demands a broad and purposive interpretation.<sup>729</sup>

428. Systemic discrimination that breaches s. 15 will also constitute constructive discrimination under the *Code*. It would be contradictory to suggest that conduct that violates s. 15 could withstand scrutiny under the *Code*, as both legal frameworks aim to prevent and remedy systemic discrimination. Indeed, what separates the *Code* from s. 15 is the breadth of its

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<sup>727</sup> *Teefy Developments (Bathurst Glen) Limited v Sun*, [2021 ONCA 870](#) at para [14](#).

<sup>728</sup> *Ontario Human Rights Commission v Simpsons-Sears Ltd.*, [\[1985\] 2 SCR 536](#) at 547; *Fraser* at para [38](#).

<sup>729</sup> *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [\[1987\] 1 SCR 114](#) at 1137–1138.

application to various actors, not the standard of discriminatory conduct. As a result, in the equality jurisprudence, the analyses of the *Code* and s. 15 have long been intertwined, with advancements in one strand of jurisprudence used to develop the other.<sup>730</sup> Given the interrelationship between the *Code* and s. 15, in addition to the submissions made in this section, the plaintiffs repeat and rely on the s. 15 submissions for the purposes of the *Code* analysis.

429. The City's conduct breached plate owners' human rights under Part I of the *Code*. As laid out above, the City in both its conduct and its failure to act to enforce existing legislation led to a disproportionate impact on already vulnerable groups. The finding of a *Code* violation flows logically from the finding of a s. 15 breach as laid out above.

### 1. Application of the *Code*

430. Section 1 of the *Code* provides that:

<b>Services</b>	<b>Service</b>
<b>1</b> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.	<b>1</b> Toute personne a droit à un traitement égal en matière de services, de biens ou d'installations, sans discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'état matrimonial, l'état familial ou un handicap.

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<sup>730</sup> [Midwives, ONCA](#); Fraser at paras [38–40](#).

431. The term “services” must be construed broadly,<sup>731</sup> and includes law enforcement.<sup>732</sup> The *Code*, therefore, applies to the enforcement (or lack thereof) of a city by-law and to the by-law itself.

432. Section 3 of the *Code* provides that:

<b>Contract</b>	<b>Contrat</b>
Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability	Toute personne jouissant de la capacité juridique a le droit de conclure des contrats à conditions égales, sans discrimination fondée sur la race, l’ascendance, le lieu d’origine, la couleur, l’origine ethnique, la citoyenneté, la croyance, le sexe, l’orientation sexuelle, l’identité sexuelle, l’expression de l’identité sexuelle, l’âge, l’état matrimonial, l’état familial ou un handicap

433. It has been long established that “discrimination during the life of a contract is protected and that policies, practices and systems that relate to a contract” must comply with the *Code*.<sup>733</sup>

434. The *Code* applies to the plate owners in this case because they are subject both to the 2016 By-Law and the City’s overall enforcement policies and practices that led to the diminished value of their plates. Both the City’s role in law enforcement and its policies and practices relating to the taxi drivers’ plate ownership bring this matter under the ambit of the *Code*.

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<sup>731</sup> *Braithwaite v Ontario (Attorney General)*, 2005 HRTO 31 at para 5. Also see: *Ontario (Attorney General) v Ontario Human Rights Commission*, [2007] OJ No 4978 at paras 39-40 (Div Ct).

<sup>732</sup> For example, see: *Logan v Ontario (Solicitor General)*, 2022 HRTO 1004 at paras 74-75 [Logan].

<sup>733</sup> *Swain v MBM Intellectual Property Law LLP*, 2015 HRTO 1011 at paras 15, 24; *Association of Ontario Midwives v Ontario (Health and Long-Term Care)*, 2014 HRTO 1370 at paras 21-24.

## 2. The test for discrimination under the *Code*

435. Section 9 of the *Code* states:

<b>Infringement prohibited</b>	<b>Interdiction de porter atteinte à un droit</b>
No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.	Nul ne doit porter atteinte à un droit reconnu par la présente partie ni faire, directement ou indirectement, quoi que ce soit qui porte atteinte à un tel droit.

436. Section 11(1) of the *Code* states:

<b>Constructive discrimination</b>	<b>Discrimination indirecte</b>
<p>A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,</p> <p>(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or</p> <p>(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.</p>	<p>Constitue une atteinte à un droit d'une personne reconnu dans la partie I l'existence d'une exigence, d'une qualité requise ou d'un critère qui ne constitue pas une discrimination fondée sur un motif illicite, mais qui entraîne l'exclusion ou la préférence d'un groupe de personnes identifié par un motif illicite de discrimination et dont la personne est membre, ou l'imposition d'une restriction à ce groupe, sauf dans l'un des cas suivants :</p> <p>a) l'exigence, la qualité requise ou le critère est établi de façon raisonnable et de bonne foi dans les circonstances;</p> <p>b) il est prévu dans la présente loi, à l'exclusion de l'article 17, que la discrimination fondée sur un tel motif ne constitue pas une atteinte à un droit.</p>

437. The test for discrimination under the *Code* is as follows:

“[T]o demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to



justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.”<sup>734</sup>

438. This 3-step test for prima facie discrimination has been repeatedly cited in Ontario to interpret sections 1, 3, and 5 of the *Code*.<sup>735</sup>

### **3. Class members are protected by the *Code***

439. Extensive evidence of disproportionate representation of racialized and immigrant populations in the taxi industry is laid out above. Dr. Ornstein’s uncontested report and the City’s own evidence confirms that plate owners belong disproportionately to vulnerable groups, specifically protected under grounds of race, national origin, and ethnic origin.<sup>736</sup>

### **4. Class members were adversely impacted by the City’s conduct**

440. Again, as set out above, plate owners continue to suffer severe consequences resulting from the City’s failure to enforce its existing by-Laws and failure to protect their rights throughout the process of legalizing PTCs.

441. The City’s conduct breached plate owners’ human rights under the *Code*. As laid out above, the City in both its conduct and its failure to act to enforce existing legislation led to a disproportionate impact on already vulnerable groups. While more evidence on damages will be entered at a future date, it is clear that the City’s entire course of conduct with respect to the

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<sup>734</sup> *Moore v British Columbia (Education)*, [2012 SCC 61](#) at para 33 (emphasis added); *Peel Law Association v Pieters*, [2013 ONCA 396](#) [*Pieters*]; *Shaw v Phipps*, [2012 ONCA 155](#) [*Shaw*]; *Midwives, ONCA*; *Stewart v Elk Valley Coal Corp*, [2017 SCC 30](#) at para 24; *Bangloy v Canada (Attorney General)*, [2021 FCA 245](#) at para 50 (leave to appeal to SCC refused, 40099, 1 September 2022).

<sup>735</sup> *Pieters*; *Shaw*; *Midwives, ONCA*.

<sup>736</sup> *Donnelly Cr Ex.*, January 30, 2023, 39:7-23; *Ornstein Report*, Exhibit 77, A829, A831; *Ornstein Ex.*, January 20, 2023, 36:29 to 37:4, 72:18-23.

enactment of the 2016 By-law and enforcement led to a severe decline in plate values that represented the livelihoods of the class members. Plate values plummeted so low that many drivers who had invested life's savings in their plates were forced to return them to the City. Racialized, immigrant, and other minority groups were sent 'back in time' by the City's conduct, to a point at which they are even more disadvantaged than they were before.

**5. Class members' protected characteristics were a factor in the adverse impact**

442. This stage of the *Code* analysis requires the following:

"[A]n applicant must only prove that there is a connection between the prohibited ground and the adverse treatment. The connection does not need to be causal [...] Further [...] the applicant does not need to prove that the respondent intended to discriminate."<sup>737</sup>

443. Thus, as with s. 15 of the *Charter*, the relationship to be demonstrated is a connection rather than a causal connection and discriminatory intent need not be shown.

444. As discussed in extensive detail above, the adverse impact that the plate owners have suffered is anchored to their disadvantage that arises from being racialized, immigrants and minorities. The City knew of the makeup of the taxi industry and severely exacerbated their disadvantage. This clearly constitutes a connection between the prohibited grounds in the *Code* and the adverse treatment that arises from the City's conduct.

445. The relationship between government decision-making and constructive discrimination under the *Code* was recently demonstrated in *Midwives*. In that case, as reviewed in paragraph

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<sup>737</sup> *Midwives*, ONCA at para [102](#).

309 above, the AOM succeeded in a systemic gender discrimination claim against the Ministry of Health and Long-Term Care that funds the province's midwifery program. The AOM sought compensation for lost wages, alleging that pay discrepancies between midwives and other health professionals resulted from systemic gender discrimination. The case turned on the province's progressive weakening of safeguards originally implemented to protect against "harmful assumptions and stereotypes concerning the value of women's work" in 1993.<sup>738</sup> The AOM succeeded in its claim and was awarded compensation.

446. This case is instructive as to the application of the *Code* to situations of constructive, or adverse impact, discrimination. As in *Midwives*, the plate owners are overwhelmingly members of a protected group. As in *Midwives*, the plate owners have experienced a severe loss of livelihood and harm. As in *Midwives*, that harm resulted from the City's conduct with respect to the class members.

447. It follows that the City is responsible for breaching plate owners' human rights under the *Code*.

#### PART V - FEES

*Q. Right. So would you agree then that there is never — at least 2005, from, from what you just confirmed, there's never been an analysis of the relationship between the fees and the costs of the service?*

*A. If you're talking about did we sit down with a calculator and do all that? No, we didn't do that.*

-- Christine Hartig Cross examination, February 3, 2023, 66:11-66:16.

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<sup>738</sup> *Midwives*, ONCA, at para 3.

*Q. So there's nothing in evidence, to your knowledge, from your testimony today, that would actually be a full costing analysis of the fees and the costs associated with the taxi or vehicle-for-hire bylaw?*

*A. Correct.*

-- Cyril Rogers Cross examination, February 14, 2023, 113:27 – 113:31

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*Q. But from what you can speak to from 2013, would you agree that you have never seen an analysis - a review of the cost of the services versus the fees generated in real numbers?*

*A. I agree.*

-- Cyril Rogers Cross examination, February 14, 2023, 109:14-109:17.

\* \* \*

*Q. So ultimately the licensing fees that are charged to the taxi industry are passed on to consumers through the meter rates, is that [...] right?*

*A. ...when you're speaking of licensing fees we know drivers' licence, but you're speaking [...] to the municipal licensing fees?*

*Q. Yes, that's what I'm talking about, yes.*

*A. That's my understanding.*

-- Susan Jones cross-examination, February 9, 2013, 28:5-28:19.

448. The City collects fees from taxi plate owners and brokers under the taxi (now vehicle for hire) by-law. The fees collected by the City are unlawful and ultra vires taxes. First, under the *Municipal Act*, a specific costing is required to justify the user fees that municipalities charge. No such costing was ever done here. Second, cities do not have the constitutional power to charge indirect taxes, but that is precisely what the taxi fees are—thus, the fees are also unconstitutional.

**A. Undisputed facts**

449. The City has collected fees under every by-law since amalgamation. The categories and amounts of these fees—including the total amounts collected since 2001—are set out in the Statement of Agreed Facts.<sup>739</sup> The fees include plate application fees, plate renewal fees, plate transfer fees, broker application and renewal fees, and processing fees.<sup>740</sup> In total, from 2002-2019, the City collected \$22,808,999 in fees (excluding transfer fees), and an additional \$2,823,326 in plate transfer fees.<sup>741</sup>

450. Fees are approved by council each year.<sup>742</sup>

**B. The fees are an unlawful tax because they are not authorized under the *Municipal Act***

**1. Under the *Municipal Act*, a specific costing is required to justify the user fees that municipalities charge**

451. As set out in s. 17(1)(a) of the *Municipal Act*, municipalities do not have the general authority to impose taxes.<sup>743</sup> No section in the *Municipal Act* authorizes a municipality to impose taxes in the context of taxicab regulation. Section 391(1) of the *Municipal Act* authorizes a municipality to impose “fees or charges”:

- (a) for services or activities provided or done by or on behalf of it;
- (b) for costs payable by it for services or activities provided or done by or on behalf of any municipality or other local board; and

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<sup>739</sup> See Statement of Agreed Facts at paras 47-48, F9-F16.

<sup>740</sup> Statement of Agreed Facts at para 47, F9-F15.

<sup>741</sup> Statement of Agreed Facts at para 49, F16.

<sup>742</sup> Hartig Cr Ex., February 3, 2023, 36:24 to 38:11.

<sup>743</sup> [SO 2001, c 25](#).

(c) for the use of its property including property under its control.

452. If a municipal fee or charge is found to be a tax, the fee will be unlawful.

453. According to caselaw, levies imposed by a municipality will be considered a tax where:

(a) They are imposed by law;

(b) They are imposed under the authority of a legislature;

(c) They are levied for a purpose; and

(d) There is no nexus between the charge and the cost of providing the service or program to those subject to the fee.<sup>744</sup>

454. The fees are a tax. They are imposed by law, imposed under the authority of a legislature (City Council), levied for a purpose, and there is no nexus between the charge and the cost of providing the service. The City does not contest the first three criteria.

455. With respect to the last criterion—*i.e.*, the nexus between the charge and the cost of providing the program—a municipality must, at a minimum, make reasonable attempts to match the revenues from levies to the associated costs of the services provided.<sup>745</sup> Best estimates based on work experience do not meet the threshold to transform a levy from a tax to a fee.<sup>746</sup> As this Court stated in *Angus*:

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<sup>744</sup> *Angus v Corporation of the Municipality of Port Hope*, [2016 ONSC 3931](#) at para 29 [**Angus**], citing *Eurig Estate (Re)*, [\[1998\] 2 SCR 565](#) [**Eurig**].

<sup>745</sup> *Angus* at para 37.

<sup>746</sup> *Angus* at para 41.

[41] Best estimates based on work experience are simply insufficient to establish a nexus. To legitimize the fee structure the Defendant Municipality needs to review the costs of the services versus the fees generated in real numbers. A cost analysis is required to legitimize the fee structure. Reasonable attempts must be more than the musings of municipal employees.<sup>747</sup>

456. In determining whether a nexus exists, the Court will not look behind the methodology used or assumptions made in the cost analysis. However, the City itself must make some assumptions and employ some methodology. In *Angus*, the Superior Court granted summary judgment in favour of the plaintiffs challenging municipal fees because there was “no evidence of any reasonable attempt to match the fee revenue with the administrative costs, or to show a reasonable connection between the costs of the services provided and the amount charged.”<sup>748</sup>

457. Here are some examples where Courts upheld a defendant municipality’s costing analysis. In *Waterloo*, the municipality defended the lawfulness of its fees on the basis of municipal staff analysis which the Divisional Court found represented “considerable and significant good faith efforts on behalf of Council to match the costs of the Program with revenues expected to flow from the licensing fees.”<sup>749</sup> This analysis matched the expected income from fees with the costs of the program.<sup>750</sup> In *Toronto*, the municipality presented a chart comparing the impugned fees with the costs of the services financed by the fee.<sup>751</sup> Based on that calculation, the Court found

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<sup>747</sup> [Angus](#) at para 41 (emphasis added).

<sup>748</sup> [Angus](#) at paras 40-43, 51.

<sup>749</sup> *1736095 Ontario Ltd. v Waterloo (City)*, [2015 ONSC 6541](#) at para 55, also see paras 54-58 [[Waterloo](#)].

<sup>750</sup> [Waterloo](#) at para 55.

<sup>751</sup> *Greater Toronto Apartment Association v Toronto (City)*, [2012 ONSC 4448](#) at paras [30-33](#) [[Toronto](#)].

“it is not difficult to see the nexus between the estimated fees and the cost of providing the service to residential users.”<sup>752</sup>

## **2. No such costing analysis was ever carried out**

458. Although given ample opportunity, the City put forward no evidence of a specific costing exercise ever having been done to justify the taxi by-law fees—from pre-amalgamation right up to 2023. The City failed to carry out a cost analysis even well after the allegation was raised in this class action. In the total absence of this costing to justify the fees, the fees are unlawful.

459. Cyril Rogers has been employed at the City of Ottawa since 2013.<sup>753</sup> He is currently the City’s acting Chief Financial Officer and the General Manager of Finance and Corporate Services.<sup>754</sup> He is a Certified Management Accountant and Certified Professional Accountant.<sup>755</sup> He is able to prepare cost analyses.<sup>756</sup> He is also able to recognize different types of financial analysis, including costing analysis.<sup>757</sup> He is involved in creating the City’s annual budgets.<sup>758</sup> He confirmed that the annual budgets do not include a specific analysis for the costs of taxi by-law enforcement and administration.<sup>759</sup> He also confirmed that nothing in the evidence presented to him constitutes a full costing analysis of the fees and costs associated with the taxi or VFH by-

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<sup>752</sup> *Toronto* at para [33](#).

<sup>753</sup> Rogers Cr Ex., February 14, 86:30 to 86:32.

<sup>754</sup> Rogers Cr Ex., February 14, 86:1 to 86:3.

<sup>755</sup> Rogers Cr Ex., February 14, 87:4 to 87:6.

<sup>756</sup> Rogers Cr Ex., February 14, 87:10 to 87:31.

<sup>757</sup> Rogers Cr Ex., February 14, 87:32 to 88:3.

<sup>758</sup> Rogers Cr Ex., February 14, 88:3 to 88:5; Rogers Ex., February 14, 34:4 to 34:12.

<sup>759</sup> Rogers Cr Ex., February 14, 112:25 to 112:28; 113:12 to 114:27.



law.<sup>760</sup> Mr. Rogers agreed that, in his personal knowledge since he has been at the City, the City has never done a review of the cost of the services versus the fees generated in real numbers.<sup>761</sup>

### **3. The City does not track the specific costs of administering the taxi by-law**

460. The City prepares annual budgets. The budgets were prepared by the finance department.<sup>762</sup> These budgets are prepared at the level of the entire department of Emergency and Protective Services, of which By-law and regulatory services is one branch.<sup>763</sup> These budgets show the overall expected income from fees, which includes fees from various by-laws as well as parking fees.<sup>764</sup> The particular income from taxi fees is not shown separately.<sup>765</sup> The budgets show the overall expected expenses at the level of the department, but do not disaggregate by individual by-law.<sup>766</sup> Thus, these budgets do not tell us anything about how taxi fees are financing by-law services.<sup>767</sup>

461. Christine Hartig gave evidence about the preparation of budgets. She is not an accountant.<sup>768</sup> Her role in preparing budgets was to review the narratives that accompanied the budget.<sup>769</sup>

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<sup>760</sup> Rogers Cr Ex., February 14, 113:27 to 113:31.

<sup>761</sup> Rogers Cr Ex., February 14, 109:15 to 109:29; 114:22 to 115:4.

<sup>762</sup> Hartig Cr Ex., February 3, 2023, 30:27 to 30:28.

<sup>763</sup> Hartig Cr Ex., February 3, 2023, 40:15 to 41:6.

<sup>764</sup> Hartig Cr Ex., February 3, 2023, 41:1 to 42:2.

<sup>765</sup> Hartig Cr Ex., February 3, 2023, 42:1-5.

<sup>766</sup> Hartig Cr Ex., February 3, 2023, 42:6-20.

<sup>767</sup> Hartig Cr Ex., February 3, 2023, 42:17-20.

<sup>768</sup> Hartig Cr Ex., February 3, 2023, 31:3-5.

<sup>769</sup> Hartig Cr Ex., February 3, 2023, 30:15-28.

462. Both Christine Hartig and Cyril Rogers testified that the City does not track the specific costs associated with enforcement and administration of the taxi (now vehicle for hire) by-law.<sup>770</sup> Both Ms. Hartig and Mr. Rogers stated that it would be “difficult”<sup>771</sup> or “onerous”<sup>772</sup> to track costs this way because of the way the department is structured. Christine Hartig stated that a forensic accountant might be able to do the analysis.<sup>773</sup>

463. The City’s service call records do not capture the nature of each call nor level of staff effort expended in responding to it;<sup>774</sup> thus, they do not provide any information about the level of the City’s effort in enforcing the taxi by-law. To Ms. Hartig’s knowledge, the City has never done an analysis of the cost of taxi service requests.<sup>775</sup>

**4. The City has never performed a full costing analysis of the fees associated with the taxi by-law**

464. A few City witnesses attempted to list or give rough estimates of some costs associated with by-law enforcement.<sup>776</sup> These are precisely the types of “musings of municipal employees” that do not meet the standard for reasonable attempts to prove a nexus.<sup>777</sup>

465. All witnesses admitted that there is no systematic tracking of the costs associated with administering or enforcing the by-law.

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<sup>770</sup> Hartig Cr Ex., February 3, 2023, 42:20-25; Rogers Ex., February 14, 2023, 46:5-27; Rogers Cr Ex., February 14, 2023, 110:30 to 112:5.

<sup>771</sup> Hartig Cr Ex., February 3, 2023, 42:25 to 43:9.

<sup>772</sup> Rogers Ex., February 14, 2023, 46:5-27; Rogers Cr Ex., February 14, 2023, 94:15-21, 95:5-6.

<sup>773</sup> Hartig Cr Ex., February 3, 2023, 43:10-12.

<sup>774</sup> Hartig Cr Ex., February 6, 2023, 63:18 to 66:1.

<sup>775</sup> Hartig Cr Ex., February 6, 2023, 66:2-6.

<sup>776</sup> For example, see Hartig Ex., February 2, 2023, 102:29; McCumber Ex., 50:20 to 52:32; Jones Ex., 107-108.

<sup>777</sup> [Angus](#) at para 41.

466. Further, the City did not put into evidence any actual costing analysis.

467. Cyril Rogers testified that at a fundamental level, a cost analysis is a breakdown of the cost of a given service or activity or unity, using actual or budget numbers, i.e. a dollar figure.<sup>778</sup>

468. Cyril Rogers testified that the City's own user fee policy requires a "full costing" as the basis for setting user fees.<sup>779</sup> He stated that the User Policy provides the "framework" used at the City of Ottawa for a costing analysis in relation to user fees.<sup>780</sup> The Policy states that "Full costing includes all direct and indirect operating and capital costs."<sup>781</sup> The City has an accounting method to attribute indirect costs (i.e. overhead) to do the costing analysis under the User Fee policy.<sup>782</sup> Mr. Rogers confirmed that the annual budget process does not include the full costing described in the User Fee Policy.<sup>783</sup> Mr. Rogers testified that to his personal knowledge, no such "full costing" has been performed for the taxi or vehicle for hire fees.<sup>784</sup>

469. In written interrogatories, the City admitted that "no specific research or analysis has been undertaken since January 1<sup>st</sup>, 2012", and that annual changes in fees "reflect the change to cost of living".<sup>785</sup> Mr. Rogers agreed that in his personal knowledge, since 2013, the City has never done a review of the cost of the services versus the fees generated in real numbers.<sup>786</sup> The City

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<sup>778</sup> Rogers Cr Ex., February 14, 88:31 to 89:20.

<sup>779</sup> Rogers Cr Ex., February 14, 88:19 to 88:30, 92:2-11. Exhibit 214, User Fee Policy. F508.

<sup>780</sup> Rogers Cr Ex., February 14, 92:2-5.

<sup>781</sup> User Fee Policy, Exhibit 214, F508, F509.

<sup>782</sup> Rogers Cr Ex., February 14, 2023, 115:5-12.

<sup>783</sup> Rogers Cr Ex., February 14, 2023, 92:12 to 93:5. Using the 2016 budget as an example, see Rogers Cr Ex., February 14, 2023, 93:6 to 95:4.

<sup>784</sup> Rogers Cr Ex., February 14, 2023, 143:22-26.

<sup>785</sup> City's answer to Plaintiff's written interrogatory 117, Exhibit Y, A2557.

<sup>786</sup> Rogers Cr Ex., February 14, 2023, 109:15-29; 114:22 to 115:4.

has also never retained a consultant to conduct this kind of research.<sup>787</sup> To Mr. Rogers' knowledge, since 2013, the City has not created any report or similar document containing any such analysis for taxi fees.<sup>788</sup> This confirms the City's earlier admission on this point.

470. Mr. Rogers confirmed that none of the City documents presented to him in his examination in chief and cross examination contained a full costing analysis for the fees charged under the taxi or vehicle for hire by-law.<sup>789</sup>

471. Thus, in the voluminous documents provided by the City related to budgets and fees, no document was provided that compares the fees collected to the costs of administering and enforcing the by-law. City witnesses admitted they are not aware of any such exercise ever having been carried out for the taxi by-law.<sup>790</sup> Knowing that this issue had been raised in this proceeding, the City could have provided expert evidence with such an analysis, but chose not to. The only inference that can be made from the City's failure to adduce any evidence on the nexus between the fees it imposed and the costs it allegedly incurred is that there is no nexus.

472. Other cities have performed full costing analyses. When shown examples from the City of Toronto (development application fees),<sup>791</sup> the City of New Tecumseth (building and planning fees),<sup>792</sup> and the City of Milton (comprehensive fees, including taxi fees),<sup>793</sup> Mr. Rogers confirmed

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<sup>787</sup> Rogers Cr Ex., February 14, 2023, 109:32 to 110:22; City answer to Plaintiff interrogatory 118, Exhibit Y, A2557.

<sup>788</sup> Rogers Cr Ex., February 14, 2023, 110:23-29.

<sup>789</sup> Rogers Cr Ex., February 14, 2023, 113:13-31.

<sup>790</sup> Hartig Cr Ex., February 3, 2023, 65:19 to 66:16; Rogers Cr Ex., February 14, 2023, 143:22-26.

<sup>791</sup> Rogers Cr Ex., February 14, 2023, 116:24 to 121:20; City of Toronto Development Application Fee Review, May 13<sup>th</sup>, 2022, Exhibit 226, A2421.

<sup>792</sup> Rogers Cr Ex., February 14, 2023, 123:24 to 132:9; Municipality of New Tecumseth Municipality of New Tecumseth Fee Review Planning and Building Fees, dated February 4th, 2019, Exhibit 227, A2397.

<sup>793</sup> Rogers Cr Ex., February 14, 2023, 132:26 to 142:8; Town of Milton 2022 User Fees Review Study, dated August 19, 2022, Exhibit 228, A2438.

that each of these was indeed a full costing analysis.<sup>794</sup> He confirmed that no similar type of analysis from the City of Ottawa had been put to him in his testimony.<sup>795</sup> He further confirmed that while the City of Ottawa has done similar analysis for some of its fees (namely site planning fees),<sup>796</sup> it has not done this analysis for taxi fees.<sup>797</sup> He stated that such an analysis would be “onerous”.<sup>798</sup>

473. Similar to these other municipalities, the City could have prepared an analysis of the fees as compared to the costs of administering the by-law. It could have used accounting methods to make assumptions about the overhead costs. It has done so for other types of fees. There is no plausible explanation why such an analysis was not done here.

#### **5. Year-over-year, the fees are set based on a variety of factors, most importantly the cost of living**

474. Ms. Hartig variously asserted that the fees were set based on the cost of enforcing and administering the By-law;<sup>799</sup> the cost of administering the processing of the applications;<sup>800</sup> the municipal tax rate;<sup>801</sup> and “a lot of factors”.<sup>802</sup> Ms. Hartig testified that once the baseline fees were set for the taxi industry, the annual adjustments are typically based on the cost of living.<sup>803</sup>

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<sup>794</sup> Toronto: Rogers Cr Ex., February 14, 121:10-20; New Tecumseth: Rogers Cr Ex., February 14, 126:2-6, 132:5-7; Rogers Cr Ex., February 14, 138:3-5, 140:6-9, 142:1-8. For taxi fees in Milton, see Town of Milton 2022 User Fees Review Study, dated August 19, 2022, Exhibit 228, A2488.

<sup>795</sup> Rogers Cr Ex., February 14, 2023, 142:21-24.

<sup>796</sup> Rogers Cr Ex., February 14, 2023, 142:25 to 153:24.

<sup>797</sup> Rogers Cr Ex., February 14, 2023, 143: 22-26.

<sup>798</sup> Rogers Cr Ex., February 14, 2023, 144:10-25; Rogers Re Ex., February 14, 2023, 147:16-18.

<sup>799</sup> Hartig Cr Ex., February 3, 2023, 38:16-19; Hartig Ex., February 2, 2013, 101:20 to 101:30.

<sup>800</sup> Hartig Cr Ex., February 3, 2023, 39:30 to 40:2.

<sup>801</sup> Hartig Cr Ex., February 3, 2023, 43:18-30.

<sup>802</sup> Hartig Cr Ex., February 3, 2023, 40:6-10.

<sup>803</sup> Hartig Cr Ex., February 3, 2023, 44:18 to 45:1, 45:32 to 46:6, 105:30 to 106:7.

Ms. Hartig testified that the City does not set fees year-to-year based on the fluctuations in the costs of by-law administration.<sup>804</sup>

475. Mr. Rogers testified that taxi by-law fees are reviewed annually for cost of living and “other inflationary factors”.<sup>805</sup> The evidence demonstrates that the main driver of the year-over-year changes to most fees is the cost of living—not the costs of by-law enforcement and administration.

476. In 2016, some fees were modified in the new by-law for reasons unrelated to either by-law administration or cost of living. For example, the licence fees for accessible plates were waived “in recognition of the importance of accessible taxi cab service to residents.”<sup>806</sup> According to Ms. Hartig, this was “to encourage drivers to become [...] accessible taxi drivers”,<sup>807</sup> and “to incentivize the drivers.”<sup>808</sup> Ms. Hartig confirmed this change was not linked to the cost of the service.<sup>809</sup> Further, the driver license fee was reduced “to provide taxi cab drivers with a measure of regulatory relief.”<sup>810</sup> Ms. Hartig confirmed this is not linked to the cost of the service.<sup>811</sup> In a few places, the 2016 staff report states that the fees “go[] toward”<sup>812</sup> or “bear a reasonable

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<sup>804</sup> Hartig Cr Ex., February 3, 2023, 64:2 to 65:5.

<sup>805</sup> City’s answer to Plaintiff’s written interrogatory 117, Exhibit Y, A2557: In written interrogatories, the City stated that “a comprehensive review of licence fees and tariffs was undertaken in 2005 in conjunction with the enactment of the 2005 harmonized taxi licensing by-law.” Rogers Cr Ex., February 14, 101:19-30.

<sup>806</sup> Report to CPSC submitted March 31, 2016, Exhibit 59, F2780; Hartig Cr Ex., February 3, 2023, 69:1 to 70:5.

<sup>807</sup> Hartig Cr Ex., February 3, 2023, 69:26-30.

<sup>808</sup> Hartig Cr Ex., February 3, 2023, 73:12-25.

<sup>809</sup> Hartig Cr Ex., February 3, 2023, 69:31 to 70:2, 73:20-23.

<sup>810</sup> Report to CPSC submitted on March 31, 2016, Exhibit 59, F2828.

<sup>811</sup> Hartig Cr Ex., February 3, 2023, 73:5-16.

<sup>812</sup> Report to CPSC submitted on March 31, 2016, Exhibit 59, F2828, F2829.

relation to”<sup>813</sup> the costs of enforcement, inspection, and administration; however there is no analysis in that report of the costs of enforcement, inspection or administration.<sup>814</sup>

**6. The baseline for the taxi fees was set at amalgamation, and was based on the fees in the prior municipalities**

477. The City undertook a comprehensive review of licensing fees in 2005 in conjunction with the enactment of the 2005 harmonized taxi licensing by-law.<sup>815</sup> That report built on a 2002 report dealing with the same subject matter.<sup>816</sup> However, as confirmed by both Ms. Hartig and Mr. Rogers, neither of these reports includes a full costing analysis of the taxi by-law fees.

478. The 2001 and 2005 staff reports discuss fees under the taxi by-law.<sup>817</sup> These are the first analyses of taxi fees for the amalgamated City of Ottawa. They were directed at harmonizing the fees from the various pre-amalgamation municipalities into one set of fees for the new municipality.<sup>818</sup>

479. The 2001 staff report states that the fees are based on cost recovery; however, there is no analysis in that report about the costs that are said to be recovered.<sup>819</sup> Ms. Hartig gave testimony about the kinds of costs that might be referred to, but she did not have personal knowledge because she was not involved in the process.<sup>820</sup> Although he did not have prior

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<sup>813</sup> Report to CPSC submitted on March 31, 2016, Exhibit 59, F2829.

<sup>814</sup> Hartig Cr Ex., February 3, 2023, 71:5 to 77:12.

<sup>815</sup> City’s answer to Plaintiff’s written interrogatory 117, Exhibit Y, A2557.

<sup>816</sup> City’s answer to Plaintiff’s written interrogatory 117, Exhibit Y, A2557.

<sup>817</sup> December 12, 2001 report to Community and Protective Services Committee and Council, Exhibit 157, A1828; Report for the EPSC, August 22, 2005, Exhibit 49, F3541.

<sup>818</sup> Hartig Cr Ex., February 3, 2023, 48:24 to 49:17, 54:26 to 55:20.

<sup>819</sup> Hartig Cr Ex., February 3, 2023, 50:8 to 54:25; December 12, 2001 Report to Community and Protective Services Committee and Council, Exhibit 157, A1828.

<sup>820</sup> Hartig Cr Ex., February 3, 2023, 55:21-25.

knowledge of the 2001 report, Mr. Rogers was shown the relevant pages, and confirmed that no costing analysis appeared in those pages.<sup>821</sup> Ms. Jones confirmed that, when the City harmonized fees at amalgamation, it did not conduct a line by line analysis to justify the fees.<sup>822</sup>

480. The 2005 staff report is mainly about harmonization of the previous tax by-laws for the new City of Ottawa.<sup>823</sup> It includes some discussion of fees, and it states that the fees “reflect[] costs associated with the administration and maintenance of the By-law...”.<sup>824</sup> However, like the 2002 staff report, it does not include an analysis of the actual or expected costs recovered by those fees.<sup>825</sup> Although he did not have prior knowledge of the 2005 report, Mr. Rogers was shown the relevant pages, and confirmed that no costing analysis appeared in those pages.<sup>826</sup>

481. Thus, the testimony of both Ms. Hartig and Mr. Rogers confirms that neither the 2002 staff report nor the 2005 staff report include an analysis of the costs of administering or enforcing the tax-by-law.<sup>827</sup> Ms. Hartig testified based on her personal knowledge and understanding of these reports,<sup>828</sup> while Mr. Rogers was not familiar with the reports, but applied his accounting knowledge to determine what analysis was or was not included in the reports.

482. Ms. Hartig was not aware of any analysis undertaken since 2005 comparing the costs of administering the tax by-law to the fees charged.<sup>829</sup>

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<sup>821</sup> Rogers Cr Ex., February 14, 97:17 to 100:28.

<sup>822</sup> Jones Ex., February 8, 2013, 19-20.

<sup>823</sup> Hartig Cr Ex., February 3, 2023, 56:17 to 57:32; Report for the EPSC, August 22, 2005, Exhibit 49, F3541.

<sup>824</sup> Hartig Cr Ex., February 3, 2023, 58:9 to 60:5; Report for the EPSC, August 22, 2005, Exhibit 49, F3562.

<sup>825</sup> Hartig Cr Ex., February 3, 2023, 58:9 to 62:17.

<sup>826</sup> Rogers Cr Ex., February 14, 2023, 95:12 to 97:17.

<sup>827</sup> Hartig Cr Ex., February 3, 2023, 65:26 to 66:16; Rogers Cr Ex., February 14, 95:12 to 100:28.

<sup>828</sup> Hartig Cr Ex., February 3, 2023, 46:7 to 47:6, 56:17 to 59:32.

<sup>829</sup> Hartig Cr Ex., February 3, 2023, 62:18 to 63:23, 65:19-26, 77:13-30.



483. The evidence demonstrates that the new City of Ottawa simply based its fees on the fees of the prior municipalities. The City did not tender any evidence of a costing having been done in the prior municipalities. Thus, there is no evidence of a costing ever having been done.

**7. The baseline for the transfer fee was based on the price of a taxi plate in the former City of Ottawa in 1993**

484. The transfer fee that was based on 10% of the sale price originated in the former City and it was based on what the perceived value of the plate was at the time the fee was imposed.<sup>830</sup>

485. The 1971 licensing by-law set the transfer fee at 10% of the “value of the consideration” paid for the plate.<sup>831</sup> As a general matter, Ms. Hartig agreed that neither the cost of processing a plate transfer nor the costs of by-law administration and enforcement depend on the consideration paid for the plate.<sup>832</sup>

486. In 1993, the old City of Ottawa set the transfer fee at \$5,800.<sup>833</sup> This represented 10% of \$58,000, which was the price set for a plate in 1993 as provided in a Collective Agreement at the time.<sup>834</sup> Mr. Bourns confirmed that the \$5,800.00 transfer fee in the City of Ottawa was directly related to plate values at the time.<sup>835</sup>

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<sup>830</sup> Jones Ex., February 8, 2023, 29:3-8.

<sup>831</sup> City of Ottawa L-1 by-law, 1971, Exhibit 2, F4692; Hartig Cr Ex., February 3, 2023, 78:15 to 79:6.

<sup>832</sup> Hartig Cr Ex., February 3, 2023, 79:6 to 81:18.

<sup>833</sup> Council Meeting Minutes, dated October 7, 1992, Exhibit 158, A1888, A1902; Hartig Cr Ex., February 3, 2023, 90:2 to 91:25.

<sup>834</sup> Collective Agreement – Blueline 1990-1993, Article 24.05, Exhibit 1, F5665; Hartig Cr Ex., February 3, 2023, 91:25 to 95:14.

<sup>835</sup> Bourns Cr Ex., February 1, 2023, 74:20-21.

487. At amalgamation, the plate transfer fee for the new City of Ottawa was set at “10% of the true consideration in the sale agreement, up to a maximum of \$5,800”.<sup>836</sup> This reflected the fact that the plate transfer fee in the old City of Ottawa had been \$5,800, while the transfer fees in other cities had been lower.<sup>837</sup>

488. As such, it is clear that the transfer fees in particular have no relationship whatsoever to the cost of administering and enforcing the by-law. They were initially set based on the cost of a plate. They have been modified from time to time based on various factors, none of which relate to the cost of administering or enforcing the by-law.

**8. None of the fees have a direct relationship with the cost of carrying out the transaction**

489. The evidence is clear: there is no relationship between the fees charged for particular transactions (e.g. application fees, transfer fees) and the cost of carrying out the transaction. The City’s processing of new applications to be a driver, plate owner or broker is typically one day.<sup>838</sup> The time to process plate transfer is also typically about a day.<sup>839</sup> The renewal process for single plate owners is done over the counter.<sup>840</sup> The City does not seriously contend that the fees exclusively offset the costs of the transaction itself.

490. The transfer fees do not have any relationship with the cost incurred to process the transfers. All that is involved in the processing of transfers is to ensure that the required

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<sup>836</sup> December 12, 2001 Report to Community and Protective Services Committee and Council, Exhibit 157, A1838, Hartig Cr Ex., February 3, 2023, 81:25 to 82:8.

<sup>837</sup> KPMG Project Report: Taxi Licensing Issues, Exhibit 7, F2279; Hartig Cr Ex., February 3, 2023, 82:4 to 85:6.

<sup>838</sup> Way Ex., January 5, 2023, 124:30 to 125:6.

<sup>839</sup> Way Ex., January 5, 2023, 125:20-30.

<sup>840</sup> Way Ex., January 5, 2023, 125:9-15.

documents that are set out in the by-law, such the sales agreement and affidavits, have been submitted.<sup>841</sup> It is a rubber-stamping exercise. The package of documents that the City receives is about 11 pages long.<sup>842</sup> The City's own evidence at trial was that it did not even verify whether the reported sale price was accurate.<sup>843</sup> Thus these fees, which have always been in the thousands of dollars, have no nexus with the cost of processing the transfer.

491. Moreover, the transfer fee is set lower (or waived altogether) for the transfer of a plate to a deceased family member.<sup>844</sup> This exception is based on compassionate grounds and has no relation to either the cost of the transaction or the cost of administering the by-law. Ms. Hartig confirmed that the cost of processing the plate transfer is not lower when the plate transfer is to a deceased family member; it could be higher if there are more documents involved.<sup>845</sup> She confirmed that the cost of the service is not a factor in this fee.<sup>846</sup>

**9. The fact that plate owners and brokers paid their fees without protest has no bearing on whether the fees are unlawful**

492. Class members pay their fees as required, up to and including today.

493. As a matter of law, a taxpayer is not required to protest the payment of a levy in order to later challenge it as unlawful.<sup>847</sup> Thus, the fact that class members paid the fee without complaint has no bearing on their ability to challenge its lawfulness in this proceeding.

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<sup>841</sup> Way Ex., January 5, 2023, 74:11-17.

<sup>842</sup> Package of Documents for plate transfer related to Plate #3016, Exhibit 8, A637-A647.

<sup>843</sup> Hartig Ex., February 3, 2023, 97:24 to 98:3.

<sup>844</sup> See Statement of Agreed Facts at para 47(c), F11-F12.

<sup>845</sup> Hartig Cr Ex., February 3, 2023, 85:30 to 87:31; see also 2012 staff report, Exhibit 13, F2380; and Hartig Cr Ex., February 3, 2023, 88:1 to 89:32.

<sup>846</sup> Hartig Cr Ex., February 3, 2023, 86:29-31.

<sup>847</sup> *Kingstreet Investments Ltd. v New Brunswick (Finance)*, [2007 SCC 1](#) at paras [52-53](#).

**C. The fees are unlawful because they are an indirect tax, and thus ultra vires the municipality under s. 92(2) of the *Constitution Act, 1867***

494. The City does not have the authority to impose a tax that is ultimately born by the consumer. The taxi fees are such a tax, and are therefore unconstitutional.<sup>848</sup>

**1. Cities cannot impose an indirect tax**

495. Since municipalities are creatures of statute, they derive their authority to impose taxes and fees from the provincial legislature. Pursuant to s. 92(2) of the *Constitution Act, 1867*, provinces only have the authority to impose direct taxes, meaning that they cannot impose an indirect tax.<sup>849</sup>

496. The difference between direct and indirect taxes is related to who will ultimately bear the burden of paying the tax. In the case of direct taxation, the ultimate burden of paying the tax is laid on the person from whom payment is demanded. An ideal example is property tax that is demanded from a homeowner.

497. In the case of indirect taxation, the ultimate burden of paying the tax is not on the person from whom payment is demanded. Rather, the expectation and intention are that the person from whom the tax is demanded will indemnify themselves from others. An ideal example of indirect taxation are taxes on goods, such as HST, that are imposed on merchants. The financial burden of those taxes is ultimately born by consumers.<sup>850</sup>

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<sup>848</sup> See Appendix 1, Notice of Constitutional Question dated November 26, 2019.

<sup>849</sup> Also see: [Eurig](#), pp 576, 579.

<sup>850</sup> The distinction between direct and indirect taxation is discussed in [Eurig](#), pp 579-580.

498. Municipalities cannot impose taxes that the province does not have the constitutional authority to impose. Therefore, they cannot impose indirect taxes. Municipalities also cannot impose direct taxes unless they have been specifically provided the authority do so through statute.

## **2. The taxi fees are an indirect tax**

499. The taxi fees are an indirect tax because the costs of the fees are passed onto the consumer by way of the meter rates. Susan Jones specifically confirmed this point in cross-examination.<sup>851</sup>

500. Meter rates are set by the City.<sup>852</sup> The Taxi Cost Index provides the basis for taxi meter rate adjustments at the request of the taxi industry.<sup>853</sup> The Index dates back to 1992.<sup>854</sup> The Index is intended to help the City set meter rates to ensure a just and reasonable return for drivers, while protecting consumers.<sup>855</sup> The goal is to ensure that all costs incurred by the taxi industry are recovered through meter rates.<sup>856</sup> The Taxi Cost Index takes into account the costs of operating a taxi. The Index includes costs such as stand rent, licenses, and union dues.<sup>857</sup> Susan

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<sup>851</sup> Jones Cr Ex., February 9, 2023, 28:1 to 29:1.

<sup>852</sup> Jones Cr Ex., February 9, 2023, 16:32 to 17:5.

<sup>853</sup> Hartig Cr Ex., February 6, 2023, 66:24-29; Jones Cr Ex., February 9, 2023, 17:6-14. See two reports by Hara, Exhibit 169, "Ottawa Taxi Cost Index 2011 Update" (A2105, A2109, A2113) and Exhibit 170, "Replacement for A Taxi Cost Index and Review of Taxi Plate Numbers" (A2135).

<sup>854</sup> Jones Cr Ex., February 9, 2023, 22:30 to 23:9; Exhibit 192, City of Ottawa Council Minutes, October 7, 1992, A2361, A2366.

<sup>855</sup> Ottawa Taxi Cost Index 2011 Update, Exhibit 169, A2109; Hartig Cr Ex., February 6, 2023, 69:20 to 70:13.

<sup>856</sup> Hartig Cr Ex., February 6, 2023, 66:30 to 67:26.

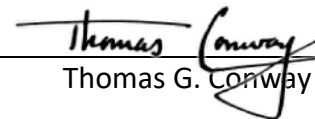
<sup>857</sup> See for e.g. Schedule "E" of 2012 By-law, Exhibit 2, F3995; Schedule "E" of the 2005 By-law, Exhibit 2, F3883; Hartig Cr Ex., February 6, 2023, 67:31 to 68:14.

Jones confirmed that the “licenses” referred to in the Index include the municipal licensing fees.<sup>858</sup>

501. Therefore, the fees charged by the City to taxi plate owners and brokers are passed on to the consumer by way of the taxi meter rate.

502. The evidence demonstrates that the way taxi meter rates are set, the taxi fees are passed on to consumers. Therefore, they are an indirect tax and unconstitutional for the City to impose.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of April, 2023.

  
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<sup>858</sup> Jones Cr Ex., February 9, 2023, 28:10-18; see also Hartig Cr Ex., February 6, 2023, 68:14-29.

**APPENDIX "A"**

Court File No. 16-69601

*ONTARIO*  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**METRO TAXI LTD., MARC ANDRE WAY, and ISKHAK MAIL**

Plaintiffs

and

**CITY OF OTTAWA**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**NOTICE OF CONSTITUTIONAL QUESTION**

The plaintiffs intend to question the constitutional validity or applicability of the Licensing Requirements & Regulations for Private Transportation Companies (adopted by the City of Ottawa on April 13, 2016 and consolidated into the City's Vehicle for Hire By-law no. 2016-272), and certain fees set out in City of Ottawa By-law 2012-258 and its predecessor by-laws (the standard taxicab plate holder license renewal fees, accessible taxicab plate license holder renewal fees, standard taxicab or accessible taxicab plate holder license transfer fees, standard taxicab plate holder license application fees, accessible taxicab license holder application fees, taxicab broker license application fees, taxicab broker license renewal fees, or taxicab broker license transfer fees).

The question is to be argued at the trial of the action in this matter at 161 Elgin Street, Ottawa, on a date to be set by the court.

The following are the material facts giving rise to the constitutional question:

1. The material facts giving rise to the constitutional question are set out in paragraphs 2-17, paragraphs 25 to 26, paragraphs 28a to 36 of the amended amended statement of claim attached as Schedule "A".

The following is the legal basis for the constitutional question:

1. The legal basis for the constitutional question is set out in paragraphs 28a – 36 of the amended amended statement of claim attached as Schedule "A".

November 26, 2019

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Lawyers for the Defendant

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at OTTAWA

**NOTICE OF CONSTITUTIONAL QUESTION**

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**SCHEDULE "A"**

Court File No. 16-69601

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

METRO TAXI LTD., MARC ANDRE WAY, and ISKHAK MAIL

Plaintiffs

– and –

CITY OF OTTAWA

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: December 30, 2016

Issued by:.....

Local registrar  
161 Elgin Street  
Ottawa ON K2P 2K1

TO: City of Ottawa  
Ottawa City Hall  
110 Laurier Avenue West  
Ottawa, Ontario, K1P 1J1

## CLAIM

1. The plaintiffs claim, on their own behalf and on behalf of the Class:
  - a) an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 certifying this action as a class proceeding and appointing the plaintiffs as the representatives of the Class;
  - b) an order declaring that the by-law passed on April 13, 2016 with respect to private transportation companies is *ultra vires* and invalid;
  - c) an order declaring that the City has unlawfully failed to enforce By-law 2012-258 (the "Taxi By-law") against Uber, as defined in the statement of claim, since September 2014;
  - d) damages in the amount of \$215,000,000;
  - e) a declaration that fees collected from the City from Class Members under the Taxi By-law are *ultra vires* and an order for restitution of those fees;
  - f) an order directing a reference or giving such directions as may be necessary to determine issues not determined at the trial of the common issues;
  - g) pre and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
  - h) costs on a substantial indemnity basis.

## The parties to the action and related parties

2. The defendant, the City of Ottawa (the "City"), is a municipality incorporated pursuant to the laws of the Province of Ontario.

3. The plaintiff, Metro Taxi Ltd., carrying on business as Capital Taxi, holds a licence to operate and dispatch taxicabs in the City of Ottawa, and is a “taxicab broker” (“Broker”) under the Taxi By-law.

4. The plaintiff, Marc Andre Way, holds licences (“Plate” or “Plates”) to operate taxicabs in Ottawa, and is a “taxicab plate holder” (“Plate Owner”) under the Taxi By-law.

4a. The plaintiff, Iskhak Mail, became a Plate Owner on or around 2013. Iskhak Mail was born in Afghanistan. As an adult, he immigrated to Canada and became a citizen. Iskhak Mail’s national and ethnic origin and ancestry is Afghani. Iskhak Mail’s first language is Persian and his religion and creed is Islam.

5. In this pleading, “Class” or “Class Members” means all persons who were Plate Owners, Brokers, or both, on or after September 1, 2014, regardless of the number of Plates owned by such persons.

6. Uber B.V., Rasier Operations B.V., Uber Canada Inc. and/or Uber Technologies, Inc. (collectively, “Uber”) collectively operate a taxi service in the City of Ottawa, as further described below.

## **Background**

### ***The regulatory scheme for taxi services in Ottawa***

7. The City and its predecessor municipalities began regulating taxi services in Ottawa in or around 1960. Since that time, the City’s regulatory scheme of taxi services has consistently included the following elements:

- a) The City has required a licence to operate a taxi (a “Plate”) and a licence to operate as a taxicab broker (a service which dispatches taxis in response to customer requests);

- b) The City has regulated and monitored the rates charged for taxi services and the number of Plates to ensure a balance between reasonable earnings for Class Members and reasonable services for the public;
  - c) The City has fixed the number of Plates relative to the population of the City of Ottawa, and has actively maintained a cap thereon;
  - d) The City has granted an exclusive right to Plate Owners to operate "taxicab services" within Ottawa;
  - e) The City has required Brokers to only dispatch taxis with Plates; and
  - f) The City has permitted the sale or lease of Plates.
8. As a result of the City's regulatory scheme, Plates have a market value.
9. The Taxi By-law establishes the particulars of the regulatory scheme as of September 1, 2014. Under the Taxi By-law, it is an offence to operate an unlicensed taxicab or as an unlicensed taxicab broker. The Taxi By-law also imposes various fees on Plate Owners and Brokers.
10. The Taxi By-law defines "taxicab," "taxicab service," "taxicab broker", and "dispatch" as follows:

"taxicab" means a motor vehicle with seating capacity of not more than seven (7) individuals, including the driver, that is intended to be used or is actually used for hire for the purpose of transporting a person and includes an accessible taxicab and a standard taxicab but does not include a limousine;

"taxicab service" means the transportation of a passenger by taxicab from a point in the regulated area to any point within or beyond the regulated area;

“taxicab broker” means a person who accepts calls in any manner for the dispatch of taxicabs and which taxicabs are not owned by that person or that person’s immediate family or employer; and

“dispatch” means the act or service of sending or directing a taxicab, by electronic or any other means, to a person or persons who have requested taxicab service but does not include a request made directly to a taxicab driver.

11. Under the statutory, regulatory, and administrative framework of the regulatory scheme, including the Taxi By-law, the *Municipal Act, 2001*, S.O. 2001, c. 25 (the “Act”), the *Provincial Offences Act*, R.S.O. 1990, c. P.33, and a memorandum of understanding with the Attorney General of Ontario, the City has the responsibility to investigate and prosecute contraventions of the regulatory scheme, including the responsibility to investigate and prosecute persons who operate unlicensed taxicabs or unlicensed taxicab brokerages.

***Events between September 2014 and April 2016***

12. In or around September 2014, Uber began operating the following service in the City of Ottawa:

- a) Uber engaged drivers willing to provide transportation services for hire from within Ottawa to other points in Ottawa or outside of Ottawa;
- b) Through electronic means, Uber accepted calls from customers wishing to engage its drivers; and
- c) Uber dispatched drivers to customers by electronic or other means.

Uber’s drivers therefore operated taxicabs within the meaning of the Taxi By-law. Uber operated as a taxicab broker within the meaning of the Taxi By-law. Uber and its drivers therefore required licences pursuant to the Taxi By-law.



13. Uber and its drivers did not obtain licences. Uber's drivers did not purchase Plates. Uber and its drivers did not comply with various other requirements of the Taxi By-law for operating taxicabs and taxicab brokerages and, in particular, did not pay any of the fees payable under the Taxi By-law.

14. The Class Members asked the City to take reasonable steps to enforce the regulatory scheme against Uber and Uber's drivers. The City prosecuted a limited number of Uber's drivers. The City did not take any steps to enforce the regulatory scheme against Uber. Uber continued to operate its services in the City of Ottawa. The City knew that Uber would continue operating its services unless the City took steps to enforce the regulatory scheme against Uber or took meaningful and reasonable steps to enforce the regulatory scheme against Uber's drivers.

### ***The Amendments***

15. On April 13, 2016, the City enacted amendments to the regulatory scheme, with a coming-into-force date of September 30, 2016 (the "Amendments").

16. The Amendments purport to create a new class of licence for "Private Transportation Companies" such as Uber. The Amendments provide a number of advantages to Uber and its drivers not available to the Class Members, including the following advantages in particular:

- a) Uber and its drivers are not required to pay the same fees as Class Members in order to operate a taxi;
- b) Uber and its drivers are not required to purchase or lease Plates in order to operate taxis or pay the associated fee with registering and renewing Plates;
- c) Uber and its drivers are not required to charge regulated rates;
- d) Uber drivers are not required to install in-vehicle cameras;

- e) Uber drivers are not required to submit driver abstracts, police records, or proof of adequate insurance to the City;
- f) Uber is not required to maintain a minimum percentage of its fleet as accessible taxicabs;  
and
- g) Uber drivers are not required to collect and remit HST or to provide passengers with a receipt indicating the Goods & Services Tax included in the fare.

17. In enacting the Amendments, the City did not consider the value of Plates and the expectations of Class Members to be relevant considerations.

## **The City negligently failed to enforce the regulatory scheme**

### ***The City owed a duty of care to Class Members***

18. The City and the Class Members were in a relationship of proximity in which the City's failure to take reasonable care would foreseeably cause loss or harm to Class Members. In particular, the City's failure to take reasonable care to maintain the integrity of the regulatory scheme would foreseeably cause loss or harm to Class Members.

19. The following circumstances enhanced the relationship of proximity between the City and the Class Members:

- a) The City created and maintained a regulatory scheme for taxi services in Ottawa;
- b) In order to function effectively, the regulatory scheme required investment by Class Members and collaboration between the City and Class Members;
- c) The Class Members have a significant interest in the integrity of the regulatory scheme;

- d) The City regulated and monitored the rates charged for taxi services and the number of Plates to ensure a balance between reasonable earnings for Class Members and reasonable services for the public;
- e) The regulatory scheme created and maintained the market value of the Plates;
- f) The City actively and deliberately encouraged the growth in the market value of the Plates including, in particular, by permitting and facilitating the sale of Plates and maintaining a cap on the number of Plates issued;
- g) The City closely monitored the market value of Plates by requiring purchasers of Plates to provide affidavit evidence indicating the consideration paid for the taxi business;
- h) The City represented to Class Members that sound public policy reasons justified maintaining the market value of the Plates and maintaining the limits on the number of Plates issued by the City;
- i) When making changes to the regulatory scheme that affected the market value of the Plates, the City provided Class Members with a reasonable period to adjust to the changes;
- j) The City directly benefitted from the market value of the Plates, including through fees levied on the transfer of Plates; and
- k) The Class Members reasonably relied on the City's actions to change their position, in particular by purchasing Plates and maintaining taxi businesses, and the City was aware of this reliance.

20. As a consequence of the direct and close relationship between the City and the Class Members, the failure of the City to take reasonable steps to maintain the integrity of the regulatory scheme would foreseeably cause loss or harm to Class Members. There is no policy reason why a duty of care should not be recognized.

21. On the contrary, there are sound public policy reasons to recognize a duty of care. In particular, the recognition of a duty of care encourages investment in the taxi industry in Ottawa by assuring stakeholders that the City will take reasonable care in its operational decisions to avoid causing loss or harm to stakeholders.

***The City breached its duty of care***

22. The duty of care required the City to take reasonable steps to maintain the integrity of the regulatory scheme.

23. The City breached its standard of care by taking no steps to enforce the regulatory scheme against Uber and taking vastly inadequate steps to enforce the regulatory scheme against Uber's drivers.

24. The failure of the City to enforce the regulatory scheme was an operational decision and was not based on economic, social, or political factors. The failure of the City to enforce the regulatory scheme did not result from a policy decision of the City made in good faith.

**The City has unlawfully refused to enforce the regulatory scheme**

25. The City had a public duty, pursuant to the Act, its by-laws, the *Provincial Offences Act*, and a memorandum of understanding between the City and the Attorney General of Ontario, to investigate and prosecute contraventions of the regulatory scheme. Furthermore, the City had a duty, under section 106 of the Act, not to confer an obvious advantage on a commercial enterprise not available

to other enterprises and, in particular, not to give a total or partial exemption to any commercial enterprise from any levy, charge, or fee.

26. Beginning in September 2014, the City refused to carry out its duty by failing to take any steps to enforce the regulatory scheme against Uber and failing to take reasonable steps to enforce the regulatory scheme against Uber's drivers. The City's refusal to enforce the regulatory scheme is not defensible, justifiable, or intelligible. The City's refusal conferred an obvious advantage on Uber and its drivers not available to Class Members, contrary to section 106 of the Act.

### **The Amendments are unlawful**

27. The Amendments are *ultra vires* and unreasonable. In particular:

- a) In developing the amendments, the City ignored relevant considerations, including the rationale of the regulatory scheme and the reliance of Class Members on the regulatory scheme;
- b) In developing the amendments, the City fettered its discretion by refusing to consider the market value of Plates, a value which the City itself had created and encouraged. This refusal was inconsistent with past amendments to the regulatory scheme, in which the City considered and took into account the impact of regulatory changes on the interests of Class Members; and
- c) By providing Uber and its drivers with various advantages not available to Class Members, the Amendments also discriminate against Class Members and confer an obvious advantage on Uber and its drivers, contrary to section 106 of the Act.

28. Furthermore and in the alternative, the Amendments were unreasonable and *ultra vires* because they did not provide Class Members with reasonable notice of the changes to the regulatory scheme. This was inconsistent with previous changes to the regulatory scheme, in which the City provided Class Members with a reasonable adjustment period.

### **The Amendments are discriminatory**

28a. In comparison to the population of Canada, a disproportionate number of Plate Owners are members of minority groups in terms of race, colour, ancestry, ethnic or national origin, religion or creed, language, place of origin, and citizenship.

28b. Race, colour, ancestry, ethnic or national origin, religion or creed, language, place of origin, and citizenship are personal characteristics protected under section 15 of the *Charter of Rights and Freedoms* and Part I of the *Human Rights Code*, R.S.O. 1990, c. H.19.

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.

28d. The distinction constitutes substantive discrimination under section 15 of the *Charter of Rights and Freedoms* and *prima facie* discrimination or unequal treatment under the *Human Rights Code* with respect to services, contracts, and employment. The particulars of this discriminatory distinction, discrimination, and unequal treatment include the following:

- a) The minority groups described above have been and remain subject to historic disadvantage, stereotyping, and prejudice.

- b) As the result of this historical disadvantage, stereotyping, and prejudice, these minority groups entered the taxi services industry in Ottawa and purchased Plates in disproportionate numbers.
  
- c) The Amendments and the failure of the City to enforce the regulatory scheme impose disproportionate burdens on these minority groups, perpetuating their historic disadvantage and widening the gap between these minority groups and the rest of society.

### **The City collected ultra vires taxes**

29. The Taxi By-law provides for the payment of fees by Class Members. In particular, to maintain their licence, Class Members must pay a renewal fee, a processing fee, and fees for mandatory inspections. Plate Owners must also pay a fee to transfer their Plate. The City has collected these fees from Class Members since the enactment of the Taxi By-law. Prior to the enactment of the Taxi By-law, the City collected similar fees from Class Members.

30. The fees are a tax. These fees are enforceable by law, imposed under the authority of the Act, levied by a public body, and intended for a public purpose. Furthermore, there is no nexus between the fees and the cost of providing services or programs to Class Members. There is no reasonable connection between the fees charged and any services provided by City to Class Members.

31. The City does not have the authority to impose a tax on Class Members in this manner. Accordingly, the fees are *ultra vires*.

## **Remedies**

### ***The Class Members are entitled to declaratory relief***

32. The Class Members are entitled to a declaration that the City unlawfully refused to enforce the Taxi By-law and that the Amendments are unlawful and invalid. The issues are real and not theoretical, and the Class Members have a real interest in determining the issues.

32a. The plaintiffs plead and rely on subsection 24(1) of the *Charter of Rights and Freedoms*, section 52 of the *Constitution Act, 1982*, and subsection 47(2) of the *Human Rights Code*.

33. The Class Members are also entitled to a declaration that the fees collected under the Taxi By-law are *ultra vires*. The issue is real and not theoretical, and the Class Members have a real interest in determining the issue.

### ***The Class Members are entitled to damages***

34. As a result of the City's negligence, the Class Members have suffered damages. In particular, the Class Members who are Plate Owners have suffered damages through a loss in the value of their Plates and a loss in the income earned from their Plates. The Class Members who are Brokers have suffered damages by a loss in income earned from their business as taxicab brokerages.

35. The Class Members are also entitled to monetary relief at public law for the City's unlawful refusal to enforce the regulatory scheme and the enactment of the unlawful Amendments. In particular:

- a) An award of monetary relief for the unlawful refusal of the City to maintain the integrity of the regulatory scheme is appropriate in light of the unacceptability and indefensibility of the City's decision, the circumstances of that decision, its effects on Class Members, and the public law values that would be furthered by an award of monetary relief.



- b) Declaratory and mandatory remedies are insufficient to compensate Class Members for the unlawful conduct of the City. As a result of the refusal of the City to reasonably enforce the Taxi By-law and the enactment of the Amendments, Class Members have suffered damages.
- c) An award of damages at public law would vindicate public law values, including the principles of proper, fair, pragmatic, and effective administrative decision-making. In particular, an award of damages would vindicate the obligation of municipalities, under section 106 of the Act, not to grant bonuses.

35a. The Class Members are also entitled to damages under subsection 24(1) of the *Charter of Rights and Freedoms* and section 46.1 of the *Human Rights Code*. In particular:

- d) The Class Members' rights under section 15 of the *Charter* and Part I of the *Human Rights Code* have been breached or infringed.
- e) An award of damages would be just and appropriate and would fulfil the functions of compensation, vindication of the Class Members' rights, and deterrence of future breaches.

***The Class Members are entitled to restitution of illegal taxes***

36. The taxes collected pursuant to the Taxi By-law are *ultra vires*. Accordingly, the Class Members are entitled to restitution for the taxes they paid under the Taxi By-law.

37. The plaintiffs propose that this action be tried in Ottawa.

Date: February 7, 2017

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Plaintiffs

and

THE CITY OF OTTAWA  
Defendant

Court File No: 16-69601

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at OTTAWA

**AMENDED AMENDED STATEMENT OF CLAIM**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at OTTAWA

**PLAINTIFFS' WRITTEN SUBMISSIONS**

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